COMMENTS
of the
National Consumer Law Center
on behalf of its low-income clients

and

the Consumer Federation of America,
Consumers Union,
U.S. PIRG, and
the National Association of Consumer Advocates

to

Bureau of Consumer Financial Protection

Regarding

12 C.F.R. Ch. X
Larger Participant Rulemaking
76 Fed. Reg. 38059 (June 29, 2011)
CFPB Docket No. CFPB-HQ-2011-2

Submitted August 15, 2011

TABLE OF CONTENTS

I. INTRODUCTION

The National Consumer Law Center[1] respectfully submits the following comments on behalf of its low income clients, along with the Consumer Federation of America,[2] Consumers Union,[3] U.S. PIRG,[4] and the National Association of Consumer Advocates (NACA).[5] We welcome the opportunity to respond to the Consumer Financial Protection Bureau's (CFPB) request for comments on defining which non-banks are "larger participants in a market" subject to the CFPB's supervision authority.

Sections II through IV of these comments discuss the general criteria that the CFPB should adopt in defining larger participants. Section V examines a series of consumer financial products and services and discusses criteria that should apply to these specific markets.

---

[1] The **National Consumer Law Center, Inc. (NCLC)** is a non-profit Massachusetts Corporation, founded in 1969, specializing in low-income consumer issues, with an emphasis on consumer credit. On a daily basis, NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government, and private attorneys representing low-income consumers across the country. NCLC publishes a series of eighteen practice treatises and annual supplements on consumer credit laws, including *Truth In Lending*, (7th ed. 2010), *Cost of Credit: Regulation, Preemption, and Industry Abuses* (4th ed. 2009 and Supp.), and *Foreclosures* (3rd ed. 2010), as well as bimonthly newsletters on a range of topics related to consumer credit issues and low-income consumers. NCLC attorneys have written and advocated extensively on all aspects of consumer law affecting low-income people, conducted training for thousands of legal services and private attorneys on the law and litigation strategies to address predatory lending and other consumer law problems, and provided extensive oral and written testimony to numerous Congressional committees on these topics. NCLC's attorneys have been closely involved with the enactment of the all federal laws affecting consumer credit since the 1970s, and regularly provide extensive comments to the federal agencies on the regulations under these laws.

[2] The Consumer Federation of America (CFA) is a nonprofit association of some 300 national, state, and local pro-consumer organizations created in 1968 to represent the consumer interest through research, advocacy, and education.

[3] Consumers Union of United States, Inc., publisher of Consumer Reports, is a nonprofit membership organization chartered in 1936 to provide consumers with information, education, and counsel about goods, services, health and personal finance. Consumers Union's publications have a combined paid circulation of approximately 8.3 million. These publications regularly carry articles on Consumers Union's own product testing; on health, product safety, and marketplace economics; and on legislative, judicial, and regulatory actions that affect consumer welfare. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, fees, and noncommercial contributions and grants. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[4] The U.S. Public Interest Research Group (U.S. PIRG) serves as the Federation of State PIRGs, which are non-profit, non-partisan public interest advocacy organizations that take on powerful interests on behalf of their members. For years, U.S. PIRG's consumer program has designated a fair financial marketplace as a priority. Our advocacy work has focused on issues including credit and debit cards, deposit accounts, payday and other predatory loans and credit reporting.

[5] The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.

In summary, we urge the Bureau to:

- **Employ a flexible, broad standard so that it can respond to changes in the marketplace and ensure that risky actors do not evade supervision.** The Bureau does not need to examine every participant who falls within the definition of "larger participant." The CFPB should cast a wide net in the rule to determine the scope of potential supervision and use other relevant factors later, such as the extent of state supervision, to determine which actors are actually supervised.
- **Use multiple, overlapping criteria to define size, looking at both absolute thresholds and relative size within particular markets**. Absolute thresholds can be used for any consumer financial product or service, and relative criteria are important to provide authority to examine the most significant players in particular markets that pose their own risks.
- **Define as many important markets and submarkets as the Bureau can presently identify**. Distinct markets pose distinct risks, and the CFPB will have more information to protect all consumers if it can conduct examinations within each market.
- **Cover nonbanks that have a significant regional impact even if they are not among the biggest players nationally**. Consumers in every region of the country need protection.
- **Reach larger companies and conglomerates selling a variety of non-bank products and services, even if those companies are not huge providers of one specific service or product.**

II. USE BOTH ABSOLUTE AND RELATIVE CRITERIA TO CREATE A BROAD AND FLEXIBLE DEFINITION OF LARGER PARTICIPANT.

A. Define Larger Participant Broadly Using Flexible Criteria.

The range of consumer financial products and services ("CFP&S") is vast, and for any given product a variety of different types of players may influence the safety or risks of that product. For that reason, identifying the larger participants in markets for such products will pose some unusual challenges. Dodd-Frank does not define "larger" or "market" but directs the Bureau to consider certain factors in exercising a risk-based supervision program. In drafting a rule to identify larger participants we urge the Bureau to strive for a rule based on broad, flexible criteria and to avoid being unduly prescriptive.

The rule is only the first step in the process of setting the CFPB's nonbank supervision program. Some of the factors that affect a product's risk to consumers will only be known later. Consequently, the Bureau should use broad criteria in defining by rule which participants are "larger." The rule can also set forth other, flexible criteria that can be assessed later in determining which specific entities are actually examined.

Such an approach will produce a rule that remains relevant as markets and risks change over time. It will also enable the Bureau to deploy its supervisory resources quickly, as problems are identified, without first returning to the lengthy rulemaking process. The Bureau's responsibility for detecting and assessing risks to consumers and markets[6] is central to the goal of stopping harmful practices before they become too widespread. Any delay caused by rules that leave an unforeseen abuse beyond the reach of examiners will risk greater injury to consumers and law-abiding competitors.

A broad, flexible approach will also help ensure a level regulatory playing field. If all competitors in a market equally face the possibility of supervision, none will gain an unfair advantage by exploiting loopholes. By contrast, overly prescriptive regulations can invite market participants to seek ways to evade the rules and to gain an unfair advantage over competitors. Whether a covered person is subject to supervision should not depend on which consultant they hire or which new, unforeseen variants of markets develop. Adopting broad, flexible rules will minimize the risk that abusive larger participants will evade supervision by creatively structuring their business, products, or services.

A key part of the broad, flexible approach that the CFPB should adopt is to identify multiple, overlapping criteria, defining a larger participant as one that meets any one of the criteria. It is also critical for the CFPB to adopt not just absolute criteria – such as a certain number of transactions per year – but also relative criteria that measure size in comparison to other players in the same market. Any other approach would invite players to downsize by dividing themselves into smaller entities, and would risk having supervisory authority over no participants in specialized markets that have a significant impact on consumers.

B. Adopt a broad reach—judiciously exercised.

Having the ability to supervise a wide range of markets and participants, however, does not mean the CFPB should exercise this authority without discretion. Dodd-Frank mandates a risk-based supervision program that takes into account the factors listed in section 1024(b)(2).[7] But that mandate applies to how the CFPB *exercises* its authority. It does not limit the *scope* of the larger-participant rule. Instead, a broad rule will act as an important deterrent to risky and abusive conduct. A broad rule without loopholes or blanket exemptions will be harder to evade and will, consequently, promote greater compliance among larger participants potentially subject to the CFPB's examination authority. The CFPB must retain the authority to supervise all markets for consumer financial products and services—nationally and regionally—as problems arise, but it must also deploy its resources judiciously to avoid burdening law-abiding competitors.

Dodd-Frank lists specific factors the CFPB should consider when determining where to exercise its supervisory authority:

- the asset size of the covered person;
- the volume of transactions;
- the risk to consumers of the product or service provided;
- the extent of state oversight;

[6] Dodd-Frank § 1024(b).
[7] Dodd-Frank § 1024(b)(2).

- any other factors the CFPB determines to be relevant.[8]

Defining the absolute and relative criteria for some of these factors, such as assets and volume, can be done in the current rule, subject to the caveats we raise in Section II.C of these comments. A covered person with few assets and low volume may not merit the CFPB's attention. Those measurements, however, must be balanced with the third and fourth factors—the risk to consumers and the effectiveness of state oversight. High risk and ineffectiveness of supervision at the state level may outweigh low volume and few assets.

Neither risk nor the efficacy of state supervision can be determined now for the broad scope of consumer financial products and services that are within the CFPB's jurisdiction. The CFPB must retain the ability to react quickly to risks that cannot be identified in the current rulemaking.

The extent of state oversight is relevant to the question of where the CFPB *exercises* its authority but not to the initial question of whether a covered person or market is within the scope of the supervisory program. The CFPB may need to supervise a market or larger participant that is subject to state oversight when the participant operates in multiple states or is beyond the state's capacity for appropriate supervision, or when a state fails to enforce the law.

Even if a state has a robust supervision program, it is likely to focus on state law and not on federal law. The CFPB's ability to supervise all larger participants may be essential to ensure compliance with federal law and uniform application of federal law in every state. States will not have the same expertise, experience or interest in overseeing compliance with CFPB or other federal rules.

If the CFPB does not retain the authority to supervise participants that are regulated at the state level, abusive businesses could migrate to states that lack the resources to exercise their own oversight authority or where state law has significant loopholes. Abusive businesses should not be allowed to use such states as a pirate's cove from which they may prey upon consumers in other states. States have also been known to trade weak laws for tax revenue and jobs. State legislatures making such a decision should not be allowed to impose their will on the rest of the country because of a potentially harmful loophole in the CFPB's jurisdiction.

A rule that maintains the CFPB's authority to supervise participants and markets in all states and territories will permit the CFPB to defer to state authorities doing a good job, and to focus more where supervision is needed. In doing so, the CFPB will fill regulatory gaps instead of creating duplication.

C. Select criteria closely related to consumer activity.

Although there are many ways to measure business activity, the CFPB should use criteria that are closely tied to a covered person's relationship to or impact on consumers. Such criteria will enable the CFPB to identify and supervise those participants having the largest impact on

[8] Dodd-Frank § 1024(b)(2).

consumers' lives. This will naturally correlate to the potential for risk of injury to consumers and the public in general.

We recommend that the CFPB identify a number of criteria, and define a larger participant as an entity that meets any one of them. One of the criteria should be the number of transactions per year, with "transaction" being defined as a single instance of any activity meeting the definition of CFP&S. This type of measurement will reflect how often a covered person interacts with or impacts consumers in any given market. Regardless of the amount of money involved, the more transactions a participant has with a consumer the greater the impact on the consumer's finances and well-being. This criterion is perhaps the one that corresponds best with the intended goals of the supervision program.

However, the number of transactions per year should not be the only factor that subjects an entity to supervision. Another criterion should measure the aggregate dollar volume of consumer assets, transaction value, credit or debt that the participant impacts. The size of the transaction is relevant and can justify reaching a participant with a lower number of transactions. For example, a participant in the general purpose reloadable prepaid card market who provides a card that holds a consumer's entire regular income poses higher risk than one that sells a higher volume of $100 gift cards. However, the dollar volume of transactions can be deceptive if it is used in isolation from other criteria. Two companies selling the same product may target different socio-economic groups by varying the price of the product (as well as by marketing strategy). Rather than asking which of those two businesses is larger and only supervising one, the CFPB would better serve the public by asking whether there are two sub-markets for the same product and supervising the larger participants in each.

In addition, as discussed in the next subsection, the number of transactions and the aggregate dollar volume should be evaluated both on an absolute basis and relative to other participants in the market. Requiring a fixed number of transactions per year or a fixed aggregate dollar volume would mean that the CFPB could not exercise supervision over any of the larger players in smaller but highly important markets.

Other potential criteria should be taken into account as grounds for extending supervision to participants that might not be identified as "larger" by the number of transactions per year or their aggregate dollar volume. These criteria include:

- **The number of states** in which a business is active. When a business is active in a number of states, any one state may have difficulty adequately supervising it, and it is likely to have a broader impact on consumers than a single-state company. But multi-state operation should not be a requirement for supervision, as a company can be "larger" and important to supervise even if it is active in just one state. For example, a business that has a corner on the California market is almost certainly "larger." Therefore any criterion based on number of states must be an additional ground for identifying a participant as "larger," not a requirement for supervision.
- **The company's assets.** Measuring assets can be a useful proxy for impact on the consumer and the marketplace. A company with a large amount of assets devoted to consumer financial products or services likely has a significant impact. But assets do not directly correlate to activity and therefore a minimum number of assets should not be

- Other relevant measurements may include the **number of customers** served in a year or **number of accounts** maintained by a participant.

We generally recommend using industry-independent criteria. Industry-specific criteria should only be added, as an additional ground for exercising supervision, where the independent criteria alone would be inadequate to identify the larger participants of unique markets. Adopting industry-independent criteria will give the CFPB enough flexibility to identify larger participants as products and services change over time. While it will sometimes be appropriate to use industry-specific measurements, a rule based solely on industry-specific measurements will fail to achieve its purpose if the data measured become obsolete.

D. Use Relative Criteria, Not Just Absolute Criteria.

In addition to using criteria that measure the absolute size of an entity, the CFPB should exercise supervision based on an entity's relative importance in the particular market or markets where it operates. In some smaller markets, or markets where market share is dispersed, no one actor may be particularly large, even if the market overall is important to consumers. Similarly, as new markets or new variants of markets arise, it will be important for the CFPB to begin to supervise and understand them, even before they explode in size and risks become entrenched.

Various criteria can be used to judge an entity's relative size in a particular market. As with the absolute criteria, these should not be requirements for supervision, but should be treated as one of several alternate grounds to identify a larger participant. Factors could include:

- The top number of actors in a market, such as the top ten, or those with a particular market share. (These two factors measure roughly the same thing. For example, the top ten participants in a market will include all those who have a market share of 10% or more.)
- Those whose transaction volume or market share is above the median.

Though criteria such as market share are relevant, they also have their limitations. Identifying larger participants by market share requires having data on an entire market, something that will not always be available. It may be possible, however, to identify the largest, most visible players even if the entire market cannot be measured and their precise market share determined.

The CFPB should adopt both relative criteria that apply to any market and also more specific, tailored criteria for particular markets. For example, the CFPB could have a rule that says the top ten actors in every identified market are considered "larger" and, in addition, "any debt collector that collects at least X number of debts" is considered larger. Market-specific criteria – which can be identified for specific markets but not generalized to other markets -- should augment both the generic criteria.

Some markets, such as the prepaid card markets, involve a multitude of players, each performing separate functions. For these markets, one way that the CFPB might exercise appropriate supervision over the entire supply chain is to choose one type of entity that has the most control over the supply chain. The CFPB would then supervise that entity, and part of its supervision would be to determine whether that entity was ensuring compliance by the other players. Decisions about targeting the CFPB's supervision resources in this way will be best made when the CFPB exercises its discretion to determine where to conduct examinations, but in devising the criteria for identifying larger participants the CFPB should keep in mind that it will be important to be able to exercise supervision over the entities that are at the fulcrum of the supply chain.

