May 31, 2022

Comment Intake—Public Release of Decisions and Orders
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: FTA Comment on Public Release of Decisions and Orders
(Docket No. CFPB-2022-0024)

The Financial Technology Association (FTA) appreciates the opportunity to respond to this request for comment issued by the Consumer Financial Protection Bureau (Bureau) regarding the public release of decisions and orders related to certain risk determinations made under its nonbank supervisory authority (the "Rule"). The FTA shares the Bureau's interest in safeguarding consumers and promoting responsible financial services innovation. In order to best satisfy these objectives, FTA urges the Bureau to afford the public with sufficient opportunity to comment on a noticed rule proposal, treat all entities subject to its supervisory authority consistently, and establish clear and fair supervisory procedures.

The Financial Technology Association

The FTA is a nonprofit trade organization that champions the transformative role of financial technology for American consumers, businesses, and the economy.[1] Representing leading fintech companies, FTA elevates fintech's power to increase competition and drive financial inclusion through responsible products and services. As our members' voice in Washington, FTA advocates for the modernization of financial regulation to support inclusion and innovation.

The FTA believes there are many opportunities for sound policy to advance responsible financial services innovation. By using modern technologies to deliver financial products and services, financial technology ("fintech") companies are improving efficiency and transparency, broadening equity, access and inclusion, reducing costs, and increasing choice for consumers and businesses.

[1] FIN. TECH. ASS'N, www.ftassociation.org (last visited May. 11, 2022). The FTA's members include Afterpay, Betterment, Block, BlueVine, Brex, Carta, Figure, Klarna, Marqeta, MoneyLion, MX, Nium, Plaid, Ribbit Capital, Sezzle, Stripe, Truework, Wise, Zest AI, Zilch, and Zip.

Whether by way of more fair and inclusive credit underwriting approaches, unlocking the power of consumer data through a well-crafted open banking framework, or more customer-friendly and transparent payment options, including responsible buy-now, pay-later models, fintech is improving financial outcomes and empowering consumers.

To this end, the FTA encourages the Bureau to engage constructively with industry participants to advance policies that provide important consumer protections, while fostering financial services innovation. As previously shared with the Bureau,[2] FTA seeks to advance key policy priorities that would provide immediate benefits to consumers, including: (i) CFPB implementation of open banking regulation under Dodd Frank section 1033 in the United States to empower consumer choice, data security, and privacy; (ii) CFPB amendment of the "Remittance Rule" and related price disclosure standards in order to eliminate hidden fees and ensure consumers have complete information to make informed decisions; and (iii) CFPB guidance on well-accepted AI/ML explainability techniques in consumer lending that would encourage lenders to use available technologies that are proven to expand access and fairness in lending.

FTA further recognizes the importance of ensuring adherence to consumer protection laws and regulations, which continue to govern financial services activities of banks and nonbanks alike.[3] The following recommendations are focused on ensuring clear, consistent, and fair treatment of nonbanks under the Bureau's Rule in order to satisfy regulatory objectives and avoid arbitrarily harming one segment of the financial services landscape. On this latter point, harming one segment of financial services providers would undermine the Bureau's goal of promoting competition and innovation that benefit consumers, as recently reinforced through the Bureau's announcement of a new Office of Competition and Innovation.[4]

FTA Recommendations Regarding the Public Release Rule and Nonbank Supervision

The FTA recognizes the statutory authority provided by Dodd Frank to supervise certain nonbanks. The FTA urges the Bureau, however, to maintain its existing policy of confidentiality with regard

[2] *See* Financial Technology Association, *Comment Letter to the Consumer Financial Protection Bureau (CFPB) on Strategic Plan FY 2022-2026* (Jan. 3, 2022), available at https://www.ftassociation.org/wp-content/uploads/2022/01/FTA-Comment_CFPB-Strategic-Plan-1.3.22-1-3.pdf.
[3] *See* Financial Technology Association, *Fintech Regulation, Explained: Modernizing Financial Policy to Drive Inclusion and Innovation* (2022), available at https://www.ftassociation.org/wp-content/uploads/2022/03/FTA_Fintech-Regulation-Explained_Compressed.pdf.
[4] *See* Consumer Financial Protection Bureau, *CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance* (May 24, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-lauches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/.

to supervisory matters in a way that would best serve regulatory interests and American consumers. Inconsistent public release of confidential supervisory information would undermine the competitive landscape, impair open and constructive industry engagement with the Bureau, and make damaging, unfair and arbitrary distinctions among industry participants.

