



NEW AMERICA
FOUNDATION



Comment on Procedural Rules to Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination [Docket No. CFPB-2012-0021]

July 24, 2012

Submitted by:

Asset Building Program, New America Foundation

National Consumer Law Center (on behalf of their low-income clients)

This letter is submitted by the Asset Building Program at the New America Foundation and the National Consumer Law Center in response to a notice and request from the Consumer Financial Protection Bureau (CFPB) for public comment on the procedural rules to establish supervisory authority over nonbank organizations based on risk determination.

The Asset Building Program and the National Consumer Law Center appreciate the opportunity to submit this comment to the Consumer Financial Protection Bureau (the Bureau) regarding the Proposed Rule establishing the procedures by which the Bureau will assume supervisory authority over a nonbank institution pursuant to 12 U.S.C. 5514(a)(1)(C). The Bureau's decision to voluntarily seek comment on the Proposed Rule underscores their commitment to transparency and public engagement.

The Proposed Rule establishes a critical piece of the Bureau's supervisory infrastructure in empowering the Bureau to supervise nonbanks over which Dodd-Frank does not explicitly confer supervisory authority but whose conduct poses a risk to consumers that warrants the Bureau's regular examination. Flexibility in the Bureau's supervisory reach will speed the process by which the Bureau can respond to sudden developments in the nonbank sector and thereby strengthen consumer protection.¹

The Proposed Rule evidences an effort at the Bureau to minimize the regulatory burden it imposes on industry participants and strikes an effective balance between the need to protect consumers and the need to preserve a competitive business environment in which welfare enhancing financial services can take root and flourish. The Bureau anticipated and addressed concerns about the regulatory burden of the Proposed Rule by: (1) streamlining the process for gaining supervisory authority over a nonbank that is the subject of an enforcement action brought by the Bureau; (2)

¹ *Hearing before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 112th Cong. 48 (2011) (testimony of Elizabeth Warren).*

granting recipients of a Notice of Reasonable Cause the right to voluntarily consent to the Bureau's supervision at any point in the process; and (3) establishing an expeditious process for a respondent to supplement their written statement with an oral response.²

While the Proposed Rule has the potential to strengthen consumer protection in the market for financial services offered by nonbanks, we have two concerns regarding the Proposed Rule: (1) the process does not provide for a sufficient level of public disclosure; and (2) it is not clear if the affidavit required of respondents under the guidelines for the written response also applies to the supplementary oral response.

Our first concern is related to the opaque and informal nature of the proceedings. Although we recognize the need for confidentiality between the Bureau and the entity that is either under an order of supervision or may become subject to one, American consumers would benefit from access to information about: (1) the entities that have received a Notice of Reasonable Cause; (2) the entities under the Bureau's supervision; and, ideally, (3) the reasoning underlying the Bureau's determination regarding the supervisory order.

Dodd-Frank gives the Bureau significant latitude to determine the scope of its supervisory authority.³ From a consumer protection standpoint, whether such latitude is good or bad can depend on the Director's commitment to fulfilling the statutory prescriptions of 12 U.S.C. 5514(a)(1)(C).⁴ In part this is because conditioning the exercise of regulatory muscle on agency discretion opens the door to the threat of bureaucratic drift, which occurs when an agency departs from its legislatively intended purpose.⁵ Publicly disclosing the issuance of a Notice of Reasonable Cause and the subsequent verdict regarding the supervisory order would mitigate the risk that a future Director could neglect the obligations of the Bureau with impunity. This disclosure would not only empower consumers to make better choices about financial services; it would serve the purpose and democratic integrity of the Bureau.⁶

The following examples of agency disclosure offer precedents for the Bureau to consider in finalizing the Proposed Rule. The Federal Deposit Insurance Corporation maintains a database listing every bank it supervises that files under the Securities Exchange Act of 1934 and a database listing failed

² 77 Fed. Reg. 31227 (2012) (to be codified as 12 CFR 1091)

³ Carpenter, David H. (June 2012) *The Consumer Financial Protection Bureau (CFPB): A Legal Analysis*. (Congressional Report No. R42572). Washington DC: Congressional Research Service. Retrieved from Federation of American Scientists website: www.fas.org/sgp/crs/misc/R42572.pdf.

⁴ See Page 271, Moe, Terry. (1989). *The Politics of Bureaucratic Structure*. In John Chubb and Paul Peterson (Eds.), *Can the Government Govern?* (267-329). Washington: Brookings Institution.