III. USE REGISTRATION ONLY ON A TARGETED BASIS, NOT ACROSS THE BOARD.

In response to the CFPB's question about what data it should collect through a registration process, we discourage the CFPB from requiring registration indiscriminately. Registration requirements by themselves do not provide any substantive protection for consumers. Yet they will expend valuable CFPB resources and risk generating opposition to more substantive regulation or supervision.

In addition, a registration requirement may falsely imply a government seal of approval:

"*You can trust us—We're registered with the CFPB!!*"

There has already been at least one federal court decision that misinterpreted a state registration requirement as meaning a suspect business practice was lawful. In *U.S. v. Blechman*,[9] the U.S. Attorney in Kansas sought the civil forfeiture of proceeds from a scheme involving "the service of foreclosure stoppage or delay" by a "'foreclosure consultant.'"[10] The government "argue[d] that there was nothing that defendants provided to their victims that could be viewed as a lawful or legitimate service."[11]

The court "agree[d] with the government's assessment of defendants' conduct," but rejected the government's request because the scheme was not an illegal service or unlawful activity as required by the forfeiture statute. The court based this conclusion, in part, on "the fact that California law specifically authorizes and regulates the business of "foreclosure consultants," who offer the same service as defendants . . . ."[12] While the decision does not specifically identify the California law, it is most likely California Civil Code § 2945.45, which requires so-called foreclosure consultants to register and post a bond. The law does not make any statement regarding the legality of the defendants' activities. Nevertheless, the mere fact that California required foreclosure consultants to register gave the impression that the defendants were engaged in a lawful activity.

[9] 2010 WL 235035 (D. Kan. Jan. 8, 2010).
[10] *Id.* at *1.
[11] *Id.* at *2.
[12] *Id.*

Similarly, businesses that are insured by the FDIC or approved as lenders by the FHA have used their symbols on solicitations. Those symbols can imply approval for products that are of questionable validity.

According to the Federal Register notice, the CFPB is considering registration requirements to aid in data gathering. Such a requirement would presumably be neutral regarding the question of whether registered individuals were providing illegal or harmful services. Nevertheless, as the *Blechman* case shows, the act of imposing a registration requirement can easily be misconstrued as a government seal of approval for the product or service offered by the registrant.

Registration by the CFPB could undermine state authority over some participants in the credit market. For example, some internet payday lenders that are subject to state licensing and supervision simply ignore state law, sometimes based on a clause in the contract that purports to subject the transaction to some other jurisdiction's law. Courts have ruled[13] that out-of-state online lenders are subject to the jurisdiction of the state where the consumer got the loan, yet many online lenders persist in making loans to consumers without being licensed under or in compliance with state laws. Since the CFPB is precluded from setting usury limits, it must take special care not to interfere with the authority of state regulatory regimes that can and do limit usurious rates. Registration of Internet payday lenders by the CFPB could undermine state jurisdiction over these lenders and risk legitimizing lenders' tactics to evade state jurisdiction, as well as state usury and loan caps.

For these reasons, the CFPB should generally seek data from other sources and use registration only as a last resort. In Section V of these comments we note the only two markets for which we believe registration may be unavoidably necessary: debt relief services and consumer reporting.[14]

If the CFPB does require any covered persons to register, the rule should state that registration does not imply the legality or adequacy of the product or service or lack of state jurisdiction. The rule should also either prohibit any mention of CFPB registration or use of the CFPB symbol, or direct that any advertisement saying a person is registered must also include a disclaimer in the same font, size, and location, stating that registration does not carry any of these implications.

IV. RETAIN SUPERVISION IF AN EXAMINATION FINDS VIOLATIONS OR A PARTICIPANT ACTS TO EVADE SUPERVISION.

The CFPB asks, in its request for comment, how long a supervised participant should remain subject to supervision after an examination finds violations of the law or otherwise raises

[13] Quik PayDay, Inc., v. Stewart, 549 F. 3d 1302 (10th Cir. 2008); Cash America Net of Nevada, LLC v. Commonwealth of Pennsylvania, 8 A.3d 282, 292 (Pa. 2010).

[14] The Fair Credit Reporting Act includes its own provision for registering consumer reporting entities, regardless of whether they meet the definition of CFP&S.

compliance concerns.[15] We believe such a participant should remain subject to supervision at least until it passes two subsequent examinations without any violations or concerns, regardless of whether it continues to meet the definition of a larger participant. The Dodd-Frank Act specifically directs the CFPB to conduct examinations in order to assess compliance with the law and to assess any risk to consumers and markets.[16] The reason for supervision is to facilitate enforcement based on those assessments. It would be pointless to supervise larger participants without doing something with the results. The only way to ensure that a participant corrects any problems found during an examination is to continue supervision until the problems are verified as resolved.

In the same vein, the CFPB should adopt rules allowing it to initiate or continue supervision over participants that take action with the intention of evading supervision. Even if the participant is not known to be violating any laws at that time, the decision to evade supervision could be an indication that the participant is either hiding or planning inappropriate conduct.

V. DEFINE MARKETS FLEXIBLY AND RECOGNIZE SUB-MARKETS.

Wall Street, Main Street, and back-alley hucksters pride themselves on innovation. New products, scams, and services appear on the market daily. Markets can be as variable as the weather.

When adopting an initial rule the CFPB must recognize that markets cannot be defined as fixed addresses. Without the ability to identify larger participants among changing markets, the CFPB's supervisory program will become outdated.

We have several recommendations to meet these goals:

- First, as discussed in Section V(A), we encourage the CFPB to adopt a rule that considers the market for all CFP&S as a whole.

- Second, as discussed in Sections V(B) through (H), we agree that the CFPB's request for comments identifies the important markets for the initial rule, but most of the markets identified should be considered multiple markets. Within the general categories listed in the request for comments, markets should be identified based on the specific function performed, the specific product or service sold, or the specific population targeted by the provider, such as military service members, ethnic communities, or elders. At least one market in each category should be a general catch-all to include new or hybrid CFP&S that do not fit squarely in the other subcategories.

- Third, as discussed in Section V(I), we recommend identifying manufactured home financing as a separate market.

The following subsections discuss our comments on defining these markets.

---

[15] 76 Fed. Reg. at 38061.
[16] Dodd-Frank § 1024(b)(1).

A. Consider the entire market for consumer financial products and services as a whole.

The CFPB solicits comments "regarding which markets for consumer financial products and services should be addressed,"[17] yet it appears to overlook the market for CFP&S as a whole. Some of the largest participants in markets for CFP&S are large because they are successful in multiple markets, selling a variety of different products and services. Such businesses may not be larger participants in any single market, but as a conglomerate or one-stop-shop they can have a significant impact on consumers and may pose a substantial risk if engaged in misconduct. By limiting the CFPB's focus to individual markets and identifying larger participants based only on their activity in a single market, the CFPB may overlook important market developments--losing sight of the financial forest for the trees.

Instead, the CFPB should supplement its focus on individual markets with a rule that also allows identification of larger cross-market participants. As described above, such participants should be identified by market-independent criteria, such as total number of transactions, customers, or similar data relevant to all types of CFP&S. A rule could, for example, say:

> A covered person is a larger participant if the person meets one or more of the following criteria:
>
> > a) engages in at least X transactions per year in any market or combination of markets; or
> >
> > b) is among the top Y for number of transactions per year in a single market or combination of markets . . .

Large companies providing CFP&S rarely limit themselves to a single product or service and they will be even less likely to limit themselves to markets specifically defined by the CFPB. The CFPB must be able to supervise abusive participants that are active in multiple markets and in new markets that have not yet been defined in a regulation. If the initial rule clearly identifies the measurement of "larger" (e.g. by number of transactions, market share, etc.), larger participants will not be surprised when they learn that the CFPB wants to supervise them. All businesses know what products and services they sell. And those of sufficient size to merit the CFPB's attention are highly likely to know their position in the market relative to their competitors. Even if they do not know the size of their competitors, all covered persons will know the size and activity level of their own businesses.

If the rule clearly explains how "larger" is measured, nobody will say "I didn't realize I was among the larger participants in the market for [prepaid cards/debt collection/check cashing, *insert newly invented CFP&S here*]. Instead, if the CFPB issues a rule that only applies to expressly defined markets, the far greater risk is that a larger participant will tell the CFPB: "You can't supervise my sale of high-cost widgets because you haven't defined the market yet." Adopting a rule that refers to "any single market or combination of markets" will eliminate that problem.

---

[17] 76 Fed. Reg. at 38061.

B. Supervise Debt Collectors and Debt Buyers as Separate Markets, and Supervise Creditors' In-House Collection Activity.

Debt collection is certainly an appropriate area for the CFPB to supervise. The impact of debt collectors on consumers and the history of abuse in this area are well-known and need no elaboration.[18]

Based on NCLC's experience with debt collection activities, we recommend that the CFPB treat debt buyers as a separate market from other debt collectors. Debt buyers are business entities that purchase massive amounts of defaulted consumer debt and then attempt to collect payment for their own benefit. They purchase only debts that are already in default; this makes them different from the creditor or merchant to which the debt was originally owed.

Debt buyers are a relatively new industry, compared to contingent-fee collectors. According to a 2007 article from the Philadelphia Federal Reserve Bank, sales of bad debt have risen from less than $10 billion per year in 1993 to over $120 billion in 2005.[19] Debt buying is also relatively concentrated, at least when measured by total debt purchased.[20] Debt buyers appear to be systematically engaging in risky behavior, such as buying debt without supporting account information and engaging in mistaken collection attempts (i.e. wrong consumer, wrong amount).[21]

We also encourage the CFPB to supervise original creditors' in-house debt collection activities. Whether the CFPB does so as part of its supervision of each larger participant's primary activity in the various CFP&S markets or does so as a separate market for in-house debt collection, this area of debt collection should not be ignored. In 2010 complaints to the FTC regarding in-house debt collectors were nearly 23% of the total number of debt collection complaints.[22]

---

[18] *See, e.g.*, FTC Annual Report 2011: Fair Debt Collection Practices Act at 5-6, *available at* www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf (indicating the FTC alone received 140,036 complaints about debt collectors, 27% of all complaints in 2010 and more than received in 2009); FTC, Repairing A Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration Federal Trade (July 2010), *available at* www.ftc.gov/os/2010/07/debtcollectionreport.pdf; NCLC, The Debt Machine: How the Collection Industry Hounds Consumers and Overwhelms Courts (July 2010), *available at* www.nclc.org/images/pdf/pr-reports/debt-machine.pdf; Protecting Consumers in Debt Collection Litigation and Arbitration: A Roundtable Discussion, NCLC Comments to FTC Regarding the FDCPA (Aug. 1, 2009), available at www.nclc.org/images/pdf/debt_collection/comments_ftc_09.pdf. NCLC, Fair Debt Collection 1.4.3 (6th ed. 2008 and Supp.) (summarizing abusive collection tactics described during 1992 congressional hearings).

[19] Robert Hunt, Collecting Consumer Debt in America at 14-15, excerpted from Philadelphia Federal Reserve Bank Business Review (Q2 2007).

[20] *Id.* at 15.

[21] *See, e.g.,* Jamie Smith Hopkins, A Push for More Proof in Debt-Collection Lawsuits, Baltimore Sun, July 24, 2011, *available at* www.baltimoresun.com (last viewed July 27, 2011).

[22] FTC Annual Report 2011: Fair Debt Collection Practices Act at 5-6, *available at* www.ftc.gov/os/2011/03/110321fairdebtcollectreport.pdf. While we cite the existence of numerous complaints here to show the need to supervise in-house collectors in general, the absence or low number of complaints regarding any market or covered person should not, by itself, be a reason to exclude a certain market or practice.

C. Supervise Consumer Reporting Agencies, but Define a Number of Markets Within This Area.

The CFPB should include consumer reporting in the initial rule. As discussed below, it should define any nationwide consumer reporting agency, and the largest providers of credit scoring models, as larger participants. Beyond these two types of participants, it should also define multiple markets within this category. Finally, using its authority under the Fair Credit Reporting Act as well as its supervision authority, it should require all consumer reporting agencies to register with it.

1. The CFPB's Supervision Authority Is Supplemented by its FCRA Rulemaking Authority.

The intersection of the Fair Credit Reporting Act (FCRA) and the definition of "consumer financial product or service" is complex, but provides the CFPB sufficient authority to supervise the larger participants in various credit reporting market, and to require registration. The term "consumer financial product or service" includes entities engaged in:

> "(ix) 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, except to the extent that—
>
> (I) a person—
>
> * * * *
>
> (cc) provides 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;"

Dodd-Frank § 1002(15)(A)(ix).

Thus, the term "consumer financial product or service" covers some, but not all, products that would be considered "consumer reports" under the FCRA. Conversely, there may be database and information products that are consumer financial products or services because they are "account information" but are not consumer reports. And as discussed below, certain companies that are considered "consumer reporting agencies" (CRAs) under the FCRA also offer other types of consumer financial product or service, such as payment processing.

The fact that the definition of "consumer financial product or service" excludes some consumer reports means that the CFPB cannot supervise specialty companies that offer solely those types of reports. However, as shown below, in many cases these reports are offered by a division of a company that also offers a wide range of products that clearly meet the definition of consumer financial product or service. Since the CFPB is to exercise supervision over "persons," not over particular products or services, it will be able to supervise these companies without drawing artificial lines between the many interrelated products they offer.

In addition, the CFPB has independent authority under Section 621(e) the FCRA to issue rules "as may be necessary or appropriate to administer and carry out the purposes and objectives of [the FCRA], and to prevent evasions thereof or to facilitate compliance therewith."[23] This authority exists regardless of whether a consumer financial product or service is involved. Thus, the CFPB can issue regulations that govern CRAs and consumer reports even if they do not involve a consumer financial product or service.

2. If a Company Is Designated a "Larger Participant," All of its Products, or At Least Its Database and Information Products, Should be Supervised.

One of the most complicated issues with respect to CRAs is that many corporations who are "larger participants" offer both consumer reports that are consumer financial products or services, as well as consumer reports that are not such. In addition, these companies may offer other types of products and services that qualify as a consumer financial product or service. Alternatively, these companies may be affiliates acting as service providers to a person that provides consumer financial products or services.

Some of these corporations are not only "larger," they are enormous. They are conglomerates, consisting of multiple database and information companies, as well as many other divisions, subsidiaries and affiliated entities. They have become larger and larger through acquisitions of smaller companies and through mergers. For example, the organizational history of one of these companies, FIS, from its own website looks like this:[24]

In order to adequately protect consumers and minimize risks to them, the CFPB should supervise all of the database and information products of these companies. In particular, the CFPB should determine whether or not each database product meets the definition of a "consumer report" under the FCRA, and thus the company should be complying with the FCRA requirements.

[23] 15 U.S.C. § 1681s(e).
[24] FIS, Our Company, http://www.fisglobal.com/aboutfis-ourcompany (last visited July 21, 2011).

