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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1091

[Docket No.: CFPB-2012-0021]

RIN 3170-AA24

Procedural Rule to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is publishing a final rule that establishes procedures to implement requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. That statutory provision authorizes the Bureau to supervise a nonbank covered person when the Bureau has reasonable cause to determine, by order, after notice to the person and a reasonable opportunity to respond, that such person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. The Bureau is authorized to, among other things, require reports from, and conduct examinations of, nonbank covered persons subject to supervision under the Act.

DATES: Effective [insert date 30 days after date of publication].

FOR FURTHER INFORMATION CONTACT: Christopher J. Young, Senior Counsel, Office of Supervision Policy, Bureau of Consumer Financial Protection; 1700 G Street, NW, Washington, DC 20552, (202) 435-7408.

SUPPLEMENTARY INFORMATION:

I. Background

On May 25, 2012, the Bureau of Consumer Financial Protection (Bureau) published a notice of proposed rulemaking (Proposed Rule) in the Federal Register¹ to establish procedures to implement section 1024(a)(1)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)² (12 U.S.C. 5514(a)(1)(C)). Under this provision of the Dodd-Frank Act, the Bureau has the authority to supervise any nonbank covered person³ that the Bureau “has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” The Bureau must base such reasonable-cause determinations on complaints collected by the Bureau under 12 U.S.C. 5493(b)(3), or on information collected from other sources.⁴ The Bureau requested comments on all aspects of the Proposed Rule. The comment period ended on July 24, 2012, and the Bureau received 32 comments from industry trade associations, businesses, consumer groups, a regulatory association, and individuals.

In addition to the Bureau’s supervisory authority under 12 U.S.C. 5514(a)(1)(C), the Bureau has the authority to supervise (1) nonbank covered persons of any size that offer or provide: (a) origination, brokerage, or servicing of loans secured by real estate for use by

¹ 77 FR 31226 (May 25, 2012).

² Public Law 111-203 (codified at 12 U.S.C. 5301 et seq.).

³ The provisions of 12 U.S.C. 5514 apply to certain categories of covered persons, described in subsection (a)(1), and expressly exclude from coverage persons described in 12 U.S.C. 5515(a) or 5516(a). “Covered persons” include “(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.” 12 U.S.C. 5481(6); see also 12 U.S.C. 5481(5) (defining “consumer financial product or service”). Under 12 U.S.C. 5514(d), subject to certain exceptions, “to the extent that Federal law authorizes the Bureau and another Federal agency to . . . conduct examinations, or require reports from a [nonbank covered person] under such law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to . . . conduct examinations [and] require reports . . . with regard to a [nonbank covered person], subject to those provisions of law.”

⁴ 12 U.S.C. 5514(a)(1)(C).

consumers primarily for personal, family or household purposes, or loan modification or foreclosure relief services in connection with such loans, (b) private education loans, and (c) payday loans;⁵ and (2) “larger participant[s] of a market for other consumer financial products or services, as [the Bureau defines] by rule.”⁶ The Bureau is authorized under the Dodd-Frank Act to ensure that “Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition.”⁷

The Bureau is authorized to supervise nonbank covered persons subject to 12 U.S.C. 5514 of the Dodd-Frank Act for purposes of: (1) assessing compliance with the requirements of Federal consumer financial law; (2) obtaining information about such persons’ activities and compliance systems or procedures; and (3) detecting and assessing risks to consumers and to markets for consumer financial products and services.⁸ Pursuant to 12 U.S.C. 5514(b), the Bureau is authorized to conduct examinations of various scopes of supervised entities. In addition, the Bureau may, as appropriate, request information from supervised entities without conducting examinations.⁹

The Proposed Rule set forth proposed procedures by which the Bureau would bring a nonbank covered person under the Bureau’s supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C), and did not propose to impose any new substantive consumer protection

⁵ 12 U.S.C. 5514(a)(1)(A), (D), and (E). In addition, the Bureau has supervisory authority over very large depository institutions and credit unions and their affiliates. 12 U.S.C. 5515(a). Furthermore, the Bureau has certain authorities relating to the supervision of other depository institutions and credit unions. 12 U.S.C. 5516(c)(1), (e).

⁶ 12 U.S.C. 5514(a)(1)(B). The Bureau has issued final rules establishing supervisory authority over larger participants of the consumer reporting and the consumer debt collection markets. See 77 FR 42874 (July 20, 2012) (consumer reporting); 77 FR 65775 (Oct. 31, 2012) (consumer debt collection). The larger participant rules are codified at 12 CFR part 1090. The Bureau has proposed a rule establishing supervisory authority over larger participants of the student loan servicing market. 78 FR 18902 (March 28, 2013). The Bureau’s supervision authority also extends to service providers of those covered persons that are subject to supervision under 12 U.S.C. 5514. 12 U.S.C. 5514(e); see also 12 U.S.C. 5481(26) (defining “service provider”).

⁷ 12 U.S.C. 5511(b)(5).

⁸ 12 U.S.C. 5514(b); see also 12 U.S.C. 5481(14) (defining “Federal consumer financial law”).

⁹ See 12 U.S.C. 5514(b) (authorizing the Bureau both to conduct examinations and to require reports from entities subject to supervision).

requirements on entities subject to the rule. Although a rule is not necessary to implement 12 U.S.C. 5514(a)(1)(C), the final rule will establish a consistent procedure applicable to all affected entities for bringing a nonbank covered person under the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C) and thereby provide transparency regarding the procedures the Bureau intends to use prior to commencement of a proceeding under 12 U.S.C. 5514(a)(1)(C). Absent the final rule, the public would lack guidance regarding such procedures. Regardless of whether nonbanks offering or providing consumer financial products or services are subject to the Bureau's supervisory authority, they are subject to the Bureau's regulatory and enforcement authority and any applicable Federal consumer financial law.

II. Summary of the Final Rule

The final rule establishes the procedures by which a nonbank covered person may become subject to the supervisory authority of the Bureau pursuant to 12 U.S.C. 5514(a)(1)(C). The final rule is intended to provide an efficient, expeditious, and fair process by which the Bureau exercises its authority under 12 U.S.C. 5514(a)(1)(C). The final rule generally adopts the Proposed Rule, with certain modifications described in the section-by-section analysis below.

The final rule is divided into four subparts. Subpart A contains general provisions, including provisions regarding scope and purpose and definitions applicable to the entire final rule. Subpart B sets forth the procedures relating to the determination process, including: (1) issuing a notice commencing a proceeding (Notice or Notice of Reasonable Cause), (2) contents of a Notice of Reasonable Cause, (3) service of a Notice, (4) response to a Notice, (5) conduct of a supplemental oral response, (6) manner of filing and serving papers, (7) issuance of recommended determinations, (8) determinations by the Director, (9) voluntary consent to Bureau's authority, (10) notice and response included in an adjudication proceeding otherwise

brought by the Bureau, and (11) relief available sought in a civil action or administrative adjudication. Subpart C sets forth a post-determination process whereby a respondent may petition the Director for the termination of supervision. Subpart D sets forth the rules for the construction of time limits, change of time limits, and effect of deadlines.

Under the final rule, a Notice of Reasonable Cause does not constitute a notice of charges for any alleged violation of Federal consumer financial law or other law. The proceedings under the final rule are informal and do not constitute an adjudication proceeding with a hearing on the record under the Administrative Procedure Act (APA).¹⁰ Accordingly, no discovery is permitted, a supplemental oral response does not constitute a hearing on the record, and no witnesses may be called as part of a supplemental oral response.

III. Legal Authority

A. Rulemaking authority

The Bureau is issuing this final rule pursuant to its authority under: (1) 12 U.S.C. 5512(b)(1), which grants the Bureau the authority to prescribe rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial law, and to prevent evasions of those laws; (2) 12 U.S.C. 5514(a)(1)(C), which authorizes the Bureau to supervise a nonbank covered person when it has reasonable cause to determine, by order, after notice to the person, and a reasonable opportunity to respond, that such person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services; and (3) 12 U.S.C. 5514(b)(7), which authorizes the Bureau to prescribe rules to facilitate the supervision of nonbank covered persons under 12 U.S.C. 5514(a)(1).

¹⁰ See 5 U.S.C. 554, 556, and 557 (setting forth APA procedures for adjudications determined on the record after opportunity for an agency hearing).

B. Effective date

The final rule relates solely to agency procedure and practice and thus is not subject to the 30-day effective date for substantive rules under the APA.¹¹ Nevertheless, the Proposed Rule provided that the final rule would be effective 30 days after publication in the Federal Register. As discussed below, after considering the comments received, the Bureau adopts the proposed 30-day delayed effective date for the final rule.

Request to extend the effective date

One commenter stated that the Bureau's proposed 30-day delayed effective date did not provide a sufficiently long transition period for nonbanks not already subject to supervision to develop compliance and recordkeeping standards to prepare for potential supervision by the Bureau, and urged the Bureau to instead adopt an effective date of six months after publication. The Bureau appreciates that supervision by a Federal agency would be new to many nonbank covered persons potentially subject to the final rule but does not believe that this factor justifies a substantial delay of the effective date of the final rule.

Although certain nonbank covered persons might choose to increase their compliance with Federal consumer financial law in response to the perceived possibility of supervision, entities offering or providing consumer financial products or services are already obligated to comply with applicable Federal consumer financial law. Therefore, nonbank covered persons potentially subject to the final rule should not require additional time to come into compliance with Federal consumer financial law. Moreover, as noted above, the final rule is not necessary to establish the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C). Rather, the final rule merely provides transparency and ensures consistency regarding the procedures that the Bureau intends to use in connection with its preexisting supervisory authority under 12 U.S.C.

¹¹ 5 U.S.C. 553(d)(1).

5514(a)(1)(C). Thus, delaying the effective date of the final rule would not actually delay the period before which entities may be subject to supervision under 12 U.S.C. 5514(a)(1)(C), and entities need not have waited for the issuance of the final rule to begin taking any measures they may wish to take in anticipation of potential supervision by the Bureau.

The Bureau thus believes that a six-month postponement of the effective date as requested by the commenter is not warranted and adopts the effective date as proposed.

Procedural versus substantive rule

Another commenter questioned the Bureau's assertion in the supplementary information to the Proposed Rule that the rule is procedural, rather than substantive. The Bureau regards the final rule as procedural because, as discussed above, the final rule does not impose on nonbank covered persons any new substantive requirements. As noted above, nonbank covered persons already must comply with applicable Federal consumer financial law, and a final rule is not necessary to implement the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C).

In any event, the question whether the final rule is procedural or substantive is generally without consequence because, as a matter of discretion, the Bureau undertook notice and comment rulemaking procedures in promulgating the final rule and is finalizing a 30-day delayed effective date.

IV. Section-by-Section Analysis of the Final Rule

Subpart A—General

Section 1091.100 Scope and purpose

Proposed § 1091.100 set forth the scope and purpose of the Proposed Rule. It stated that proposed part 1091 establishes procedures to implement 12 U.S.C. 5514(a)(1)(C) and to facilitate the supervision of nonbank covered persons under 12 U.S.C. 5514(b)(7). The Bureau

received a few comments that appear to have misinterpreted the scope and purpose of the Proposed Rule.

A commenter asserted that Proposed Rule asserts an “extremely broad grant of jurisdiction” that “appears at odds” with the structure of the Dodd-Frank Act. The commenter argued that the Dodd-Frank Act lists under 12 U.S.C. 5514(a)(1)(A)-(E) five discrete categories of nonbank entities that the Bureau may supervise. According to the commenter, the Proposed Rule employed 12 U.S.C. 5514(a)(1)(C) to “supervise any nonbank entity if the [Bureau] determines on its own, and without appeal to any court, that a nonbank entity ‘poses a risk’ to consumers.” The commenter maintained that had “Congress intended to grant the [Bureau] such broad supervisory authority, it is unlikely it would have done so in the negative, limiting the authority to five discrete situations.”

Another commenter stated that the Bureau should explain why the Bureau’s existing authorities relating to data collection, and regulatory and enforcement authority, are not sufficient to achieve the Bureau’s mission. The commenter also stated that the Bureau should make clear that the final rule will not pertain to mortgage lenders because they are already within the Bureau’s supervisory authority. This and another commenter asked the Bureau to clarify whether a law firm may be examined as a service provider.

Assertions relating to jurisdiction

The comment asserting that the Proposed Rule claims an extremely broad grant of jurisdiction in contravention of the Dodd-Frank Act misunderstands the purpose of the final rule and the structure of 12 U.S.C. 5514(a)(1). As noted above, the purpose of the final rule is to provide transparency and ensure consistency regarding the procedures the Bureau intends to follow in exercising its authority under 12 U.S.C. 5514(a)(1)(C), not to establish or to define the

scope of the Bureau's 12 U.S.C. 5514(a)(1)(C) authority. The Dodd-Frank Act, not the final rule, establishes and defines the scope of that authority. In addition, the commenter's understanding of the Bureau's supervisory authority appears at odds with the language of 12 U.S.C. 5514(a)(1)(C), which defines the covered persons subject to the Bureau's authority under the provision not exclusively by reference to the category of activities in which they engage, but based on whether there is reasonable cause to believe that their conduct – whatever the particular activity involved – poses risks to consumers with regard to the offering or provision of consumer financial products or services..

As to the commenter that requested the Bureau justify the need for 12 U.S.C. 5514(a)(1)(C) in light of the Bureau's other authorities, the Bureau notes that Congress provided the Bureau with various complementing authorities to enable the Bureau to achieve its statutory purposes and objectives relating to consumer financial protection. These authorities, which include supervision, as well as market research and data collection, regulation, and enforcement, are not mutually exclusive, but rather complement and reinforce each other. For example, where the Bureau issues a substantive rule under its regulatory authority, such as Regulation Z,¹² it may also be appropriate to supervise a nonbank covered person to examine whether the person is in compliance with that regulation pursuant to 12 U.S.C. 5514(a)(1)(C), where the Bureau has reasonable cause to determine that the person is engaging, or has engaged, in conduct that poses risks to consumers regarding the offering or provision of consumer financial products or services.

Relatedly, the Bureau notes that if an entity is subject to the Bureau's supervisory authority, the Bureau may examine the entire entity for compliance with all Federal consumer

¹² Regulation Z is codified at 12 CFR part 1026 and implements the Truth in Lending Act which is codified at 15 U.S.C. 1601 et seq.

financial law, assess enterprise-wide compliance systems and procedures, and assess and detect risks to consumers or to markets for consumer financial products and services posed by any activity of the entity, not just the activities that initially rendered the entity subject to Bureau supervisory authority. This authority results from the Dodd-Frank Act’s conferral of authority on the Bureau to supervise “covered person[s]” described in 12 U.S.C. 5514(a)(1)(A)-(E). In addition, the Dodd-Frank Act directs the Bureau to require reports and conduct examinations on a periodic basis of such persons for purposes of (a) assessing compliance with the requirements of Federal consumer financial law, (b) obtaining information about the activities and compliance systems or procedures of such persons, and (c) detecting and assessing risks to consumers and to markets for consumer financial products and services.¹³ By granting the Bureau supervisory authority over such “covered persons,” as opposed to over particular activities in which they engage, the Dodd-Frank Act establishes that the Bureau’s supervisory authority is not limited to the products or services that qualified a person for supervision, but also includes other activities of such a person that involve other consumer financial products or services or are subject to Federal consumer financial law.¹⁴

Applicability to mortgage lenders

The procedures established by the final rule will be used only to assess whether a nonbank covered person will be made subject to the Bureau’s supervisory authority based on a reasonable-cause determination. There would ordinarily be no reason to make such a determination and thus invoke the procedures set forth in the final rule with respect to a nonbank covered person already subject to the Bureau’s supervisory authority. Potentially, however, if

¹³ 12 U.S.C. 5514(b)(1).

¹⁴ For specific references in the Dodd-Frank Act to supervision authority over “persons” rather than particular activities *see, e.g.*, 12 U.S.C. 5514(b)(1) (“The Bureau shall require reports and conduct examinations on a periodic basis of ‘persons’ described in subsection (a)(1)”) (emphasis added); 12 U.S.C. 5514(a)(1) (“[T]his section shall apply to any covered ‘person’ who”) (emphasis added).

the Bureau believed that a nonbank entity qualified for supervision under another provision of 12 U.S.C. 5514(a), the entity disagreed, and the Bureau believed that there might be reasonable cause to determine that the entity was engaging, or had engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, the Bureau might use the procedures in the final rule to establish supervisory authority under 12 U.S.C. 5514(a)(1)(C). The Bureau would not be conceding the lack of supervisory authority on another basis by proceeding in this manner. Therefore, the Bureau declines to establish an exclusion from coverage for entities subject to supervision under another provision of 12 U.S.C. 5514.

Attorneys as service providers

The Proposed Rule did not address the scope or manner of the Bureau's supervisory authority over service providers to nonbank covered persons pursuant to 12 U.S.C. 5514. The Proposed Rule simply proposed procedures for use by the Bureau to subject a nonbank covered person to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C), and observed that the Dodd-Frank Act vests the Bureau with supervisory authority over service providers to persons described in 12 U.S.C. 5514(a)(1).¹⁵ Consequently, comments regarding which service providers the Bureau may supervise, and how, are beyond the scope of the final rule.¹⁶

For the foregoing reasons, the Bureau adopts § 1091.100 as proposed with minor technical revisions for consistency.

Section 1091.101 Definitions

¹⁵ 77 FR 31226, 31227 (May 25, 2012). A service provider is a person that provides a material service to a covered person in connection with a consumer financial product or service. 12 U.S.C. 5481(26)(A). The Dodd-Frank Act provides a non-exhaustive set of examples of such material services. 12 U.S.C. 5481(26)(A)(i)-(ii).

¹⁶ One commenter suggested that the Bureau publish a policy that it will not examine any service provider until after it has examined the entity receiving the services. The Bureau notes that policies regarding the Bureau's supervision of service providers are also beyond the scope of the final rule, which is limited to establishing procedures the Bureau intends to follow in implementing 12 U.S.C. 5514(a)(1)(C).

Section 1091.101 defines terms used in the final rule that are applicable to all of part 1091. If a term is defined in the Dodd-Frank Act, the final rule generally incorporates that definition, with clarifications and modifications as appropriate. The Bureau received comments on several definitions set forth in the Proposed Rule and discusses the comments below in the context of the definition to which they relate.

