BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1090

[Docket No. CFPB–2012–0005]

RIN 3170–AA00

Defining Larger Participants of the Consumer Reporting Market

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is publishing a final rule pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. That statute grants the Bureau authority to supervise certain nonbank covered persons for compliance with Federal consumer financial law and for other purposes. The Bureau has the authority to supervise nonbank covered persons of all sizes in the residential mortgage, private education lending, and payday lending markets. In addition, the Bureau has the authority to supervise nonbank ''larger participant[s]'' of markets for other consumer financial products or services, as the Bureau defines by rule. An initial rule to define such larger participants must be issued by July 21, 2012. The Bureau issues this final rule to define larger participants of a market for consumer reporting. The final rule thereby facilitates the supervision of nonbank covered persons active in that market.

DATES: Effective September 30, 2012.

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SUPPLEMENTARY INFORMATION: On February 17, 2012, the Bureau published a notice of proposed rulemaking proposing tests for defining larger participants of two markets identified by the Bureau: consumer reporting and consumer debt collection. The Bureau issues this final rule to define larger participants of a market for consumer reporting. After the issuance of this final rule, the Bureau will take further action regarding the proposed consumer debt collection market. This initial rule to define larger participants will be followed by a series of rulemakings covering additional markets for consumer financial products and services.

I. Overview

Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] established the Bureau of Consumer Financial Protection (Bureau) on July 21, 2010. One of the Bureau's responsibilities under the Dodd-Frank Act is the supervision of certain nonbank covered persons,[2] and very large banks, thrifts, and credit unions and their affiliates.[3]

Under 12 U.S.C. 5514, the Bureau has supervisory authority over nonbank covered persons of any size offering or providing three enumerated types of consumer financial products or services: (1) Origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans.[4] The Bureau also has supervisory authority over ''larger participant[s] of a market for other consumer financial products or services,'' as the Bureau defines by rule.[5] The Bureau is authorized to supervise nonbank entities subject to 12 U.S.C. 5514 of the Dodd-Frank Act by requiring the submission of reports and conducting examinations to: (1) Assess compliance with Federal consumer financial law; (2) obtain information about such persons' activities and compliance systems or procedures; and (3) detect and assess risks to consumers and to consumer financial markets.[6] The Bureau is required to issue an initial larger participant rule by July 21, 2012.

This final rule establishes, in part, the scope of the Bureau's supervision authority for nonbank covered persons [7] under 12 U.S.C. 5514, by defining ''larger participants'' of a market for consumer reporting.[8] The Bureau intends the final rule to be the first in a series of rules to define larger participants of other markets. After the issuance of this rule, the Bureau will take further action relating to its notice of proposed rulemaking to define larger participants of a market for consumer debt collection.

The final rule pertains only to defining larger participants of a specified market and thereby delineating, in part, the scope of the Bureau's nonbank supervision authority. It does not impose new substantive consumer protection requirements. Nor does it delineate the scope of the Fair Credit Reporting Act (FCRA), provisions of the Dodd-Frank Act related to consumer reporting activities, or any other Federal consumer financial law. Nonbank covered persons generally are subject to the Bureau's regulatory and enforcement authority, and any applicable Federal consumer financial law, regardless of whether they are subject to the Bureau's supervisory authority.

II. Background

On June 29, 2011, through a notice and request for comment (Notice), the Bureau solicited public comment on developing a proposed larger participant rule.[9] The Bureau also held a series of roundtable discussions with industry, consumer and civil rights groups, and State regulatory agencies and associations.[10] The Bureau considered

[1] Public Law 111–203 (12 U.S.C. 5301 *et seq.*).

[2] The provisions of 12 U.S.C. 5514 apply to nondepository (nonbank) covered persons and expressly exclude from coverage persons described in 12 U.S.C. 5515(a) or 5516(a). A ''covered person'' means ''(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (A)] if such affiliate acts as a service provider to such person.'' 12 U.S.C. 5481(6); *see also* 12 U.S.C. 5481(5) (defining ''consumer financial product or service''). Under 12 U.S.C. 5514(d), subject to certain exceptions, ''to the extent that Federal law authorizes the Bureau and another Federal agency to * * * conduct examinations, or require reports from a [nonbank covered person] under such law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to * * * conduct examinations [and] require reports * * * with regard to a [nonbank covered person], subject to those provisions of law.''

[3] *See* 12 U.S.C. 5515(a). The Bureau also has certain authorities relating to the supervision of other banks, thrifts, and credit unions. *See* 12 U.S.C. 5516(c)(1), (e). The Bureau notes that one of the objectives of the Dodd-Frank Act is to ensure that ''Federal consumer financial law is enforced consistently without regard to the status of a person as a depository institution, in order to promote fair competition.'' 12 U.S.C. 5511(b)(4).

[4] 12 U.S.C. 5514(a)(1)(A), (D), and (E).

[5] 12 U.S.C. 5514(a)(1)(B), (a)(2). The Bureau also has the authority to supervise any nonbank covered person that it ''has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity * * * to respond,'' that such covered person ''is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.'' 12 U.S.C. 5514(a)(1)(C). The Bureau has published a notice of proposed rulemaking to establish uniform procedures relating to this provision of the Dodd-Frank Act. 77 FR 31226 (May 25, 2012).

[6] 12 U.S.C. 5514(b)(1).

[7] The Bureau's supervision authority also extends to service providers of covered persons subject to supervision under 12 U.S.C. 5514. *See* 12 U.S.C. 5514(e) (establishing the Bureau's supervisory authority relating to service providers); *see also* 12 U.S.C. 5481(26) (defining ''service provider'').

[8] The final rule describes one market for consumer financial product or services, which the rule labels ''consumer reporting.'' The definition in the rule does not encompass all activities that could be considered consumer reporting. Any reference herein to ''the consumer reporting market'' means only the particular market for consumer reporting identified by the final rule.

