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CFPB Targets Debt Relief Services Market for Supervision

On June 23, 2011, the Consumer Financial Protection Bureau (“CFPB”) announced it had targeted debt relief services as one of six nonbanking consumer financial market areas that could be classified as “larger participants” and subject to supervision by the CFPB.

The CFPB’s announcement, in the form of a Notice and Request for Comment (the “Notice”), was made in preparation for an eventual rulemaking on a key element of the agency’s nonbank supervision program: the statutory requirement to define who is a “larger participant” in certain consumer financial markets.

Under the Consumer Financial Protection Act (the “Act” or the “CFPA”) – Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act – the CFPB must issue an initial “larger participant” rule no later than July 21, 2012, one year after the CFPB will be up and running. The Act authorizes the CFPB to require reports and conduct examinations of such participants. Once the scope of the nonbank supervision program is established, the operation of the program will be based on an assessment by the CFPB of the “risks posed to consumers in the relevant product markets and geographic markets.”

According to the Notice, the term “debt relief services” is in reference to “consumer financial products and services offered to reduce a consumer’s debt.” The CFPB states that providers generally offer debt management plans or debt settlement services. “Principally, these providers offer to reduce consumers’ credit card debt, but some providers offer to reduce medical or tax debt,” stated the CFPB. “Statistics on the size of these industries, as well as the size of other debt relief services, are not readily available. The CFPB will need to consider carefully how to define any debt relief provider market or markets included in an initial rule.”

Of particular importance to debt relief service market participants, in a footnote of the Notice, the CFPB states the “debt relief market” does not include “providers of debt relief services that relate to mortgage debt, commonly referred to as mortgage loan modification or foreclosure relief services.” The Act gives the CFPB “authority to supervise those providers without regard to size,” along with other covered persons in the residential mortgage market, as well as the private education lending and payday lending markets.

Other markets identified by the CFPB for potential supervision are: debt collection; consumer reporting; consumer credit and related activities; money transmitting, check cashing and related activities; and prepaid cards.

Designation as a “larger participant” under this supervisory program would not impose new consumer law requirements on nonbank companies, as all companies, regardless of size, are required to comply with applicable federal consumer protection laws with respect to the products and services they provide.

The comment period closes 45 days after the publication of the Notice in the Federal Register. The Notice is available online at <http://www.consumerfinance.gov/notice-and-comment/defining-larger-participants-in-certain-consumer-financial-products-and-services-markets/>, and contains information about how to submit responses.

A brief summary of the Notice and areas for comment follows.

CFPB Nondepository Supervision Authority

The CFPA charged the CFPB with ensuring that both banks and nonbanks comply with federal consumer financial laws. The CFPB is required under Section 1024 of the Act to implement a risk-based supervision program for certain nondepository covered persons.

The purposes of this supervision program are to: (1) assess nondepository covered persons for 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.

The CFPB has said that in implementing this supervision program, it may, among other things, require submission of reports and conduct onsite examinations of a covered person to assess the covered person's compliance with federal consumer financial law and to achieve the other purposes described above.

Although the CFPB can require such entities to register, the Notice indicates that they intend to make such a decision in a separate rulemaking. The CFPB, however, has said that registration could help to support the implementation of the supervision program.

Scope of Supervision Program

The Act authorizes the CFPB to supervise depository institutions and certain other entities that provide consumer financial products or services ("nondepository covered persons") and all sizes of nonbank (1) origination, brokerage, or servicing of residential mortgage loans secured by real estate, as well as related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. But, before the CFPB begins its nonbank supervision program in other markets, the Act requires that the agency first define by rule who is "a larger participant of a market for other consumer financial products or services."

Once the scope of the nondepository supervision program is established, the Act requires that the operation of the program be based on an assessment by the CFPB of the "risks posed to consumers in the relevant product markets and geographic markets." Under the Act, the factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services, risks to consumers, the extent to which institutions are subject to state supervision, and any other factor that the CFPB determines to be relevant.

Issues in Drafting a Rule to Define a "Larger Participant"

The CFPB seeks public comment on the issues presented in drafting a rule to define a "larger participant." The Notice presents a number of general questions for comment, although the CFPB has invited public comment on all issues relevant to the development of this proposal.

The general questions asked in the Notice for comment span three principal areas:

1. Criteria and Thresholds to Define a Larger Participant.

- What criteria to use to measure a market participant.
- Where to set the thresholds for inclusion.
- Whether to adopt a single test to define larger participants in all markets (measure the same criteria and use the same thresholds), or instead use tests tailored for specific markets.

2. Data to Be Used in Measuring Criteria.

- What data are available to be used for these purposes.

3. Measuring Dates and Supervision Timeframes.

- What time period to use to measure the size of a market participant.
- How long a participant should remain subject to supervision after initially meeting the larger participant threshold, even if subsequently falling below the threshold.
- What consumer financial markets to include in the initial rule.

Consideration of Markets to Include in the Initial Rule

In addition, the CFPB solicits comment on whether the six categories identified in the Notice – debt collection, consumer reporting, consumer credit and related activities, money transmitting, prepaid cards, and debt relief services – should be covered in the initial rule, whether each particular category consists of a single market or multiple markets, and whether other markets also should be addressed. Although the CFPB anticipates including certain specified markets in an initial rule, additional markets may be added through subsequent rulemakings. The specific questions asked by the CFPB in the Notice are:

- What consumer financial product or service markets should be included in the initial rule?
- How should the financial product or service markets included in the initial rule be defined? In addition to considerations relating to how to define the relevant product markets, should all markets

be national in scope, or should the CFPB consider regional or other geographic markets in certain instances? If regional or other geographic markets should be considered, describe with specificity how they could be defined.

- What specific criteria should be measured, and threshold levels set, to define a larger participant in the markets identified above, and in any other markets that should be included in an initial rule? What data should be used to assess whether the thresholds have been met?

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Update: The Notice was published in the Federal Register on June 29, 2011. The deadline for comments is August 15, 2011. The Notice is available **online** and contains information about how to submit a response.

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