



Billing Code: 4810-AM-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1091

[Docket No.: CFPB –2012- 0021]

RIN 3170-AA24

Procedural Rules to Establish Supervisory Authority over Certain Nonbank Covered Persons Based on Risk Determination

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: This proposed rule establishes procedures to implement section 1024(a)(1)(C) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5514(a)(1)(C)). Pursuant to this provision, the Bureau of Consumer Financial Protection (Bureau) has the authority to supervise a nonbank covered person when the Bureau has reasonable cause to determine, by order, after notice to the person and a reasonable opportunity to respond, that such person 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. This proposed rule sets forth the procedures by which the Bureau may subject a nonbank covered person to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C). Under 12 U.S.C. 5514, the Bureau is authorized to require reports from, and conduct examinations of, entities made subject to its supervisory authority in this manner.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. You may submit comments, identified by Docket No. CFPB-2012-0021 or RIN 3170-AA24 by any of the following methods:

- Electronic: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail/Hand Delivery/Courier: Monica Jackson, Administrative Specialist, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington DC 20552.
- Instructions: All comments should include the agency name and docket number or RIN for this rule making. Because paper mail in the Washington, DC area and at the bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <http://www.regulations.gov>. Comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435-7275.

All comments, including attachments and other supporting materials, will become part of the public record and will be subject to public disclosure. Submit only information that you wish to make available publicly. Do not include sensitive personal information, such as account numbers or Social Security numbers. Comments will not be edited to remove any identifying or contact information, such as name and address information, email addresses, or telephone numbers.

FOR FURTHER INFORMATION CONTACT: Christopher Young, Senior Counsel, Office of Nonbank Supervision, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20552, at (202) 435-7408.

SUPPLEMENTARY INFORMATION:

I. Background

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act)¹ established the Bureau of Consumer Financial Protection (Bureau) on July 21, 2010. One of the Bureau’s key responsibilities under the Dodd-Frank Act is the supervision of very large banks, thrifts, and credit unions, and their affiliates,² and certain nonbank covered persons.³

Under 12 U.S.C. 5514, the Bureau’s supervision authority for nonbank covered persons varies by consumer financial product or service market. Specifically, 12 U.S.C. 5514 grants the Bureau authority to supervise nonbank covered persons that offer or provide to consumers: (1) origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.⁴ In addition, the Bureau has the authority to supervise any nonbank covered

¹ Public Law 111-203 (12 U.S.C. 5301 *et seq.*).

² *See* 12 U.S.C. 5515(a). The Bureau also has certain authorities relating to the supervision of other banks, thrifts, and credit unions. *See* 12 U.S.C. 5516(c)(1), (e).

³ The provisions of 12 U.S.C. 5514 apply to nondepository (nonbank) covered persons and expressly exclude from coverage persons described in 12 U.S.C. 5515(a) or 5516(a). A “covered person” means “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.” 12 U.S.C. 5481(6); *see also* 12 U.S.C. 5481(5) (defining “consumer financial product or service.”). Under 12 U.S.C. 5514(d), subject to certain exceptions, “to the extent that Federal law authorizes the Bureau and another Federal agency to . . . conduct examinations, or require reports from a [nonbank covered person] under such law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to . . . conduct examinations [and] require reports . . . with regard to a [nonbank covered person], subject to those provisions of law.”

⁴ 12 U.S.C. 5514(a)(1)(A), (D), and (E). The Bureau’s supervision authority also extends to service providers of these entities. *See* 12 U.S.C. 5514(e) (establishing the Bureau’s supervisory authority relating to service providers); *see also*, 12 U.S.C. 5481(26) (defining “service provider”).

person that it “has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond” that such covered person “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.”⁵ The Bureau shall base such reasonable cause on complaints collected by the Bureau under 12 U.S.C. 5493(b)(3), or on information collected from other sources.⁶ This Proposal sets forth procedures to implement these risk-based provisions.

The Bureau is authorized to supervise nonbank covered persons subject to 12 U.S.C. 5514 by requiring the submission of reports and conducting examinations to: (1) assess compliance with the requirements of Federal consumer financial law; (2) obtain information about such persons’ activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to markets for consumer financial products and services.⁷ The Proposed Rule sets forth only procedures by which the Bureau may make a nonbank covered person subject to its supervisory authority under 12 U.S.C. 5514(a)(1)(C) and would not impose new substantive consumer protection requirements on any nonbank entity. Moreover, nonbank entities are subject to the Bureau’s regulatory and enforcement authority and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau’s supervisory authority.

II. Summary of the Proposal

This Proposed Rule, if adopted, would govern the process by which a nonbank covered person may become subject to the supervisory authority of the Bureau pursuant to 12 U.S.C.

⁵ 12 U.S.C. 5514(a)(1)(C). The Bureau also has the authority to supervise any “larger participant of a market for other consumer financial products or services,” as defined by rule by the Bureau. 12 U.S.C. 5514(a)(1)(B), (a)(2). An initial rule to define who is a larger participant in other markets must be issued by July 21, 2012; a notice of proposed rulemaking for this initial rule was published in the Federal Register on February 17, 2012 at 77 FR 9592.

⁶ 12 U.S.C. 5514(a)(1)(C).

⁷ 12 U.S.C. 5514(b)(1); see also 12 U.S.C. 5481(14) (defining “Federal consumer financial law”).

5514(a)(1)(C). In this Proposal, the Bureau has endeavored to establish an efficient, expeditious, and fair process to exercise the Bureau's authority under 12 U.S.C. 5514(a)(1)(C). Under the proposed process, the Bureau would provide a nonbank covered person a notice (Notice or Notice of Reasonable Cause) stating that the Bureau may have reasonable cause to determine that such covered person 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 Proposal establishes mechanisms to provide the nonbank covered person a reasonable opportunity to respond to the Notice. The Bureau believes that the procedures established by this Proposed Rule would provide a recipient of a Notice (respondent) with a more robust process than required by Section 1024(a)(1)(C). For example, to satisfy the statutory requirement that the Bureau provide a reasonable opportunity to respond, the Bureau need not offer respondents an opportunity to participate in a supplemental oral response. The Proposed Rule, however, if adopted, would provide such an opportunity to respondents.

To provide a reasonable opportunity to respond to a Notice, the Proposed Rule would require that a Notice include a description of the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that 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. A Notice is intended to afford a respondent the opportunity to evaluate the assertions set forth therein and to formulate an appropriate response. The Proposed Rule would provide a respondent with two opportunities to respond to a Notice—first in writing and then, if requested by a respondent, through a supplemental oral response generally to be conducted by telephone. Under the Proposed Rule, a respondent would be required to include with the written response records, documents, or other items supporting the

arguments set forth in the response that a respondent wants the Bureau’s Assistant Director for Nonbank Supervision (Assistant Director) and the Bureau’s Director (Director) to consider. A supplemental oral response, if requested, would provide a respondent with the opportunity to present arguments to the Bureau’s Assistant Director or her or his designee.

