

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1091

[Docket No. CFPB–2022–0024]

Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk

Determination; Public Release of Decisions and Orders

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Procedural rule; request for public comment.

SUMMARY: The Consumer Financial Protection Bureau (Bureau) is amending an aspect of procedures for establishing supervisory authority based on a risk determination. Specifically, the Bureau is adding a mechanism for the Bureau to make final decisions and orders in these proceedings public. The Bureau welcomes comments on this rule, and the Bureau may make further amendments if it receives comments warranting changes.

DATES: This procedural rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2022-0024, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* 2022-Amendment-to-Part-1091@cfpb.gov. Include Docket No. CFPB-2022-0024 in the subject line of the message.

- *Mail/Hand Delivery/Courier: Comment Intake—Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders*, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number for this rulemaking. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, and in light of difficulties associated with mail and hand deliveries during the COVID-19 pandemic, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to <https://www.regulations.gov>. In addition, once the Bureau's headquarters reopens, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. At that 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 subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Christopher Shelton, Senior Counsel, Legal Division, at 202-435-7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Discussion

Among other sources of supervisory authority, the Bureau can supervise a nonbank covered person that the Bureau “has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond . . . 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.”¹ The Bureau issued a procedural rule in 2013 to govern these proceedings.² Section 1091.115(c) of the existing rule provides, in summary, that documents, records or other items in connection with a proceeding under part 1091 shall be deemed confidential supervisory information.

The Bureau is now adding a new § 1091.115(c)(2), which provides an exception regarding final decisions and orders by the Director. A central principle of the supervisory process is confidentiality. At the same time, these decisions and orders present unique considerations compared to other supervisory activity. There is a public interest in transparency when it comes to these potentially significant rulings by the Director as head of the agency. Also, if a decision or order is publicly released, it would be available as a precedent in future proceedings. Accordingly, the Bureau believes that there should be a procedural mechanism to determine whether all or part of a decision or order should be publicly released. The process established in § 1091.115(c)(2) is a straightforward one. In summary, within seven days of service of the decision or order, the respondent has the option of filing a submission on this

¹ 12 U.S.C. 5514(a)(1)(C). The Bureau must base such reasonable-cause determinations on complaints collected by the Bureau under 12 U.S.C. 5493(b)(3), or on information collected from other sources. *Id.*

² 78 FR 40351 (July 3, 2013); *see also* 85 FR 75194 (Nov. 24, 2020) (updating certain cross-references to 12 CFR part 1070).

issue, and then the Director will determine whether the decision or order will be released on the Bureau's website, in whole or in part.³

In this rule, the Bureau is not endeavoring to codify a standard on the issue of public release. However, the Bureau generally anticipates applying Exemptions 4 and 6 of the Freedom of Information Act to information submitted by respondents that is reflected in final decisions and orders.⁴ Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential," while Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁵ The Bureau would also consider whether there are other reasons to not publicly release a final decision or order, in whole or in part. The Bureau welcomes any comments on whether it should amend the rule to codify a standard for determinations regarding public release.

The Bureau notes that this rule will have limited effects on the public. Nonbank covered persons that are respondents may incur incidental costs, if they choose to prepare submissions on the issue of public release. The rule itself will not trigger public release of decisions and orders, since it simply establishes a procedure to consider that issue. If the Bureau does ultimately decide to release a decision or order, that should generally benefit covered persons, consumers,

³ The Bureau also notes three features of this provision. First, the computation of "days" is governed by existing § 1091.114. Second, the Director's authority regarding public release could be delegated to a designee of the Director under existing § 1091.101. Third, the Bureau is not extending the staff separation-of-functions requirement in § 1091.109(c), which applies to the Director's final decision and order, to the Director's subsequent determination regarding public release. Doing so would not be required by law, and the routine determination of whether to post material on the Bureau's website is not sufficiently significant to warrant doing so.

⁴ 5 U.S.C. 552(b)(4), (b)(6).

⁵ *Id.*

and other members of the public by giving them a better understanding of the Bureau's decisionmaking.

In formulating this rule, the Bureau has consulted or offered to consult with the prudential regulators and the Federal Trade Commission.

II. Regulatory Requirements

As a rule of agency organization, procedure, or practice, this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act.⁶

Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.⁷ Moreover, the Bureau's Director certifies that this rule will not have a significant economic impact on a substantial number of small entities. Therefore, an analysis is also not required for that reason.⁸ As a result of the rule, respondents in the relevant proceedings may choose to make submissions on the issue of public release. Some of these respondents may be small entities under the Regulatory Flexibility Act, but they would represent a very small fraction of small entities in consumer financial services markets. Accordingly, the number of small entities affected is not substantial.

The Bureau has also determined that this rule does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.⁹

⁶ 5 U.S.C. 553(b).

⁷ 5 U.S.C. 603, 604.

⁸ 5 U.S.C. 605(b).

⁹ 44 U.S.C. 3501-3521.

List of Subjects in 12 CFR Part 1091

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

Authority and Issuance

For the reasons set forth above, the Bureau revises 12 CFR part 1091 as set forth below:

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

1. The authority citation for part 1091 continues to read as follows:

Authority: 12 U.S.C. 5512(b)(1), 5514(a)(1)(C), 5514(b)(7).

2. Revise § 1091.115(c) to read as follows:

§ 1091.115 Change of time limits and confidentiality of proceedings.

* * * * *

(c) *Confidentiality*—(1) *General rule*. In connection with a proceeding under this part, including a petition for termination under § 1091.113, all documents, records or other items submitted by a respondent to the Bureau, all documents prepared by, or on behalf of, or for the use of the Bureau, and any communications between the Bureau and a person, shall be deemed confidential supervisory information under 12 CFR 1070.2(i)(1). However, this paragraph does not apply to the version of a document that is released on the Bureau’s website under paragraph (c)(2).

(2) *Publication of final decisions and orders by the Director*. The Director will make a determination regarding whether a decision or order under § 1091.103(b)(2), § 1091.109(a), or § 1091.113(e) will be publicly released on the Bureau’s website, in whole or in part. The respondent may file a submission regarding that issue, within seven days after service of the

decision or order. The Director may also decide that the Director's determination regarding public release will itself be released on the website, in whole or in part. Section 1091.109(c) is not applicable to determinations under this paragraph.

/s/ Rohit Chopra

Rohit Chopra,

Director, Consumer Financial Protection Bureau.