Assistant Director. The Proposed Rule stated that the term “Assistant Director” means the Bureau’s Assistant Director for Nonbank Supervision or his or her designee. The proposed definition provided that, in the event there is no Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to perform the functions of the Assistant Director under the rule. The Bureau did not receive any substantive comments on this definition.

However, subsequent to the issuance of the Proposed Rule, the Bureau reorganized its supervision offices into the Office of Supervision Policy and the Office of Supervision Examinations, each headed by an Assistant Director. As a result of that restructuring, there is no longer an Office of Nonbank Supervision. The Bureau has therefore revised the Proposed Rule to delete the reference to Nonbank Supervision, but otherwise adopts the proposed definition with only minor technical revisions for consistency. As revised, the term “Assistant Director” means an Assistant Director for Supervision, and thus refers to the Assistant Directors for both the Offices of Supervision Policy and Supervision Examinations. The definition under the final rule further provides that if there is no Assistant Director, the Associate Director may designate an alternative Bureau employee to perform the functions of an Assistant Director under part 1091.

Associate Director. The Proposed Rule did not define the term “Associate Director” in large part because at the time the Proposed Rule was issued, the Bureau did not have an

Associate Director of Supervision, Enforcement, and Fair Lending. An Associate Director has since been appointed. The Bureau therefore is revising the Proposed Rule to formally include the Associate Director in the procedures established by the final rule and to provide the Bureau with more flexibility in assigning personnel to handle the key functions under such procedures. As described in greater detail in the section-by-section analysis of §§ 1091.102-.108 below, the functions of the Assistant Director under the Proposed Rule have been transferred to the Associate Director, or his or her designee, under the final rule. Similarly, under the final rule, the functions of the Deputy under the Proposed Rule have been transferred to the Assistant Director or his or her designee, and the term “initiating official” is used to identify the Assistant Director or his or her designee as discussed in the section-by-section analysis for the definition of the term “initiating official” below.¹⁷ This modification does not change the basic structure of the Proposed Rule, which designated separate Bureau personnel to perform the functions of (1) issuing a notice, (2) considering written and oral responses and issuing a recommended determination, and (3) rendering a final determination.

For the reasons discussed above, the final rule defines the term “Associate Director” to mean the Associate Director of the Bureau for Supervision, Enforcement, and Fair Lending, or his or her designee. The definition under the final rule provides that if there is no Associate Director, the Director of the Bureau may designate an alternative Bureau employee to perform the functions of the Associate Director under part 1091.¹⁸

¹⁷ Unless otherwise noted herein, when discussing the Proposed Rule in this section-by-section analysis, the term “[initiating official]” will be used in place of the term “Deputy.”

¹⁸ Because the Assistant Director’s role in the process has been transferred to the Associate Director, this section-by-section analysis of the final rule refers to the “[Associate Director]” in place of the Assistant Director in discussing the functions of the Assistant Director under the Proposed Rule.

Bureau. The Proposed Rule stated that that the term “Bureau” means the Bureau of Consumer Financial Protection. The Bureau did not receive any substantive comments on this section and adopts it as proposed with minor technical revisions for consistency.

Consumer. The Proposed Rule incorporated the definition of the term “consumer” set forth in 12 U.S.C. 5481(4). That provision defines “consumer” as an individual or an agent, trustee, or representative acting on behalf of an individual. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Consumer financial product or service. The Proposed Rule incorporated the definition of the term “consumer financial product or service” set forth in 12 U.S.C. 5481(5). The Proposed Rule provided that the term “consumer financial product or service” means any financial product or service as defined in 12 U.S.C. 5481(15) that is described in one or more categories under: (1) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (2) clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A)¹⁹ and is delivered, offered, or provided in connection with a consumer financial product or service referred to in (1).

The Bureau received one comment recommending modification to the definition of the term “consumer financial product or service.” This commenter asserted that the definition of the term is ambiguous. The commenter stated that, as proposed, the definition fails to provide clear notice as to which products are subject to the definition and which products are not. The

¹⁹ Under these specified clauses, the term “financial product or service” is generally defined to include, subject to certain exclusions: (1) extending credit and servicing loans, 12 U.S.C. 5481(15)(A)(i); (2) providing real estate settlement services or performing appraisals of real estate or personal property, 12 U.S.C. 5481(15)(A)(iii); (3) collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, 12 U.S.C. 5481(15)(A)(ix); and (4) collecting debt related to any consumer financial product or service, 12 U.S.C. 5481(15)(A)(x).

commenter explained that some of the financial products it offers are sold for both consumer and business uses. The commenter urged the Bureau to modify the definition of the term “consumer financial product or service” to make clear that the Bureau intends to base reasonable-cause determinations solely on risk associated with products that are used exclusively for personal, household, or family purposes.

The Bureau declines to adopt the commenter’s request, because the commenter’s proposed definition of the term “consumer financial product or service” would be narrower than the definition in the Dodd-Frank Act. The definition of that term in the Act includes not only financial products or services “offered or provided ‘for use by’ consumers primarily for personal, family or household purposes” but also, for certain types of financial products or services, those “delivered, offered, or provided ‘in connection with’ a consumer financial product or service” of the first type.²⁰ The Bureau is not aware of any reason that it should treat as less significant for purposes of determining the scope of its supervisory authority under 12 U.S.C. 5514(a)(1)(C) the risks to consumers that may arise in the offering or provision of the second type of consumer financial product or service.

Accordingly, the Bureau adopts the definition of the term “consumer financial product or service” as proposed with minor technical revisions for consistency.

Decisional employee. The Proposed Rule stated that the term “decisional employee” means any employee of the Bureau who has not engaged in: (1) assisting the [initiating official] in either determining whether to issue a Notice of Reasonable Cause, or presenting the [initiating official’s] position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the [Associate] Director; or (2) assisting the [Associate] Director in the preparation of a recommended determination. The Bureau received one comment on this

²⁰ 12 U.S.C. 5481(5).

definition expressing appreciation for the Bureau's efforts to separate the functional roles of Bureau employees with respect to the procedures the Bureau will follow under 12 U.S.C. 5514(a)(1)(C). The Bureau adopts the definition as proposed with minor technical revisions for consistency.

Director. The Proposed Rule stated that the term "Director" means the Director of the Bureau or his or her designee. The Proposed Rule provided that if there is no Director the term shall mean a person authorized to perform the functions of the Director under part 1091, or his or her designee. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Executive Secretary. The Proposed Rule stated that the term "Executive Secretary" means the Executive Secretary of the Bureau. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Initiating official. As noted in the section-by-section analysis of the term "Associate Director" above, the Proposed Rule defined the term "Deputy," which in the final rule is replaced with the term "initiating official."

The final rule further revises the definition of the term "initiating official" to provide the Bureau with more flexibility in staffing the key functions of the rule with Bureau personnel. As revised, the term "initiating official" means an Assistant Director of the Office of Supervision or Office of Examinations, or a Bureau employee designated to act as an "initiating official" by an Assistant Director. The final rule states that if there is not an Assistant Director, the Associate Director may designate a Bureau employee to perform the functions of an initiating official under part 1091.

The Bureau adopts the proposed definition with the revisions described above and with other minor technical revisions for consistency.

Nonbank covered person. The provisions of 12 U.S.C. 5514 relate to “covered persons” as defined in 12 U.S.C. 5481(6) that are not insured depository institutions or credit unions, or, in the case of such entities with assets of more than \$10 billion, their affiliates, as set forth in 12 U.S.C. 5515 and 5516. The Proposed Rule therefore excluded from the definition of the term “nonbank covered persons,” persons described in 12 U.S.C. 5515(a) and 5516(a), and provided that the term “nonbank covered person” means, except for persons described in 12 U.S.C. 5515(a) and 5516(a): (1) any person that engages in offering or providing a consumer financial product or service; and (2) any affiliate of a person described in (1) if such affiliate acts as a service provider to such person.

The Bureau received a comment asserting that the Bureau’s authority to supervise based on reasonable-cause determinations under 12 U.S.C. 5514(a)(1)(C) should not extend to affiliates of nonbank covered persons that act as service providers. The commenter expressed concern about the potential for affiliated service providers being unaware of the possibility that they could be brought under the Bureau’s supervisory authority. The commenter asserted that affiliate service providers that do not themselves offer or provide consumer financial products or services would not anticipate that their work for their affiliated nonbank entities could subject them to Bureau supervision.

The Bureau believes that it is appropriate to include affiliated service providers under the definition of the term “nonbank covered person.” This definition derives from the definition of the term “covered person” provided in 12 U.S.C. 5481(6). By including affiliated service providers in the definition of the term “covered person,” Congress expressed its intention that

these particular service providers be subject to the Bureau’s supervisory authority over covered persons as set forth in the Act.²¹ Accordingly, the Bureau declines to revise the definition of “nonbank covered person” to exclude affiliated service providers and adopts the definition as proposed with minor technical revisions for consistency.

Notice of Reasonable Cause and Notice. The Proposed Rule stated that the terms “Notice of Reasonable Cause” and “Notice” mean a Notice issued under § 1091.102. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Person. The Proposed Rule incorporated the definition of the term “person” set forth in 12 U.S.C. 5481(19). The Proposed Rule therefore stated that the term “person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Respondent. The Proposed Rule stated that the term “respondent” means a person who has been issued a Notice of Reasonable Cause by the [initiating official] under § 1091.102. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Response. The Proposed Rule stated that the term “response” means the response to a Notice of Reasonable Cause filed by a respondent with the [Associate] Director under

²¹ The Bureau also notes that the treatment of service providers affiliated with nonbank covered persons under the final rule for purposes of 12 U.S.C. 5514(a)(1)(C) is consistent with the treatment of such affiliated service providers for purposes of 12 U.S.C. 5514(a)(1)(A), (B), (D), and (E). The same rationale that applies to treating affiliated service providers as covered persons under 12 U.S.C. 5514(a)(1)(A), (B), (D) and (E) applies equally to the treatment of affiliated service providers under 12 U.S.C. 5514(a)(1)(C).

§ 1091.105. The Bureau did not receive any substantive comments on this definition and adopts it as proposed with minor technical revisions for consistency.

Subpart B—Determination and Voluntary Consent Procedures

Subpart B sets forth the procedures relating to the Bureau’s process for determining, after notice to a person and a reasonable opportunity to respond, whether there is reasonable cause to determine, based on complaints and information from other sources, that the respondent is a covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, and therefore subject to the Bureau’s supervisory authority under 12 U.S.C. 5514(a)(1)(C). The Bureau received several comments on the Proposed Rule that are generally applicable to subpart B. The Bureau addresses these comments prior to its analysis of the specific sections of subpart B.

A number of commenters urged the Bureau to define the type of “risks” posed to consumers that could give rise to supervision under 12 U.S.C. 5514(a)(1)(C). Other commenters asked the Bureau to define what constitutes “reasonable cause” for purposes of the rule. A number of commenters requested that the Bureau revise the Proposed Rule to require the Bureau to verify complaints. A few commenters asked the Bureau to identify what “information from other sources” it would consider in issuing a Notice of Reasonable Cause. One commenter asserted that the Dodd-Frank Act requires a formal hearing under the Administrative Procedure Act (APA) because determinations under 12 U.S.C. 5514(a)(1)(C) are to be made by “order” of the Bureau.

Define risk

As noted above, several commenters asserted that the Proposed Rule failed adequately to define the types of conduct that pose risks to consumers within the meaning of 12 U.S.C.

5514(a)(1)(C). For example, two commenters urged the Bureau to clarify that prohibited “risks” include only inappropriate or undisclosed financial risks to consumers. Another commenter asserted that, although it may be “impracticable to provide a laundry list” of products, services, or actions that might pose risks, even a non-exhaustive list would allow businesses to evaluate not only their compliance with existing law, but also compliance with the Bureau’s expectations. This commenter stated that, unlike other consumer protection laws and regulations that are codified, the Bureau will be creating new law as it goes along. The commenter argued that, without a clear understanding of what conduct is prohibited under the rule, it will be difficult to understand what conduct would subject nonbank covered persons to supervision.

In a similar vein, another commenter stated that the “utilization of consumer financial products and services inherently involves risk” and that to avoid acting in an arbitrary and capricious manner, the Bureau must set forth clear and detailed descriptions of the process that it will follow and the factors that it will consider to determine whether a covered person’s conduct poses more risks to consumers than is inherently present in the product or transaction without that conduct.

In objecting to the Bureau’s decision not to define or ask for comments regarding whether to define the terms “risk determination” or “risk” in the Proposed Rule, a commenter asserted that any “risk paradigm” must be clarified with respect to the unfair, deceptive, or abusive acts or practices (UDAAP) provisions of the Dodd-Frank Act. This commenter asserted that because the hearing prescribed in this part may deem actions that do not violate Federal law to be risky, the Bureau must define the terms “unauthorized,” “deceptive,” and “abusive” before issuing a final rule. Regarding a related issue, one commenter requested that the Bureau define the term “risk” to include a safe harbor from a reasonable-cause determination under the final

rule where a respondent can demonstrate reliance upon written reports or judgments issued by the Bureau.

First, the Bureau notes that the phrase “risks to consumers” is taken directly from 12 U.S.C. 5514(a)(1)(C). The phrase is not defined by that or any other provision of the Dodd-Frank Act, and neither the Dodd-Frank Act nor any other law requires the Bureau to define the phrase before implementing 12 U.S.C. 5514(a)(1)(C). Second, the Bureau notes that the final rule is not a substantive conduct rule. The final rule neither prohibits any conduct nor requires any disclosures. It merely sets forth the procedures the Bureau intends to use in connection with the exercise of its existing authority under 12 U.S.C. 5514(a)(1)(C). Among other things, the final rule establishes procedures for issuing Notices of Reasonable Cause, responding to such Notices, considering responses, and rendering determinations. Consistent with the narrow purpose of the Proposed Rule, it is beyond the scope of the final rule to establish substantive standards for what constitutes “risks to consumers.”

The Bureau also believes that the procedures established by the final rule provide sufficient opportunity for respondents to address, and for the Bureau to evaluate, whether, consistent with 12 U.S.C. 5514(a)(1)(C), any particular covered person is subject to the Bureau’s risk-based supervision authority. As discussed below, a Notice under the final rule is required to contain a description of the basis for the Bureau’s assertion that there may be reasonable cause to determine that a respondent is engaging, or has engaged, in conduct that poses risks to consumers. A reasonable opportunity to respond to such Notice does not necessitate that the Bureau identify in advance of the issuance of a Notice the types of conduct that the Bureau has determined may pose risks to consumers. Accordingly, the Bureau declines commenters’ requests that the Bureau define the term “risks to consumers” for purposes of the final rule.

For similar reasons, the Bureau declines the commenter’s request to include a safe harbor in the final rule from a reasonable-cause determination where a respondent can demonstrate reliance upon written reports or judgments issued by the Bureau. The Bureau believes that the final rule, consistent with 12 U.S.C. 5514(a)(1)(C), provides respondents with a reasonable opportunity to present to the Bureau, in a response, information supporting any asserted reliance on Bureau decisions or guidance. The Bureau observes that a covered person’s reliance on written reports or judgments issued by the Bureau would likely be a relevant consideration in evaluating risk.

The Bureau notes that in evaluating risks to consumers for purposes of 12 U.S.C. 5514(a)(1)(C), it expects to consider, consistent with the objectives set forth in the Dodd-Frank Act,²² whether a nonbank covered person has engaged in conduct that would pose risks to consumers because, for example, it involves potentially unfair, deceptive, or abusive acts or practices, or because the conduct otherwise potentially violates applicable Federal consumer financial law.

Define reasonable cause

Several commenters requested that the Bureau define the term “reasonable cause.” One commenter asserted that without such a definition, nonbank covered persons would have no guidance on how to comply with the law or how to protect consumers. Another commenter complained that although the term “reasonable cause” is vital to a full understanding of the Bureau’s authority to subject a nonbank to its supervision authority, this term is not defined by the rule.

The Bureau does not believe that it is necessary to define the term “reasonable cause” in the final rule for three reasons. First, the Bureau notes that the term “reasonable cause” is

²² 12 U.S.C. 5511(b).

adopted in the final rule without revision from 12 U.S.C. 5514(a)(1)(C). The term is not defined by that or any other provision of the Dodd-Frank Act, and neither the Dodd-Frank Act nor any other law requires the Bureau to define the term to implement 12 U.S.C. 5514(a)(1)(C). Second, the Bureau disagrees with the commenter that the lack of a definition of the term “reasonable cause” results in nonbank covered persons having “no guidance for compliance with the law and protection of consumers.” Nonbank covered persons and other persons are required, irrespective of the final rule, to comply with applicable Federal consumer financial law. Third, the purpose of the final rule is not to establish or describe the supervisory authority of the Bureau as it relates to nonbank covered persons described in 12 U.S.C. 5514(a)(1)(C). The Bureau’s supervisory authority in this regard is established by 12 U.S.C. 5514(a)(1)(C), and a rule is not necessary to further delineate that authority. Rather, the purpose of the final rule is to provide transparency and ensure consistency regarding the procedures the Bureau intends to follow in exercising its authority under 12 U.S.C. 5514(a)(1)(C).

12 U.S.C. 5514(b)(2)(A)-(E) risk criteria

A couple of commenters argued that in making reasonable-cause determinations, the Bureau must consider the criteria enumerated in 12 U.S.C. 5514(b)(2)(A)-(E) relating to risk-based supervision, something these commenters felt the Proposed Rule failed to do.²³ One commenter asserted that the Proposed Rule did not adequately explain the interrelatedness of these criteria to each other and to the Proposed Rule. Another commenter noted that the Proposed Rule made no mention of these factors which, the commenter argued, Congress clearly

²³ The factors for exercising the Bureau’s supervisory authority on a risk basis include: “the asset size of the covered person,” “the volume of transactions involving consumer financial products or services in which the covered person engages,” “the risks to consumers created by the provision of such consumer financial products or services,” “the extent to which such institutions are subject to oversight by State authorities for consumer protection,” and “any other factors that the Bureau determines to be relevant to a class of covered persons.” 12 U.S.C. 5514(b)(2).

intended to limit the exercise of the Bureau's authority by focusing the Bureau's efforts on the most problematic issues.

The Bureau believes that these commenters have misinterpreted the scope and purpose of 12 U.S.C. 5514(b)(2). That subsection describes how the Bureau must "exercise its authority under paragraph [(b)](1)," ²⁴ which in turn authorizes the Bureau to supervise "persons described in subsection (a)(1)." The final rule does not address the exercise of the Bureau's supervisory authority under subsection (b)(1). Rather, the final rule establishes procedures for implementing subsection (a)(1)(C) to bring a nonbank covered person under the Bureau's supervisory authority. Nevertheless, although not expressly applicable to an (a)(1)(C) proceeding, the Bureau may consider the (b)(2) factors to the extent applicable in making a reasonable-cause determination.

