

August 15, 2011

By electronic delivery to:
<http://www.regulations.gov>

Nondepository Supervision
Consumer Financial Protection Bureau
1801 L Street, N.W.
Room 513-H
Washington, D.C. 20036

Re: Notice and Request for Comment, CFPB Docket No. CFPB-HQ-2011-2

Ladies and Gentlemen:

The American Bankers Association (ABA) welcomes the opportunity to respond to the Consumer Financial Protection Bureau's (Bureau) notice and request for comment on the development of a rule to define the nondepository covered persons (Nondepositories) that will be subject to the Bureau's supervision program as "larger participants" in markets for consumer financial products and services (Notice).¹ ABA represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.

A cornerstone of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA) was the authority given to the Bureau to establish a supervisory program for Nondepositories to ensure that federal consumer financial law is "enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."² ABA fully supports the Bureau's preliminary efforts to define its Nondepository supervisory scope as it prepares for the future exercise of that supervision authority. This approach has been a model effort to seek broad, careful, and thoughtful input in the important early stages of developing a rule proposal. The mere existence of consumer protection laws and regulation is not enough. Those laws must actually be enforced in a fair, comparable, and rational way to ensure that the legal and regulatory obligations are observed. ABA believes that establishing comparable accountability across *all* providers of comparable financial products and services is a fundamental mission of the Bureau.

¹ 76 *Fed.Reg.* 38059 (June 29, 2011).

² Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1337, *to be codified at* 12 U.S.C. §1021(b)(4).

Background

Section 1024 of the Dodd-Frank Act directs the Bureau to establish a risk-based Nondepository supervision program. Under section 1024, the CFPB must require reports and conduct examinations of certain Nondepositories on a periodic basis to assess the entity's compliance with Federal consumer financial law; to obtain information about the entities' activities and compliance procedures or systems; and to detect and assess risks to consumers and markets. The scope of coverage of this supervisory program, however, varies by market. Section 1024 grants the Bureau authority to supervise, regardless of size, Nondepositories that offer or provide to consumers: (1) mortgage origination, brokerage, or servicing, as well as any related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. For other markets, the Bureau's supervisory authority applies to a Nondepository that is a "larger participant of a market for other consumer financial products and services as defined by rule."³ In addition, once the scope of the Nondepository supervision program has been established, DFA requires that operation of the program – i.e., determinations about which entities to examine and which entities to require reports from – be based on an assessment by the Bureau of the "risks posed to consumers in the relevant product markets and geographic markets."⁴ In order to fulfill this second step, the Bureau must initially cast its net for larger participants by analyzing both product and geographic markets.

Introductory considerations for developing a larger participant rule

ABA recognizes the challenges presented by the task of defining appropriate markets and choosing the criteria and thresholds to be used to determine which market participants are "larger" participants. We support the Bureau's early initiation of the process so that it is ready to exercise its supervisory authority soon after it is empowered to do so. As discussed above, this work is an essential first step toward ensuring that the Bureau enforces "Federal consumer financial law consistently" and that "markets for consumer financial products and services are fair, transparent, and competitive."⁵

Congress directed the Bureau to promulgate an "initial" larger participant rule by July 21, 2012. Although this statutory language suggests that the Bureau has the authority to reconsider, as necessary, the markets, criteria, and thresholds established by this rule-making, we urge the Bureau to define each market, the criteria to be measured, and the thresholds to be applied as generally and inclusively as possible so that it is not necessary to initiate a new rulemaking as consumer financial products, services, and markets evolve. Competition can drive financial innovation at a rapid pace. As a result, consumer financial products and markets are constantly changing, and prescriptively defined markets, criteria, and thresholds, which demand a re-opening of the APA rule making process to modify, would ensure a supervisory regime for Nondepositories that is always a step behind, perpetuating the unlevel playing field.

³ 12 U.S.C. §1024(a)(1).

⁴ *Id.*, §1024(b)(2).

⁵ *See id.*, §1021(a).