Under the Proposed Rule, a Notice of Reasonable Cause would not constitute a notice of charges for any alleged violation of Federal consumer financial law or other law. The proceedings under the Proposed Rule would be informal and would not constitute an adjudicatory proceeding under section 554 of the Administrative Procedure Act (APA).⁸ Appropriately, under the informal process that would be established by the Proposed Rule if made final, no discovery would be permitted, a supplemental oral response would not constitute a hearing on the record, and no witnesses would be permitted to be called as part of a supplemental oral response.

Under the Proposed Rule, the Bureau’s Deputy Assistant Director for Nonbank Supervision (Deputy) would commence a proceeding by issuing a Notice. The response (both written and oral—if any) would then be considered by the Bureau’s Assistant Director, who would provide to the Bureau’s Director a recommended determination. The Director would make the final determination in any proceeding by adopting without revision, modifying, or rejecting the Assistant Director’s recommended determination. The result would be either an order subjecting a respondent to the Bureau’s supervisory authority under 12 U.S.C. 5514, or a notice stating that a respondent is not subject, as a result of the proceeding, to the Bureau’s supervisory authority.

⁸ See 5 U.S.C. 554 and 556 (setting forth APA procedures for adjudications determined on the record after an opportunity for an agency hearing).

In addition, under the Proposed Rule there would be two ways in which a respondent could consent to the Bureau's supervisory authority. First, the Proposed Rules provides for an expedited method by which a respondent may execute the consent agreement form attached to the Notice that is served on the respondent and file it with the Assistant Director in lieu of a response. Second, under the Proposed Rule, at any time during a proceeding, a respondent may voluntarily consent to the Bureau's supervisory authority under such terms as the parties may agree.

The Proposed Rule also generally provides that if a determination by the Director results in an order bringing a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, the respondent would be permitted, after two years (and no more than annually thereafter), to petition the Director for the termination of such an order. However, under the Proposed Rule, where a respondent voluntarily consents to the Bureau's supervisory authority for a specified period of time, the respondent would not be permitted to petition for the termination of supervision during the period specified in the consent agreement. A petition for termination of an order provides a method for a respondent to inform the Bureau of actions taken and progress made to reduce the risks to consumers after the issuance of the order. Further, the Proposed Rule makes clear that nothing in the rule affects the relief the Bureau may seek in any civil action or administrative adjudication.

Finally, the Proposed Rule provides that if the Bureau otherwise issues a notice of charges against a person under 12 CFR 1081.200,⁹ the Bureau may, in its sole discretion, also provide a notice and opportunity to respond as required by 12 U.S.C. 5514(a)(1)(C) in the notice

⁹ 12 CFR 1081.200 sets forth the procedures for the commencement of an adjudicative proceeding by the Bureau under section 1053 of the Dodd-Frank Act, 12 U.S.C. 5563, and also the contents of the notice of charges in such a proceeding.

of charges. In such a circumstance, the procedures set forth in proposed § 1091.101 - § 1091.113 would not apply to the proceedings.

III. Legal Authority

A. Rulemaking authority

The Bureau is issuing this Proposed Rule pursuant to its authority under: (1) 12 U.S.C. 5512(b)(1), which grants the Bureau the authority to prescribe rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions of those laws; (2) 12 U.S.C. 5514(a)(1)(C), which authorizes the Bureau to supervise a nonbank covered person when it has reasonable cause to determine, by order, after notice to the person, and a reasonable opportunity to respond, that such person 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; and (3) 12 U.S.C. 5514(b)(7), which authorizes the Bureau to prescribe rules to facilitate the supervision of nonbank covered persons under 12 U.S.C. 5514(a)(1).

B. Effective date

The Proposed Rule relates solely to agency procedure and practice and, thus, is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the APA.¹⁰ Although not required, the Proposal provides that the final rule will be effective 30 days after publication in the Federal Register.

IV. Section-by-Section Description

Section .100 Scope and purpose

¹⁰5 U.S.C. 551 et seq.

Proposed § 1091.100 sets forth the scope and purpose of the Proposed Rule. It states that the part sets forth procedures to implement 12 U.S.C. 5514(a)(1)(C) and to facilitate the supervision of nonbank covered persons under 12 U.S.C. 5514(b)(7).

Section 1091.101 Definitions

Proposed § 1091.101 defines terms used in the Proposed Rule. If a term is defined in the Dodd-Frank Act, the Proposal generally incorporates that definition, with clarifications and modifications where necessary. The Bureau seeks comment on each of the definitions set forth in the Proposed Rule and any suggested clarification, modifications, or alternatives.

Assistant Director. Under the Proposal, the term “Assistant Director” means the Bureau’s Assistant Director for Nonbank Supervision or her or his designee. This proposed definition provides that, in the event there is no Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to perform the functions of the Assistant Director.

Bureau. The Proposal provides that the term “Bureau” means the Bureau of Consumer Financial Protection.

Consumer. The Proposal incorporates the definition of the term “consumer” set forth in 12 U.S.C. 5481(4), which defines “consumer” as an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service. The Proposal incorporates the definition of the term “consumer financial product or service” set forth in 12 U.S.C. 5481(5). The Proposal provides that the term “consumer financial product or service” means any financial product or service as defined in 12 U.S.C. 5481(15) that is described in one or more categories under: (a) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family,

or household purposes; or (b) clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A)¹¹ and is delivered, offered, or provided in connection with a consumer financial product or service referred to in (a).

Decisional employee. The Proposal states that the term “decisional employee” means any employee of the Bureau who has not engaged in: (a) assisting the Deputy in either determining whether to issue a Notice of Reasonable Cause, or presenting the Deputy’s position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the Assistant Director; or (b) assisting the Assistant Director in the preparation of a recommended determination.

Deputy. The Proposal states that the term “Deputy” means the Bureau’s Deputy Assistant Director for Nonbank Supervision or her or his designee. If there is no Deputy, the term shall mean any alternative Bureau employee designated by the Assistant Director or Director to fulfill the duties of the Deputy under this part.

Director. The Proposal states that the term “Director” means the Director of the Bureau or her or his designee. If there is no Director, the term shall mean a person authorized to perform the functions of the Director in accordance with the law, of her or his designee.

Executive Secretary. The Proposal states that the term “Executive Secretary” means the Executive Secretary of the Bureau.