Indeed, even the biggest nationwide CRAs (Equifax, Experian and TransUnion) have products that they do not consider to be "consumer reports" and thus they believe these products are outside of the purview of the FCRA. One of the most notable examples of these products is the OFAC Advisor product offered by TransUnion, which was the subject of the Third Circuit's decision in *Cortez v. TransUnion*, 617 F.3d 688 (3rd Cir. 2010). TransUnion took the position that the OFAC Advisor was not a consumer report, and thus did not need to comply with the FCRA, despite the fact that the OFAC Advisor was incorporated into credit reports and used to deny consumers the ability to obtain credit and rental housing. Fortunately, the Third Circuit ruled otherwise.

Another example is Talx, an Equifax subsidiary. Talx failed to comply with the FCRA until forced to do so by the FTC.[25]

In addition to database products, the Big Three nationwide CRAs offer other types of consumer financial products and services. For example, Experian owns the lead generator web site, LowerMybills.com, which has been the subject of numerous complaints.[26]

When a consumer reporting agency offers a multiplicity of products, the CFPB should designate the entire entity as a "larger participant" and subject it to supervision. These products are often intermingled and used by the same creditors, banks and other businesses for screening purposes. Furthermore, the companies' policies and procedures on these databases, how they maintain accuracy, how they handle disputes, audits, compliance checks, data security, and privacy are all likely to be similar. Thus, it will be impractical for the CFPB to limit its supervision to that part of the entity that offers credit-based consumer reports or consumer financial products or services. Instead the CFPB must supervise the entire enterprise that sells database or information about consumers.

There are numerous examples of these gigantic conglomerates that offer consumer reports (both ones that fit the definition of consumer financial products or services and ones that do not),other data/information products, and consumer financial products or services that are not consumer reports. We discuss two of these companies as examples.

a. Lexis/Nexis Risk Solutions

LexisNexis is one of the largest companies in the world selling information about consumers. According to its website, LexisNexis "is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. …. A member of Reed Elsevier,

[25] *See* Consumer Reporting Agency TALX Corp. Agrees to Settle FTC Charges, July 9, 2009, available at http://www.ftc.gov/opa/2009/07/talx.shtm (last visited July 21, 2011).

[26] Joe Cuervo, *LowerMyBills.Com Ads Claiming an Obama Housing Refinance Program Completely Bogus*, Associated Content, June 10, 2010, at http://www.associatedcontent.com/article/5497646/lowermybillscom_ads_claiming_an_obama.html?cat=3 (last visited July 21, 2011).

LexisNexis serves customers in more than 100 countries with more than 15,000 employees worldwide."[27]

LexisNexis is certainly "large" in every sense of the word. Its parent, Reed Elsevier, has a market capitalization of £6.5 billion, or about $10.5 billion USD. Reed Elsevier earned £6 billion in revenues in 2010 (or about $10 billion USD).[28] LexisNexis Risk Solutions is the unit that offers consumer reports and other data/information services, and includes parts of the former Choicepoint. LexisNexis Risk Solutions earned total revenues in 2010 of £927 million, or about $1.5 billion USD, and has 4,400 employees.[29]

LexisNexis offers a number of different products, and has a number of divisions that sell consumer reports or furnish information to CRAs. According to its website:

> LexisNexis offers the largest and most comprehensive base of public and proprietary information available today. We leverage more than 10,000 data sources and gather information from more than 20 billion public and proprietary records that are refreshed daily with an additional one million search records.
>
> In addition, we have approximately 20 percent more data than other providers, with coverage on more than 400 million individuals and 150 million businesses.[30]

Some of the LexisNexis products or divisions that sell consumer reports or furnish information to CRAs include:

Accurint – Accurint is a database that compiles and provides identification and public records information, with over 4 billion records. Accurint boasts that it has more than 400,000 customers.[31] Despite the fact that it claims Accurint is not a CRA, LexisNexis offers one version, "Accurint for Collections" that it touts as "a powerful suite of debt collection data and skip tracing tools to help you identify assets and locate both individuals and businesses, thereby improving debt collections and enhancing operational efficiency."[32]

Public Records Vendor – LexisNexis is the largest vendor of public records to the Big Three nationwide CRAs. In 2003, LexisNexis had acquired Dolan Media, including Hogan Information Services, which was the public records vendor for TransUnion and Experian. Through its acquisition of Choicepoint, LexisNexis acquired National Data Retrieval, Inc., which was Equifax's public records vendor.

---

27 LexisNexis, About LexisNexis, at http://www.lexisnexis.com/about-us/ (last visited July 21, 2011).
28 Reed Elsevier, Annual Reports and Financial Statements 2010, at 2, at http://reports.reedelsevier.com/documents/pdfs/reed_ar_2010.pdf (last visited July 21, 2011).
29 *Id.* at 25.
30 LexisNexis Risk Solutions, Data Resources, at http://www.lexisnexis.com/risk/about/data-resources.aspx (last visited July 21, 2011).
31 LexisNexis Risk Solutions, Accurint, at http://www.accurint.com (last visited July 21, 2011).
32 LexisNexis Risk Solutions, Accurint® for Collections, at http://www.lexisnexis.com/risk/solutions/contact-locate/skip-tracing-accurint-collections.aspx (last visited July 21, 2011).

Specialty CRA Products – LexisNexis, through its acquisition of Choicepoint, offers a number of products that are consumer reports for specialty purposes, such as insurance. According to LexisNexis, "over 95% of insurance companies have come to rely on our products and services to manage their business"[33]

- "Attract" Insurance Scores – Choicepoint sells insurance scores that dominate 50% of the market.
- C.L.U.E. Auto or Homeowners Reports
- Resident History Reports – This is Choicepoint's tenant screening product
- Esteem – This is a retail employee "theft" database currently being sued for problems with accuracy and employer blacklisting.[34]

Marketing Provider – LexisNexis's acquisition of Dolan Media included ClickData, a purveyor of online marketing lists. ClickData's offerings include:[35]

- Bankruptcy List – "Bankruptcy List enables you to target consumers who have recently filed for–or been discharged from–bankruptcy. …
  Records: 30+ million"

- Consumer List – "match your marketing offers to groups such as mail order buyers, homeowners, credit card users, and many more.
  Records: 150+ million"

- Tax Liens & Judgments List – "get accurate names and addresses for both individuals and businesses with tax liens and judgments against them. Records: 100+ million"

Finally, and perhaps most importantly, LexisNexis offers a number of undisclosed products that "provide[] financial institutions with risk management, identity verification, fraud detection, credit risk management, and compliance solutions."[36]

b. Fidelity National Information Services (FIS)

FIS proclaims itself to be "the world's largest financial technology company. Supported by the skill and industry expertise of more than 32,000 employees across the globe, FIS provides core banking and payment processing solutions in over 100 countries."[37] FIS is also a "larger

---

[33] LexisNexis Risk Solutions, LexisNexis Insurance Solutions, at http://solutions.lexisnexis.com/forms/IS09InsurIASAIASATS801?source=RD_insurancesolutions (last visited July 21, 2011).
[34] Menefee v. Choicepoint, 2009 WL 174134 (E.D. Pa. Jan. 26 2009).
[35] LexisNexis, ClickData, at https://www.clickdatastore.com (last visited July 21, 2011).
[36] Annual Reports and Financial Statements 2010, at 24, at http://reports.reedelsevier.com/documents/pdfs/reed_ar_2010.pdf (last visited July 21, 2011).
[37] FIS, Accelerate Success - 2010 Annual Review, at i, available at http://www.fisglobal.com/ucmprdpub/groups/public/documents/relatedlinks/c007117.pdf (last visited July 21, 2011).

participant" when one considers financial measurements. FIS has a market capitalization of about $9.3 billion, and has $14 billion in assets.[38] It earned about $5.3 billion in revenues in 2010.[39]

As a payment processer, FIS is a covered person. Under the Dodd-Frank Act, a consumer financial product or service includes:

> "providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network."[40]

FIS offers a number of payment transaction processing services, including the NYCE Network of ATMs. Other products offered by FIS that may be "consumer financial products or services" include:

> "Automotive Finance – integrated loan and lease automotive finance servicing system.
>
> Card Services – comprehensive, customized and flexible solutions and services for credit, debit and merchant card processing.
>
> Check Services – complete check management programs and solutions for collecting outstanding check debt." [41]

FIS also offers:

> "FIS CreditWorx™ is the complete indirect point-of-sale financing solution used by many top financial institutions, manufacturers, and retailers to provide best-in-class financing experience for their entire indirect financing channel. The solution has been designed to support multiple loan types, multiple score models and multiple origination points.
>
> FIS Loan Origination (FLO) services a wide range of domestic banks and thrifts seeking automation to originate commercial and consumer loans. FLO is a browser based solution that provides a wide range of loan origination functionality including warranted document selection, flexible IntelleDoc technology, and third-party interfaces all coupled with seamless core integration.
>
> FIS Automotive Financing offers both dealer and wholesaler software solutions for the global automotive finance industry, supported through service-oriented architecture (SOA)." [42]

---

[38] *Id.* at 12.
[39] *Id.* at 13.
[40] Dodd-Frank § 1002(15)(A)(vii).
[41] FIS, About FIS, at http://www.fisglobal.com/aboutfis (last visited July 21, 2011).

In addition to payment processing and lending products described, FIS is a consumer reporting agency and sells a number of different consumer reports. These include:

> ChexSystems - In September 2007, FIS purchased eFunds. In turn, e-Funds operates ChexSystems, one of the largest – if not the largest - CRA that issues consumer reports on consumers' check writing histories for bank account opening purposes.
>
> Certegy Check Services – This is a retail check authorization service both issues consumer reports and acts as a debt collector if the check is returned for nonsufficient funds.
>
> FIS DebitBureau – According to its literature, this database and decisioning tool is "[u]pdated on average nearly 350,000 times each day, DebitBureau® is the powerhouse behind the decisioning solutions on which so many of the nation's financial institutions rely." DebitBureau includes information from over 9,000 financial institutions on account applications, account openings, reporting account closures, and check printing histories. It also includes information on 70% of retail check payments, including 3.5 billion checks verified at point-of-sale, and public records information. [43]

This listing might only scratch the surface of the consumer reports and other consumer financial products and services that FIS offers. FIS is a result of the conglomeration, merger, and acquisition of many companies that are in the financial products business, as shown by the graphic above. As such, FIS is certainly a larger participant in several markets for consumer financial products or services, and its U.S. facing divisions should be supervised on an entity-wide basis.

Finally, but perhaps most importantly, we understand that some of the technology support services that FIS provides to small and medium size financial institutions include data processer services for those institutions to furnish information to the Big Three nationwide CRAs. In this role, we believe that FIS may be responsible for some of the errors in credit reports caused by such furnishers.

3. Any Nationwide CRA Should Be Considered a Larger Participant.

As a principle, we urge that any consumer reporting agency that "compiles and maintains files on consumers on a nationwide basis" under Section 603(p) of the FCRA, 15 U.S.C. § 1681a(p), be considered a "larger participant." Section 603(p) of the FCRA covers any CRA that:

> "regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer's

---

[42] FIS, Retail and Consumer Lending, at http://www.fisglobal.com/products-lending-retailandconsumerlending (last visited July 21, 2011).
[43] FIS, FIS DebitBureau, 2009-2010, at http://www.fismoreinfo.com/landing-pages/6steps/RFC_DebitBureau_Product_Sheet.pdf?webSyncID=a791ce14-842d-46d7-ab49-32a5ffdb73e7&sessionGUID=80055873-4a43-484d-aa0f-e482ab1911b8 (last visited July 21, 2011).

credit worthiness, credit standing, or credit capacity, each of the following regarding consumers residing nationwide:
(1) Public record information.
(2) Credit account information from persons who furnish that information regularly and in the ordinary course of business"

Sometimes referred to as "nationwide" CRAs, these entities are required under the FCRA to:

- Provide free annual credit reports
- Maintain a toll-free telephone number during normal business hours with personnel accessible to consumers who have received an adverse action notice.
- Jointly maintain a notification system for consumers to opt out of being included in prescreening list mailings.
- Provide fraud and active military duty alerts to consumer files and refer alerts to other such CRAs.

Currently, the FTC has designated only three nationwide CRAs – Equifax, Experian and TransUnion, often referred to as the "Big Three." There should be little doubt that these three CRAs are "larger participants" in a market for consumer financial services or products. These three nationwide CRAs literally control the access to credit, as well as other basic life necessities such as insurance and employment, for nearly every single American.

Indeed, the websites of these three nationwide CRAs, as well as their trade association, the Consumer Data Industry Association (CDIA), provide ample evidence that they are "larger participants."

CDIA – According to CDIA, "One billion credit cards are in use in the United States today. A similar number of consumer credit reports are issued annually in the United States. Four and a half billion pieces of data are entered monthly into credit records. Each of the consumer credit reporting systems — Equifax, Experian, and TransUnion — maintains 200 million credit files, which are used by independent credit reporting agencies across the United States."[44]

Equifax – Equifax boasts that it "employs approximately 7,000 people in 15 countries through North America, Latin America and Europe."[45] It has a market capitalization of $4.2 billion and earned $1.86 billion in revenue in 2010.[46]

Experian - Experian touts itself as "a global leader in consumer and business credit reporting and marketing services and a constituent of the United Kingdom's FTSE 100 index, with revenues in

---

44 CDIA, About CDIA, at http://www.cdiaonline.org/about/index.cfm?unItemNumber=515 (last visited July 21, 2011).
45 Equifax, Company Profile, at http://www.equifax.com/about_equifax/company_profile/en_us (last visited July 21, 2011).
46 Equifax, 2010 Annual Report at i, at http://www.equifax.com/investor_center/en_us (click Equifax 2010 Annual Report) (last visited July 21, 2011).

excess of US$4 billion. We support clients in more than 65 countries and employ more than 15,500 people in 38 countries." [47]

TransUnion – According to TransUnion's website, the company:

- Provides solutions to approximately 45,000 businesses
- Reaches businesses and consumers in 23 countries
- Maintains credit histories on approximately 500 million consumers and businesses worldwide.[48]

4. The Biggest Providers of Credit Scoring Models Should be Considered "Larger Participants."

As most Americans know, the credit report is just part of the puzzle. Access to credit depends on having a good credit score too. Credit scores are the all-important number that can make or break a consumer financially. As the CFPB has remarked: "[c]redit scores are ubiquitous in the consumer credit marketplace. Lenders use them to determine not only whether to grant credit but also what amount of credit to provide and on what terms."[49]

The largest providers of the computer programs for these all-important numbers should be considered "larger participants" and supervised by the CFPB. These include FICO: the CFPB itself has noted that '[o]ne industry observer estimates that FICO had over 90 percent of the market share in 2010 of scores sold to firms for use in credit-related decisions."[50] It should also include VantageScore, the company formed as a joint venture by the Big Three nationwide CRAs.

There is no question that credit scoring model developers can be categorized as providers of "consumer products or services." That term includes products or services for "collecting, *analyzing*, maintaining, or providing consumer report information … used or expected to be used in connection with any decision regarding the offer or provision of a consumer financial product or service." Clearly a scoring model "analyzes" consumer report information for the purpose of a decision to offer or deny credit products.