Considerations relating to market definitions

ABA believes that the identification of “larger” participants should begin with the delineation of the individual markets in which the activity levels of participants will be compared. We believe that this analysis involves two components: the definition of broad product markets followed by the consideration of the appropriate geographic scope of each product market. Once relevant markets have been delineated, then the Nondepositories who serve those markets can be identified as “larger” by measuring their share of those markets among like entities.

As an initial matter, we note that the statutory language of section 1024 is not limited to the “largest” participants in each market. We believe Congress’ decision to direct the Bureau to engage in a rule-making to define “larger” participants reflects its intention for the Bureau to have supervisory authority over a broad range of non-bank consumer financial products and service providers so that the existing gap in regulatory oversight can be closed. This, in turn, suggests that the markets defined by the Bureau should be narrow and numerous enough to permit market share calculations to identify a wide variety and number of larger participants, as opposed to the identification of fewer, larger markets in which the same market share calculations typically would result in the identification of only the very largest participants.

Despite the fact that section 1024 mandates a risk analysis to allocate supervisory resources further, we believe that the *possibility* of oversight should encourage compliance efforts that might otherwise be lacking in entities that believe that they will never be subject to the Bureau’s supervisory and record-keeping requirements because they fall below the applicable larger participant threshold. Furthermore, unlike all insured depository institutions who receive rigorous supervision by prudential regulators, Nondepositories who are not identified as larger participants will fall into existing Federal Trade Commission and state enforcement regimes that do not assert visitorial supervisory oversight.

Identifying appropriate product markets

ABA supports the Bureau’s identification of the following product markets: debt collection, debt relief services, consumer reporting, and prepaid cards. We believe that each is appropriately considered a single product market. However, we believe that the proposed market for “Consumer Credit and Related Activities” encompasses too many unrelated products and services. As a result, market share comparisons would not necessarily identify a comparable group of larger providers for each of the financial products and services included within the product market. Instead, market share comparisons might only identify the larger providers of *one* product or service – for example, automotive finance providers – because annual volumes of automobile finance transactions dominate that of the other forms of consumer credit.⁶ Rather than one Consumer Credit and Related Activities market, ABA suggests that it be divided into at least three markets as follows: (1) automotive and recreational vehicle purchase

⁶ See Board of Governors of the Federal Reserve System’s G.20 Report including statistical data on finance companies (July 26, 2011) available at <http://www.federalreserve.gov/releases/g20/current/g20.htm>,

financing, which would include entities that originate, broker, or service loans or leases secured by automobiles, motorcycles and other motorized personal vehicles; boats and other personal watercraft; and recreational vehicles;⁷ (2) unsecured consumer installment lending; and (3) “other” secured consumer lending which would include pawn shops and automobile title loan companies.

Similarly, ABA urges the Bureau to divide the proposed product market for “Money Transmitting, Check Cashing and Related Activities” into two separate product markets, one for money transmitting and the other for check cashing. Although we recognize that many entities offer both money transmission and check cashing services, not all do, and because annual transaction volumes for money transmission are high, analyzing the market shares of participants of the combined markets may result in the identification of only money transmitters as larger participants, effectively excluding check cashers from the closer Bureau supervision.

Finally, ABA believes that Nondepositories that offer competitive payment services (other than money transmitting, check cashing, or prepaid cards) should also be subject to supervision under section 1024. Accordingly, we believe the Bureau should consider defining a product market that will encompass non-bank online and mobile payment providers. Although it is an evolving market, the number of consumers paying for items via their mobile devices is expected to exceed 141 million this year, a 38.2% increase over 2010.⁸ In addition, we believe that providers of virtual currencies used to purchase items in the virtual world should also be identified for supervision under section 1024. We understand that in some instances virtual currencies, which were initially developed to help individuals manage virtual credits earned through online games, have also been used to pay developers of applications, and their use can be expected to expand even further.