[9] 76 FR 38059 (June 29, 2011).

[10] In July 2011, the Bureau held four roundtable discussions on the Notice. More than 70

the comments it received in connection with the Notice in developing a proposed rule to define larger participants of two markets for consumer financial products or services: consumer debt collection and consumer reporting. The Bureau published a notice of proposed rulemaking on February 17, 2012 (Proposed Rule or Proposal).[11] The Bureau requested and received public comment on the Proposed Rule.

The Proposed Rule defined certain terms, including ''affiliated company,'' ''annual receipts,'' ''consumer reporting,'' and ''nonbank covered person.'' The Proposed Rule also set forth a test for determining whether a nonbank covered person is a larger participant of the consumer reporting market.[12] Under this test, a nonbank covered person with more than $7 million in annual receipts resulting from consumer reporting activities described in the Proposed Rule would be a larger participant of the consumer reporting market. As defined in the Proposed Rule, the determination of annual receipts is generally derived from a three-year average of receipts. Under the Proposed Rule, once a nonbank covered person met a larger-participant test for a particular market, the person would retain larger-participant status for a period of at least two years. The Proposed Rule also set forth a procedure for a person to challenge an assertion by the Bureau that the person qualified as a larger participant of a covered market and a mechanism by which the Bureau could request information to assess whether a person is a larger participant.

The Bureau received 82 comments on the Proposed Rule from, among others, consumer groups, industry trade associations, companies, State financial services agencies, and individuals. These comments are discussed in more detail below in the section-by-section analysis of the final rule.

III. Summary of the Final Rule

The final rule is the first in what the Bureau intends to be a series of rules to define ''larger participants'' of specific markets for purposes of establishing, in part, the scope of coverage of the Bureau's nonbank supervision program. The rule contains two main components. Subpart A establishes general definitions, concepts, protocols, and procedures relating to the Bureau's supervision of larger participants and assessment of whether entities are larger participants. Subpart B identifies a market for consumer reporting, defines the term ''annual receipts'' for purposes of measuring participation in that market, and sets forth the test for assessing which entities are larger participants of that market. As the Bureau identifies additional markets in which to supervise larger participants, the Bureau expects to include the relevant market descriptions and larger-participant tests in Subpart B.

In its general provisions under Subpart A, the final rule defines terms relevant to the rule, such as ''affiliated company,'' ''consumer financial product or service,'' and ''nonbank covered person,'' adopting (with minor modifications) the proposed definitions for these terms. The final rule adopts the provision of the Proposed Rule that once a nonbank covered person qualifies as a larger participant, the person will be deemed a larger participant for a period not less than two years from the first day of the tax year in which the person last met the applicable test. The final rule also adopts the proposed procedure for a person to challenge that it qualifies as a larger participant, during a specified time period after being notified by the Bureau that the Bureau intends to conduct some type of supervision activity in connection with the person. However, in response to comments, the Bureau has extended the specified time period from 30 days to 45 days. To facilitate the Bureau's supervision of nonbank covered persons, to enable the Bureau to carry out the purposes and objectives of the Dodd-Frank Act relating to supervision, and to prevent evasion, the final rule also adopts the proposed provision that the Bureau may require submission of records, documents, and other information for purposes of assessing whether a person is a larger participant of a covered market.

Under Subpart B, the final rule defines the term ''consumer reporting'' by describing market-related activities; defines the term ''annual receipts,'' the criterion by which entities' level of participation in the consumer reporting market is measured; and sets forth the test for which participants are larger participants. The consumer reporting market, as defined in the final rule, includes consumer reporting agencies selling consumer reports, consumer report resellers, analyzers of consumer reports and other account information (analyzers), and specialty consumer reporting agencies (collectively referred to as consumer reporting entities). As a general matter, some consumer reporting agencies collect, among other information, information about credit accounts, items sent for collection, and public records such as judgments and bankruptcies. Resellers purchase consumer information from one or more of the agencies that collect information, typically provide further input to the consumer report (including by merging files from multiple agencies or adding information from other data sources), and then resell the report to lenders and other users. Analyzers apply statistical and other methods to consumer reports and other account information to facilitate the interpretation of such information and its use in decisions regarding other products and services. Certain analyzers develop and sell credit scoring services and products. Specialty consumer reporting agencies primarily collect and provide specific types of information that may be used to make decisions regarding particular consumer financial products or services, such as payday loans or checking accounts, or for other determinations, such as eligibility for employment or rental housing. However, some of these specialty consumer reporting agencies, depending on their activities, may not be engaged in offering or providing consumer financial products or services within the meaning of the Dodd-Frank Act, and therefore would not, on the basis of their activities, become ''covered persons'' subject to the Bureau's supervisory authority.[13] These exclusions are implemented in the definition of ''consumer reporting'' in the final rule.

As detailed in the Proposal, consumer reporting is a consumer financial product or service that is of fundamental importance to markets for many other consumer financial products and services. Consumer reports (sometimes referred to as ''credit reports''), which may contain information about consumers' credit histories and other transactions, and the

stakeholders participated, representing a diverse mix of nonbank and bank trade associations and consumer advocacy and civil rights groups. The roundtables focused on key issues regarding how to define larger participants, including what criteria to measure, where to set thresholds, available data sources, and which markets to cover. Also in July 2011, the Bureau held a multistate regulator and regulatory association conference call that had more than 40 participants.

[11] 77 FR 9592 (Feb. 17, 2012).

[12] As noted above, the Proposed Rule also addressed a market for consumer debt collection; that market will be the subject of a later publication.