For the reasons discussed above, the Bureau declines to revise the Proposed Rule to define the term "reasonable cause" in the final rule.

Consideration of past conduct in risk determinations

A commenter stated that any assertion of supervisory authority by the Bureau based upon past (but not ongoing) risk-posing activity should be required clearly to state the basis for the Bureau's belief that such conduct is likely to recur. This commenter also recommended that there should be something akin to a "statute of limitations" where past conduct cannot be the basis for a Notice, and that activity more than three years in the past should not be a permissible basis for reasonable cause.

Contrary to the commenter's assertion, the Bureau does not believe that requiring the Bureau to state its belief that the risk-posing conduct giving rise to a proceeding is likely to recur is consistent with the Dodd-Frank Act. The plain language of 12 U.S.C. 5514(a)(1)(C) covers

²⁴ 12 U.S.C. 5514(b)(2).

conduct that a nonbank covered person “is engaging, or has engaged, in” that poses risks to consumers. The Bureau further believes that past conduct may pose risks to consumers, even if the identical conduct is not likely to recur, to the extent that such conduct indicates weak compliance systems that might lead to other potential law violations or harms to consumers. Additionally, the Dodd-Frank Act does not require, and the Bureau does not believe it is appropriate to adopt, the equivalent of a statute of limitations. Accordingly, the Bureau declines to revise the Proposed Rule to add the language suggested by the commenter regarding recurring activity or to impose a statute of limitations as requested by commenters. The Bureau notes that it intends to consider both past and present conduct of nonbank covered persons in evaluating whether there is reasonable cause to proceed under 12 U.S.C. 5514(a)(1)(C), but that in considering past conduct, it expects to take into account, among other factors, the length of time since conduct occurred.

Verify complaints and describe information from other sources

The Bureau received a number of comments requesting that the Bureau verify any complaints used as the basis for issuing a Notice of Reasonable Cause or reaching a final determination under 12 U.S.C. 5514(a)(1)(C). In expressing concerns about the use of complaints, a commenter stated that complaints provide “anecdotal, unverified, and incomplete accounts of consumer satisfaction with financial products and services.” This commenter asserted that “complaints are an unreliable means of targeting supervision of financial institutions, particularly given the small number of complaints typically generated by smaller providers of financial services.” Another commenter stated that the Proposed Rule does not contain any “mechanism to ensure that only legitimate and verifiable complaints are considered.” The commenter stated that without a mechanism to systematically root out “baseless complaints

from legitimate ones,” businesses will be left defenseless against baseless complaints, and the Bureau will leave itself vulnerable to making decisions based on inaccurate information. The commenter specifically requested that the Bureau revise the Proposed Rule to state that in making reasonable-cause determinations, the Bureau will consider only complaints that, after “reasonable inquiry” by the Bureau, are found to have merit.

The Bureau received similar comments questioning the Bureau’s reliance on complaints as a basis for issuing reasonable-cause determinations on the ground that complaints do not accurately reflect an entity’s compliance with applicable law. A trade association for the debt collection industry stated that reviewing “consumer inquiries and complaints about the debt collection industry is not a proper, reasonable, or accurate gauge of the industry’s level of compliance with consumer protection laws, such as the [Fair Debt Collection Practices Act (FDCPA)].” This commenter was also concerned that complaints would be treated the same by the Bureau, regardless of their nature. The commenter noted the importance of providing adequate procedural and training measures to ensure that any data gathered at the outset clearly distinguishes between complaints of FDCPA violations and complaints that do not assert law violations or simply inquire into the rights and responsibilities of collectors and consumers during the collection process. The commenter urged the Bureau to clarify how consumer complaints will be used in determining “reasonable cause” under the rule. Similar comments expressed concern that the Proposed Rule would not require the Bureau to consider the nature and severity of complaints. A commenter urged the Bureau to look not just at the number of complaints regarding a company, but also at the nature of the complaints submitted against a company. Voicing a related concern, another commenter asserted that there is a danger that

consumers might equate the number of complaints against a nonbank covered person with the risks the person actually poses to consumers.

The Bureau also received comments expressing concern that third parties may submit complaints to the Bureau on behalf of consumers. In this regard, a commenter stated that because the Bureau's complaint system permits the submission of complaints by third parties on behalf of consumers, the system runs the risk of being inundated with complaints from "credit repair organizations, debt settlement companies, advocacy groups, politicians, competitors, and even blog sites dedicated to airing gripes about specific companies."

In emphasizing the potential for meritless complaints, a commenter noted that "the federal financial agencies estimated in the Accuracy and Integrity Rule that the percentage of frivolous or irrelevant disputes could range from 25 percent to 94 percent of all disputes [referring to complaints under the Fair Credit Reporting Act]." The commenter asserted that the procedure the Bureau uses to verify complaints it receives is insufficient, and therefore that the Bureau should not make a determination that a covered person is engaging, or has engaged, in conduct that poses risks to consumers based solely on the number of complaints or on unverified information from other sources. This commenter recommended that, instead, the Bureau should consider risks associated with specific products and acknowledge that the strong financial performance of some products during the recent crisis indicates lower consumer risks.

Several commenters also expressed concern that the Proposed Rule did not adequately describe what may be used as "information from other sources" and requested the Bureau to describe these other sources of information, and/or provide examples of such sources. One commenter asked whether information from "other sources" might include privileged information. Another raised concern about using internet blogs, which the commenter deemed

unreliable. As with complaints, commenters requested that the Proposed Rule be revised to require that information from other sources be verified by the Bureau. Lastly, the Bureau received a comment requesting guidance on how the Bureau will use data sources.

In response to these comments, the Bureau notes that it intends to look at many factors relating to complaints and information from other sources in deciding whether there is a sufficient basis to initiate a proceeding under 12 U.S.C. 5514(a)(1)(C). These factors may include, among others, the nature of the conduct relating to the complaints or other information, the severity of risk alleged, the number of consumers potentially affected, and the number of complaints or amount of information from other sources received. The Bureau is committed to using its limited resources where most needed and intends to consider complaints and information from other sources with the efficient use of Bureau resources in mind.

At the same time, the Bureau notes that the purpose of the final rule is to establish procedures that the Bureau intends to use to exercise its authority under 12 U.S.C. 5514(a)(1)(C) through which a nonbank covered person might become subject to the Bureau's supervisory authority. This process is not intended to determine whether a nonbank covered person has, in fact, violated applicable Federal consumer financial law or harmed consumers. The level of inquiry necessary to make a finding of a violation of law would instead occur, where consistent with Bureau prioritization and resources, in the course of supervisory activity such as an examination. It is not required under, and would defeat the purpose of, 12 U.S.C. 5514(a)(1)(C), to mandate that the Bureau make a finding of a law violation before concluding that there is "reasonable cause to determine" that a nonbank covered person's conduct poses risks to consumers with regard to the offering or provision of consumer financial products or services.

Finally, the Bureau notes that “information from other sources” may, as the phrase suggests, come from a variety of places. Such information sources might include, among others, judicial opinions and administrative decisions. Given the potential range of sources, the Bureau does not believe it would serve a useful purpose to provide a list (even a nonexclusive list) of such sources in the final rule.

For the reasons stated above, the Bureau declines to revise the Proposed Rule to require the Bureau to verify complaints or to identify “other sources of information” that form the basis for a Notice or a determination of reasonable cause.

Request for formal adjudication under the Administrative Procedure Act

In response to the comment that determinations under 12 U.S.C. 5514(a)(1)(C) require a hearing on the record, the Bureau notes that there is no statutory requirement that the process to exercise the Bureau’s authority under 12 U.S.C. 5514(a)(1)(C) be a formal adjudication with a hearing on the record under the APA. Rather, 12 U.S.C. 5514(a)(1)(C) states only that the Bureau must provide to a respondent “notice” and a “reasonable opportunity to respond.” Nor does Due Process necessitate formal adjudication with a hearing on the record in this context. As stated above, the sole consequence of a determination that an entity is a covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of a consumer financial product or service under 12 U.S.C. 5514(a)(1)(C) is that such person becomes subject to Bureau supervisory authority. Supervision alone does not impose any penalty on a person, does not deprive it of any property, and does not restrict its ability to engage in a viable business.

The Bureau has wide discretion in establishing the procedures it will adopt to implement 12 U.S.C. 5514(a)(1)(C). The Bureau has sought to establish a process that meets the statutory

requirement of providing a respondent with a notice and a reasonable opportunity to respond and that is also fair and efficient. The Bureau believes that a formal adjudication with a hearing on the record would unnecessarily add complexity to, lengthen, and add to the cost of, the process established by the final rule and declines to revise the Proposed Rule to require a formal adjudication with a hearing on the record.

Confidentiality of proceedings

The Bureau received several comments regarding the confidentiality of the process established by the final rule. Some commenters expressed the view that all aspects of a proceeding should be confidential, while others urged the Bureau to make information regarding the entire process available to the public. Preliminarily, the Bureau notes that proposed § 1091.105 relating to responses, stated that “documents, records or other items submitted by a respondent with a response shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1)(iv).” After consideration of the comments regarding confidentiality, the Bureau agrees that all aspects of a proceeding under the final rule relate to the Bureau’s supervisory process and should be deemed confidential supervisory information under 12 CFR 1070.2(i)(1).²⁵ As noted below, the Bureau therefore revises proposed § 1091.115²⁶ to add a new paragraph (c), which states: “In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1).”

Section 1091.102 Issuance of Notice of Reasonable Cause

²⁵ See also 12 CFR 1070.2(q) (defining “supervised financial institution” to mean a “financial institution that is ‘or may become’ subject to the CFPB’s supervisory authority”).

²⁶ Section 1091.115 of the final rule appeared as § 1091.112 in the Proposed Rule.

Section 1091.102 relates to the issuance of a Notice of Reasonable Cause, which initiates a proceeding that culminates in a determination by the Director under § 1091.109 of the final rule, or a respondent's voluntary consent to supervision by the Bureau.²⁷ Section 1091.102 of the Proposed Rule provided that the [initiating official] is authorized to issue a Notice of Reasonable Cause stating that the Bureau may have reasonable cause to determine that a nonbank covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services and, consistent with 12 U.S.C. 5514(a)(1)(C), that such Notice shall be based on complaints collected by the Bureau, or on information from other sources. The Bureau received several comments on proposed §1091.102 discussed below.

Concerns regarding use of “may have” reasonable cause to determine statement in Notice

The Bureau received a few comments expressing concern that, under the Proposed Rule, a Notice of Reasonable Cause would state that the Bureau “may have” reasonable cause to determine that a nonbank covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. One commenter interpreted this language in the Proposed Rule as not requiring the Bureau to articulate a “reasonable cause” in a Notice. This commenter asserted that under the Proposed Rule it is enough that Bureau staff merely “suppose, surmise, or conjecture” that there might possibly be a ‘reasonable cause’ to assume risky conduct.” Similarly, another commenter argued that the “may have reasonable cause” standard is vague and not in accordance with the statute.

In response, the Bureau notes that these commenters appear to be confusing the Bureau's basis for issuing a Notice with the reasonable cause necessary to support a final determination of

²⁷ A final determination may result in an order bringing a person under the Bureau's supervisory authority based on a reasonable-cause determination, or may result in a notice indicating that a person will not be so brought under the Bureau's supervisory authority.

reasonable cause under 12 U.S.C. 5514(a)(1)(C). The Bureau clarifies that the initiating official issues a Notice indicating that there “may” be reasonable cause to determine that a person’s activities pose risks to consumers but that a reasonable-cause determination will not be made until the Director makes a final determination. At the final stage of the process set forth in the final rule, the Director will issue a final determination indicating that there “is” reasonable cause to determine that a nonbank covered person’s activities pose risks to consumers, or a notice stating that the person will not be made subject to the Bureau’s authority. The Dodd-Frank Act provides that the Bureau’s reasonable-cause determinations under 12 U.S.C. 5514(a)(1)(C) must follow notice and a reasonable opportunity to respond.²⁸ Accordingly, the Bureau believes it would not be appropriate to state unequivocally in a Notice that the Bureau “has reasonable cause to determine” that the respondent’s conduct poses risks to consumers. The Bureau therefore declines to revise the proposed content of the Notice to state that the Bureau “has,” as opposed to “may have,” reasonable cause to determine that an entity’s conduct poses risks to consumers.

The Bureau also received a comment requesting that the Bureau meet with a respondent prior to issuing a Notice to that respondent. The commenter recognized that this may not be feasible in every instance. The Bureau agrees with the commenter that meeting with a potential respondent prior to sending out a Notice may not be feasible in some, and perhaps many, instances, and as stated above, one of the purposes of the final rule is to establish uniform procedures applicable to all persons potentially subject to the final rule that the Bureau intends to follow in implementing its authority under 12 U.S.C. 5514(a)(1)(C). Moreover, the Bureau believes that the commenter’s suggestion would add an additional layer to the process

²⁸ 12 U.S.C. 5514(a)(1)(C) (“[T]he Bureau has reasonable cause to determine, by order, ‘after’ notice to the covered person and a reasonable opportunity for such covered person to respond. . . .” (emphasis added)).

established by the final rule that would unnecessarily lengthen and complicate the process.

Accordingly, the Bureau declines to revise the Proposed Rule to adopt a provision requiring the Bureau to meet with a prospective respondent prior to issuing a Notice.

For the reasons discussed above, the Bureau adopts § 1091.102 as proposed with minor technical revisions for consistency.

Section 1091.103 Contents of Notice

Section 1091.103 details the required contents of a Notice of Reasonable Cause. To ensure that a respondent would have a reasonable opportunity to address the substance of a Notice, proposed § 1091.103 provided that a Notice must set forth, among other things, the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

Proposed § 1091.103 further stated that a Notice must contain a statement informing a respondent of how to file a timely response, and of the required contents of a response. Under proposed § 1091.103, a Notice would be required to inform a respondent that he or she may request a supplemental oral response, and that a respondent may, in lieu of filing a response, voluntarily consent to the Bureau's supervisory authority under 12 U.S.C. 5514 by filing an executed form of consent agreement attached to a Notice served on a respondent. Proposed § 1091.103 further provided that a Notice shall inform a respondent that failure to respond, as set forth in a Notice, may result in a determination by the Director without further opportunity for the respondent to respond. As set forth in proposed § 1091.103, a Notice would also inform a respondent of the various timelines associated with the process.

The Bureau received a number of comments on the proposed contents of a Notice and related issues discussed below.

Information in, and items accompanying, a Notice

Several commenters recommended that a Notice should include copies of the complaints collected by the Bureau and/or the information from other sources that were used in the decision to issue the Notice. One commenter stated that the Bureau should include in the Notice a statement detailing what specific risk to consumers is under consideration, what conduct the respondent is engaging in, or has engaged in, that the Bureau alleges poses risks to consumers, and how those risks are increased by the respondent's alleged conduct. This commenter asked the Bureau to release a model Notice. Another commenter recommended that the Bureau provide copies of underlying complaints with a Notice, asserting that without a copy of the underlying complaint, "a respondent wishing to object or to accede to the notice will have limited information upon which to make a reasonably informed decision."

Some other commenters asked the Bureau to revise the Proposed Rule to provide greater detail regarding the items relied on to issue a Notice of Reasonable Cause. One commenter recommended that the Bureau include detailed information regarding any consumer complaints, in addition to copies of the complaints, together with the Notice of Reasonable Cause. Another commenter urged the Bureau to require that the Notice state with specificity the basis for the Bureau's assertions and include an inventory of any complaints and other information relied upon by the Bureau. This commenter asserted that such a showing is crucial to a respondent's ability to prepare adequately its response and assemble "documents, records or other evidence" in support of its position.

Similarly, a commenter requested that the Bureau explain how much detail it expects to provide in the Notice, as well as the level of detail it expects to receive in response. The commenter asked the Bureau to clarify whether it intends to include in the Notice detailed information regarding the consumer complaints, if any, on which the Bureau bases its assertions, and whether it will provide copies of any such complaints together with the Notice of Reasonable Cause. The commenter further asked whether the Bureau expects respondents specifically to address each complaint and any resolution thereof in its response.

The Bureau also received several comments taking issue with proposed § 1091.103(c), which stated that “[n]othing in this section shall be construed as requiring the Bureau to produce any documents or information to a respondent other items than as set forth in this section.” One commenter stated that this provision “seems unreasonable,” and “in the interest of open and honest communication,” urged the Bureau to “be willing to share any and all relevant information with respondents.” Another commenter asserted in connection with this provision that the good faith efforts of nonbank covered persons will continue to be frustrated by the lack of clearly defined requirements and expectations in the rule. Similarly, the Bureau received a comment suggesting a specific revision to § 1091.103(c) to require the Bureau to produce to a respondent documents or information “as otherwise relevant, material and necessary for respondent to prepare its response to the Notice.” This commenter encouraged the Bureau to include in the final rule a process by which a respondent, upon receiving a Notice of Reasonable Cause, may request additional relevant information from the Bureau and requested the establishment of a reasonable time frame in which the Bureau must provide such additional information or, conversely, state with specificity the reason for its denial of the request.

The Bureau does not believe that a reasonable opportunity to respond requires the Bureau to provide copies of all complaints or information from other sources relied on by the Bureau in issuing a Notice along with a Notice. Respondents should typically already have, or have access to, copies of any complaints, pleadings, judicial opinions, or independent studies on which the initiating official may rely in issuing a Notice.²⁹ Other information that the initiating official might rely on in issuing a Notice could contain confidential or other personally identifiable information regarding consumers or others.

For the same reasons, the Bureau does not believe it is necessary or appropriate to provide respondents with the right to request additional information from the Bureau. The final rule, moreover, prohibits discovery and permitting such requests would not be consistent with the informal, expeditious nature of the proceedings. Thus, the Bureau rejects the commenter's request that the Bureau add language to § 1091.103(c) requiring the Bureau to produce items "as otherwise relevant, material and necessary for respondent to prepare its response to the Notice."

