



FINANCIAL INSTITUTIONS REGULATORY UPDATE

Consumer Financial Protection Bureau Requests Comment on Which Non-Bank Companies Should Be Directly Supervised Under the Dodd-Frank Act

On June 23, 2011, the Bureau of Consumer Financial Protection (the “CFPB”) issued a notice and request for comment (“Notice”) on defining the non-bank entities that will be subject to CFPB supervision as “larger participants” in a market for consumer financial products or services (the “Rule”) under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act” or the “Act”).¹

Financial service providers that are not banks (other than residential mortgage lenders, brokers and servicers, private student lenders and payday lenders) should consider whether, under the Notice, they might be subject to supervision by the CFPB as a “larger participant” in designated markets for other consumer financial services or products. Under the Notice, those other markets include: (1) debt collection, (2) consumer reporting, (3) consumer credit and related activities, (4) money transmitting, check cashing and related activities, (5) prepaid cards and (6) debt relief services.

Background

Section 1024 of the Dodd-Frank Act gives the CFPB authority to supervise nondepository “covered persons” that offer or provide residential mortgage loan origination, brokerage or servicing, private education loans or payday loans.² In addition, Section 1024 gives the CFPB authority to supervise nondepository covered persons that are “larger participants” in markets for other consumer financial products or services, as defined by rule by the CFPB. These nondepository covered persons have not previously been subject to examination by Federal authorities, and instead have been subject to supervision only on a state-by-state basis. The CFPB’s authorities under the Dodd-Frank Act with respect to nondepository institutions are intended to promote “fair competition” with respect to consumer financial products and services, by enforcing Federal consumer financial laws “without regard to the status of a person as a depository institution.”

¹ See 76 Fed. Reg. 38,059 (June 29, 2011), available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-29/pdf/2011-15984.pdf>.

² A “covered person” is defined to mean “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.” Dodd-Frank Act, Pub. L. No. 111-203, § 1002(6), 124 Stat. 1956 (to be codified at 12 U.S.C. § 5481). A “service provider” is defined as a person that provides a material service to a covered person in connection with the offering or provision of a consumer financial product or service. *Id.* § 1002(26).

The CFPB's nondepository supervisory authority includes authority to require reports and conduct examinations on a periodic basis for purposes of assessing compliance with Federal consumer financial law, obtaining information about activities and compliance systems or procedures, and detecting and assessing risks to consumers and to the consumer financial markets.

The Act requires that the CFPB issue an initial Rule under Section 1024, after consultation with the FTC, by July 21, 2012. However, until a director is appointed and confirmed, the CFPB does not appear to have the authority to examine nondepository institutions, or possibly even to issue a rule. Appointment of a director for the CFPB has been stalled by ongoing disagreements between the President and congressional leadership regarding the CFPB.

The Notice

The Notice seeks comment on the markets to be included in the Rule and the criteria and thresholds to be used to define larger participants in those markets.

Market Categories

The CFPB identified six "other market" categories for potential inclusion in an initial rule, and solicited comment on whether the identified categories should be covered in the initial rule, whether each category consists of a single market or multiple markets, and whether other markets should also be addressed. The CFPB indicated that it anticipates including certain markets in an initial rule, but that additional markets may be added through subsequent rulemakings. The six categories and the potential scope of each is summarized below.

- *Debt Collection.* May include persons who collect a debt on behalf of another entity that owns the debt, or collect on their own behalf after purchasing the debt from a creditor or other holder of the debt. The Notice would include persons who purchase debts when they are not in default, and thus could (possibly unintentionally) pick up many participants in indirect lending or secondary market programs that are not traditionally considered debt collectors.
- *Consumer Reporting.* May include large credit bureaus that compile and maintain data and provide credit reports on individual consumers, creditors and other entities that furnish credit history and other credit-related information to the credit bureaus, and other market participants that resell information compiled by the large credit bureaus or operate as specialty reporting agencies, such as services that verify consumer check writing history to facilitate acceptance of consumers' personal checks by retailers.
- *Consumer Credit.* May include finance companies, consumer lenders, and loan servicers and brokers (other than residential mortgage originators, brokers and servicers, payday lenders and private education lenders, which are specifically covered by Section 1024).
- *Money Transmitting, Check Cashing, and Related Activities.* May include persons who provide money transmitting alone, or money transmitting and related consumer financial products and services such as check cashing.
- *Prepaid Cards.* May include persons who provide general purpose reloadable open-loop payment cards, non-reloadable open-loop payment cards, closed-loop gift or store cards, electronic benefits transfer cards, and payroll cards. The CFPB noted that multiple parties may be involved in offering or providing a prepaid card product, but that under the definition of "consumer financial product or service," the rule would not include the sale or reloading of prepaid cards by persons that do not exercise "substantial control" over the terms or conditions of the stored value provided to the consumer.
- *Debt Relief Services.* May include persons who provide "debt management plans," which typically are non-profit credit counseling agencies that work with creditors to develop repayment plans that permit a consumer to repay the full credit balance owed under renegotiated terms, and "debt settlement" entities that offer to negotiate with a

consumer's creditors to enable the consumer to make a lump-sum payment of less than the entire balance owed to the creditor, thereby settling the debt obligation.

Definition of Larger Participants

The CFPB seeks comment on the criteria and thresholds to be used to define larger participants in a particular market. The CFPB indicated that it seeks criteria that will allow it to identify larger participants based on objective available data, and that for purposes of computing the activity levels of a market participant, the activities of the participant will be aggregated with the activities of nondepository "affiliated companies." Examples of potential criteria include annual number of transactions, annual value of transactions (*e.g.*, total loan volume), annual receipts or revenue, geographic coverage (*e.g.*, number of states where engaged in business), asset size or outstanding loan balances. The CFPB also requested comment on whether it should tailor the criteria and thresholds to each market, or apply a single set of criteria and thresholds across all markets.

The CFPB seeks comment on what data sources are available and would be suitable for the CFPB to use in its larger participant determinations, and what data the CFPB should collect through a registration process for use in these determinations. Possibilities include public data, such as the Securities and Exchange Commission's online EDGAR database and state and federal licensing and registration records, nonpublic state or federal supervisory or other data, commercial data, such as proprietary industry market analyses, or data obtained directly from market participants. The CFPB also is considering establishing a registration program that would include a larger universe of covered persons than would be subject to CFPB supervision, through which it could receive information relevant to determining whether covered persons meet applicable thresholds.

Questions For Public Comment

The CFPB invites public comment on any issues relevant to development of its Rule, including a series of specific questions. Members of the public have until August 15, 2011 to submit comments. After considering the comments received, the CFPB will draft and publish a proposed rule.

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