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## CFPB Proposes Expedited Procedure For Subjecting Nonbank Entities To Its Supervision

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*Nonbank providers of consumer financial products or services have limited time to comment on the expedited process by which the CFPB would impose its supervision on those it deems to pose risk to consumers.*

**The Issue:** On May 25, the Consumer Financial Protection Bureau (CFPB) published for comment procedural rules by which it would impose its supervision over nonbank providers of consumer financial products and services.[1] Companies designated as posing risks to consumers would only have one chance to dispute that designation and avoid the potentially costly duties that accompany CFPB supervision. The deadline to comment on the proposed procedure is July 24.

One of the CFPB's missions is to regulate the "shadow market" for consumer financial services, which had developed beyond the purview of federal banking regulators.[2] With the enactment of Dodd-Frank, all consumer finance providers are subject to the CFPB's regulatory powers. [3] In addition, the CFPB has power to "supervise" those entities it deems to pose risk with regard to the offering or provision of consumer financial products or services.[4] According to the proposed rule, the Bureau will look to information it collects from consumer complaints as well as information from other sources as a basis for determining whether the entity poses such risk. If the Bureau does decide it has supervisory powers, it may require reporting of specified information and may subject to the entity to examinations by the CFPB on a periodic basis to (a) assess

compliance with consumer finance laws, (b) obtain information on the subject's activities, systems and procedures and (c) detect and assess risks to consumers and markets.[5] As such, the qualification decision could have significant impact on an entity's regulatory burden and risk.

The relevant highlights of the proposed procedure are:

- *Quick process:* The process begins with the receipt of a notice from the CFPB ("Notice of Reasonable Cause" or "Notice") asserting that the Bureau may have reasonable cause to determine that the recipient is engaging, or has engaged, in conduct that poses risk to consumers. The notice would include the basis for that assertion. After receiving CFPB Notice of Reasonable Cause, the recipient has 20 days to file a written response.[6] The recipient can also request an opportunity to make an oral statement.[7]
- *The Notice recipient has only one chance to present arguments and evidence against the CFPB designation:* The response must contain all arguments and documents with which the entity will contest the CFPB's determination that it warrants supervision based on the risk it presents. Any arguments or documents not presented in the original response will not be considered.[8]
- *Informal process:* The CFPB notes that when it designates an entity for supervision, it is not charging the entity with the violation of any law, and for that reason it is not an adjudicatory proceeding under the Administrative Procedures Act.[9] No discovery is permitted and the respondent cannot call witnesses.[10]

**Implication:** If the proposed streamlined process is adopted, it will be difficult to challenge the CFPB after it chooses to impose its supervisory authority. Providers of consumer financial products or services now have another, pressing reason to manage their reputational risk, including their procedures for handling consumer complaints, bad press and other indicia of consumer risk so as to avoid the CFPB's attention.[11] As described in our prior alert, (available [here](#)), an efficient complaint management process that enables real-time feedback mechanisms to the business is feasible. It is also cost effective, as it can mitigate the risk of costly CFPB examinations and potential consumer finance litigation.

If the CFPB believes an entity is suspect enough to be supervised, then an enforcement action may not be far off. If an entity receives a Notice of Reasonable Cause from the CFPB, it may wish to immediately and rigorously review its compliance with consumer financial law so as to avoid a CFPB enforcement action.

The procedures, and indeed the CFPB's statutory mandate, make heavy use of the term consumer "risk." While the CFPB's core function is to research the causes of such risk and mitigate them, the statute does not define the term "risk." However, the CFPB's Risk Assessment Template

provides dozens of factors that the CFPB currently looks at when assessing an entity's risk to consumers.[12] Based on a survey of those factors, perhaps a suitable shorthand definition for consumer risk can be: monetary loss suffered as a result of a consumer's inability to reasonably manage a financial product or service.

[1] 77 FR 31226 (May 25, 2012), available [here](#).

[2] Prepared Remarks by Richard Cordray before the Consumer Bankers Association, Mar. 21, 2012, available [here](#).

[3] The CFPB has enforcement powers under Dodd Frank §§ 1021(c)(4), 1036, 1051-1058; the power to issue regulations under Dodd Frank §§ 1021(c)(5), 1022(b)(1); the power to compel registration under Dodd Frank § 1022(c)(7) and the power to compel record-keeping under Dodd Frank § 1036(a)(2)(B) over virtually all providers of consumer financial products or services.

[4] Under Dodd-Frank §1024 and §1025, the CFPB already has such supervision powers over (a) large banks and credit unions; (b) "Large Participants" as defined by CFPB regulation to currently include large debt collectors and credit reporting agencies; (c) mortgage originators and servicers; (d) private education loan originators; (e) payday loan originators and (f) third parties who provide services to any of the above.

[5] Dodd Frank § 1024(b)(1).

[6] Proposed Rule 12 C.F.R. §1091.105(a).

[7] Proposed Rule 12 C.F.R. §1091.106(a).

[8] Proposed Rule 12 C.F.R. §1091.105(d).

[9] 5 U.S.C. §§ 554 and 556.

[10] Proposed Rule 12 C.F.R. §1091.106(b)(3).

[11] Proposed Rule 12 C.F.R. §1091.102(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.).

[12] CFPB Supervision and Examination Manual (Oct. 2011 release), page Risk Assessment 1, available [here](#).