5. The CFPB Should Define Specialty CRAs, Resellers, Furnishers, Other Types of CRAs, and Data Processers as Separate Markets.

There are a number of other sectors relevant to "consumer reports" that the CFPB should define as "markets" for the purposes of Dodd-Frank Section 1024(a)(1)(B).

---

[47] Experian, About Experian, at http://www.experian.com/corporate/about-experian.html (last visited July 21, 2011).

[48] TransUnion, Fast Facts (sidebar) at http://www.transunion.com/corporate/aboutUs/aboutUs.page (last visited July 21, 2011).

[49] Consumer Financial Protection Bureau, The Impact of Differences Between Consumer- and Creditor-Purchased Credit Scores – Report to Congress, July 19, 2011, at 5.

[50] *Id.* at 6.

a. Nationwide Specialty CRAs

Any specialty CRA that offers a consumer financial product or service on a nationwide basis should be covered as a larger participant. The FCRA defines "nationwide specialty consumer reporting agency" as any CRA that "compiles and maintains files on consumers on a nationwide basis relating to" medical records, tenant history, check writing history, employment history, or insurance claims.[51]

The main category of this "market" that the CFPB has authority to supervise is check-verification and check-writing history CRAs. Under Section 1002(15)(A)(iv) of the Dodd-Frank Act, the provision of deposit accounts is a consumer financial product, as is the processing of payments. Thus, these CRAs should be considered to offer consumer financial services or products as well, since they provide consumer reports used in a decision to offer deposit accounts or to accept payment. Finally, some of these CRAs, such as Telecheck, also act as check guaranty and collection services when a check is returned due to non-sufficient funds, and would be covered under Section 1002(15)(A)(vi) of the Dodd-Frank Act.

Some of the larger check-writing and check-verification CRAs include ChexSystems, Certegy Check Services, and TeleCheck. The first two are owned by FIS, while TeleCheck is owned by First Data, a Fortune 500 technology and payments processing company "serving more than 6 million merchant locations, thousands of card issuers and millions of consumers worldwide." [52] First Data also manages prepaid card operations for employers and retailers, and processes credit and debit card transactions. It also operates the STAR Network for ATM/debit transactions.

b. Resellers

Under the FCRA, a reseller is a CRA that:

> "assembles and merges information contained in the database of another consumer reporting agency or multiple consumer reporting agencies concerning any consumer for purposes of furnishing such information to any third party, to the extent of such activities; and
> (2) does not maintain a database of the assembled or merged information from which new consumer reports are produced."[53]

In some cases, it is a consumer report from a reseller and not the Big Three nationwide CRAs that is used by a lender or other user of consumer reports. For example, many mortgage lenders use "tri-merge" resellers in their decisions to approve or deny a mortgage loan. Thus, we believe that resellers should be defined as a market, and the larger resellers should be supervised by the CFPB.

---

51 Section 603(x) of the FCRA, 15 U.S.C. § 1681a(x).

52 First Data, First Data Fact, at http://www.firstdata.com/en_us/about-first-data/media/first-data-facts.html (last visited July 21, 2011).

53 15 U.S.C. §1681a(u) (Section 603(u) of the FCRA).

c. Furnishers

Another category of actors under the FCRA are furnishers of information. Many of the larger furnishers of information, such as large banks and debt collectors, will be supervised by CFPB for other reasons. However, at least one category of furnishers do not fall into some other supervision category – vendors of public records information, such as LexisNexis (formerly Choicepoint/ Hogan Information Services/National Data Retrieval).

Public records vendors are furnishers and providers of financial services or products because they "provide … 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 of provision of a consumer financial product or service."[54] Public records are certainly "account information" if they pertain to a lawsuit or judgment regarding a credit or deposit account.[55]

Because the information ends up in credit reports issued by the Big Three nationwide CRAs, it can play a significant role in whether a consumer is approved or denied for credit. Thus a vendor that compiles this information and sells it to the Big Three nationwide CRAs should be considered a furnisher, as well as an entity that provides consumer financial products or services, and furnishers should be defined as a market.

d. Other Types of CRAs That Operate on National Basis

There are a number of other CRAs that operate on a national basis that are not considered "nationwide" or "specialty nationwide" CRAs as defined under Sections 603(p) and 603(x) of the FCRA. These CRAs should be defined as another market, and the CFPB should supervise the larger participants of this market.

One example is TeleTrack, which is a CRA used by payday lenders and other fringe credit providers, discussed further below. Another example is Accurint for Collections. While LexisNexis claims that "Accurint® for Collections does not constitute a 'consumer report' as that term is defined in the federal Fair Credit Reporting Act,"[56] at least one federal district court has held that it is a CRA.[57] As this court noted, debt collection of a credit account is considered an authorized purpose under Section 604(a)(3)(A) of the FCRA, and thus information on a consumer's general reputation or personal characteristics used for that purpose would a consumer report under Section 603(d)(1).

---

54 Dodd-Frank § 1002(15)(A)(ix).

55 It is true that "retrieval" of public records is not considered a "consumer financial product or service" under the "catch-all" provision at § 1002(15)(A)(xi) of Dodd-Frank, because it is excluded by § 1002(15)(b)(i). However, that provision does not prevent thesse furnishers from being considered providers of a financial product or service under § 1002(15)(A)(ix) of Dodd-Frank as providers of account information. See Section § 1002(15)(B)(ii) (nothing in § 1002(15)(B)(i) shall limit authority of CFPB under § 1002(15)(A)(ix) or FCRA). Furthermore, public records vendors do more than simply retrieve the records. They format the records so that the records can be incorporated into consumer files in the databases of the nationwide CRAs.

56 LexisNexis Risk Solutions, Accurint® for Collections, at http://www.lexisnexis.com/risk/solutions/contact-locate/skip-tracing-accurint-collections.aspx (last visited July 21, 2011).

57 Adams v. LexisNexis Risk & Information Analytics Group, Inc. 2010 WL 1931135 (D.N.J. May 12, 2010).

Furthermore, as discussed above in Section C.2, if a company is a larger participant, the CFPB should supervise the entire company, or at least its database and information segments. In addition to LexisNexis and FIS, as discussed in Section C.2 above, other CRAs that operate on a national basis and should be considered larger participants include:

Axciom —Axciom is a large technology, marketing and database services provider, with over $1 billion in revenues in 2010 and 6,600 employees.[58] Its products include:

- Multichannel Marketing
- Data: "With more than 32 billion data records updated each month, Acxiom is the industry leader in compiling, managing and applying consumer and business data for marketing, privacy and security"
- Technology Leadership: "We currently manage over 20 billion customer and prospect records and integrate over 4 billion customer records each day"
- Identity Solutions: "Our comprehensive data and up-to-date technology help authorities search for criminals, help institutions locate debtors, and help banks and retailers prevent identity theft and other fraud"
- Employee Background Screening
- Privacy: "suppressing three billion potential privacy violations per year across media; our expertise helps companies develop successful, privacy-compliant strategies for managing consumer information"[59]

Corelogic —Corelogic is a large conglomerate, similar to LexisNexis and FIS above, with a marketplace capitalization of $1.8 billion. Corelogic states that it:

> "is a leading provider of consumer, financial and property information, analytics and services to business and government .... CoreLogic has built the largest and most comprehensive U.S. real estate, mortgage application, fraud, and loan performance databases and is a recognized leading provider of mortgage and automotive credit reporting, property tax, valuation, flood determination, and geospatial analytics and services. More than one million users rely on CoreLogic to assess risk, support underwriting, investment and marketing decisions, prevent fraud, and improve business performance in their daily operations"[60]

Some of the products and divisions of CoreLogic include:

> **TeleTrack** – TeleTrack is a CRA used by payday lenders, rent-to-own stores and subprime lenders. The FTC recently announced a settlement against TeleTrack in an enforcement action over TeleTrack's sale of consumer reports for marketing purposes, in violation of the

[58] Acxiom Corp., 2011 Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, at 11, F-4.
[59] About Acxiom, at http://www.acxiom.com/about_us/Pages/AboutAcxiom.aspx (last visited July 21, 2011).
[60] CoreLogic, About CoreLogic, 2011, at http://www.corelogic.com/about-us/asset_upload_file613_2137.pdf (last visited July 21, 2011).

FCRA.[61] According to its website "The Teletrack specialty credit platform offers companies an extended set of credit and fraud risk solutions beginning with its own proprietary data assets, which include more than 240 million consumer credit records representing approximately 39 million unique consumers. In addition, these extended solutions include a variety of external data services and scores, including public records, bank account information, and traditional credit performance data."[62]

Credco – Credco is a tri-merge reseller of credit reports. According to CoreLogic, Credco is "a credit reporting agency and leading provider of specialized credit reports, is in the business of providing the critical data companies need to make credit decisions." It offers the "Instant Merge" credit report which merges consumer report information from the Big Three nationwide CRAs using "Credco's patented Merge Logic to create a more streamlined and comprehensive credit report."[63]

Anthem – Anthem is a tri-merge reseller. According to CoreLogic, "[t]he Anthem Report first utilizes any available bureau data as a baseline when you order an Instant Merge credit report on a borrower who has a thin or no credit file. It then supplements any bureau data with non-traditional credit data, such as rent payments, utility bills and phone bills. The result is a fully compliant credit reporting solution that meets or exceeds mortgage loan underwriting and due diligence requirements, including HUD, FHA, Fannie Mae and Freddie Mac."[64]

SafeRent – This is one of the largest tenant history screening databases in the country, formerly known as First Advantage SafeRent. In turn, FirstAdvantage SafeRent had acquired the tenant screening CRA known as U.D. Registry.

e. Data Processers

There are a number of companies that provide furnishers, especially small and medium size financial institutions, with data processer services to assist those institutions in furnishing information to the Big Three nationwide CRAs. The most notable example is FIS, discussed above in Section (V)(C)(2). These data processors may be responsible for the systems, processes, data field definitions and other programming that enable furnishers to report information to the nationwide CRAs using one of the Metro formats. As such, we understand that they also may be responsible for some of the errors in credit reports caused by such furnishers. The CFPB should define these "data processors" as a market, and supervise the larger participants in this market.

---

[61] Federal Trade Commission, Consumer Reporting Agency to Pay $1.8 Million for Fair Credit Reporting Act Violations, June 27, 2011, at http://www.ftc.gov/opa/2011/06/teletrack.shtm (last visited July 21, 2011).
[62] CoreLogic TeleTrack, Company, at http://www.teletrack.com/company.html (last visited July 21, 2011).
[63] CoreLogic Credco Company History, at http://www.credco.com/company.aspx?mid=1006&cid=580. (last visited July 21, 2011).
[64] CoreLogic, Anthem Report, at http://www.corelogic.com/products/anthem-report.aspx (last visited July 21, 2011).

5. The CFPB Should Require All CRAs to Register With It, Using Its Authority under the Fair Credit Reporting Act.

In the request for comment, the CFPB states that it is considering the establishment of a registration program for certain "covered persons." As discussed in Section III, we generally oppose registration requirements but consumer reporting agencies are one of the rare exceptions. For consumer reporting agencies, we urge the CFPB to require all CRAs to register with it.

The CFPB's power to require registration of CRAs is not limited to "larger participants," "covered persons," or even "consumer financial services or products." The CFPB has separate authority under Section 621(e) of the FCRA, 15 U.S.C. § 1681s(e), as added by Dodd-Frank, to issue any regulation "as may be necessary or appropriate to administer and carry out the purposes and objectives of [the FCRA], and to prevent evasions thereof or to facilitate compliance therewith." This authority exists regardless of whether a consumer financial product or service is involved. Thus, the CFPB could issue a regulation under Section 621(e) requiring all CRAs to register with it.

We believe that requiring CRAs to register with the CFPB will assist consumers greatly. Currently, there are no minimum requirements to become a consumer reporting agency. Any person can become a CRA, including literally a lone individual working from home with a personal laptop. Indeed, we understand from practitioners and others that there are such CRAs.

Registration will allow the CFPB to at a minimum keep track of CRAs that traffic in the sensitive financial and other personal information of consumers. The problem of little-known companies amassing huge databases about consumers with little oversight is highlighted in a recent Washington Post article.[65] CRAs are an exception to our general opposition to registration requirements because CRAs are already subject to substantive regulation, primarily by the FCRA. Registration will help the CFPB enforce the FCRA and future regulations against CRAs that are currently escaping the attention of regulators.

Registration will also assist consumers greatly, especially for CRAs that do not provide information on credit worthiness, credit standing or credit capacity. For example, a consumer who wants to check for errors in his/her credit report for purposes of applying for credit at least is able to order his/her free annual disclosure from the Big Three nationwide CRAs. However, there is no defined limited list for a consumer to check his/her employment report before applying for a job. (Note that, while a consumer report used exclusively for employment is not a "consumer financial product or service," it is regulated under the FCRA, and the CFPB can issue regulations that apply to employment CRAs under the FCRA.)

Thus, we encourage the CFPB to issue a regulation <u>under the FCRA</u> requiring all "consumer reporting agencies" to register with the CFPB. Alternatively, the CFPB could require that certain CRAs register with the CFPB and the remaining CRAs register with the Federal Trade Commission.

[65] Ylan Q. Mui, Little-Known Firms Tracking Data Used in Credit Scores, Washington Post, July 16, 2011.

D. Supervise Debt Relief Services as Two Markets: For-profit and Non-profit.

1. Debt relief services are a moving target requiring a broad definition.

We urge the CFPB to supervise debt relief services, in addition to enforcing the recent debt settlement amendment to the telemarketing sales rule.[66] The rampant abuses in the debt relief services industry have been well documented by the FTC,[67] the GAO,[68] NCLC and CFA,[69] and the media.[70] With few exceptions[71] it is questionable whether anyone can provide legitimate debt relief services on a for-profit basis. Creditors have no obligation to accept less than full payment of legally valid debts. Even if a creditor is willing to accept less than the full amount due, the amount saved is rarely sufficient to cover the fees charged by for-profit debt relief services. The provider's fee, plus taxes on the discharge of indebtedness, often leave debtors in worse shape than they were before.

The CFPB should also not overlook the companies that enable debt relief service providers to stay in business. Escrow account managers (such as Global Client Solutions and NoteWorld), lead generators, and marketers play a significant role in the debt relief industry and should themselves be eligible for consideration as larger participants.

