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CFPB ISSUES PROPOSED RULE ON LARGER PARTICIPANTS FOR DEBT COLLECTION AND CONSUMER REPORTING

The Bureau of Consumer Financial Protection (CFPB) issued a proposed rule pursuant to Section 1024 of the Dodd Frank Act that grants the CFPB authority to supervise larger participants in markets for consumer financial products or services, including broad access to books and records and the ability to make a variety of inquiries. In the proposed rule the CFPB proposes to define larger participants in the markets for consumer debt collection and consumer reporting. The CFPB indicated that it intends to follow this proposed rule with a series of rules covering additional markets for consumer financial products and services. Money transmitters, check cashers and pre-paid card issuers, reportedly, may follow next. The CFPB already has the authority to supervise mortgage industry participants and payday and student lenders of any size.

Market Tests

The proposal establishes a test for each market to determine whether a nonbank entity is a larger participant of that market. For the debt collection and consumer reporting markets, the CFPB is proposing a test that measures the criterion of "annual receipts." Under the tests set forth in the proposed rule, these receipts must result from activities related to the market in question. Covered persons meeting the proposed tests would qualify as larger participants and be subject to the CFPB's supervision authority under Section 1024 of the Dodd Frank Act.

The proposed rule provides that once a nonbank covered person qualifies as a larger participant, the person will be deemed a larger participant for a period not less than two years from the first day of the tax year in which the person last met the applicable test. The proposal also includes a procedure for a person to dispute that it qualifies as a larger participant.

The proposed rule provides that for purposes of determining activity levels for defining who is a larger participant of certain markets, the activities of affiliated companies (other than insured depository institutions or insured credit unions) must be aggregated.

Consumer Reporting

The proposed threshold for the consumer reporting market is more than \$7 million in "annual receipts" (discussed below).

The proposed definition states that the term "consumer reporting" means collecting, analyzing, maintaining or providing consumer report information or other account information, used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service. The definition provides exceptions for the activities of a person providing information related to their (or their affiliate's) transactions and experiences with a consumer to an affiliate or to a consumer reporting entity, as well as information used solely in a decision regarding employment, government licensing and residential leasing.

According to the CFPB, a threshold of more than \$7 million in annual receipts would cover no more than 39 credit bureaus, or 7 percent of credit reporting agencies. Because 75 percent of these credit bureaus are consumer reporting agencies, the threshold would likely cover approximately 30 out of approximately 401 consumer reporting agencies, according to the CFPB.

Debt Collectors

The proposed threshold for the consumer debt collection market is more than \$10 million in annual receipts.

The proposed definition describes "consumer debt collection" as collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. The definition provides that the debt may either be collected on behalf of another person or on the person's own behalf if the debt was obtained while in default, in an apparent attempt to include the consumer debt collection activities of certain debt buyers.

According to the CFPB, the proposed threshold would likely bring within the CFPB's scope of supervision approximately 175 entities out of approximately 4,500 firms engaged in debt collection or approximately 4 percent of all collection firms would be covered by the proposed threshold.

Annual Receipts

Under the proposed rule, for purposes of calculating "annual

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receipts," the term "receipts" means "total income" (or in the case of sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reporting on Internal Revenue Service tax return forms. The term does not include net capital gains or losses. Annual receipts are measured as the average of a person's most recently completed three fiscal years, or the average receipts for the entire period the person has been in business if it has less than three completed fiscal years. The calculation of annual receipts also implements the aggregation requirement by providing that the annual receipts of a person shall be added to the annual receipts of each of its affiliated companies. Such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

The CFPB noted that the proposal only defines larger participants in certain markets for purposes of the CFPB's supervisory authority and will not impose any new substantive requirements. The CFPB indicated that annual receipts may not be the appropriate test for other markets.

Comment Period

The CFPB is requesting comments on the proposed rule, which must be received within 60 days of publication of the proposal in the Federal Register.

As this proposal is the first in a series of proposed rules defining large participants in various markets. Industry participants generally, including those not directly affected by this proposal (for debt collection and credit reporting), should review (and, if appropriate, consider commenting on) the proposal as the proposal will likely serve as a model for future rules.

Impact on Smaller Participants

Smaller participants will not be subject to direct supervision but will be required to comply with any rules adopted by the CFPB that may arise as the result of information gleaned from larger participants. Consequently, small participants should track further developments. Small participants may, of course, be subject to direct enforcement action by the CFPB, Federal Trade Commission (FTC) or state regulatory regardless. Thus, small participants are advised to consider compliance audits as much as larger participants.

In establishing the large participant thresholds, the CFPB has avoided panels under the Small Business Regulatory Enforcement and Fairness Act. Future rules, although perhaps not "guidance," may yet trigger such panels. □

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