American Financial Services Association

July 24, 2012

Monica Jackson
Administrative Specialist
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Procedural Rules To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination (Docket No. CFPB–2012–0021 or RIN 3170–AA24)

Dear Ms. Jackson:

The American Financial Services Association ("AFSA") welcomes the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB") proposed rule ("Proposed Rule") establishing procedures to implement § 1024(a)(1)(C) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which gives the CFPB the authority to supervise 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.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

Definition of Risk

In order to promulgate a rule intended to set forth the procedures by which the CFPB will identify, for purposes of supervision a nonbank covered person who is engaging, or has engaged, in conduct that poses risks to consumers, the CFPB must determine what is meant by "risk to consumers."

The utilization of consumer financial products and services inherently involves risk. Selecting a lender for a personal loan, a home mortgage loan, or an auto finance loan, poses some degree of risk (even just credit risk) to the consumer. Although Congress mandated that the CFPB supervise covered persons engaging in conduct that poses risks to consumers in the Dodd-Frank Act, legislators obviously did not intend for the CFPB to supervise *all* covered persons. The CFPB must allocate its resources effectively and efficiently to best accomplish its mandate to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."

Therefore, it follows that Congress intended for the CFPB to supervise covered persons whose conduct poses **more** risk to consumers than is present in a comparable consumer transaction without that conduct.[1] This leads to the logical conclusion that each determination by the CFPB under § 1024(a)(1)(c) must be made on an individual, case-by-case basis. To avoid acting in an arbitrary and capricious manner, the CFPB must set forth clear and detailed descriptions of the process that it will follow and the factors that it will consider to determine whether a covered person's conduct poses more risk to consumers than is inherently present in the product or transaction without that conduct.

Determination of Risk

AFSA acknowledges that the Dodd-Frank Act directs the CFPB to supervise covered persons whom it determines, based on complaints collected through its consumer complaint system or information from other sources, to be engaging in, or to have engaged in, conduct that poses risks to consumers. We ask, however, that the CFPB carefully evaluate both the complaints that it receives and the information from other sources before making any determination.

Because the CFPB's complaint system permits the submission of complaints by third parties on behalf of consumers, the system runs the risk of being inundated with "complaints" from credit repair organizations, debt settlement companies, advocacy groups, politicians, competitors, and even blog sites dedicated to airing gripes about specific companies. This will most certainly result in a number of frivolous "disputes."[2] Although covered persons receive and respond to consumer complaints that occur naturally as part of the business process, the vast majority of "disputes" received under the auspices of the Fair Credit Reporting Act ("FCRA") are correctly identified as frivolous and or unfounded. We draw your attention to the fact that the federal financial agencies estimated in the Accuracy and Integrity Rule[3] that the percentage of frivolous or irrelevant disputes could range from 25 percent to 94 percent of all disputes.[4] Some of AFSA's members report that the actual number of frivolous disputes is even higher. Furthermore, many of the disputes that are not automatically deemed frivolous under the FCRA are either unfounded (in that they are based on a misunderstanding of the law) or not complaints at all; rather they are simple requests for information.

[1] It is critical to note that Congress directed the CFPB to make its determination on the basis of conduct, not on the basis of product or transaction characteristics. Any attempt to "determine" that a kind of product or a type of transaction poses risk to consumers would to exceed the authority of the CFPB.

[2] §41.43 (f) of the FCRA states that a dispute qualifies as frivolous or irrelevant if: (i) The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section; (ii) The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer, either directly to the furnisher or through a consumer reporting agency, with respect to which the furnisher has already satisfied the applicable requirements of the Act or this section; provided, however, that a direct dispute is not substantially the same as a dispute previously submitted if the dispute includes information listed in paragraph (d) of this section that had not previously been provided to the furnisher; or (iii) The furnisher is not required to investigate the direct dispute because one or more of the exceptions listed in paragraph (b) of this section applies.

