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CFPB Targets Nonbanks for Supervision

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The Consumer Financial Protection Bureau ("CFPB") recently announced that it is going to exercise authority described as "dormant" to supervise nonbanks that are not otherwise subject to the CFPB's supervision authority. Since 2011, the CFPB has limited its supervisory activities to banks, so-called "larger participants" in specific industry sectors such as credit reporting, and mortgage and payday lenders. This expanded supervision authority suggests therefore that the CFPB is focused upon gaining supervisory access to fintechs that are not involved in lending and that offer products or services to consumers. Basically, if a company is considered a "covered person" for purposes of the Consumer Financial Protection Act (the "CFPA", also known as Title X of the Dodd-Frank Act), then the CFPB could potentially claim to have supervisory authority over that company.

This supervisory authority is based upon language in the CFPA that gives the CFPB supervisory authority when it "has reasonable cause to determine" that a 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." 12 U.S.C. 5514(a)(1)(C). In 2013, the CFPB promulgated a procedural rule in 12 CFR Part 1091 that defines how the CFPB can use this authority that has lain dormant to date.

The rule provides that when the CFPB seeks to utilize this authority, it will send a "Notice of Reasonable Cause" that lists consumer complaints or other information the CFPB has obtained that indicate that the nonbank covered person is engaging in conduct that poses risks to consumers. Companies may initially rebuff the attempt at supervision, but the appeal is directed to the CFPB's own Associate Director of the Division of Supervision, Enforcement and Fair Lending and then to the Director of the CFPB, neither of whom is obligated to provide any particular level of impartial review. Further, while supervision is typically cloaked in confidentiality, the CFPB has further amended its procedural rule such that to the extent the CFPB decides that a particular company is rightfully subject to supervision under this authority, the Director of the CFPB may choose to publish information regarding not only that the company is subject to supervision, but also the reasons why that company appears to be posing risks to consumers.