[13] *See* 12 U.S.C. 5481(15)(A)(ix). Under the final rule, ''consumer reporting'' does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely regarding a decision for employment, government licensing, or a residential lease or tenancy involving a consumer, or 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.

credit scores derived from credit files, affect many aspects of consumers' lives. Consumer reports are important tools that lenders use to assess borrower risk when evaluating applications for credit cards, home mortgage loans, automobile loans, and other types of credit. Consumer reports may also be used to determine eligibility and pricing for other types of products and services, such as checking accounts. The consumer reporting market affects hundreds of millions of consumers. The Consumer Data Industry Association (CDIA), a trade association that represents, among others, the consumer reporting industry, estimates that each year there are more than 36 billion updates made to consumer files at consumer reporting agencies,[14] and three billion reports issued.[15] It also estimates that each of the three largest consumer reporting agencies maintains credit files on more than 200 million consumers.[16] Because of the significant connections between consumer reporting and other consumer financial products and services, supervision of consumer reporting will further the Bureau's mission to ensure that all consumers have access to fair, transparent, and competitive markets for such products and services.[17]

The final rule establishes a test, based on ''annual receipts,'' to assess whether a nonbank covered person is a larger participant of the consumer reporting market. The definition of ''annual receipts'' is adapted from the definition of the term used by the Small Business Administration (SBA) for purposes of defining small business concerns. The final rule adopts the proposed test for qualifying as a larger participant of the consumer reporting market: More than $7 million in annual receipts resulting from relevant consumer reporting activities. Covered persons meeting the test qualify as larger participants and are subject to the Bureau's supervision authority under 12 U.S.C. 5514. The test to assess larger-participant status set forth in the final rule is tailored to the consumer reporting market identified by the rule. The Bureau has not determined that annual receipts, or a threshold of $7 million in annual receipts, would be appropriate for any other market that may be the subject of a future larger participant rulemaking. Rather, the Bureau will tailor each test for defining larger participants to the market to which it will be applied.

IV. Legal Authority and Effective Date

A. Rulemaking Authority

The Bureau is issuing this final rule pursuant to its authority under: (1) 12 U.S.C. 5514(a)(1)(B) and (a)(2), which authorize the Bureau to supervise larger participants of markets for consumer financial products or services, as defined by rule, and require the Bureau to issue an initial such rule by July 21, 2012; [18] (2) 12 U.S.C. 5514(b)(7), which, among other things, authorizes the Bureau to prescribe rules to facilitate the supervision of covered persons under 12 U.S.C. 5514; and (3) 12 U.S.C. 5512(b)(1), which grants the Bureau the authority to prescribe rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial law, and to prevent evasions of such law.

B. Effective Date of Final Rule

The Bureau proposed an effective date of 30 days after the publication of the final rule, noting that the Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective dates.[19] The Bureau received a few comments requesting a postponement of the effective date.

Two industry commenters urged the Bureau to adopt an effective date at least 180 days after issuance of the final rule. One of these commenters, representing the consumer reporting industry, asked the Bureau to consider the fact that some of the companies affected by the final rule have never been examined at the Federal or State level and will need time to develop processes and engage in training to prepare for examinations. Another commenter, representing online payday lenders, stated that the Bureau should adopt an effective date no earlier than six months after issuance of the final rule and one year after publication by the Bureau of final examination manuals and procedures for the markets covered in the Proposed Rule. This commenter noted that, unlike the various examination procedures for banks and lenders that the Bureau has released, any such procedures with respect to the covered markets published by the Bureau will be completely new, and industry will need time to prepare for examinations.

The Bureau appreciates the fact that supervision by a Federal agency will be new to many larger participants of the consumer reporting market. The Bureau does not believe, however, that this is a sufficient reason for a substantial delay of the effective date of the final rule. The final rule itself does not impose substantive conduct requirements with respect to which larger participants might require time to come into compliance. Although larger participants might choose to increase their compliance with Federal consumer financial law in response to the possibility of supervision, market participants are already obligated to comply, and should already be in compliance with, applicable Federal consumer financial law, regardless of whether they are subject to supervision. Thus, entities that qualify as larger participants under the final rule should not require additional time to come into compliance with Federal consumer financial law. In addition, the Bureau is concerned that postponing the effective date by too much would unnecessarily delay the Bureau's supervision of larger participants of the consumer reporting market. This could adversely affect consumers because, among other reasons, the Bureau would be delayed, with respect to the consumer reporting activities covered by the rule, in assessing compliance with Federal consumer financial law, detecting and assessing risk to consumers, and obtaining information about activities and compliance systems or procedures, and thus delayed in taking any appropriate corrective action.

The Bureau believes that, for the reasons described above, a long postponement of the effective date as suggested by the commenters is not warranted. However, in balancing the requests for a longer pre-effective date period with the Bureau's view that too lengthy a period would be detrimental to consumers, the Bureau believes it is

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[14] Stuart Pratt, President, CDIA, Statement Before House Committee on Financial Institutions and Consumer Credit, ''Keeping Score on Credit Scores: An Overview of Credit Scores, Credit Reports, and their Impact on Consumers,'' at 7 (March 24, 2010), *available at* (*http://www.house.gov/apps/list/hearing/financialsvcs_dem/pratt_testimony.pdf*). *See also* Federal Trade Commission, Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003 at 8–9 (2004).

[15] *See* Stuart Pratt, President, CDIA, Statement Before House Committee on Financial Services, ''Credit Reports: Consumers' Ability to Dispute and Change Inaccurate Information,'' at 23 (June 19, 2007), *available at http://archives.financialservices.house.gov/hearing110/ospratt061907.pdf.*

[16] Stuart Pratt, Comments of CDIA to National Telecommunications and Information Administration, ''Information Privacy and Innovation in the Internet Economy,'' at 2 (June 13, 2010), *available at http://ntia.doc.gov/files/ntia/comments/100402174-0175-01/attachments/Consumer%20Data%20Industry%20Association%20Comments.pdf.*

[17] 12 U.S.C. 5511(a).

