

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1090

[Docket No. CFPB-2012-0005]

RIN: 3170-AA00

Defining Larger Participants in Certain Consumer Financial Product and Service Markets

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule; request for public comment.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is proposing a new regulation pursuant to section 1024 of the Consumer Financial Protection Act of 2010. That provision grants the Bureau authority to supervise certain nonbank covered persons for compliance with Federal consumer financial laws and for other purposes. The Bureau has the authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank “larger participant[s]” in markets for other consumer financial products or services. The Bureau must define such “larger participants” by rule, and such an initial rule must be issued by July 21, 2012.

In this proposal, the Bureau proposes to define larger participants in the markets for consumer debt collection and consumer reporting. The Bureau intends that this proposal and subsequent initial rule will be followed by a series of rulemakings covering additional markets for consumer financial products and services. The Bureau also proposes to include provisions in this proposal that will facilitate the supervision of nonbank covered persons.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER FEDERAL REGISTER PUBLICATION].

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-2012-0005 or RIN 3170-AA00 by any of the following methods:

- Electronic: <http://www.regulations.gov>. Follow the instructions for submitting comments. In general, all comments received will be posted without change to their content.
- Mail: Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington DC 20006.
- Hand Delivery/Courier: Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington DC 20006.

In addition, comments will be available for public inspection and copying at 1700 G Street, NW, Washington, DC 20006 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, (202) 435-7408, or Nicholas Krafft, Consumer Financial Protection Analyst, (202) 435-7252, Office of Nonbank Supervision, Bureau of Consumer Financial Protection, 1700 G Street, NW, Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Background

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

This proposal (Proposed Rule or proposal) would establish, in part, the scope of coverage of the Bureau’s supervision authority for nonbank covered persons pursuant to section 1024 of the Act.⁴ That authority varies by consumer financial product or service market. Specifically, section 1024 grants the Bureau authority to supervise, regardless of size, nonbank covered

¹ The Act is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203 (12 U.S.C. 5301).

² See Act section 1025(a). The Bureau also has certain authorities relating to the supervision of other banks, thrifts, and credit unions. See Act section 1026 (c)(1), (e).

³ Section 1024 of the Act applies to nondepository (nonbank) covered persons and expressly excludes from coverage persons described in sections 1025(a) or 1026(a) of the Act. Under section 1002(6) of the Act, 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.” Act section 1002(6); see also Act section 1002(5) (defining “consumer financial product or service.”) Section 1024(d) of the Act provides that, 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 exclusive authority to . . . conduct examinations [and] require reports . . . with regard to a [nonbank covered person], subject to those provisions of law.”

⁴ The Bureau’s supervision authority also extends to service providers of these entities. See Act section 1024(e) (establishing the Bureau’s supervisory authority relating to service providers); see also, Act section 1002(26) (defining “service provider”). Service providers to consumer debt collectors and consumer reporting agencies may include firms such as data aggregators, law firms, data and record suppliers, account maintenance services, call centers, software providers, and developers of credit scoring algorithms.

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.⁵ In addition, the Bureau 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.⁶ The Act requires the initial larger participant rule to be issued by July 21, 2012. This Proposed Rule would establish the initial larger participant rule for two markets: consumer debt collection and consumer reporting. The Bureau anticipates subsequent rulemakings to define larger participants in additional markets.

The Bureau is authorized to supervise nonbank entities subject to section 1024 of the Act by requiring the submission of reports and conducting examinations to: (1) assess compliance with 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 the consumer financial markets.⁷

The Proposed Rule only pertains to defining larger participants in certain markets for purposes of the Bureau’s nonbank supervision authority 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.

⁵ Act section 1024(a)(1)(A), (D), and (E).

⁶ Act section 1024(a)(1)(B), (a)(2). The Bureau also 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.” Act section 1024(a)(1)(C).

⁷ Act section 1024(b)(1).

II. Overview of Comments Received

The Bureau solicited public comment on developing an initial proposed larger participant rule by publishing in the Federal Register a Notice and Request for Comment (Notice) on June 29, 2011,⁸ and holding a series of roundtable discussions with industry, consumer and civil rights groups, and state regulatory agencies and associations.⁹ The comment period for the Notice ended on August 15, 2011. The Bureau received more than 10,400 comments from individual consumers, consumer advocacy groups, industry trade groups, individual companies, state and federal regulators, regulatory associations, and elected officials.¹⁰ Issues addressed in the comments included which markets should be covered in the initial proposed rule, the particular criteria and thresholds the initial rule should use to measure the size of nonbank covered persons, available data sources, and measurement dates and supervision timeframes.

Commenters suggested a variety of approaches to choosing markets for inclusion in the initial larger participant rule. Some suggested the inclusion of certain specified markets, such as consumer reporting. Other commenters, both industry and consumer, recommended that the Bureau take a broad and flexible approach to covering markets and defining larger participants, in order to bring a large number of markets and market participants under the Bureau's supervision program. Still other commenters suggested consideration of specific factors in choosing markets for inclusion, such as risk to consumers, costs and benefits, or duplication of existing supervision. With respect to establishing a test to define who is a larger participant in a

⁸ 76 FR 38059.

⁹ In July 2011, the Bureau held four roundtable discussions on the larger participant Notice. More than 70 stakeholders participated, representing a diverse mix of nonbank and bank trade associations and consumer advocacy and civil rights groups. The roundtables focused on key issues regarding criteria (what to measure), thresholds (where to set), data (available sources), and markets (which to cover and how to define). Also in July 2011, the Bureau held a multistate regulator and regulatory association conference call that had more than 40 participants.

¹⁰ More than 10,300 of these comments were nearly identical form letters from individuals asking the Bureau to include credit bureaus and credit scoring companies in its supervision program.

market, comments submitted by both consumer groups and industry associations recommended that any test adopted by the Bureau enable it to adapt to evolving markets and be crafted such that nonbank covered persons do not “slip through the cracks.” Several commenters suggested that a “one-size-fits-all” approach to establishing a test to define who is a larger participant would not work. These commenters noted that the differences between markets call for tests tailored to each individual market. In addition, some industry and consumer group commenters supported using multiple tests within a given market to make it harder for nonbank covered persons to evade supervision under the rule. Other industry group commenters, however, favored the use of a single test to minimize burden on both nonbank covered persons and the Bureau.

The Bureau received comments both in favor and opposed to including small businesses within the coverage of the rulemaking. Trade groups with members that are small businesses cautioned about unnecessary burden and recommended an exemption of small businesses from coverage by the larger participant rule. Some consumer groups, on the other hand, advocated coverage of relevant firms even if they are small, arguing that in highly fragmented industries, almost all participants may be small businesses, and further, in the context of regional markets, small businesses may be large, regional players.

Finally, some commenters responded to the Bureau’s request for suitable data sources to develop and apply definitions of larger participants. However, none of the comments identified available, comprehensive data sources that could be used for this purpose.

Comments are discussed below as relevant in the section-by-section description of the proposal.

III. Summary of the Proposal

This proposal is the first in what the Bureau intends to be a series of rules to define “larger participants” in specific markets for purposes of establishing, in part, the scope of coverage of the Bureau’s nonbank supervision program. In developing the proposal, the Bureau considered the comments it received in response to the Notice and in the roundtables conducted last year. The Proposed Rule covers two markets for consumer financial products and services: consumer debt collection and consumer reporting.

The Proposed Rule sets forth definitions for the consumer financial products or services comprising the markets that it covers, in addition to defining other terms. The proposal establishes a test for each market to determine whether a nonbank entity is a larger participant of that market. For the debt collection and consumer reporting markets, the Bureau is proposing a test that measures the criterion of “annual receipts.” This measurement will use a definition of “annual receipts” adapted from the definition of the term used by the Small Business Administration (SBA) for purposes of defining small business concerns. The proposed threshold for the consumer debt collection market is more than \$10 million in annual receipts and, for the consumer reporting market, is more than \$7 million in annual receipts. Under the tests set forth in the Proposed Rule, these receipts must result from activities related to the market in question. Covered persons meeting the proposed tests would qualify as larger participants and be subject to the Bureau’s supervision authority under section 1024 of the Act. Although annual receipts are proposed as the criterion of measurement for both markets covered by the Proposed Rule, the Bureau has not determined that this criterion would be appropriate for any other market that may be the subject of a future rulemaking. Rather, the Bureau will tailor each test to the market to which it will be applied.

The Proposed Rule provides that once a nonbank covered person qualifies as a larger participant, the person will be deemed a larger participant for a period not less than two years from the first day of the tax year in which the person last met the applicable test. The proposal also includes a procedure for a person to dispute that it qualifies as a larger participant. To facilitate the Bureau's supervision of nonbank covered persons, to enable the Bureau to carry out the purposes and objectives of the Act relating to supervision, and to prevent evasion, the Proposed Rule provides that the Bureau may require submission of certain records, documents, and other information for purposes of determining whether a person is a larger participant of a covered market.

IV. Legal Authority and Procedural Matters

A. Rulemaking Authority

The Bureau is issuing this Proposed Rule pursuant to its authority under: (1) sections 1024(a)(1)(B) and (a)(2) of the Act which require the Bureau to issue an initial rule to define who is a larger participant in certain markets for consumer financial products or services by July 21, 2012, one year after the designated transfer date; (2) section 1024(b)(7) which authorizes the Bureau to prescribe rules to facilitate the supervision of covered persons under section 1024 of the Act; (3) section 1022(c)(5), which provides the Bureau the authority to assess whether a nonbank entity is a covered person under the Act by requiring such person to submit to the Bureau, under oath or otherwise, annual reports or answers in writing to specific questions; and (4) section 1022(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 these laws.

B. Proposed Effective Date of Final Rule

The Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.¹¹ The Bureau proposes that, once issued, the final rule for this proposal would be effective 30 days after publication. The Bureau seeks comment on whether the proposed effective date is appropriate, or whether the Bureau should adopt an alternative effective date.

V. Section-by-Section Description of the Proposed Rule

Section 1090.100—Scope and purpose.

Proposed § 1090.100 sets forth the scope and purpose of the Proposed Rule. It states that the part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to sections 1024(a)(1)(B) and (a)(2) of the Act. Proposed § 1090.100 further explains that a larger participant of a market covered by the part will be subject to the supervisory authority of the Bureau under section 1024 of the Act. Finally, proposed § 1090.100 provides that the part establishes rules to facilitate the Bureau's supervisory authority over larger participants pursuant to section 1024(b)(7) of the Act.