Nonbank covered person. The provisions of 12 U.S.C. 5514 relate to “covered persons” as defined in 12 U.S.C. 5481(6) that are not insured depository institutions or credit unions, or, in

¹¹ Under these clauses, the term “financial product or service” is generally defined to include, subject to certain exclusions: (1) extending credit and servicing loans, 12 U.S.C. 5481(15)(A)(i); (2) providing real estate settlement services or performing appraisals of real estate or personal property, 12 U.S.C. 5481(15)(A)(iii); (3) collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, 12 U.S.C. 5481(15)(A)(ix); and (4) collecting debt related to any consumer financial product or service, 12 U.S.C. 5481(15)(A)(x).

the case of such entities with assets of more than \$10 billion, their affiliates, as set forth in 12 U.S.C. 5515 and 5516. The Proposal therefore excludes from the definition of “nonbank covered persons” persons described in 12 U.S.C. 5515(a) and 5516(a), and provides that the term “nonbank covered person” means, except for persons described in 12 U.S.C. 5515(a) and 5516(a): (a) any person that engages in offering or providing a consumer financial product or service; and (b) any affiliate of a person described in (a) if such affiliate acts as a service provider to such person.

Notice of Reasonable Cause and Notice. The Proposal states that the terms “Notice of Reasonable Cause” and “Notice” mean a Notice issued under § 1091.102.

Person. The Proposal incorporates the definition of “person” set forth in 12 U.S.C. 5481(19). The Proposal therefore states that the term “person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Respondent. The Proposal states that the term “respondent” means a person who has been issued a Notice of Reasonable Cause by the Deputy under § 1091.102.

Response. The Proposal states that the term “response” means the response to a Notice of Reasonable Cause filed by a respondent with the Assistant Director under § 1091.105.

Section 1091.102 Issuance of Notice of Reasonable Cause

Proposed § 1091.102 relates to the issuance of a Notice of Reasonable Cause, which initiates the proceedings that culminate in a determination by the Director under § 1091.109 of the Proposed Rule, or a respondent’s voluntary consent to supervision by the Bureau. Section 1091.102 provides that the Deputy is authorized to issue a Notice of Reasonable Cause and,

consistent with 12 U.S.C. 5514(a)(1)(C), that such Notice shall be based on complaints collected by the Bureau, or on information from other sources.

The Bureau seeks comment on the issuance of a Notice of Reasonable Cause and any suggested modifications or alternatives.

Section 1091.103 Contents of Notice

Proposed § 1091.103 details the required content of a Notice. To ensure that a respondent has a reasonable opportunity to address the substance of a Notice, proposed § 1091.103 provides that a Notice must set forth, among other things, the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that 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.

Under proposed § 1091.103, a Notice must also contain a statement informing a respondent how to file a timely response, and of the required contents of a response. A Notice must also inform a respondent that he or she may request a supplemental oral response, and that a respondent may, in lieu of filing a response, voluntarily consent to the Bureau's supervisory authority under 12 U.S.C. 5514 by filing an executed consent form attached to a Notice served on a respondent. Section 1091.103 further provides that a Notice shall inform a respondent that a failure to respond, as set forth in a Notice, may result in a determination by the Director without further opportunity to respond by the respondent. As set forth in proposed § 1091.103, a Notice must also inform a respondent of the various timelines associated with the process.

The Bureau seeks comment on the proposed contents of a Notice and any suggested modifications or alternatives.

Section 1091.104 Service of Notice

Proposed § 1091.104 provides that a Notice shall be served pursuant to methods including electronic transmission (where a respondent has consented), personal service, first class U.S. Mail, or commercial courier or express delivery service. Proposed § 1091.104 further requires that the Deputy submit a copy of a Notice and any attached documents, records or other items to the Assistant Director, who shall proceed as set forth in the Proposal.

The Bureau seeks comment on the proposed requirements relating to the service of a Notice and any suggested modifications or alternatives.

Section 1091.105 Response

Proposed § 1091.105 sets forth the requirements for responding to a Notice of Reasonable Cause. Specifically, § 1091.105 provides that any response must be filed within 20 days of service of a Notice, and the failure to file a timely response shall result in a waiver of a respondent's right to respond, authorize the Assistant Director to issue a recommended determination, and the Director a final determination, on the basis of the Notice. Proposed § 1091.105 further provides that a respondent may respond to a Notice of Reasonable Cause either by contesting that it is a nonbank covered person that 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, or by voluntarily consenting to the Bureau's supervisory authority under 12 U.S.C. 5514. Where a respondent wishes to contest the assertions in a Notice, proposed § 1091.105 mandates that the response: (1) set forth the basis for a respondent's contention that the respondent should not be subject to supervision pursuant to 12 U.S.C. 5514(a)(1)(C); (2) include all records, documents, or other items upon which a respondent relies; and (3) include an affidavit signed by the respondent attesting that the information contained in the response is true, accurate, and without any omission that would cause the response to be

materially misleading. The Proposed Rule further provides that documents, records or other items submitted by a respondent with a response shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1)(iv). In addition, under proposed § 1091.105, if a respondent wishes also to present arguments in a supplemental oral response, the respondent must make such a request in the response. A failure to do so will constitute a waiver of a respondent's opportunity to present a supplemental oral response.

Finally, proposed § 1091.105 states that the failure to timely raise an issue in, or submit records, documents, or other items with, the response constitutes a waiver of a respondent's right to raise the issue, or submit the records, documents, or other items, at any future stage of consideration under this Proposed Rule and in any petition for judicial review. The Bureau intends for the waiver to remove any incentive for a respondent to wait until after filing a response, such as at a supplemental oral response or during judicial review, to raise an argument or present documents or other information for the first time. This will help ensure that the Bureau is aware of all relevant issues upon which a respondent wishes to rely at the earliest opportunity before reaching a determination under this Proposed Rule.

The Bureau seeks comment on the proposed contents of and requirements relating to the response and any suggested modifications or alternatives.

Section 1091.106 Supplemental oral response

Proposed § 1091.106 provides that a respondent may request a supplemental oral response and sets forth the procedures for the conduct of a supplemental oral response. Under proposed § 1091.106, supplemental oral responses will generally be held via telephone. In the Bureau's view, conducting such oral responses by telephone allows for more flexibility and is less burdensome than conducting an in person response.

Proposed § 1091.106 further provides that the Assistant Director may impose limitations on the conduct of a supplemental oral response and provides a non-exhaustive set of such limitations. The Bureau believes that providing the Assistant Director with authority to impose such limitations will help ensure that a supplemental oral response focuses on a respondent's and Deputy's arguments supporting their respective legal and factual assertions in the matter.

Proposed § 1091.106 further makes clear that no discovery will be permitted, and no witnesses will be called, in connection with a supplemental oral response. This limitation is appropriate given the informal nature of the procedures set forth in this Proposed Rule. The prohibition on discovery and the calling of witnesses in connection with a supplemental oral response also furthers the Bureau's objective of providing a timely and efficient determination process, saving both the Bureau and respondents the time and expenses typically expended on discovery.