[18] July 21, 2012, is one year after the Bureau's ''designated transfer date.'' This was the date on which certain authorities transferred from other Federal agencies to the Bureau. 12 U.S.C. 5581; *see* 12 U.S.C. 5582 (mechanism for setting ''designated transfer date''); 75 FR 57252 (Sept. 20, 2010) (establishing ''designated transfer date'' as July 21, 2011).

[19] 5 U.S.C. 553(d).

reasonable to extend the effective date to September 30, 2012, to give entities some time to prepare for Federal supervision, and adopts this effective date for the final rule. As compared with the Proposal, this new effective date will provide more than double the time between the publication date and the date when entities may be subject to Bureau supervision under the rule.

V. Section-By-Section Analysis of the Final Rule [20]

Subpart A—General

Section 1090.100—Scope and Purpose

Proposed § 1090.100 set forth the scope and purpose of Part 1090. It stated that the Part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services, pursuant to 12 U.S.C. 5514(a)(1)(B) and (a)(2). Proposed § 1090.100 further explained that a larger participant of a market covered by the Part will be subject to the supervisory authority of the Bureau under 12 U.S.C. 5514. Finally, § 1090.100 provided that the Part establishes rules to facilitate the Bureau's supervisory authority over larger participants pursuant to 12 U.S.C. 5514(b)(7).

The Bureau received one comment recommending that the Bureau clarify that the scope and purpose of the final rule does not include the supervision of nonprofit organizations engaged in offering credit counseling services. This comment relates specifically to the market for consumer debt collection and will be addressed in the final rule for that market. The Bureau notes, however, that the Bureau does not believe that the scope and purpose section is the appropriate place to exclude any type of activity from a market covered by the final rule. Subpart B addresses the nature and scope of activities included in the market covered by the rule.

Section 1090.100 is adopted as proposed, with minor technical amendments for consistency.

Section 1090.101—Definitions

Section 1090.101 defines terms used in the final rule that are applicable both to the consumer reporting market and to other markets that may be addressed in future rulemakings. If a term is defined in the Dodd-Frank Act, the final rule generally incorporates that definition, with clarifications and modifications as appropriate. The Bureau received comments on a number of definitions set forth in the Proposed Rule and discusses the comments below in the context of the definition to which they relate.

Affiliated company. To compute activity levels for purposes of 12 U.S.C. 5514(a)(1) and its implementing rules, 12 U.S.C. 5514(a)(3)(B) provides that the activities of affiliated companies (other than insured depository institutions or insured credit unions) shall be aggregated. The term ''affiliated company'' is not defined in the Dodd-Frank Act. The Proposed Rule defined the term ''affiliated company'' in a manner guided by the definition of ''affiliate'' set forth in the Dodd-Frank Act,[21] with modifications to track the requirements of 12 U.S.C. 5514(a)(3)(B). Thus, the Proposed Rule stated that the term ''affiliated company'' of a person means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with the person.

For purposes of the definition of ''affiliated company,'' the Proposed Rule provided that the term ''company'' means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization. The Bureau received one comment suggesting that this definition be revised to include professional corporations and professional limited liability companies. The Bureau believes that the proposed definition, which encompasses ''similar organization[s]'' to those expressly enumerated, is sufficiently broad to cover professional corporations and professional limited liability companies, as well as other forms of organization comparable to those on the enumerated list that exist or may arise. Thus, the Bureau deems the suggested amendment unnecessary.

Also for purposes of the definition of ''affiliated company,'' the Proposed Rule set forth when a person would be considered to have control over another person, guided by the definitions of the term ''control'' provided in section 2 of the Bank Holding Company Act (BHCA) (12 U.S.C. 1841) and rules issued by other Federal financial regulators.[22] The proposed definition provided that a person has control over another person if: (i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person; (ii) the person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or (iii) the person directly or indirectly exercises a controlling influence over the management or policies of the other person, as determined by the Bureau.

The Bureau received a number of comments from consumer groups requesting that the Bureau include in the final rule provisions to prevent market participants from structuring business forms and activities to evade coverage as larger participants. For example, one commenter suggested that the Bureau should prevent evasion by aggregating not only the revenues of ''affiliated companies,'' but also those of ''joint enterprises,'' defined as two or more companies that act with a common purpose, in coordination, or through a contractual relationship to provide consumer financial products or services. Similarly, many consumer groups suggested aggregating the receipts of a firm's agents and contractors.

The Bureau understands commenters' concern regarding possible evasion of the final rule that could potentially occur by a market participant's structuring business activities through separate entities. For example, a covered person might attempt evasion by dividing its consumer reporting tasks among several unaffiliated companies, each having less than $7 million in annual receipts, to avoid Bureau supervision. However, control or common control is a prerequisite for being an ''affiliate'' under the Dodd-Frank Act; and the Bureau likewise proposed to make control or common control a prerequisite for being an ''affiliated company.'' [23] The Bureau further believes that the test for control in the Proposal, which considered, among other things, whether one person directly or indirectly exercises a controlling influence over the management or policies of another, provides an adequate tool to address the type of structuring to evade supervision coverage that the commenters describe. The Bureau therefore declines to amend

[20] The Bureau notes that the final rule is structured differently than the Proposed Rule. Unlike the Proposed Rule, the final rule is divided into Subparts A and B, as described in the Summary of Final Rule (Section III) above, resulting in different section numbers. This section-by-section analysis refers to the section numbers in the final rule except as otherwise noted.

[21] 12 U.S.C. 5481(1).

