Proposed Rules

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

[Docket No. CFPB–HQ–2011–2]

Defining Larger Participants in Certain Consumer Financial Products and Services Markets

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and Request for Comment.

SUMMARY: The Bureau of Consumer Financial Protection (''CFPB''), created by the Consumer Financial Protection Act of 2010 (''Act''), is required to implement a program to supervise certain nondepository covered persons for compliance with Federal consumer financial laws. The scope of supervision coverage varies for different product markets. Section 1024 of the Act provides that the CFPB may supervise covered persons in the residential mortgage, private education lending, and payday lending markets. For other markets for consumer financial products or services, the supervision program generally will apply only to a ''larger participant'' of these markets, as defined by rule. The CFPB is required to issue an initial ''larger participant'' rule not later than July 21, 2012, one year after the designated transfer date.

This notice and request for comment (''Notice'') seeks public comment on the development of such a rule. After considering any comments on this Notice and other relevant information, the CFPB will draft and publish a proposed rule for public comment.

DATES: Comments must be received by August 15, 2011.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Because paper mail in the Washington, DC area and at the CFPB is subject to delay, commenters are encouraged to submit comments electronically. Comments should refer to ''CFPB Docket No. CFPB–HQ–2011–2.'' Comments should be submitted to:

- *Web site: http://www.regulations.gov.*
- *Mail:* Nondepository Supervision, Consumer Financial Protection Bureau, 1801 L Street, NW., Room 513–H, Washington, DC 20036.
- *Hand Delivery/Courier in Lieu of Mail:* Department of the Treasury, 1500 Pennsylvania Avenue, NW., Consumer Financial Protection Bureau, Washington, DC 20220.

You may view copies of this Notice and any comments we receive at *http://www.regulations.gov* within CFPB Docket No. CFPB–HQ–2011–2. The CFPB will make such comments available for public inspection and copying in Department of the Treasury's Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622–0990.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly. Do not include sensitive personal information, such as account numbers or social security numbers. Your comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Nicholas Krafft, Research Analyst, (202) 435–7252, Nondepository Supervision, Consumer Financial Protection Bureau, 1801 L Street, NW., Room 513–H, Washington, DC 20036.

SUPPLEMENTARY INFORMATION:

I. Background: The CFPB's Nondepository Supervision Program

On July 21, 2010, the Consumer Financial Protection Act of 2010 (''Act'') [1] established the Bureau of Consumer Financial Protection (''CFPB''). One of the CFPB's specific objectives under the Act is to ensure that Federal consumer financial law [2] is ''enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition.'' [3] One of the ways the Act accomplishes this objective is by giving the CFPB authority to supervise not only certain banks, thrifts, and credit unions (''depository institutions''), and their affiliates, but also certain other entities that provide consumer financial products or services (''nondepository covered persons'').[4]

The CFPB is required under Section 1024 of the Act to implement a risk-based supervision program for certain nondepository covered persons. The purposes of this supervision program are to: (1) Assess nondepository covered persons for compliance with Federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to the consumer financial markets.[5] In implementing this supervision program, the CFPB may, among other things, require submission of reports and conduct onsite examinations of a covered person to assess the covered person's compliance with Federal consumer financial law and achieve the other purposes described above. The CFPB also has the authority to require, by rule, registration of certain covered persons. Such registration could help support the implementation of the supervision program.[6]

The scope of coverage of this supervision program under Section 1024 varies by consumer financial product or service market. Section 1024 specifically grants the CFPB authority to supervise, regardless of size, covered persons that offer or provide to consumers the following enumerated consumer financial products or services: (1) Origination, brokerage, or servicing of residential mortgage loans secured by

[1] The Act is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

[2] *See* Act § 1002(14) (defining ''Federal consumer financial law'').

[3] *Id.* § 1021(b)(4).

[4] *See id.* § 1002(6) (a ''covered person'' means ''(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.''). A ''service provider'' is a person that provides a material service to a covered person in connection with the offering or provision of a consumer financial product or service. *Id.* § 1002(26). Service providers also may be subject to CFPB supervision. *See, e.g., id.* § 1024(e). Under the Act, ''person'' means ''an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.'' *Id.* § 1002(19).

