U.S. Chamber of Commerce

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May 31, 2022

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

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

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB") procedural rule adding a mechanism for the CFPB to make public final decisions and orders establishing supervisory authority over certain nonbank covered persons (the "2022 Rule").[1]

Congress granted the CFPB sweeping regulatory authority, including the power to write rules, supervise covered entities, and enforce statutory and regulatory requirements. With respect to the CFPB's supervisory authority, Congress took a varied approach. It subjected certain covered persons to supervision directly,[2] authorized the CFPB to supervise larger participants of particular market segments as identified by rule,[3] and permitted the CFPB to impose supervision on other nonbank covered entities that it determined, by order and after notice to that covered person, are "engaging, or ha[ve] engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services."[4] In 2013, the CFPB promulgated a rule implementing its risk-based authority to supervise this third category of covered persons (the "2013 Rule").[5]

The CFPB now has issued a new rule—already effective as of April 29, 2022 (the "2022 Rule")—that revises one aspect of the 2013 Rule. While the 2013 Rule does not

[1] *See* CFPB, Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders, 87 Fed. Reg. 25,397 (April 29, 2022).

[2] 12 U.S.C. §§ 5514(a)(1)(A), 5515(a).

[3] 12 U.S.C. §§ 5514(a)(1)(B).

[4] 12 U.S.C. § 5514(a)(1)(C).

[5] *See* CFPB, Procedural Rule To Establish Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination, 78 Fed. Reg. 40,352 (July 3, 2013).

authorize publication of any determination by the CFPB that a covered person posed risks to consumers and thus should be subject to supervision, the 2022 Rule would create a process under which the Director or delegate could decide to publish such a determination on the CFPB's website.

The 2022 Rule will have significant negative consequences as enacted. By permitting publication of a decision to supervise a relevant covered person, it will turn a sensitive, confidential decision into an opportunity for a press release, causing needless reputational harm to the company while immediately souring the supervisory relationship in a way that ultimately will harm consumers. Moreover, because the 2022 Rule does not impose any standard upon the decision whether to publish such a determination, it will lead to unpredictable and inconsistent decision-making. We believe that these unintended consequences of the 2022 Rule deserve careful consideration and that the CFPB ultimately should preserve the confidentiality of these sensitive determinations. We consequently write to emphasize three points:

- The CFPB should revoke the 2022 Rule and subject any subsequent proposal to notice and comment.
- The CFPB should not publish determinations that a company should be supervised due to risks to consumers.
- The CFPB should establish a written standard for public release if it does not revoke the 2022 Rule.

Analysis

1. The CFPB should revoke the 2022 Rule and subject any subsequent proposal to notice and comment.

The CFPB does not consider the possible consequences of the public disclosure of a decision to supervise a non-bank covered person on the basis of the risk that company poses to consumers. The CFPB notes that "[n]onbank covered persons that are respondents may incur incidental costs, if they choose to prepare submissions on the issue of public release."[6] However, the CFPB seems to exclude the potential consequences of public release from the analysis: "The rule itself will not trigger public release of decisions and orders, since it simply establishes a procedure to consider that issue."[7] It would be a strange accounting of the impact of the 2022 Rule, however, to ignore the consequences of public release, since the 2022 Rule creates the possibility of public release where none previously existed. Perhaps recognizing as much, the CFPB goes on to say that if it "does ultimately decide to release a decision or order, that

[6] 87 Fed. Reg. at 25,398.

[7] *Id.*

should generally benefit covered persons, consumers, and other members of the public by giving them a better understanding of the Bureau's decisionmaking."[8] As described below, however, the 2022 Rule will have significant negative consequences that the CFPB did not consider and that stakeholders did not have the opportunity to present before the 2022 Rule became effective.

We appreciate the opportunity to comment on the 2022 Rule. However, considering the negative consequences of the 2022 Rule, the CFPB should have published a proposed rule for comment. It should not have issued a procedural rule that became effective immediately without full consideration of the consequences for relevant businesses and the consumers they serve. We consequently strongly urge the CFPB to revoke the 2022 Rule. Should the CFPB decide to continue to pursue public disclosure of risk-based supervision determination, we would ask it to begin a new notice and comment process to ensure that the stakeholders have a meaningful opportunity to provide input on all the possible consequences of public release, including an opportunity to offer alternatives.

2. The CFPB should not publish determinations that a company should be supervised due to risks to consumers.

The 2022 Rule creates a new option to publish determinations that a company should be supervised due to risks to consumers. This is a mistake for at least five reasons:

- First, publishing such risk-based determinations will lead to negative consequences for covered persons that outweigh any associated benefit. Companies will be harmed by the public disclosure of determinations that they pose risks to consumers, with potential consequences including competitive disadvantage, reputational harm and associated negative consequences in the marketplace (e.g., loss of partnership opportunities), and increased costs to mitigate these consequences (e.g., an expanded marketing campaign).

- Second, publishing such information will distort the marketplace and hurt consumers. Under the 2022 Rule, the CFPB is poised to announce that a company poses risk to consumers without either having conducted an investigation or a supervisory exam. In short, the CFPB may announce that a company poses risks to consumers—altering consumer behavior in the process—only to find out, when it does subsequently conduct a supervisory exam, that no consumer has been harmed by the company's products. The CFPB should not inject its opinions into the marketplace in

[8] *Id.*

this manner since doing so will impair competition, distort the marketplace, and lead to worse outcomes for consumers.