[22] See, *e.g.,* 12 CFR 41.3(i) (Office of the Comptroller of the Currency (OCC) rule defining ''common ownership or common corporate control'' in connection with the FCRA); 12 CFR 336.3(b) (Federal Deposit Insurance Corporation (FDIC) rule defining ''control'' in connection with post-employment restrictions on former FDIC examiners); 12 CFR 1805.104(q) (Department of the Treasury rule defining ''control'' in connection with the Community Development Financial Institutions Program).

[23] *See* 12 U.S.C. 5481(1) (definition of ''affiliate'').

the Proposal to require aggregation of the annual receipts of ''joint enterprises'' or of companies that have only a cooperative or contractual relationship but otherwise do not satisfy a test for control in the final rule.

A few industry commenters objected more generally to one concept of control recognized in the proposed definition, in which one person directly or indirectly exercises a controlling influence over the management or policies of another. These commenters stated that a potential larger participant would not know in advance which companies it is deemed to exercise a controlling influence over, and therefore how to calculate its aggregated annual receipts. Normally, the Bureau believes, a market participant could use reasonable judgment to determine whether it has an affiliated company whose annual receipts would be aggregated with its own. In addition, under the final rule, prior to undertaking supervisory activity in connection with a market participant, the Bureau would notify the participant of its intent; the market participant would then have the opportunity, pursuant to § 1090.103 of the final rule, to challenge its status as a larger participant, including on the ground that its annual receipts should not be aggregated with those of certain other companies. Accordingly, the Bureau believes that, in the context of the procedures set forth in the final rule, the proposed definition of ''control'' provides market participants sufficient advance guidance regarding their status as larger participants and does not believe it is necessary to amend the proposed test for control to address these commenters' concerns. Moreover, as indicated above, the Bureau believes it is necessary and appropriate to have a definition of ''control'' that is sufficiently flexible to prevent evasion of the rule.

One commenter also expressed concern that if a large company handles a small firm's day-to-day operations, as a service, the larger firm would be considered to exercise a controlling influence. Therefore, according to this commenter, the ''controlling influence'' test for control could distort the market for such services. It could also, this commenter said, unfairly sweep a small firm into the category of larger participants, based solely on the small firm's use of a larger participant for such operational services. As defined in the Proposed Rule, mere execution of certain of another company's activities would not constitute ''control'' over that company. Rather, under the proposed definition of the term, to constitute control, one person must directly or indirectly exercise a controlling influence over the management or policies of another person. The Bureau notes that under the Proposal, the Bureau would evaluate for each company it reviews whether one person has a controlling interest over another, based on the particular facts and circumstances of the relationship.[24] If one company does in fact have a controlling influence over another's management or policies, the Bureau believes that it is appropriate to aggregate the annual receipts of the companies for purposes of assessing larger-participant status, and that this would not be unfair to a smaller company that is controlled by a larger one. Therefore the Bureau declines to amend the Proposal to delete the ''controlling influence'' test.

Commenters also argued that before determining that one person exercises a controlling influence over another, the Bureau should provide notice and an opportunity for a hearing. The Bureau recognizes that some other Federal statutes, such as the BHCA, provide for hearings in assessing whether one company has a controlling influence over another.[25] At the same time, a number of other Federal statutes and regulations that contain ''controlling influence'' provisions do not contain hearing provisions.[26] The Bureau believes that the need for a hearing, as under the BHCA, is not present here. Under the BHCA, the Board of Governors of the Federal Reserve System must approve the establishment of a bank holding company.[27] A person that controls a bank holding company is itself a bank holding company under the BHCA.[28] The activities of a bank holding company are highly regulated by the Board of Governors.[29] Thus, a finding of control under the BHCA has a much more significant consequence than a finding of control would have under the final rule. In the case of the final rule, the consequence of companies' being affiliated by means of a ''controlling influence'' is that their annual receipts would be aggregated for purposes of assessing whether they are larger participants of a covered market, and thus subject to supervision by the Bureau's supervisory authority.[30] The companies would not be subject to any new substantive conduct requirements as a result. As discussed below, being subject to supervision is not a consequence that necessitates a hearing, as a matter of due process, on the general question whether a company is a larger participant. A hearing is similarly not necessary on the predicate issue of whether two companies are affiliated. Therefore, the Bureau believes that a hearing provision is not warranted for the final rule and declines to add such a provision.

Several industry commenters argued that owning voting securities or similar interests should not constitute control until a person owns 50 percent, rather than 25 percent, of any class of voting securities or similar interest. One pointed out that if the threshold is only 25 percent, a given entity could be an ''affiliated company'' of several persons, if each such person owned just over 25 percent of a class of voting securities. The Bureau notes the 25 percent threshold test is used in a number of statutes and regulations to determine whether one person controls another in the context of financial institutions.[31] The Bureau believes that this widely used threshold is appropriate for the final rule. The Bureau is concerned that increasing the ownership threshold from 25 percent to 50 percent would mean that if one person owns 49 percent of a company, and three others separately owned the remaining 51 percent of that company, no person would be deemed to control that company, absent the presence of a ''controlling influence.'' The Bureau believes that raising the ownership threshold as requested would too easily

[24] If two companies might be considered affiliates due to a ''controlling influence,'' the Bureau might assert that their aggregated receipts placed them over the threshold for a relevant market. After issuing correspondence initiating supervisory activity, pursuant to § 1090.103 of the final rule, the Bureau would entertain arguments that the companies were not linked by a ''controlling influence,'' along with other arguments relating to larger-participant status. The Proposed Rule's use of the phrase ''as determined by the Bureau'' was not meant to suggest that the Bureau would make a prior determination with respect to ''controlling influence.'' The Bureau therefore omits that phrase from the definition of ''control'' in the final rule.

[25] 12 U.S.C. 1841.