[5] *Id.*§ 1024(b)(1).

[6] *Id.* §§ 1022(c)(7) and 1024(b)(7).

real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[7] By contrast, for all other markets, the CFPB's nondepository supervisory authority generally applies only to any covered person that is ''a larger participant of a market for other consumer financial products or services,'' as defined by rule by the CFPB.[8] The CFPB's initial larger participant rule must be issued not later than one year after the designated transfer date.[9]

Once it has the requisite authority, the CFPB may immediately begin its nondepository supervision program in the mortgage, payday lending, and private education lending markets,[10] including through examinations of covered persons in these markets, based on the CFPB's assessment of relevant risks. The CFPB will also propose a rule to define a ''larger participant'' of other markets for consumer financial products or services. The ''larger participant'' rule will not impose new substantive consumer protection requirements on any nondepository entity, but rather will provide to the CFPB the authority to supervise larger participants in certain markets—including by requiring reports and conducting examinations—to ensure, among other things, that they are complying with existing Federal consumer financial law. However, a covered person will remain subject to any Federal consumer financial law applicable to its activities regardless of whether such covered person is subject to the CFPB's supervisory authority.

Once the scope of the nondepository supervision program is established, the Act requires that the operation of the program be based on an assessment by the CFPB of the ''risks posed to consumers in the relevant product markets and geographic markets.'' [11] The factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services,[12] risks to consumers, the extent to which institutions are subject to state supervision, and any other factor that the CFPB determines to be relevant.[13]

Through this notice and request for comment (''Notice''), the CFPB seeks public comment on the issues presented in drafting that proposed rule.[14] While this Notice presents a number of particular questions for comment, the CFPB invites public comment on all issues relevant to the development of this proposal.

II. Issues in Developing a Larger Participant Rule

There are a number of issues that arise in connection with determining how to identify a larger participant in a market, including both broad issues that cut across markets and specific issues relating to particular markets that may be covered by an initial rule. The CFPB is also considering which markets to include in an initial rule. Markets identified in this Notice for possible inclusion are: debt collection, consumer reporting, consumer credit and related activities, money transmitting, check cashing and related activities, prepaid cards, and debt relief services.

These issues and related questions are discussed below.

A. Criteria and Thresholds To Define a Larger Participant

In considering how to define which nondepository covered persons are larger participants in a particular market, a number of approaches are available. Determining the appropriate criteria and thresholds to be used should be approached in light of the applicable statutory language, which refers to a ''larger participant'' of a market.[15] This statutory language is not limited only to the ''largest'' participants in each market, but at the same time does not encompass smaller market participants.

In determining the criteria to measure the size of market participants, the CFPB should consider criteria that will allow it to administer the program efficiently by readily identifying larger participants based on objective available data. Whatever the criteria used, the Act provides that, for purposes of computing the activity levels of a market participant, the activities of the participant ''shall be aggregated'' with the activities of nondepository ''affiliated companies.'' [16] Examples of potential criteria that could be used to define larger participants of a market include one or a combination of the following: annual number of transactions in the market; annual value of transactions (*e.g.,* total loan volume); annual receipts or revenue; geographic coverage (*e.g.,* number of states where engaged in business); asset size; and outstanding loan balances.

The thresholds used to define a larger participant under the criteria used could be based on an absolute approach (*e.g.,* a covered person with an annual loan volume of $X is a larger participant), or it could be based on a relative approach (*e.g.,* every market participant having an annual loan volume of a certain amount relative to other participants). These approaches are not necessarily exclusive: multiple criteria (each with its own threshold) could be used in identifying larger participants.

A related issue is whether the CFPB should tailor the criteria and thresholds to each market, given the significant differences among various markets. For example, a larger participant in a market for consumer credit might be defined using criteria and thresholds different from those used in the market for consumer debt collection. Alternatively, the initial rule might be structured around a single set of criteria and thresholds applicable across all markets.

The CFPB seeks public comment on the following:

• Should a larger participant be defined based on the relative size of the participants within a market (*e.g.,* whether the number of annual transactions of the market participants is above the mean or median) or, alternatively, should a larger participant be defined based on an absolute threshold, such as doing business in a specified number of states?