Proposed § 1091.106 also prescribes the timing of a supplemental oral response. Specifically, under the proposed section, within 14 days of receiving a respondent's request for a supplemental oral response, the Assistant Director shall serve on a respondent a notice advising of the date, time, and relevant information relating to the conduct of a supplemental oral response, with a copy to the Deputy. To allow a respondent and the Deputy sufficient time to prepare for a supplemental oral response, and to make arrangements to participate, proposed § 1091.106 provides that a supplemental oral response shall be scheduled not less than ten days after the date of such service. Finally, proposed § 1091.106 states that if a respondent fails to participate in a scheduled supplemental oral response, such a failure constitutes a respondent's waiver of the opportunity to present a supplemental oral response.

The Bureau seeks comment on the proposed procedures for a supplemental oral response and any suggested modifications or alternatives.

Section 1091.107 Manner of filing papers

Proposed 1091.107 provides for filing of papers in a proceeding under the Proposed Rule by electronic transmission under such conditions as specified by the Assistant Director or Director. This section also authorizes other methods of filing and service if a respondent demonstrates electronic filing is not practicable and the Assistant Director or Director permits an alternative method of filing or service.

The Bureau seeks comment on the proposed manner of filing papers and any suggested modifications or alternatives.

Section 1091.108 Recommended determination

Proposed § 1091.108 provides that the Assistant Director shall make a recommended determination and submit to the Director either a proposed order that would bring a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, or a proposed notification containing the determination that a respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514 on the basis of the proceeding. Under proposed § 1091.108, if a respondent has not voluntarily consented to the Bureau's supervisory authority, and has not requested the opportunity to present a supplemental oral response, a recommended determination shall be made not later than 45 days from the receipt of a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response. If a respondent has requested the opportunity to present a supplemental oral response, a recommended determination shall be made not later than 90 days after the service of a Notice of Reasonable Cause. Proposed § 1091.108 further sets forth the required content of the

Assistant Director's recommended determination, and the documents and items that must accompany the recommended determination sent to the Director by the Assistant Director.

The Bureau seeks comment on the proposed content of, and procedures relating to, the recommended determination and any suggested modifications or alternatives.

Section 1091.109 Determination by the Director

Proposed § 1091.109 provides that, not later than 45 days after receipt of the Assistant Director's recommended determination, the Director shall make a final determination by adopting without revision, modifying, or rejecting the Assistant Director's recommended determination. Under the proposed section, the Director shall issue to a respondent, with copies to the Assistant Director and Deputy, an order bringing a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, or a notification containing the determination that a respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514 on the basis of the proceeding. Proposed § 1091.109 also provides that the Director may rely on the assistance and advice only of decisional employees in reaching a final determination.

The Bureau seeks comment on the proposed content of, and procedures relating to, the determination and any suggested modifications or alternatives.

Section 1091.110 Petition for termination of order

Proposed § 1091.110 provides that a respondent may petition the Director for the termination of an order bringing a respondent within the Bureau's supervisory authority under 12 U.S.C. 5514, and sets forth the required contents of such a petition. Under proposed § 1091.110, a respondent may so petition no sooner than two years after the issuance of the order, and no more frequently than annually thereafter, except that in the case of a voluntary consent to supervision, a respondent may not petition for early termination of the supervisory authority

period set forth in the consent agreement. A petition is a respondent's opportunity to inform the Bureau of the actions taken and the progress made to reduce risk to consumers after the issuance of an order. A petition should set forth the reasons supporting a respondent's petition for the termination of the order. Under proposed § 1091.110, the Deputy would be permitted to file a response to a petition for termination setting forth the Deputy's recommendation to terminate or modify the order, or to deny the petition, and the reasons supporting such a recommendation within 30 days of her or his receipt of a copy of a petition. Proposed § 1091.110 further provides that within 90 days of a respondent submitting a petition for termination, the Director shall either terminate or modify the order, or deny the petition. This section also specifies the manner in which a petition for termination must be filed.

The Bureau seeks comment on the proposed content of, and procedures relating to, the petition for termination of an order and any suggested modifications or alternatives.

Section 1091.111 Construction of time limits

Proposed § 1091.111 provides common rules for computing time limits, taking into account the effect of weekends and holidays on time periods that are ten days or less. This section also sets forth when filing or service is effective. With regard to time limits for responsive papers, proposed § 1091.111 incorporates a three-day extension for mail service, and a one-day extension for overnight delivery and electronic transmission. A one-day extension for service by electronic transmission reflects that electronic transmissions may result in delays in actual receipt by the person served.

The Bureau seeks comment on the proposed construction of time limits and any suggested modifications or alternatives.

Section 1091.112 Change of time limits and effect of deadlines

Proposed § 1091.112 provides that requests for the extension of time may be granted in the limited circumstances in which the extension is necessary to prevent substantial prejudice. The Bureau intends for this section to further the Bureau's goal of ensuring the timely conclusion of matters. Accordingly, the section provides that requests for the extension of time are strongly disfavored and may only be granted when a party makes a strong showing that the denial of the request would substantially prejudice the party. Finally, proposed § 1091.112 states that deadlines for action by the Assistant Director or Director established in this Proposed Rule confer no substantive rights on respondents.

The Bureau seeks comment on the proposed procedures relating to the change of time limits and effect of deadlines and any suggested modifications or alternatives.

Section 1091.113 Voluntary consent to Bureau's authority

Proposed § 1091.113 provides that nothing in the Proposed Rule shall affect a person's ability to voluntarily consent, at any time, to the Bureau's supervisory authority under 12 U.S.C. 5514 as mutually agreed to by the parties. Voluntary consent under this section is an alternative to voluntarily consenting to the Bureau's supervision as provided under proposed § 1091.103(b), which allows a respondent to execute and file a consent agreement form in lieu of filing a written response. Proposed § 1091.113 also provides that a consent agreement that specifies the period during which the person will be subject to the Bureau's supervisory authority precludes such a person from petitioning for the termination of the order under proposed § 1091.110 during the agreed-to supervisory period. Additionally, proposed § 1091.113 provides that a person entering into a consent agreement waives any right to judicial review of that agreement.

The Bureau seeks comment on the proposed procedures relating to a respondent's voluntary consent to the Bureau's authority under 12 U.S.C. 5514 and any suggested modifications or alternatives.

Section 1091.114 Notice and response included in adjudication proceeding otherwise brought by the Bureau

Proposed § 1091.114 provides that if the Bureau issues a notice of charges against a person under 12 CFR 1081.200,¹² the Bureau may, in its sole discretion, also provide the notice and opportunity to respond required by 12 U.S.C. 5514(a)(1)(C) in the notice of charges. In such a circumstance, the procedures set forth in proposed § 1091.101 - § 1091.113 would not apply to the proceedings. The Bureau intends to use the administrative adjudication proceedings set forth in 12 CFR 1081.200 to provide notice and a reasonable opportunity to respond as required by 12 U.S.C. 5514(a)(1)(C) only in certain cases where the Bureau has otherwise brought an administrative action against a respondent. The Bureau believes that the flexibility provided by this section would enhance efficiency and reduce burdens to respondents and the Bureau by allowing a determination under 12 U.S.C. 5514(a)(1)(C) and an adjudicative proceeding to be handled in a single forum.