Identifying appropriate geographic markets

The second step for determining the relevant market in which to define a larger participant requires consideration of the geographic area within which covered persons compete. Competition is often a localized phenomenon, especially in rural markets in which financial services are limited and their providers are few in number. In order to achieve a level playing field for the benefit of consumers, we believe that the Bureau must consider the different geographic boundaries that apply. Community banks face competition not only from nationwide financial service providers, but also from local entities that lack a significant market share on a national level but are nonetheless sizable competitors in a particular local market. On the other hand, non-bank entities with low penetration in multiple geographies may not have a material market share in any one locale, but nonetheless have a material market share at a regional or national level. In either case, ABA believes both of these situations illustrate the attributes of a larger participant for purposes of Bureau supervisory scope.

⁷ Subject to §1029’s statutory exclusion for auto dealers.

⁸ See <http://www.gartner.com/it/page.jsp?id=1749114>.

ABA appreciates the challenges involved in determining the appropriate geographic market for consumer financial products and services. Nevertheless, identifying who competes within communities from both a provider perspective and a consumer perspective naturally drives the question of who is a larger participant down to building blocks that begin at the local level. Whether one enters such community geographic markets via broadband or by brick-and-mortar, the consumer makes an election on the basis of factors that include convenience and proximity to where they live and shop. For instance, whether it is a web-based lender or the title lender down the street, the consumer is operating on a local basis even if one option is delivered from a national internet platform. Whether either provider is a larger participant should be based on an evaluation of it in any of the settings in which it ultimately competes—local, regional or national. Consequently, ABA urges the Bureau to identify larger participants based on the intersection of product and geographic market parameters building from the local level on up.

Considerations relating to criteria and thresholds to define a larger participant

ABA appreciates the Bureau’s interest in defining criteria and thresholds that will “allow it to administer the program efficiently by readily identifying larger participants based on objective available data.”⁹ However, we caution the Bureau against erring too far on the side of administrative convenience with the end result the establishment of rigid, absolute standards based on limited data, standards that may incentivize organizational manipulation to avoid identification as a larger participant. For example, a rule that defines a larger participant as one with annual transaction volumes that exceed a particular threshold and operations in a certain number of jurisdictions may invite organizational decisions to remain just below those parameters. ABA urges the Bureau to adopt criteria that will balance this incentive with an equally powerful force: competition. Thus, ABA urges the Bureau to measure and compare the market share of Nondepositories.

Increasing market share can be a driving force in a competitive market, suggesting that it will not be manipulated as other measures might be.¹⁰ Moreover, market share can be measured and compared objectively, and this single measure can more likely be applied consistently across all markets, promoting both administrative efficiency and transparency. We recognize, however, that to accommodate differences in markets, the appropriate measure of market share may vary; in some markets it may be measured by the total *number* of annual transactions and in others by the *dollar volume* of annual transactions.¹¹

⁹ 76 Fed.Reg. *supra* at 38060.

¹⁰ One way that a company might be tempted to manipulate market share would be by spinning off pieces of the business into affiliated companies. Section 1024(a)(3)(B), however, forecloses this possibility; it provides: “For purposes of computing activity levels...activities of affiliated companies (other than insured depository institutions or insured credit unions) shall be aggregated.”

¹¹ Assuming this measure is adopted, we urge the Bureau to invite comment in the initial rulemaking on the precise measure to be applied in each market.

As it calculates market share, ABA urges the Bureau to consider whether an entity is operating independently or whether it is acting as an agent of a larger Nondepository. For example, a small convenience store may offer wire transfers to consumers through an agency relationship with a nationwide money transfer provider operating through a network of similar agents. In the case of these agency relationships, we believe that the Bureau should consider aggregating the market share of all of the agents with those of the Principal to provide an accurate assessment of the relative size of the Nondepository in the market.

Once the market share of each Nondepository operating in a particular market has been measured, the Bureau must determine the relevant threshold to be used to define a larger participant. ABA believes these thresholds should be flexible enough to reflect the competitive reality in each market and may need to be defined specifically for each product and geographic market. At this early stage of the Bureau's exploration of the larger participant definition, it is premature to take a hard and fast position on any particular threshold or cut-off. However, for discussion purposes, ABA offers some suggestions.