• Should more than one criterion be used to determine the size of a market participant, such as the number of annual transactions and/or the number of states in which the participant conducts business?

• Should the same criteria and thresholds be used to define a larger participant for every market, or should different criteria and thresholds be tailored for each market based on the market's characteristics?

B. Data To Be Used in Measuring Criteria

Whatever criteria are selected for a particular market, the CFPB must be able to measure the criteria as they relate to specific market participants.

[7] *Id.* § 1024(a)(1)(A), (D), and (E).

[8] *Id.* §§ 1024(a)(1)(B) and 1024(a)(2). 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.'' *Id.* § 1024(a)(1)(C).

[9] *Id.* § 1024(a)(2). The CFPB must consult with the Federal Trade Commission prior to issuing a rule.

[10] *Id.* § 1024(a)(1)(A), (D), and (E).

[11] *Id.*§ 1024(b)(2).

[12] *See id.* § 1002(5) (defining ''consumer financial product or service'') and § 1002(15) (defining ''financial product or service'').

[13] *Id.* § 1024(b)(2).

[14] Section 1066 of the Act grants the Secretary of the Treasury interim authority to perform certain functions of the CFPB. Pursuant to that authority, Treasury publishes this Notice on behalf of the CFPB.

[15] *Id.* § 1024(a)(1)(B).

[16] *Id.* § 1024(a)(3)(B).

For example, if the criteria selected to define a larger participant includes the number of states in which a market participant conducts business, the CFPB will need access to data establishing which covered persons meet the specified threshold for that criterion. The data that could be used in connection with an initial rule might include: (1) Public data, including 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 CFPB is considering the establishment of a registration program for certain covered persons through a future rulemaking.[17] If such a registration program is established, the CFPB may receive relevant information from covered persons subject to that program that would supplement existing data used to measure market participants.[18] This additional data could be useful in determining which covered persons meet the applicable thresholds.

The CFPB seeks public comment on the following:

- For each market, what reliable data sources are available and would be suitable for the CFPB to use in its larger participant determinations?
- What data should the CFPB collect through a registration process to use in its larger participant determinations?

C. Measurement Dates and Supervision Timeframes

In measuring the size of market participants, an initial rule might require the CFPB to determine whether a covered person is a larger participant by measuring applicable criteria for the immediately preceding calendar year or years, or at one or more points in time. For example, if the annual number of transactions is used, coverage could be determined by evaluating the market participant's annual transactions for the previous calendar year or years. An initial rule would also need to consider how to treat certain significant events relevant to ''larger participant'' determinations, such as the merger of market participants.

A related issue is how long a market participant should be subject to supervision once it has met the thresholds for being a larger participant. For example, if a market participant meets the larger participant threshold in one year, for how long should it be subject to CFPB supervision if in the subsequent year its size falls below the applicable threshold? One consideration relevant to these issues is whether the period should be long enough to permit the CFPB to conduct a subsequent examination if an initial examination found violations of law or otherwise raised compliance concerns.

The CFPB seeks public comment on the following:

- In evaluating a market participant's size, should the CFPB measure the size of a market participant based on the relevant criteria for the previous one year, two years, or more—or at one or more than one points in time? Should a market participant be a larger participant if it meets the applicable threshold in any one of a specified number of prior years, or only if it meets the threshold in the most recent period?
- What factors should the CFPB consider in connection with the treatment of events such as the merger of market participants during an assessment time period?
- Are there alternative approaches for establishing an assessment time period that the CFPB should consider?
- For what length of time should a market participant be subject to supervision once it meets the applicable threshold? How should subsequent changes in the participant's size be treated?

III. Consideration of Markets To Include in the Initial Rule

A variety of consumer financial products and services offered by nondepository covered persons could be subject to the CFPB's supervision program under a larger participant rule. The CFPB is interested in public comment regarding which markets for consumer financial products and services should be addressed in an initial rule. Specifically, the CFPB solicits comment on whether the categories discussed below should be covered in the initial rule, whether each particular category consists of a single market or multiple markets, and whether other markets also should be addressed.[19] Although the CFPB anticipates including certain specified markets in an initial rule, additional markets may be added through subsequent rulemakings.