The Bureau seeks comment on the proposed procedures relating to providing notice and a reasonable opportunity to respond under 12 U.S.C. 5514(a)(1)(C) in an adjudicative proceeding brought by the Bureau pursuant to 12 part CFR 1081.200 and any suggested modifications or alternatives.

Section 1091.115 No limitation on relief sought in civil action or administrative adjudication

This section clarifies that nothing in this part shall be construed to limit the relief the Bureau may seek in any civil action or administrative adjudication.

¹² 12 CFR 1081.200 sets forth the procedures for the commencement of an adjudicative proceeding by the Bureau under 12 U.S.C. 5563, and also the contents of the notice of charges in such a proceeding.

The Bureau seeks comment on this section and any suggested modifications or alternatives.

V. Request for Comment

The Proposed Rule relates solely to agency procedure and practice and, thus, is not subject to the notice-and-comment requirements of the APA.¹³ Although the Proposed Rule is exempt from these requirements, the Bureau invites comment on all aspects of this notice of proposed rulemaking and on the specific issues upon which comment is solicited elsewhere herein, including on any appropriate modifications or exceptions to the Proposed Rule.

VI. Section 1022(b)(2) of the Dodd-Frank Act (12 U.S.C. 5512(b)(2))

In developing the Proposed Rule, the Bureau has considered the potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators and the Federal Trade Commission, including with regard to consistency with any prudential market, or systemic objectives administered by such agencies.¹⁴

Under 12 U.S.C. 5514(a)(1)(C), the Bureau has the authority to supervise any nonbank covered person that it “has reasonable cause to determine, by order, after notice . . . and a reasonable opportunity . . . to respond” that such covered person “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 Proposed Rule is intended to provide an efficient,

¹³ 5 U.S.C. 553(b)(A).

¹⁴ The provisions of 12 U.S.C. 5512(b)(2)(A) address the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in 12 U.S.C. 5516; and the impact on consumers in rural areas. The provisions of 12 U.S.C. 5512(b)(2)(B) further address consultation between the Bureau and other federal agencies during the rulemaking process. The manner and extent to which these provisions apply to procedural rules and to benefits, costs and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

expeditious, and fair process to implement 12 U.S.C. 5514(a)(1)(C).¹⁵ Although a rule is not necessary to implement this statutory provision, the Proposed Rule, if adopted, establish a consistent procedure applicable to all affected entities, and provide transparency regarding the applicable process prior to commencement of a proceeding. Absent the Proposed Rule, the public would lack any guidance regarding the Bureau's process under 12 U.S.C. 5514(a)(1)(C). Nonbank covered persons will incur certain costs in considering and responding to a Notice from the Bureau under the rule, but these costs would generally exist in the absence of the rule.

For major provisions of the Proposal, the Bureau considered the benefits and costs of certain alternatives. For example, the Proposed Rule would provide respondents an opportunity to participate in a supplementary oral response, which would generally be conducted via telephone. The Bureau believes that the proposed approach, if adopted, would benefit covered persons by offering an additional method of responding to a Notice compared with the alternative of not permitting any oral response. At the same time, the Bureau believes that the proposed approach would be less costly than the alternative of requiring that all oral responses be conducted in person at a designated location. Also in connection with supplemental oral responses, the Proposed Rule would permit, but not require, a respondent to be represented by counsel. The Bureau considered requiring representation by counsel, but opted to provide respondents with the opportunity to receive the benefits of representation, while not mandating that respondents incur the costs of such representation.

The Proposed Rule also permits respondents to consent to the Bureau's supervisory authority under standard terms in lieu of filing a response, or to enter into a negotiated agreement

¹⁵ The Bureau notes that there is little publicly available data with which to effectively measure or quantify the benefits, costs, and impacts of the Proposed Rule. Where benefits or costs are not readily quantifiable or where data is not reasonably available, the Bureau will conduct qualitative analyses relying on information from available sources.

at any time consenting to the Bureau’s supervisory authority. The Bureau believes that this approach, if adopted, would provide a streamlined resolution process that would reduce the costs to the Bureau and those respondents who wish to consent to the Bureau’s supervisory authority, compared to the alternative of permitting only negotiated consent agreements.

The Proposed Rule will have no unique impact on insured depository institutions or insured credit unions with \$10 billion or less in assets as described in 12 U.S.C. 5516(a). Nor would the Proposed Rule have a unique impact on rural consumers.

The Bureau requests comments on the potential benefits, costs, and impacts of the Proposed Rule.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations. The RFA defines a “small business” as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.¹⁶

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to

¹⁶ 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment.

consult with small business representatives prior to proposing a rule for which an IRFA is required.¹⁷

As discussed above in section V, a notice of proposed rulemaking is not required for this rulemaking. The Proposed Rule therefore is not a “rule” as defined by the RFA.¹⁸ Nevertheless, the Bureau opted to issue a notice of proposed rulemaking to receive public comment.

An IRFA would not otherwise be required because the Proposed Rule, if adopted, would not have a significant economic impact on any small entities. The Proposed Rule sets forth only procedures by which a nonbank covered person may become subject to the Bureau’s current supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C). The Proposed Rule establishes a transparent and streamlined process by which the Bureau would exercise its existing legal authority and would not impose new substantive requirements. Accordingly, the undersigned certifies that this Proposed Rule will not have a significant impact on a substantial number of small entities.

VIII. Paperwork Reduction Act

The Bureau has determined that the Rule does not impose any new recordkeeping, reporting or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under 44 U.S.C. 3501, et seq.

List of Subjects in 12 CFR Part 1091

Administrative practice and procedures, Consumer protection, Credit, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to add part 1091 to Chapter X in Title 12 of the Code of Federal Regulations to read as set forth below.

¹⁷ 5 U.S.C. 609.

¹⁸ 5 U.S.C. 601(2) (“the term ‘rule’ means any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title, or any other law”)

Title 12—Banks and Banking

CHAPTER X—BUREAU OF CONSUMER FINANCIAL PROTECTION

PART 1091 - PROCEDURAL RULES TO ESTABLISH SUPERVISORY AUTHORITY OVER CERTAIN NONBANK COVERED PERSONS BASED ON RISK DETERMINATION

Sec.

1091.100 Scope and purpose.

1091.101 Definitions.

1091.102 Issuance of Notice of Reasonable Cause.

1091.103 Contents of Notice.

1091.104 Service of Notice.

1091.105 Response.

1091.106 Supplemental oral response.

1091.107 Manner of filing and serving papers.

1091.108 Recommended determination.

1091.109 Determination by the Director.

1091.110 Petition for termination of order.

1091.111 Construction of time limits.

1091.112 Change of time limits and effect of deadlines.

1091.113 Voluntary consent to Bureau's authority

1091.114 Notice and response included in adjudication proceeding otherwise brought by the Bureau

1091.115 No limitation on relief sought in civil action or administrative adjudication

AUTHORITY: Sections 1022(b)(1), 1024(a)(1)(C), and 1024(b)(7) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203 (12 U.S.C. 5512(b)(1), 5514(a)(1)(C), and 5514(b)(7)).