Nevertheless, after consideration of the comments received, the Bureau agrees that it may be helpful to respondents to include in a Notice more information on items that the initiating official relied on in issuing a Notice than was required under the Proposed Rule. Thus, the Bureau revises the Proposed Rule to require under the final rule that the Notice set forth not just a "description of the basis" for, but also a "summary of the documents, records, or other items relied on," by the initiating official in issuing a Notice. Accordingly, as finalized, § 1091.103(a)(1) reads: "A Notice of Reasonable Cause shall contain the following: A description of the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that

²⁹ It is the Bureau's policy to place complaints in the public database 15 days after forwarding the complaint to the company in question. 77 FR 37558, 37568 (June 22, 2012). Thus, typically the company should already have copies of the complaints that the Bureau might rely on in issuing a Notice.

poses risks to consumers with regard to the offering or provision of consumer financial products or services, including a summary of the documents, records or other items relied on by the initiating official to issue a Notice. Such summary will be consistent with the protection of sensitive information, including compliance with federal privacy law and whistleblower protections.”

Statement of verification

Another commenter suggested that a Notice include a “statement of verification undertaken by the Bureau . . . of . . . the specific harms and risks that the Bureau believes the entity’s activities pose to consumers,” which should also “state the basis for the Bureau’s belief that such conduct will recur if the assertion is based upon past but not ongoing activities.”

Under the final rule, the Notice must describe the basis for the assertion that the Bureau may have a “reasonable cause to determine” that the conduct of a nonbank covered person poses risks to consumers and provide a summary of the documents, records, or other items relied on by the initiating official in issuing a Notice. Accordingly, the Notice would describe the risks the Bureau believes the respondent’s conduct poses to consumers as requested by the commenter. However, for the reasons discussed in the section-by-section analysis of § 1091.102 above, the Bureau declines to include provisions in the final rule requiring the Bureau to verify specific harms and risks on which a Notice is based, or to conclude where past conduct forms the basis for a Notice that such conduct is likely to recur.

Notice regarding parallel proceedings

Another commenter mistook the Proposed Rule’s Notices of Reasonable Cause for notices that might be given at the outset of a civil investigation or examination. Accordingly, this commenter claimed that the Bureau should, in accordance with the commenter’s

interpretation of the Fifth Amendment and understanding of the approach taken by the SEC, revise the Proposed Rule to require that a Notice of Reasonable Cause “inform civil investigative targets of their Constitutional rights.” Contrary to the commenter’s assumption, a Notice would not be used to initiate a civil investigation or an examination. A Notice, rather, would commence a proceeding solely to determine whether a nonbank covered person would be made subject to the Bureau’s supervisory authority on the basis of a reasonable-cause determination. Moreover, a person receiving a Notice would not be compelled to respond or otherwise act in response to such a Notice. Accordingly, the Fifth Amendment concerns raised by the commenter are not relevant to the issuance of Notices of Reasonable Cause under the Proposed Rule. In any event, nothing in the Proposed Rule would preclude the Bureau from providing additional information to those persons who receive a Notice of Reasonable Cause.³⁰ The Bureau therefore declines to revise the Proposed Rule as recommended by the commenter.

Revision to address confidentiality of proceedings

As discussed above, after consideration of the comments regarding confidentiality, the Bureau agrees that all aspects of a proceeding under the final rule relate to the Bureau’s supervisory process and therefore qualify as confidential supervisory information under 12 CFR 1070.2(i)(1).³¹ Consistent with new § 1091.115(c), the Bureau has therefore revised proposed § 1091.103(a) to add a new subparagraph (vii), which states: “In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of,

³⁰ The Bureau takes no position here whether and in what circumstances it would be obligated under the Fifth Amendment to provide additional information to recipients of notices initiating a civil investigation or supervisory activity.

³¹ See also 12 CFR 1070.2(q) (defining “supervised financial institution” to mean a “financial institution that is ‘or may become’ subject to the CFPB’s supervisory authority”).

or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1).”

Section 1091.104 Service of Notice

Section 1091.104 sets forth the procedures governing service of a Notice of Reasonable Cause. Proposed § 1091.104 provided that a Notice of Reasonable Cause shall be served pursuant to methods including electronic transmission (where a respondent has consented), personal service, First Class U.S. Mail, or commercial courier or express delivery service. Proposed § 1091.104 further required that the [initiating official] submit a copy of a Notice and any attached documents, records or other items to the [Associate] Director, who shall proceed as set forth in the Proposed Rule.

Rule 4 of the Federal Rules of Civil Procedure

The Bureau received several comments pertaining to the proposed service requirements. One commenter recommended that the Bureau use the rules for service set forth in Rule 4 of the Federal Rules of Civil Procedure (FRCP 4). Specifically, this commenter objected to service of notice on an administrative employee or other person at a respondent’s office, or through Certified Mail or a third-party commercial carrier. This commenter also asserted that the Bureau should enable entities to designate agents and officers to receive service of notice, which is allowed under FRCP 4.

The Bureau believes that service by the methods set forth in proposed § 1091.104 is reasonably calculated to provide to a respondent the Notice commencing a proceeding under the Proposed Rule. The manner of service proposed incorporates many of the provisions of FRCP 4. For example, in the case of a corporation or other business entity, the Proposed Rule incorporates the provision of FRCP 4 that permits service by delivery to an officer, managing or general

agent, or other agent authorized by appointment or law to receive such a notice. In most instances this will mean serving an entity's registered agent.

Where the Proposed Rule differs from FRCP 4, such as by permitting service by Registered Mail or next-day courier, the Proposed Rule is consistent with the procedural rules of practice of other Federal bank regulators.³² For example, the Federal Deposit Insurance Corporation (FDIC) Rules of Practice and Procedure permit service on a person that has not appeared in a proceeding by the following methods: “(i) By personal service; (ii) If the person to be served is an individual, by delivery to a person of suitable age and discretion at the physical location where the individual resides or works; (iii) If . . . a corporation or other association, by delivery to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service . . . and the statute so requires, by also mailing a copy to the party; (iv) By registered or certified mail addressed to the party's last known address; or (v) By any other method reasonably calculated to give actual notice.”³³

Service on persons registered with the Bureau

Additionally, two commenters requested clarification on what it meant to be registered with the Bureau under § 1091.104(a)(3). The Bureau notes that the provision in the Proposed Rule stating that “[n]otice may be served on a person currently registered with the Bureau” by using “the most recent business address shown on the person's registration form,” was included to permit such service if the Bureau adopts a rule requiring nonbank covered persons to register with the Bureau. The Bureau anticipates that to the extent a registration rule is adopted, a person required to register with the Bureau would be required to have its business address on file with

³² In some instances, FRCP 4, by reference to applicable state law, may allow service by Registered Mail, next-day courier, or other means not explicitly provided for in FRCP 4.

³³ 12 CFR 308.11(c). See also 12 CFR 263.11(c)(2) (Federal Reserve System, Rules of Practice); 12 CFR 19.11(c)(2) (Office of the Comptroller of the Currency (OCC), Uniform Rules of Practice and Procedure); 12 CFR 1081.113(d) (Bureau Rules of Practice for Adjudication Proceedings).

the Bureau. In such a case, the Bureau believes that it should be able to rely on the address provided by a registrant in serving a Notice. Although a registration rule has not been adopted, the Bureau is including this provision in the final rule to avoid the need to revise the final rule to add such a provision should the Bureau adopt a registration rule in the future.

Waiver of service

The same two commenters also requested clarification on what a waiver of service under § 1091.104(a)(6) would entail and requested that the Bureau require waivers to be in writing and given by persons “upon whom the Notice would be served.” First, to clarify what waiver entails under proposed § 1091.104(a)(6), a waiver of service would permit the Bureau to provide a Notice by “First Class Mail or other reliable means.” There may be a number of “other reliable means” to provide a Notice, but one example would be delivering it to a designated person not otherwise authorized to accept service. Second, the Bureau agrees with the commenters’ suggestion that service should be waived only in writing, and by the person “upon whom the Notice would be served.” Accordingly, to make this explicit, the Bureau has revised proposed § 1091.104(a)(6) to read: “In lieu of service as set forth in paragraph (a)(1) or (a)(2) of this section, the person may be provided a copy of a Notice by First Class Mail or other reliable means if a written waiver of service is obtained from the person to be served. In the case of a respondent that is not a natural person, a written waiver may be provided by an officer, managing or general member, or partner authorized to represent the respondent.”

For the reasons discussed above, the Bureau adopts § 1091.104 as proposed, other than the revisions to subsection (a)(6) relating to waiver of service as discussed above and other minor technical revisions for consistency.

Section 1091.105 Response

Section 1091.105 sets forth the requirements for responding to a Notice of Reasonable Cause, including the time limit to respond, content of a response, default for failure to respond, and waiver of the right to submit items or make arguments not included in the response. The Bureau received a number of comments on proposed § 1091.105.

Time limit

Proposed § 1091.105 provided that any response must be filed within 20 days of service of a Notice. The Bureau received several comments requesting a longer time period to file a response, ranging from a response deadline of 30 to 120 days. Generally these commenters asserted that a 20-day response deadline is not sufficient for a respondent to respond to a Notice. One commenter suggested either using the Federal Rules of Civil Procedure as a model for setting deadlines, or the method prescribed by the Bureau for contesting consumer complaints (20 days to provide notice that the entity will challenge a complaint, and 60 days to provide a complete response). Another commenter stated that 20 days is an unreasonably short time limit given that there is no limit on the content, accuracy, and/or length of a Notice of Reasonable Cause. Another commenter asserted that responding to a Notice of Reasonable Cause would require engaging counsel, locating and reviewing potentially relevant documents, interviewing personnel, drafting a written response, compiling documents to accompany the response, internally approving the response, and submitting the response—activities that the commenter asserted could not be completed in 20 days. One commenter proffered that an extended period is needed to facilitate collection of data and material from remote locations. A few commenters implied that it would be unfair if the Bureau could review a response for longer than a respondent had to prepare the response. One commenter asserted that 20 days is too short given that this period of time would include any intermediate Saturday, Sunday, and Federal holiday.

Still other commenters asserted that it would be unfair to set a time limit shorter than the limits for responding to government subpoenas, pre-examination audits, civil discovery requests, or notices of proposed rulemaking. Finally, one commenter asserted that the 20-day window did not provide for an opportunity to be heard at a meaningful time and in a meaningful manner. In a related comment, a commenter requested a mechanism by which the response time could be restarted if the Bureau raised a new material issue or assertion after issuance of a Notice.

In proposing a 20-day response time, the Bureau attempted to ensure a fair process that provides respondents a reasonable opportunity to respond, but that is also efficient and streamlined. The Bureau notes that a 20-day response period is consistent with the rules of practice of other Federal banking regulators for certain administrative actions that impose similar burdens on the respondent in terms of consultation with counsel, review and compilation of documents, and preparation of a written response.³⁴ The Bureau, however, understands the commenters' concerns that 20 days to respond to a Notice may not be sufficient in some instances and believes that the response time can be moderately increased without undermining the goal that the process be streamlined and efficient. Thus, the Bureau is adopting a revision to the Proposed Rule extending the response time from 20 to 30 days. The Bureau believes that 30 days should generally provide a respondent sufficient time to respond.³⁵ Moreover, the final rule provides certain flexibility in response time. Section 1091.115(a) of the final rule adopts the proposed provision stating that an extension of a time limit may be granted at the discretion of the Associate Director or Director, as applicable, for good cause shown, and the Bureau has

³⁴ See 12 CFR 308.19(a) (FDIC Rules of Practice and Procedure); 12 CFR 263.19(a) (Federal Reserve System Rules of Practice for Hearings); 12 CFR 19.19(a) (OCC Rules of Practice) see also 12 CFR 1081.201(a) (Bureau's Rules of Practice for Adjudication Proceedings, providing a 14-day deadline to submit an answer to a notice of charges).

³⁵ The Bureau notes for example that, as distinguished from its rules of practice, the Board of Governors of the Federal Reserve provides 30 days for submitting a written response to a preliminary "control" determination under the Bank Holding Company Act. Control determinations often involve complex issues of fact and law. See 12 CFR 225.31(b) (providing that if a person wishes to contest a preliminary control determination the person may file a response within 30 days).

deleted a provision in the Proposed Rule that directed the Associate Director or Director to strongly disfavor extension requests. The Bureau believes that the increase in the response deadline from 20 to 30 days, coupled with the increased flexibility for the Associate Director or Director to grant an extension for good cause shown, should address the commenters' concerns and provide respondents sufficient time to respond to a Notice without undermining the goal of establishing a streamlined and efficient process for making determinations under 12 U.S.C. 5514(a)(1)(C). Finally, the Bureau agrees with the comment that additional time would be warranted were the Bureau to raise a new material basis for issuing a Notice that was not fairly within the scope of the initial Notice. The Bureau believes, however, this result was evident under the Proposed Rule, which contemplates that a response be responsive to the Notice. Thus, the Bureau does not believe that a revision to the Proposed Rule is necessary to address this comment.

Content of Response

Section 1091.105(b) sets forth the requirements relating to the content of a response. Proposed § 1091.105(b) provided that a respondent could respond to a Notice of Reasonable Cause either by contending that it is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services (proposed § 1091.105(b)(1)-(2)), or by voluntarily consenting to the Bureau's supervisory authority under 12 U.S.C. 5514 (proposed § 1091.105(b)(5)). Where a respondent wished to contest the assertions in a Notice, proposed § 1091.105(b) required that the response: (1) set forth the basis for a respondent's contention that the respondent should not be subject to supervision pursuant to 12 U.S.C. 5514(a)(1)(C); (2) include all records, documents, or other items upon which a respondent relies; (3) include any

request for a supplemental oral response to present oral arguments; and (4) include an affidavit signed by the respondent attesting that the information contained in the response is true, accurate, and without any omission that would cause the response to be materially misleading.

One commenter requested that the Bureau permit entities to request a supplemental oral response after submitting the written response but within 14 days of that submission. The Bureau believes that the extension of the written response period from 20 to 30 days sufficiently satisfies the commenter's request for an extension of time to request a supplemental oral response. Under the commenter's requested time frame, a respondent would have 34 days to determine whether it wanted a supplemental oral response, while under the final rule, the respondent will have 30 days to make this determination. Therefore the Bureau declines to revise the final rule to allow respondents to submit a request for a supplemental oral response after submitting a written response.

Additionally, in response to comments relating to the confidentiality of the overall process established by the final rule, as discussed in the section-by-section analysis of § 1091.103(a), the Bureau has added § 1091.115(c), which addresses the issue of confidentiality for the entire rule. Consequently, the Bureau has deleted from the final rule the second sentence of proposed § 1091.105(b)(2) relating to confidential supervisory information, which has been rendered superfluous by the addition of § 1091.115(c) to the final rule.

Further, the Bureau notes that it is revising proposed § 1091.105(b)(3) to permit respondents to request either an in-person or telephonic supplemental oral response in the written response. The Proposed Rule had provided only for a telephonic supplemental oral response unless the [Associate] Director directed that it be conducted in some other manner. The Bureau

is making this revision to address comments received regarding proposed § 1091.106 discussed below.

Waiver of right to file response

Proposed § 1091.105(c) provided that the failure of a respondent to file a response within the required time period would constitute a waiver of the respondent's right to file a response and would authorize the Director to issue a decision and order.

One commenter asserted that the compressed 20-day time frame to respond and the provision for default for failing to respond could unduly disadvantage persons or entities that least expect to be subject to federal financial services regulation. This commenter urged the Bureau to give appropriate regard to procedural fairness. The Bureau has carefully considered procedural fairness and believes that the waiver provision is appropriate. A key purpose of establishing procedures to implement 12 U.S.C. 5534(a)(1)(C) is to set appropriate deadlines to allow for an efficient resolution of a matter. The Bureau believes that a reasonable and fair way to enforce the Notice-response deadline is to make the consequence of failing to respond within the allotted time the waiver of the right to respond. Moreover, the removal of the waiver provision from the final rule could undermine the process established by the rule by effectively rendering the timing requirements unenforceable. The Bureau further believes that the increase in the response time period under the final rule from 20 to 30 days, as well as the revision to the final rule to give the Associate Director or Director increased flexibility to grant an extension for good cause shown, as discussed above, should alleviate the commenter's concern.

Waiver of right to raise an issue or submit items

Proposed § 1091.105(d) stated that the failure to raise timely an issue in, or submit records, documents, or other items with, the response constitutes a waiver of a respondent's right

to raise the issue, or submit the records, documents, or other items, at any future stage of consideration of the matter and in any petition for judicial review. Several commenters objected to this waiver provision; one stated that the provision “violates fundamental fairness,” another stated that it is “not equitable.” A few commenters expressed concern that this provision, coupled with the 20-day response time limit, was too onerous and could have serious consequences for respondents.

One commenter, while generally agreeing with the need for a waiver provision, stated that it is possible that information relevant to the Bureau’s evaluation may come to the respondent’s attention subsequent to submitting the initial response even when the respondent has, for example, conducted appropriate due diligence in compiling documents, searching electronic databases, and conducting interviews. This commenter urged the Bureau to revise § 1091.105(d) by including a provision stating that “a respondent shall not be deemed to have waived its right to submit relevant information when a respondent can demonstrate to the satisfaction of the [Associate] Director or the Director that such information could not have reasonably been discovered at the time that petitioner submitted its [response to a Notice].” Another commenter asked the Bureau to extend the time period for responding and/or permit extensions of time or allow respondents to submit supplemental materials within a reasonable time after a supplemental oral response, if requested. Similarly, one commenter expressed the concern that a respondent failing to raise an issue within the proposed 20-day response deadline would risk waiving the ability to defend itself on the issue. This commenter requested a longer process that would require four, instead of two, steps: the Notice of Reasonable Cause, the response, a Bureau answer setting forth its analysis of the response, and a respondent’s reply to that subsequent Bureau answer—together with an additional 20 or 30 days added to the deadline.

As stated earlier, the final rule sets forth a process only for determining whether the Bureau has supervisory authority over a person pursuant to 12 U.S.C. 5514(a)(1)(C). A determination resulting in an order for supervision under the final rule does not constitute a finding of a violation of Federal consumer financial law. As such, the ramifications of the waiver provision are limited. By failing to raise an issue or argument in a response, covered persons do not waive under the final rule any right to use arguments or evidence to rebut a claim of a violation of law during the supervision process or any potential collateral enforcement action.

