



March 27, 2012

CFPB Proposed Rule – Defining Larger Participants in Certain Consumer Financial Product and Service Markets

Executive Summary:

- The Consumer Financial Protection Bureau (CFPB) has issued a proposed rule and request for comment relating to its authority to supervise certain nonbank entities for compliance with Federal consumer protection laws.
- The CFPB has authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets.
- The CFPB has additional authority to supervise “larger participants” in markets for other consumer financial products or services.
- The proposed rule would include certain debt collectors and consumer reporting agencies under the CFPB’s nonbank supervision program.
- In summer of 2011, The CFPB sought public comment about possible markets to include in the initial rule and available data sources the CFPB could use to define larger participants in nonbank markets. For a copy of CUNA’s comment letter, click [here](#).
- Under the proposed rule, debt collectors with more than \$10 million in annual receipts from debt collection activities would be subject to CFPB supervision.
- The scope of proposed covered debt collectors includes debt collectors, debt buyers and collection law firms.
- The proposed rule would also subject consumer reporting agencies with more than \$7 million in annual receipts from consumer reporting activities to CFPB supervision.
- This is the first in a series of rulemakings to define larger participants. As the CFPB adds new markets, it will choose the best criteria and the appropriate thresholds for each market. These new markets may include, but not be limited

to money transmitters, prepaid card providers, check-cashing agencies and consumer credit providers.

- The proposed rule does not apply to credit unions, regardless of size; however, credit unions might see changes in the quality and prices of consumer reporting and debt collection services if the rule is finalized as proposed.
- As required by the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB must define such “larger participants” by rule, and such an initial rule must be issued by July 21, 2012.
- The proposal would add Part 1090 to Chapter X in Title 12 of the Code of Federal Regulations.
- The proposed rule provides that the CFPB will notify covered entities in writing of their larger participant status, and the entity will have 30 days to respond. Once designated as a larger participant, an entity would retain that status for a two year period.
- Click [here](#) for the proposed rule. Comments are due to the CFPB by April 17, 2012, and can be filed at <http://www.regulations.gov>. **Please submit comments to CUNA by April 13, 2012.** If commenting directly to the CFPB, commenters should refer to Docket No. CFPB-2012-0005 or RIN 3170-AA00 on the comment letter.

For more information about this CFPB rulemaking, contact CUNA Deputy General Counsel Mary Dunn at Mdunn@cuna.coop or Senior Assistant General Counsel Jared Ihrig at jihrig@cuna.coop.

Detailed Summary:

Introduction

The CFPB is proposing a new rule pursuant to section 1024 of the Consumer Financial Protection Act of 2010 (Act). In the proposed rule, the CFPB proposes to define “larger participants” in the markets for consumer debt collection and consumer reporting. The CFPB intends that the proposed rule and the initial subsequent final rule will be followed by a series of rulemakings covering additional markets for consumer financial products and services. The CFPB also proposes to include provisions which will facilitate its supervision of nonbank covered entities.

The CFPB has the authority to supervise any “larger participant of a market for other consumer financial products or services,” as defined by rule by the CFPB.¹ The Act

¹ Act section 1024(a)(1)(B), (a)(2). The CFPB also has the authority to supervise any nonbank 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 section 1024(a)(1)(C).

requires the initial larger participant rule to be issued by July 21, 2012. The proposed rule would establish the initial larger participant rule for two markets: consumer debt collection and consumer reporting.

The CFPB is authorized to supervise nonbank entities subject to section 1024 of the Act by requiring the submission of reports and conducting examinations to: (1) assess 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.²

For the debt collection and consumer reporting markets, the CFPB is proposing a test that measures the criterion of "annual receipts." This measurement will use a definition of "annual receipts" adapted from the definition of the term used by the Small Business Administration (SBA) for purposes of defining small business concerns. The proposed threshold for the consumer debt collection market is more than \$10 million in annual receipts, and more than \$7 million in annual receipts for the consumer reporting market. Under the tests set forth in the proposed rule, these receipts must result from activities related to the market in question. Covered persons meeting the tests would qualify as larger participants and be subject to the CFPB's authority under section 1024 of the Act. While annual receipts are being proposed as the criterion for these two markets under the proposed rule, the CFPB has not yet determined that this would be the appropriate measure for any other market that may be the subject of a future rulemaking. Rather, the CFPB will tailor each test to the market to which it will be applied.

