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INTERNATIONAL

May 31, 2022

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Comments of ACA International - Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders (Docket No. CFPB–2022–0024)

Dear CFPB Staff:

On behalf of the Association of Credit and Collection Professionals (ACA International), I am writing regarding your rule already issued amending procedures for establishing supervisory authority based on a risk determination and the new mechanism for the Consumer Financial Protection Bureau (CFPB) to make final decisions and orders in these proceedings public. ACA represents approximately 2,100 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 125,000 people worldwide. Most ACA member debt collection companies are small businesses. The debt collection workforce is ethnically diverse, and 70% of employees are women.

ACA members play a critical role in protecting both consumers and lenders. ACA members' compliant work helps consumers by saving American households an average of more than $700 in savings per year, and ACA members work toward numerous compliance and ethical standards through industry-sponsored education and certifications. The accounts receivable management (ARM) industry plays a critical role in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. Data from 2018 shows that the total net debt returned to creditors through the ARM industry's work with consumers amounted to nearly $90.1 billion. This work benefits all American consumers and keeps the costs of goods and services down during a time when rising prices are harming Americans throughout the country. In short, ACA members are committed to helping consumers resolve their legally owed debts in a responsible manner, which helps create a sustainable marketplace. This is consistent with the Collector's Pledge that states all consumers should be treated with dignity and respect.

I. The CFPB's Decision to Issue a Procedural Rule Contrary to the Notice and Comment Process Violates the Administrative Procedure Act (5 U.S.C. § 553)

The CFPB's decision to issue a rule establishing supervisory authority over nonbank financial companies based on risk determination violates the Administrative Procedure Act (APA) by robbing the public of its right to be afforded notice and have the opportunity to comment. Section 553 of the APA requires that when a regulatory agency imposes new obligations, the agency must follow required rulemaking procedures, which include public notice, comment, and agency response. These procedures satisfy the requirements of procedural due process by ensuring that stakeholders are informed of changes affecting their rights and obligations and given the opportunity for meaningful participation. The CFPB claims that its rule establishing supervisory authority is exempt from the APA's notice-and-comment rulemaking requirements and that, "this rule will have limited effects on the public." This analysis is patently incorrect.

The CFPB's rule is procedural in name only. While the APA provides an exception for notice and comment procedures for rules, which are purely procedural, this exception is narrow and does not include any "any action which goes beyond formality and substantially affects the rights of those over whom the agency exercise authority."[1] Making new determinations about supervising entities based on the CFPB's opinion alone and exerting this power over the very the broad category of anyone, "engaging, or [who] has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services," opens the door to substantial changes in the marketplace that could lead to immense costs for companies and consumers.

It is nondebatable that the supervisory and examination process is extremely costly and requires substantial resources for businesses subject to it. A rule changing how and over whom this burdensome process is imposed thus necessarily has a major impact on the rights of the parties subject to it. Additionally, the new rule contains provisions allowing for the publication of previously confidential investigation information. As discussed in greater detail below, this change substantially affects the rights of the parties who face potential harm from this public "naming and shaming." Accordingly, ACA urges the CFPB to withdraw its rule, and to reissue the details and requirements for the risk-determination process in accordance with the APA and the notice and comment process.

II. The New Process for Public Release of Information is a Backdoor Attempt to Circumvent the APA and Conduct Rulemaking by Enforcement

The CFPB in its rule admits that in 2013, it made a different determination about whether supervisory proceedings should be public. It states, "Section 1091.115(c) of the existing rule provides, in summary, that documents, records or other items in connection with a proceeding under part 1091 shall be deemed confidential supervisory information." Nevertheless, the CFPB is reversing this determination by stating:

[1] *Pickus v. United States Bd. of Parole*, 507 F.2d 1107, 1113 (D.C. Cir. 1974).

> The Bureau is now adding a new § 1091.115(c)(2), which provides an exception regarding final decisions and orders by the Director. A central principle of the supervisory process is confidentiality. At the same time, these decisions and orders present unique considerations compared to other supervisory activity. There is a public interest in transparency when it comes to these potentially significant rulings by the Director as head of the agency.

