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May 31, 2022

Via Electronic Submission

Comment Intake—Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

RE: Docket No. CFPB-2022-0024—Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders

Dear Sir or Madam:

The Independent Community Bankers of America ("ICBA")[1] welcomes the opportunity to provide comment on recent amendments to the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") procedural rule regarding its supervisory authority over certain nonbank covered persons. Overall, ICBA is supportive of this amendment, as ICBA has long held that nonbanks should be examined and supervised for compliance with federal consumer protection laws. This procedural amendment will provide the public with confidence that the CFPB is protecting consumers from potential harm committed by nonbanks.

Background

The CFPB currently has authority to require reports and conduct periodic examinations of nonbank covered persons under the Dodd-Frank Act, including nonbank mortgage lenders and

[1]*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

servicers, private student lenders and servicers, and payday loan providers.[2] In addition to the nonbanks explicitly listed in the Act, the Bureau is also provided with the authority to supervise "larger participants" of a market for other consumer financial products or services.[3]

Finally, the Bureau is authorized to supervise nonbanks, which the Bureau has reasonable cause to determine, after notice and an opportunity to respond, that the nonbank 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. The Bureau bases its reasonable cause on complaints collected or information from other sources.[4]

The CFPB finalized a procedural rule in July 2013 that implemented this authority.[5] Among other provisions, the procedural rule established a notice requirement that would inform a nonbank that the Bureau may have reasonable cause to determine a nonbank is a covered person that 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. The procedural rule set out the required contents, service, and reply deadline of that notice, as well as the parameters surrounding a determination made by the Director that the nonbank recipient of the notice is, indeed, subject to the Bureau's supervisory authority.

Relevant to this current amendment, the 2013 procedural rule also provided that all documents, records, communications, or other items connected with a proceeding, either by a respondent or by the Bureau, be deemed confidential supervisory information. Now, the Bureau is amending its 2013 procedural rule by providing an exception to the confidentiality provision for final decisions and orders made by the Director.

ICBA Comments

In general, ICBA welcomes this change to the Bureau's procedural rule. ICBA has long believed that nonbanks, including fintechs and big tech, should be supervised for compliance with federal consumer protection laws. Nonbanks, especially technology companies, wield great power and influence over the market and should be subjected to oversight to ensure they ethically manage consumer financial data.

Nonbank technology companies are continuously looking to increase their presence in the financial services ecosystem. However, given their growth and increasing power in the financial services market, there does not appear to be a commensurate growth in the active supervision and examination of these providers. Nonbanks do not undergo routine examinations by federal

[2] 12 U.S.C. 5514(a)(1)(A).
[3] 12 U.S.C. 5514(a)(1)(B).
[4] 12 U.S.C. 5514(a)(1)(C).
[5] 78 Fed. Reg. 40352 (Jul. 3, 2013).

agencies to ensure compliance with fair lending laws. Nor are these entities required to comply with data security and privacy standards, such as Gramm-Leach Bliley Act ("GLBA") with which community banks are required to comply.

Under current federal law, technology companies and other parties that process or store consumer financial data are not subject to the same federal data security standards and oversight as banks. More troubling, certain nonbank technology companies might use loss-leader products to generate and harvest consumer data to be used for other purposes, unbeknownst to the consumer/customer. Regulators must play an equally active role in defining and identifying the risks big tech poses to consumers and businesses alike.

Recent and Ongoing Rulemakings Dictate CFPB Supervision of Nonbanks

As the Bureau moves forward in conducting and publishing risk assessments to determine which nonbank companies to supervise and examine, ICBA recommends that the Bureau's assessment take into account the following two pending rulemakings. Amending this procedural rule now provides the opportunity for nonbanks and fintechs to be supervised and regularly monitored for compliance on par with banks.

Dodd-Frank Act, Section 1071

Section 1071 of the Dodd-Frank Act requires financial institutions ("FIs") to collect certain data regarding applications for credit from women-owned, minority-owned, and small businesses, and to report that data to the Bureau on an annual basis. Although section 1071 will likely cover nonbanks, ICBA notes that there will be asymmetries in how covered entities will be assessed for complying with the final rulemaking.