The proposed rule provides that once a nonbank covered person qualifies as a larger participant, the person will be deemed a larger participant for a period not less than two years from the first day of the tax year in which the person last met the applicable test. The proposal also includes a procedure for a person to dispute that it qualifies as a larger participant.

To facilitate the CFPB's supervision of nonbank covered persons, to enable the CFPB to carry out the purposes and objectives of the Act relating to supervision, and to prevent evasion, the proposed rule provides that the CFPB may require submission of certain records, documents and other information for purposes of determining whether a person is a larger participant of a covered market.

Proposed Effective Date

The CFPB proposes that once issued, the final rule would be effective 30 days after publication in the Federal Register.

² Act section 1024(b)(1).

Section-by-Section Analysis

Proposed § 1090.100

This section sets forth the scope and purpose of the rule, basically stating that the rule defines nonbank covered persons that qualify as larger participants, that larger participants of a market are subject to the supervisory authority of the CFPB, and that the rule establishes rules to facilitate the CFPB's supervisory authority over such larger participants.

Proposed § 1090.101

This section sets forth the definitions for the rule as follows:

- “Act” means the Consumer Financial Protection Act of 2010;
- “Affiliated company” means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person. For purposes of this definition:
 - “Company” means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization;
 - A person has control over another person if:
 - The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25% or more of any class of voting securities or similar ownership interest of the other person;
 - The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or
 - The person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.
- “Annual receipts” means receipts calculated as follows:
 - Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on IRS tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes

collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, are included in receipts.

- "Completed fiscal year" means a tax year including any short year. "Fiscal year," "tax year," and "short tax year" have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:
 - A "fiscal year" is 12 consecutive months ending on the last day of any month except December 31st;
 - A "tax year" is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a short tax year; and
 - A "short tax year" is a tax year of less than 12 months.
- "Period of measurement":
 - Annual receipts of a person that has been in business for three or more complete fiscal years means the total receipts of the person over its most recently completed three fiscal years divided by three;
 - Annual receipts of a person that has been in business for less than three complete fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52;
 - Where a person has been in business for three or more complete fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.
- "Annual receipts of affiliated companies":
 - The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies;
 - If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts used in determining size status include the receipts of such affiliated company for the entire period of measurement (not just the period after the affiliation arose);
 - Receipts are calculated separately for the person and each of its affiliated companies in accordance with the "period of

measurement” bullets above, even though this may result in a different period of measurement to calculate an affiliated company’s annual receipts. For example, if an affiliated company has been in business for a period of less than three years, the affiliated company’s receipts are to be annualized in accordance with the second bullet under “period of measurement” discussed above, even if the person has been in business for three or more complete fiscal years;

- The annual receipts of a former affiliated company are not included if affiliation ceased before the applicable period of measurement, as discussed above. This exclusion of annual receipts of former affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.
- “Assistant Director” means the Bureau’s Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under the proposed rule. In the event there is no such Assistant Director, the Director may designate an alternative Bureau employee to fulfill the duties of the Assistant Director.
- “Bureau” means the Bureau of Consumer Financial Protection.
- “Consumer” means an individual or an agent, trustee, or representative acting on behalf of an individual.
- “Consumer debt collection” means 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 offers or provides consumer debt collection where the relevant debt is either:
 - Collected on behalf of another person; or
 - 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.
- “Consumer financial product or service” means any financial product or service, as defined in section 1002(15) of the Act that is described in one or more categories under:
 - Section 1002(15) of the Act and is offered or provided for use by consumers primarily for personal, family or household purposes; or
 - Clauses (i), (iii), (ix), or (x) of section 1002(15)(A) of the Act and is delivered, offered, or provided in connection with a consumer financial product or service, as described in the first bullet above.
- “Consumer reporting” means:

- In general. Consumer reporting means 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;
- Exception for furnishing to an affiliated person. Consumer reporting does not include the activities of a person to the extent that a person:
 - Collects, analyzes, or maintains information that solely relates to transactions or experiences between the person and a consumer; and
 - Provides such information to an affiliate.
- Exception for furnishing information to a consumer reporting entity. Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and the person, or the affiliate of such person, to another person that is engaged in consumer reporting;
- Exception for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy. Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.
- “Larger Participant” means a nonbank covered person that meets a test under § 1090.103 of the proposed rule.
- “Nonbank covered person” means, except for persons described in sections 1025(a) and 1026(a) of the Act:
 - Any person that engages in offering or providing a consumer financial product or service; and
 - Any affiliate of a person that engages in offering or providing a consumer financial product or service if such affiliate acts as a service provider to such person.
- “Person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.
- “Supervision or supervisory activity” means the Bureau’s exercise, or intended exercise, of supervisory authority by initiating or undertaking an examination, or requiring a report of a person pursuant to section 1024 of the Act.