The FTC's recent debt relief amendment to the Telemarketing Sales Rule[72] (TSR) will hopefully reduce abuses but the CFPB will likely need to exercise its supervisory authority to ensure compliance. The TSR also has notable loopholes. It does not apply to a sale of debt relief services conducted solely on the Internet. It also does not apply where "payment is not required until after a face to face meeting."[73] And the rule addresses only when the provider may be paid—not the size of the fee charged.[74]

In addition, even though the FTC focused on debt settlement, an internet search for "debt relief" yields a seemingly endless list of grandiose offers of help for the indebted consumer. Some are marketed based on religion; some offer "freedom;" while others offer tax assistance, debt management, debt elimination, debt restructuring, "non-formal chapter 13 debt resolution," and

---

66 16 C.F.R. Part 310; 75 Fed. Reg. 48457 (Aug. 10, 2010).
67 74 Fed. Reg. 41988 (Aug. 19, 2010); 75 Fed. Reg. 48457 (Aug. 10, 2010).
68 Statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations, GAO, DEBT SETTLEMENT: Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers (Testimony Before the Committee on Commerce, Science, and Transportation, U.S. Senate) (Apr. 22, 2010) (GAO report #GAO-10-593T).
69 *See* NCLC Special Reports, http://www.nclc.org/issues/debt-settlement.html; NCLC Special Reports, http://www.nclc.org/issues/credit-counseling.html.
70 Peter Goodman, Peddling Relief, Firms Put Debtors in Deeper Hole, N.Y. Times, June 19, 2010, at A1; Edward Wyatt, F.T.C. Accuses Tax Relief Company of Empty Promises, N.Y. Times, Oct. 7, 2010, at B1. By EDWARD WYATT
71 The only exceptions we are aware of are qualified attorneys in private practice who perform their work in accordance with all relevant laws and state rules of professional responsibility. Such attorneys are generally only able to negotiate debt settlements when there is a bona fide legal dispute over the validity of the debt.
72 Telemarketing Sales Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010) (codified at 16 C.F.R. § 310).
73 *Id.* at 48468. The rule only applies to telemarketing – i.e., "a plan, program, or campaign which is conducted to induce the purchase of goods or services' and that involves interstate telephone calls." *Id.*
74 *Id.* at 48488 ("The Commission declines to set fee limits in this proceeding").

debt settlement.[75] Debt relief services are forever morphing to attract customers and to exploit perceived loopholes in the law. For example, some debt settlement providers believe there is a loophole in the TSR's ban on advance fees for a so-called "attorney model." [76] Under the attorney model the debt relief provider uses an attorney as a front.[77] Supervising the larger participants in the debt relief market will enable the CFPB to detect this type of abuse and deter it in smaller participants subject to the TSR.

With minor modifications we recommend defining "debt relief service" using the same definition the FTC recently incorporated into the Telemarketing Sales Rule:[78]

> Debt relief service means any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector.[79]

The definition should be modified to ensure that it also includes secured non-mortgage creditors, all taxes, and debts owed to government entities. While it may already be interpreted to include taxes and other debts owed to government creditors, the FTC is not currently enforcing the rule against tax debt relief services[80] so the CFPB should eliminate any ambiguity in this regard by clearly incorporating these items into the definition. The CFPB should also clearly state in commentary on the rule that, for purposes of the CFPB's supervisory program, the definition of debt relief service is not subject to the same limitations as the Telemarketing Sales Rule.

2. Divide the market into for-profit and non-profit debt relief services.

The CFPB can most effectively exercise its supervisory authority in this area by dividing the debt relief industry into two markets: for-profit and non-profit. One reason to divide this industry into two markets is allocation of resources. For-profit debt relief needs more intensive supervision because it is almost always a worthless scam. In addition, most for-profit debt relief services are privately owned, so obtaining information will require more effort. This market also merits more supervision because, by charging fees, it poses a greater risk of harm to consumers.

---

[75] *See* Christian debt consolidation: Reduce rates and save, *available at* www.debtconsolidationcare.com/christian-debt.html; Freedom Debt Relief, *available at* www.freedomdebtrelief.com; Freedom Tax Relief, *available at* www.freedomtaxrelief.com; Oak View Law Group, *available at* www.ovlg.com/debt-relief; Consumer Debt Restructuring 101: What It is and Why You Should Avoid It, *available at* http://getoutofdebt.org/29213/consumer-debt-restructuring-101-what-it-is-and-why-you-should-avoid-it; Morgan Drexen, Non-Formal Debt Resolution, *available at* www.mdrexen.com/legal_services/nonformal_debt_resolution.html.
[76] Results of search for "debt relief attorney model" on www.google.com on Jul. 31, 2011 ("About 3,310,000 results").
[77] *See* FTC Facts for Business: Debt Relief Services & the Telemarketing Sales Rule: What People Are Asking at 2 (Rev. 10/27/2010), *available at* http://business.ftc.gov.
[78] Telemarketing Sales Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010) (codified at 16 C.F.R. § 310).
[79] 16 C.F.R. 310.2(m).
[80] FTC Press Release, FTC Issues Enforcement Policy Statement on New Debt Relief Rule (10/27/2010), *available at* www.ftc.gov/opa/2010/10/debtrelief2.shtm.

Non-profit debt relief is less likely to be abusive because it is generally free or nearly free of charge. Supervision of non-profit services will also require fewer resources because non-profits are more likely to make relevant data publicly available, and because they must undergo some scrutiny to initially obtain non-profit status. Non-profit entities in general have also come under increasingly close IRS scrutiny to ensure that they are not abusing their non-profit status.

Nevertheless, the CFPB should reserve the authority to supervise and examine larger non-profit entities to guard against abuses. The IRS only examines non-profits for compliance with the internal revenue code—not to protect consumers. This difference in mission could allow anti-consumer conduct to survive IRS scrutiny. It would also be inappropriate to automatically assume that non-profits are universally safe when experience shows otherwise.

Non-profit credit counseling agencies, one of the most common forms of non-profit debt relief service, were invented by creditors to promote repayment of debts over bankruptcy.[81] As a result many credit counselors once depended on creditors for a significant portion of their funding though a system known as "Fair Share."[82] This created a clear conflict of interest that lead the IRS to describe one applicant for tax-exempt status as a "collection agency" for credit card companies.[83] In 2004 NCLC published a report showing that abuses persisted despite increased attention from states.[84] The IRS noted in a 2006 report that "many credit counseling organizations operating as tax-exempt charities are now primarily sellers of debt-reduction plans, motivated by profit, and offering little or no counseling or education."[85] While the IRS has been aggressively fighting this problem for several years now, the CFPB should not omit non-profit debt relief providers from the CFPB's supervisory jurisdiction on the assumption that the IRS will carry this burden forever.

3. Registration may be appropriate to collect data on for-profit debt relief services.

Unfortunately, as the CFPB has noted, there is little public data on the for-profit debt relief services industry.[86] Most for-profit debt relief companies are privately held and do not share the data needed to identify larger participants in the market. While the FTC gathered extensive information in the course of the TSR rulemaking, much of that is probably outdated because the FTC's new prohibition on advance fees likely caused some industry participants to go out of business or change their business models. Accordingly, this market may be one of the very few where registration is the only way to identify larger participants.

---

81 Caroline E. Mayer, IRS Denies Nonprofit Exemptions for Credit Counselors, Wash. Post (Oct. 1, 2005), *available at* www.washingtonpost.com/wp-dyn/content/article/2005/09/30/AR2005093001677.html.
82 NCLC & CFA, Credit Counseling In Crisis: The Impact On Consumers Of Funding Cuts, Higher Fees And Aggressive New Market Entrants at 6 (Apr. 2003), *available at* www.nclc.org/images/pdf/credit_counseling/report_creditcounseling_crisis.pdf
83 Caroline E. Mayer, IRS Denies Nonprofit Exemptions for Credit Counselors, Wash. Post (Oct. 1, 2005), available at www.washingtonpost.com/wp-dyn/content/article/2005/09/30/AR2005093001677.html.
84 NCLC, Credit Counseling in Crisis Update: Poor Compliance and Weak Enforcement Undermine Laws Governing Credit Counseling Agencies (Nov. 2004), *available at* www.nclc.org/images/pdf/credit_counseling/report_cc_enforcement.pdf.
85 IRS, Credit Counseling Compliance Project at 1 (May 15, 2006), *available at* www.irs.gov/pub/irs-tege/cc_report.pdf.
86 76 Fed. Reg. 38059, 38062 (June 29, 2011).

In addition to traditional measurement data, such as assets, debt relief service providers should be required to provide information on the number of customers they have, their service providers and affiliates, the number of creditors each customer has, and the dollar value of consumer debts (when the consumer signs up and at other significant mileposts in the business relationship).

E. Supervise the Larger Participants in Each of Several Prepaid Card Markets.

Prepaid cards are an important market for the CFPB to define and supervise. The most vulnerable consumers are often shut out of the bank account world and are increasingly turning to – or being solicited to turn to – prepaid cards for their transaction needs. In our increasingly electronic world, consumers who traditionally relied on cash are turning to other types of transaction products.

In addition, prepaid cards are being used for a dizzying variety of new functions. As this is a relatively new market, there are various types of cards.

1. Defining "Prepaid Card"

As a threshold matter, it is important to define "prepaid card" broadly for purposes of defining the market. That definition may be different from one used in other contexts, such as authorization for direct deposit of federal payments, the gift card rules, or expanded coverage under the Electronic Funds Transfer Act.

The most important aspect of defining "prepaid card" in this context is to catch those products for which a bank is not the primary point of contact for the consumer or the primary player in setting the terms, conditions or other factors influencing the operation and use of the product. Banks that offer prepaid cards directly will be supervised separately by the CFPB or bank regulators, and the ancillary players that they use in their prepaid card programs can be reached indirectly. But for those cards offered or designed by nonbanks, this rule provides the only vehicle for directly supervising the most important player in the chain, even if the funds are ultimately held in a bank.

For that reason, the definition must avoid lines that invite evasion. For example, whether the funds are held in a pooled account or an individual account should be immaterial. A nonbank prepaid card program manager can set up a program in which the card is linked to what are technically individual bank accounts.

Similarly, the definition should not require use of a card. Both internet payment systems such as PayPal and cell phone payment systems such as OboPay offer means of storing value and transacting without use of a card. The term "access device" as defined by the Electronic Funds Transfer Act is a more flexible touchstone than "card."

Instead, the definition should incorporate the essential transaction functions that are within the scope of the CFPB's authority but are not always provided by banks. These include products that provide the means to:

- transmit or exchange funds for goods and services, or that otherwise act as a custodian of funds or any financial instrument for use by or on behalf of a consumer;[87]
- store value or make or process payments.[88]

2. Reaching All Important Players in the Prepaid Card Supply Chain

Prepaid cards are very complicated products involving many different players in the supply chain including the payment network, the card issuer, the fulfillment and transaction processor, the program manager, the loading network and the distributor or vendor.[89] Separate entities can sell the card, market the card, design the terms and conditions, provide access to cash, or provide customer service. In addition, some cards offer add-on features including insurance, lines of credit, rewards programs and other features that may be managed by yet additional entities.

Many of these entities can have an impact on the consumer experience, including the consumer's understanding of the product he or she is buying, the terms and conditions, use of the card and resolution of problems. It is essential that the CFPB design a supervision system that enables it to protect consumers fully in such a complicated product.

Once it defines the appropriate prepaid card markets, a second question will be the most effective way to exercise the CFPB's supervisory authority. The best way to ensure that the CFPB is able to exercise appropriate supervision over the entire supply chain is to treat one central player as primarily responsible for the product, including the supervision of any other entity that is involved with the product. The CFPB should choose the entity that has the most control over the entire prepaid card program and the revenue. That central party would bear responsibility for ensuring compliance throughout the supply and distribution chain. That entity is most likely the program manager, but the CFPB should have flexibility to consider another player.

In addition, the CFPB should consider whether other players in the supply chain play a significant enough role that they should be potentially subject to independent supervision. For example, payday lenders, check cashers, and WalMart with its Money Stores all have other products that may interact with prepaid cards and could merit independent attention. Giving heed to the limitations on its authority over retailers of prepaid cards, the CFPB should consider defining the retail market for prepaid cards as an independent market for those retailers that exercise control over the terms and conditions of the card.

---

[87] *See* Dodd-Frank § 1002(15)(A)(iv). Deposit-taking is presumably an activity in which only banks or credit unions can engage. Pure exchange of funds between individuals unrelated to goods and services would be covered by the separate money transmitting market. However, market definitions may, and probably should, overlap. Overlapping definitions are far preferable to definitions that leave gaps.
[88] *Id.* §§ 1002(15)(A)(v), (vii).
[89] *See* Center for Financial Services Innovation, "CFSI Nonprofit Guide to Prepaid" at 17.

3. Types of Prepaid Cards to Cover

There are a variety of types of prepaid cards. Many pose special issues for consumers, and the CFPB should retain the authority to supervise the larger participants in each of these markets.

General purpose reloadable. Clearly, the most central market is the market for open-loop, reloadable prepaid cards, also called general purpose reloadable (GPR). GPR cards are the closest to a bank account substitute and are the cards most likely to handle the bulk of a consumer's regular income. Clearly, the GPR market is a key consumer financial market and the CFPB should keep a close eye on it as it develops.

Payroll cards. Payroll cards differ from GPR cards in that the consumer does not shop for or compare cards. Instead, employees are a captive market and are paid their wages on payroll cards if they do not set up direct deposit. Captive markets pose special dangers for consumers and it is particularly important that they be protected in those markets. General disclosure requirements are completely inadequate. Payroll cards may also pose special concerns, such as inactivity fees that trigger overdraft fees and debt that continues to accrue (and to be collected) when the employee assumes the account has been closed because employment has ended. Additional protections may be warranted for payroll cards that are not necessary on the private market. For that reason, the CFPB should define the payroll card market as an independent market and supervise the larger nonbank players.

Student cards. Colleges and universities are increasingly turning their identification cards into stored value devices. Whether or not they request a stored value feature, it is included in the identification card automatically given to every student, In some instances, student aid is automatically loaded onto these ID cards. In others, the student merely has the option of loading value onto the card. The cards are usable within a closed network of locations affiliated with the school. Like payroll cards, student ID prepaid cards are given to a captive audience and may pose special dangers of which the CFPB should be aware. Therefore, the CFPB should define student cards as a separate market and supervise the larger participants.

Tax time prepaid cards. Prepaid cards used at tax time are another distinct market with cards marketed to a captive audience. Cards have been used as vehicles for tax refund anticipation loans, an abusive product that regulators have worked to shut down. But prepaid cards can provide a vehicle for consumers to pay for tax preparation costs out of their tax refund even if the refund is not loaned in advance but is paid out (minus preparation costs) after it arrives. These cards can be very useful for consumers, but they are likely to choose them based on the fact that they are the only vehicle that a tax preparer offers, not based on a comparison of different products. Consequently, the CFPB should supervise the larger participants in the tax time prepaid card market.

Prepaid cards that offer credit. One of the most troubling uses of prepaid cards is as a vehicle for exorbitantly expensive credit. Consumers are sometimes lured into arranging direct deposit of their wages or benefits and then are solicited heavily for dangerous credit products. Conversely, consumers who are struggling to make ends meet are sometimes pushed into switching their direct deposit from a safer bank or prepaid card account onto a more dangerous one that offers a vehicle for credit. The Office of Thrift Supervision shut down one such prepaid card line of credit last year, but the market is clearly reevaluating and continuing to explore vehicles for offering credit on prepaid cards. Payday lenders are also greedily eyeing prepaid cards as a vehicle for evading state payday loan laws, as at least one Arizona payday lender has done. This market is nascent and small, but it has the potential to explode and to cause significant danger to consumers. Consequently, the CFPB should define prepaid cards that offer credit as a separate market and supervise the larger participants in order to ensure that the CFPB has a handle on this potentially risky market early on.

Prepaid cards with credit building features. Prepaid cards are typically marketed based on the ease of qualifying, and sometimes offer to help consumers build credit. But how a prepaid card can build credit (unless it has a credit feature) is not entirely clear. Offers of credit building are potentially deceptive. The larger GPR prepaid card providers typically stay away from such claims but some other prepaid cards do claim to build credit. Examining these claims, how they purport to build credit, and whether they actually do will be important for this growing market. The prepaid market is on the verge of exploding. Practices that start small will grow and the CFPB needs to identify dangerous practices early.

Rebate cards. Rebate cards are another captive prepaid card market. Consumers purchase electronics or other large ticket items and the rebate is provided in the form of a prepaid card, typically one that is not reloadable. Some very large retailers and manufacturers offer rebates in the form of prepaid cards, so this practices affects a large number of consumers. Even though the retailer's sale of the nonfinancial product – the electronic equipment or other item -- is outside the scope of the CFPB's jurisdiction, the rebate card is a consumer financial service or product and should be subject to supervision. Rebate cards are also not protected by the EFTA gift card provisions even though they pose the same dangers of inactivity fees, another reason that it is important for the CFPB to be able to supervise them for unfair, deceptive or abusive practices.

Flexible spending/health care/defined benefit cards. Prepaid cards are used to enable consumers to access funds that they set aside with their employers for transportation, dependent care, health care and other purposes. A different set of players is involved in these cards, whose primary expertise or business may be managing such flexible spending programs and not in issuing stored value. For example, Choice Strategies claims to be the leader in debit card based and non-debit card based flexible spending plan administration, even though it may be unheard of to those who study the general prepaid card market. It is possible that an entity like Choice Strtegies will be within the generic definitions of larger participant based on the number of states, transactions, accounts or another measure. But one way or another, this is another captive audience and the CFPB should be able to examine whether these cards pose unique issues or risks.

Public benefits and other government funds. The use of prepaid cards by government agencies for the distribution of benefits and other funds is another growing and important market for which consumers are a captive audience. However, to our knowledge the cards used for these programs are primarily issued by banks without the same complicated supply chain as other prepaid cards. If that is the case, then the CFPB's and bank regulators' authority over banks may be sufficient to protect these consumers. However, the CFPB should investigate further to determine whether there are nonbanks involved in this market that should be supervised and will not be caught by other market definitions.

Cards that target discrete communities. Some card issuers target particular communities, including African-Americans and latinos. Such targeting can raise potential issues just as the subprime mortgage market posed different concerns than the prime market. Issues of language, and different uses of such cards as for international remittances, also can pose unique concerns that will not be caught by an examination of the broader prepaid card market. Just as products that are significant in a particular region should be examined even if they are not larger on a national scale, so should the larger participants in markets made up of vulnerable communities, especially those within the CFPB's mandate to promote equal opportunity.

Gift cards. Gift cards are a distinct type of stored value card that pose different issues from GPR cards. Some gift cards are limited to a particular retailer and may not be within the CFPB's jurisdiction.[90] However, others are network branded and are similar to GPR cards but may not be reloadable or may be promoted for use as gifts. Here again, the larger issuers or program managers of gift cards may be within the generic definitions of larger participant based on the number of states, transactions, accounts or another measure, or may be banks supervised elsewhere, but the CFPB should consider defining gift cards as a separate market.

F. Supervise the Larger Participants in the Check Casher Market.

Check-cashing companies are often the financial services provider of last resort to low income consumers. Many consumers are locked out of the mainstream banking system either because of the high costs of maintaining bank accounts, because of the fear of incurring NSF charges, or because of a previous negative experience with a bank. There are far more check cashers than mainstream banks in poor neighborhoods. Yet, the level of regulation of these providers of financial services is vastly different than it is for banks. Many companies which cash checks also offer services such as money orders, wire transfers, and short-term loans (for example, payday loans).

The convenience of check-cashers comes at a significant cost, not only because of the high fees charged but also because check-casher practices are largely unregulated and prone to abuse. In most states, there is only a thin layer of registration or licensing imposed by state law. In only about a dozen states are there even limits on the amounts that check cashers can charge for cashing a check: in most states, fees and charges are completely unregulated. Moreover, state agency enforcement is not strong in some states, making private litigation often the only viable consumer remedy.

1. State Regulation

Many states require check cashers to obtain a license.[91] Generally, in order to obtain a license, the check casher must file an application fee and meet minimum requirements for

---

90 *See* Dodd-Frank § 1002(28)(B).

91 Ariz. Rev. Stat. Ann. § 44-1362 (West); Ark. Code Ann. § 23-52-104 (West); Cal. Civ. Code § 1789.35 (West); Conn. Gen. Stat. § 36a-584; Del. Code Ann. tit. 5, § 2742; D.C. Code Ann.§ 26-317; Fla. Stat. Ann. § 560.309 (West); Ga. Code. Ann. § 7-1-706 (West); 815 Ill. Comp. Stat. Ann. § 315/2 (West); Ind.Code Ann. § 28-8-5-17 (West); Ky. Rev. Stat. Ann. § 368.102 (West) (citing 15 U.S.C. § 1601); La. Rev. Stat. Ann. § 6:1009; Me. Rev. Stat. Ann. tit. 32, § 6138; Md. Code Ann., Fin. Inst. § 12-120 (West); Mass. Gen. Laws Ann. ch. 169A, § 3 (West); Minn. Stat. Ann. § 53A.07 (West); Miss. Code Ann. § 75-67-517 (West); N.J. Stat. Ann. § 17:15A-43 (West); N.Y. Comp. Codes R. & Regs. tit. 3, § 400.12; N.C. Gen. Stat. § 53-280; Ohio Rev. Code. Ann. § 1315.26 (West); Pa. Stat. Ann. tit. 63, § 2323 (West); R.I. Gen. Laws § 19-14.4-4; S.C. Code Ann. § 34-

competency, integrity, and financial wherewithal. The stringency of the licensing requirement varies considerably. Some statutes allow the state administrator discretion to approve applicants despite the applicant's failure to meet certain requirements. Often, little more is required than submitting the necessary forms.

Some state laws require check cashers to prominently post the fees they charge for the service. Some laws may require the notice to be in Spanish as well as English. The notice may also require information about how to file a complaint against the check casher. Some statutes also require the check casher to post a copy of its license or registration certificate.

A minority of states set limits on the amount of fees that can be charged. Although some states set a flat fee,[92] most states which have limits base them on the type of checks.[93] The National Conference of Commissioners on Uniform State Laws has urged states to adopt its Uniform Money Services Act, which requires most check cashers to obtain a license from the state.[94] The Act contains no consumer protection provisions such as regulating the amount of fees or requiring the posting of fees.

41-60 (Law. Co-op.); Tenn. Code Ann. § 45-18-121 (West); Va. Code Ann. § 6.1-437 (West); Wash. Rev. Code Ann. §§ 31.45.070-31.45.080 (West); W. Va. Code Ann. § 32A-3-1(a), (e) (West); Wis. Stat. Ann. § 218.05 (West); Roman Check Cashing, Inc. v. New Jersey Dep't of Banking & Ins., 169 N.J. 105, 777 A.2d 1 (N.J. Super. Ct. App. Div. 2000) (rejecting constitutional challenge to statute providing that a check cashing business may not obtain a license if it is located within 2500 feet of an existing office). *See generally* Chris Daniel, Steve Stone & Sherri Dimarco, *Money Transmission: The Legal Landscape, a Quandary and a Proposed Solution*, 1 J. of Payment Systems Law 305 (2005).

92 Ariz. Rev. Stat. Ann. § 44-1362 (the greater of 3% of the face amount or $5.00); Del. Code Ann. tit. 5, § 2742 (greater of 2% or $4.00); W. Va. Code Ann. § 32A-3-1(b) (West) (greater of $1 or 1% of face value of check). Other states' fees are set by a state official. *See, e.g.*, Minn. Stat. Ann. § 53A.07 (West) (commissioner must approve all fees as reasonable); Nev. Rev. Stat. Ann. § 604.170 (West) (set by commissioner); N.Y. Banking Law § 372 (McKinney) (fees set by superintendent). *Cf.* Mass. Gen. Laws ch. 169A, § 6 (check casher files fee schedule with commissioner); Wash. Rev. Code Ann. § 31.45.070 (West) (licensing requirement with no mention of allowable fees); Wis. Stat. Ann. § 218.05 (West) (licensing of check cashers as "community currency exchanges" without mention of allowable fees).

93 *See, e.g.*, Ark. Code Ann. § 23-52-104 (West) (5% for AFDC or Social Security checks, 10% for any personal check or money order, and 6% for all others, but Arkansas statute was held unconstitutional in McGhee v. Arkansas State Bd. of Collection Agencies, 375 Ark. 52 (2008)); Cal. Civ. Code § 1789.35 (for payroll or government checks: greater of $3 or 3% or 3.5% if customer does not provide identification; 12% for personal check; 15% for deferred deposits (pay day loans)); Conn. Gen Stat. § 36a-584 (1% for public assistance checks; no checks over $2500 may be cashed for any fee); Conn. Agencies Regs. § 36a-585-1 (2% limit on all non-public-assistance checks); D.C. Code Ann. § 26-317(c) (the greater of $4 or 5% for government or payroll checks, 7% for insurance checks, 10% for personal check or money orders); N.J. Stat. Ann. § 17:15A-43 (West) (check cashers may charge the greater of $.90 or 2% of the face value of any check drawn on a depositary institution, 1% of AFDC checks, or 1.5% of any Social Security check); 63 Pa Cons. Stat. § 2323 (2.5% on government checks, 3% for payroll checks, 10% for personal checks).

94 148 Uniform Money Services Act (2000) (approved by the National Conference of Commissioners on Uniform State Laws).

2. The Federal Mandate Requiring Direct Deposit of Federal Payments Requires *More* Regulation of Check Cashers.

The Treasury Department requires that all electronic transfers of federal payments be made directly to an account in the recipient's name at a federally insured financial institution.[95] However, entities that are not eligible to receive federal payments—such as check cashers, currency dealers and exchangers, money transmitters, convenience stores, and liquor stores— have a strong profit motive to be involved in the business of transferring electronic payments from the federal government to recipients: they can charge recipients fees to establish these accounts, to receive the monthly deposits, to provide recipients access to withdraw the funds, and to cash the checks they provide for this withdrawal. Another financial incentive is that, by providing the access to the federal money, these entities can ensure that their customers return to their premises on a regular basis, which allows them to market high-priced loans or other goods or services.[96] The check casher lures the federal recipient into the scheme, completes the paperwork to establish the account at the financial institution, *and provides the sole access to the federal funds*.

Generally, the payments are initially transferred to the qualifying bank, the bank then transfers the funds to a pooled account owned by the check casher, and the consumer has access to those funds only through the check casher, not the bank. Although the recipient technically has an account at the financial institution and the federal funds are deposited into this account, generally there are no account privileges, and the recipient cannot access the federal funds even at the financial institution's ATMs or branches. This account is basically a fiction, established only to qualify for electronic receipt of the federal funds. The consumer may not even understand that the account exists, and the bank often has no branches even in the same state where the consumer resides.

The only way the recipient can withdraw funds is generally through the check casher. When the financial institution transfers the federal payments sent to this false account into a commingled account in the name of the check casher, the consumer's interest in this commingled account is unlikely to be protected by federal deposit insurance. Typically, the consumer is charged an enrollment fee, a monthly fee for the service or a fee for each deposit, and a check cashing or withdrawal fee. These fees are often significant. It may also be that the consumer cannot withdraw part of a federal payment but must withdraw the full amount of the payment at one time.

The Treasury Department described several typical arrangements:

- In one arrangement, the federal payments of recipients who enroll in the program are initially deposited into a federally insured account of the recipient at the participating financial institution. These payments are immediately transferred to a trust account at the financial institution that contains the federal payments of all recipients who enrolled at a particular check casher. A recipient's only means of accessing his or her funds is by obtaining a check at the check casher where the recipient enrolled in the full amount of the federal payment. The recipient may then cash the check at the check casher or elsewhere. An

---

95 31 C.F.R. § 210.5(a).

96 *See, e.g.* E. Schultz & Theo Francis, *Social Insecurity—High-Interest Lenders Tap Elderly, Disabled*, Wall St. J., Feb. 12, 2008, at A1.

enrollee may obtain a monthly statement at the check casher or by mail, at the enrollee's option. The cost for the program is $1.60 per federal payment, plus a check-cashing fee.

- A second arrangement establishes a federally insured account at a financial institution affiliated with the service provider for each recipient enrolled in the program. After the financial institution receives a federal payment and credits it to the recipient's account, the amount is immediately transferred to a pooled account at an unaffiliated financial institution in the name of the payment service provider and in which each recipient's interest is not federally insured. Recipients in the program may withdraw the amount of the federal payment (in full or in part) and check the available balance at any office of the payment service provider or at any ATM included in a participating network. The charges for the program include a $4.00 enrollment fee, a $5.50 monthly maintenance fee, and a $1.00 fee for each withdrawal or balance inquiry.[97]

Check cashers are the financial providers of last resort for many low income people. Their fees are high and generally unregulated. The CFPB should define check-cashing as a market and supervise its larger participants.

G. Supervise Larger Money Transmitters.

Tens of billions of U.S. dollars are sent every year by American residents to their relatives overseas. Remittances total at least three times official development assistance and are the largest source of external financing in many developing countries. While many remittance transfers flow between financial institutions without issues, there have been far too many instances of serious problems with remittances. These problems range from the remittance not reaching its intended recipient, to overcharging remittance fees and changing exchange rates.

The Dodd-Frank law amended the Electronic Fund Transfer Act to create a new set of enforceable requirements for all "senders" of remittances originated in the United States.[98] These new rules, which require new disclosures, error resolution procedures and – particularly importantly – protections against loss through error or theft, will provide a substantial improvement to the legal framework governing remittances. [99] However, there is no similar law applicable to transactions with money transmittors for transactions originating and ending within the United States.

---

[97] 64 Fed. Reg. 1150 (Jan. 8, 1999). For further details about the high cost of accessing federal payments through alternative financial service providers, including examples from a number of communities around the nation, see National Consumer Law Center, Comments to Treasury on Advance Notice of Public Rulemaking Regarding Possible Regulation Regarding Access to Accounts at Financial Institutions Through Payment Service Providers (Apr. 1999), *available at* www.consumerlaw.org/action_agenda/electronic_benefits/access_to_accounts.shtml.

[98] New section § 919 of the Electronic Fund Transfer Act, 15 USC §1693q, Public Law 111-203, 124 Stat. 1376 (2010).