§1091.100 Scope and purpose.

This part implements section 1024(a)(1)(C) of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public L. 111-203 (12 U.S.C. 5514(a)(1)(C)) (Dodd-Frank Act), and establishes rules to facilitate the Bureau's supervision authority over certain nonbank covered persons pursuant to section 1024(b)(7) of the Dodd-Frank Act (12 U.S.C. 5514(b)(7)).

§ 1091.101 Definitions.

For the purposes of this part, the following definitions apply:

Assistant Director means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. If there is no Assistant Director, the Director may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15) that is described in one or more categories under:

- (1) 12 U.S.C. 5481(15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or
- (2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (1) of this paragraph.

Decisional employee means any employee of the Bureau who has not engaged in:

- (1) Assisting the Deputy in either determining whether to issue a Notice of Reasonable Cause, or presenting the Deputy's position in support of a Notice of Reasonable Cause, either in writing or in a supplemental oral response, to the Assistant Director; or
- (2) Assisting the Assistant Director in the preparation of a recommended determination.

Deputy means the Bureau's Deputy Assistant Director for Nonbank Supervision or her or his designee. If there is no Deputy, the term shall mean any alternative Bureau employee designated by the Assistant Director or Director to fulfill the duties of the Deputy under this part.

Director means the Director of the Bureau or her or his designee. If there is no Director, the term shall mean a person authorized to perform the functions of the Director in accordance with the law, or her or his designee.

Executive Secretary means the Executive Secretary of the Bureau.

Nonbank covered person means , except for persons described in 12 U.S.C. 5515(a) and 5516(a):

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person described in subparagraph (1) of this paragraph if such affiliate acts as a service provider to such person.

Notice of Reasonable Cause and Notice mean a Notice issued under § 1091.102 .

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Respondent means a person who has been issued a Notice of Reasonable Cause under § 1091.102.

Response means the response to a Notice of Reasonable Cause filed by a respondent with the Assistant Director under § 1091.105.

§1091.102 Issuance of Notice of Reasonable Cause.

(a) The Deputy is authorized to issue a Notice of Reasonable Cause to a nonbank covered person stating that the Bureau may have reasonable cause to determine that the nonbank covered person 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.

(b) A Notice of Reasonable Cause shall be based on:

- (1) Complaints collected through the system under 12 U.S.C. 5493(b)(3); or
- (2) Information from other sources.

(c) Except as provided in § 1091.114, a notice required under 12 U.S.C.

5514(a)(1)(C) shall contain the information set forth in § 1091.103, and be served on respondent as described in § 1091.104.

§ 1091.103 Contents of Notice.

(a) A Notice of Reasonable Cause shall contain the following:

(1) A description of the basis for the assertion that the Bureau may have reasonable cause to determine that a respondent is a nonbank covered person that 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; and

(2) A statement informing a respondent that:

(i) A respondent may file with the Assistant Director a written response to a Notice of Reasonable Cause no later than 20 days after a Notice is served on a respondent;

(ii) The written response shall include the elements addressed in § 1091.105(b):

(iii) A respondent may request in its response to a Notice an opportunity to present a supplemental oral response to the Assistant Director as set forth in § 1091.106;

(iv) A failure to timely file a response to a Notice shall constitute a waiver of a respondent's right to respond, and may result in a default determination by the Director, based on the Notice, that a respondent is a nonbank covered person that 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 and the issuance of a decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C);

(v) The Assistant Director shall serve a respondent with a notice of the date and time of a supplemental oral response, if a respondent has requested the opportunity to present a supplemental oral response, within 14 days of the Assistant Director's receipt of a timely-filed response; and

(vi) If a respondent has not requested the opportunity to present a supplemental oral response, the Assistant Director shall, not later than 45 days of receiving a timely-filed response, or not later than 45 days after the service of a Notice of Reasonable Cause when a respondent fails to file a timely response, provide a recommended determination to the Director including either a proposed decision and order subjecting a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C), or a proposed notification that the Bureau has determined not to subject a respondent to the Bureau's supervisory authority at that time, pursuant to § 1091.108.

(b) A Notice shall be accompanied by a form of consent agreement by which a respondent may voluntarily consent to the Bureau's authority to supervise a respondent under 12 U.S.C. 5514. A completed and executed form of consent agreement under this paragraph:

(1) Shall not constitute an admission that a respondent is a nonbank covered person that has engaged, or is engaging, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services;

(2) Shall result in an order by the Director that a respondent is subject to the Bureau's supervisory authority under 12 U.S.C. 5514 for a period of two years from the date of

such order; and

(3) Shall include a provision that a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

(c) Nothing in this section shall be construed as requiring the Bureau to produce any documents or information to a respondent other items than as set forth in this section.

§ 1091.104 Service of Notice.

(a) A Notice shall be served on a respondent as follows:

(1) To individuals. A Notice shall be served on a respondent that is an individual by delivering a copy of the Notice to the individual or to an agent authorized by appointment or by law to receive such a Notice. Delivery, for purposes of this paragraph, means handing a copy of a Notice to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of a Notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(2) To corporations or entities. Notice shall be served on a person other than an individual by delivering a copy of a Notice to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such a Notice, by any method specified in paragraph (a)(1) of this section.

(3) Upon persons registered with the Bureau. In addition to any other method of service specified in paragraph (a)(1) or (a)(2) of this section, Notice may be served on a person currently registered with the Bureau by sending a copy of a Notice addressed to the most

recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(4) Upon persons in a foreign country. Notice may be served on a person in a foreign country by any method specified in paragraph (a)(1) or (2) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(5) Record of service. The Bureau shall maintain and file a record of service of a Notice on a respondent, identifying the party given Notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if available, the name of the individual to whom a Notice was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail or Express Mail, the Bureau shall maintain the confirmation of receipt or attempted delivery.

(6) Waiver of service. In lieu of service as set forth in paragraph (a)(1) or (a)(2) of this section, the party may be provided a copy of a Notice by First Class Mail or other reliable means if a waiver of service is obtained from the party.

(b) The Deputy shall promptly submit a copy of a Notice and a copy of the certificate of service to the Assistant. The Assistant Director shall proceed as set forth in this Proposal upon receipt of a Notice.

§ 1091.105 Response.

(a) Timing. Within 20 days of service of a Notice, a respondent shall file any response with the Assistant Director according to the instructions set forth in a Notice.

(b) Content of the response. (1) The response shall set forth the basis for a

respondent's contention that the respondent is not a nonbank covered person that 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.

(2) The response shall include all documents, records or other evidence a respondent wishes to use to support the arguments or assertions set forth in the response.

Documents, records or other items submitted by a respondent with a response shall be deemed confidential supervisory information under 12 CFR part 1070.2(i)(1)(iv).

(3) Any request to present a supplemental oral response must be included in the response. A respondent's failure to request to present a supplemental oral response shall constitute the respondent's waiver of the opportunity to present a supplemental oral response.

(4) A response shall include an affidavit or declaration, made by the individual respondent if a natural person, or, if a corporate or other entity that is not a natural person, by an officer, managing or general member or partner authorized to represent the respondent, affirming that the response is true and accurate and does not contain any omissions that would cause the response to be materially misleading.

(5) Notwithstanding any other provisions of this paragraph, a respondent may respond by voluntarily consenting to the Bureau's authority to supervise the respondent under 12 U.S.C. 5514 by completing and executing the consent agreement form provided to the respondent with a Notice of Reasonable Cause in accordance with § 1091.103(b).

(c) Default. Failure of a respondent to file a response within the time period set forth in paragraph (a) of this section shall constitute a waiver of the respondent's right to respond, and shall, based on the Notice, authorize the Assistant Director, without further notice to the respondent, to issue a proposed decision and order as provided in § 1091.108(c)(1) and the

Director to issue a decision and order as provided in § 1091.109(a)(1).

(d) Waiver. A respondent shall be deemed to have waived the right, at any future stage of the Assistant Director's or the Director's consideration of the matter and in any petition for judicial review, to rely on any argument, record, document, or other information that the respondent does not raise or include in its response.

(e) No Discovery. There shall be no discovery in connection with a response.

§ 1091.106 Supplemental oral response.

(a) A respondent may request in a response under § 1091.105 the opportunity to present to the Assistant Director a supplemental oral response in support of a respondent's assertion that the respondent is not a nonbank covered person that 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.

(b) The conduct of a supplemental oral response shall be subject to the following procedures:

(1) A supplemental oral response shall be conducted by telephone unless the Assistant Director directs that it be conducted in some other manner.

(2) The Assistant Director may impose any limitations on the conduct of a supplemental oral response, including but not limited to establishing a time limit for the presentation of a supplemental oral response, and limiting the subjects to be addressed in a supplemental oral response.

(3) There shall be no discovery permitted or witnesses called in connection with a supplemental oral response.

(4) If a respondent is a corporate or other entity, and not a natural person, the

respondent shall be represented in any supplemental oral response by:

(i) An officer, managing or general member or partner authorized to represent the respondent; or

(ii) An attorney in good standing of the bar of the highest court of any state.

(5) If a respondent is a natural person, the respondent shall be represented in any supplemental oral response by:

(i) Herself or himself; or

(ii) An attorney in good standing of the bar of the highest court of any state.

(6) The Assistant Director shall cause a recording of a supplemental oral response to be made. A respondent may purchase a copy or transcript of the recording at the respondent's own expense.

(c) The Deputy may participate in any supplemental oral response conducted under this section.

(d) The Assistant Director shall serve on a respondent, within 14 days after the Assistant Director receives the respondent's timely-filed response requesting a supplemental oral response, a notice setting forth the date, time and general information relating to the conduct of a supplemental oral response. The date of a supplemental oral response shall be scheduled not less than ten days after the date the respondent is served with the notice of supplemental oral response.

(e) The notice of supplemental oral response shall be served on a respondent pursuant to § 1091.107.

(f) The Assistant Director shall send a copy of the notice of supplemental oral response to the Deputy.

(g) A respondent's failure to participate in a supplemental oral response scheduled by the Assistant Director shall constitute the respondent's waiver of the opportunity to present a supplemental oral response.

§1091.107 Manner of filing and serving papers.

Unless otherwise specified by the Assistant Director or Director, a respondent shall file the response and any other paper with the Executive Secretary at the mailing or electronic address provided by the Bureau, and the Assistant Director and Director shall serve any paper, other than a Notice as set forth in § 1091.104, on a respondent, by:

(a) Electronic transmission upon any condition specified by the Assistant Director or Director; or

(b) Any of the following methods if a respondent demonstrates electronic filing is not practicable and the Assistant Director or Director permits:

(1) Personal delivery;

(2) Delivery through a reliable commercial courier service or overnight delivery service; or

(3) Mailing the papers by first class, registered, certified, or Express mail.

§ 1091.108 Recommended determination.

(a) If a respondent did not voluntarily consent to the Bureau's supervision authority, and did not request the opportunity to present a supplemental oral response, not later than 45 days after receipt of a timely-filed response, or not later than 45 days after the service of a Notice

of Reasonable Cause when a respondent fails to file a timely response, the Assistant Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that 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 which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(b) If a respondent did request the opportunity to present a supplemental oral response, not later than 90 days after service of a Notice of Reasonable Cause, the Assistant Director shall make a recommended determination whether there is reasonable cause for the Bureau to determine that the respondent is a nonbank covered person that 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 which should result in an order subjecting the respondent to the Bureau's authority under 12 U.S.C. 5514(a)(1)(C).

(c) Upon making the recommended determination described in paragraphs (a) and (b) of this section, the Assistant Director shall submit to the Director either:

(1) A proposed decision and order that would subject a respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C) if adopted by the Director;

or

(2) A proposed notification that a respondent should not be subjected to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) based on the proceedings. Such a notification shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause pursuant to either § 1091.102, or the procedures set forth in § 1091.114, at any time, or from issuance of a decision and order subjecting a respondent to the Bureau's

authority pursuant to either of those sections.

(d) Any proposed decision and order issued by the Assistant Director pursuant to paragraph (c)(1) of this section shall set forth:

(1) A statement that the Assistant Director has preliminarily determined based on reasonable cause that a respondent is a nonbank covered person that 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;

(2) The basis for the Assistant Director's determination; and

(3) A proposed order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514.

(e) (1) The Assistant Director shall include with the recommended determination submitted to the Director copies of the following:

(i) The Notice of Reasonable Cause;

(ii) The record of service of a Notice of Reasonable Cause;

(iii) A respondent's response and any documents, records or other items filed with the written response;

(iv) Any document, record, or other item considered by the Assistant Director to be material in making a recommended determination; and

(v) A recording of a supplemental oral response, if a supplemental oral response was conducted, and/or a transcript if a transcript was prepared at a respondent's request or if requested by the Director.

(2) The requirement that the Assistant Director provide to the Director the

items described in subparagraph (1) of this paragraph shall confer no substantive rights on a respondent and any omission of an item may be cured by the Assistant Director to the extent applicable.

§1091.109 Determination by the Director.

(a) Not later than 45 days after receipt of the Assistant Director's recommended determination, the Director shall, after considering the recommended determination and all documents, records, and other items submitted therewith by the Assistant Director, make a determination either adopting without revision, modifying, or rejecting the Assistant Director's recommended determination, and shall issue to respondent, with copies to the Assistant Director and the Deputy:

(1) A decision and order subjecting the respondent to the Bureau's supervisory authority pursuant to 12 U.S.C. 5514(a)(1)(C); or

(2) A notification that the Director has determined that the respondent is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514(a)(1)(C) as a result of the proceedings. Such notification shall have no precedential effect and shall not prevent the issuance of another Notice of Reasonable Cause pursuant to either § 1091.102, or the procedures set forth in § 1091.114, at any time, or the issuance of an order subjecting the respondent to the Bureau's authority pursuant to either of those sections.

(b) Any decision and order issued by the Director pursuant to paragraph (a)(1) of this section shall set forth:

(1) That the Director adopts the Assistant Director's proposed decision and order without revision as the Director's decision and order; or that the Director rejects or modifies the Assistant Director's proposed determination for reasons set forth by the Director;

(2) A statement that the Director has determined that the Bureau has reasonable cause to determine that a respondent is a nonbank covered person that 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;

(3) The basis for the Director's determination, which may be an adoption of the basis set forth in Assistant Director's proposed decision; and

(4) An order directing that, pursuant to this determination, as of a specified date a respondent shall be subject to the Bureau's supervisory authority under 12 U.S.C. 5514 and informing a respondent that a respondent may petition for termination of the Bureau's supervisory authority after two years from the date of the order, and no more than annually thereafter.

(c) Only decisional employees may advise and assist the Director in the consideration and disposition of a proceeding under this part.

(d) A decision and order issued pursuant to paragraph (a)(1) of this section shall constitute final agency action under 5 U.S.C. 704.

(e) Any item required to be served on a respondent under this section shall be served pursuant to § 1091.107.

§ 1091.110 Petition for termination of order.

(a) Any person subject to an order issued pursuant to § 1091.109(a)(1) may, no sooner than two years after issuance of such an order and no more frequently than annually thereafter, petition the Director for termination of the order.

(b) A petition for termination submitted pursuant to paragraph (a) of this section shall set forth the reasons supporting termination of the order, including any actions taken by a

respondent since issuance of the order to address the conduct that led to issuance of the order, and may include any supporting information or evidence that the petitioner believes is relevant to the Director's determination of the matter.

(c) A petition for termination shall be filed by the petitioner with the Executive Secretary at the mailing or electronic address provided by the Bureau.

(d) The Director shall, promptly upon receipt of a petition for termination, send a copy of same to the Deputy.

(1) The Deputy may, within 30 days of her or his receipt of a copy of a petition for termination, file with the Director a response to the petition stating whether the Deputy recommends that the order should be terminated, modified, or that the petition for termination should be denied and the basis for such recommendation.

(2) The Deputy shall serve a copy of the response to a petition for termination on the petitioner at the time of filing it with the Director.

(e) Not later than 90 days after submission of a petition under paragraph (a) of this section, the Director shall issue a written decision either terminating or modifying the order, or denying the petition. If the Director modifies the order or denies the petition, the Director shall explain the basis for his or her decision with respect to the petition and send the written decision to the petitioner and the Deputy.

(1) The Director shall serve the written decision on a petition for termination of order on a respondent pursuant to § 1091.107.

(2) The Director shall send a copy of the written decision on a petition for termination of order to the Assistant Director and Deputy promptly upon issuing the written decision.

(f) Any item required to be served on a petitioner in this section shall be served pursuant to § 1091.107.

(g) The decision of the Director made pursuant to paragraph (e) of this section shall constitute final agency action under 5 U.S.C. 704.

§1091.111 Construction of time limits.

(a) General rule. In computing any period of time prescribed by this part, or by order of the Assistant Director or Director, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section.

(b) Filing or service of papers. Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by the person served;

(2) In the case of overnight commercial delivery service, U.S. Express Mail delivery, or first class, registered, or certified mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, including email, upon transmission.

(c) Calculation of time for service and filing of responsive papers. Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by first class, registered, or certified mail, add three calendar days to the prescribed period;

(2) If service is made by express mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the prescribed period.

§ 1091.112 Change of time limits and effect of deadlines.

(a) Except as otherwise provided by law, the Assistant Director until the issuance of a recommended determination, or the Director at any time thereafter, may extend the time limits prescribed by this part or by any notice or order issued pursuant to this part. Any request for an extension of a time limit by a respondent must be for good cause shown, in writing, and filed with the Assistant Director or Director, as appropriate. The mere filing of a written request for an extension does not alleviate a respondent of the obligation to meet an applicable time limit absent written confirmation that an extension has been granted.

(b) In considering all requests for extensions of time filed pursuant to paragraph (a) of this section, the Assistant Director or Director, as appropriate, shall adhere to a policy of strongly disfavoring such requests, except in circumstances where the requesting party makes a strong showing that the denial of the request would substantially prejudice its case.

(c) Deadlines for action by the Deputy, Assistant Director or the Director established in this part confer no substantive rights on respondents.

§ 1091.113 Voluntary consent to Bureau's authority.

(a) Notwithstanding any other provision, pursuant to a consent agreement agreed to by the Bureau, a person may voluntarily consent to the Bureau's supervisory authority under 12

U.S.C. 5514 , and such voluntary consent agreement shall not be subject to any right to judicial review.

(b) The consent agreement of any person, pursuant to paragraph (a) of this section, that specifies the duration of time that such person will be subject to the Bureau's authority under 12 U.S.C. 5514 shall not be eligible for a petition for termination of order pursuant to § 1091.110, and a respondent entering into a consent agreement waives any right to judicial review of such consent agreement.

§ 1091.114 Notice and response included in adjudication proceeding otherwise brought by the Bureau.

(a) Notwithstanding sections § 1091.102 through § 1091.104, the Bureau may, in its sole discretion, provide the notice and opportunity to respond required by 12 U.S.C. 5514(a)(1)(C) in a notice of charges otherwise brought by the Bureau pursuant to 12 CFR 1081.200 and the adjudication proceedings pursuant to that part.

(b) If the Bureau chooses to proceed in the manner described in paragraph (a) of this section, it shall so indicate in the notice of charges, and any order of the Director resulting from the notice of charges shall constitute the order referred to in 12 U.S.C. 5514(a)(1)(C).

(c) If the Bureau proceeds pursuant to paragraph (a) of this section, the provisions of § 1091.100 through § 1091.113 will be inapplicable to such proceeding. If the Bureau proceeds pursuant to this part, then the provisions of 12 CFR part 1081 shall be inapplicable to such proceedings.

§ 1091.115 No limitation on relief sought in civil action or administrative adjudication.

Nothing in this part shall be construed to limit the relief the Bureau may seek in any civil action or administrative adjudication, including but not limited to, seeking an order to have a

person deemed subject to the Bureau's supervisory authority under 12 U.S.C. 5514 for the reasons set forth in 12 U.S.C. 5514(a)(1)(C) or otherwise.

Dated: May _20_, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2012-12718 Filed 05/24/2012 at 8:45 am; Publication Date: 05/25/2012]