Proposed § 1090.102

This section sets forth the proposed covered markets and threshold tests for determining larger participants for those markets as follows:

- Consumer debt collection. A nonbank covered person that offers or provides consumer debt protection is a larger participant of the consumer debt collection market if the person's annual receipts resulting from consumer debt collection are more than \$10 million.
- Consumer reporting. A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than \$7 million.

Proposed § 1090.103

This section sets forth the proposed length of time that a person remains designated as a larger participant, as follows:

- A person qualifying as a larger participant under § 1090.102 shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under § 1090.102.

Proposed § 1090.104

This section sets forth the proposed appeals process for persons to dispute their status as a larger participant with the Bureau, and also discusses proposed records that may be requested by the Bureau from the larger participant:

- If a nonbank covered person receives a written communication from the Bureau initiating a supervisory activity, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this [proposed rule] within 30 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by [the proposed rule] and therefore is not subject to the Bureau's supervisory authority under section 1024 of the Act. In addition, a person may include with the response copies of any

records, documents, or other information on which the person relied to make the assertion.

- A person shall be deemed to have waived the right, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director as discussed above. A person who fails to respond to the Bureau's written communication within 30 days will be deemed to have acknowledged that it is a larger participant.
- The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement setting forth the Bureau's conclusion as to whether the person meets the definition of a larger participant of a market covered under [this proposed rule].
- At any time, including prior to issuing the written communication referred to in the first bullet of this section, the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to determine whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.
- The Assistant Director, in her or his discretion, may modify any timeframe prescribed by this section on his or her own initiative or for good cause shown.

QUESTIONS TO CONSIDER REGARDING THE PROPOSED RULE

1. The CFPB proposes that, once issued, the final rule for this proposal would be effective 30 days after publication in the Federal Register. Do you believe that this effective date is appropriate? Do you recommend that the CFPB adopt an alternative effective date?
2. The CFPB is seeking comment on each of the definitions included within proposed § 1090.101, and any suggested clarifications, modifications, or alternatives. The CFPB notes that certain key terms defined by the Act and adopted by the proposed rule, such as "consumer, are defined differently by other regulations such as Reg Z and Reg E. Should the CFPB conform any of these definitions to other regulations for consistency and, if so, which definitions should conform?

3. Do you have any comments with respect to how the CFPB is proposing to define “consumer debt collection?” Are there alternatives that should be suggested to the CFPB for this term?
4. Do you have any comments with respect to how the CFPB is proposing to define “consumer reporting?” Are there alternatives that should be suggested to the CFPB for this term?
5. The CFPB is seeking comment on whether the use of “annual receipts” is an appropriate criterion to use for determining larger participants for both the consumer debt collection as well as the consumer reporting markets, and whether any additional or alternative criteria should be used. Do you have any comments on this question? If another criterion should be used, please suggest data sources available for such criterion.
6. For the consumer debt collection market, the CFPB has proposed that persons with a threshold of more than \$10 million in annual receipts would be considered larger participants. The CFPB is seeking comment, including any possible alternatives on this threshold. Do you have any comments on this threshold?
7. For the consumer reporting market, the CFPB has proposed that persons with a threshold of more than \$7 million in annual receipts would be considered larger participants. The CFPB is seeking comment, including any possible alternatives on this threshold. Do you have any comments on this threshold?
8. The CFPB is proposing that once defined as a larger participant, that a person will continue to maintain this status for at least two years from the first day of the tax year in which the person meets the threshold tests discussed in questions 6 and 7. Do you have any comments as to whether this time period should be a shorter or longer one?
9. The CFPB is seeking comment on the proposed process described in proposed § 1090.104 discussed above. Do you have any comments on this proposed process for allowing a person to submit documentation to the CFPB supporting its assertion that it is not a larger participant?
10. Do you have any other general comments about the proposed rule you would like to share?

11. Are there other markets for consumer financial products or services that should be covered by future proposed rules to define larger participants?

12. Do you believe that the proposed rule, if finalized in current form, will have any impact on the cost to you for obtaining consumer debt collection or consumer reporting services? If so, please elaborate and give examples of such anticipated cost increases.