- Third, by immediately imposing reputational consequences on the subject company, the CFPB will sour the supervisory relationship with the company at the outset. This action will impair the collaboration that facilitates effective supervision and that ultimately benefits consumers.

- Fourth, gaining a "better understanding of the Bureau's decisionmaking" does not justify revealing confidential supervisory information in other contexts—as many other regulators have concluded. Likewise, it does not justify, in this context, breaking the confidentiality that the CFPB correctly notes is a "central principle of the supervisory process."[9]

- Fifth, the CFPB may discourage companies from offering innovative products that benefit consumers to the extent that its published decision appears to raise concerns about a particular product or type of product. It is difficult to recommend constructive solutions, however, given the CFPB has provided almost no insight on the type of information it may or may not make public. The CFPB should encourage innovation, not distort the marketplace by casting doubt upon particular products or types of product offerings. Additionally, other companies – that may or may not already be subject to supervision – may be discouraged from pursuing partnerships with companies named in risk-based supervisory determinations or pursuing business lines that they offer.

The CFPB's decisions and orders regarding whether a nonbank covered person is subject to the CFPB's supervision due to engaging in conduct that poses risks to consumers are Confidential Supervisory Information ("CSI"). The CFPB previously evaluated whether such decisions and orders should be made public and decided against doing so in the 2013 Rule. Specifically, the CFPB stated: "The Bureau agrees that all aspects of a proceeding under the final rule relate to the Bureau's supervisory process and should be deemed confidential supervisory information under 12 CFR 1070.2(i)(1)."[10] This is the correct view. We consequently urge the CFPB to change course from the different path it now charts with the 2022 Rule.

To be sure, there is a public interest in the CFPB disclosing risks to consumers that it identifies. Such disclosures allow consumers can avoid such harms and responsible companies to learn from others' mistakes. However, naming an individual company as a source of risk to consumers—importantly, before the CFPB has begun

[9] *Id.* at 25,397.

[10] 78 Fed. Reg. at 40,360.

supervision—is not the proper way to disclose such risks. Rather, the CFPB should continue to use other tools at its disposal to communicate such concerns. For example, the CFPB regularly uses its Supervisory Highlights to raise public awareness of issues it has identified during supervisory examinations. In doing so, the CFPB does not name individual companies but describes them generically so that appropriate lessons can be learned without undue reputational harm. Of course, if the CPFB does want to pursue a company individually, it has the option of undertaking an investigation and ultimately an enforcement action in which it can clearly state its view of a company's misconduct, subject to the rigor and scrutiny associated with the adversarial process.

However, there will be no substantial benefit to naming a company as posing risks to consumers without previously examining or investigating that company, and certainly no benefit that outweighs the undue harms such an announcement could cause. For example, the CFPB suggests that it may be helpful as a "precedent in a future proceeding." However, without imposing any binding standard upon the Director, such a determination will have no precedential value for a future decision whether to publish a decision to supervise an entity based on risk. (Indeed, despite the CFPB's reference to a "ruling," this is not an adjudication of any kind, but rather is merely an exercise of executive discretion by the Director or delegate that will be unique to each individual company and its business, not apply broadly to any particular type of business product or activity.) That decision should receive no weight in any other proceeding that might subsequently be undertaken, such as an adjudication under the CFPB's administrative procedures.

3. The CFPB should establish a written standard for public release if it does not revoke the 2022 Rule.

If the CFPB does not revoke the 2022 Rule, it should establish a written standard on the public release of decisions and orders establishing supervisory authority over nonbank covered persons. As noted above, the CFPB hopes that such decisions would give rise to relevant precedent. The 2022 Rule is at odds with this goal, however. It would not establish any standard for such decision but would leave the Director—including any successors in future Administrations—with unfettered discretion to arbitrarily resolve that question as they see fit. Indeed, the 2022 Rule explicitly states "the Bureau is not endeavoring to codify a standard on the issue of public release."[11]

This approach may reflect, in part, the CFPB's view that the decision whether to publish such a determination is not a particularly significant one. For example, the CFPB would exempt this decision from the separation-of-functions rule that otherwise would apply, since "the routine determination of whether to post material on the Bureau's

[11] 87 Fed. Reg. at 25,397.

website is not sufficiently significant to warrant" adhering to that principle here.[12] As discussed above, publishing the name of a company subject to supervision based on perceived risk is a significant decision, not equivalent to a "routine determination" whether to upload content onto the CFPB's website. Such a decision should be governed by an appropriate standard, which should be subject to notice and comment as discussed above. Moreover, the CFPB should make clear that it would employ this standard only in deciding whether to publish the result of its determination whether to supervise a company's line of business, and that the CFPB would not publish broader findings about the company.

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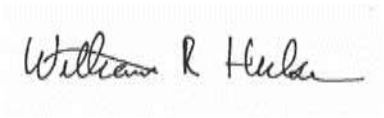
Thank you for considering these comments. We would be happy to discuss these issues further.

Sincerely,



Bill Hulse
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[12] *Id.* at n.3.