[26] 12 CFR 41.3(i) (the OCC's definition of ''control'' under the FCRA); 12 CFR 717.3(i) (the National Credit Union Administration's (NCUA) definition of ''control'' under the FCRA); 12 CFR 1805.104(q) (Treasury Department's definition of ''control'' for purposes of the Community Development Financial Institutions Program); 12 CFR 336.3 (the FDIC's definition of ''control'' for purposes of post-employment restrictions on former FDIC examiners).

[27] 12 U.S.C. 1842.

[28] 12 U.S.C. 1841(a)(1).

[29] See, *e.g.,* 12 U.S.C. 1843 (restricting activities in which a bank holding company may engage).

[30] 12 U.S.C. 5514(b)(1).

[31] 12 U.S.C. 1841 (BHCA); 12 CFR 41.3(i) (the OCC's definition of ''control'' under the FCRA); 12 CFR 717.3(i) (the NCUA's definition of ''control'' under the FCRA); 12 CFR 1805.104(q) (Treasury Department's definition of ''control'' with respect to Community Development Financial Institutions Program); 12 CFR 336.3 (the FDIC's definition of ''control'' for purposes of post-employment restrictions on former FDIC examiners).

permit evasion of, or attempts to evade, the aggregation requirement. The Bureau therefore declines to increase the ownership threshold to 50 percent.

Finally, one commenter argued that when a company acquires another firm, the acquiring company cannot immediately exercise control over the target's operations. This commenter requested a grace period of 12 months after the acquisition, during which the target firm would not be considered an ''affiliated company'' for purposes of this rule. The Bureau believes that when one company acquires another, the acquiring company in fact controls the acquired company at the time of the transaction. This is true even if the acquiring company chooses to exercise that control by maintaining the status quo. The Bureau also notes that ''control'' is a concept used only to implement the aggregation requirement under 12 U.S.C. 5514(a)(3)(B) in connection with assessing whether a person is a larger participant of a market for consumer financial products or services. Even assuming the acquirer lacks effective control over the acquired company immediately after the acquisition, the annual receipts of the combined company are nonetheless an appropriate measure of the resulting company's market participation. Accordingly, the Bureau declines to amend the Proposed Rule to provide a 12-month grace period as requested.

For all of the foregoing reasons, the Bureau adopts the definition of ''affiliated company'' with minor technical amendments for consistency.

Assistant Director. The Proposed Rule stated that the term ''Assistant Director'' means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. The Proposed Rule further stated that the Director of the Bureau may perform the functions of the Assistant Director as set forth in the Proposed Rule, and that, in the event there is no Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director. The Bureau received no substantive comments on this definition and adopts the definition as proposed, with minor technical amendments for consistency.

Bureau. The Proposed Rule stated that the term ''Bureau'' means the Bureau of Consumer Financial Protection. The Bureau received no substantive comments on this definition and adopts the definition as proposed, with minor technical amendments for consistency.

Completed fiscal year. The Proposed Rule stated that the term ''completed fiscal year'' meant any tax year including any short tax year. The Bureau did not receive any objections to the proposed definition. However, the Bureau believes that a calendar year, a 12-month period ending on December 31, could be an appropriate tax year for purposes of this Part. For this reason, and for clarification purposes, the final rule amends the Proposed Rule to define ''completed fiscal year'' as a tax year including any fiscal year, calendar year, or short tax year,[32] with other minor technical amendments for consistency.

Consumer. The Proposed Rule's definition of ''consumer'' is the same as that set forth in 12 U.S.C. 5481(4). The Proposed Rule provided that the term ''consumer'' means an individual or an agent, trustee, or representative acting on behalf of an individual. The Bureau did not receive any substantive comments addressing the proposed definition and adopts the definition as proposed, with minor technical amendments for consistency.

Consumer financial product or service. The Proposed Rule incorporated the definition of the term ''consumer financial product or service'' set forth in 12 U.S.C. 5481(5). Thus, the Proposed Rule stated that the term ''consumer financial product or service'' means any financial product or service as defined in 12 U.S.C. 5481(15) that is described in one or more categories under: (a) 12 U.S.C. 5481(15)(A) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or (b) clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A)[33] and is delivered, offered, or provided in connection with a consumer financial product or service referred to in the immediately preceding subparagraph. The Bureau did not receive substantive comments on the definition of the term ''consumer financial product or service'' and adopts the definition as proposed, with minor technical amendments for consistency.

Dodd-Frank Act. The Proposed Rule stated that the term ''Act'' means the Consumer Financial Protection Act of 2010. The Bureau did not receive any substantive comments on the proposed definition. For purposes of consistency with other Bureau rulemakings, the final rule replaces the defined term ''Act'' with ''Dodd-Frank Act,'' and otherwise adopts the definition as proposed with minor technical amendments for consistency.

Larger participant. The Proposed Rule defined the term ''larger participant'' to mean a nonbank covered person that meets a test under Subpart B, and which remains a larger participant for the period provided in § 1090.102. The Bureau did not receive substantive comments on this definition and adopts the definition as proposed, with minor technical amendments for consistency.

Nonbank covered person. The scope of coverage of the Bureau's supervisory authority under 12 U.S.C. 5514 relates to ''covered persons,'' as defined in 12 U.S.C. 5481(6), that are neither insured depository institutions or credit unions, nor affiliates of those insured depository institutions or credit unions with assets of more than $10 billion, as set forth in 12 U.S.C. 5515(a) and 5516(a). Thus, the proposed definition excluded persons described in 12 U.S.C. 5515(a) and 5516(a) and provided that the term ''nonbank covered person'' means, except for persons described in those sections: (1) Any person that engages in offering or providing a consumer financial product or service; and (2) any affiliate of a person described in subparagraph (1) of this paragraph if such affiliate acts as a service provider to such person. The Bureau did not receive any substantive comments on the definition of ''nonbank covered person'' and adopts the definition as proposed, with minor technical amendments for consistency.