As stated in the supplementary information to the Proposed Rule, the Bureau continues to believe that the proposed waiver provision is necessary to remove any incentive for a respondent to wait until after filing a response, such as at a supplemental oral response or during judicial review, to raise an argument or present documents or other information for the first time. The waiver is intended to help ensure that the Bureau is aware of all relevant issues upon which a respondent wishes to rely at the earliest opportunity before reaching a determination.³⁶ Including the waiver provision is within the Bureau's broad discretion in formulating the informal procedures set forth in the final rule. Consequently, the Bureau declines to delete the waiver provision. The Bureau believes, however, that by increasing the response time limit under the final rule from 20 to 30 days and by revising the final rule to provide increased flexibility for the Associate Director or Director to grant an extension for good cause shown, it has reasonably addressed the commenters' core concerns. Nor is the Bureau persuaded by the commenters' contention that an exception to the waiver provision is necessary where information relevant to the Bureau's evaluation purportedly could not have reasonably been discovered until after the initial response is provided. The documents, records, or other items that respondents may wish

³⁶ 77 FR 31230 (May 25, 2012).

to rely on are types that should reasonably be available to respondents, such as product or service information, promotional materials, transactional, account, or financial information, and policies or procedures. Additionally, the Bureau believes that the recommended additional layers of procedure requested by commenters (i.e., a Bureau answer to a response and a respondent's reply to such answer) is not necessary to reduce the risk of waiver and would needlessly complicate and lengthen the informal process set forth in the final rule.

Expressing a different concern, a commenter stated that the waiver provision incentivizes respondents to submit more information than is necessary to preserve arguments, frustrating efficiency. The Bureau believes that the commenter overstates the risks that the waiver provision will cause respondents to submit extraneous or unnecessary information in response to a Notice. The Bureau believes that respondents generally will include with their responses such records, documents, or other items that they believe relevant to supporting their substantive positions; the Bureau believes that documents pertaining to arguments a respondent wishes to preserve will generally be relevant to a determination under the final rule. Also, the Bureau notes that respondents that wish to frustrate the process under the final rule by supplying unnecessary or extraneous information in response to a Notice may do so even in the absence of a waiver provision. Moreover, the Bureau believes that on balance the waiver provision will enhance, rather than frustrate, the efficiency of the process established by the final rule. It would be highly inefficient and disruptive to the process to permit the introduction of additional evidence or arguments at any point during a proceeding.

Another commenter asserted that the waiver provision conflicts with the exhaustion of administrative remedies doctrine because, according to that doctrine, courts deem arguments waived on judicial review that have not first been raised before an administrative agency on

“administrative appeal,” and the waiver provision under § 1091.105(d) might result in waiver of an argument “prior to an administrative review of the underlying merits of the claim, well before appeal.”

Contrary to the commenter’s contention, the proposed waiver provision is fully consistent with the doctrine of exhaustion of administrative remedies. This doctrine generally requires that “[o]ne challenging an agency decision must exhaust all administrative remedies before seeking judicial review.”³⁷ Moreover, “[r]elated is the requirement, often included under the exhaustion doctrine, that one must raise issues with the agency or lose the right to challenge those issues on review.”³⁸ The doctrine of exhaustion of administrative remedies does not preclude an agency from specifying the time and manner in which issues must be raised before the agency, including prior to any administrative appeal, or from deeming arguments waived that are not raised consistent with such rules, even if this waiver precludes consideration of the issue in any administrative or subsequent judicial review process.³⁹ Rather, the doctrine provides that any administrative remedy that is available must be exhausted in the manner specified by the agency – and consistent with any rules of that agency – before a litigant resorts to the courts.

The Bureau therefore declines the commenter’s request that the waiver provision be deleted or revised.

No Discovery

Proposed § 1091.105(e) stated that there shall be no discovery in connection with the response. A few commenters requested that the Bureau provide for discovery at this point in the process. The Bureau notes that neither the Dodd-Frank Act nor the APA requires discovery as

³⁷ 33 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice and Procedure § 8398 (2d ed.).

³⁸ 33 Charles Alan Wright & Charles H. Koch, Jr., Federal Practice and Procedure § 8398 (2d ed.).

³⁹ The Bureau notes that the procedures set forth in the final rule do not provide for an administrative appeal process, and that such a process is neither required under the APA nor necessary to provide respondents a reasonable opportunity to respond.

part of the informal process established by the final rule. There are many informal agency procedures that do not allow for discovery. For example, the FDIC's informal exemption hearings under Section 12(H) of the Securities and Exchange Act of 1934 do not permit discovery.⁴⁰ Indeed, the final rule provides greater procedural rights to respondents than required by the Dodd-Frank Act, which mandates only that the Bureau provide respondents with notice and a reasonable opportunity to respond.⁴¹ Among other procedural enhancements, the final rule permits a respondent to request a supplemental oral response in addition to filing a written response. The final rule also permits a respondent to petition for termination of supervision after two years, whereas 12 U.S.C. 5514(a)(1)(C) does not expressly provide for termination.

The Bureau believes that permitting discovery would unnecessarily protract the process established by the final rule and increase its costs to the Bureau. A longer process would be contrary to the Bureau's goal of establishing efficient and streamlined procedures. Instead, a Notice under the final rule must contain a description of the basis for the assertions giving rise to the Notice. As revised, under the final rule, a Notice will also include a summary of the consumer complaints and information from other sources relied on by the Bureau in issuing the Notice, as described in the section-by-section analysis of § 1091.103. The Bureau believes that this process will afford a respondent a reasonable opportunity to evaluate the assertions in a Notice and formulate an appropriate response.

For the reasons discussed above, the Bureau adopts § 1091.105 as proposed, other than revisions to: subsection (a), which increases the response time limit from 20 to 30 days, and subsection (b)(3), which provides that a respondent may specify whether it prefers an in-person

⁴⁰ 12 CFR 308.142(b)(2).

⁴¹ 12 U.S.C. 5514(a)(1)(C).

or telephonic supplemental oral response. Additionally, the Bureau deletes the second sentence of proposed § 1091.105(b)(2) relating to confidential supervisory information because this sentence is redundant in light of new § 1091.115(c) of the final rule.

Section 1091.106 Supplemental oral response

Section 1091.106 sets forth the procedures relating to a supplemental oral response. Proposed § 1091.106 provided that a respondent may request in its written response under § 1091.105 to present a supplemental oral response in support of its assertion that it is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. Proposed § 1091.106 also set forth procedures for the conduct of a supplemental oral response.

Option for in-person supplemental oral response

Proposed § 1091.106(b)(1) provided that a supplemental oral response would be conducted by telephone unless the [Associate] Director directed that it be conducted in some other manner. The Bureau received several comments requesting that the Bureau also grant respondents an option for an in-person supplemental oral response. These commenters asserted that respondents should have the option to take on any level of burden that they wish, and that in-person responses facilitate better communication.

The Bureau proposed that a supplemental oral response generally be held by telephone to minimize burdens on both respondents and the Bureau. The Bureau provided some flexibility in the Proposed Rule to allow for the conduct of supplemental oral responses by other means if directed by the [Associate] Director. In light of the comments received and on further consideration, however, the Bureau agrees that it would be reasonable to provide a respondent with an opportunity for an in-person supplemental oral response where the respondent wishes to

take on the additional burden of traveling to the Bureau's headquarters. Thus, the Bureau revises proposed § 1091.106(b)(1) to allow a respondent to request an in-person supplemental oral response to be held at the Bureau's headquarters in Washington, DC. Under the final rule, if a respondent requests in its written response a supplemental oral response but does not specify whether such response shall be conducted via telephone or in person, the supplemental oral response will be conducted by telephone unless otherwise directed by the Associate Director.

Alternatives to supplemental oral response

Raising a different issue, a commenter asserted that it is unclear whether, as proposed, a supplemental oral response would provide any material benefit to a respondent because no discovery is allowed in connection with the response and respondents cannot raise issues in the supplemental response that were not raised in the written response. This commenter recommended that the Proposed Rule be revised either to: (1) permit limited discovery, or (2) replace a supplemental oral response with a supplemental written response that would allow a respondent to present additional relevant issues or documentation related to a matter.

The Bureau notes that a supplemental oral response is optional under the final rule. A respondent that does not believe a supplemental oral response would be beneficial need not request such a response. Contrary to the commenter's contention, however, the Bureau believes that in many instances a supplemental oral response would benefit a respondent by, for example, providing a respondent with the opportunity to present arguments orally directly to the Associate Director and to highlight particular aspects of its written response. Moreover, as discussed above, the Bureau believes that it would unnecessarily lengthen and complicate the final rule to allow for discovery or provide a respondent the opportunity to submit a supplemental written response, and that such measures are not necessary to ensure that respondents have a reasonable

opportunity to respond to a Notice. Accordingly, the Bureau declines the commenter's suggestion to replace a supplemental oral response with discovery or a supplemental written response.

Limitations on conduct of supplemental oral response

Proposed § 1091.106(b)(2) provided that the [Associate] Director may impose limitations on the conduct of a supplemental oral response and set forth a non-exhaustive set of such limitations. The Bureau received several comments pertaining to the [Associate] Director's discretion to set restrictions on the supplemental oral response. Two commenters argued that the [Associate] Director should not be able to set a time limit on the presentation of a supplemental oral response. One of these commenters stated that no time limit was necessary given the Bureau's proposed limitation on subjects that may be addressed. The other stated that there should be no limitation on the submission of additional records, documents, or other items, in addition to no limitation on presentation time. Another commenter requested that the respondent be provided an opportunity to file a written dissent when it believes that the [Associate] Director is imposing unreasonable limitations on the supplemental oral response. Two commenters proffered that the Bureau should set uniform guidelines, similar to the guidelines for a written response that all respondents must follow. One of these commenters asserted that if the previous recommendation is not adopted, limitations should be developed on a case-by-case basis in consultation with the respondent.

The Bureau believes that permitting the Associate Director to impose limitations on the conduct of a supplemental oral response is appropriate in an informal proceeding of the type established by the final rule and will help ensure that a supplemental oral response focuses on a respondent's and initiating official's arguments supporting their respective assertions in the

matter. It is important, for example, that the Associate Director have the flexibility to set time limits for these proceedings so that they do not become unwieldy or cumbersome and are appropriate in relation to the issues presented.

At the same time, it would not be consistent with the informal nature of the proceedings under the final rule, or the Bureau's objective to establish an efficient and streamlined process, to permit written dissents or objections on limitations imposed by the Associate Director in connection with a supplemental oral response, or in connection with any other issue relating to the proceedings. The informal procedures under the final rule do not contemplate motions practice or objections, and such motions and objections would undermine the efficiency of the procedures under the final rule.

The Bureau also believes that it would not best serve the interests of the Bureau or respondents to establish uniform guidelines governing the supplemental oral response because the facts and circumstances relating to proceedings – such as the size of the respondents or the complexity of matters under consideration – may vary significantly between matters. The Bureau is concerned that a single approach to supplemental oral responses would not permit the flexibility needed to efficiently and fairly accommodate the particular circumstances of a matter. The Bureau, however, recognizes the need to ensure that respondents understand what the process of a supplemental oral response will entail. Thus, the Bureau included in proposed § 1091.106(d) a requirement that a notice for a supplemental oral response include “general information relating to the conduct of an oral response.” Such information would include, for example, time limitations for presenting a supplemental oral response.

No discovery or witnesses

Proposed § 1091.106(b)(3) stated that no discovery will be permitted, and no witnesses will be called, in connection with a supplemental oral response. Several commenters objected to these restrictions. However, as discussed above, the Bureau believes that this limitation is appropriate given the informal nature of the procedures set forth in this Proposed Rule and the Bureau's objective to establish an efficient and streamlined process for making determinations under 12 U.S.C. 5514(a)(1)(C). The prohibition on discovery in this section is consistent with, and supported by, the same considerations as those underlying the prohibition on discovery in connection with the response under § 1091.105, which is discussed in detail in the section-by-section analysis above. The prohibition on the calling of witnesses in connection with a supplemental oral response is consistent with the overall prohibition on submitting additional evidence in connection with a supplemental oral response. If a respondent wishes to submit testimony, it may submit written testimony under affidavit as part of its response under § 1091.105.

Timing and waiver for failure to participate

Proposed § 1091.106(d) prescribed the timing of a supplemental oral response. Under this proposed section, within 14 days of receiving a respondent's request for a supplemental oral response, the [Associate] Director shall serve on a respondent a notice advising the respondent of the date, time, and general information relating to the conduct of a supplemental oral response, with a copy to the [initiating official]. To allow a respondent and the [initiating official] sufficient time to prepare for a supplemental oral response, and to make arrangements to participate, proposed § 1091.106(d) provided that a supplemental oral response shall be scheduled not less than ten days after the date of such service. Finally, proposed § 1091.106(g) stated that if a respondent fails to participate in a scheduled supplemental oral response, such a

failure would constitute a respondent's waiver of the opportunity to present a supplemental oral response.

The Bureau received a few comments pertaining to the timing of a supplemental oral response. Several commenters requested that the time and date of the supplemental oral response be scheduled at a time that is convenient for both the Bureau and the respondent. One commenter stated that a respondent that fails to participate in a scheduled supplemental oral response due to extenuating circumstances should not be deemed to have waived the opportunity to participate in a supplemental oral response.

The Bureau believes that it is important that the final rule grant the Associate Director discretion to make final decisions pertaining to the scheduling of a supplemental oral response. To provide otherwise might necessitate burdensome and unwieldy negotiations and would infringe unnecessarily on Bureau prioritization. However, the Bureau notes that under the final rule, in exercising his or her discretion to schedule a supplemental oral response, the Associate Director will take into consideration the availability and convenience of a respondent. A respondent that is unable to participate in a scheduled supplemental oral response for good cause may request an extension. The Associate Director may, at his or her discretion, grant an extension "for good cause shown."

Recording of supplemental oral response

Proposed § 1091.106(b)(6) provided that a recording of the supplemental oral response will be made, and that a respondent may purchase a copy or transcript of the recording. The Bureau received a few comments regarding recordings and transcripts of the supplemental oral response. One commenter asked the Bureau to use a court stenographer to reduce the supplemental oral response to writing. Another commenter suggested that the Bureau afford

respondents the opportunity to record the supplemental oral response themselves. Additionally, a commenter requested confirmation that the recording of the supplemental oral response would be treated as confidential supervisory information.

In response to the comments received, the Bureau notes that it intends to use court reporters to record supplemental oral responses and has revised § 1091.106(b)(6) of the Proposed Rule to make this explicit. The Bureau does not, however, anticipate that it will have these recordings transcribed in each instance. Under the final rule, if a respondent wishes to purchase a copy of the recording or a transcript from the court reporter, it may do so at its own expense. The Bureau believes that it is important to have only one official recording (and, if produced, transcript) of a supplemental oral response. Thus the Bureau declines to revise the Proposed Rule to permit a respondent to create its own recording of a supplemental oral response. Finally, the Bureau notes that under new § 1091.115(c), transcripts and recordings of supplemental oral responses are deemed confidential supervisory information.

Other issues

The Bureau also received comments requesting clarification on whether the supplemental oral response will include a question and answer period, or whether the oral responses will simply be a monologue performed by the respondent. The Bureau considers a supplemental oral response an opportunity for a respondent to present oral arguments in support of the respondent's written response. The initiating official may also participate in a supplemental oral response to present oral arguments supporting the assertions set forth in the Notice of Reasonable Cause. The Associate Director may, at his or her discretion, ask questions of the respondent and/or initiating official during the proceeding.

Finally, the Bureau received a comment from a consumer group expressing its concern that, unlike in the written response, there would be no requirement of truthfulness with respect to the supplemental oral response. The Bureau notes that an affidavit or declaration of truthfulness as required under § 1091.105(b)(4) is not warranted in connection with a supplemental oral response because no new evidence or witnesses are permitted as part of such response. Rather, during a supplemental oral response, a respondent is limited to making oral arguments in support of the respondent's written response. Thus, it is sufficient that, under the final rule, only the written response must be submitted pursuant to § 1091.105(b)(4), under affidavit or declaration that it is true and accurate and does not contain any omissions that would cause the response to be materially misleading.

For the reasons discussed above, the Bureau adopts § 1091.106 as proposed, other than the revisions to 1091(b)(1) and (6) as described above and other minor technical revisions for consistency.

Section 1091.107 Manner of filing papers

Proposed 1091.107 provided for filing of papers other than a Notice in a proceeding under the Proposed Rule by electronic transmission under such conditions as specified by the [Associate] Director or Director. Proposed 1091.107 also authorized other methods of filing and service if a respondent demonstrated electronic filing was not practicable and the [Associate] Director or Director permitted an alternative method of filing or service.

The Bureau did not receive any substantive comments on this proposed provision and adopts § 1091.107 as proposed with minor technical revisions for consistency.

Section 1091.108 Recommended determination

Section 1091.108 sets forth the procedures relating to the issuance of a recommended

determination by the [Associate] Director. Proposed § 1091.108 provided that the [Associate] Director shall make a recommended determination and submit to the Director either a proposed order that would bring a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, or a proposed notification containing a determination that a respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514 on the basis of the proceeding. Under proposed § 1091.108(a), if a respondent had not voluntarily consented to the Bureau's supervisory authority, and had not requested the opportunity to present a supplemental oral response, a recommended determination would be required to be made not later than 45 days from the receipt of a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent failed to file a timely response. If a respondent requested the opportunity to present a supplemental oral response, a recommended determination would be required to be made not later than 90 days after the service of a Notice of Reasonable Cause. Proposed § 1091.108(c)-(e) further set forth the required content of the [Associate] Director's recommended determination, and the records, documents, and other items that were required to accompany the recommended determination sent to the Director by the [Associate] Director. Proposed § 1091.108 also provided that if the [Associate] Director recommended that the respondent should not be subjected to the Bureau's supervisory authority based on the proceedings, such recommendation would not have precedential effect and would not prevent the issuance of another Notice of Reasonable Cause or a determination subjecting the respondent to the Bureau's supervisory authority.

Provision of recommended determination to respondent

Several commenters requested that the Bureau provide the respondent with an exact copy of the recommended determination and all accompanying documentation. Some of these

commenters recommended that the Bureau allow respondents to file objections to a recommended determination before the Director makes a final determination. Commenters stated that allowing for objections would provide a fairer process, provide the Director with the respondent's position before he or she makes a final determination, resolve claims in advance of judicial review, and correspond with common practice in other informal adjudicatory processes.