[3] Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act. 12 C.F.R. Part 660

[4] 74 F.R. 31504

Furthermore, because the consumer complaints collected by the CFPB are not verified and validated, they can be false, misleading, or filed concerning the wrong company. The procedure the CFPB uses to verify complaints is insufficient. Complaints that are entered incorrectly are not corrected. Complaints may not be matched to the correct financial services company. There is no effort to eliminate frivolous complaints or to verify that a complaint submitted by a consumer's representative was actually authorized by the consumer. It is unclear if duplicate complaints are actually being removed from the database.

Thus, the CFPB should not make a determination that a covered person is engaging, or has engaged, in conduct that poses risks to consumers based solely on the number of complaints.

Nor should it make that determination on the basis of unverified *information from other sources* as it would be difficult to determine whether the information or data collected from these sources is reliable and unbiased. Moreover, it would be difficult, if not impossible, to verify the accuracy of external source conclusions, findings, or recommendations, or to determine if the research behind it was analytically and methodologically sound.

Reliance on information and data, and subsequent reports, conclusions, or recommendations provided by special interest organizations or other non-governmental third parties may be difficult to verify or substantiate, and could threaten or undercut the credibility and validity of CPFB actions in this area.

Instead, we recommend that the CFPB consider risks associated with specific products and acknowledge that the strong financial performance of some products during the recent crisis indicates lower consumer risks.

Submission of Additional Records, Documents, or Other Items

In the Proposed Rule, the CFPB states that, "the failure to timely raise an issue in, or submit records, documents, or other items with, the response constitutes a waiver of a respondent's right to raise the issue, or submit the records, documents, or other items . . . in any petition for judicial review." AFSA asks that the CFPB remove this prohibition and allow respondents to submit additional records, documents, or other items at a later date. Other federal agencies, such as the Federal Trade Commission ("FTC") and the Office of the Comptroller of the Currency ("OCC") do not prohibit the submission of additional materials in appeals or adjudication procedures. In fact, the OCC's Bank Appeals Process Guidance specifies that the OCC ombudsman contact the bank to ensure that the OCC has all relevant materials. Moreover, § 556 of the Administrative Procedures Act ("APA") states, "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." We ask that the CFPB do so as well. Additionally, the CFPB may raise new information during the oral response to which the covered person would need to respond, so we request that covered persons be allowed to submit an additional written response as follow-up to the oral response. Finally, we ask the CFPB to consider: (1) that a respondent is limited to gathering all supporting materials, and submitting them, within 20 days; (2) that the respondent will not be given additional time in which to supplement the record in the event it discovers important supplemental information; and (3) that

failing to submit everything within just 20 days is a "waiver" of the respondent's right to build a further record. Taken together, this extremely brief window of opportunity to respond effectively limits the respondent's ability to obtain judicial review of the CFPB's determination. We believe this violates fundamental fairness – due process – and again request that either the period for responding be expanded, and/or the respondent be allowed an extension of time to submit a full response, and/or that the respondent be allowed to submit supplemental materials within a reasonable time after the oral response if requested.

Section-by-Section Discussion

§ 1091.102 – Issuance of Notice of Reasonable Cause

In the Proposed Rule, the CFPB states that a Notice of Reasonable Cause ("Notice") shall be based on "complaints collected through the system 12 U.S.C. 5493(b)(3)" or "information collected from other sources." The CFPB should provide the covered persons receiving the Notice ("respondents") with a copy of each complaint that factored into the CFPB's decision to issue the Notice. Furthermore, the CFPB should ensure that any complaint used as the basis for a Notice is validated and verified. In order to adequately respond to the Notice, especially since the Proposed Rule permits respondents only one opportunity to provide records, documents, or other items, the respondents need to know to what, exactly, they are responding. This is an issue of fundamental fairness, as it is not reasonable to make a covered person respond solely to summaries, characterizations or conclusory statements about allegedly risky conduct. This is especially true when one considers that many financial service providers receive a large number of frivolous or unfounded complaints; therefore, respondents need an opportunity to verify that the complaints the CFPB is using as the basis of a Notice are not frivolous or unfounded. A covered person will be unable to adequately investigate a "complaint" or "information" collected from other sources and prepare a response without actually seeing the complaint or information the CFPB has relied upon.

