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CFPB Request for Comment: Identifying Non-Depository Companies for Direct Examination and Supervision

Summary

On June 29, 2011, the CFPB (through the auspices of the Treasury) published in the Federal Register one of its most significant notices to date. (*76 Fed. Reg.* 38059) Specifically, the CFPB has asked for public comment to identify "larger" non-depository providers of consumer financial products and services that will be supervised and examined directly by the CFPB. Among other things, the identification process will also include requiring specified entities to register with the CFPB, to provide regular reports of their activities, and to become subject to direct enforcement for violation of federal consumer laws by the CFPB.

Discussion

The Dodd-Frank Act provides the CFPB with direct supervision over all depository institutions worth over \$10 billion, plus the following non-depository entities regardless of size:

- lenders, servicers and brokers of residential mortgage loans;
- mortgage modification and foreclosure relief services;
- private educational lenders; and
- payday lenders.

For all other non-depository entities that provide consumer financial products and services, the CFPB must issue regulations identifying "larger participant[s] of a market for other consumer products and services..." Once identified, the CFPB will assume jurisdiction over such larger market participants, and may subject them to a range of supervisory oversight, including:

- federal registration;
- direct examination and supervision;
- enforcement by the CFPB for violations of federal consumer laws; and
- off-site reporting and related investigative inquiries.

In particular, the CFPB has initially identified the following categories of providers of consumer financial products and services that it believes may warrant direct supervision:

- debt collection agencies;
- credit reporting agencies;
- consumer lenders, servicers and brokers (i.e., non-real-estate related);
- money transmitters, check cashers and similar entities;
- prepaid card providers; and
- debt relief services.

In its request for public comment, the CFPB has invited industry comment on a host of legal issues

pertaining to the criteria it will adopt for identifying larger non-depository entities. Topics that would impact the selection criteria include:

- criteria based upon size—including factors such as number, size or value of transactions;
- annual receipts or revenue;
- geographic coverage, including relative market penetration on an intrastate or interstate model; and
- determining whether factors should be adopted regardless of the industry segment or whether the CFPB should adopt criteria pertinent to each industry segment.

It is important to note that there appears to be a dearth of experience at the federal staff level regarding the industry segments that are the subject of the rulemaking. Stated another way, companies concerned about their possible inclusion as being directly regulated by the CFPB might wish to consider the comment period as presenting the opportunity to educate the CFPB staff regarding their particular industry, including its operations. Similarly, the use of data regarding the operation of a particular financial service industry segment may prove valuable when advocating in favor of or against possible criteria for identifying larger non-depositories to be directly regulated.

Finally, due to the potential impact of the rulemaking, it is suggested that the 45-day comment period is a very short time period within which to develop suggested policy positions and supporting industry data.

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