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CBA Requests Increased CFPB Supervision of Fintechs Via the Larger Participant Rule

WRITTEN BY

David N. Anthony | James W. Stevens | P. Thomas Bright

The Consumer Bankers Association (CBA), a trade group of retail financial institutions, recently sent a letter to the Consumer Financial Protection Bureau (CFPB) director, requesting increased supervision of financial technology companies (fintechs). On October 3, just three days after Rohit Chopra was confirmed as the next CFPB director, the CBA urged him to consider expanding the agency's larger participant rule.

The CFPB has authority to supervise certain "covered persons," defined in 12 U.S.C. §5481 (6) to include "any person that engages in offering or providing a consumer financial product or service" and any affiliate of such person that acts as a service provider to such person. Fintechs are thus nondepository covered persons, but fall outside of the CFPB's express, statutory supervisory authority. Under 12 U.S.C. § 5514, the CFPB has express supervisory authority over covered persons in the residential mortgage, private student lending, and consumer payday lending markets. The agency also has supervisory authority of any covered person who "is a larger participant of a market for other consumer financial products or services," as defined by particular rulemaking.

Under this latter provision, the CFPB could, through additional rulemaking, supervise fintechs that operate in a covered market and meet a relevant test for being deemed a larger participant. 12 CFR 1090 currently provides for CFPB supervision of the consumer reporting, consumer debt collection, student loan servicing, international money transfer, and automobile financing markets, and for each of those markets, it prescribes a test or threshold for determining a person's status as a larger participant. For example, the threshold for determining whether a nonbank covered person is a larger participant in the automobile financing market is 10,000 aggregate annual originations.

In its letter, the CBA specifically advocated to add the unsecured consumer lending market to the list of defined markets supervised by the CFPB pursuant to its larger participant authority as the mechanism to bring fintechs under CFPB supervision. The CBA put forth a two-pronged argument. First, it highlighted the need for competitive markets and a level playing field, citing statistics suggesting non-supervised fintechs have customer bases that "rival some of the country's largest supervised banks." Second, it argued that a lack of supervision puts consumers at risk. As examples, the CBA highlighted recent lawsuits and consent orders against fintechs and statistics about the high rate of suspicious PPP loans from fintech lenders as opposed to traditional lenders.

The approach suggested by the CBA may have unintended consequences. The implications of a larger participant rule for the unsecured consumer lending market would likely extend beyond online nonbank consumer lenders, as such a rule could cover non-fintech companies as well. Also, because the fintech sector is broader than unsecured consumer lending, it would not provide supervision to all types of fintechs.

This will be an issue to watch in the Rohit Chopra era at the CFPB. New rulemaking regarding the larger participant rule was previously designated “inactive,” so an initial indicator will be whether the CFPB will reinstate such rulemaking to active status.

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