The Rule Was Adopted Without the Necessary Notice and Comment Process

The Bureau published the Rule as a "rule of agency organization, procedure, or practice," and accordingly bypassed the notice and comment requirements of the Administrative Procedures Act. The Court of Appeals for the D.C. Circuit has consistently held that "rules of agency organization, procedure, or practice" are "primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights [or] interests of affected parties," and that such rules "do not themselves alter the rights or interests of parties, although [they] may alter the manner in which the parties present themselves or their viewpoints to the agency." *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (citing *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980)).

The Rule permits the Bureau to make public its determination of whether a nonbank is subject to the Bureau's supervisory authority when that nonbank is not otherwise expressly subject to the Bureau's authority. *See* 12 C.F.R. § 1091.115(c)(2); *see also* 12 C.F.R. § 1091.103(b)(2). The Bureau is only statutorily permitted to place such a nonbank under its supervision if the Bureau has reasonable cause to determine that the entity 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. *See* 12 U.S.C. § 5514(a)(1)(C). Prior to this Rule, such nonbanks could expect that the determination would remain confidential. However, this rule would arbitrarily mean that this is no longer the case.

By making the determination public, the Bureau is essentially telling the public that the specific nonbank is subject to Bureau supervision because the Bureau has found that it poses risks to consumers – with the obvious implication that the Bureau intends to address those risks through supervisory or enforcement action against the affected entity.

This change in confidentiality substantially affects the interests of any nonbank whose determination is made public. Unlike other supervised firms, the affected entity must now combat a public perception of noncompliance and consumer harm without having any specific allegations levied against it. The affected company's relationships with customers and investors will most certainly be affected. Additionally, the affected company has no ability to clear its name in the

event that there is ultimately no action by the Bureau, as the results of any Bureau examination would be barred from disclosure under 12 C.F.R. § 1070.42 as confidential supervisory information. The publication of the Bureau's determination therefore unfairly puts a negative impression into the public about the affected entity, but the Bureau's conclusions after the examination will remain confidential, meaning the suspicion created by the initial determination can never be resolved positively. Placing a public stigma on a targeted nonbank company is not a mere rule of procedure.

Moreover, the public release of a "risks to consumers" finding has nothing to do with the Bureau's procedure for making the determination – that procedure was already established in the existing rule and is unchanged by the new portions of the rule. Rather, this concept of public disclosure appears solely directed at publicizing preliminary findings of "risks to consumers," and therefore is not a rule of procedure. It is a reversal of the Bureau's previous substantive policy judgment that confidentiality in the supervisory process is an important element of the Bureau's work, subject only to very narrow exceptions:

> Subpart D of the rules [12 C.F.R. part 1070] pertains to the protection and disclosure of confidential information that the CFPB generates and receives during the course of its work. Various provisions of the Act require the CFPB to promulgate regulations providing for the confidentiality of certain types of information and to protect such information from public disclosure. Other provisions of the Act, however, require or authorize the CFPB to share information, under certain circumstances, with other federal and state agencies to the extent that they share jurisdiction with the CFPB as to the supervision of financial institutions, the enforcement of consumer financial protection laws, or the investigation and resolution of consumer complaints regarding financial institutions or consumer financial products and services. In implementing these provisions, the CFPB has sought to provide the maximum protection for confidential information, while ensuring its ability to share or disclose information to the extent necessary to achieve its mission.
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> The CFPB recognizes that much of the information that it will generate and obtain during the course of its activities will be commercially, competitively, and personally sensitive in nature, and generally warrants heightened protection. The need for greater protection for these categories of information is reflected in the substantive law of privilege and in various statutes, including the FOIA and the Privacy Act, that provide for the protection of such information from disclosure.

> Notwithstanding these concerns, there are instances in which the disclosure of confidential information will be necessary or appropriate for the CFPB to accomplish its statutory mission, such as the investigation and resolution of consumer complaints or the enforcement of federal consumer financial law. Disclosures may also serve the public interest where federal and state agencies share elements of the CFPB's mission and where, by sharing information, they can do their jobs more effectively.
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> The regulations in this subpart balance these competing concerns by generally prohibiting the CFPB and its employees from disclosing confidential information to non-employees, and even in certain cases to its employees, except in limited circumstances. Even where the CFPB permits disclosures of confidential information, the CFPB imposes strict limits upon the further use and dissemination of disclosed information.