For example, as ICBA noted in its comment letter,[6] small community banks will be supervised to ensure compliance with collecting and reporting the data fields set forth in the rule. The Bureau's expansion of its procedural rule to supervise nonbanks is desperately needed to ensure nonbanks are similarly examined for compliance with the final rule. Failure to do so would construct a regulatory system where the smallest community banks have to dedicate resources to compliance, whereas the largest nonbanks would not have to incur such similar costs.

Dodd-Frank Act, Section 1033

Another rulemaking relevant for large nonbanks under the Dodd-Frank Act, Section 1033, is currently pending at the Bureau. Under Section 1033, consumer financial services providers, including nonbanks, must make available to a consumer information in the control or

[6] ICBA Comment Letter RE: [Docket No. CFPB-2021-0015] — Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), (Jan. 6, 2022), *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-1071-small-business-lending-data-collection.

possession of the provider concerning the consumer financial product or service that the consumer obtained from the provider.

While nonbank entities, namely large technology companies and data aggregators, will likely be covered by this rule, it will be imperative for CFPB to examine and ensure that these nonbanks are complying with this rule. Nonbank data aggregators currently benefit from unregulated access to and storage of sensitive consumer financial data without the scrutiny of examinations.

ICBA has expressed concern that nonbanks, which access customer information and store bank login credentials, do not take the same care in protecting consumer privacy and data that community banks do. Nonbank entities accessing customer account data must be held responsible for ensuring the security of the consumer information they are accessing and must be held liable for any data breaches and consumer harm as a result of accessing consumer data.

To date, aggregators benefit from unregulated access to sensitive consumer financial data without the oversight of examinations. Banks, on the other hand, are vigorously examined by various federal regulators for consumer protection compliance. As aggregators continue to collect consumer data without commensurate supervision, the risk of harm to consumers continues to increase.

Supervision of Credit Union Service Organizations and Other Credit Union Third Parties
Under the Bank Service Company Act ("BSCA"), the federal banking agencies have direct oversight and supervisory authority over nonbanks that have a third-party relationship with banks. When nonbanks partner with banks, these nonbanks are folded into the supervisory framework and ecosystem, allowing the federal banking agencies to ensure their compliance with federal consumer protection laws.

In stark contrast are credit union service organizations ("CUSOs") and other credit union third parties. Because it is not empowered under the BSCA, the National Credit Union Administration ("NCUA") does not have similar supervisory authority over CUSOs. Given this regulatory blind spot, NCUA is not able to supervise or examine CUSOs' compliance with federal consumer protection laws.

CUSOs are separate entities from credit unions. Many CUSOs are for-profit entities, not owned by credit union members, and not required to have a board of directors comprised of members. They are not supervised by NCUA, not mutually owned, nor member-owned. They are privately owned, not required to serve only credit union members, and are often, for-profit. Importantly, they are not capped by usury rates in the Federal Credit Union ("FCU") Act. Simply put, CUSOs are nonbanks that do not have any federal supervision or examination.

As such, consumers do not have a protective layer of oversight or supervision when they interact with a CUSO. As the current chairman of NCUA, Todd Harper, lamented when dissenting to a recent rule that further deregulated CUSOs and credit union third parties, "we [NCUA] will not be taking substantive action to close these regulatory blind spots. Instead, this final rule will create an unregulated Wild West within the credit union space with little accountability for protecting consumers and credit unions."[7]

Several federal agencies, including the Government Accountability Office and the Financial Stability Oversight Council, have recommended and requested that NCUA be given supervisory oversight of CUSOs. Additionally, the chairs of every NCUA Board over the past decade, as well as NCUA's inspector general, have recognized the growing risks that emanate from CUSOs, similarly calling for the ability to examine and supervise CUSOs.[8]

Although FCUs are required to comply with consumer protection laws enumerated in the FCU Act, CUSOs are not similarly bound or required to comply with the same consumer protection laws. For example, FCUs are not permitted to originate loans at a rate that exceeds 15 percent per annum.[9] Yet, if a FCU wanted to avoid that usury ceiling, the FCU could easily direct the member to a CUSO in which it has an ownership interest for a loan, which has no such usury cap. Shedding light on this practice, former NCUA Board Chair Debbie Matz explained, "Many of the processes that go through CUSOs–originating speculative business loans, steering subprime indirect auto loans and selling risky loans to other credit unions–expose credit unions to undue risk."[10]