Section 1090.101—Definitions.

Proposed § 1090.101 defines terms used in the Proposed Rule. If a term is defined in the 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 clarifications, modifications, or alternatives. The Bureau notes that certain key terms defined by the Act and adopted by the proposal, such as “consumer,” are

¹¹ 5 U.S.C. 553(d).

defined differently by some consumer protection regulations such as Regulation Z¹² or Regulation E.¹³ The Bureau solicits comment on whether the Bureau should conform any of these definitions to other regulations for consistency and, if so, to which definitions it should conform.

Act. Proposed § 1090.101(a) states that the term “Act” means the Consumer Financial Protection Act of 2010.

Affiliated company. Section 1024(a)(3)(B) of the Act provides that for purposes of determining activity levels for, among other things, defining who is a larger participant of certain markets, the activities of affiliated companies (other than insured depository institutions or insured credit unions) shall be aggregated. The term “affiliated company” is not defined in the Act. For purposes of implementing section 1024(a)(3)(B)’s aggregation requirement, proposed § 1090.101(b) defines the term “affiliated company” in a manner guided by the definition of “affiliate” set forth in the Act,¹⁴ with modifications to track the requirements of 1024(a)(3)(B). Thus, proposed § 1090.101(b) states that the term “affiliated company” means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person.

For purposes of the definition of “affiliated company,” proposed § 1090.101(b) provides that the term “company” means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.¹⁵

¹² 12 CFR 1026.1 et seq.

¹³ 12 CFR 1005.1 et seq.

¹⁴ Act section 1002(1).

¹⁵ This definition of “company” is guided by the definition of that term in Regulation P, 12 CFR 1016.1 et seq. (Privacy of Consumer Financial Information), and Regulation V, 12 CFR 1022.1 et seq. (Fair Credit Reporting).

Also for purposes of the definition of “affiliated company,” proposed § 1090.101(b) explains when a person shall be considered to have control over another person, guided by the definitions of the term control provided in section 2 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) (12 U.S.C. 5301),¹⁶ section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813), section 2 of the Bank Holding Company Act (12 U.S.C. 1841), and the rules of other Federal financial regulators.¹⁷ Proposed § 1090.101(b) thus provides that a person has control over another person if: (i) the person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person; (ii) the person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or (iii) the person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.

The Bureau seeks comment on whether the definition of “affiliated company” is appropriate to implement the aggregation requirement under section 1024(a)(3)(B) of the Act, and on possible alternatives to the proposed definition.

Annual receipts. Proposed § 1090.101(c) is informed by the method of calculating “annual receipts” used by the SBA¹⁸ in determining whether a business is a “small business concern.” Under proposed § 1090.101(c), for purposes of calculating “annual receipts,” the term “receipts” means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS)

¹⁶ Pub. L. 111-203, 124 Stat. 1390, section 2(18)(A) (2010).

¹⁷ See, e.g., 12 CFR 41.3(i) (OCC rule defining “common ownership or common corporate control” in connection with fair credit reporting); 12 CFR 336.3(b) (FDIC rule defining “control” in connection with minimum standards of fitness for employment with the FDIC); 12 CFR 1805.104(q) (Department of the Treasury rule defining “control” in connection with the Community Development Financial Institutions Program).

¹⁸ 13 CFR 121.104.

tax return forms. The term does not include net capital gains or losses. Annual receipts are measured as the average of a person's most recently completed three fiscal years, or the average receipts for the entire period the person has been in business if it has less than three completed fiscal years.¹⁹ The calculation of annual receipts also implements the aggregation requirement in section 1024(a)(3)(B) of the Act by providing that the annual receipts of a person shall be added to the annual receipts of each of its affiliated companies. Such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

The Bureau considered defining "annual receipts" as the term is used in the U.S. Economic Census, but this term includes revenue from all business activities, whether or not payment was received in the census year, including net investment income, interest, and dividends.²⁰ The Bureau believes that the SBA's definition of "annual receipts" is more appropriate as a guide for this proposal because, by excluding net capital gains and losses, it does not capture this investment income, which is not generated from market activities in a given year.

Assistant Director. Proposed § 1090.101(d) states that the term "Assistant Director" means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. Under proposed § 1090.101(d), the Director of the Bureau may perform the functions of the Assistant Director as set forth in the Proposed Rule. Proposed § 1090.101(d) further provides that, in the

¹⁹ A "completed fiscal year" means a "tax year" including any "short tax year." A "fiscal year" is 12 consecutive months ending on the last day of any month except December 31st. A "tax year" is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a "short tax year." A "short tax year" is a "tax year" of less than 12 months. IRS Publication 538, available at <http://www.irs.gov/publications/p538/ar02.html#d0e237>.

²⁰ See http://factfinder2.census.gov/faces/help/jsf/pages/metadata.xhtml?lang=en&type=category&id=category.en./ECN/ECN/2007_US/56SSSZ4.MEASURE.RCPTOT#main_content

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. Proposed § 1090.101(e) states that the term “Bureau” means the Bureau of Consumer Financial Protection.

Consumer. Proposed § 1090.101(f) incorporates the definition of “consumer” set forth in section 1002(4) of the Act. Thus, proposed § 1090.101(f) states that the term “consumer” means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer debt collection. Under section 1002(15)(A)(x) of the Act, the term “financial product or service” includes “collecting debt related to any consumer financial product or service.” Section 1002(5)(B) of the Act, in turn, provides that this activity is a “consumer financial product or service” when “delivered, offered, or provided in connection with a consumer financial product or service.”

Proposed § 1090.101(g) defines the consumer financial product or service of “consumer debt collection” to ensure that it captures a range of consumer debt collection activities, including consumer debt collection activities undertaken by third-party collectors, law firms, attorneys, and debt buyers. The proposed definition describes consumer debt collection as collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service.²¹ It also indicates the debt may either be collected on behalf of another person or on the person’s own behalf if the debt was obtained while in default, to ensure consumer debt collection activities of

²¹ Similarly, section 1692a(6) of the Fair Debt Collection Practices Act (15 U.S.C.1692 et seq.), defines debt collection to include, among other things, collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another.

debt buyers are covered. The Bureau invites comments on all aspects of the definition of the term “consumer debt collection,” including possible alternatives to the proposed definition.

Consumer financial product or service. Proposed § 1090.101(h) incorporates the definition of the term “consumer financial product or service” set forth in section 1002(5) of the Act. Proposed § 1090.101(h) provides that the term “consumer financial product or service” means any financial product or service as defined in section 1002(15) of the Act that is described in one or more categories under: (a) section 1002(15) of the Act 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 section 1002(15)(A) of the Act²² and is delivered, offered, or provided in connection with a consumer financial product or service referred to in the immediately preceding subparagraph (a).

Consumer reporting. Under section 1002(15)(A)(ix) of the Act, the term “financial product or service” includes, subject to certain exceptions, “collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service.” Section 1002(5)(B) of the Act, in turn, provides that this activity is a “consumer financial product or service” when “delivered, offered, or provided in connection with a consumer financial product or service.”

²² Under these clauses, the term “financial product or service” is generally defined to include, subject to certain exclusions: (1) extending credit and servicing loans, Act section 1002(15)(A)(i); (2) providing real estate settlement services or performing appraisals of real estate or personal property, Act section 1002(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, Act section 1002(15)(A)(ix); and (4) collecting debt related to any consumer financial product or service, Act section 1002(15)(A)(x).

The definition of the consumer financial product or service of “consumer reporting” proposed in § 1090.101(i) is guided by the activity described in sections 1002(5)(B) and (15)(A)(ix) of the Act. The Bureau is proposing to modify this definition for the purposes of this Proposed Rule generally to exclude the activities of persons that furnish information about their own experiences or transactions with consumers and persons that use consumer report or other account information for their own purposes. While these activities do not typically result in annual receipts, the Bureau believes expressly excluding these activities will provide greater certainty for nonbank entities that do engage in these activities. Moreover, many large furnishers of information to consumer reporting entities are already subject to the Bureau’s supervisory authority under the Act.²³

Proposed § 1090.101(i) states that the term “consumer reporting” means collecting, analyzing, maintaining, or providing consumer report information or other account information, used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service. The language “by another person” revises the language of the Act to prevent the possibility of a person’s own use of consumer report information being included in the definition. The definition also provides exceptions for the activities of a person providing information related to their (or their affiliate’s) transactions and experiences with a consumer to an affiliate or to a consumer reporting entity, as well as the exception detailed in the Act for information used solely in a decision regarding employment, government licensing, and residential leasing. This definition covers different types of consumer

²³ As noted above, section 1024 of the Act grants the Bureau authority to supervise, regardless of size, 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. Section 1025 of the Act grants the Bureau authority to supervise very large banks, thrifts, and credit unions, and their affiliates.

reporting agencies such as credit bureaus, consumer report resellers, and specialty consumer reporting agencies such as those specializing in consumer check verification and payday lending transactions.²⁴ The Bureau invites comments on all aspects of the definition of the term “consumer reporting,” including possible alternatives to the proposed definition.

Larger participant. Proposed § 1090.101(j) defines the term “larger participant” to mean a nonbank covered person that meets a test under § 1090.102, and which remains a larger participant for the period provided in § 1090.103 of this part.

Nonbank covered person. Section 1024 of the Act relates to “covered persons” as defined in section 1002(6) of the Act that are not insured depository institutions or credit unions, or, in the case of such entities with assets of more than \$10 billion, their affiliates, as set forth in sections 1025(a) and 1026(a) of the Act. Proposed § 1090.101(k) therefore excludes from the definition of “nonbank covered persons” persons described in sections 1025(a) and 1026(a) of the Act and provides that the term “nonbank covered person” means, except for persons described in sections 1025(a) and 1026(a) of the Act: (a) any person that engages in offering or providing a consumer financial product or service; and (b) any affiliate of a person described in subparagraph (a) of this paragraph if such affiliate acts as a service provider to such person.

Person. Proposed § 1090.101(l) incorporates the definition of “person” set forth in section 1002(19) of the Act. Proposed § 1090.101(l) states that the term “person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

²⁴ This definition may also include entities such as credit scoring companies. Whether such an entity is covered under this definition would depend upon its particular activities. To the extent that a credit scoring company is engaged in collecting, analyzing, maintaining, or providing consumer report or other account information for the purposes described above, it would be covered by the definition.

Supervision or supervisory activity. Proposed § 1090.101(m) defines the terms “supervision” or “supervisory activity” to mean the Bureau’s exercise, or intended exercise, of supervisory authority by initiating or undertaking an examination, or requiring a report, of a person pursuant to section 1024 of the Act.

Section 1090.102—Covered markets and tests for determining larger participants of those markets.

Section 1090.102(a)—Consumer debt collection.

Market Overview.

Proposed § 1090.102(a) relates to the market for consumer debt collection. As explained in the section-by-section description of proposed § 1090.101(g), this market encompasses the collection, or attempted collection, of debt related to the consumer financial products or services described in sections 1002(5) and (15)(A) of the Act. Such activity includes the collection of debt related to consumer credit, certain consumer leases, and a variety of other consumer financial products or services, but generally not other debt incurred by individuals, such as medical debt.

Participants in the debt collection market generally include third-party debt collectors, debt buyers, and collection attorneys and law firms. Third-party collectors primarily collect debt on behalf of a debt owner, the person that originated the debt or purchased it. Third-party collectors typically are compensated through contingency fees calculated as a percentage of the debt they collect.²⁵ Creditors’ practices vary in how they use outside collection agencies; in some cases creditors use collection agencies in the early stages of delinquency prior to charge off

²⁵ACA International, *2010 Agency Benchmarking Survey*, at 19 (2010). According to the ACA International’s 2010 Benchmarking Survey, collection agency commission rates averaged 27% in 2009, with a median of 25.6%.

(charge off usually occurs 120 or 180 days after delinquency, depending on the type of debt).²⁶

In other cases, creditors use third-party debt collectors after a debt has been written off by the creditor.

Debt buying is another important component of the consumer debt collection market. As the name indicates, debt buyers purchase debt, either from the original creditor or from another debt buyer, usually for a fraction of the balance owed.²⁷ They profit when their recoveries exceed the combined costs of debt acquisition and of collecting from debtors, including overhead (or direct and indirect costs of collection). Debt buyers sometimes use third-party collection agencies or collection law firms to collect their debt, but many also undertake their own collection efforts. Finally, debt buyers also may decide to sell purchased debt to another debt buyer.

Collection attorneys and law firms also play a key role in the consumer debt collection market.²⁸ They sometimes are the primary (or only) debt collector with which a consumer will interact. Collection attorneys and law firms may collect through litigation (i.e., filing suit against consumers to collect debt). They also may collect in the same manner as other debt collectors,

²⁶ For example, the Federal Financial Institutions Examination Council, in its Uniform Retail Credit Classification and Account Management Policy, establishes a charge-off policy for open-end credit at 180 days delinquency and closed-end credit at 120 days delinquency. See 65 FR 36903, June 12, 2000.

²⁷ Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change, at 4 (Feb. 2009), available at (<http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>) (citing, Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 50 (7th ed. 2007)).

²⁸ Although attorneys are generally excluded from the Act's coverage, see Act section 1027(e)(1), this exclusion does not preclude the exercise of the Bureau's supervisory authority over collection attorneys. Section 1027(e)(2) of the Act provides that the general exclusion for attorneys does not limit the Bureau's supervisory, enforcement, or other authority with respect to an attorney who offers or provides a consumer financial product or service with respect to any consumer who is not receiving legal advice or services from the attorney in connection with that product or service. Further, section 1027(e)(3) of the Act provides that the Bureau shall have authority over attorneys who are otherwise subject to any "enumerated consumer law" within the meaning of the Act. Collection attorneys are subject to the Fair Debt Collection Practices Act, which is included among the enumerated consumer laws listed in section 1002(23) of the Act. See Heintz v. Jenkins, 514 U.S. 291 (1995).

such as by sending dunning letters and making phone calls. By one estimate, approximately one in 20 delinquent accounts gets referred to a law firm that specializes in debt collection.²⁹

Consumer debt collection is a market for “consumer financial products or services” under section 1024(a)(1)(B) of the Act and is thus appropriate for inclusion in a larger participant rulemaking. Moreover, consumer debt collection is critical to the functioning of the consumer credit market and has a significant impact on consumers. By collecting delinquent debt, collectors reduce creditors’ losses from non-repayment and thereby help to keep consumer credit available and potentially more affordable to consumers. Available and affordable credit is vital to millions of consumers because it makes it possible for them to purchase goods and services that they could not afford if they had to pay the entire cost at the time of purchase. Further, debt collection is a large, multi-billion dollar industry that directly affects a large number of consumers. In 2011, approximately 30 million individuals, or 14 percent of American adults had debt that was subject to the collections process (averaging approximately \$1,400).³⁰ Although these figures include not only consumer debt covered by the Act and the Proposed Rule, but also other types of debt such as medical debt, they indicate the importance and central role of consumer debt collection as a market for consumer financial products or services.

The Bureau received comments from consumer groups recommending that the Bureau define each of the various debt collection activities described above as separate markets. Although the collection of consumer debt encompasses these different business models and it may be reasonable to define them as separate markets, it is difficult based on current market practices to draw a bright line separating them. Some third party-collectors also buy debt, and

²⁹ National Consumer Law Center, The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts at 11 (July 2010).

³⁰ Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (November 2011), available at http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32011.pdf.

debt buyers may utilize in-house or third-party collectors. Similarly, collection attorneys and law firms may, in addition to representing debt owners, buy debt and collect on their own behalf.³¹ The Bureau is also not aware of any currently available data that would be useable to devise separate tests for these nonbank covered persons. Thus, the Proposed Rule provides for a single-market approach to consumer debt collection.

Test to define larger participants in the debt collection market.

Criteria. The Bureau has broad discretion in choosing criteria for determining whether a nonbank covered person is a larger participant of a covered market. For any specific market there could be several criteria, used alone or in combination, that could be viewed as reasonable alternatives. For the consumer debt collection market, the Bureau considered a variety of criteria, including criteria used by other agencies in different contexts. Among other possible criteria, the Bureau considered annual receipts; annual recoveries; number of employees; and new business (debt purchased by or placed with a collector).

The Bureau proposes in § 1090.102(a) to use annual receipts as the criterion for defining larger participants in the market for consumer debt collection. As noted above, the Proposed Rule is guided by and adapts the SBA's definition of "annual receipts." The Bureau believes that annual receipts are a reasonable criterion because, among other things, they are a meaningful measure of the level of participation of an entity in a market and the entity's impact on consumers. For example, third-party collectors, debt buyers, and collection law firms earn income from recovering delinquent consumer debt. Those recoveries are the result of market participation, either through traditional collection means or litigation. Thus, the level of a

³¹ Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change, at 3 (Feb. 2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf> (citing, Kaulkin Ginsberg, The Kaulkin Report: The Future of Receivables Management at 74 (7th ed. 2007)).

person's market participation is reflected by the amount of that person's annual receipts. Moreover, by adapting the SBA's definition of "annual receipts," which has been used by the SBA for purposes of measuring small business concerns since soon after the inception of its program,³² the Proposed Rule uses a criterion that should be familiar to nonbank covered persons, thereby reducing regulatory burden. Further, the calculation for annual receipts is based on IRS tax forms and, as a result, generally can be determined by using business records created in the ordinary course of business.

In addition, the U.S. Census Bureau's 2007 Economic Census (Economic Census)³³ provides an available data source for determining the general contours of the market for consumer debt collection based on the criterion of annual receipts and thereby for defining the larger participants of that market. The Economic Census undertakes a direct survey of domestic business establishments and releases comprehensive statistics about key features and activity levels of these businesses, including total annual receipts.³⁴ To conduct an Economic Census, the Census Bureau mails out data collection forms for all establishments of multi-unit companies, large single-unit employers, and a sample of small employers (generally defined as three or fewer employees).³⁵

³² See "SBA Size Standards Methodology" at 4, [available at http://www.sba.gov/sites/default/files/size_standards_methodology.pdf](http://www.sba.gov/sites/default/files/size_standards_methodology.pdf).

³³ U.S. Census Bureau 2007 Economic Census, [available at http://www.census.gov/econ/census07/](http://www.census.gov/econ/census07/).

³⁴ As noted in the section-by-section discussion of the definition of "annual receipts" (proposed § 1090.101(c)), the SBA and the Economic Census use the term "annual receipts" somewhat differently. As used by the Economic Census, the term includes receipts from all business activities, including net investment income, interest, and dividends, whether or not payment was received in the census year. The SBA, by contrast, defines the term to exclude net capital gains and losses and thus does not capture investment income. Notwithstanding this difference in the meaning of the term, the Economic Census data regarding annual receipts remain useful for purposes of developing a general understanding of the market for consumer debt collection and establishing a test for defining larger participants in that market.

³⁵ Response is required by law. No firm-level data is released; rather, the data are aggregated by sector according to North American Industry Classification System (NAICS) codes. For annual receipts, the Economic Census categorizes a business's annual receipts into one of 11 tiers to indicate different sizes, beginning at the highest level with firms having annual receipts in excess of \$100 million, with each lower tier approximately half the size of the

There are limitations to the use of the Economic Census data on annual receipts in the debt collection market for purposes of the Proposed Rule. Most importantly, the Economic Census data are not limited to the collection of consumer financial debt, but rather include both business and non-financial consumer debt, such as medical debt.³⁶ They may also be under-inclusive because entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond to the Census; moreover, the NAICS code may not include all persons engaged in activities that meet the definition of consumer debt collection under this proposal. However, although over-inclusive and possibly under-inclusive, the Economic Census data are nevertheless useful in showing the general contours of the consumer debt collection market, the relative size of participants within it on an aggregated basis, and how the participants are clustered by size. This information is thus helpful for purposes of developing a test to determine which participants in the market for consumer debt collection are larger participants based on the criterion of annual receipts.

By contrast, neither annual recoveries nor new business were considered by the Bureau as viable criteria at this time, in large part, because there are not sufficient data to allow the Bureau to ascertain the general contours of the market based on these criteria. Further, the Bureau believes that the number of employees is not a suitable alternative criterion for this market because it may be difficult for a multi-line company to apportion employee time between relevant market-related and other activities. In addition, the number of employees may be an

one above it (e.g., \$50 million, \$25 million, \$10 million). When categorizing the data by sector, both the SBA and the Economic Census use the NAICS codes. This furthers the purpose of having a standard set of classification codes used across the Federal government. This joint use of NAICS codes enables the Bureau to make direct comparisons between the two data sets for purposes of market classification.

³⁶ Entities whose activities fall within this NAICS code are described as: “establishments primarily engaged in collecting payments for claims and remitting payments collected to their clients” and include, among others, collection agencies, debt collection services, and account collection services. NAICS code 56144 (collection agencies) through 2007, available at <http://www.naicscodes.com/search/MoreNAICSDetail.asp?N=561440>.

inaccurate measure if a company with wide market reach performs much of its work through contractors.

The Bureau anticipates considering alternative or additional criteria for measuring larger participants of the market for consumer debt collection in the future if additional data for the debt collection market become available to the Bureau, whether through registration of nonbank covered persons by the Bureau or otherwise.³⁷ In that event, the Bureau may also consider potential amendments to the annual receipts criterion used in the Proposed Rule. The Bureau seeks comment on the proposed criterion and any additional or alternative criteria that might be used for measuring larger participants in the consumer debt collection market, as well as on any data sources available for such criteria.

Threshold. Under the Proposed Rule, a nonbank covered person is a larger participant in the market for consumer debt collection if its annual receipts meet a specified threshold. As with regard to the selection of the criterion itself, the Bureau has broad discretion in setting the threshold above which an entity would qualify as a larger participant. The Bureau proposes more than \$10 million in annual receipts as the threshold to define larger participants in the consumer debt collection market. Using this threshold, proposed § 1090.102(a) states that if a nonbank covered person offers or provides consumer debt collection, and has annual receipts of more than \$10 million resulting from that activity, it will be a larger participant of the consumer debt collection market.

³⁷ The Bureau is contemplating a future rulemaking to establish a nonbank registration program, which could be used to gather data to support subsequent larger participant rulemakings and their implementation. The Bureau has authority to issue such a registration rule under sections 1022(c)(7) and 1024(b)(7) of the Act.

The Bureau believes that this threshold is a reasonable means of defining larger participants in this market.³⁸ Based on the Economic Census, the proposed threshold would likely bring within the Bureau's scope of supervision approximately 175 entities³⁹ out of approximately 4,500 firms engaged in debt collection under NAICS code 56144. Thus, approximately 4 percent of all collection firms would be covered by the proposed threshold.⁴⁰ For comparison, based on the Economic Census data, the median for annual receipts among collection firms is roughly \$500,000, significantly below the proposed threshold.⁴¹

The Bureau believes that the proposed definition would result in sufficient coverage of the debt collection market to enable the Bureau effectively to identify and assess risks to consumers in that market and assess nonbank covered persons' compliance with Federal consumer financial laws. The firms that would be covered by the proposed threshold generate approximately 63 percent of collections receipts.⁴² Thus, although covering only a small percentage of firms in the market, under the proposed threshold, the Bureau's supervision program would cover nonbank entities interacting with a significant portion of consumers with debt under collection.

³⁸ The Bureau believes that a lower threshold might bring under the Proposed Rule entities that could reasonably be described as larger participants. The Bureau therefore seeks comment on whether in this proposal or in a future rulemaking the Bureau should set a lower threshold. For example, a threshold of \$5 million in annual receipts would cover approximately 361 firms out of 4,500, and would comprise approximately 73% of the industry's annual receipts.

³⁹ Because firms collecting commercial and other debt that would not fall under the definition of consumer debt collection would not qualify as larger participants, the number of nonbank covered persons that would be larger participants under the Proposed Rule may be less than 175.

⁴⁰ Estimated from 2007 U.S. Economic Census – available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56144.

⁴¹ Estimated from 2007 U.S. Economic Census – available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56144.

⁴² Estimated from 2007 U.S. Economic Census – available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56144.

Two trade associations for the debt collection industry each suggested that the Bureau set a threshold that would cover third-party collection firms and debt buyers with annual revenues of more than \$250 million. Based on available data, however, the Bureau estimates that \$250 million in annual receipts would cover, at most, approximately seven or fewer firms comprising only approximately 20 percent of overall collection industry receipts.⁴³ The Bureau does not believe that this recommended threshold would result in sufficient market coverage to allow it effectively to assess compliance with Federal consumer financial laws and detect and assess risks to consumers. Further, by covering only a handful of actors in a market of approximately 4,500 firms, the recommended threshold would omit many firms that would fairly be described as larger market participants. Indeed, the Act provides that the Bureau’s supervision authority extends to the “larger,” not merely the “largest,” participants in a market.⁴⁴ The threshold set forth in the Proposed Rule would provide the Bureau with the ability to supervise a broader range of market participants than only the very largest and identify and evaluate risks to consumers in different segments of the market.

The Bureau notes that one of the largest debt buyers commented that the Bureau should not limit its supervisory authority to the very largest market participants. This commenter indicated that some of the most significant risks to consumers come from smaller debt collection companies that do not file disclosures and financial statements with the Securities and Exchange Commission and may not be properly licensed. Another industry commenter noted that smaller debt collection firms own or service tens of millions of consumer collection accounts, but often

⁴³ Estimated from 2007 U.S. Economic Census – available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table, scroll to NAICS code 56144..

⁴⁴ Act section 1024(a)(1)(B).

lack the sophisticated quality control mechanisms, training programs, and technological safeguards of the largest debt collectors.

Finally, the threshold set forth in the Proposed Rule is substantially above the SBA's size standard for defining small business concerns. Under the SBA's rules, a debt collection firm with annual receipts of \$7 million or less is a small business concern.⁴⁵ Consequently, the Bureau believes that small business concerns under the SBA's rules generally should not meet the Proposed Rule's threshold for the consumer debt collection market.

The proposed threshold is tailored for consumer debt collection, and the Bureau recognizes that it may not be suitable for other markets. The Bureau anticipates that other thresholds may be appropriate for purposes of defining larger participants in other markets. Moreover, just as with its choice of criteria, the Bureau anticipates considering alternative thresholds to define larger participants of the market for consumer debt collection in the future if additional data for the consumer debt collection market become available to the Bureau.

The Bureau seeks comment, including any possible alternatives on the threshold it proposes for defining larger participants in the consumer debt collection market.

Apportionment. The Bureau recognizes that there are multi-line companies that derive only a portion of their annual receipts from activities related to the consumer debt collection market. The Bureau further recognizes that in determining whether a person qualifies as a larger participant, the annual receipts that are relevant are those that derive from a market covered by the Proposed Rule. Thus, the proposal provides that the only annual receipts to be considered are those "resulting from" activities related to the covered market. For example, a single entity

⁴⁵ U.S. Small Business Administration Table of Small Business Size Standards Matched to NAICS Codes, http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf at 32.

might engage in both consumer debt collection and the collection of commercial debt. Similarly, in certain cases, the consumer debt it collects may be debt unrelated to consumer financial products or services, such as medical debt. In these circumstances, only the annual receipts resulting from the entity's collection of debt related to consumer financial products or services would be considered for purposes of determining whether the person is a larger participant of the consumer debt collection market.

The Bureau recognizes that this apportionment adds an additional step in determining whether an entity is a larger participant for multi-line nonbank covered persons, and of nonbank covered persons that are part of a corporate family that files its tax returns on a consolidated basis. The Bureau also understands that the burden of determining annual receipts, and performing this additional calculation where necessary, will vary among businesses. The Bureau seeks comment on the way apportionment is treated in the Proposed Rule and any suggested alternative method for determining whether multi-line entities qualify as larger participants in a given market.

Section 1090.102(b)—Consumer reporting.

Market Overview.

Proposed § 1090.102(b) relates to the market for consumer reporting. As explained in the section-by-section description of proposed § 1090.101(i) above, the consumer reporting market includes the largest consumer reporting agencies selling comprehensive consumer reports, consumer report resellers, and specialty consumer reporting agencies. The largest consumer reporting agencies collect, among other information, credit account information, items sent for collection, and public records such as judgments and bankruptcies. Resellers purchase consumer information from one or more of the largest agencies, typically provide further input to the

consumer report (including by merging files from multiple agencies or adding information from other data sources), and then resell the report to lenders and other users. Specialty consumer reporting agencies primarily collect and provide specific types of information that may be used to make eligibility decisions for particular consumer financial products or services, such as payday loans or checking accounts, or for other determinations, such as eligibility for employment or rental housing. However, certain types of specialty consumer reporting agencies, depending on their activities, may not be engaged in offering consumer financial products or services within the meaning of the Act, and for that reason would not be “covered persons” subject to the Bureau’s supervisory authority.⁴⁶ These effective exclusions are implemented in the definition of consumer reporting in proposed § 1090.101(i).

The consumer reporting market is appropriate for inclusion in the Proposed Rule because it is a market for a consumer financial product or service under section 1024(a)(1)(B) of the Act. Additionally, consumer reporting is of fundamental importance to the broader market for consumer financial products and services. Consumer reports (commonly referred to as “credit reports”), which contain information about consumers’ credit histories and other transactions, and the credit scores derived from these reports, affect many aspects of consumers’ lives. Consumer reports are important tools that lenders use to assess borrower risk when evaluating applications for credit cards, home mortgage loans, automobile loans, and other types of credit. Consumer reports may also be used to determine eligibility and pricing for other types of products and services and other relationships, such as checking accounts. The consumer

⁴⁶ Such an agency does not provide a “consumer financial product or service” if it provides only information “that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.” Act section 1002(15)(A)(ix)(I)(cc). The Bureau received a number of comments from consumer groups suggesting that the larger participant rule include within its scope of coverage firms that engage in providing background screening for employment purposes. However, as noted above, such activities do not constitute a “consumer financial product or service” within the meaning of the Act.

reporting market affects hundreds of millions of consumers. The Consumer Data Industry Association estimates that each year there are more than 36 billion updates made to consumer files at consumer reporting agencies,⁴⁷ and three billion reports issued.⁴⁸ It also estimates that each of the three largest consumer reporting agencies maintains credit files on more than 200 million consumers.⁴⁹

In response to the Notice, the Bureau received more than 10,400 comments, approximately 10,300 of which were nearly identical letters sent from individuals asking the Bureau to exercise supervisory authority over different types of consumer reporting agencies and over credit scoring companies. On the other hand, one industry trade association commented that the Bureau should give careful consideration to the costs and burdens of including the consumer reporting market within the larger participant rule.

In addition, a number of commenters recommended that the Bureau divide the consumer reporting market into separate markets for the largest consumer reporting agencies, specialized consumer reporting agencies, and credit scoring companies to ensure that consumer reporting agencies other than the three largest are deemed larger participants. The Bureau recognizes the importance of covering different types of consumer reporting agencies in its supervision program and believes that it may be reasonable to identify separate markets. At this time, however,

⁴⁷ Stuart Pratt, President, Consumer Data Industry Association (CDIA), Statement before House Committee on Financial Institutions and Consumer Credit, “Keeping Score on Credit Scores: An Overview of Credit Scores, Credit Reports, and their Impact on Consumers,” at 7 (March 24, 2010), [available at \(http://www.house.gov/apps/list/hearing/financialsvcs_dem/pratt_testimony.pdf\)](http://www.house.gov/apps/list/hearing/financialsvcs_dem/pratt_testimony.pdf). See also Federal Trade Commission, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 at 8-9 (2004).

⁴⁸ See Stuart Pratt, President, Consumer Data Industry Association (CDIA), Statement before House Committee on Financial Services, “Credit Reports: Consumers’ Ability to Dispute and Change Inaccurate Information,” at 23 (June 19, 2007), [available at http://archives.financialservices.house.gov/hearing110/ospratt061907.pdf](http://archives.financialservices.house.gov/hearing110/ospratt061907.pdf).

⁴⁹ Stuart Pratt, Comments of CDIA to National Telecommunications and Information Administration, “Information Privacy and Innovation in the Internet Economy,” at 2 (June 13, 2010), [available at http://ntia.doc.gov/files/ntia/comments/100402174-0175-01/attachments/Consumer%20Data%20Industry%20Association%20Comments.pdf](http://ntia.doc.gov/files/ntia/comments/100402174-0175-01/attachments/Consumer%20Data%20Industry%20Association%20Comments.pdf).

despite its request for public comment on the best data sources, the Bureau is not currently aware of adequate data to devise separate tests for distinct markets in the consumer reporting industry. Although the Bureau is treating the consumer reporting market as a single market, as discussed in further detail below, it has chosen a test that would bring within the scope of the Bureau's supervision program certain consumer reporting agencies other than the very largest, including some larger specialty consumer reporting agencies.

Test to define larger participant in the consumer reporting market.

Criteria. As noted in the section-by-section description of the consumer debt collection market above (proposed § 1090.102(a)), the Bureau has broad discretion in choosing criteria for measuring whether a nonbank entity is a larger participant of a covered market. The Bureau considered several criteria to measure participants in the consumer reporting market. These include, among others, annual receipts; number of unique consumer reports sold or otherwise provided to a third party annually; number of individual consumers a nonbank covered person collects, analyzes, and maintains data about, or provides consumer reports on, annually; and number of employees.

The Bureau proposes in § 1090.102(b) to use annual receipts as the criterion for defining larger participants in the consumer reporting market. As in the consumer debt collection market, the Bureau proposes to use as a guide the SBA's definition of "annual receipts." The Bureau believes that annual receipts resulting from consumer reporting activities provide a reasonable indication of the level of market participation by a person and its impact on consumers. Consumer reporting agencies earn income from selling consumer reports and other market-related activities that directly affect consumers. As a result, the greater the annual receipts of a consumer reporting agency, the greater its market participation and the greater its impact on

consumers. In addition, as with the consumer debt collection market, by adapting the SBA's definition of "annual receipts," which has been used by the SBA since soon after the inception of its program, the proposed test is intended to be sufficiently straightforward so as not to put undue burden on nonbank covered persons in determining or disputing whether they are subject to the Bureau's nonbank supervision program.

There are limited data available to develop a test for defining larger participants in the consumer reporting market. Although several of the largest participants in this market are public companies, the majority of firms are private and do not publicly disclose data. However, as with the consumer debt collection market, for the criterion of annual receipts, the 2007 Economic Census data provides an available data source.⁵⁰

The Bureau analyzed the Economic Census data for annual receipts for NAICS code 561450 (credit bureaus). Encompassed within this code are both "consumer reporting agencies" and "mercantile (business-to-business) reporting agencies." Consequently, as with the consumer debt collection market, a limitation of the Economic Census data is that they are over-inclusive.⁵¹ They are also under-inclusive because entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond to the Census; moreover, the NAICS code may not include all persons engaged in activities that meet the definition of consumer reporting under this proposal. An additional limitation of the Economic Census data for this particular NAICS code is that for certain census tiers, the aggregated annual receipts data are kept

⁵⁰ A description of the Economic Census and its methodologies may be found in the debt collection market section (proposed § 1090.102(a)) above.

⁵¹ http://factfinder2.census.gov/faces/help/jsf/pages/metadata.xhtml?lang=en&type=category&id=category.en./ECN/ECN/2007_US/56SSSZ4.MEASURE.RCPTOT#main_content.

confidential.⁵² The data are nonetheless useful in showing the general distribution of the size of participants in the consumer reporting market.

By contrast, the Bureau does not believe that other potential criteria, such as the total number of unique consumer reports sold or the number of individual consumers an entity provides consumer reports on, are appropriate alternatives because the available data do not permit the Bureau meaningfully to measure the general contours of the market based on these criteria and thus to devise a test for defining larger participants in the market on the basis of them. Further, the Bureau believes that the number of employees is not a suitable alternative criterion because it could be very difficult for a multi-line company to apportion employee time between market-related and other activities, and many positions could be filled by contractors rather than employees.

As additional data for the consumer reporting market become available to the Bureau, through future registration of nonbank covered persons or by other means, the Bureau may consider other criteria and potential revisions to the annual receipts criterion used in the Proposed Rule. The Bureau seeks comment on the proposed criterion and any additional or alternative criteria that might be used for measuring larger participants in the consumer reporting market, as well as on any data sources available for such criteria.

⁵² Available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56145. Many Census tiers have flags in the receipts category, which read “withheld” to avoid disclosing data for individual companies; data are included in higher level totals. Other aggregated revenue data are available in a table showing the concentration of revenues among the largest firms, which extend through the top 50. See also http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table, scroll to NAICS code 56145.

Threshold. As noted above with regard to the consumer debt collection market, the Bureau has broad discretion in setting the threshold above which a nonbank covered person will qualify as a larger participant in the consumer reporting market.

The Bureau proposes adopting more than \$7 million in annual receipts as the threshold to define larger participants in the consumer reporting market. Applying this threshold, proposed § 1090.102(b) states that if a nonbank covered person offers or provides consumer reporting and has annual receipts of more than \$7 million resulting from this activity, it will be a larger participant of the consumer reporting market.

The Bureau believes that this threshold is reasonable, in part, because available data indicate that it would enable the Bureau to cover in its nonbank supervision program the largest consumer reporting agencies as well as a number of larger specialty consumer reporting agencies.⁵³ The Bureau believes that this threshold would cover a sufficient number of market participants to enable the Bureau effectively to assess compliance and identify and assess risks to consumers, but at the same time cover only the “larger” participants of the market.

While there are hundreds of consumer reporting agencies, according to the 2007 Economic Census, a threshold of more than \$7 million in annual receipts would cover no more than 39 credit bureaus, or 7 percent of credit reporting agencies (including both mercantile credit reporting agencies and consumer reporting agencies).⁵⁴ Because the Economic Census indicates

⁵³ The Bureau believes that a lower threshold might bring under the Proposed Rule entities that could reasonably be described as larger participants. The Bureau therefore seeks comment on whether in this proposal or in a future rulemaking the Bureau should set a lower threshold. For example, a threshold of \$5 million in annual receipts would cover approximately 36 firms out of 401, and would comprise approximately 95% of the industry’s annual receipts.

⁵⁴ This calculation assumes that firms in the Census-defined tier between \$5 million and \$10 million are evenly distributed throughout the tier.

that 75 percent of these credit bureaus are consumer reporting agencies,⁵⁵ this threshold would likely cover approximately 30 out of approximately 401 consumer reporting agencies. However, some of those consumer reporting agencies may be specialty consumer reporting agencies providing, for example, consumer reports only for employment background screening or rental decisions. As noted above, such agencies do not offer consumer financial products or services within the meaning of the Act, and are effectively excluded from the Bureau's supervisory jurisdiction.⁵⁶ As a result, the Bureau believes that this threshold will cover fewer than 30 consumer reporting agencies. Again for comparison, the Bureau estimates that the median for annual receipts in this industry is less than \$500,000, significantly below the proposed threshold.⁵⁷

The threshold of more than \$7 million in annual receipts is consistent with the objective of supervising market participants that have a significant impact on consumers, in terms of the number of consumers affected by their operations. In the consumer reporting industry, prices range from two to three cents for prescreening products, from seven cents to sixty two cents for credit scores, and from one to two dollars for consumer reports, while some specialty reports may cost several dollars.⁵⁸ Thus, a company with more than \$7 million in annual receipts would

⁵⁵ The Bureau extrapolated the number of entities from the proportion of establishments that are part of consumer reporting agencies rather than part of mercantile reporting agencies. According to the Economic Census, consumer reporting agencies account for almost 75 percent of all credit bureau entities (401 out of 535 in total). The Economic Census also indicates that the consumer reporting industry is highly concentrated. The 50 largest firms generate 96 percent of industry revenues. Conversely, the smallest 50 percent of firms generate approximately 1 percent of revenues.

⁵⁶ See Act section 1002(15)(A)(ix)(I)(cc). This provision defines the term "financial product or service" to exclude the provision of information "that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer."

⁵⁷ The median is estimated from data available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56145.

⁵⁸ Based on an analysis of General Services Administration schedules and other publicly available price quotes for several consumer reporting firms.

likely impact several million consumers. Further, the entities meeting the proposed threshold generate approximately 94 percent of industry receipts.⁵⁹ Although this market share coverage is higher than that resulting from the threshold proposed for the consumer debt collection market, the Bureau believes that this difference is appropriate in light of the different structures of the two markets, particularly the highly concentrated nature of the consumer reporting market and the different types of firms encompassed in the market.

Pending better and more complete data sources, the Bureau tentatively concludes that setting the threshold higher than that proposed amount likely would not result in sufficient coverage of consumer reporting agencies effectively to identify and assess risks to consumers in the consumer reporting market and to assess compliance with the Federal consumer financial laws. It is particularly important to reach larger participants of the consumer reporting market that may not be the largest firms, as some consumers may not have files at the largest consumer reporting agencies. Many consumers may not utilize a credit card or checking account, or otherwise participate in mainstream financial activities. As a result, the largest consumer reporting agencies may receive little, if any, data with which to maintain files on these consumers. However, these consumers may utilize alternative financial products such as payday loans or check cashing services, which in some instances may be reported to specialty consumer reporting agencies. Setting the threshold too high would fail to capture the larger specialty consumer reporting agencies that compile information about consumers in alternative financial markets.

⁵⁹ Estimated from 2007 Economic Census – available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table, scroll to NAICS code 56145. See also http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ6&prodType=table, scroll to NAICS code 56145.

Finally, the proposed threshold is consistent with the SBA's size standard for defining small business concerns. Under the SBA's rules, a consumer reporting firm with annual receipts of \$7 million or less is a small business concern.⁶⁰ Thus, the Bureau believes that small business concerns under the SBA's rules generally should not meet the Proposed Rule's threshold for the consumer reporting market.

In tailoring the thresholds for this market, the Bureau considered several comments from both industry and consumer groups that suggested the Bureau use tests involving multiple criteria and thresholds for each market segment. Although the Bureau recognizes the advantages of this approach, in light of the limited data for the consumer reporting market, the Bureau tentatively concludes that in the case of consumer reporting a test using a single criterion and threshold would be most effective for the nonbank supervision program at this time.

The Bureau seeks comment, including any possible alternatives, on the proposed threshold for defining larger participants in the consumer reporting market.

Apportionment. As with the consumer debt collection market, the Bureau recognizes that in developing a test for determining whether a person qualifies as a larger participant, the annual receipts that are relevant are those that derive from a market covered by the Proposed Rule. Thus, the proposal provides that the only annual receipts to be considered are those "resulting from" activities related to the covered market. As with the consumer debt collection market, the need to apportion revenues would add an additional step in determining whether an entity is a larger participant both for multi-line nonbank covered persons and for nonbank covered persons that are part of a corporate family that files its tax returns on a consolidated basis. The Bureau seeks comment on the way apportionment is treated in the Proposed Rule and any suggested

⁶⁰ U.S. Small Business Administration Table of Small Business Size Standards Matched to NAICS Codes, http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf at 32.

alternative method for determining whether multi-line entities qualify as larger participants in a given market.

Section 1090.103— Status as larger participant subject to supervision.

The Bureau believes that it is important that the Bureau have sufficient time to undertake and complete supervisory activities relating to a larger participant. Thus, proposed § 1090.103 states that a person qualifying as a larger participant under § 1090.102 shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under § 1090.102.⁶¹

For the above reasons, the Bureau believes that establishing this minimum two-year supervision period is appropriate for the administration of the Bureau's supervisory authority and will avoid the inefficiency of more frequent determinations of an entity's status. The Bureau seeks comment on all aspects of proposed § 1090.103, and in particular on whether a longer or shorter supervision period might be appropriate.

Section 1090.104—Determination of status as a larger participant.

Prior to its implementation of a registration program, the Bureau expects to use various data sources, including publicly available data, to identify which nonbank covered persons appear to qualify as larger participants. If the Bureau determines that an entity qualifies as a

⁶¹ For example, assume a nonbank consumer reporting agency's tax year were to run from July 1 to June 30. Assume the entity had \$8 million in receipts in each of the tax years of 2010, 2011, and 2012 (July 1, 2010 to June 30, 2011; July 1, 2011 to June 30, 2012; and July 1, 2012 to June 30, 2013, respectively). That entity would have \$8 million in annual receipts for the 2012 tax year (July 1, 2012 to June 30, 2013), as annual receipts are generally calculated as a three-year average. If the entity then had only \$2 million in receipts for the 2013 tax year (July 1, 2013 to June 30, 2014), its annual receipts for the 2013 tax year would be \$6 million. With the two-year supervision period, it would nevertheless remain a larger participant through June 30, 2014 because of its annual receipts in the 2012 tax year. On the other hand, assume the same facts but that the entity's tax year were to run from April 1 to March 31. In that case, the entity would remain a larger participant through March 31, 2014. If the entity were to continue to have \$7 million or less in annual receipts for the 2014 tax year (April 1, 2014 to March 31, 2015), it would not be a larger participant for that year. However, if it were to have more than \$7 million in annual receipts for the 2014 tax year, it would again qualify as a larger participant for that year and would remain a larger participant through March 31, 2016, even if its annual receipts again fell below \$7 million for the 2015 tax year (April 1, 2015 to March 31, 2016).

larger participant and, after assessing applicable criteria as set forth in the Act, including risk to consumers,⁶² decides to undertake supervisory action in connection with that entity, the Bureau will send the entity a letter apprising it that it plans to undertake supervisory action on the basis of the entity's status as a larger participant. The Bureau recognizes that there may be instances when a person will dispute that it is a larger participant after receiving such a letter. Proposed § 1090.104 sets forth a procedure for such a person to dispute its classification as a larger participant by providing to the Assistant Director for Nonbank Supervision of the Bureau an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant. Proposed § 1090.104 further permits a person to include with the response copies of any records, documents, or other information on which the person relied to make the assertion. Proposed § 1090.104 further provides that a person waives the right, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under this section. Moreover, proposed § 1090.104 states that a person who fails to respond to the Bureau's written communication within 30 days will be deemed to have acknowledged that it is a larger participant. Under proposed § 1090.104, after reviewing the affidavit and any other information submitted by the person disputing its status as a larger participant or deemed relevant by the Assistant Director, the Assistant Director must send the person a statement setting forth the Bureau's conclusion as to whether the person meets the definition of a larger participant. Additionally, the Proposed Rule provides that the Assistant Director may require

⁶² Act section 1024(b)(2). The factors to be considered in making this assessment include asset size, volume of transactions involving consumer financial products or services, risks to consumers, the extent to which institutions are subject to state oversight, and any other factor that the Bureau determines to be relevant.

that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to determine whether a person is a larger participant.⁶³

These provisions are proposed pursuant to the Bureau's authority under section 1024(b)(7) of the Act to facilitate the Bureau's supervision of larger participants of the markets covered by this Proposed Rule by permitting the Bureau to determine whether a person meets the test for being a larger participant.⁶⁴ The Bureau also proposes § 1090.104 pursuant to section 1022(b)(1) of the Act, which grants the Director the authority to prescribe such 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, such as its supervision of larger participants, and to prevent evasions of these laws. Providing a process whereby entities must come forward with information if they wish to dispute their status as larger participants, and providing the Bureau the ability to require such information, is necessary and appropriate for the Bureau to implement and efficiently exercise its supervision authority and to prevent evasion of section 1024 of the Act.⁶⁵

The Bureau seeks comment on this proposed process for allowing a person to submit to the Bureau documents and information supporting its assertion that it is not a larger participant. The Bureau also seeks comment on all other aspects of these proposed provisions.

⁶³ The Bureau believes that while it would have this authority under section 1024 of the Act even absent a regulation, a regulation is useful to provide clarity on the issue.

⁶⁴ Section 1024(b)(7) of the Act provides that in developing requirements or systems under that provision, where appropriate the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration). Given the focus of these provisions of the Proposed Rule on obtaining information to determine larger participant status, the Bureau does not believe that such consultation is appropriate in connection with this proposal. The Bureau, however, requests comments from relevant State agencies on this proposal.

⁶⁵ The Bureau also proposes § 1090.104 in part pursuant to section 1022(c)(5) of the Act, which permits the Bureau to require that a nonbank person file with the Bureau, under oath or otherwise, annual or special reports or written answers to specific questions, to determine whether such person is a covered person.

VI. Request for Comments

The Bureau invites comment on all aspects of this notice of proposed rulemaking and on the specific issues on which comment is solicited elsewhere herein, including on any appropriate modifications or exceptions to the Proposed Rule. The Bureau also seeks comment on which other markets for consumer financial products or services should be covered by future proposed rules to define larger participants.

VII. Section 1022(b)(2)(A) of the Act

A. Overview

Section 1022(b)(2)(A) of the Act calls for the Bureau to consider the potential benefits, costs, and impacts of its regulations.⁶⁶ The proposal, if adopted, would authorize the Bureau to exercise its supervisory authority with respect to certain nonbank covered persons defined as larger participants of the consumer debt collection and consumer reporting markets. Nonbank covered persons in the consumer debt collection market with more than \$10 million in annual receipts and nonbank covered persons in the consumer reporting market with more than \$7 million in annual receipts, as calculated in the manner set forth in the proposal, would qualify as larger participants and thus be subject to the Bureau's supervision authority. As noted, the Bureau estimates that these thresholds would encompass approximately 175 consumer debt collectors and 30 consumer reporting agencies.

That the Bureau is authorized to undertake supervisory activities with respect to a nonbank covered person that qualifies as a larger participant does not necessarily mean that the

⁶⁶ Specifically, the Bureau is to consider the potential benefits and costs of a 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 section 1026 of the Act; and the impact on consumers in rural areas. The manner and extent to which the provisions of section 1022(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses.

Bureau would in fact undertake such activities. Rather, the Bureau would decide whether to use its limited resources to examine or otherwise exercise its supervisory authority over a larger participant based on criteria set by Congress, which focus on risks to consumers.⁶⁷ Conversely, nonbank covered persons in the consumer debt collection market with \$10 million or less in annual receipts and nonbank covered persons in the consumer reporting market with \$7 million or less in annual receipts, as calculated in the manner set forth in the proposal, generally would not be subject to the Bureau’s supervision authority as larger participants of a covered market. They would, however, be subject to the Bureau’s rulemaking and enforcement authority and subject to potential Bureau supervision pursuant to section 1024(a)(1)(C) of the Act.

The Bureau notes at the outset that there is little publicly available data with which to effectively measure or quantify the benefits, costs, and impacts of supervision for compliance with Federal consumer financial law generally; as applied to the consumer debt collection or consumer reporting markets, more specifically; or, even more particularly, to covered persons in these markets with annual receipts above the thresholds set by the Proposed Rule. The Bureau has sought information from State regulators and regulatory associations to help quantify the costs incurred by nonbank covered persons from supervision, but, to date, the Bureau has been unable to locate useful information. As a result, the analysis that follows qualitatively examines the benefits, costs, and impacts of the key provisions of the proposal.⁶⁸ The Bureau seeks comment on additional sources of data to evaluate the proposal. The Bureau will further

⁶⁷ Act section 1024(b)(2). The Bureau is required to exercise its authority under its nonbank supervision program in a manner that is “based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable— (A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person engages; (C) the risks to consumers created by the provision of such consumer financial products or services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons.”

⁶⁸ 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.

consider the benefits, costs, and impacts of the Proposed Rule and any modifications the Bureau might make to the Proposed Rule prior to adopting a final rule.

B. Potential benefits and costs to consumers and covered persons

The analysis considers the benefits, costs, and impacts of the key provisions of the proposal against a pre-statutory baseline, *i.e.*, the benefits, costs, and impacts of the statute⁶⁹ and the regulation combined. Together, the Act and the Proposed Rule initiate a Federal supervision program for certain nonbank entities in the markets for consumer debt collection and consumer reporting. The benefits, costs, and impacts therefore are considered relative to a baseline where such a Federal supervisory regime does not exist for nonbank institutions in these markets.⁷⁰ In the following discussion, references to the proposal or the supervision program should be read to include the relevant provisions of the Act and the Proposed Rule regarding larger participants.

The potential benefit to consumers from the proposal is the increased consumer protection that should result from larger participants' likely increased compliance with Federal consumer financial law.⁷¹ The potential costs derive from the resources that larger participants will use to respond to any supervisory activity by the Bureau and to improve their compliance where necessary.

The Bureau expects that the initiation of the supervision program in these markets will likely increase larger participants' compliance with Federal consumer financial law, and that

⁶⁹ Sections 1024(a)(1)(B) and 1024(b) of the Act.

⁷⁰ The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. For the current proposal, another approach would be focus almost entirely on the supervision-related costs for larger participants and would omit a broader consideration of the benefits and costs of increased compliance. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

⁷¹ The Bureau also views the increased detection and assessment of risks to consumers and to the consumer financial markets as a critical mission of the supervision program. The extent to which the Bureau is better informed and that further policy actions yield tangible benefits to consumers, covered persons, and the markets in general could also be viewed as a longer term benefit.

such additional compliance will yield certain benefits for consumers that are affected by consumer debt collectors or consumer reporting agencies. For example, supervisory activity by the Bureau may lead to increased compliance with various statutes and regulations governing consumer debt collection and consumer reporting activities, such as the Fair Debt Collection Practices Act⁷² and the Fair Credit Reporting Act,⁷³ respectively.⁷⁴

Increased compliance with existing laws may lead the affected entities to incur additional costs. Expenditures on systems and personnel may be required to revise existing products or processes to the extent they do not comply with Federal consumer financial law. At present, the Bureau does not have specific information on the magnitude of such changes, but expects that such costs will be larger at firms where major changes are necessary.

Additional costs of the Proposed Rule are related to instances in which the Bureau decides to undertake supervisory activity, including an examination, with respect to a larger participant. The nature and extent of the supervisory activity will depend on the circumstances, and the costs incurred by an entity may derive from the gathering and reporting of information; the staff time, space and resources necessary to support on site exams; or other costs of interacting with the supervisor. Importantly, the proposal, if adopted, would not in itself impose any supervision-related costs. The rule would only authorize the Bureau to undertake certain supervisory activities. In deciding whether to undertake a supervisory activity with respect to any particular larger participant, the Bureau would have to take account of its limited supervisory resources, and apply the statutory criteria, which focus on risks to consumers. Therefore, these potential costs related to responding to supervisory activity, and any potential costs or benefits

⁷² 15 U.S.C. 1692 *et seq.*

⁷³ 15 U.S.C. 1681 *et seq.*

⁷⁴ For those larger participants as to which the Bureau does not initiate supervisory activity, it is expected that the prospect of potential supervisory activity may create an incentive to increase compliance where it is lacking.

derived from increased compliance that would result from such supervisory activity, are probabilistic in nature.

Consumer debt collectors and consumer reporting agencies may also incur some minor costs in determining if they qualify as larger participants under the rule, specifically if they believe their annual receipts are near the applicable thresholds and they wish to dispute the Bureau's decision to commence a supervisory activity based on their status as larger participants. The Bureau's choice to use annual receipts, a well-defined criterion that is likely available to these entities, should help to minimize the costs of this calculation relative to other possible criteria. This is true even though apportionment may be necessary for certain firms that engage in activities not covered by this rule.

As noted earlier, the Bureau may decide to undertake supervisory activity with regard to a larger participant only after considering the applicable statutory criteria including factors such as the size of the entity and risks to consumers. For larger firms or firms where there is evidence of risk to consumers, the benefits of the proposal should be highest. The largest firms are expected to impact the most customers; therefore, any lapses in compliance by such firms may have the largest negative impacts.⁷⁵ Any increase in compliance would therefore benefit a large number of customers or transactions. At the same time, these firms should be best able to bear any fixed supervisory costs given their size and their potential ability to spread these costs over the large number of consumers and transactions. Where there is evidence of risks to consumers, the benefits of supervisory activity are also expected to be high. As a result, the statutory criteria

⁷⁵ Larger firms may have more comprehensive or complex systems to monitor internal compliance limiting potential failures to comply with relevant regulations. However, the increased difficulty in coordination and communication in larger firms, and the fact that any compliance failures that do occur may impact a greater number of consumers, suggests that the benefits of supervision are still substantial.

regarding supervision should ensure that those larger participants that are supervised and that incur the costs of that supervision are the same firms where the benefits are likely to be highest.

The proposal, if adopted, may have impacts on consumers' access to consumer financial products or services. Predicting the nature and extent of any potential impacts is difficult, particularly given that consumers are not generally the end customers in these two markets. For most consumers, consumer credit reports and the information contained therein, are primarily an input into ultimate credit decisions by mortgage lenders, credit card issuers, and other financial services providers. Similarly, terms in the consumer debt collection market are set between debt collectors and the creditors for whom they collect or from whom they purchase debts, in part, based on the debt collectors' ability to recover from consumers.

Under the proposal, larger participants, and in particular those with respect to whom the Bureau chooses to conduct supervisory activity, are expected to incur the majority of the resource costs of increased compliance and increases in the quality of the services provided (e.g. credit reports may become more accurate, or consumers in collection may be treated more fairly).⁷⁶ However, providers may pass on those costs to their customers (as noted, consumers do not generally purchase these types of services) who then may pass them on to consumers, in part through changes in prices for credit. The extent to which these costs are eventually reflected, on average, in higher prices for consumers or lower profits for the affected firms depends on the

⁷⁶ Debt collectors and consumer reporting agencies below the larger participant thresholds may change their behavior in response to the actions of larger participants. Specific reactions will depend on various factors, including the extent to which larger participants change their services or pricing, and are therefore difficult to predict.

competitive conditions in the relevant markets. Some consumers could see higher costs of credit and less access, while for others the opposite could be true.⁷⁷

In developing the proposal the Bureau considered selecting different thresholds for each market. One alternative would be to set the thresholds substantially higher and cover only the very largest firms in each market. For example, a threshold of \$100 million in annual receipts in the market for consumer reporting would cover only about 10 firms. Under such an alternative, the benefits of supervision to both consumers and covered persons would likely be substantially reduced, since firms impacting a large number of consumers and/or consumers in important market segments would be omitted. On the other hand, the potential costs to covered persons would of course be reduced if fewer firms were defined as larger participants and thus fewer were subject to the Bureau's supervision authority on that basis.⁷⁸

C. Impact on depository institutions and credit unions with total assets of \$10 billion or less as described in section 1026 of the Act, and the impact on consumers in rural areas.

The proposal does not apply to depository institutions or credit unions of any size.⁷⁹ In addition, there is no additional or unique impact from the proposal on rural consumers.

⁷⁷ For example, increased accuracy of credit reports may yield a higher credit score for some borrowers and lower score for others. This former group could see the cost of credit decrease and access increase. The opposite may happen for the latter. Overall, the increased accuracy of the information should improve the pricing and allocation of credit.

⁷⁸ Pursuant to section 1024(e) of the Act, the Bureau also has supervision authority over service providers to nonbank covered persons encompassed by section 1024(a)(1), which includes larger participants, and some of these service providers may qualify as covered persons. The service providers to consumer debt collection and consumer reporting larger participants may include data aggregators, law firms, account maintenance services, call centers, data and record suppliers, and software providers. The Bureau does not have data on the number and characteristics of these service providers. The Bureau's discussion of potential costs, benefits, and impacts that may result from this proposal generally applies to service providers to larger participants.

⁷⁹ As noted above, as potential users of some of the services covered by the proposal, depository institutions and credit unions might see changes in the quality and prices of such services.

VIII. 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.⁸⁰ 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.⁸¹

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 consult with small business representatives prior to proposing a rule for which an IRFA is required.⁸²

An initial regulatory flexibility analysis is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. If adopted, the rule would define a class of firms as larger participants and thereby authorize the Bureau to undertake supervisory activities with respect to those firms. The rule would not itself impose any obligations or standards of conduct on larger participants for purposes of RFA analysis. Moreover, even if the rule were considered to impose regulatory

⁸⁰ 5 U.S.C. 601 *et seq.* The Bureau is not aware of any governmental units or not-for-profit organizations to which the proposal would apply.

⁸¹ 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.

⁸² 5 U.S.C. 609.

obligations for purposes of RFA analysis, the rule would impose such obligations only on nonbank covered persons in the consumer debt collection market with more than \$10 million in annual receipts and nonbank covered persons in the consumer reporting market with more than \$7 million in annual receipts, as calculated as set forth in the rule. As a result, a nonbank entity that would qualify as a larger participant would generally not meet the SBA standard for a small business, which in these markets has annual receipts at or below \$7 million.⁸³

Additionally, the Bureau believes that the Proposed Rule would not result in a “significant impact” on any small entities that may be affected. As noted, the proposal, if adopted, would authorize the Bureau to undertake supervisory activities with respect to larger participants. Whether the Bureau would in fact engage in supervisory activity, such as an examination, with respect to a larger participant (and, if so, the frequency and extent of such activity) would depend on a number of considerations, including the availability of Bureau resources and the application of the applicable statutory factors set forth in section 1024(b)(2). Given the Bureau’s finite supervisory resources, and the range of industries over which it has supervisory responsibility for consumer financial protection, whether and when an entity in the consumer debt collection and consumer reporting markets would be supervised is probabilistic.

⁸³ The Proposed Rule, if adopted, might authorize the Bureau to supervise a small business as a larger participant in two rare instances. First, a nonbank covered person that was not a small business when it met the larger participant definition might become a small business during the second year of the supervision period. The Bureau expects that this would be rare given that relatively few nonbank covered persons appear to have annual receipts near the relevant threshold. Moreover, the Bureau’s choice to average the nonbank covered person’s receipts over the previous three years (absent special circumstances) reduces the probability that a firm would fall below the \$7 million threshold because this average is less sensitive to fluctuations from a single year. Second, the Proposed Rule defines the term “control” somewhat more expansively than the Small Business Administration for purposes of aggregating the activities of a nonbank covered person’s affiliated companies for purposes of classification as a larger participant. A nonbank covered person that was not considered affiliated under the Small Business Administration standards but was classified as affiliated under the Proposed Rule might therefore be classified as a small entity under the RFA and a larger participant under the Proposed Rule. The Bureau anticipates that very few such cases would exist in either of the markets covered by the Proposed Rule.

Moreover, in cases where supervisory activity were to occur, the costs that would result from such activity are expected to be minimal in relation to the overall activities of the firm.

Finally, section 1024(e) of the Act authorizes the Bureau to supervise service providers to nonbank covered persons encompassed by section 1024(a)(1), which includes larger participants. Because the Proposed Rule does not address service providers, effects on service providers need not be addressed for purposes of this RFA analysis. Even were such effects relevant, the Bureau believes that it is very unlikely that any supervisory activities with respect to the service providers to the approximately 200 larger participants covered by this proposal would result in a significant economic impact on a substantial number of small entities.⁸⁴

Accordingly, the undersigned certifies that this Proposed Rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

IX. Paperwork Reduction Act

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

⁸⁴ The Bureau reaches this judgment in light of the number of relevant small firms in the relevant NAICS codes. For example, based on the examples in footnote 4, many of these service providers would be considered to be in industry 522390, "Other activities related to credit intermediation," or 518210, "Data Processing, Hosting, and Related Services." According to the 2007 Economics Census, there are more than 5000 small firms in the first industry group and nearly 8,000 in the second. Moreover, the limited number of expected cases in which an examination of a larger participant may indicate the need to examine a small service provider further limits any impact on these entities. And, were the Bureau to choose to undertake some supervisory activity with respect to a service provider, the burden imposed would likely be small compared to the overall activities of the firm. For example, using a conservative estimate of an exam that lasts ten business days (the Bureau expects any exam of a small service provider to be considerably shorter), the Bureau conservatively estimates that the supervised small entity would require a maximum of four person-weeks of time to support that exam (one full-time person for the two weeks prior to the exam and for the duration of the exam). For the two industries described above, such an exam at the median-sized firm below the SBA size threshold (approximately three or eight employees, respectively) is estimated to cost a fraction of a percent of annual receipts. Because the Bureau finds it very unlikely that it would supervise such entities except in rare circumstances, a substantial number of entities could not be involved. For larger small entities, the potential costs as a fraction of revenue are even smaller. For these reasons, the Bureau believes that any supervision of service providers would not result in a substantial economic impact on a significant number of small entities.

X. Consultation with Federal Agencies

In developing the Proposed Rule, the Bureau consulted or offered to consult with the Federal Trade Commission, as well as with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the National Credit Union Administration, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.⁸⁵

List of Subjects in 12 CFR Part 1090

Consumer protection and Credit.

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection proposes to add part 1090 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

Part 1090 - Defining Larger Participants in Certain Consumer Financial Product and Service Markets

Sec.

| | |
|----------|---|
| 1090.100 | Scope and purpose. |
| 1090.101 | Definitions. |
| 1090.102 | Covered markets and tests for determining larger participants of those markets. |
| 1090.103 | Status as larger participant subject to supervision. |
| 1090.104 | Determination of status as a larger participant. |

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(b)(7)(A); 12 U.S.C. 5512(b)(1); and 12 U.S.C. 5512(c)(5).

⁸⁵ Section 1022(b)(2)(B) of the Act requires the Bureau to consult with appropriate prudential regulators or other Federal agencies regarding consistency with any prudential, market, or systemic objectives administered by such agencies prior to proposing a rule and during the comment process. Additionally, section 1024(a)(2) specifically requires the Bureau to consult with the Federal Trade Commission prior to issuing a rule defining larger participants under section 1024(a)(1)(B) of the Act.

§ 1090.100 Scope and purpose.

This part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to sections 1024(a)(1)(B) and (a)(2) of the Act. A larger participant of a market covered by this part is subject to the supervisory authority of the Bureau under section 1024 of the Act. This part also establishes rules to facilitate the Bureau's supervisory authority over such larger participants pursuant to section 1024(b)(7) of the Act.

§ 1090.101 Definitions.

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

(a) Act means the Consumer Financial Protection Act of 2010.

(b) Affiliated company means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person. For purposes of this definition:

(1) Company means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.

(2) A person has control over another person if:

(i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person;

(ii) The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or

(iii) The person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.

(c) Annual receipts means receipts calculated as follows:

(1) Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer’s request, and employee-based costs such as payroll taxes, are included in receipts.

(2) Completed fiscal year means a tax year including any short tax year. “Fiscal year,” “tax year,” and “short tax year” have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:

(i) A “fiscal year” is 12 consecutive months ending on the last day of any month except December 31st.

(ii) A “tax year” is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a short tax year.

(iii) A “short tax year” is a tax year of less than 12 months.

(3) Period of measurement. (i) Annual receipts of a person that has been in business for three or more complete fiscal years means the total receipts of the person over its most recently completed three fiscal years divided by three.

(ii) Annual receipts of a person that has been in business for less than three complete fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(iii) Where a person has been in business for three or more complete fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(4) Annual receipts of affiliated companies. (i) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(ii) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts used in determining size status include the receipts of such affiliated company for the entire period of measurement (not just the period after the affiliation arose).

(iii) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (c)(3) of this section even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with

paragraph (c)(3)(ii) of this section even if the person has been in business for three or more complete fiscal years.

(iv) The annual receipts of a former affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (c)(3) of this section. This exclusion of annual receipts of former affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(d) Assistant Director means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under this proposal. In the event there is no such Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

(e) Bureau means the Bureau of Consumer Financial Protection.

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

(g) Consumer debt collection means collecting or attempting to collect, directly or indirectly, any debt owed or due or asserted to be owed or due to another and related to any consumer financial product or service. A person offers or provides consumer debt collection where the relevant debt is either:

(1) Collected on behalf of another person; or

(2) Collected on the person's own behalf, if the person purchased or otherwise obtained the debt while the debt was in default under the terms of the contract or other instrument governing the debt.

(h) Consumer financial product or service means any financial product or service, as defined in section 1002(15) of the Act that is described in one or more categories under:

(1) Section 1002(15) of the Act and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clauses (i), (iii), (ix), or (x) of section 1002(15)(A) of the Act and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (h)(1) of this section.

(i) Consumer reporting means:

(1) In general. Consumer reporting means collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service.

(2) Exception for furnishing to an affiliated person. Consumer reporting does not include the activities of a person to the extent that a person—

(i) Collects, analyzes, or maintains information that solely relates to transactions or experiences between the person and a consumer; and

(ii) Provides the information described in paragraph (i)(2)(i) of this section to an affiliate.

(3) Exception for furnishing information to a consumer reporting entity.

Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and the person, or the affiliate of such person, to another person that is engaged in consumer reporting.

(4) Exception for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy. Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer.

(j) Larger participant means a nonbank covered person that meets a test under § 1090.102, and for the period provided in § 1090.103 of this part.

(k) Nonbank covered person means, except for persons described in sections 1025(a) and 1026(a) of the Act:

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

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

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

(m) Supervision or supervisory activity means the Bureau's exercise, or intended exercise, of supervisory authority by initiating or undertaking an examination, or requiring a report of a person pursuant to section 1024 of the Act.

§ 1090.102 Covered markets and tests for determining larger participants of those markets.

(a) Consumer debt collection. A nonbank covered person that offers or provides consumer debt collection is a larger participant of the consumer debt collection market if the person's annual receipts resulting from consumer debt collection are more than \$10 million.

(b) Consumer reporting. A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than \$7 million.

§ 1090.103 Status as larger participant subject to supervision.

A person qualifying as a larger participant under § 1090.102 shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under § 1090.102.

§ 1090.104 Determination of status as a larger participant.

(a) If a nonbank covered person receives a written communication from the Bureau initiating a supervisory activity, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this part within 30 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by this part and therefore is not subject to the Bureau's supervisory authority under section 1024 of the Act. In addition, a person may include with the response copies of any records, documents, or other information on which the person relied to make the assertion.

(b) A person shall be deemed to have waived the right, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under paragraph (a) of this section. A person who fails to respond to the Bureau's written communication within 30 days will be deemed to have acknowledged that it is a larger participant.

(c) The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted pursuant to paragraph (a) of this section, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement setting forth the Bureau's conclusion as to whether the person meets the definition of a larger participant of a market covered by this part.

(d) At any time, including prior to issuing the written communication referred to in paragraph (a) of this section, the Assistant Director may require that a person provide to the

Bureau such records, documents, and information as the Assistant Director may deem appropriate to determine whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.

(e) The Assistant Director, in her or his discretion, may modify any timeframe prescribed by this section on his or her own initiative or for good cause shown.

Dated: February 8, 2012.

Richard Cordray,

Director, Consumer Financial Protection Bureau.