First, the Bureau might consider a threshold intended to ensure parity between bank and non-bank supervisory programs. Thus, the Bureau would define as a larger participant all Nondepositories whose market share (defined, as appropriate, in terms of number of transactions or dollar volume) was at least as high as the market share of the smallest insured depository institution operating in the relevant product and geographic market. For example, assume that the smallest insured depository operating in a defined geographic market reported total annual automobile loan volume of "\$X", any Nondepository operating in that market with an annual automobile loan volume of "\$X" or more, would be deemed a larger participant. The principle at play here is that, inasmuch as all depository institutions will be subject to a supervisory program, then any competitor of comparable market presence should be as well.

Another possible suggestion for discussion is that the Bureau consider applying the Pareto Principle to define larger participants as those entities doing business in a particular market whose *combined* non-depository market shares (measured by either transaction or dollar volume) account for 80% of the total market.¹² For example, if company #1 has 45% of the market share, company #2 has 25%, and companies #3 and 4 each have 5%, these four companies would be identified as the larger participants in the market. Other rules might be applied to rank-order market participants and to set a "cut-off" of the top-ranked participants. And in any event, consideration must be given to anomalies or *de minimis* positions that might cause a small firm inappropriately to be caught by a definition.

Regardless of the approach chosen, we emphasize again that there may be anomalies at the margin, and additional criteria or combinations of criteria may need to be applied.

¹² We have suggested setting the threshold at 80% based on the rule of 80-20, often referred to as the "Pareto Principle" after Italian economist Vilefredo Pareto who first announced it in 1906. Many economic and business realities reflect the 80-20 rule, including the widely-accepted notion that 20% of the entities operating in a particular market hold 80% of the market share. In 1995, the threshold between large and small banks for CRA purposes roughly reflected this rule.

Consequently, ABA acknowledges that further discussion of the threshold issue is warranted and looks forward to participating in the Bureau's future outreach and rule-making efforts.

Considerations relating to the establishment of a registration program for Nondepositories

ABA recognizes that to measure and compare market share requires access to data that may not exist for all Nondepositories operating in each of the markets discussed above. Indeed, in many markets there may not be reliable public or private information about either the number of market participants or their operations. We understand that the Bureau is considering the establishment of a registration program for certain covered persons through a future rulemaking and that if a registration program is established, it could provide the Bureau with additional data useful to the process of determining which Nondepositories meet applicable thresholds.¹³ ABA is pleased that the Bureau had included this in the list of topics presented for public comment; we believe that there are important considerations to weigh before initiating a registration rule.

Although a registration program may provide needed data, we have concerns about the registration of covered persons which may not be subject to supervision and yet may seek to ride the reputational gain that could flow from registration with a federal regulator. Experience has shown at the state level that firms that are registered with but not supervised by state authorities use the fact of registration to gain reputational advantage with customers that may not be warranted by their practices, since those practices are not subject to supervisory review. For example, without a supervisory framework applicable to registered entities, there is no way to test the accuracy of the data they provide. To address these issues, ABA suggests that the Bureau consider creating a registration program that would compel those determined to be larger participants (or are otherwise statutorily subject to Bureau supervision) to register and, in addition, to permit other covered persons to register if they agree to submit to the Bureau's supervisory authority. It seems to us important that all registered entities be subject to DFA section 1024 examination and reporting. This would attenuate any mistaken imprimatur associated with registration that was not accompanied by comparable oversight.

Conclusion

ABA appreciates the opportunity to provide comments to the Bureau's initial efforts to define a larger Nondepository and look forward to future opportunities to provide input. ABA is anxious

¹³ 76 Fed.Reg., *supra* at 38061.

to participate in future discussions as the Bureau advances in its efforts to define its non-bank supervisory scope. If you have any questions about these comments or desire further input, please contact the undersigned at 202-663-5073 or voneill@aba.com.

Sincerely,

A handwritten signature in black ink that reads "Virginia O'Neill". The signature is written in a cursive, flowing style.

Virginia O'Neill
Senior Counsel
ABA Center for Regulatory Compliance