A. Debt Collection

With regard to the collection of debt related to consumer financial products or services, market participants may collect on behalf of another entity that owns the debt, or collect on their own behalf after purchasing the debt from a creditor or other holder of the debt. The debt collection market affects a large number of consumers. About 30 million individuals, or 14% of consumers, now have debt that is subject to the collections process, and the average debt those consumers have under collection is approximately $1,400.[20]

B. Consumer Reporting

A range of actors engage in consumer reporting-related activities. A handful of large credit bureaus compile and maintain data and provide credit reports on individual consumers. The reports include credit history and other credit-related information furnished to the credit bureaus by certain creditors and other entities. Additional market participants resell information compiled by the large credit bureaus, or operate as specialty consumer reporting agencies that offer such services as verifying consumer check writing history to facilitate the acceptance of consumers' personal checks by retailers. The consumer reporting market is of fundamental importance to the market for consumer credit. The Consumer Data Industry Association estimates that there are over 54 billion updates to consumer reports, and 3 billion reports issued, each year. In addition, each of the large credit bureaus maintains credit files on over 200 million consumers.[21]

C. Consumer Credit and Related Activities

There are a variety of activities relating to consumer credit that might be covered in an initial rule.[22] Market participants include finance companies, consumer lenders, and loan servicers

[17] *See id.* §§ 1022(c)(7) and 1024(b)(7).

[18] The number of covered persons that may be subject to these registration requirements may be larger than the number that will be subject to CFPB supervision under section 1024(a)(1).

[19] The participants in markets discussed in this Notice may be subject to any number of Federal consumer financial laws depending on their specific activities that they are engaged in. Examples of such laws include the Truth in Lending Act, the Fair Debt Collection Practices Act, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act, and, more broadly, the relevant portions of the Consumer Financial Protection Act. *See* Act § 1002(14) (defining ''Federal consumer financial law'').

[20] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit* (February 2011).

[21] ANSI–BBB, *Identity Theft Prevention and Identity Management Standards* (2008).

[22] Mortgage originators, brokers, and servicers, payday lenders, and private education lenders are specifically enumerated in Section 1024(a) as subject to the CFPB's supervisory authority. Accordingly, whether covered persons engaged in those activities are subject to CFPB supervision would not depend upon the content of a larger participant rule. *See* Act at § 1024(a)(1)(A), (D), and (E).

and brokers. Relevant products include, for example, secured credit such as automobile loans, and unsecured consumer installment loans. Revenues in auto lending and financing, and other sales financing, total $60 billion annually.[23] The CFPB's authority relating to consumer credit providers is subject to important exceptions in the Act, including exceptions relating to vehicle dealerships and retailers and merchants.[24] The CFPB will need to consider carefully how the respective consumer credit-related product and service markets should be defined.

D. Money Transmitting, Check Cashing, and Related Activities

Money transmitting generally involves the receipt of funds by a transmitter that then sends the funds via wire transfer, ACH transfer, or other means to a recipient in another location on behalf of a consumer, for a fee. The check cashing business generally involves the cashing of consumer checks by retail establishments for a fee. The sale of money orders and related items provides products consumers can use to pay bills or conduct other financial transactions. Typically, businesses engaged in the foregoing activities offer a menu of several of these products and services to consumers.

Money transmitting is a significant industry. Total transaction volume for money transmission was approximately $72 billion in 2005, with $40 billion of that amount transmitted internationally.[25] The CFPB will need to consider whether to include money transmitting alone, or money transmitting and related consumer financial products and services such as check cashing, as a market or markets to be covered in an initial rule. If multiple products are included, the CFPB will need to consider carefully how the respective product and service markets should be defined.