[99] Regulations interpreting the new law on remittances have been proposed by the Federal Reserve Board. Comments will be reviewed by, and final regulations issued by the Consumer Financial Protection Bureau. 76 Fed. Reg 29902 at 29906 (May 23, 2011).

Money orders are a crucial type of payment device for consumers who do not have bank accounts.[100] Millions of consumers do not have bank accounts because they can not afford the fees assessed on accounts with low balances, there are no banks near where they live or work, they do not trust banks, or they do not feel comfortable doing business with banks.

Certain companies that sell money orders operate in a safe and sound manner and charge reasonable fees; others do not.[101] Money orders are also sold by "fringe bankers" who offer the service in order to draw consumers into their stores so they can sell goods and services of questionable quality at high prices. An additional problem with money orders arises from their format. Typically, they are sold with an original and two carbonized copies. The payee receives the original, the issuer gets one copy, and the consumer retains the second copy. Consumers often must have their copy in order to prove they have paid their obligations or to receive a refund. The consumer's copy, however, often is illegible.[102] Moreover, by the time of trial, that copy often is lost.

In some respects, the law applicable to money orders is more unsettled and less favorable to consumers than the law which applies to other payment systems. Some states have strong money transmitter laws to protect consumers. Other states have weak regulatory requirements or do not enforce their laws.

Usually bank money orders come within the UCC's definition of a check.[103] The label on the instrument is not determinative; even if the instrument bears the title of "Money Order," it will be treated legally as if it is a check if it meets the UCC's definition.[104] Less clear is what type of check it is. Money orders may be classified as or analogized to various types of checks, each with their own set of rules. These include ordinary checks or teller's checks.[105] Personal money orders are drafts governed by the UCC[106] but are not checks.[107] Personal money orders have the amount stamped on them. The name of the purchaser, the date, and the name of the payee are left blank for the purchaser to fill in. Ordinarily, the issuer does not sign the money order. Therefore, the issuer has no liability to the payee.[108]

---

100 Berler v. Barclays Bank, 442 N.Y.S.2d 54, 56 (N.Y. App. Div. 1981) (money order is poor person's "one-shot checking account").

101 A general description and economic analysis of the money order industry can be found in J. Macey & G. Miller, *Nondeposit Deposits and the Future of Bank Regulation*, 91 Mich. L. Rev. 237, 246–250 (1992).

102 B. Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L.Rev. 533, 560 n.91 (1992) ("Many [tenants] pay by money order, which is a method notorious for illegible carbons").

103 U.C.C. § 3-104(f) defines "check" as a draft which is drawn on a bank.

104 U.C.C. § 3-104(f): "An instrument may be a check even though it is described on its face by another term, such as 'money order.' " 9 U.C.C. § 3-104, cmt. 4.

105 Home Bank of Guntersville v. Perpetual Fed. Sav. & Loan Ass'n, 547 So. 2d 840, 843 (Ala. 1989) (stop payment case).

106 A "draft" is a negotiable instrument that is in the form of an order. The UCC distinguishes between "drafts" and "notes" that are in the form of a promise. U.C.C. § 3-104(d), (e), (f), and cmt. 4.

107 *See* U.C.C. § 3-104(e); Triffin v. Dillabough, 552 Pa. 550, 716 A.2d 605 (Pa. 1998) (money order is a negotiable instrument despite notice warning party cashing it to protect self against fraud). A negotiable instrument is a "draft" if it is an order. The difference between checks and drafts that are not checks is that a check is drawn on a bank.

108 *See* Steve H. Nickles, Negotiable Instruments and Other Related Commercial Paper 161 (2d ed. 1993); William H. Lawrence, Understanding Negotiable Instruments and Payment systems 41 (2002).

Issuers of money orders are governed by state money transmitter laws,[109] which regulate entities that forward money for others and are designed primarily to ensure the safety and soundness of the issuers. The laws typically require companies to qualify for a license and post a bond. These laws also state that the money paid for money orders may be invested only in certain "permissible investments." State agencies conduct examinations of companies to ascertain whether they are complying with the state's requirements. For the most part, these laws do not contain provisions to protect consumers except to ensure the issuer's solvency.[110] A very few state laws include consumer protection provisions. But even then, the protections are minimal. For example, a money transmitter statute may require a money order to contain a disclosure that the money order is not protected by FDIC insurance, if that is the case.[111] Administrative agencies are authorized to commence a disciplinary action against money transmitters,[112] and some states permit consumers to file lawsuits.[113]

Money transmitters – like check cashers – are generally the financial service providers for the low income community. Yet their low-income clients are charged the highest prices. These financial service providers are also the most thinly regulated. The CFPB should remedy that, and include within its regulatory auspices the larger players in this alternative financial marketplace.

In crafting a rule defining this market, the CFPB should keep in mind the technology companies that such as Fiserv, Inc.,[114] that operate behind the scenes in processing these transactions. These companies have a significant impact on consumers. Technology companies also offer platforms for bank payday loan products. Given their transaction volume, they are likely to meet the generic criteria for supervision, but the CFPB should consider defining them as a separate market.

---

109 There is some question as to whether the definitions of products and payment methods in these statutes are broad enough to cover modern methods of money transmission such as electronic or wire transfers. While some statutes specifically cover transmission by electronic transfer, others do not. In order to modernize these statutes, the National Conference of Commissioners on Uniform State Laws has issued the Uniform Money Services Act which, *inter alia*, expressly covers electronic transmissions. Uniform Money Services Act (approved by NCCUSL in 2000). The uniform act has been enacted in Alaska, Arkansas, Iowa, the U.S. Virgin Islands, Vermont, and the state of Washington. The act is largely confined to licensing and money laundering and does not contain any meaningful consumer protection. However, the Act does not "replace or supplant existing consumer protection laws relating to check cashing." *Id.* at Prefatory Note, viii. Presumably the same is true concerning consumer protection laws relating to money orders and wire transfers. Another issue is whether the state statutes cover companies operating outside the state.

110 *See, e.g.*, Colo. Rev. Stat. § 12-55-109(5).

111 *See, e.g.*, Cal. Fin. Code § 33525 (West) (requiring disclosure that money orders are not covered by government insurance).

112 *E.g.*, Fla. Stat. ch. 560.112 & 560.114.

113 Mass. Gen. Laws Ann. ch. 169, §§ 3 & 5 (West).

114 *See* Carter Dougherty, "Wal-Mart Cashing More Checks Has Banks Demanding U.S. Oversight" (Bloomberg News Aug. 1, 2011) *available at* http://www.fisca.org/Content/NavigationMenu/NewsViews/LatestNews/Wal-Mart_Cashing_Mo.htm.

H. Supervise the Larger Participants in Several Auto Finance Markets.

1. There is a History of Abuse in Auto Lending.

A consumer has a strong interest in buying and keeping a safe and reliable car. A working car is central to productivity and self-sufficiency for most families. Over 90% of workers drive to their jobs.[115] The importance of a working car is especially great for low-income families. Households with incomes below $25,000 are nine times more likely to be without a car than households with incomes above $25,000.[116] But a car does more than provide access to employment and economic success. Safe, reliable transportation expands families' options for suitable child care, affordable housing, medical care, healthy foods, financial institutions, and a host of other needs and opportunities. Without transportation, families' ability to meet their basic needs is severely limited.

Unfortunately, the auto finance market is plagued by abuses that undermine the ability of working families to get and keep a reliable car at fair terms. CFPB supervision is important as a means of identifying and reducing these abuses. While the CFPB's supervision authority over vehicle dealers themselves has certain limitations,[117] it can reach most of these abuses by exercising its supervision authority over the separate entities that provide financing for vehicle sales.

a. Dealer markups

In most car purchase transactions, the dealer is the original extender of credit. The dealer's role in financing the vehicle, including the opportunity for add-ons, generally creates more profit than the sale of the car itself. Before the transaction is closed, dealers provide the consumer's financial information to prospective assignees. These financing companies, many of whom later securitize the auto loans, then inform the dealer of the terms on which they will be willing to buy the loan made to that consumer for a particular car. Often the dealer places the consumer in less favorable financing than the consumer qualifies for based upon credit worthiness, and splits the extra profit from the higher interest rate with the assignee. This increase in interest rate above what the consumer qualifies for is called "dealer markup" or "dealer participation."

An extremely troubling feature of dealer financing markups is their disparate racial impact. There is extensive proof of these practices and their illegal impact on minorities obtained through litigation brought by NCLC and others. It has been well documented that minority car buyers pay significantly higher dealer markups than non-minority car buyers *with the same credit scores.*[118]

---

115 U.S. Department of Transportation, Bureau of Transportation Statistics, *NHTS 2001 Highlights Report,* BTS03-05 (Washington, DC: 2003).

116 U.S. Department of Transportation, Bureau of Transportation Statistics, *NHTS 2001 Highlights Report,* BTS03-05 (Washington, DC: 2003).

117 Dodd-Frank §§ 1027(a), 2029.

118 See, e.g., Ian Ayers, Expert Report, June 2004, available at http://www.consumerlaw.org/issues/cocounseling/content/AHFCIanAyresReportExhibits.pdf; Cohen, Mark A. "Imperfect Competition in Auto Lending: Subjective Markups, Racial Disparity, and Class Action Litigation." available at http://ssrn.com/abstract=951827.

These dealer markups make the loan more expensive for the consumer than it need be, so it is reasonable to expect it would increase the likelihood that the consumer would default. In a recent study the Center for Responsible lending found that this is indeed the case and that "undisclosed markups increase the odds that a subprime borrower will default by 12 percent and the odds that he or she will end up having their car repossessed by 33 percent."[119] In many states, interest rate caps for vehicle finance are very high or non-existent, so are not effective in reducing this risk. The CFPB's supervision of the auto financing markets is particularly important because it will be a way to detect and bring an end to discrimination and undue risk caused by financing markups.

b. Sale of "add-ons"

As previously discussed, auto dealers now make more of their profit selling financing and add-ons than from selling cars.[120] They have incentives to sell various add-ons to consumers such as rust proofing, window etching, GAP insurance, credit life insurance, credit disability insurance, tire protection plans, service contracts, warranties and more. Dealers can make a handsome profit on many of these products, often charging a great deal more than the products cost the dealer and a tremendous amount more than any value they might have to the consumer. In addition, if the dealer is receiving mark-up proceeds, the amount of the dealer participation will increase as the amount financed increases with additional add-ons.

All these add-ons make the loan more expensive and increase the risk that the consumer will be unable to pay the loan. Lenders realize this and typically limit loan amounts to 120% - 140% of the blue book value of the car. This level is likely not the level at which the loans become significantly less risky, but rather a reflection of the tightest controls lenders can exert without losing significant business from dealers. CFPB supervision of vehicle financing entities will provide a means of assessing the magnitude of these risks and crafting market-wide measures to reduce them.

c. Negative equity from a trade-in vehicle

When a car buyer owes more on a trade-in vehicle than it is worth, this negative equity is often added to the loan for the car the consumer is purchasing. Adding such negative equity to a car loan not only increases the risk of default, but also increases the size of any deficiency after repossession. A recent report indicates that "more than one quarter of loan transactions have some level of negative equity today, with an average new-car-loan negative equity of $4,250."[121] Exerting some control over the risks – both to consumers and to the financial markets in general – by the growing amount of negative equity in auto finance will be an important part of supervision.

---

119 Delvin Davis and Joshua M. Frank, UNDER THE HOOD: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses, April 19, 2011, available at: http://www.responsiblelending.org/other-consumer-loans/auto-financing/research-analysis/Under-the-Hood-Auto-Dealer-Rate-Markups.pdf.

120 *See* 2009 F&I Statistics, F&I Management & Technology, December 30, 2008, at 28, stating that---"After experiencing slight declines in 2005, F&I's contribution recaptured some ground in 2006 and continued to rise in 2007 and 2008, representing more than half of total profits. Lower gross margins on the sale of new units has helped increase the importance of F&I contributions. Source: CNW Market Research."

121 Richard Apicella and George Halloran, The Rising Repossession Tide, BenchMark Consulting International (2008), available at: http://www.benchmarkinternational.com/Articles/TheRisingRepossessionTide.pdf.

2. The CFPB Should Define Multiple Auto Finance Markets.

For purposes of its supervisory authority, the CFPB should look at the numerous categories that auto finance companies use to segregate themselves in order to ensure it is effectively supervising each of these different markets. As finance and insurance (F&I) salespersons well know, there are a number of different types of auto finance companies, each focusing on different types of car buyers, auto dealers, geographic locations, and other criteria.

Some auto finance companies, such as AmeriCredit prior to its purchase by GM Financial, are focused solely on subprime car buyers. Some auto finance companies, both captives and others, focus primarily on franchised dealers. Others lend entirely to independent dealers. There are also a number of large players that focus on particular geographic areas.

Each of these subdivisions of the auto finance market is prone to different abuses and risks. If the CFPB treats all auto finance as a single market, its supervision is unlikely to reach the major players in the subprime auto finance market, and the particular practices and abuses in that market may escape its attention. We urge the CFPB to define at least two auto finance markets – first, general or prime auto finance, and, second, subprime auto finance -- and to supervise the larger players in each.

I. Supervise the Larger Participants in the Small Installment Loan Market and the Specialized Military Lending Market.

We recommend that the CFPB identify small installment loans and military-focused lending as markets, and supervise the larger participants within those markets. There are distinct differences in these sectors which could be glossed over if all consumer loan and sales finance companies were evaluated for "larger" status as one group. The huge auto financing sector would overwhelm most other types of consumer lending if CFPB treated all installment lending as a single market to determine larger participants. (See the discussion of auto sales finance in section V(G)).

1. Small Installment Loans

Small installment loan companies serve a mostly low to moderate income clientele and are an important credit sector for the CFPB to supervise to supplement state regulation. Although traditional small installment loan companies are smaller market participants compared to credit card issuers or home equity lines of credit, the CFPB should pay special attention to this sector due to loan terms, history of problems for consumers, and the vulnerability of low-to-moderate income consumers who often make up the borrower segment for small loans.

According to a survey by NCLC, CFA, and Consumers Union in 2010, almost all states authorize small installment loans. Forty-four states set an interest rate and fee caps that result in the cost of a $500 six-month installment loan ranging from a 17 percent APR in Arkansas to a 99 percent APR in Illinois. Seven states set no limit at all on the cost of small loans.[122]

---

[122] National Consumer Law Center, "Small Dollar Loan Products Scorecard 2010," updated by CFA.

Responsible small dollar lending guidelines typically call for loans to be repaid in equal installments over a longer period of time to make it possible for consumers to successfully repay loans at affordable terms. Consumer protection issues with small installment lending include loan-packing with low-value or worthless credit insurance and auto club membership add-ons, repeated refinancing of loans, hidden prepayment penalties when calculating the rebate of unearned interest upon refinancing or default, and securing loans by personal property solely for the purpose of selling low-value credit insurance coverage or non-filing fees.

Small installment loans are intended to give consumers a path to paying off loans and being free of debt. In practice, borrowers frequently renew loans during the term of the existing loan, either to borrow additional funds or to refinance after falling behind on payments. In one infamous case, Security Finance, a small loan company based in South Carolina, was alleged to have a scheme to renew consumers' loans every 60 days after the borrower made two payments in order to maximize profit on finance charges which included two front-loaded flat fees. The attorney who represented an Oklahoma borrower testified that the "vast majority of Security Finance's profits comes from loan flipping."[123] A bankruptcy referee in Muskogee told the Tulsa World that the average small-loan borrower filing for bankruptcy had at least two small loans pending, with some consumers having as many as 15 pending loans.[124]

Last year the North Carolina Superintendent of Banks conducted a study of consumer finance companies and found that loan renewals were a major share of total lending, with 69.2 percent of loans made to renew existing accounts in 2009 and 11 percent of loans made to customers with previous loans. Less than twenty percent of loans were made to new customers.[125] The Colorado Office of Consumer Credit Code Administrator compared repayment terms for payday loans and Colorado's alternate rate small installment lenders and found that 65 percent of small consumer loans were refinanced, compared with 64 percent of payday loans during 2005. The average sized loan was nearly the same, $329 for the installment loan vs. $336 for the payday loan. Colorado also found that the average actual loan term was three months although the contractual loan term was 6.5 months.[126]

There is a thin line between the well-documented problems with payday loans that trap consumers in repeat borrowing at triple-digit rates and small installment loans that are flipped repeatedly. Given the priority set by Congress on CFPB oversight of payday lenders of any size, the CFPB should address similar problems with installment loans that impact consumers who struggle to make ends meet and who cannot afford harmful loan products.

The traditional small installment loan industry has undergone major changes in recent years as the growth of credit cards, home equity lines of credit, and cash-out refinancing of mortgages provided alternatives to consumer finance loans. However, major small loan companies offering

---

123 Testimony of David Humphreys, Kansas Legislature, Re: SB 376, February 13, 2006.
124 Ginnie Graham, "Holiday is big season for small-loan companies," *Tulsa World*, November 27, 2005, p. A-10.
125 "The Consumer Finance Act: Report and Recommendations to the 2011 General Assembly," North Carolina Office of the Commissioner of Banks, February 2011.
126 Colorado Department of Law, "Colorado Small Consumers Loans and Payday Loans," based on Uniform Consumer Credit Code 2005 annual reports and compliance examinations.

several types of products remain an important sector, while a second tier of small loan companies provides loans in multiple states. For example:

OneMain Financial, formerly CitiFinancial which included The Associates, is part of the Citi conglomerate. OneMain is a large consumer finance company with 1,300 branches nationwide.[127] The company's website states "We specialize in providing personal and home equity loans." Among other loan products, OneMain makes unsecured personal loans of $300 to $10,000 with loan terms of 12 to 60 months. The loan company suggests that lower rates are available if borrowers use their personal vehicles as collateral for loans. In just one state, North Carolina, CitiFinancial had 113 offices and $608,979,936 in loans receivable outstanding at the end of 2009.

Springleaf Finance Corporation, formerly American General Finance, Inc. owned by AIG, is another very large firm that is a major player in the small installment loan market. The company, which began in Indiana in 1920, says it sells loans, retail financing and other credit-related products to more than a million families in 40 states, the United Kingdom, Puerto Rico and the Virgin Islands. The company provides bill consolidation loans, home equity loans, personal loans, home improvement loans, and loans for unexpected expenses and vacations, according to its website.[128] Springleaf lists a variety of licenses under which it does business in nine states (AZ, CA, GA, HI, NJ, NY, PA, VA, and WV) and lists corporate names in the states of DE, IN, WY, WA, NC, AL, OH, PA, SC, LA, IL, IA, HI, WI, and TX.[129] American General Finance was the second largest finance company in North Carolina in 2009, with 91 offices and $190,358,306 in loans receivable outstanding at the end of 2009.

Other lenders with a significant presence in the small installment loan market include World Acceptance, Security Finance, and Sun Loans. Security lists sixteen states where it makes small loans.[130] Sun Loans has 248 offices in eight states and makes loans from $100 to $1,500 with terms of four to twelve months in duration. Sun not only makes small loans but sells Continental Car Club memberships to its borrowers in four states.[131] World Acceptance Corporation (WRLD) makes loans in twelve states at 1,067 offices. According to WRLD's 2010 SEC Form 10-K, the loan company charges rates up to 204 percent APR, uses the archaic Rule of 78s to compute rebates of unearned income, and makes 85 percent of its loans as renewals and loans to former borrowers.

Responsible small-dollar lending has the potential to be a reasonable alternative to payday loans. But it is also susceptible to the same traps and abuses that characterize payday loans. It is particularly important for the CFPB to define the small installment loan market as a separate market, and supervise its larger participants, as a means of ensuring that any reforms imposed on payday lending are not eroded by a migration of the same abuses to the small-dollar lending market.

---

127 www.onemainfinancial.com/USCFA/CFA/portal/SubPage.do?content_id=our_history visited August 5, 2011.
128 www.springleaffinancial.com/about-us/history.html, visited August 5, 2011.
129 www.springleaffinancial.com/disclosures.html, visited August 5, 2011.
130 www.security-finance.com/loan_products.php, visited August 5, 2011.
131 www.sunloan.com/about-us/index/asp, visited Auguest 5, 2011.

2. Military Installment Lenders

Installment loan companies, such as Pioneer, Omni, and Patriot that specialize in loans to Service members, should get particular consideration in CFPB's determination of what constitutes a "larger" consumer lender. The Dodd-Frank Act created an Office of Servicemember Affairs in CFPB, an indication that the impact of credit providers on the military should be a priority. Several installment loan companies have offices near military bases and market loans online exclusively to the military.

Omni Financial (www.yesomni.com) is based in Nevada and makes loans of $500 to $10,000 for terms of 6 to 36 months to Service members who have eight months or more left to serve. Omni lists branches in 17 states but CFA was only able to verify state licenses in nine states.

Patriot Loan Co. (www.patriotloanco.com) is owned by Security Finance and is based in South Carolina. It makes loans from $100 to $1,000 and has branches in six states. Patriot Loan Company offers in-person military loans.

Pioneer Military Services (www.pioneermilitaryloans.com) is owned by Midcountry Financial Corp. and makes loans of $500 to $10,000 for up to 36 months. No APR is quoted on the company's website for the origination fee and interest charged on loans. Pioneer has loan offices in 14 states and makes loans via the Internet.

Military Financial (www.militaryfinancial.com) is an Internet-only military lender, based in Delaware. Loan size is up to 40 percent of take home pay. Loans are structured as an "open-end" Rapid Line of Credit. Military Financial notes in its FAQs that it is not required to comply with the Military Lending Act cap of 36 percent MAPR for payday loans to service members.

Armed Forces Loans of Nevada, Inc. is an online installment lender that only makes loans to Service members and claims Nevada as choice of law. Applicants must agree to make payments via allotments handled by First Citizens Bank and to provide authorization to electronically withdraw payments from the borrower's bank account if for any reason an allotment is not received. Paperwork for a loan made in 2007 states in bold that "If your allotment is not started your loan request will be denied." Borrowers must agree not to discontinue any allotment payment without the express written consent of the lender.[132] In addition to 17 percent annual interest ($188.92), this lender charged $879.84 in "administration and origination" fees on a loan of $2,000, and deducted a $30 transfer fee from the proceeds. It required a total of payments of $3068.76 to be repaid in twelve monthly installments.

CFA recently surveyed online installment loan offers to Service members and found nine lenders that deal primarily or exclusively with Service members. Most of the lenders only make loans via the Internet. Borrowers at online military installment lender websites are not likely to find the cost of loans disclosed prior to an accepted application. Two exceptions are Armed Forces Loans, which quotes up to 87.5 percent, and Omni Financial, which quotes 9.95 percent to 34.95 percent as the cost to borrow. Loan size varies but loans in CFA's survey were all between $100 and $10,000 with up to 36 months to repay.

---

[132] Armed Forces Loans of Nevada Inc. contract, April 4, 2007, on file with CFA.

Lenders ask for the applicant's Leave and Earnings Statement. The favored method of payment for installment loans to Service members is by allotment directly from wages before the monthly paycheck is direct deposited to the borrower's bank account. Lenders also take payment by debits to borrowers' bank accounts. Since Service members are required to have accounts at depository institutions to receive direct deposit of their military pay, any loan based on repayment by allotment or electronic funds transfer is important to monitor for compliance with Department of Defense rules for allotments and compliance with the Electronic Fund Transfer Act and Reg E. In addition, it appears that at least some of these lenders require payment through an allotment that is not truly revocable at the will of the borrower – a practice that the Federal Trade Commission has already identified as unfair in the context of wage assignments.[133]

The CFPB also should make military-only installment lenders a supervisory priority due to uneven supervision by states. This issue was raised in the Department of Defense Report to Congress which noted that a "particular concern with the lack of universal state licensing is that these companies do not have to comply with state laws covering disclosure, rate caps, fee limits, loan size and collateral requirements."[134] As noted above, one military installment lender affiliated with a bank does not appear to be licensed in each state in which loans are made from stores. In some states that apply small loan laws to loans made to "residents," loan companies that only lend to non-resident service members stationed in the state have in the past not been licensed or supervised by states. One online lender avoids this problem. Military Funding USA, Inc. notes on its website (www.loansmilitary.com) that "Loans are not offered to residents of CA, FL, GA, MT, NV, or WV or individuals stationed in states that consider members of the military stationed in those states to be residents of the state in which they are stationed."

We recommend that the CFPB define military-focused installment lending as a separate market. Within this market, it should define as "larger" any loan company that markets exclusively or predominantly to Service members in more than one state or via the Internet in order to make sure that military lenders comply with all federal credit laws and do not use unfair, deceptive, or abusive acts and practices in loans to an important groups of customers.

J. Supervise the Larger Participants in the Manufactured Home Finance Market.

1. There is a History of Abuse in Manufactured Home Lending.

The same abuses that have plagued the mortgage market have been widespread in the financing of manufactured homes. In fact, some argue that the irresponsible lending that precipitated the foreclosure crisis began with manufactured housing. Inflated appraisals, lending without regard to ability to repay, and a reliance on per-deal commissions led to the collapse of the manufactured housing market over a decade ago.

Unique features of manufactured home financing make it subject to special abuses. In particular, the ability to treat manufactured homes as personal property means that lenders, and dealers who arrange or originate financing, can exclude these homes from the mainstream mortgage

133 FTC Credit Practices Rule, 16 C.F.R. § 444.2(a)(3).

134 Department of Defense, "Report on Predatory Lending Practices Directed at members of the Armed Forces and Their Dependents," August 9, 2006, p. 18.

market and steer buyers into higher-cost chattel financing. The exclusion of some manufactured homes from the protections of federal laws such as the Real Estate Settlement Procedures Act (RESPA) facilitates this steering.

One reason that manufactured home lending is so vulnerable to abuse is that the market structure discourages consumer shopping. As with car finance, the seller tends to control the financing of the sale. Typically, the seller arranges financing, often with a captive finance company. This structure increases the opportunity to steer consumers into disadvantageous loans.

2. Steering of Manufactured Home Buyers into Disadvantageous Chattel Loans Is a Significant Problem.

About two-thirds of new manufactured homes are classified as personal property for purposes of financing. These buyers are steered into higher-priced chattel lending, similar to that provided for purchase of a motor vehicle.

Interest rates on chattel loans are generally 2% to 5% higher than comparable real estate mortgages. Moreover, because lenders making such loans are often subsidiaries or captive lenders of manufacturers, they are rarely willing to finance resale of the home. The absence of financing for sale of "used" homes impairs the ability to sell them and significantly reduces their value.

Many of these homes are sited on land the homeowner owns, or are on leased land with a long-term lease, so could be treated as real property and eligible for mainstream real estate financing under existing state law. Indeed, the Uniform Law Commission is drafting a model law that would allow all manufactured homes to be treated as real property, whether on land the home owner owns or leases, as is currently the rule in New Hampshire. The importance of a prohibition against steering will continue to grow as states reform their laws to increase the recognition of manufactured homes as real estate.

The CFPB is mandated by the Dodd-Frank Act to adopt rules against steering.[135] To craft an effective rule, it will be helpful for the CFPB to become thoroughly familiar with the unique features of the manufactured home finance industry by exercising supervisory authority over its larger participants. Supervisory authority will also be important as a way of ensuring compliance with any steering rule that is adopted, particularly since steering is often subtle and difficult for consumers to detect.

3. The CFPB Should Define Manufactured Home Finance as a Market.

For purposes of its supervisory authority, the CFPB should treat manufactured home financing as its own market, and assume supervisory authority over the larger players. The manufactured home financing market, while sharing many features with the broader mortgage market, is distinct from the mainstream mortgage market in several important ways, particularly the use of chattel lending. Most mainstream mortgage lenders rarely or never finance manufactured homes that will be placed on rented land, leaving this market to a relatively small number of specialized manufactured home lenders. Even when the home is to be placed on land the

[135] 15 U.S.C. § 1639b.

homeowner owns, the consumer is often steered into chattel lending. The result is a specialized, highly concentrated market, with unique abuses and unique ways of doing business.

Some of the participants in this market are depository institutions that are already subject to supervision by the CFPB or a banking agency. However, others are non-depository institutions. Even for the depository institutions, when the CFPB or a banking agency conducts supervision it should pay particular attention to manufactured home finance.

4. The CFPB Should Apply Several Alternate Criteria in Defining the Larger Participants in the Manufactured Home Finance Market.

In general, in defining larger participants in a market, the CFPB should use a set of alternate criteria, defining a larger participant as one who meets any one of these criteria. For manufactured home finance, one of the criteria should be dominance in a region. Since it is expensive to transport a manufactured home from a factory to a home site, manufacturers tend to sell homes just for the areas surrounding their plants. Because so much financing is done through captive finance companies that are related to a particular manufacturer, regional dominance may be a feature of the manufactured home financing market as well.

5. The CFPB Has Authority to Exercise Supervisory Jurisdiction Over Manufactured Home Lending.

The CFPB has authority to assume supervision over the larger participants in the manufactured housing finance market.[136] It cannot assume supervision over a manufactured home dealership employee who is merely acting as the agent for a buyer, or who is negotiating the purchase price or terms of the sales contract.[137] But it can exercise this authority over a dealership employee who offers or provides financing,[138] and nothing in the Dodd-Frank Act prevents it from exercising supervision over the lender itself. The CFPB also cannot exercise supervisory authority over buy-here-pay-here type retailers who allow consumers to buy goods or services on installment credit but do not assign those contracts to financing companies,[139] but few manufactured home dealers would fall within this exception.

[136] *See* Dodd-Frank §§ 1031(b), 1002(6).
[137] § 1027(c).
[138] Dodd-Frank § 1027(c).
[139] Dodd-Frank § 1027(c).