AFSA also requests that the CFPB disclose what other sources of information the CFPB used in its decision to issue the Notice and what information those sources provided. Again, this is an issue of fundamental fairness since (1) covered persons have only one opportunity to provide documentation in response to the Notice, and (2) one cannot adequately defend against that which one does not know. Thus, it is imperative that covered persons have all the information they need to adequately respond.

Finally, this section states that the CFPB is authorized to issue a Notice when "the Bureau *may have* reasonable cause to determine that the nonbank covered person is engaging or has engaged in conduct that poses risks to consumer. . . ." This is a vague standard not in accordance with the statute. This is because the DFA states that the Bureau must actually *have* reasonable cause to believe that the covered person is engaging in conduct that *is* risky to consumers; it does not say the Bureau can subject covered persons to supervision based upon a suspicion that the covered person *may* be engaging in risky conduct:

> "The Bureau has reasonable cause to determine . . . that such covered person is engaging, or has engaged, in conduct that poses risks to consumers…." § 1024(a)(1)(C).

Therefore, AFSA believes that the CFPB should issue the Notice only when it *does* have reasonable cause, not just when it *may* have reasonable cause. Accordingly, we ask that the CFPB change § 1091.102 to state that the CFPB is authorized to issue a Notice of Reasonable Cause when "the Bureau *has* reasonable cause to determine that the nonbank covered person is engaging or has engaged in conduct that poses risks to consumer. . . . "

§ 1091.103 – Contents of Notice

We offer four comments on this section. One, we believe that the CFPB should include two additional items in the Notice. First, as mentioned above, the Notice should include copies of the complaints collected by the CFPB and/or the information from other sources that were used in the decision to issue the Notice. Second, the CFPB should include in the Notice a statement detailing what specific risk to consumers is under consideration; what conduct the respondent is engaging in or has engaged in that the CFPB alleges poses risks to consumers; and how that risk is increased by the respondent's alleged conduct.

Two, we request that the CFPB release a model Notice. Such a Notice would be very helpful to covered persons, in much the same way that the model notices released in the CFPB's "Know Before You Owe" campaigns will be helpful to consumers.

Three, this Proposed Rule states that "a respondent may file with the Assistant Director a written response to a Notice of Reasonable Cause no later than 20 days after a Notice is served on a respondent." Twenty days is far too short a timeframe for a respondent to review the Notice and the information contained therein and draft a response. This is especially important given that the CFPB will undoubtedly take ample time to thoroughly investigate before sending a Notice of Reasonable Cause, and because respondents are not permitted to supplement a response with additional records, documents, or items after the initial 20 days. Furthermore, there can be no assurance that the covered person may have actually received the Notice. It is possible that the Notice may not be routed to the right person for handling until many of the 20 days have elapsed.

And four, we have significant concerns with the language that states that nothing in this section shall be construed as requiring the CFPB to produce any documents or information to a respondent other than items as set forth in this section. Given the potentially significant ramifications of supervision, this seems unreasonable. In the interest of open and honest communication, we urge the CFPB to be willing to share any and all relevant information with respondents.

§ 1091.104 – Service of Notice

AFSA asks that the CFPB follow Rule 4 of the Federal Rules of Civil Procedure ("Rule 4") when it serves the Notice upon a respondent. The CFPB does not specify a reason for not following Rule 4, which will ensure that the proper designee of the respondent receives the Notice timely. Leaving a copy of the Notice at the respondent's office with a clerk or other person, sending a copy through the U.S. Postal Service (even by Registered Mail, Certified Mail, or Express Mail delivery), or sending a copy by third-party commercial carrier (even for

overnight delivery with a confirmation receipt) is not as reliable as following the procedures outlined in Rule 4. Given the size and complexity of organizations with multiple business locations that could receive this notification, and the potential delay that could arise if delivered to an incorrect location due to the short time-frame in which responses must be filed, providing notice in a reliable way is critical. Corporations and other entities all have agents and officers designated under state law to receive service of process, such as CT Corporation, and electronically transmit such process to their customers. These systems are tried and true. AFSA can think of no justification for establishing a completely different procedure for service of a Notice when a system exists that works and with which all covered persons use and are already familiar.

