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Dodd-Frank Financial Reform Law

ALERT

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CFPB Proposes New Procedural Rules for Nonbank Supervision

Calling it "an important step" in the development of its Nonbank Supervisory Program, the Consumer Financial Protection Bureau (CFPB) announced its proposed rules establishing the procedures the Bureau will use to extend its supervision to certain nonbanks – entities that offer consumer financial products or services but are not banks, thrifts or credit unions. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the CFPB has the authority to supervise all nonbank institutions providing mortgage services (originators, brokers, and servicers including loan modification or foreclosure relief services), payday lenders and private education lenders.

Dodd-Frank also authorizes the CPFB to exercise its supervisory authority if, after notice to the nonbank and a reasonable opportunity for it to respond, the Bureau has reasonable cause to determine that the institution's activities related to its consumer financial products or services pose risks to consumers. The proposed rule sets forth the procedures by which the CFPB would make that determination and extend supervision over the nonbank entity.

Under the proposed rule, the process begins when the Bureau sends out a Notice of Reasonable Cause to a nonbank institution, including a description of the basis for its belief that the entity is engaged in behavior that creates a risk to consumers. The Notice must include a statement explaining how to respond and the consequences of failing to respond. The nonbank then has 20 days to take action, by either contesting its designation as a nonbank subject to the Bureau's supervision, or by consenting to the Bureau's supervisory authority.

If the entity disputes the basis of the Bureau's assertion of authority to supervise it, its response must explain why it should not be supervised, including providing all available documentary evidence (which will be considered "confidential supervisory information"), and providing an affidavit attesting to the truthfulness of the facts asserted. The nonbank may also request a supplemental oral hearing (which would usually be held by telephone) to offer further arguments in support of its case, but it must make this request in its response or it will be deemed to have waived that right. The Bureau then has 14 days after receiving the request for a supplemental hearing to provide the details of the oral hearing to the nonbank, and must schedule the hearing for no less than 10 days after serving the notice of hearing. The entity must make all its arguments and provide all its evidence in the initial response and the supplemental oral hearing.

The Assistant Director of the Bureau then has 45 days after receiving the nonbank's response – or after serving the Notice if the entity fails to respond – to issue its initial recommended determination. If the entity requests a supplemental oral hearing, this time limit is extended to 90 days. The Director of the Bureau must issue its final determination 45 days after receiving the initial recommendation, either issuing an order bringing the entity within the Bureau's supervisory authority, or a notice that the nonbank is not subject to the Bureau's supervisory authority on the basis of the proceeding.

A nonbank over which the CFPB extends its supervisory authority may petition the Bureau to terminate its designation at any time after two years from its first designation, and then annually thereafter.

According to its May 24, 2012 statement, the CFPB says it does not need to issue the proposed rule in order to bring these nonbank entities under its supervision, but that it is nonetheless proposing this rule in order to be "transparent in its authorities and procedures." The Bureau also asserts that "the procedures established by this Proposed Rule would provide a recipient of a Notice (respondent) with a more robust process than required by [Dodd-Frank]."

Comments in response to the proposed rule may be submitted at the rule's Comment Page. The comment period ends July 24, 2012.

For more information about the content of this alert or for assistance in submitting comments, please contact Michael Thurman at mthurman@loeb.com or Michael Mallow at mmallow@loeb.com.

Loeb & Loeb's Dodd-Frank Financial Reform Task Force monitors key issues surrounding approval of the Dodd-Frank Wall Street Reform and Consumer Protection Act that are relevant to a broad spectrum of firm clients in the financial services industry. The multidisciplinary Task Force is comprised of attorneys across core practice areas – including general corporate, private equity, securities, mergers and acquisitions, consumer protection and banking and finance – who are focused on analyzing the historic legislation and interpreting the significant business implications for financial institutions and commercial companies nationwide.

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