

CFPB Watch

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CFPB Proposes "Larger Participant" Rule to Supervise Consumer Reporting and Debt Collection Companies

The Consumer Financial Protection Bureau ("CFPB") on February 16, 2012 announced the first in a series of anticipated proposed rulemakings that will identify and define various nonbank "larger participants" in markets for consumer financial products or services that will be subject to the supervisory authority of the CFPB. This initial rulemaking proposes to bring two markets under the CFPB's supervision: consumer reporting and consumer debt collection.

Specifically, the CFPB has proposed to extend its supervisory authority over nonbanks offering consumer reporting whose annual receipts from consumer reporting exceed \$7 million, and nonbanks providing consumer debt collection whose annual receipts from such consumer debt collection exceed \$10 million.

Comments on the rulemaking are due by April 17, 2012. By statute, the final rule must be issued by July 21, 2012, and the CFPB has proposed to implement the final rule 30 days after it is published (although the agency is requesting comment on this timeframe).

Statutory Authority to Supervise Larger Participants

Under section 1024 of the Consumer Financial Protection Act of 2010, the CFPB was granted authority to supervise nonbanks of any size participating in the markets of residential mortgages, private education lending and payday lending. The same provision also gave the CFPB authority to supervise any "larger participants" of markets for consumer financial products or services that it defines by rule. This is the first attempt by the CFPB to exercise this authority in a formal proposed rulemaking.

Who Is Covered

As proposed, the rule would capture (1) consumer reporting agencies whose annual receipts resulting from consumer reporting are more than \$7 million, and (2) debt collectors whose annual receipts resulting from consumer debt collection are more than \$10 million.

- **Consumer Reporting:** Nonbanks providing "consumer reporting" would be defined to include those covered persons collecting, analyzing, maintaining or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service. Such activities, however, would exclude furnishing information to an affiliated person, furnishing information to a consumer reporting entity, and providing information that will only be used in a decision regarding employment, government licensing, or residential leasing or tenancy.
- **Consumer Debt Collection:** Nonbanks providing "consumer debt collection" would be defined to include those covered persons collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. A person would be deemed to offer or provide consumer debt collection where the relevant debt is either: (i) collected on behalf of another person; or (ii) collected on the person's own behalf, if the person purchased or otherwise obtained the debt while the debt was in default under the terms of the contract or other instrument governing the debt.

For the consumer reporting market, the CFPB has stated that the rule would capture: (1) the largest credit bureaus selling comprehensive consumer reports; (2) consumer report resellers; and (3) specialty consumer reporting agencies. The debt collection firms covered by the rule, according to the CFPB, would include: (1) firms that collect debt owed by another company for a fee; (2) firms that buy debt and collect the proceeds for themselves; and (3) debt collection attorneys and law firms that collect through litigation. The CFPB has explained that although it considered identifying these different business models as separate markets, it ultimately chose to define them as a single consumer reporting market and consumer debt collection market based on current available data.

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The proposed definitions of “consumer reporting” and “consumer debt collection” notably differ from those found in the Fair Debt Collection Practices Act (“FDCPA”) and the Fair Credit Reporting Act (“FCRA”). For instance, the term “debt collector” found in section 803(6) of the FDCPA includes a number of exceptions such that many companies often take the position that they fall outside the scope of the law. In its proposal, the CFPB has stated that one of its goals with supervising consumer debt collectors and consumer reporting agencies would be to increase compliance with the FDCPA and FCRA. While imposing a supervisory regime on such entities would not automatically require them to comply with the substantive provisions of the FDCPA and FCRA, the distinction between those entities covered raises a question as to what the supervisory examinations would be aimed at determining.

Criteria for Larger Participants

While the CFPB has wide discretion to identify criteria to define larger participants, it has proposed relying on “annual receipts” resulting from activities related to the market in question both for consumer reporting and debt collection. The term “receipts” is defined to mean “total income” (or in the case of a sole proprietorship, “gross income”) plus the “cost of goods sold” as those terms are defined and reported on Internal Revenue Service tax return forms. “Receipts” would not include net capital gains or losses.

As proposed, when determining whether annual receipts reach the \$7 million (for consumer reporting) or \$10 million (for consumer debt collection) threshold, the rule provides that as part of a statutory aggregation requirement, the annual receipts of affiliates must be included in the calculation. The rule clarifies that all such receipts would constitute only those resulting from consumer reporting or consumer debt collection activities and not those derived from other activities in which the entities may be engaged.

The CFPB has estimated that the rule would capture 7 percent of consumer reporting agencies (about 30 consumer reporting agencies accounting for about 94 percent of annual receipts from consumer reporting) and 4 percent of debt collection firms (about 175 companies accounting for 63 percent of annual receipts from the debt collection market). Such figures exceed those anticipated by industry.

Time Period Subject to Supervision

The proposal provides that a person determined to be a “larger participant” would remain a larger participant until two years from the first day of the tax year in which the person last met the test to qualify as a larger participant. The CFPB has explained that this arrangement would provide the CFPB with sufficient time to undertake and complete supervisory activities.

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Determinations of and Challenges to Status as Larger Participant

The CFPB has proposed providing nonbanks with written notice that the CFPB is initiating a supervisory activity. Under the proposal, the nonbanks would have 30 days to dispute their status as a “larger participant” subject to the agency’s supervisory authority. Such nonbanks would be given the opportunity to provide an affidavit and supporting documentation to state their case. Any entity that failed to respond to the agency’s initial written communication would be deemed to have acknowledged that it is a larger participant.

Implications for Future Rulemakings

The CFPB has signaled that it will identify additional “larger participants” in future rulemakings, which, based on last year’s Advance Notice, could capture such industries as prepaid cards, debt relief services, money transmitting and check cashing, and consumer credit and related activities. Although in this rulemaking the CFPB stated that it considers the consumer reporting and consumer debt collection markets as “single markets” and chose to use “annual receipts” as the criteria for determining which entities qualified as “larger participants,” the CFPB noted that it may use different criteria and thresholds when defining larger participants in other markets.

Nonbanks are already subject to the CFPB’s regulatory and enforcement authority, but if they wish to challenge whether they should also be subject to the agency’s supervisory authority as a “larger participant,” now is the time to raise those concerns while the comment period remains open. If you wish to submit comments for this or future rulemakings, the Venable [CFPB Task Force](#) team is ready to assist you. And, even if you are not in a market covered by this rulemaking, Venable attorneys can

assist you with examining the factors that the agency may consider when it undertakes efforts to define larger participants in your market.