If the CFPB does not change the way in which the Notice is sent to the respondent, we ask that the CFPB provide a waiver or automatic extension of time for respondents who do not receive the Notice when it was supposed to be delivered.

§ 1091.105 – Response

As mentioned above, twenty days are not sufficient for respondents to adequately respond to the Notice (even with the extra days provided in Section 1091.111). This is particularly true since the Proposed Rule specifies that respondents cannot submit additional records, documents, or other items at a later date, and it may take most of those 20 days for the covered person (especially a smaller institution without in-house counsel) to find a lawyer or other person who can assist with its response. In this respect, we reiterate that the CFPB should follow the Federal Rules of Civil Procedure. Regulators tend to liberally apply the Rules to allow defendants time to answer or, if information with which to answer is not known, then to state that the defendant does not know (with liberally-granted time to amend its answer, and/or to request additional information (discovery) after which a defendant can still amend its answer).

AFSA asks that the CFPB allow respondents to reply to the Notice in a similar manner to the way that covered persons reply to complaints in the CFPB database. Respondents could have twenty days for an initial response, which would just be a notification as to whether the respondent intends to contest the Notice. The respondent would then have sixty days or longer to provide a complete response. Alternatively, the CFPB could grant a twenty day automatic extension whenever asked, much in the same way that courts grant extensions. Since the CFPB allows covered persons sixty days to respond to one complaint in the database, allowing only twenty days for a respondent to respond to an aggregate of complaints seems counter-intuitive.

In the event that response information includes privileged information, the Proposed Rule further provides that "documents, records or other items submitted by a respondent with a response shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1)(iv)." While 12 CFR 1070.2(i)(1)(iv) defines confidential supervisory information, it does not specify how such information will be kept confidential. AFSA is unclear as to whether information provided to the CFPB in response to a Notice will be privileged, and therefore, further clarity with respect to this issue is necessary.

§ 1091.106 – Supplemental Oral Response

AFSA understands that the CFPB believes conducting oral responses by telephone allows for more flexibility and is less burdensome than conducting an in-person response. While we appreciate that the CFPB is trying to be flexible and cost sensitive, AFSA maintains that respondents should have an option for an in-person meeting for the oral response, particularly when a complaint appears in person. In-person meetings better facilitate communication. Furthermore, we ask that the CFPB specify that either an oral or in-person response be scheduled at a time that is convenient for both the CFPB and the respondent.

Since the oral response must be scheduled ten days after the Assistant Director serves a respondent a notice advising of the date, time, and relevant information relating to the conduct of a supplemental oral response ("Oral Response Notice"), we ask that (1) the Oral Response Notice be sent to the respondent in accordance with Rule 4 to ensure that the Oral Response Notice is received in a timely manner by the appropriate employees, and (2) that the information presented in the Oral Response Notice be very clear.

This section permits the Assistant Director to impose "any limitations on the conduct of a supplemental oral response, including but not limited to establishing a time limit for the presentation of a supplemental oral response, and limiting the subjects to be addressed in a supplemental oral response." A time limit or limitation on the subjects to be addressed could prohibit a respondent from fully supporting its assertion that the respondent is not engaging in, or has not engaged in, conduct that poses risks to consumers. Thus, we ask both that the CFPB remove the time limit and allow respondents to submit additional records, documents, or other items as a follow-up to the oral response and questions by the Assistant Director. Experienced counsel all know that trial and appellate courts often ask litigants to supplement records, and AFSA believes that a response may generate such a request from the CFPB or that proceedings may bring to light the need to do so. Fundamental fairness requires that the CFPB, the complainant and the respondent not be deprived of the opportunity to present a full record.

