



May 31, 2022

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk
Determination; Public Release of Decisions and Orders, Docket No. CFPB-2022-0024

Dear Director Chopra,

The American Bankers Association¹ and Consumer Bankers Association² (the Associations) appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (Bureau, or the CFPB) procedural rule amending the risk-determination procedures applicable to the Bureau's exercise of supervisory authority over a nonbank entity that may "pose[] risks to consumers" regarding the provision of consumer financial products or services (Procedural Rule).³

I. Summary of Comment

The Associations fully support the authority given to the Bureau in section 1024 of the Dodd-Frank Wall Street Reform and Consumer Protection Act⁴ (Dodd-Frank Act) to supervise nonbank providers of consumer financial products or services (nonbanks) to ensure that federal consumer financial law is "enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."⁵ Section 1024(a)(1)(C) authorizes the Bureau to supervise nonbanks that "pose[] risks to consumers" (Nonbank Risk-Based Supervision Authority).⁶ That authority allows the Bureau to move quickly to supervise entities

¹ The American Bankers Association is the voice of the nation's \$24.0 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$19.9 trillion in deposits and extend \$11.4 trillion in loans.

² CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

³ Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders, 87 Fed. Reg. 25,397 (Apr. 29, 2022) [hereinafter, Procedural Rule].

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1337, *codified at* 12 U.S.C. § 5514.

⁵ *Id.* § 5511(b)(4).

⁶ *Id.* § 5514(a)(1)(C).

that present an immediate risk of harm to consumers. Under the Bureau’s 2013 final rule implementing the Nonbank Risk-Based Supervision Authority provision, the Bureau may exercise supervision of the nonbank for a period of two years under this authority.⁷

We support the Bureau’s announcement that it will use this authority to increase nonbank supervision.⁸ We agree that the Bureau should act nimbly in response to emerging risks. At the same time, the Bureau’s use of this authority is no substitute for the Bureau’s supervision of nonbanks using its authority to supervise “larger participant[s]” in a market for financial products or services.⁹ That authority allows the Bureau to provide ongoing — not time-limited — supervision of these larger participants.¹⁰

A cornerstone of Title X of the Dodd-Frank Act was the authority given to the CFPB to establish a supervisory program for nonbanks to ensure that federal consumer financial law is “enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition.”¹¹ Consumer protection laws and regulations must be enforced in a fair, comparable, and rational way for legal and regulatory obligations to be observed. The Associations have long believed that establishing comparable accountability across all providers of comparable financial products and services is a fundamental mission of the Bureau.¹² Only through ongoing supervision does an entity expend the resources to develop the practices, procedures, training, and other components of an effective compliance management system that promotes the entity’s compliance with consumer protection laws. We urge the Bureau to initiate expeditiously rulemakings to define data aggregators and nonbank consumer installment lenders as “larger participants” in their respective markets.

By the Procedural Rule, the Bureau proposes to establish a process for it to release publicly all or part of any decision or order (collectively, orders) subjecting the entity to the Bureau’s supervision.¹³ While we appreciate the Bureau’s intent to provide transparency in how it carries out its work, we oppose this change. Confidentiality has long been a bedrock principle of the supervisory process, and it should be preserved. We are concerned that the release of the Bureau’s orders would set a harmful precedent by disclosing confidential supervisory information.

We do not agree that the public release of these orders will provide helpful guidance to regulated entities about the CFPB’s interpretation of the law and regulations it enforces. Instead, the orders will be based on limited information regarding conduct that the CFPB has not investigated fully and only believes may be illegal, leaving the public and industry to speculate about what conduct might violate the relevant statute or regulation. Indeed, we believe the public release of these orders will exacerbate the challenges of “regulation by enforcement,” generating uncertainty

⁷ Procedural Rule to Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40,352, 40,376 (July 3, 2013), *codified at* 12 C.F.R. § 1091.103(b)(2).

⁸ Press Release, Consumer Fin. Prot. Bureau, CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers (Apr. 25, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/> [hereinafter, CFPB Press Release].

⁹ 12 U.S.C. § 5514(a)(1)(B).

¹⁰ *Id.*

¹¹ *Id.* § 5511(b)(4).

¹² *See, e.g.*, Letter from Robert A. Morgan, Am. Bankers Ass’n, to Consumer Fin. Prot. Bureau 9 (Feb. 4, 2021), <https://www.aba.com/advocacy/policy-analysis/cfpb-anpr-consumer-access-to-financial-records>.

¹³ *See* Procedural Rule, *supra* note 3, at 25,397.

among regulated entities and increasing their legal exposure, which discourage innovation in the design and delivery of financial services. Rather than seeking to provide transparency through these orders, we recommend the Bureau adopt procedures permitting the public release of the name of each nonbank subject to the Bureau's supervision pursuant to its Nonbank Risk-Based Supervision Authority and issue Supervisory Highlights publications to inform companies of emerging risks to consumers.