⁵ Durant, Robert F., & Edwards, George C. (Eds.). (2010). *The Oxford Handbook of American Bureaucracy*. New York, NY: Oxford University Press.

⁶ Stirton, Lindsay, & Lodge, Martin. (2001). Transparency Mechanisms: Building Publicness into Public Services. *Journal of Law and Society*. 28(4), 471-489. Retrieved from: <http://www.jstor.org/stable/3657957>

banks.⁷ After meetings of the Board of Governors, the Federal Reserve releases minutes, a roll call vote, and a policy statement; although annual disclosure of Board policy is required by statute, the procedures that exist today were voluntarily adopted over the last few decades.⁸ Outside of the financial realm, the Secretary of the Environmental Protection Agency, under the Endangered Species Act, must publish in the Federal Register every determination made with respect to a petition for the protection of a species.⁹

Section 1016(c) of Dodd-Frank requires the Bureau to disclose “supervisory actions with respect to covered persons” in its semiannual reports to Congress, which provides an opportunity for the Bureau to make an accounting of its regulatory action pursuant to 12 U.S.C. 5514(a)(1)(C). However, even full disclosure under Section 1016(c) would still fail to satisfy two concerns. First, it would provide only for the release of information regarding “supervisory action,” whereas supervisory inaction is the concern. Second, the prolonged gaps between the reports would leave consumers vulnerable. The New America Foundation recommends that the Bureau explore a way to provide a means for the public to track the status of entities that have received a Notice of Reasonable Cause and those that are brought under supervision of the Bureau. For example, the Bureau could create an online database with information related to any supervisory action taken and not taken in addition to information about the risk posed to consumers by nonbanks it has suspected of posing an undue risk to consumers. Publicly disclosing the identity of a respondent may elicit comment from former or current customers. The increase in information resulting from customer feedback could bolster the Bureau’s case for supervising or not supervising a respondent.

In public statements, the Bureau’s leadership often emphasizes the importance of transparency. On July 19, 2012, Raj Date declared that increasing transparency is a primary objective in the Bureau’s rulemaking around not just mortgage services but “across other financial services markets as well.”¹⁰ On June 5, 2012, Richard Cordray, addressing the need for transparency in the market for student loans, stated that “The Consumer Bureau’s goal across consumer markets is to give people the confidence and peace of mind that the financial world is not full of tricks and traps that will ruin their lives. We want information to be clear and easy to understand so that consumers can make wise financial decisions for themselves and their families.”¹¹ Increasing disclosure at the Bureau would serve this aspiration.

⁸ Banking Act of 1935, 12 U.S.C. § 247(a); Burton, Maureen, Nesiba, Reynold F., & Lombra, Raymond. (2010). *An Introduction to Financial Markets* (2nd ed.). Armonk, NY: M.E. Sharpe, Inc.

⁹ The Endangered Species Act of 1973, 16 U.S.C. 1533 (b)(3)

¹⁰ *The Impact of Dodd-Frank on Consumer Choice and Access to Credit: Hearing before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services, 112th Cong.* (2012) (testimony of Raj Date).

¹¹ Cordray, Richard. (2012, June). Prepared Remarks by Richard Cordray. Presented at White House Press Briefing, Washington, DC.

Our second concern is the apparent absence of a requirement for truthfulness in the supplementary oral response. While the submission of the written response requires a signed affidavit attesting to the truthfulness of the information provided,¹² it is not explicitly stated that this affidavit also attests to the truthfulness of the information provided in the supplemental oral response. If the affidavit submitted with the written response does not cover the supplemental oral response, the Proposed Rule does not impose any measures to ensure truthfulness in the supplemental oral response. While we appreciate the Bureau's effort to minimize the burden of the Proposed Rule, we believe it vital to the public interest to make respondents accountable for the truthfulness of their supplemental oral response.

About the Asset Building Program: The Asset Building Program incubates promising policy proposals and serves as a leading voice on innovative public policies to enable low- and middle-income families in the U.S. and around the world to accumulate savings, access wealth-building financial services, develop financial capability, and build and protect productive assets across the life course. Our focus in the area of financial services aims to forge a new responsibility framework for consumer financial services in the 21st century; improve the effectiveness of financial education; expand access to wealth-building financial services; and enable low- and middle-income Americans to better manage debt in order to build assets.

About the National Consumer Law Center: Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

For follow up, please contact Pamela Chan (Chan@NewAmerica.net) or Bill Margeson (Margeson@NewAmerica.net).

¹² 77 Fed. Reg. 31230 (2012) (to be codified as 12 CFR 1091)