The Bureau believes that the procedures for issuing a recommended determination set forth in the proposed rule strike the appropriate balance between fairness and efficiency. In the Bureau's view, if the final rule were to allow a respondent to submit a written objection to a recommended determination for the Director's consideration, as requested by commenters, then to ensure a fair process, the final rule would also need to afford the initiating official the opportunity to rebut the objection. The Bureau believes that such a procedure would be unwieldy and unnecessarily lengthen and increase the costs of the process set forth in the Proposed Rule. The Bureau therefore declines to revise the Proposed Rule to require such a procedure. In addition, given the limited purpose of the Associate Director's recommended determinations under the final rule to guide the final determination of the Director, the Bureau believes that it would serve no purpose to require the Associate Director to provide a respondent with an exact copy of a recommended determination together with all accompanying documents at the time these items are submitted to the Director, or to allow respondents to object to a recommended determination on the record. Accordingly, the Bureau declines to revise the Proposed Rule to include such requirements. However, the Bureau believes that a respondent should receive a copy of the recommended determination (excluding other documents or items transmitted to the Director) at the end of the determination process. Therefore, as discussed in the section-by-section analysis of § 1091.109(b) below, the Bureau is revising that section to add

a new subparagraph (5) stating that the Director will send to the respondent a copy of the recommended determination issued by the Associate Director.

Bureau deadlines

One commenter requested clarification regarding the consequences of a failure by the Bureau to meet the deadlines set forth in proposed § 1091.108. The Bureau addressed this issue in § 1091.112(c) of the Proposed Rule (§ 1091.115 in the final rule), which states that “[d]eadlines for action by the [initiating official], [Associate] Director, or the Director established in this part confer no substantive rights on respondents.” This provision reflects the Bureau’s desire to balance its commitment to establish an efficient and streamlined process, with the need to maintain flexibility in meeting internal prioritization goals.

Findings of fact and conclusions of law

A commenter stated that the Proposed Rule should be revised to require that recommended determinations set forth specific findings of fact and conclusions of law. Although the Proposed Rule did not mandate the inclusion of findings of fact and conclusions of law in the [Associate] Director’s recommended determination, proposed § 1091.108(d)(2) would have required that a recommended determination provide the “basis” for a recommendation that the Director issue a final determination that there is reasonable cause to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services. The Bureau believes that this proposed requirement is sufficient to achieve a fair process and ensure that the recommended determination contains sufficient information to facilitate a final determination of the Director. On the other hand, the Bureau does not believe that revising the Proposed Rule to impose a requirement that a recommended determination

include proposed findings of fact and conclusions of law would be consistent with the informal nature of the procedures set forth in the final rule, or with the limited purpose of the Associate Director's recommended determinations under the rule to facilitate the final determination of the Director. Such a requirement also is not warranted in light of the limited purposes of a determination of reasonable cause by the Director under the final rule. A proceeding under the final rule would not result in a determination that a person violated the law or is subject to penalty, but would merely subject such person to the Bureau's supervisory authority.

For the reasons discussed above, the Bureau adopts § 1091.108 as proposed with minor technical revisions for consistency.

Section 1091.109 Determination by the Director

Section 1091.109 governs the procedures relating to the Director's issuance of a final determination. Proposed § 1091.109(a) provided that, not later than 45 days after receipt of the [Associate] Director's recommended determination, the Director shall make a final determination by either adopting without revision, modifying, or rejecting the [Associate] Director's recommended determination. Under the proposed subsection, the Director shall issue to a respondent, with copies to the [Associate] Director and [initiating official], a decision and order bringing a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, or a notification containing the determination that a respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514 on the basis of the proceeding. Proposed § 1091.109(b) described what a decision and order must set forth. Proposed § 1091.109(c) provided that the Director may rely on the assistance and advice only of decisional employees in reaching a final determination.

Written analysis relating to decision

One commenter requested that proposed § 1091.109 be modified to require the Director to include a written and detailed analysis of the reasons supporting his or her final determination, and that the Director's determinations should include a description of how the risky product or practice can be changed in order to conform with Bureau requirements.

First, the Bureau notes that proposed § 1091.109(b)(3) already requires the Director to provide the basis for the Director's decision in his or her final determination. The Bureau does not believe that it is necessary to revise the Proposed Rule to further require the Director to include in a final determination a written and detailed analysis of the reasons supporting his or her decision as requested by the commenter. To the extent the commenter is suggesting that the final rule should be revised to mandate that the Director include in a final determination findings of facts and conclusions of law, the Bureau declines the recommendation for the reasons discussed above with respect to the Associate Director's recommended determination. For the foregoing reasons, the Bureau declines to revise the Proposed Rule to require a final determination to include the level of detail requested by the commenter.

Second, the Bureau notes that, as stated above, the purpose of the final rule is to provide transparency and ensure consistency regarding the procedures the Bureau intends to follow in determining whether to subject a nonbank covered person to supervision under 12 U.S.C. 5514(a)(1)(C). As discussed above, it is beyond the scope of this procedural rule to define "risks to consumers" or to establish conduct standards. For similar reasons, it would exceed the scope of the final rule to require the Director to include in a final determination a description of how a risky product or practice can be changed in order to conform to the Bureau's requirements. Moreover, to the extent that the Bureau were to provide guidance to a particular nonbank covered person regarding its activities, it would do so in the context of supervision, not in an

order issued by the Director bringing a nonbank covered person under the Bureau's supervisory authority. The Bureau therefore declines to revise the Proposed Rule to require the Director to provide in a final determination a description of how a risky product or practice should be changed.

Deferring to State or other Federal determinations

The same commenter also recommended that the final rule allow the Director to defer to State or other official determinations on the same issue addressed by a Notice of Reasonable Cause, or require the Director to explain how the Bureau's position is consistent or inconsistent with such outside determinations.

The Bureau does not believe that requiring the Director to justify a final determination in relation to State or other official determinations on the same issue is in accord with 12 U.S.C. 5514(a)(1)(C), which confers on the Bureau the sole authority to make reasonable-cause determinations. The Bureau notes, however, that under 12 U.S.C. 5514(a)(1)(C), the Bureau may base a final determination on complaints, as well as on "information from other sources." Such information may include, among other things, State or other Federal administrative, civil, or criminal actions taken in connection with a nonbank covered person. The Bureau further observes that in exercising its supervisory authority under 12 U.S.C. 5514(a)(1)(C), it will coordinate with State and other Federal agencies as set forth in 12 U.S.C. 5514(b)(3) and will consider the extent to which the nonbank covered person is subject to oversight by State authorities for consumer protection pursuant to 12 U.S.C. 5514(b)(2).

Final agency action and judicial review

Another commenter recommended that the Bureau expand on proposed § 1091.109(d), which stated that a determination by the Director is final agency action under 5 U.S.C. 704, and

add a separate section to the final rule delineating a respondent's opportunities for review of an order and decision issued by the Director. The commenter further asserted that deeming the final determination of the Director final agency action under proposed § 1091.109(d) was in tension with the Bureau's assertion that the action was informal.

The Bureau included proposed § 1091.109(d) to make clear that a decision and order issued by the Director pursuant to the informal process described in the rule is a final agency action for purposes of judicial review. The Bureau does not believe that the informal nature of the proceedings conflicts in any way with deeming a final determination of the Director final agency action under § 1091.109(d). Also, in the Bureau's view, inclusion of a section in the final rule of procedures relating to judicial review, as requested by the commenter, is unnecessary and beyond the scope of the final rule.

Precedential effect

Two commenters argued that proposed § 1091.109(a)(2), which provided that the issuance of a notification that the respondent will not be made subject to the Bureau's supervisory authority "shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause," appears to constitute "double jeopardy." The Bureau disagrees with the commenters' characterization of § 1091.109(a)(2). First, the double jeopardy clause is wholly inapplicable to the proceedings under the final rule, which are informal administrative proceedings rather than criminal in nature, and do not result in a punitive action against the respondent, but rather merely subject the respondent to Bureau supervision. Second, the Bureau believes that there are good reasons to allow an initiating official to issue a Notice of Reasonable Cause to a respondent even after the Director has issued a final determination not to subject it to supervision under 12 U.S.C. 5514(a)(1)(C) on the basis of a prior Notice. For

example, the second Notice may be based on new complaints or sources of information, or while the conduct at issue in the second Notice might be similar to that in the first, the severity of risk to consumers may have significantly increased because of the number of consumers alleged to be affected. Although such circumstances may be rare, the Bureau believes, consistent with the Dodd-Frank Act, that it is necessary and appropriate to preserve the possibility of invoking the procedures under 12 U.S.C. 5514(a)(1)(C) should such circumstances arise. The Bureau therefore declines to revise the Proposed Rule to delete the no precedential effect provision.

Making information regarding a proceeding publicly available

The Bureau received one comment requesting that the Bureau publicly release information on the entities that receive a Notice of Reasonable Cause, the entities under the Bureau's supervision, and the reasoning underlying the Bureau's final determinations. The commenter argued that such publicity would mitigate the risk that a future Director could neglect the obligations of the Bureau. As set forth in § 1091.115(c), information relating to a proceeding shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1), and the Bureau declines to depart from the limitations on public disclosure set forth in that provision of the final rule.

For the reasons discussed above, the Bureau adopts § 1091.109 as proposed with a revision to specify that the Director will provide the Associate Director's recommended determination along with the Director's final determination to a respondent, as explained in the section-by-section analysis of § 1091.108 above, and with minor technical revisions for consistency.

Section 1091.110 Voluntary consent to Bureau's authority⁴²

⁴² Proposed § 1091.113 has been renumbered § 1091.110 in the final rule. All references to proposed § 1091.113 in this analysis correspond to § 1091.110 of the final rule.

Proposed § 1091.113(a) provided that nothing in the Proposed Rule shall affect a person's ability to voluntarily consent, at any time, to the Bureau's supervisory authority under 12 U.S.C. 5514 as mutually agreed to by the parties. As proposed, voluntary consent under this provision would be an alternative to consenting voluntarily to the Bureau's supervision under proposed § 1091.103(b), which provided that a respondent could execute and file a consent-agreement form in lieu of filing a written response to a Notice. The Bureau did not receive any substantive comments on proposed § 1091.113(a) and therefore adopts § 1091.113(a) as proposed with minor technical revisions for consistency, including renumbering this section as § 1091.110(a).

Length of supervision period under consent agreement; waiver of judicial review

Proposed § 1091.113(b) provided that a person entering into a consent agreement waives any right to judicial review of that agreement. Additionally, proposed § 1091.113(b) provided that a consent agreement that specifies the period during which the person will be subject to the Bureau's supervisory authority precludes such a person from petitioning for the termination of the consent order during the agreed-to supervisory period. The Bureau received several comments regarding proposed § 1091.113(b). A few commenters addressed the appropriate length of the supervision period required under a voluntary consent, or similarly, how much time should pass before a consenting nonbank may petition to terminate supervision. One commenter stated that consent agreements should require a supervision period lasting at least two examination cycles. Another commenter asserted that respondents entering into consent agreements should have the right to petition for termination of supervision after two years. A commenter asked that nonbanks be able to reconsider and void consent agreements upon discovering additional evidence. The Bureau received one comment stating that requiring

respondents to waive their right to judicial review of a voluntary consent agreement is not equitable or reasonable. Finally, two commenters suggested that proposed § 1091.113 be revised to require the inclusion of a confidentiality provision and corrective-action plans that, if adhered to, would allow for early termination of supervision.

First, the Bureau notes that a consent agreement is voluntary and that, under proposed § 1091.113, most terms of such agreements are negotiable. Respondents do not have to enter into a consent agreement if they do not wish to accept its terms. Benefits of consent agreements include, among others, providing certainty of outcome to the parties and reducing the potential burden of going through the full informal process established by the final rule.

Second, proposed § 1091.113 is intended to provide flexibility to allow the parties to establish terms acceptable to each. One of the negotiable terms under proposed § 1091.113 is the length of the supervision period to which a respondent will be subject. This differs from the consent agreement form described in § 1091.103(b), which automatically establishes a two-year supervision period. The Bureau does not believe that it is appropriate to limit this flexibility by mandating under proposed § 1091.113 a minimum supervision period, such as requiring two examination cycles, or by mandating that a respondent be permitted to petition for termination of supervision earlier than agreed. For the same reason, the Bureau declines to revise proposed § 1091.113 to require correction action plans that, if adhered to, would allow for early termination of supervision.

Third, as discussed above, the Bureau has added § 1091.115(c) to the final rule, which provides that information relating to a proceeding shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1). The Bureau believes that this provision adequately addresses the issue of confidentiality and therefore declines to revise the Proposed Rule to

require the inclusion of a confidentiality provision in a consent agreement.

Fourth, since one of the purposes of entering into a consent agreement is to provide certainty to the parties and reduce potential burden, the Bureau believes that it is reasonable to require that the respondent waive the right to judicial review of the terms of a consent agreement, thereby ensuring that the parties do not litigate an agreement after it is executed. A respondent that does not want to relinquish any possible opportunity for judicial review need not enter into a consent agreement. For clarity, the Bureau revises proposed § 1091.113(b) to add that a consent agreement “shall state” that a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

For the reasons discussed above, the Bureau adopts § 1091.113 as proposed with the revision to proposed § 1091.113(b) to clarify the waiver provision described in the preceding paragraph and with other minor technical revisions for consistency, including renumbering this section as § 1091.110(b).

Section 1091.111 Notice and response included in adjudication proceeding otherwise brought by the Bureau⁴³

Proposed § 1091.114 provided that if the Bureau issues a notice of charges against a person under 12 CFR 1081.200,⁴⁴ the Bureau may, in its discretion, also provide the notice and opportunity to respond required by 12 U.S.C. 5514(a)(1)(C) in the notice of charges. In such a circumstance, the procedures set forth in § 1091.102 - § 1091.110 would not apply to the proceedings. Under the Proposed Rule, the Bureau could use the administrative adjudication proceedings set forth in 12 CFR 1081.200 to provide notice and a reasonable opportunity to

⁴³ Proposed § 1091.114 has been renumbered § 1091.111 in the final rule. All references to proposed § 1091.114 in this analysis correspond to § 1091.111 of the final rule.

⁴⁴ 12 CFR 1081.200 sets forth the procedures for the commencement of an adjudicative proceeding by the Bureau under 12 U.S.C. 5563, and also the contents of the notice of charges in such a proceeding.

respond as required by 12 U.S.C. 5514(a)(1)(C) only in certain cases where the Bureau has otherwise brought an administrative action against a respondent. The Bureau believes that the flexibility provided by this section would enhance efficiency and reduce burdens on respondents and the Bureau by allowing a determination under 12 U.S.C. 5514(a)(1)(C) and an adjudicative proceeding to be handled in a single forum. The Bureau received two comments suggesting that supervision authority should be established before bringing an enforcement action. One commenter asserted that simultaneous risk-determination proceedings and enforcement actions could penalize a company for conduct that it previously had no reason to know was illegal. This commenter recommended that the risk determinations set forth in this rule be used to put a company on notice that certain activities are deemed to pose risks to consumers before any enforcement action is initiated. The other commenter asserted that simultaneous risk determinations and enforcement actions would give rise to enforcement actions regarding otherwise lawful conduct that poses risks to consumers, which the commenter believed would be an expansion of Bureau authority.

The Bureau believes that the commenters may have misconstrued the purpose of proposed § 1091.114. Under this provision, the Bureau would provide the notice required under 12 U.S.C. 5514(a)(1)(C) in a notice of charges only when the Bureau has “otherwise” brought an administrative action against a respondent.⁴⁵ The Bureau further notes that, under the Dodd-Frank Act, supervision is not a necessary precursor to an enforcement action. The Bureau may, however, wish to bring a person subject to an enforcement action under the Bureau’s supervisory authority, in addition to seeking other relief through an administrative action. Proposed § 1091.114 is intended to provide administrative convenience and efficiency both for

⁴⁵ 77 FR 31231.

respondents and the Bureau by handling what would otherwise be two separate processes in a single administrative forum.

For the reasons discussed above, the Bureau adopts proposed § 1091.114 substantially as proposed with minor technical revisions for consistency, including renumbering this section as § 1091.111. The Bureau has also made one change to proposed § 1091.114 to clarify that a person may submit to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) by agreeing to a consent order in connection with an adjudication proceeding or civil action.

Section 1091.112 No limitation on relief sought in civil action or administrative adjudication⁴⁶

Proposed § 1091.115 clarified that nothing in proposed part 1091 shall be construed to limit the relief the Bureau may seek in any civil action or administrative adjudication, including seeking an order to have a person deemed subject to the Bureau's supervisory authority under 12 U.S.C. 5514, for the reasons set forth in 12 U.S.C. 5514(a)(1)(C) or otherwise. Two commenters discussing this proposed section recommended that the Bureau provide respondents the option to proceed using a formal adjudication, instead of the informal hearing process prescribed in this part. In response, the Bureau notes that proposed § 1091.115 does not relate to the procedures established by the final rule, but rather merely makes clear that the final rule does not limit the relief the Bureau might seek in another forum. The Bureau's authority to adopt informal procedures rather than formal adjudication procedures, as requested by the commenter, and its rationale for so doing is discussed in the introductory paragraphs to subsection B above. The Bureau therefore adopts proposed § 1091.115 as proposed with minor technical revisions for consistency, including renumbering to § 1091.112.

Subpart C— Post-Determination Procedures

⁴⁶ Proposed § 1091.115 has been renumbered § 1091.112 in the final rule. All references to proposed § 1091.115 in this analysis correspond to § 1091.112 of the final rule.

Section 1091.113 Petition for termination of order⁴⁷

Proposed § 1091.110 provided that a respondent may petition the Director for the termination of an order bringing a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, and set forth the required contents of such a petition. Under proposed § 1091.110, a respondent could petition for termination no sooner than two years after the issuance of the order, and no more frequently than annually thereafter, except that in the case of a voluntary consent to supervision, a respondent could not petition for early termination of the supervisory authority period set forth in the consent agreement. A petition is a respondent's opportunity to inform the Bureau of the actions taken and the progress made to reduce risk to consumers after the issuance of an order subjecting the entity to supervision under 12 U.S.C. 5514(a)(1)(C). Under proposed § 1091.110(b), a petition was required to set forth the reasons supporting a termination of an order, including any actions taken by a respondent since issuance of an order to address the conduct that led to the order. Under proposed § 1091.110(d), the [initiating official] would be permitted to file a response to a petition for termination setting forth the [initiating official's] recommendation to terminate or modify the order, or to deny the petition, and the reasons supporting such a recommendation, within 30 days of his or her receipt of a copy of a petition. Proposed § 1091.110(e) further provided that within 90 days of a respondent's submission of a petition for termination, the Director could either terminate or modify the order, or deny the petition. This proposed section also specified the manner in which a petition for termination must be filed.