II. The Public Release of Bureau Orders Would Impair the Supervisory Process

As stated above, the Bureau proposes to establish a process for it to release publicly all or part of any decision or order subjecting the entity to the Bureau's supervision under its Nonbank Risk-Based Supervision Authority.¹⁴ Under the Bureau's 2013 final rule, documents, records, and other items relating to its decision to supervise a nonbank entity are classified as confidential supervisory information and protected from disclosure.¹⁵ According to the Bureau, the proposed change is intended to "increase the transparency of the risk determination process."¹⁶

We support the Bureau's efforts to provide greater transparency to regulated entities regarding the identification of conduct that violates clearly defined federal consumer protection law, particularly conduct that violates the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts or practices (UDAAP).¹⁷ Nonetheless, we oppose the proposed addition of section 1091.115(c)(2) that would provide an exemption to existing confidentiality guarantees in order to permit the Bureau Director to release orders regarding the agency's determination to supervise a nonbank using its Nonbank Risk-Based Supervision Authority. We believe that the orders constitute confidential supervisory information that must be protected from disclosure.

Confidentiality has long been a bedrock principle of bank supervision, as the Bureau acknowledges.¹⁸ It encourages candid communication and cooperation between bank management, the board, and the supervisory authority. Confidentiality is also critical to maintaining the public's confidence in the supervised entity. The release of these orders and other information from its supervision of nonbank entities would set a harmful precedent. We oppose any erosion of exam confidentiality. Without this protection, communication and cooperation between bank management, the board, and the supervisory authority could be impaired, and the public's confidence in the bank could be eroded.

The publication of these orders is particularly concerning because the Director's decision to exercise supervisory authority is based, by necessity, on incomplete information and an inchoate determination that a nonbank "poses risks to consumers" — not on a fully developed record and finding that the entity has violated a law or regulation.¹⁹ The objective of placing the entity under supervision is to enable full examination and assessment. After further investigation and analysis of the identified risks, examiners may determine that no violation of law occurred. Moreover, the determination that a nonbank poses risks to consumers would be based on consumer complaints or "[i]nformation from other sources."²⁰ In its press release announcing the Procedural Rule, the

¹⁴ *Id.*

¹⁵ 12 C.F.R. § 1091.115(c)(1).

¹⁶ CFPB Press Release, *supra* note 8, at 1.

¹⁷ 12 U.S.C. § 5531.

¹⁸ Procedural Rule, *supra* note 3, at 25,397 ("A central principle of the supervisory process is confidentiality.")

¹⁹ 12 U.S.C. § 5514(a)(1)(C).

²⁰ 12 C.F.R. § 1091.102(b)(2).

Bureau states that these other sources may include whistleblower complaints or news reports.²¹ Complaints and information from these sources may include unsubstantiated allegations, misunderstanding about the product's terms of service or activities, and other inaccurate or fragmentary information.²²

As previously explained, a central purpose of supervisory confidentiality is to provide the supervised entity with the freedom to share information with its regulator without fear that the information may become public. The threatened publication of these orders would discourage the nonbank from fully and freely responding to a Notice of Reasonable Cause issued by the Bureau. The nonbank would fear that the information shared in its response could be included in the published order.

The Bureau asserts that application of Exemptions 4 and 6 of the Freedom of Information Act (FOIA) would protect confidential information shared during the supervisory process. Those exemptions protect against disclosure of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential"²³ (Exemption 4) and protect against disclosure of information about individuals in "personnel and medical files and similar files" when the disclosure of that information "would constitute a clearly unwarranted invasion of personal privacy" (Exemption 6).²⁴ However, these FOIA exemptions do not constitute an absolute bar against disclosure, but instead are heavily contested and litigated when a party seeks protection from disclosure under the exemption. Consequently, reliance on the FOIA exemptions does not provide adequate protection against disclosure, and we oppose any inroad on the existing absolute bar against disclosure of confidential supervisory information.

Furthermore, the Bureau has not proposed a standard by which the Director would make a determination that a decision or order should be publicly released. The Bureau has not stated how it would balance the "public interest in transparency"²⁵ with the importance of confidentiality in the supervisory process. The absence of a standard would give the Director unfettered discretion to release (or not release) orders as the Director desires.

III. The Public Release of Bureau Orders Would Exacerbate the Challenges of "Regulation by Enforcement"

We also are concerned that publication of the Director's orders regarding the agency's supervision of nonbank entities adds to the challenges of "regulation by enforcement." In the Supplementary Information published with the Procedural Rule, the Bureau states that "[t]here is a public interest in transparency when it comes to these potentially significant rulings by the Director as head of the agency. Also, if a decision or order is publicly released, it would be available as a precedent in future proceedings."²⁶

²¹ CFPB Press Release, *supra* note 8, at 1.

²² See Letter from Jonathan Thessin, Am. Bankers Ass'n, to J. Michael Mulvaney, Acting Dir., Consumer Fin. Prot. Bureau, 7-8 (Jun. 4, 2018) (explaining how consumer complaints may be potentially false and misleading), <https://www.aba.com/advocacy/policy-analysis/letter-bureaus-rfi-consumer-complaint-reporting>.

²³ 5 U.S.C. § 552(b)(4).

²⁴ *Id.* § 552(b)(6).

²⁵ Procedural Rule, *supra* note 3, at 25,397.

²⁶ *Id.*

We anticipate that the vast majority of these orders will concern risks arising from allegations of unfairness, deception, or abusiveness, which are fact-specific determinations. Yet the published orders will contain few substantiated facts about the targeted conduct because the orders will be issued at a preliminary stage of the Bureau’s investigation, when the Bureau has identified only a potential risk but not a violation of law. The absence of a fully developed factual record and response from the relevant firm will make it exceedingly difficult for banks and other entities supervised by the Bureau to determine, with confidence, precisely what conduct or aspect of a product or service would constitute a regulatory or statutory violation. This uncertainty may discourage conduct that the Bureau ultimately would not deem illegal, including innovative ways of designing and delivering financial services. This “chilling effect” on the activities of banks and other supervised entities will harm consumers, who may have fewer products and services available to them.

Moreover, as noted the orders would describe conduct the Director *believes* poses risks to consumers, but a subsequent examination may show that there was no legal or regulatory violation. Yet this later finding — included in the exam report — would be confidential supervisory information that would not be made public. As a result, perfectly lawful conduct could be publicly “labeled” a UDAAP or other regulatory violation, which would have a chilling effect on other market participants. Publication of the Bureau’s orders therefore conflicts with Director Chopra’s stated desire to create “durable jurisprudence,”²⁷ to promulgate “laws that are clear, easy to follow, [and] easy to enforce,”²⁸ and to promote competition and innovation.

Publication of the Director’s orders also would increase the risk of class action litigation against nonbanks and other financial service providers. Plaintiffs’ attorneys likely will initiate litigation against companies that are named in the published orders, as well as against banks and other companies that offer products and services in the same market space. Because of reputational risk, companies will have a strong incentive to settle these lawsuits, even if the lawsuit targets conduct that the Bureau ultimately determines to be lawful.

The publication of these orders also would undermine competition and foster an unlevel playing field. Some financial institutions will review the Bureau’s orders and, out of caution, alter the institution’s products and services in response to the order. Yet the lack of clarity from these orders may lead each to take a divergent path to interpreting (or misinterpreting) the orders’ implications and altering its conduct. Still other financial institutions may maintain the status quo while awaiting further guidance. The result is the antithesis of Director Chopra’s goal of moving markets positively and ensuring that all financial institutions operate under the same set of rules.

IV. The Bureau Should Publish a List of Nonbanks Subject to Supervision and Issue Supervisory Highlights to Provide Transparency and Identify Illegal Conduct

Instead of publishing risk-determination orders, we urge the Bureau to publish at regular intervals a list of nonbanks that are subject to supervision under the Nonbank Risk-Based Supervision Authority. This would provide transparency to the public and to other market participants as to which nonbanks are subject to a risk-determination order. At the same time,

²⁷ *Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau: Hearing Before the H. Comm. on Fin. Svcs.* (2021) (testimony of Rohit Chopra, Dir., Consumer Fin. Prot. Bureau).

²⁸ *Id.* (testimony of Rohit Chopra, in response to question from Rep. Andy Barr (R-Ky.)).

publication of a list would not exacerbate the challenges of “regulation by enforcement” discussed above.

If the Bureau’s goal is to inform the market, we also recommend the Bureau issue an edition of its Supervisory Highlights publication identifying conduct ultimately found to be illegal by nonbanks, instead of publishing risk-determination orders. Editions of Supervisory Highlights describe illegal conduct — not risks — and provide the Bureau with an opportunity to describe the illegal conduct in detail based on a full record. This would help ensure that regulated financial institutions have clear laws to follow.

Conclusion

The Associations support the Bureau’s announcement that it will use its Nonbank Risk-Based Supervisory Authority to increase nonbank supervision. However, we oppose the Procedural Rule to establish a process for it to release publicly all or part of any decision or order subjecting the entity to the Bureau’s supervision. The public release of this information would set a harmful precedent by disclosing confidential supervisory information. The release also will not provide helpful guidance to regulated entities because the decision or order will be based on inchoate risk assessments resting on incomplete and potentially inaccurate information, not verified illegal conduct based on a full record and analysis. Instead, the Bureau should publish a list of nonbanks that are under its supervision and issue editions of Supervisory Highlights that describe the Bureau’s identification of illegal conduct by nonbanks.

The Bureau’s use of its Nonbank Risk-Based Supervisory Authority is no substitute for the Bureau’s supervision of entities using its separate authority to supervise “larger participant[s]” in a market for financial products or services. We urge the Bureau expeditiously to initiate separate rulemakings to define data aggregators and nonbank consumer installment lenders as larger participants in their respective markets.

Sincerely,



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