The rule also notes that entities subject to a CFPB order or decision can file a submission with the CFPB regarding publication of the CFPB's determination. Additionally, it states that the CFPB can decide whether to publish on the CFPB's website the decision about whether the risk determination will be released to the public. Clearly, allowing for the public release of potentially harmful information substantially affects the rights of those businesses. Yet, the CFPB articulates no compelling reasons why the alleged benefits of publicly naming companies, outweighs the harm that comes with including information that is potentially embarrassing to businesses and business owners on a public website.

In fact, Director Rohit Chopra himself recently stated in a Congressional hearing that the CFPB should not be focused on naming and shaming small-business owners in response to a question from Congressman William Timmons, R-S.C..[2] Regulation through naming and shaming on a website, or through press release, to force unresearched policy changes in the financial services marketplace is an extremely dangerous way to regulate major sectors of the economy relied on by consumers. The CFPB provides no substantive reason why the publication of previously confidential information in the name of "transparency" produces a public benefit. Indeed, the very reason Congress has outlined specific procedures surrounding a rulemaking process is so that such proclamations cannot simply be made by federal agency leaders without applicable analysis or explanation.

The possibility of naming companies on a public website through the process the CFPB outlines in the name of transparency also conflicts with longstanding policies that several other financial regulators have for guarding confidential information garnered in the supervision process. ACA is unaware of any other financial regulator that has such broad authority to publicly target certain companies using Confidential Supervisory Information. In fact, in 2013, the CFPB previously stated:

> The Bureau does not intend to utilize this provision routinely, or as a matter of convenience, to circumvent applicable laws or provisions of the rule that exist elsewhere in subpart D to prohibit or restrict its disclosure of confidential information. Instead, the Bureau intends to use this provision in the same way that other Federal agencies utilize similar catch-all provisions—to account for rare situations in which an unforeseen and exigent need exists to disclose confidential information

[2] Bringing Consumer Protection Back: A Semi-Annual Review of the Consumer Financial Protection Bureau, available at https://financialservices.house.gov/events/eventsingle.aspx?EventID=408560 (October 27, 2021).

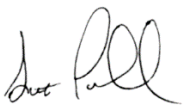
for purposes or in a manner not otherwise provided for in the rule.[3]

Moreover, the CFPB's intention to use this broad and vague authority, without providing more details to the public about its plans, allows it to pick winners and losers in the marketplace by negatively identifying certain financial products or services as problematic. Publicly favoring certain products and companies, without engaging in any data-driven research or analysis about them, is not the purpose of the supervision process. Under the Dodd-Frank Reform and Consumer Protection Act (Dodd-Frank Act), Congress contemplated several checks and balances on the system of creating new rules and policies. In addition to protections already in place requiring a detailed process for creating federal rules, Congress in the Dodd-Frank Act also required the CFPB to go through the Small Business Regulatory Enforcement Fairness Act of 1996 process to protect small businesses from overly burdensome rules that do not properly consider their size and structure. The creation of new policies and standards through the enforcement and supervision process conflicts with the Dodd-Frank Act and is contrary to the stated purpose of the CFPB to enforce federal consumer financial laws to ensure that all consumers have access to markets for consumer financial products and services that are fair, transparent, and competitive.

III. The CFPB Cannot Change the Scope of Finalized Rules through a Procedural Rule

In several sectors of the financial services marketplace, the CFPB has already clarified which entities are subject to the supervision process through defining "Larger Market Participants." This was done in 2012 for the debt collection industry after the CFPB solicited feedback through the notice and comment process and in accordance with the APA before finalizing a rule. At the time, it established a test based on "annual receipts" to assess whether a nonbank covered person engaging in consumer debt collection is a larger participant in this market. The definition of "annual receipts" is adapted from the definition of the term used by the U.S. Small Business Administration for purposes of defining small-business concerns. Any changes to this published final rule, particularly changes that significantly affect the rights of regulated parties, would need to go through the public process to provide regulated entities proper notice. Such changes undoubtedly would not fall under any exemption to the APA.

Thank you for your attention to the concerns of the ARM Industry. Please feel free to contact Leah Dempsey, Shareholder at Brownstein Hyatt Farber Schreck at Ldempsey@bhfs.com or I with questions.



Scott Purcell
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[3] 78 Fed. Reg. 11,499 (Feb. 15, 2013).