Time periods related to petitions to terminate

⁴⁷ Proposed § 1091.110 has been renumbered § 1091.113 in the final rule. All references to proposed § 1091.110 in this analysis correspond to § 1091.113 of the final rule.

The Bureau received a number of comments discussing the termination-petition process generally and the prohibition on filing a petition prior to two years after an order establishing supervisory authority under 12 U.S.C. 5514(a)(1)(C) has been issued. Several commenters believe that allowing petitions to terminate an order only after two years is excessively harsh, and that respondents should either be allowed to petition for termination of the order immediately after the respondent has remedied the behavior that the Bureau deemed risky, or respondents should be allowed to petition after one year. One commenter asserted that orders should automatically terminate after one year unless the Bureau can show good cause for continuation, eliminating the need to petition for termination of an order. Many of these commenters argued that supervision would be unfair or unnecessary if the respondent terminated the practice for which the Bureau established supervisory authority. Taking a different view, one commenter asserted that the two-year period was not long enough because the Bureau might only finish one examination cycle within the two-year period. This commenter suggested setting a time limit for the first petition to terminate an order after two examination cycles.

After consideration of the comments, the Bureau continues to believe that allowing a respondent to petition for termination of supervision no sooner than two years after the issuance of a decision and order by the Director subjecting an entity to supervision under 12 U.S.C. 5514(a)(1)(C) is appropriate. This period is intended to provide the Bureau with sufficient time to conduct an initial set of supervision activities, such as requesting reports and/or undertaking an examination, and to conduct follow-up supervision activities so the Bureau can assess whether a nonbank covered person corrected any deficiencies identified by the Bureau and maintained any required corrective actions. A minimum two-year supervision period reflects the reality that after supervisory jurisdiction is established, it will take two years to meaningfully examine, and

possibly re-examine, an entity. In essence, the Bureau believes that the proposed supervision period will permit two examination cycles as one commenter asserted was necessary. Allowing termination after one year or immediately after a nonbank covered person purportedly remediated any deficiencies would not permit enough time for the needed follow-up supervision activity. Permitting termination on an ad hoc basis at any time would engender a disorderly supervision program where a supervised person could demand an evaluation of its activities at any time, regardless of Bureau resource constraints or supervision priorities.

For all of the foregoing reasons the Bureau declines to revise the Proposed Rule to alter the process for petitioning for termination of supervision.

Administrative appeal

A few commenters suggested that the Bureau adopt an administrative appeals process instead of the petition process. The Bureau believes that an administrative appeals process is not necessary and would significantly add to the complexity and length of the process established by the final rule.

Require initiating official to file a recommendation regarding a petition to terminate

A commenter argued that the Bureau should revise proposed § 1091.110(d)(1) to require the [initiating official] to file a response to a petition to terminate. The Bureau made the filing of a recommendation regarding a petition by the initiating official permissive rather than mandatory because the Bureau recognized that the initiating official may not feel the need to provide a recommendation in all instances. If the initiating official were to choose not to file a response to a petition to terminate, the result would be that the petition would be unopposed. The Bureau does not believe that this result would prejudice a petitioner. Moreover, the Bureau believes that it is important that under the final rule the initiating official have flexibility in determining how

to expend Bureau resources. The Bureau does not believe that it would be appropriate to require the initiating official to prepare and file a recommendation where the initiating official has determined that this is not a necessary or useful allocation of Bureau resources. The Bureau therefore declines to revise the Proposed Rule to require the initiating official to file a response to a petition to terminate.

Add requirement that the Director terminate supervision under certain circumstances

Another commenter requested that the Bureau include a requirement that the Director approve petitions to terminate where the respondent provides clear and convincing evidence that the respondent has eliminated any reasonable prospect of consumer risk.

The purpose of proposed § 1091.110 was to permit the Director to grant a petition and terminate supervision if the Director believed that it was appropriate to do so. The Bureau believes that adding to the final rule a requirement that the Director grant a petition as recommended by the commenter would impose a standard not consistent with 12 U.S.C. 5514(a)(1)(C), which does not require that the Bureau consider petitions to terminate. Therefore the Bureau declines to revise the Proposed Rule as suggested by the commenter.

Clarification on whether petitions to terminate are public information

Another commenter urged the Bureau to make the Bureau's response to a petition for termination publicly available.

The Bureau has added to the final rule § 1091.115(c), which provides that “[i]n connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12

CFR 1070.2(i)(1).” In light of this provision, a petition to terminate supervision is confidential supervisory information, subject to the confidentiality requirements of 12 CFR part 1070.

For the reasons discussed above, the Bureau is adopting § 1091.110 as proposed with minor technical revisions for consistency, including renumbering that section as § 1091.113.

Subpart D—Time Limits and Confidentiality

Section 1091.114 Construction of time limits⁴⁸

Proposed § 1091.111(a) provided common rules for computing time limits, taking into account the effect of weekends and holidays on time periods that are ten days or less. This section also sets forth when filing or service is effective. Proposed § 1091.111(b) established when papers are deemed to be served. With regard to time limits for responsive papers, proposed § 1091.111(c) incorporated a three-day extension for mail service, and a one-day extension for overnight delivery and electronic transmission. A one-day extension for service by electronic transmission reflects that electronic transmissions may result in delays in actual receipt by the person served.

The Bureau received two comments pertaining to the construction of time limits. Both of these comments requested the Bureau to provide clear deadline dates in the Notice of Reasonable Cause, asserting that the time limit framework provided may be confusing to respondents. The Bureau adopted the language used in § 1091.111 from the Bureau’s rules for adjudication proceedings in 12 CFR 1081.114, which in turn incorporates rules similar to the Federal Rules of Civil Procedure and some agencies’ existing rules.⁴⁹

The Bureau understands the commenters’ desire for exact dates on which filings are required, but is concerned that providing specific dates as requested would be difficult in many

⁴⁸ Proposed § 1091.111 has been renumbered § 1091.114 in the final rule. All references to proposed § 1091.111 in this analysis correspond to § 1091.114 of the final rule.

⁴⁹ 77 FR 39058, 39065 (June 29, 2012).

circumstances and might result in increased operational costs or inaccuracy. For example, the Bureau may need to put Notices into production sometime in advance of when they will be served and might not know the exact date that a Notice will be served. The Bureau believes that it is important to specify dates in the Notice in relation to the date of service to ensure the accuracy of the time periods disclosed.

For the reasons discussed above, the Bureau adopts § 1091.111 as proposed with minor technical revisions for consistency, including renumbering this section as § 1091.114.

Section 1091.115 Change of time limits and confidentiality of proceedings⁵⁰

Proposed § 1091.112(a) provided that requests for an extension of time may be granted where good cause is shown. Proposed § 1091.112(b) provided that requests for extensions of time are strongly disfavored and may be granted only when a party makes a strong showing that the denial of the request would substantially prejudice the party. Finally, proposed § 1091.112(c) stated that deadlines for action by the [Associate] Director or Director established in this Proposed Rule confer no substantive rights on respondents.

The Bureau received several comments requesting a more flexible extension policy. One commenter suggested allowing time extensions where it would prevent prejudice and do substantial justice. Another commenter asserted that providing Bureau staff the discretion to grant extensions would alleviate its concerns regarding the abbreviated response time of 20 days provided in the Proposed Rule. A few commenters objected to the language used in proposed § 1091.112(b), which stated that extensions are “strongly disfavor[ed].” Additionally, one commenter asserted that granting extensions only to prevent substantial prejudice was excessively stringent and requested instead that the Bureau decide requests for extensions based

⁵⁰ Proposed § 1091.112 has been renumbered § 1091.115 in the final rule. All references to proposed § 1091.112 in this analysis correspond to § 1091.115 of the final rule.

on the “good cause shown” standard set forth in proposed § 1091.112(a).

Although many of the concerns regarding time limits should be alleviated with the extension of the written-response deadline in § 1091.105(a) from 20 to 30 days, the Bureau agrees that the [Associate] Director and Director should have reasonable flexibility to permit extensions of time limits at their discretion and for good cause shown. The Proposed Rule granted some flexibility in this regard—permitting extensions for good cause shown—but, as noted above, it also stated a policy of strongly disfavoring requests for extensions and permitting them only where a denial would substantially prejudice a requesting party’s case. The Bureau is concerned that the language in the Proposed Rule stating that extensions are strongly disfavored and should be permitted only where there would be substantial prejudice may result in less flexibility to allow extensions than the Bureau intended. The Bureau therefore revises the Proposed Rule by deleting proposed § 1091.112(b). The Bureau believes that this will provide the Associate Director and Director with greater flexibility to permit, at their discretion, extensions of time limits where good cause is shown.

One commenter requested that the Bureau provide an automatic extension where a respondent did not receive a Notice. Such a revision to the Proposed Rule is unnecessary, however, because the 30-day time limit begins upon service of a Notice.

The Bureau adopts § 1091.112 with the revision deleting proposed § 1091.112(b), and adding a new paragraph (c) on confidentiality of proceedings (for the reasons discussed in the section-by-section analysis of subpart B above) and with other minor technical revisions for consistency, including renumbering this section as § 1091.115.

V. Section 1022(b)(2) of the Dodd-Frank Act

A. Overview

In developing the final rule, the Bureau has considered the potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators and the Federal Trade Commission, including with regard to consistency with any prudential market, or systemic objectives administered by such agencies.⁵¹

Under 12 U.S.C. 5514(a)(1)(C), the Bureau has the authority to supervise any nonbank covered person that it “has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond . . . is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.” The Bureau must base such reasonable-cause determinations on complaints collected by the Bureau under 12 U.S.C. 5493(b)(3), or on information collected from other sources.⁵² The final rule is intended to provide an efficient, streamlined, and fair process to implement 12 U.S.C. 5514(a)(1)(C).⁵³ Although a rule is not necessary to implement this statutory provision, the final rule establishes a consistent procedure applicable to all affected entities, and provides transparency regarding the applicable procedures prior to commencement of a proceeding.

B. Potential Benefits and Costs to Consumers and Covered Persons

The analysis considers the benefits, costs, and impacts of the final rule against a statutory baseline. That is, the analysis evaluates the benefits, costs, and impacts of the final rule as

⁵¹ Specifically, 12 U.S.C. 5512(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in 12 U.S.C. 5516, and the impact on consumers in rural areas. In addition, 12 U.S.C. 5512(b)(2)(B) directs the Bureau to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which the provisions of 12 U.S.C. 5512(b)(2) apply to a procedural rule of this kind, and to benefits, costs and impacts that are compelled by statutory changes rather than discretionary Bureau action, is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the analysis and consultations described in those provisions of the Dodd-Frank Act.

⁵² 12 U.S.C. 5514(a)(1)(C).

⁵³ The Bureau notes that there is little publicly available data with which to effectively measure or quantify the benefits, costs, and impacts of the Proposed Rule. Where benefits or costs are not readily quantifiable or where data is not reasonably available, the Bureau will conduct qualitative analyses relying on information from available sources.

compared to the statute without an implementing rule.⁵⁴ Absent the final rule, the public would lack any guidance regarding the Bureau's process under 12 U.S.C. 5514(a)(1)(C). Nonbank covered persons will incur certain costs in considering and responding to a Notice from the Bureau under the final rule, but these costs would generally exist in the absence of the rule.

For major provisions of the final rule, the Bureau considered the benefits and costs of certain alternatives. For example, the final rule provides respondents an opportunity to participate in a supplementary oral response, which would generally be conducted via telephone, but permits respondents to request an in-person supplemental oral response at the Bureau's headquarters in Washington, DC. The Bureau believes that this approach will benefit covered persons by offering an additional method of responding to a Notice compared with the alternative of not permitting any oral response. At the same time, the Bureau believes that this approach will be less costly than the alternative of requiring that all oral responses be conducted in person at a designated location. Also in connection with supplemental oral responses, the final rule permits, but does not require, a respondent to be represented by counsel. The Bureau considered requiring representation by counsel, but opted to provide respondents with the opportunity to receive the benefits of representation, while not mandating that respondents incur the costs of such representation.

The final rule also permits respondents to consent to the Bureau's supervisory authority under standard terms in lieu of filing a response to a Notice of Reasonable Cause, or to enter into a negotiated agreement at any time consenting to the Bureau's supervisory authority. The Bureau believes that this approach provides a streamlined resolution process that will reduce the

⁵⁴ The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and the appropriate baseline.

costs to the Bureau and those respondents that wish to consent to the Bureau's supervisory authority, compared to the alternative of permitting only negotiated consent agreements.

Several industry commenters discussed the potential costs of the rule; however, only one directly commented on the Bureau's consideration of benefits, costs and impacts under Section 1022. Commenters argued that the rule may subject firms to new regulations or that they may bear the burden of increased compliance with existing Federal consumer laws. However, as discussed above, the final rule only establishes procedures the Bureau intends to use to implement 12 U.S.C. 5514(a)(1)(C) to bring a nonbank covered person under the Bureau's supervisory authority when the Bureau has made a reasonable-cause determination; it does not subject any entities to new substantive regulation or require increased compliance with existing law; nor is the final rule necessary for the Bureau to exercise its supervisory authority under 12 U.S.C. 5514(a)(1)(C).

Commenters also asserted that the possibility of supervision and/or the actual initiation of supervision would prove costly to firms. Regarding the costs of changing business practices in preparing for possible supervision, the Bureau notes that nonbank covered persons are required to comply with existing law and with any current record-retention requirements to document such compliance even in the absence of this final rule. The Bureau recognizes, as the commenters do, that entities will incur some costs in responding to Notices and participating in examinations; however, those costs would also exist in the absence of the final rule since a rule is not necessary to implement 12 U.S.C. 5514(a)(1)(C).

Going even further, one commenter asserted that the Bureau must also gather more data and quantify the costs related to the rule. This commenter noted the Bureau's claim that data are quite limited, but then offered several citations to studies about the costs of regulation. As noted

however, the costs of regulation writ large are not relevant here. Rather the relevant data must describe the costs of adhering to particular informal administrative procedural frameworks in establishing reasonable cause. The studies mentioned include estimates of all regulation, including environmental regulations, and from the Bureau's reading, do not discuss or mention the costs to financial institutions of adherence with informal administrative procedural frameworks.

The final rule will have no impact on insured depository institutions or insured credit unions with \$10 billion or less in assets as described in 12 U.S.C. 5516(a). Nor will the final rule have a unique impact on rural consumers.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.⁵⁵ The RFA defines a "small business" as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.⁵⁶

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is

⁵⁵ 5 U.S.C. 601 *et seq.* The term "'small organization' means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes [an alternative definition after notice and comment]." 5 U.S.C. 601(4). The term "'small governmental jurisdiction' means governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes [an alternative definition after notice and comment]." 5 U.S.C. 601(5).

⁵⁶ 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment.

subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.⁵⁷

As discussed above in section V, a notice of proposed rulemaking was not required for this rulemaking. Because no notice of proposed rulemaking was required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.⁵⁸

In the alternative, a FRFA would not otherwise be required because the final rule would not have a significant economic impact on any small entities. The final rule sets forth only procedures by which a nonbank covered person may become subject to the Bureau's current supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C). The final rule establishes a transparent and streamlined process by which the Bureau would exercise its existing legal authority and would not impose new substantive requirements.

As noted, the Bureau opted to issue a notice of proposed rulemaking to receive public comment including comment on the analysis under the RFA. One commenter argued that smaller institutions could bear substantial costs in responding to a Bureau notice, but did not provide any specific data regarding those costs. The Bureau had noted in its proposal that such responses will require firm resources; however, the Bureau maintains that those costs will not be substantial nor, given any reasonable expectation of the scope of supervision under this provision, will they be borne by a significant number of small entities.

Accordingly, the undersigned certifies that this final rule will not have a significant impact on a substantial number of small entities.

VII. Paperwork Reduction Act

⁵⁷ 5 U.S.C. 609.

⁵⁸ 5 U.S.C. 603(a), 604(a).

The Bureau has determined that the final rule does not impose any new recordkeeping, reporting or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq.

List of Subjects in 12 CFR Part 1091

Administrative practice and procedures, Consumer protection, Credit, Trade practices.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau adds part 1091 to Chapter X in Title 12 of the Code of Federal Regulations to read as set forth below.

PART 1091 - PROCEDURAL RULE TO ESTABLISH SUPERVISORY AUTHORITY OVER CERTAIN NONBANK COVERED PERSONS BASED ON RISK DETERMINATION

Subpart A—General

Sec.

1091.100 Scope and purpose.

1091.101 Definitions.

Subpart B—Determination and Voluntary Consent Procedures

1091.102 Issuance of Notice of Reasonable Cause.

1091.103 Contents of Notice.

1091.104 Service of Notice.

1091.105 Response.

1091.106 Supplemental oral response.

1091.107 Manner of filing and serving papers.

1091.108 Recommended determination.

1091.109 Determination by the Director.

1091.110 Voluntary consent to Bureau's authority.

1091.111 Notice and response included in adjudication proceeding otherwise brought by the Bureau.

1091.112 No limitation on relief sought in civil action or administrative adjudication.

Subpart C—Post-Determination Procedures

1091.113 Petition for termination of order.

Subpart D—Time Limits and Deadlines

1091.114 Construction of time limits.

1091.115 Change of time limits and confidentiality of proceedings.

AUTHORITY: 12 U.S.C. 5512(b)(1), 5514(a)(1)(C), 5514(b)(7).

Subpart A—General

§ 1091.100 Scope and purpose.

This part sets forth procedures to implement section 1024(a)(1)(C) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111-203 (12 U.S.C. 5514(a)(1)(C)) (Dodd-Frank Act), and establishes rules to facilitate the Bureau's supervisory authority over certain nonbank covered persons pursuant to section 1024(b)(7) of the Dodd-Frank Act (12 U.S.C. 5514(b)(7)).

§ 1091.101 Definitions.

For the purposes of this part, the following definitions apply:

Assistant Director means an Assistant Director for Supervision. If there is no Assistant Director, the Associate Director may designate an alternative Bureau employee to perform the functions of an Assistant Director under this part.

Associate Director means the Associate Director of the Bureau's Division of Supervision, Enforcement, and Fair Lending, or his or her designee. If there is no Associate Director, the Director may designate an alternative Bureau employee to perform the functions of the Associate Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15), that is described in one or more categories under:

- (1) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or
- (2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (1) of this paragraph.

Decisional employee means any employee of the Bureau who has not engaged in:

- (1) Assisting the initiating official in either determining whether to issue a Notice of Reasonable Cause, or presenting the initiating official's position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the Associate Director; or
- (2) Assisting the Associate Director in the preparation of a recommended determination.

Director means the Director of the Bureau or his or her designee. If there is no Director, the term shall mean a person authorized to perform the functions of the Director under this part, or his or her designee.

Executive Secretary means the Executive Secretary of the Bureau.

Initiating official means an Assistant Director or a Bureau employee designated to act as an "initiating official" by an Assistant Director. If there is not an Assistant Director, the Associate Director may designate a Bureau employee to perform the functions of an initiating official under this part.

Nonbank covered person means, except for persons described in 12 U.S.C. 5515(a) and 5516(a):

- (1) Any person that engages in offering or providing a consumer financial product or service; and
- (2) Any affiliate of a person described in subparagraph (1) of this paragraph if such affiliate acts as a service provider to such person.

Notice of Reasonable Cause and Notice mean a Notice issued under § 1091.102.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Respondent means a person who has been issued a Notice of Reasonable Cause under § 1091.102.

Response means the response to a Notice of Reasonable Cause filed by a respondent with the Associate Director under § 1091.105.

Subpart B—Determination and Voluntary Consent Procedures

§ 1091.102 Issuance of Notice of Reasonable Cause.

(a) An initiating official is authorized to issue a Notice of Reasonable Cause to a person stating that the Bureau may have reasonable cause to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(b) A Notice of Reasonable Cause shall be based on:

- (1) Complaints collected through the system under 12 U.S.C. 5493(b)(3); or
- (2) Information from other sources.

(c) Except as provided in § 1091.111, a Notice of Reasonable Cause shall contain the

information set forth in § 1091.103, and be served on respondent as described in § 1091.104.

§ 1091.103 Contents of Notice.

(a) A Notice of Reasonable Cause shall contain the following:

(1) A description of the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services, including a summary of the documents, records, or other items relied on by the initiating official to issue a Notice. Such summary will be consistent with the protection of sensitive information, including compliance with federal privacy law and whistleblower protections; and

(2) A statement informing a respondent that:

(i) A respondent may file with the Associate Director a written response to a Notice of Reasonable Cause no later than 30 days after the Notice is served on the respondent;

(ii) The written response shall include the elements addressed in § 1091.105(b);

(iii) A respondent may request in its written response to a Notice an opportunity to present an in-person or telephonic supplemental oral response to the Associate Director as set forth in § 1091.106;

(iv) A failure timely to file a response to a Notice shall constitute a waiver of a respondent's right to respond, and may result in a default determination by the Director, based on the Notice, that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of

consumer financial products or services and the issuance of a decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C);

(v) The Associate Director shall serve a respondent with a notice of the date and time of a supplemental oral response, if a respondent has requested the opportunity to present a supplemental oral response, within 14 days of the Associate Director's receipt of a timely-filed response;

(vi) If a respondent has not requested the opportunity to present a supplemental oral response, the Associate Director shall, not later than 45 days after receiving a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response, provide a recommended determination to the Director including either a proposed decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C), or a proposed notification that the Bureau has determined not to subject a respondent to the Bureau's supervisory authority at that time, pursuant to § 1091.108; and

(vii) In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1).

(b) A Notice shall be accompanied by a form of consent agreement by which a respondent may voluntarily consent to the Bureau's authority to supervise a respondent under 12 U.S.C. 5514. A completed and executed form of consent agreement under this paragraph:

(1) Shall not constitute an admission that a respondent is a nonbank covered

person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(2) Shall result in an order by the Director that a respondent is subject to the Bureau's supervisory authority under 12 U.S.C. 5514 for a period of two years from the date of such order; and

(3) Shall include a provision that a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

(c) Nothing in this section shall be construed as requiring the Bureau to produce any documents or other information to a respondent other than as set forth in this section.

§ 1091.104 Service of Notice.

(a) A Notice of Reasonable Cause shall be served on a respondent as follows:

(1) To individuals. A Notice shall be served on a respondent that is a natural person by delivering a copy of the Notice to the individual or to an agent authorized by appointment or by law to receive such a Notice. Delivery, for purposes of this paragraph, means handing a copy of a Notice to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of a Notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(2) To corporations or entities. Notice shall be served on a person other than an individual by delivering a copy of a Notice to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such a Notice, by any method specified

in paragraph (a)(1) of this section.

(3) Upon persons registered with the Bureau. In addition to any other method of service specified in paragraph (a)(1) or (2) of this section, Notice may be served on a person registered with the Bureau by sending a copy of a Notice addressed to the most recent business address shown on the person's registration form by U.S. Postal Service Certified, Registered, or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(4) Upon persons in a foreign country. Notice may be served on a person in a foreign country by any method specified in paragraph (a)(1) or (2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(5) Record of service. The Bureau shall maintain a record of service of a Notice on a respondent, identifying the party given Notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if available, the name of the individual to whom a Notice was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail, or Express Mail, the Bureau shall maintain the confirmation of receipt or attempted delivery.

(6) Waiver of service. In lieu of service as set forth in paragraph (a)(1) or (2) of this section, a person may be provided a copy of a Notice by First Class Mail or other reliable means if a written waiver of service is obtained from the person to be served. In the case of a respondent that is not a natural person, a written waiver may be provided by an officer, managing or general member, or partner authorized to represent the respondent.

(b) The initiating official shall promptly submit a copy of a Notice and a copy of the

certificate of service to the Associate Director.

§ 1091.105 Response.

(a) Timing. Within 30 days of service of a Notice, a respondent shall file any response with the Associate Director according to the instructions set forth in a Notice.

(b) Content of the response. (1) The response shall set forth the basis for a respondent's contention that the respondent is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(2) The response shall include all documents, records, or other evidence a respondent wishes to use to support the arguments or assertions set forth in the response.

(3) Any request to present a supplemental oral response, including the respondent's preference for a telephonic or in-person supplemental oral response, must be included in the response. A respondent's failure to request to present a supplemental oral response shall constitute a waiver of the opportunity to present a supplemental oral response.

(4) A response shall include an affidavit or declaration, made by the individual respondent if a natural person, or, if a corporate or other entity that is not a natural person, by an officer, managing or general member, or partner authorized to represent the respondent, affirming that the response is true and accurate and does not contain any omissions that would cause the response to be materially misleading.

(5) Notwithstanding any other provisions of this paragraph, a respondent may respond to a Notice of Reasonable Cause by voluntarily consenting to the Bureau's authority to supervise the respondent under 12 U.S.C. 5514 by completing and executing the consent agreement form provided to the respondent with a Notice of Reasonable Cause in accordance

with § 1091.103(b).

(c) Default. Failure of a respondent to file a response within the time period set forth in paragraph (a) of this section shall constitute a waiver of the respondent's right to respond, and shall, based on the Notice, authorize the Associate Director, without further notice to the respondent, to issue a proposed decision and order as provided in § 1091.108(c)(1) and the Director to issue a decision and order as provided in § 1091.109(a)(1).

(d) Waiver. A respondent shall be deemed to have waived the right, at any future stage of an Associate Director's or the Director's consideration of a matter, and in any petition for judicial review of an order issued pursuant to § 1091.109(a)(1), to rely on any argument, record, document, or other information that the respondent does not raise or include in its response.

(e) No Discovery. There shall be no discovery in connection with a response.

§ 1091.106 Supplemental oral response.

(a) A respondent may request in a response under § 1091.105 the opportunity to present to the Associate Director a supplemental oral response in support of a respondent's assertion that the respondent is not a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

(b) The conduct of a supplemental oral response shall be subject to the following procedures:

(1) A supplemental oral response shall be, at the respondent's preference, by telephone or in person at the Bureau's headquarters in Washington, DC. If a respondent requests in its written response a supplemental oral response but does not specify whether such response

shall be conducted via telephone or in person, the supplemental oral response will be conducted by telephone unless otherwise directed by the Associate Director;

(2) The Associate Director may impose any limitations on the conduct of a supplemental oral response, including but not limited to establishing a time limit for the presentation of a supplemental oral response, and limiting the subjects to be addressed in a supplemental oral response;

(3) There shall be no discovery permitted or witnesses called in connection with a supplemental oral response;

(4) If a respondent is a corporate or other entity, and not a natural person, the respondent shall be represented in any supplemental oral response by:

(i) An officer, managing or general member, or partner authorized to represent the respondent; or

(ii) An attorney in good standing of the bar of the highest court of any State.

(5) If a respondent is a natural person, the respondent shall be represented in any supplemental oral response by:

(i) Himself or herself; or

(ii) An attorney in good standing of the bar of the highest court of any State.

(6) The Associate Director shall cause an audio recording of a supplemental oral response to be made by a court reporter. A respondent may purchase a copy or transcript of the recording at the respondent's own expense.

(c) The initiating official may participate in any supplemental oral response

conducted under this section.

(d) The Associate Director shall serve on a respondent, within 14 days after the Associate Director receives the respondent's timely-filed response requesting a supplemental oral response, a notice setting forth the date, time, and general information relating to the conduct of a supplemental oral response. The date of a supplemental oral response shall be scheduled not less than ten days after the date the respondent is served with the notice of supplemental oral response.

(e) The notice of supplemental oral response shall be served on a respondent pursuant to § 1091.107.

(f) The Associate Director shall send a copy of the notice of supplemental oral response to the initiating official.

(g) A respondent's failure to participate in a supplemental oral response scheduled by the Associate Director shall constitute the respondent's waiver of the opportunity to present a supplemental oral response.

§ 1091.107 Manner of filing and serving papers.

Unless otherwise specified by the Associate Director or Director, a respondent shall file the response and any other paper with the Executive Secretary at the mailing or electronic address provided by the Bureau, and the Associate Director and Director shall serve any paper, other than a Notice as set forth in § 1091.104, on a respondent, by:

(a) Electronic transmission upon any condition specified by the Associate Director or Director; or

(b) Any of the following methods if a respondent demonstrates electronic filing is not practicable and the Associate Director or Director permits:

- (1) Personal delivery;
- (2) Delivery through a reliable commercial courier service or overnight delivery service; or
- (3) Mailing the papers by U.S. Postal Service First Class, Registered, Certified, or Express Mail.

§ 1091.108 Recommended determination.

(a) If a respondent did not voluntarily consent to the Bureau's supervision authority, and did not request the opportunity to present a supplemental oral response, not later than 45 days after receipt of a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response, the Associate Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(b) If a respondent did request the opportunity to present a supplemental oral response, not later than 90 days after service of a Notice of Reasonable Cause, the Associate Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(c) Upon making the recommended determination described in paragraphs (a) or (b)

of this section, the Associate Director shall submit to the Director either:

(1) A proposed decision and order that would subject a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C) if adopted by the Director; or

(2) A proposed notification that a respondent should not be subjected to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) based on the proceedings. Such a notification shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause pursuant to either § 1091.102, or the procedures set forth in § 1091.111, at any time, or from issuance of a decision and order based on another Notice recommending that a respondent be subject to the Bureau's authority pursuant to either of those sections.

(d) Any proposed decision and order issued by the Associate Director pursuant to paragraph (c)(1) of this section shall set forth:

(1) A statement that the Associate Director has preliminarily determined based on reasonable cause that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(2) The basis for the Associate Director's determination; and

(3) A proposed order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514.

(e) The Associate Director shall include with the recommended determination submitted to the Director copies of the following:

(1) The Notice of Reasonable Cause;

- (2) The record of service of a Notice of Reasonable Cause;
 - (3) A respondent's response and any documents, records, or other items filed with the written response;
 - (4) Any document, record, or other item considered by the Associate Director to be material in making a recommended determination; and
 - (5) An audio recording of a supplemental oral response, if a supplemental oral response was conducted, and/or a transcript if a transcript was prepared at a respondent's request or if requested by the Director.
- (f) The requirement that the Associate Director provide to the Director the items described in paragraph (e) of this section shall confer no substantive rights on a respondent and any omission of an item may be cured by the Associate Director to the extent applicable.

§ 1091.109 Determination by the Director.

(a) Not later than 45 days after receipt of the Associate Director's recommended determination, the Director shall, after considering the recommended determination and all documents, records, and other items submitted therewith by the Associate Director, make a determination either adopting without revision, modifying, or rejecting the Associate Director's recommended determination, and shall issue to respondent, with copies to the Associate Director and the initiating official:

- (1) A decision and order subjecting the respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C); or
- (2) A notification that the Director has determined that the respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) as a result of the proceedings. Such notification shall have no precedential effect and shall not prevent the

issuance of another Notice of Reasonable Cause pursuant to either § 1091.102, or the procedures set forth in § 1091.111, at any time, or the issuance of an order based on another Notice subjecting the respondent to the Bureau's authority pursuant to either of those sections.

(b) Any decision and order issued by the Director pursuant to paragraph (a)(1) of this section shall include:

(1) A statement that the Director adopts the Associate Director's proposed decision and order without revision as the Director's decision and order, or that the Director rejects or modifies the Associate Director's proposed determination for reasons set forth by the Director;

(2) A statement that the Director has determined that the Bureau has reasonable cause to determine that a respondent is a nonbank covered person that is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(3) The basis for the Director's determination, which may be an adoption of the basis set forth in the Associate Director's proposed decision;

(4) An order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514 and informing a respondent that the respondent may petition for termination of the Bureau's supervisory authority no sooner than two years from the date of the order, and no more than annually thereafter; and

(5) A copy of the recommended determination issued by the Associate Director.

(c) Only decisional employees may advise and assist the Director in the consideration

and disposition of a proceeding under this part.

(d) A decision and order issued pursuant to paragraph (a)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(e) Any item required to be served on a respondent under this section shall be served pursuant to § 1091.107.

§ 1091.110 Voluntary consent to Bureau's authority.

(a) Notwithstanding any other provision, pursuant to a consent agreement agreed to by the Bureau, a person may voluntarily consent to the Bureau's supervisory authority under 12 U.S.C. 5514, and such voluntary consent agreement shall not be subject to any right of judicial review.

(b) The consent agreement of any person, pursuant to paragraph (a) of this section, that specifies the duration of time that such person will be subject to the Bureau's authority under 12 U.S.C. 5514 shall not be eligible for a petition for termination of order pursuant to § 1091.113, and a consent agreement shall state that a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

§ 1091.111 Notice and response included in adjudication proceeding otherwise brought by the Bureau.

(a) Notwithstanding §§ 1091.102 through 1091.106, the Bureau may, in its discretion, provide the notice and opportunity to respond required by 12 U.S.C. 5514(a)(1)(C) in a notice of charges otherwise brought by the Bureau pursuant to 12 CFR 1081.200 and the adjudication proceedings pursuant to part 1081. Also, a person may agree to submit to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) as part of a consent order entered into in connection with an adjudication proceeding or civil action.

(b) If the Bureau chooses to proceed in the manner described in paragraph (a) of this section, it shall so indicate in the notice of charges, and any order of the Director resulting from the notice of charges shall constitute the order referred to in 12 U.S.C. 5514(a)(1)(C).

(c) If the Bureau proceeds pursuant to paragraph (a) of this section, the provisions of §§ 1091.101 through 1091.110, and 1091.113 through 1091.115 will be inapplicable to such proceeding.

§ 1091.112 No limitation on relief sought in civil action or administrative adjudication.

Nothing in this part shall be construed to limit the relief the Bureau may seek in any civil action or administrative adjudication, including but not limited to, seeking an order to have a person deemed subject to the Bureau's supervisory authority under 12 U.S.C. 5514, including for the reasons set forth in 12 U.S.C. 5514(a)(1)(C).

Subpart C— Post-Determination Procedures

§ 1091.113 Petition for termination of order.

(a) Any person subject to an order issued pursuant to § 1091.109(a)(1) may, no sooner than two years after issuance of such an order and no more frequently than annually thereafter, petition the Director for termination of the order.

(b) A petition for termination submitted pursuant to paragraph (a) of this section shall set forth the reasons supporting termination of the order, including any actions taken by a respondent since issuance of the order to address the conduct that led to issuance of the order, and may include any supporting information or evidence that the petitioner believes is relevant to the Director's determination of the matter.

(c) A petition for termination shall be filed by the petitioner with the Executive Secretary at the mailing or electronic address provided by the Bureau.

(d) The Director shall, promptly upon receipt of a petition for termination, send a copy of the same to the initiating official.

(1) The initiating official may, within 30 days of his or her receipt of a copy of a petition for termination, file with the Director a response to the petition stating whether the initiating official recommends that the order be terminated, or modified, or that the petition for termination be denied and the basis for such recommendation.

(2) The initiating official shall serve a copy of the response to a petition for termination on the petitioner pursuant to § 1091.107 at the time of filing it with the Director.

(e) Not later than 90 days after submission of a petition under paragraph (a) of this section, the Director shall issue a written decision either terminating or modifying the order, or denying the petition. If the Director modifies the order or denies the petition, the Director shall explain the basis for his or her decision with respect to the petition and send the written decision to the petitioner and the initiating official.

(1) The Director shall serve the written decision on a petition for termination of order on a respondent pursuant to § 1091.107.

(2) The Director shall send a copy of the written decision on a petition for termination of order to the Associate Director and initiating official promptly upon issuing the written decision.

(3) The decision of the Director made pursuant to paragraph (e) of this section shall constitute final agency action under 5 U.S.C. 704.

Subpart D—Time Limits and Deadlines

§ 1091.114 Construction of time limits.

(a) General rule. In computing any period of time prescribed by this part, or by order of the Associate Director or Director, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section.

(b) Filing or service of papers. Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by the person served;

(2) In the case of overnight commercial delivery service, U.S. Postal Service Express Mail delivery, or First Class, Registered, or Certified Mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, including email, upon transmission.

(c) Calculation of time for service and filing of responsive papers. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by U.S. Postal Service First Class, Registered, or Certified Mail, add three calendar days to the prescribed period;

(2) If service is made by Express Mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the

prescribed period.

§ 1091.115 Change of time limits and confidentiality of proceedings.

(a) Except as otherwise provided by law, the Associate Director until the issuance of a recommended determination, or the Director at any time thereafter, at their respective discretion, may extend the time limits prescribed by this part or by any notice or order issued pursuant to this part. Any request for an extension of a time limit by a respondent must be for good cause shown, in writing, and filed with the Associate Director or Director, as appropriate. The mere filing of a written request for an extension does not alleviate a respondent of the obligation to meet an applicable time limit absent written confirmation that an extension has been granted.

(b) Deadlines for action by the initiating official, Associate Director, or the Director established in this part confer no substantive rights on respondents.

(c) In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1).

Dated: June 17, 2013

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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