

Consumer Financial Protection Bureau Seeks Comment on Definition of “Larger Participants” for Nonbank Supervision Program

Last week, on June 23, 2011, the new Consumer Financial Protection Bureau (CFPB) issued its first notice and request for comment (Notice). The Notice requested input on how the CFPB should define “larger participants” for purposes of its supervision of nondepository entities that provide consumer financial products and services. These nondepository providers are for the first time subject to federal supervision by the CFPB under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act). While certain entities, including nonbank mortgage companies, private education lenders, and payday lenders are subject to this supervision regardless of size, other providers of nonbank financial services are generally only subject to CFPB supervision if they are deemed to be a “larger participant” in a financial market.¹ The Notice solicits comments on how those “larger participants” are to be identified.

The Act requires that the CFPB issue an initial rule to define the entities that are “larger participants of a market for other consumer financial products or services.”² A variety of consumer financial products and services offered by nondepository entities could potentially be subject to supervision by the CFPB under the “larger participant” rule. The Notice identifies the following markets for possible inclusion in the initial rule: (1) debt collection; (2) consumer reporting; (3) consumer credit and related activities; (4) money transmitting, check cashing, and related activities; (5) prepaid cards; and (6) debt relief services. These markets are consistent with the CFPB’s public statements as to its priorities. The Notice solicits comment on whether these categories should be covered by

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¹ The CFPB also has the authority to supervise any covered person that it “has reasonable cause to determine, by order, after notice and a reasonable opportunity to respond” that such 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.” Act § 1024(a)(1)(C).

² See Act §§ 1024(a)(1)(B) and 1024(a)(2).



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the initial rule, whether each category consists of a single market or multiple markets, whether other markets should be addressed by the rule, how the markets included in the rule should be defined, and whether all such markets should be national in scope or whether the CFPB should consider regional or other geographic markets.

Comments on the Notice are due by August 15, 2011. The Notice states that the CFPB will draft and issue a proposed rule for public comment after considering the comments it receives on the Notice and other relevant information. The CFPB must issue the initial rule no later than July 21, 2012 (i.e., one year after the designated transfer date), after consultation with the Federal Trade Commission. The Notice states that although the CFPB anticipates including certain specified markets in an initial rule, additional markets may be added through subsequent rulemakings.

The “larger participant” rule supposedly does not create any new substantive consumer protection requirements to be imposed upon nondepository entities. Rather, the rule will provide the CFPB with authority to supervise larger participants in certain markets by conducting periodic examinations and requiring reports for purposes of assessing compliance with the requirements of federal consumer financial laws, obtaining information about the activities and compliance systems or procedures of such person, and detecting and assessing risks to consumers and to markets for consumer financial products and services. As defined in the Act, the “federal consumer financial laws” include nearly every existing federal consumer financial statute, as well as new consumer financial protection mandates prescribed by the CFPB under the Act, such as the new mortgage loan standards set forth in Title XIV. The federal consumer financial laws include, for example, the Truth in Lending Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act.

The Notice solicits public comment on the (1) criteria and thresholds, (2) data sources, and (3) measurement dates

and supervision timeframes that the CFPB should use to define a “larger participant.” Specifically, the Notice seeks comment on whether a larger participant should be defined based on the relative size of the participants within a market, or rather based upon an absolute threshold. The Notice states that examples of potential criteria that could be used to define larger participants of a market include one or a combination of the following: (1) annual number of transactions in the market; (2) annual value of transactions (e.g., total loan volume); (3) annual receipts or revenue; (4) geographic coverage (e.g., number of states where engaged in business); (5) asset size; and (6) outstanding loan balances. Comment is also solicited on whether the CFPB should use more than one criterion to define a larger participant and whether the same criteria and thresholds should be used to define a larger participant for every market.

The Notice also solicits public comment on the types of reliable data sources that are available and suitable for the CFPB to use in its larger participant determinations. The Notice states that the type of data that could be used in connection with an initial rule might include: (1) public data from sources such as the Securities and Exchange Commission’s online EDGAR database and state and federal licensing and registration records; (2) nonpublic state or federal supervisory or other data; (3) commercial data, such as proprietary industry market analyses; and (4) data obtained directly from market participants.

The Act also provides that the CFPB may establish registration requirements for certain covered persons.³ The Notice states that the CFPB is considering the establishment of such requirements through a future rulemaking and solicits public comment concerning the type of data that it should collect through such a registration process to use in its larger participant determinations.

With respect to measurement dates and supervision timeframes, the Notice seeks comments on: (1) the

³ See Act § 1024(b)(7).

timeframe during which the market participant's size should be measured (e.g., the previous year, two years, or more); (2) the factors the CFPB should consider in the event of a merger of market participants; and (3) the length of time for which a market participant should be subject to supervision once it meets the applicable threshold.

Arnold & Porter LLP is available to assist you in preparing comments on the Notice or in determining how the Notice or the Act may affect your business. For further information, please contact your Arnold & Porter attorney or:

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