77 FR 45373-74 (July 28, 2011). The Bureau adopted this substantive policy as required by Section 1022(c)(6) of Dodd-Frank, which requires the Bureau to "prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law," and which provides only for release of confidential information to other regulatory agencies, not to the public. *See* Dodd-Frank § 1022(c)(6)(C). Reversing that position and creating a new public disclosure not called for in the statute is not a "procedural" rule, and implementing it without notice and comment under the APA was improper.

The Rule Undermines the Consistent Treatment of Confidential Supervisory Information and Treats Newly-Supervised Nonbanks Unfairly as Compared to Other Supervised Entities and Enforcement Targets

As noted above, a public finding by the Bureau that it believes a particular nonbank poses "risks to consumers" effectively assigns an impression of suspected wrongdoing to the affected company without the Bureau reaching any conclusion about whether a violation of law has occurred, and without the Bureau having conducted any direct inquiry of the affected entity. This will certainly impact the affected entity's relationships with investors, commercial lenders and consumers, and may even trigger private litigation against the entity. This negative impact will last an indefinite period of time, since the results of any examination that occurs – even if favorable – cannot be disclosed pursuant to the Bureau's regulations (12 C.F.R.§ 1070.42). The Rule also puts nonbanks subject to supervision under the "risks to consumers" provision of Dodd-Frank on a uniquely unfair footing as compared to large banks and nonbanks subject to CFPB supervision under Dodd-Frank or the Bureau's "larger participant" rules, by selectively abrogating the Bureau's previous

policy decision to keep supervisory information confidential. For example, the Bureau might decide that a large bank, or a nonbank subject to supervision under a "larger participant" rule, poses risks to consumers, and prioritize that entity for an examination. This decision would remain wholly confidential under 12 C.F.R. part 1070. But for the nonbanks designated for supervision based on a finding of "risks to consumers," the determination will be public, causing these nonbanks to suffer the kind of reputational harm outlined above. This difference in treatment is unfair and unjustified.

Moreover, public announcements that particular nonbanks pose "risks to consumers" would treat those entities less favorably than the Bureau's enforcement targets. The Bureau may issue a civil investigative demand (CID) when it "has reason to believe" a person has material relevant to a violation, not dissimilar to the situation contemplated here where the Bureau must have "reasonable cause" to believe that a person's conduct poses risk to consumers. *See* 12 U.S.C. §§ 5562(c)(1); 5514(a)(1)(C). However, while the CID process is kept confidential under 12 C.F.R. part 1070 until the Bureau finishes its investigation and pursues an enforcement action (unless the target chooses to file a petition to set aside or modify), the Bureau's determination of supervisory authority will be released to the public without the Bureau conducting an examination or reaching any other conclusion. As a result, the Rule treats these specific nonbank supervision targets unfairly as compared to enforcement targets. There is no sound basis to support this arbitrary difference in treatment among industry participants, and the Bureau should reconsider it.

The Bureau Can Provide Guidance to the Marketplace Through Other Proper Means

It is important to underscore that the FTA shares the Bureau's view that it is important for market participants to understand when the Bureau might invoke its supervisory authority over a nonbank that poses "risks to consumers." However, FTA suggests that the proper approach to providing transparency and clarity to the marketplace is through Bureau guidance or related communications that do not disclose confidential supervisory information or target a specific company. To be sure, guidance issued by the Bureau, such as its Supervisory Highlights, can clearly outline the Bureau's considerations in identifying a nonbank that poses "risks to consumers," and would be consistent with sound regulatory practice. Such guidance would also be able to provide more comprehensive and usable information to the marketplace by abstracting across entities and issues rather than over-indexing to the specifics of a particular firm.

Conclusion

The FTA shares the Bureau's overall objective of safeguarding consumers, but urges the Bureau to reconsider its Rule that would publicize its designations. It would not improve the Bureau's ability to conduct supervisory reviews, nor advance the Bureau's statutory mission. It would, however, have significant detrimental effects on the targeted nonbanks, and treat them unfairly as compared to other supervised entities and even as compared to enforcement targets. For these reasons, we respectfully suggest that the Bureau should withdraw the rule permitting publication of its "risks to consumers" supervisory designations.

Sincerely,

Penny Lee
Chief Executive Officer
Financial Technology Association