Person. The Proposed Rule incorporated the definition of ''person'' set forth in 12 U.S.C. 5481(19). The Proposed Rule thus stated that the term ''person'' means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity. The Bureau did not receive any substantive comments on the definition of ''person'' and adopts the definition as proposed, with minor technical amendments for consistency.

Supervision and supervisory activity. The Proposed Rule defined the terms ''supervision'' and ''supervisory activity'' to mean the Bureau's exercise,

[32] The final rule provides that a ''fiscal year'' is 12 consecutive months ending on the last day of any month except December 31. A ''calendar year'' is 12 consecutive months beginning on January 1 and ending on December 31. A ''tax year'' is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a ''short tax year.'' A ''short tax year'' is a ''tax year'' of less than 12 months. IRS Publication 538, *available at http://www.irs.gov/publications/p538/ar02.html.*

[33] Under these clauses, the term ''financial product or service'' is generally defined to include, subject to certain exclusions: (1) Extending credit and servicing loans, 12 U.S.C. 5481(15)(A)(i); (2) providing real estate settlement services or performing appraisals of real estate or personal property, 12 U.S.C. 5481(15)(A)(iii); (3) collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, 12 U.S.C. 5481(15)(A)(ix); and (4) collecting debt related to any consumer financial product or service, 12 U.S.C. 5481(15)(A)(x).

or intended exercise, of supervisory authority, including by initiating or undertaking an examination, or requiring a report, of a nonbank covered person pursuant to 12 U.S.C. 5514. The Bureau did not receive any substantive comments suggesting changes to the definition of ''supervision'' and ''supervisory activity'' and adopts the definition as proposed, with minor technical amendments for consistency.

The Bureau did, however, receive several comments related to the scope and exercise of the Bureau's supervisory authority. One group representing industry participants requested further detail about what an examination or supervision report would entail. Supervision may involve requests for information or records, on-site or off-site examinations, or some combination of these activities. While the specifics of an examination may vary by market and by firm, the following applies generally to the supervision process. Typically, Bureau officials begin an on-site examination by contacting the firm for an initial conference with management, and often by also requesting records and information. Based on these discussions and an initial review of the information received, examiners will determine the scope of an on-site examination, and then coordinate with the firm to initiate the on-site portion of the examination. While on-site, examiners will spend a period of time holding discussions with management about the company's processes and procedures; reviewing documents, records, and accounts for compliance; and evaluating the firm's compliance management systems. As with the Bureau's bank examinations, examinations of nonbanks will involve issuing confidential examination reports and compliance ratings.

The Bureau additionally notes that it has published a general examination manual describing the Bureau's supervisory approach and processes, as well as substantive legal areas subject to examination. This manual is available on the Bureau's Web site.[34] As explained in the examination manual, reports of examination will be structured to address various factors related to a supervised entity's compliance with Federal consumer financial law and other relevant considerations. The Bureau intends to release examination procedures specific to consumer reporting prior to beginning examinations.

One consumer group commented that where the Bureau has supervisory authority over a larger participant by virtue of its participation in a particular market, the Bureau should examine all of the entity's activities related to consumer financial products or services, even those that pertain to markets in which the entity is not a larger participant. A commenter from the consumer reporting industry, on the other hand, asked the Bureau to make clear that it will exclude from its examination of a larger participant of a market areas of the company's operations outside that particular market.

The Dodd-Frank Act authorizes the Bureau to supervise ''covered person[s]'' described in 12 U.S.C. 5514(a)(1)(A) through (E). By granting the Bureau supervisory authority over such ''covered persons,'' as opposed to over particular activities in which they engage, the Dodd-Frank Act establishes that the Bureau's supervisory authority is not limited to the products or services that qualified a person for supervision, but also includes other activities of such a person that involve other consumer financial products or services or are subject to Federal consumer financial law.[35] This broad supervisory scope is consistent with the purposes that the Dodd-Frank Act sets out for the Bureau's supervisory activities. Specifically, the Dodd-Frank Act directs the Bureau to require reports and conduct examinations on a periodic basis of the ''persons'' described in 12 U.S.C. 5514(a)(1) for purposes of (a) assessing compliance with the requirements of Federal consumer financial law, (b) obtaining information about the activities and compliance systems or procedures of such persons, and (c) detecting and assessing risks to consumers and to markets for consumer financial products and services.[36] In many cases, these broad purposes could not be accomplished if the scope of the Bureau's examinations and report requests were limited to the particular products or services that qualified a person for the Bureau's supervision. For example, an entity's violation of a provision of the FCRA in connection with activities that fall outside the final rule's definition of consumer reporting would still be relevant to whether the entity has violated a Federal consumer financial law and to whether the entity may pose risks to consumers. Moreover, such a violation of the FCRA may indicate weaknesses in compliance systems and the potential for other violations and related consumer harms.

Accordingly, the Bureau concludes that if an entity is subject to the Bureau's supervisory authority, the Bureau may examine the entire entity for compliance with all Federal consumer financial law, assess enterprise-wide compliance systems and procedures, and assess and detect risks to consumers or to markets for consumer financial products and services posed by any activity of the entity, not just the activities that initially rendered the entity subject to Bureau supervision.

A commenter representing the consumer reporting industry urged the Bureau to publish examination manuals and procedures sufficiently far in advance of any examination or other supervision activity so that affected companies could incorporate such manuals and procedures into their procedures and training. As noted above, the Bureau has published its general examination manual as well as examination procedures for mortgage origination and servicing, and for short-term, small-dollar loans. The examination manual outlines legal requirements under the various laws applicable to the relevant products and services and guides examiners on information they should evaluate regarding compliance with those laws. Many of the laws addressed in the examination manual, including but not limited to the FCRA, are directly applicable to consumer reporting entities, and the Bureau intends to supplement the manual to include procedures specifically addressed to consumer reporting before beginning examinations. As noted in the discussion on the effective date above (Section IV(B)), however, market participants are required to be in compliance with applicable Federal consumer financial law, regardless of whether they are subject to supervision by the Bureau.