Yet, even if NCUA were given the power to supervise CUSOs for consumer protection, it is not certain whether the agency would have the capacity to do so. For example, a recent NCUA inspector general report found that NCUA does not investigate whether laws were broken when overseeing complaints: "Based on our review of complaints, we determined that the

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[7] Chairman Harper's dissent to credit union service organization final rule, (delivered Oct. 21, 2021), *available at https://www.ncua.gov/newsroom/speech/2021/ncua-chairman-todd-m-harper-statement-credit-union-service-organizations-final-rule.* Now finalized, Chairman Harper explained that the CUSO rule "will allow CUSOs to engage in payday lending that exceeds rate caps and without other consumer protection guardrails. That action will set back the agency's long-term efforts to create access to credit for provident and productive purposes and runs counter to the spirit of the Federal Credit Union Act." Also adding, "there is much to dislike in this rulemaking. It will give CUSOs the ability to become indirect auto lenders and payday lenders without applying consumer protection and prudential guardrails. It will also increase a regulatory blind spot and foster regulatory arbitrage."

[8] NCUA Office of Inspector General Report, "Audit of the NCUA's Examination and Oversight Authority Over Credit Union Service Organizations and Vendors" Report #OIG-20-07, Sept. 1, 2020, (hereinafter "NCUA IG Report") recommending that the FCU Act be amended to provide NCUA with supervisory authority over CUSOs and third-party vendors, and finding, at 13, "The Financial Stability Oversight Council (FSOC)… supports providing the NCUA with statutory examination and enforcement authority, as does the Government Accountability Office (GAO) when it made a recommendation consistent with the FSOC's position in a July 2015 report on cybersecurity."

[9] 12 U.S.C. §1757(5)(A)(vi).

[10] Marx, Claude R., "CUSO Regs Readied by the NCUA," Credit Union Times, Jul. 17, 2011.

agency's consumer complaint process focuses mostly on assisting consumers with resolving consumer complaints with their credit union as opposed to determining whether the credit union has violated a law or regulation… Because the credit union resolves the issue with the consumer without a violation determination, the credit union could continue violating the consumer protection laws after it resolves the complaint."[11]

Additionally, NCUA still has not sufficiently budgeted to have a consumer protection staff that conducts fair lending exams on a parity basis with other federal banking agencies. For example, the National Community Reinvestment Coalition recently noted that as the number of consumer complaints received by the NCUA rose from 3,480 in 2013 to 53,337 in 2018, the number of fair lending exams and supervisory contacts decreased from 70 to 66 over the same time period.[12]

Treatment of Confidential Information

While ICBA agrees with and supports the Bureau's procedural change that results in the publication of the Bureau's risk determinations of nonbank entities, we stress the importance of maintaining the confidential nature and findings of those examinations as they may constitute confidential investigative information or confidential supervisory information under 12 CFR 1070.2. Despite ICBA's desire to see nonbanks supervised to the same degree as banks, we would be gravely concerned if the Bureau were to publish such confidential information, as such a change would likely overlay supervision and investigation of community banks.

Conclusion

Because nonbanks continue to grow in size and expand their products and services, it is important that the CFPB is taking this procedural action to amend its practices overseeing nonbank service providers. Given that much of the federal consumer protection framework is dependent on ensuring compliance with laws and regulations, the Bureau's amended procedures will close a loophole that not only disadvantages community banks, but more importantly, poses undue risk to consumers.

[11] NCUA Office of Inspector General, Audit of the NCUA's Consumer Complaint Program, Report #OIG-21- 01, Feb. 9, 2021.

[12] Van Tol, Jesse, National Community Reinvestment Coalition, Comment Letter in Response to NCUA 2020- 2021 Budget, Dec. 2, 2019.

ICBA thanks the Bureau for the opportunity to comment on this procedural amendment. Should you like to discuss the recommendations made in this letter, please do not hesitate to reach me at Michael.Emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel