

April 29, 2022

CFPB Announces Intent To Examine Broader Array of Fintechs

CFPB Also Seeks Comment on Update to Related Procedures

SUMMARY

On April 25, the CFPB announced that it is invoking its heretofore “largely unused” or “dormant” authority to examine certain nonbank financial companies that could pose risk to consumers. According to the CFPB, many of these nonbanks “brand themselves as ‘fintechs’” and operate outside the CFPB’s existing nonbank supervision program. Noting the rapid growth of consumer offerings by these nonbanks, the CFPB stated its intent to “level the playing field” with supervised banks. The CFPB also issued a related procedural rule that would allow the CFPB to make public certain information about any final risk determinations made in connection with invoking this nonbank examination authority.

NONBANK SUPERVISION

Under Title X, Section 1024 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), the CFPB is authorized to supervise, among other nonbank entities, a nonbank covered person when the CFPB has reasonable cause to determine, by order, after notice to the person and a reasonable opportunity to respond, that such 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 (a “Nonbank Provider”).¹ The CFPB’s authority to supervise these Nonbank Providers includes requiring reports and conducting examinations to: (1) assess compliance with the requirements of federal consumer financial law; (2) obtain information about the Nonbank Provider’s activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to markets for consumer financial products and services.²

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On April 25, 2022, the CFPB announced that it is invoking its authority to supervise Nonbank Providers, which the CFPB characterizes as “largely unused” since the promulgation of Dodd-Frank in 2010 and the related rules in 2013.³ Noting the “rapid growth of consumer offerings by nonbanks” and referring to 12 U.S.C. § 5514, CFPB Director Rohit Chopra stated that the CFPB will “now utiliz[e] a dormant authority to hold nonbanks to the same standards that banks are held to” and “move as quickly as the market, allowing [the CFPB] to conduct examinations of financial companies posing risks to consumers and stop harm before it spreads.”⁴ The CFPB noted that risky conduct could involve “potentially unfair, deceptive, or abusive acts or practices, or other acts or practices that potentially violate federal consumer financial law” and that it could base a reasonable cause determination on complaints received by the CFPB, judicial opinions, administrative decisions, whistleblower complaints, information received from other regulators, or news reports.⁵

PROCEDURAL RULE AMENDMENT

In 2013, the CFPB promulgated a final rule establishing the procedures by which the CFPB would determine whether a nonbank covered person is a Nonbank Provider (the “Procedural Rule”) and thus subject to the CFPB’s supervisory authority under 12 U.S.C. § 5514.⁶

Records created in connection with proceedings under the Procedural Rule are generally considered confidential supervisory information (“CSI”), meaning they are not subject to public disclosure.⁷ With a view to increasing transparency around the CFPB’s final decisions that a nonbank covered person is engaging in conduct that poses risks to consumers, the CFPB is revising the Procedural Rule to provide the CFPB a mechanism by which it could publicly disclose final decisions and orders under the Procedural Rule (the “Publication Rule”).⁸ Specifically, the Publication Rule would (1) allow the CFPB Director to determine whether a final decision or order should be publicly released, in whole or in part and (2) allow the nonbank to, within seven days after service of any decision or order, submit arguments regarding whether such decision or order should be publicly released.⁹ According to the CFPB, the intent of the Publication Rule is to provide covered persons and consumers “a better understanding of the CFPB’s decisionmaking.”¹⁰ Although the Publication Rule is effective on publication in the Federal Register, the CFPB requests comment on the rule within 30 days of publication.

IMPLICATIONS

The CFPB’s announcement does not immediately impact fintech firms or other nonbanks that to-date have not been subject to supervision by the CFPB—i.e., those nonbanks do not, by virtue of the announcement, become subject to CFPB supervision. Rather, the CFPB will still need to follow the Procedural Rule before exercising its supervisory authority under 12 U.S.C. § 5514 with respect to any given nonbank. However, the announcement, particularly when coupled with the CFPB’s and Director Chopra’s recent actions and statements with respect to fintech firms,¹¹ plainly foreshadows future efforts by the CFPB to supervise and

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examine nonbanks just as it supervises and examines banks. Accordingly, all nonbank firms providing any such services or products, including those operating in the fintech and digital asset spaces, should remain alert to any decisions and orders made public pursuant to the Publication Rule, which may provide meaningful insight into conduct the CFPB considers to present sufficient risk to consumers to warrant a Nonbank Provider determination and the categories of nonbank firms subject to increased risk of a proceeding under the Procedural Rule. In addition, although the Publication Rule appears aimed primarily at providing such insight, it may also signal a greater receptiveness of the CFPB to authorizing public disclosures of CSI.

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ENDNOTES

- 1 12 U.S.C. § 5514(a)(1)(C). “Covered person” is defined broadly to include “any person that engages in offering or providing a consumer financial product or service” and any affiliate of such a person that acts as a service provider. 12 U.S.C. § 5481(6). “Consumer financial product or service” is also defined broadly and captures activities including extending credit, engaging in deposit-taking activities, providing payments or other financial data processing products or services and certain financial advisory services. 12 U.S.C. § 5481(15). Other nonbanks regulated by the CFPB include mortgage originators and servicers, payday lenders, private student lenders and services providers to such firms, subject to certain exceptions. 12 U.S.C. § 5514(a)(1)(A), (D) and (E); 12 U.S.C. § 5514(e); 12 U.S.C. § 5514(a)(3)(A).
- 2 12 U.S.C. § 5514(b).
- 3 CFPB, *CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers* (April 25, 2022), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/>.
- 4 *Id.*
- 5 *Id.*
- 6 12 C.F.R. § 1091.
- 7 12 C.F.R. § 1081.115(c)(1).
- 8 CFPB, *Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders*, available at https://files.consumerfinance.gov/f/documents/cfpb_public-release-of-decisions-and-orders_procedural-rule_2022-04.pdf.
- 9 *Id.* at 6-7.
- 10 *Id.* at 4-5.
- 11 See, e.g., *CFPB Shuttles Lending by VC-Backed Fintech for Violating Agency Order* (Dec. 21, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-shuttles-lending-by-vc-backed-fintech-for-violating-agency-order/>; *Consumer Financial Protection Bureau Opens Inquiry into “Buy Now, Pay Later” Credit* (Dec. 16, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-opens-inquiry-into-buy-now-pay-later-credit/>; *Statement Regarding the CFPB’s Inquiry into Big Tech Payment Platforms* (Oct. 21, 2021), available at <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms/>.

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