

May 31, 2022

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

Re: *Proposed Rule on 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 Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the procedural rule to establish supervisory authority based on a risk determination (the “Rule”).² Specifically, the Rule implements § 1024(a)(1)(C) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), which gives the Consumer Financial Protection Bureau (the “Bureau” or “CFPB”) the authority to supervise a nonbank covered person when the CFPB determines that such person is engaging in conduct that poses risks to consumers.

AFSA fervently opposes the Bureau’s proposal to publicize its designation of a covered person as a—yet undefined—“risky business.” Before using this authority, and in the interest of transparency, AFSA urges the Bureau to define “risk to consumers.”

I. Change of Confidentiality of Proceedings

AFSA strongly discourages the Bureau from publicizing any designation of covered persons under this Rule. As the Bureau states itself in the Rule, “a central principle of the supervisory process is confidentiality.”³ AFSA concurs. There is a vast and insurmountable difference between the public knowing that *all* banks over \$10 billion, along with companies designated as “larger participants” by the CFPB in a rulemaking, and the Bureau deeming a *specific* business risky—again, under yet undefined criteria—and announcing that it will be supervised by the Bureau.

AFSA finds the logic behind this change flawed. While the Bureau states it proposes this change to “level the playing field,”⁴ this Rule does not create parity, but rather exposes companies to a potentially public, reputation-damaging designation of “risky” with little opportunity to challenge it due to a lack of an administrative appeals process. The mere adverse publicity associated with a Bureau declaration that a business is risky would impose unfair adverse reputational consequences upon the business. The public

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² 87 FR 25397 (April 29, 2022).

³ *Ibid.*

⁴ “CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers.” (April 25, 2022). Consumer Financial Protection Bureau. Available at: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/>.

disclosure of the designation creates both an unnecessary confirmation bias and an unfair distrust of certain companies.

Moreover, when the Bureau makes a public declaration of supervision of a particular business model or product, this action alone sends a message to the market (to competitors, investors, and customers) that something is wrong at that institution. And, under existing exam confidentiality rules, the supervised nonbank cannot make any public remarks about the nature of the supervision to address the Bureau's public disclosure. Further, if the nonbank were allowed to defend itself in the court of public opinion, the exam will be adversarial. As a result, the nonbank will be harmed by the declaration without any way to put the declaration of supervision in proper context.

II. Definition of Risk

The Bureau must determine what is meant by “risk to consumers” in order to best accomplish its mandate to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.” In 2013, AFSA submitted comments to the Bureau on the then-proposed rule titled the “Procedural Rule To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination.”⁵ These comments encouraged the Bureau to adequately define the actions or conduct that the Bureau believed posed risks to consumers.

In the final rule, the Bureau asserted that since “risks to consumers...is not defined by [12 U.S.C. 5514(a)(1)(C)] or any other provision of the Dodd-Frank Act, and neither the Dodd-Frank Act nor any other law requires the Bureau to define the phrase before implementing 12 U.S.C. 5514(a)(1)(C),”⁶ the Bureau declined to provide a clear and cohesive definition of behaviors it would consider risky. This lack of guidance not only leaves nonbank covered persons without a clear understanding of what conduct is prohibited under the Rule, but also leaves the Bureau without proper guidelines to effectively use its resources. Moreover, with the lack of clear definitions and without formal rulemaking, any decisions which are made thereafter violate the Administrative Procedures Act's requirement that an agency's actions not be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”⁷

As with many consumer products, the consumer financial products and services market inherently involves some degree of risk to the consumer as they select a provider for a personal loan, a home mortgage loan, or an auto finance loan.⁸ When Congress mandated that the Bureau supervise covered persons engaging in conduct that poses risks to consumers in the Dodd-Frank Act, legislators obviously did not intend for the Bureau to supervise all covered persons. Congress intended for the Bureau to supervise covered persons whose conduct poses more risk to consumers than is present in a comparable consumer transaction without that conduct.

As a result, the Bureau must make each determination of the level of risk on a case-by-case basis. The Bureau must set forth clear and detailed descriptions of both the process that it will follow when determining risk and the factors that it will consider in determining whether the conduct poses more risk to consumers than is inherently present in the product or transaction without that conduct. Providing a bright-line definition would clarify to the covered persons what the Bureau considers inappropriate conduct and aid the Bureau in allocating its time to properly supervise truly risky businesses.

⁵ 78 FR 40351.

⁶ 78 FR 40351, § 11091.101.

⁷ 5 U.S.C. §706(2)(A).

⁸ Additionally, what the Bureau has left out of this discussion, and does not seem to consider, is that there is risk for the nonbank lender as well.

Additionally, a clear definition of the “risks to consumers” will aid in the Bureau’s mission to enhance transparency. In the Director’s testimony before the Senate Banking Committee last month, the Director stated: “Laws work best when they are easy to understand, easy to follow, and easy to enforce.”⁹ This statement is undeniably true; however, the lack of definitions in the Rule makes it difficult to understand, to follow, and to enforce in a fair and appropriate manner. AFSA requests the Bureau to incorporate clear definitions in the Rule as a part of its mission and commitment to transparency.

* * *

AFSA appreciates the Bureau giving careful consideration to this rulemaking. We look forward to continuing to work with the Bureau. If you have any questions or require additional information, please do not hesitate to contact me at 202-776-7300 or cwinslow@afsamail.org.

Sincerely,

A handwritten signature in black ink that reads 'Celia Winslow'. The signature is written in a cursive, flowing style.

Celia Winslow
Senior Vice President
American Financial Services Association

⁹ “Written Testimony of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs”. (Apr 26, 2022). Consumer Financial Protection Bureau.