E. Prepaid Cards

A prepaid card product is one in which funds are paid into an individual or pooled account by, or on behalf of, a consumer and can be accessed by the consumer via a card (and in some cases, by alternative means). Prepaid card products include general purpose reloadable open-loop payment cards,[26] non-reloadable open loop payment cards, closed-loop gift or store cards,[27] electronic benefits transfer cards,[28] and payroll cards.[29] Multiple parties may be involved in offering or providing a prepaid card product. However, under the Act, the definition of ''consumer financial product or service'' would not include the sale or reloading of prepaid cards by persons that do not exercise ''substantial control'' over the terms or conditions of the stored value provided to the consumer.[30]

Prepaid card products affect a large number of consumers. Over $140 billion dollars in transactions were made with reloadable open-loop prepaid cards in 2009.[31] Over 11 million households have used these cards.[32] The CFPB will need to consider carefully whether to cover all or only certain types of prepaid card products in an initial rule, and, for those included, how to define the relevant market or markets.

F. Debt Relief Services

Debt relief services refer to consumer financial products and services offered to reduce a consumer's debt.[33] Providers generally offer one of two products or services.[34] Providers of ''debt management plans,'' typically non-profit credit counseling agencies, work with creditors to develop repayment plans for consumers. These plans typically permit a consumer to repay the full credit balance owed under renegotiated terms, such as substantially reduced interest rates and fees. For consumers who are unable to repay the full balance owed, ''debt settlement'' entities offer to negotiate with a consumer's creditors to enable the consumer to make a lump-sum payment of less than the entire balance owed to the creditor, thereby settling the debt obligation. Statistics on the size of these industries, as well as the size of other debt relief services, are not readily available.[35] The CFPB will need to consider carefully how to define any debt relief provider market or markets included in an initial rule.

The CFPB seeks public comment on the following:

- What consumer financial product or service markets should be included in the initial rule?
- How should the financial product or service markets included in the initial rule be defined? In addition to considerations relating to how to define the relevant product markets, should all markets be national in scope, or should the CFPB consider regional or other geographic markets in certain instances? If regional or other geographic markets should be considered, describe with specificity how they could be defined.
- What specific criteria should be measured, and threshold levels set, to define a larger participant in the markets identified above, and in any other markets that should be included in an initial rule? What data should be used to assess whether the thresholds have been met?

Dated: June 21, 2011.

Alastair Fitzpayne,

Executive Secretary, U.S. Department of the Treasury.

[FR Doc. 2011–15984 Filed 6–28–11; 8:45 am]

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[23] IBIS World Industry Report. *Auto Leasing, Loans and Sales Financing in the U.S.* (2009).

[24] *See* Act § 1029 (dealership exclusion); *id.* § 1027(a) (merchant and retailer exception).

[25] KPMG, *2005 Money Services Business Industry Survey Study* (2005).

[26] An open-loop card usually carries the logo of a major payment network, such as American Express, Discover, MasterCard, or Visa, and can be used wherever those cards are accepted.

[27] A closed-loop card usually can be used only at one store, chain of stores, or group of stores (such as stores in a shopping mall). *See* Act § 1002(28)(B) (setting forth exclusion for certain closed-loop cards).

[28] Electronic benefits transfer cards are made available by the Federal government and by state and local governments to allow individuals to access government benefits such as Social Security or unemployment compensation.

[29] Payroll cards are made available by employers to employees to access their salaries.

[30] Act § 1002(5) and (15)(A)(v)(I) and (II).

[31] Federal Reserve Board, *Noncash Payment Trends in the United States: 2006–2009* (Apr. 2011).

[32] Federal Deposit Insurance Corporation, *National Survey of Unbanked and Underbanked Households* (Dec. 2009).

[33] Principally, these providers offer to reduce consumers' credit card debt, but some providers offer to reduce medical or tax debt. Not included in the debt relief market are providers of debt relief services that relate to mortgage debt, commonly referred to as mortgage loan modification or foreclosure relief services. Section 1024(a)(1)(A) and (b) of the Act gives the CFPB authority to supervise those providers without regard to size.

[34] *See generally,* Federal Trade Commission, *Telemarketing Sales Rule: Final Rule* (debt relief services amendments), 75 FR. 48458 (Aug. 10, 2010).

[35] *Id.*

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0646; Directorate Identifier 2010–NM–224–AD]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace LP Model Galaxy and Gulfstream 200 Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed