May 31, 2022

By electronic submission to FederalRegister.comments@cfpb.gov

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders (Docket No. CFPB-2022-0024)

Dear Madam or Sir:

The Online Lenders Alliance ("OLA") is a trade association that promotes a diverse and responsible marketplace for access to innovative online financial services through education, communication, collaboration and advocacy with policymakers and opinion leaders.[1] OLA's members appreciate the opportunity to engage and collaborate with the Consumer Financial Protection Bureau (the "Bureau") to ensure that regulatory policy strikes an appropriate balance between ensuring Americans have access to responsible, well-regulated credit and policing the marketplace for fraud and abuse. Today, we write concerning the Bureau's recent publication of the rule captioned above (the "Rule") and, at the Bureau's invitation, offer the following comments.[2]

[1] Online Lenders Association website, https://onlinelendersalliance.org/about/about-ola/ (last accessed May 26, 2022).

[2] We note that while the Rule is styled as a "procedural rule," the regulatory scheme it amends—12 C.F.R. Part 1091—was promulgated following a full notice-and-comment period under Director Richard Cordray. OLA respectfully submits that the Bureau should have used a full notice-and comment process for this Rule because it may affect the substantive rights of the public and thus amount to a legislative rule for which the Administrative Procedure Act requires the Bureau to solicit and take into consideration input from the public. OLA further questions the need for this rule at all given the Bureau's

1. The Rule is Not and "Procedural Rule" and Should Have Been Promulgated Pursuant to a Notice-and-Comment Process Pursuant to the Administrative Procedure Act.

The Administrative Procedure Act (5 U.S.C. § 553) generally requires an agency to engage in a notice-and-comment process to promulgate regulations that affect the substantive rights of the public. This process not only affords the public an opportunity to learn about new rules prior to their becoming effective but also improves the quality of rulemaking by allowing the agency to consider a diversity of views before a rule is made final. An exception to this notice-and-comment process exists for, among other kinds of rules, "rules of agency organization, procedure, or practice."[3] The exception is not available to an agency when an action "is likely to have considerable impact on ultimate agency decisions" or when it "substantially affects the rights of those over whom the agency exercises authority."[4]

The Bureau has styled the Rule as a "procedural rule"; it took effect on April 29, 2022, the same day the Rule was published in the Federal Register.[5] While the Bureau simultaneously invited comment on the Rule from the public, the public's comments were not taken into consideration before the Rule took effect.

The Rule does, however, dramatically affect (or have the potential to affect) the substantive rights of entities subject to the Bureau's authority; it is thus more appropriately considered a legislative rule. In fact, the set of rules the Bureau amended in the Rule—Part 1091 (relating to nonbank supervisory activity)—was promulgated through a full notice-and-comment process in 2013, without reliance on a procedural rule exception. So too were the rules generally governing the publication or sharing of confidential information, including confidential supervisory information ("CSI"), codified in 12 C.F.R. Part 1070.[6] While the Rule amends Part 1091, a more appropriate placement for the Bureau's change would be in Part 1070, which governs the circumstances under which the Bureau may share CSI. OLA does not understand—and the Supplementary Information accompanying the Rule does not explain—why only the CSI of nonbank supervised entities should be subject to release on the Bureau's website and not the CSI of other entities within the Bureau's jurisdiction.

---

[3] 5 U.S.C. § 553(b)(3)(A).
[4] Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1114 (D.C. Cir. 1974) ("This category … should not be deemed to include any action which goes beyond formality and substantially affects the rights of those over whom the agency exercise authority.").
[5] 87 Fed. Reg. 25,397 *et seq.*
[6] 78 Fed. Reg. 11,484 (Feb. 15, 2013).

Regardless of where the rule change is located in the Bureau's rules, however, it creates a brand-new type of permission and manner of sharing for the Bureau's disclosure of CSI, and thus should have gone through a full notice-and-comment rulemaking process. The Bureau, through a legislative rule in 2013, limited its ability to share CSI. Under 12 C.F.R. § 1070.41, no current or former employee of the Bureau may share CSI (let alone publish it on a website) "except as required by law or as provided in this part [Part 1070]."[7] Sections 1070.42 and 1070.43 outline narrow exceptions to the general nondisclosure rule, namely for the disclosure of CSI to financial institutions and to law enforcement and other agencies. Section 1070.44 governs the disclosure of confidential consumer complaint information. Section 1070.45, captioned "Affirmative disclosure of confidential information," permits the Bureau to release CSI to Congress, in various hearing or administrative settings, in court proceedings, in Bureau personnel matters, and to other agencies. And Section 1070.46, which may be perceived as a "catch-all" exception to the nondisclosure rule in Section 1070.41, was described this way by the Bureau in 2013 when concerns were raised about how it would be used:

> The Bureau declines to eliminate or substantially modify § 1070.46. As the CPFB noted when it published the interim final rule, the Bureau does not intend to utilize this provision routinely, or as a matter of convenience, to circumvent applicable laws or provisions of the rule that exist elsewhere in subpart D to prohibit or restrict its disclosure of confidential information. Instead, the Bureau intends to use this provision in the same way that other Federal agencies utilize similar catch-all provisions—to account for rare situations in which an unforeseen and exigent need exists to disclose confidential information for purposes or in a manner not otherwise provided for in the rule.[8]

The release of CSI on the Bureau's website cannot reasonably be said to be comport with this description of the Bureau's intended use of Section 1070.46—and OLA is certainly not aware of any "other Federal agencies" that "utilize similar catch-all provisions" to publish CSI to their website.

2. Disclosure of the Identity of the Respondent Serves No Public Purpose.

If the Rule had been subject to public comment, OLA would have highlighted—as we do now—that the Rule should be amended to prohibit the Director from disclosing the identity of the respondent associated with the decision or order being published. Currently under the Rule, there is no such prohibition.

[7] 12 C.F.R. § 1070.41(a).
[8] 78 Fed. Reg. 11,499.

Redacting the name and identifying information of the entity to whom the published CSI pertains would not reduce or eliminate the Bureau's claimed interest in publishing the CSI. The Bureau claims two primary benefits to the Rule: first, that there is a "public interest in transparency when it comes to these potentially significant rulings by the Director"; and that "if a decision or order is publicly released, it would be available as a precedent in future proceedings." As to the first claimed benefit—the transparency of significant rulings of the Director—OLA is unable to glean from the Supplementary Information what benefit this transparency would yield, either in an absolute sense or in a relative sense, i.e. when weighed against the drawbacks of publishing CSI on a website (e.g., if the CSI highlighted the need for a supervised entity to enhance its cybersecurity, publishing that information may invite the perpetration of cybercrime). Whatever benefit there *is* in transparency, the risks associated with that transparency would be greatly diminished if the name and identifying information of the supervised entity were redacted.

As to the second claimed benefit, OLA submits that redacting the name and identifying information of the respondent would not affect the Bureau's ability to use decisions and orders as precedent. Indeed, OLA believes that all financial regulators use prior decisions and orders to inform current and future regulatory policy—all without the need to publish those documents on a website. If the Bureau's claim is that publishing decisions and orders would help establish regulatory standards (much like the publication of enforcement/consent orders), redacting the name of the respondent would not interfere with the public's ability to understand the facts and circumstances regarding which the Bureau took supervisory action.

Moreover, if the claim that the release of CSI to the public for precedential value is for the benefit of other nonbank supervised entities, the Bureau should seek comment on the strength of this claim given that Part 1091 does not address supervision of whole industries but of individual firms or entities. The Bureau has the authority to supervise nonbanks on a limited number of grounds, set forth in 12 U.S.C. § 5514(a)(1). The Bureau has rules governing the supervision of so-called Larger Market Participants ("LMPs"), which are not contained in Part 1091. Part 1091 governs nonbank supervision of entities that may not fall within the scope of a LMP designation, and which are flagged for supervision based on the Bureau's consumer complaint database or other "reasonable cause." The nature of the Bureau's supervisory jurisdiction under § 5514(a)(1)(C) is thus more akin to "one-off" entities, which calls into question the Bureau's claim that the publication of previously confidential decisions and orders is valuable for standard-setting.

*   *   *

Thank you for the opportunity to comment on the Rule. OLA believes these comments should be considered in the context of a legislative rulemaking undertaken by the Bureau, just as the Bureau did in creating Parts 1091 and 1070 in 2013. According, OLA respectfully requests that the Bureau withdraw the Rule and, if the Bureau wishes, examine the costs and benefits of the publication of CSI before giving such a rule effect.

Thank you for your consideration.

Andrew Duke
Executive Director
Online Lenders Alliance
703-567-0327
aduke@oladc.org

■