WilmerHale

CFPB Finalizes Automobile Finance Larger Participant Rule and Publishes Examination Procedures

MONDAY, JUNE 15, 2015

On June 10, 2015, the Consumer Financial Protection Bureau (CFPB) announced a final rule that will allow it to supervise larger nonbank automobile finance companies. Accompanying the rule, it also published the procedures that will be used by examiners in their reviews of the regulated entities. These examination procedures are an important new tool for covered auto lenders preparing for CFPB supervision.

As expected, the final rule largely adopts the version proposed for comment on September 17, 2014.[1] Pursuant to its authority under the Dodd-Frank Act, the CFPB has defined “larger participants” to include any nonbank auto finance company that makes, acquires, or refinances 10,000 or more loans or leases in a year. The CFPB estimates that the rule will cover about 34 nonbank auto finance companies and their affiliates, which account for approximately 90 percent of the nonbank auto loan and lease market. The final rule will go into effect 60 days after publication in the *Federal Register*.

This final rule marks the fifth CFPB rulemaking to define what constitutes a “larger participant” in markets for consumer financial products or services. The bureau has previously defined larger participants in the consumer reporting, consumer debt collection, student loan servicing, and international money transfer markets.

Highlights of the Rule

Larger Participants. Newly covered entities include nonbank auto finance companies that make, acquire, or refinance 10,000 or more aggregate annual originations. Specialty finance companies, captive nonbanks, and Buy Here Pay Here companies may qualify as larger participants if they meet the requisite number of annual originations. Motor vehicle dealers do not fall under the definition of larger participants, as they are excluded from the CFPB’s authority under the Dodd-Frank Act.

Originations. Originations include grants of credit to purchase an automobile, refinancings secured by an automobile, automobile leases, and the purchases or acquisitions of those obligations.

Refinancings not secured by an automobile, certain transactions by special purposes entities to facilitate asset-back securitizations, and title loans are excluded from the definition of originations. To determine if an entity meets the 10,000 annual origination requirement, the originations from the previous calendar year by the nonbank entity and its affiliated companies are aggregated.

Automobiles. The definition of automobiles in the final rule includes cars, sports utility vehicles, light-duty trucks, and motorcycles. Heavy-duty trucks, buses, ambulances, motor homes, RVs, golf carts, and motor scooters are excluded from the definition.

Examination Procedures

Auto finance companies across the industry have been working to prepare for CFPB supervision at least since the publication of the bureau's proposed larger participant rule. The bureau's publication of examination procedures along with the final larger participant rule gives covered entities a new tool to evaluate their readiness for a CFPB examination, and the opportunity to begin any needed enhancements to their compliance risk management system prior to examination.

Examination Process

The bureau will notify the entities that it intends to examine, and those entities will then have the option of contesting whether they qualify under the rule as a larger participant. If the examination proceeds, the CFPB will generally conduct an initial conference with entity's management, request records, and review the entity's compliance management system. Based on the initial review, the CFPB will then plan and conduct an on-site examination. The CFPB estimates that a typical examination will require 11 weeks of assistance from the larger participant's staff.

Key Areas of Focus

- *Service Provider Oversight*. As larger participants may be responsible for the activities of service providers, the examiners will review the relationship between larger participants and their service providers to ensure a proper compliance management system is in place. In particular, the examiners will evaluate whether the larger participant: (1) has compliance management controls for selecting and monitoring affiliates and service providers; (2) takes steps to ensure that its service providers are licensed and registered as required; (3) performs due diligence concerning the service providers' regulatory compliance history; (4) monitors the service providers' hiring and training practices; (5) has a process for ensuring service providers comply with the larger participant's privacy policy; and (6) appropriately audits the service providers and reacts to those audits.
- *Fair Lending*. Examiners will review larger participants for compliance with the Equal Opportunity Credit Act and Regulation B, and will contact the Office of Fair Lending and Supervision Policy with any concerns. At a time of heightened fair lending scrutiny in this sector, the fair lending portion of upcoming examinations could prove particularly consequential for regulated entities.

- *Fair Credit Reporting*. Examiners will assess larger participants' compliance with the FCRA Furnisher Requirements. The review will include determining the policies and procedures used to ensure accuracy in data collection, storage, and reporting, and for resolving consumer complaints. The examiners will also independently review consumer complaints, and will compare samples of the larger participants' servicing records with information reported to credit reporting agencies. Examiners will also review whether larger participants are complying with the FCRA when denying loans, offering loans on materially less favorable terms based on a consumer credit information, and providing credit scores to consumers.
- *Optional Products*. In addition to how larger participants manage accounts and payments generally, the examiners will inquire into optional financial products or services that are offered to consumers, including: (1) whether optional products are offered; (2) whether debt cancellation, suspension, or similar products are offered; (3) how optional products attached to loans or leases are monitored; (4) what role service providers play in connection with the optional products; (5) what marketing materials are used for the optional products; (6) whether the optional products are ever added without explicit authorization from the consumers; (7) whether bi-weekly payment plan advertisements clearly explain the terms and conditions, including when the payments will be applied.
- *Debt Collection and Repossession*. Examiners will review a sample of servicing records for customers in default, in bankruptcy, and whose loans or leases have been repossessed, as well as a sample of collection calls and any collections related complaints. Examiners will review collections practices for FDCPA and UDAAP compliance, including whether collections calls clearly indicated the purposes of the call, as well as whether the calls are repetitive, harassing, or misleading and whether proper controls are present to ensure monitoring and compliance. Examiners will also closely scrutinize repossessions (including the use of starter interrupt devices) and how lenders identify and process accounts in bankruptcy.
- *Other Areas*. The examination procedures address a number of other review areas, including consumer complaint monitoring, privacy and data security, and advertising, marketing, and truth in lending.

* * *

CFPB supervision and examinations will mean big changes for the nonbank auto finance market. Larger participants now have the opportunity to prepare for their first examination by carefully reviewing the published examination procedures against their policies and practices and to initiate any needed enhancements.

---

[1] 79 FR 60762 (Oct. 8, 2014)

Authors

David W. Ogden

PARTNER

Chair, Government and Regulatory Litigation Practice Group

david.ogden@wilmerhale.com

+1 202 663 6440

Franca Harris Gutierrez

PARTNER

Chair, Financial Institutions Practice

Co-Chair, Securities and Financial Regulation Practice

franca.gutierrez@wilmerhale.com

+1 202 663 6557