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CFPB Takes Steps to Increase Supervisory Authority Over Nonbanks

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On April 25, 2022, the Consumer Financial Protection Bureau announced a significant change to its supervisory practices, stating that it would begin "invoking a largely unused legal provision to examine nonbank financial companies that pose risks to consumers." This potentially opens a large swath of nonbank financial service providers to regulatory examinations in which CFPB examiners will have direct access to interview employees and examine corporate records.

The Bureau intends to use its authority under 12 U.S.C. § 5514(a)(1)(C) to supervise any nonbank covered person that "the Bureau has reasonable cause to determine . . . 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's "reasonable cause" may be based on consumer complaints or "other information"—which, according to the Bureau's press release, may include judicial opinions, administrative decisions, whistleblower complaints, news reports, or other actions by federal or state agencies. In making this determination, the Bureau must provide the entity with a "notice of reasonable cause" containing the basis for the Bureau's assertion that the entity has engaged in risky behavior, and an opportunity to respond. *See* 12 C.F.R. § 1090.105.

The Bureau asserts extending its supervisory authority in this way will allow it to "be agile and supervise entities that may be fast-growing or are in markets outside the existing nonbank supervision program." CFPB Director Rohit Chopra further noted that this authority allows the Bureau to "hold nonbanks to the same standards that banks are held to." In particular, the Bureau appears to intend to use this previously-dormant provision to supervise fintech companies, without undertaking a specific round of notice and comment rulemaking.

Although the Bureau implemented this provision in 2013, it has largely declined to exercise this authority since then other than as a remedy in consent orders with non-supervised entities. Rather, the Bureau's supervisory authority has traditionally extended to (1) banks and credit unions with more than $10 billion in assets, (2) nonbanks that are engaged in statutorily-enumerated industries, including mortgage, payday lending, and private student lending, and (3) "larger participants" in other nonbank markets. *See* 12 U.S.C. § 5514(a)(1)(A), (B). Notably, the Bureau's authority to supervise larger participants requires the Bureau to engage in notice and comment rulemaking before doing so. Conversely, utilizing a section 5514(C) "reasonable cause" determination allows the Bureau to extend its supervisory authority over additional nonbank entities based solely on the Director's determination that an entity is engaging in behavior that poses risks to consumers. Some of the Director's initiative thus far indicates that he has a very broad view of what constitutes risks, such as "junk fees."

While announcing its intent to revive use of section 5514 to supervise nonbank entities, the Bureau also announced a new procedural rule that allows the Bureau to publish its final decisions regarding the risk-determination process on its website. Previously, such determinations would have been treated as confidential supervisory information, but the Bureau's new rule would disclose this information. The Bureau is seeking public comment on this procedural rule.

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