§ 1091.108 – Recommended Determination

AFSA requests that the respondent receive an exact copy of what the Assistant Director submits to the Director. Given that the respondent does not have an opportunity to interact with the Director and the consequences of the determination could have a substantial impact on the respondent, it is imperative that the respondent know exactly what information the Director has. We are not aware of any compelling reason to prevent a respondent from knowing what the Assistant Director submits..

We also ask that the CFPB clarify what happens if no decision is rendered within the timeframe specified in the rule. Should the respondent consider itself not subjected to the CFPB's supervisory authority under 12 U.S.C. 5514(a)(1)(C)?

§ 1091.109 – Determination by the Director

AFSA believes that the CFPB should allow an administrative appeal to the Director before judicial review. Because respondents do not have an opportunity to communicate directly with

the Director, such a step would provide the Director with helpful information from the respondents. The CFPB should do its best to give respondents recourse other than judicial review, which could be expensive and time-consuming for both the CFPB and the respondent.

§ 1091.110 – Petition for Termination of Order

This section states that a respondent subjected to an order issued pursuant to § 1091.109(a)(1) may not petition the Director for termination of the order sooner than two years after the issuance of such an order and not more frequently than annually thereafter. The Dodd-Frank Act does not mandate that the respondent be supervised for two years. Accordingly, AFSA believes that two years is excessive and beyond the authority given to the CFPB by the Dodd-Frank Act. The CFPB should allow the respondent to petition the Director for termination of the order immediately after the respondent has remedied the behavior that the CFPB deemed risky. If the CFPB denies the petition for termination of the order, the respondent should not have to wait another year to petition again, but should be permitted to petition again after making additional modifications to the behavior deemed risky.

If the CFPB would like to continue supervising the respondent, the CFPB should have to follow the procedural rules to establish supervisory authority, *i.e*., providing the respondent with a Notice stating that the CFPB may have reasonable cause to determine that the respondent is engaging, or has engaged, in conduct that poses risks to consumers.

§ 1091.112 – Change of Time Limits and Effect of Deadlines

AFSA recommends that the CFPB remove the part of this section that states that requests for extensions of time are "strongly disfavored." We believe the CFPB should avoid using language that implies that regulated entities cannot exercise due care when responding to the CFPB. Such language detracts from the desire to create complete records to the fullest extent possible. As we noted above, because respondents only have one brief chance to provide records, documents, or other items, respondents should have longer than twenty days -- or a liberally applied extension of time -- to make sure that they have an opportunity to provide all relevant materials.

Regulatory Flexibility Act

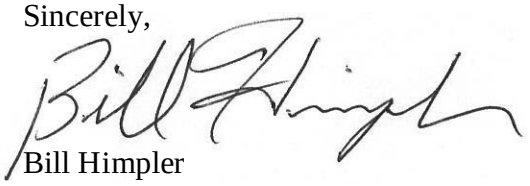
The CFPB states that the Proposed Rule would not have a significant impact on a substantial number of small entities. AFSA respectfully disagrees. As mentioned previously, smaller institutions, of which there are many, will need adequate time to find legal counsel, meet with said counsel, and provide counsel with the information the counsel thinks she needs to draft an appropriate response to the CFPB (some of which may be in a remote office), all within the proposed twenty-day time frame. Given the staffing and resources constraints that smaller institutions may have, these proposed "procedures by which a nonbank covered person may become subject to the Bureau's current supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C)" may impose a significant burden on these companies. In fact, we believe that this rulemaking arguably has a greater impact on smaller institutions who may not be aware that they are could be within the grasp of the CFPB's direct supervisory authority and are less likely to have in-house or outside counsel capable to respond to the Notice within the timeframes

proposed by the CFPB. Therefore, AFSA maintains that the CFPB conduct the appropriate Regulatory Flexibility Act analyses to determine the extent of that impact.

Conclusion

We look forward to working with the CFPB on this Proposed Rule. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
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