The Bureau received several comments regarding the supervision of service providers to larger participants. Neither the Proposed Rule nor the final rule addresses the scope or manner of the Bureau's supervisory authority over service providers to nonbanks pursuant to 12 U.S.C. 5514. The Proposal simply observed that the Dodd-Frank Act vests the Bureau with supervisory authority over service providers.[37] Consequently,

[34] Available at *http://www.consumerfinance.gov/guidance/supervision/manual/*.

[35] For specific references in the Dodd-Frank Act to supervision authority over ''persons'' rather than particular activities see, *e.g.,* 12 U.S.C. 5514(b)(1) (''The Bureau shall require reports and conduct examinations on a periodic basis of 'persons' described in subsection (a)(1) * * *.'') (emphasis added); 12 U.S.C. 5514(a)(1) (''[T]his section shall apply to any covered 'person' who * * *.'') (emphasis added).

[36] 12 U.S.C. 5514(b)(1).

[37] A service provider is a person that provides a material service to a covered person in connection

comments regarding which service providers the Bureau may supervise, and how, are not germane to the final rule.[38]

Section 1090.102—Status as Larger Participant Subject to Supervision

The Proposed Rule stated that a person qualifying as a larger participant shall not cease to be a larger participant under this Part until two years from the first day of the tax year in which the person last met the applicable threshold to be defined as a larger participant.[39] One industry commenter objected to supervision's continuing for a minimum of two years, even if the business immediately falls below the applicable threshold. The Bureau believes that it is important to have sufficient time to undertake and complete supervisory activities, including any necessary follow-up examinations relating to a larger participant, and that less than two years would not be adequate to achieve this goal. Moreover, the threshold is not a precise demarcation of what market participants are ''larger.'' For example, a firm with annual receipts falling below the threshold for the consumer reporting market may still be a relatively large participant of the market, especially if its annual receipts, calculated using the procedures specified in the final rule, were above the threshold within the previous two years. To conclude that such a firm should still be a larger participant within the Bureau's supervisory authority is consistent with setting the threshold at more than $7 million. Indeed, the two-year period is part of the Bureau's definition of ''larger participant,'' a fact the Bureau took into account in setting the threshold for the consumer reporting market at more than $7 million in annual receipts. Accordingly, the Bureau adopts § 1090.102, as proposed in § 1090.103 of the Proposed Rule, with minor technical amendments for consistency.

Section 1090.103—Assessing Status as a Larger Participant

The Bureau explained in the Proposal that it expects to use various data sources, including publicly available data, to identify which nonbank covered persons appear to qualify as larger participants. One commenter asked the Bureau to describe the nature of these ''various data sources.'' The Bureau intends to use any data sources that it determines are appropriate, which may include SEC filings, public shareholder information, industry surveys, or data obtained through proprietary sources. In some instances, if sufficient information is not available to the Bureau to assess a person's larger-participant status, the Bureau may, as discussed below, request information to facilitate such an assessment.

As explained in the Proposal, the Bureau recognizes that there may be instances when the Bureau seeks to supervise a person but that person disputes whether it is a larger participant. The Proposed Rule therefore sets forth a procedure for such a person to challenge its status as a larger participant by providing to the Assistant Director for Nonbank Supervision of the Bureau an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant. The Proposed Rule further permitted a person to include with the response copies of any records, documents, or other information on which the person relied to make the assertion. The Proposed Rule also provided that a person waives the right to rely, in disputing whether it qualifies as a larger participant, on any argument, records, documents, or other information that it failed to submit to the Assistant Director under this section. Moreover, the Proposed Rule stated that a person that fails to respond to the Bureau's written communication within 30 days would be deemed to have acknowledged that it is a larger participant. Under the Proposed Rule, after reviewing the affidavit and any other information submitted by the person challenging its status as a larger participant or deemed relevant by the Assistant Director, the Assistant Director would send the person an electronic transmission explaining whether the person meets the definition of a larger participant. Additionally, the Proposed Rule stated that the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate for assisting assessments of entities' status as larger participants.[40]

These provisions were proposed pursuant to the Bureau's authority under 12 U.S.C. 5514(b)(7). Subparagraph (7)(A) authorizes the Bureau to ''prescribe rules to facilitate [its] supervision'' of, among other things, larger participants of the markets to be covered by regulations like the Proposed Rule. The ability to acquire information to support an assessment of whether a person meets the test for being a larger participant will serve that purpose.[41] In addition, subparagraph (7)(B) authorizes the Bureau to require persons described in 12 U.S.C. 5514(a)(1) to provide records to facilitate the Bureau's supervision. Section 1090.103 of the final rule was also proposed pursuant to 12 U.S.C. 5512(b)(1), which grants the Director of the Bureau the authority to prescribe such rules as may be necessary and appropriate to enable the Bureau to administer and carry out the purposes and objectives of Federal consumer financial law, such as the Bureau's supervision of larger participants, and to prevent evasions of such law. Providing a process whereby entities must come forward with information if they wish to challenge their status as larger participants, and providing the Bureau the ability to obtain information related to the status of persons as larger participants under the rule, is necessary and appropriate for the Bureau to implement and efficiently exercise its supervision authority and to prevent evasion of 12 U.S.C. 5514.

The Bureau received a number of comments on the proposed process for

with a consumer financial product or service. 12 U.S.C. 5481(26)(A). The Dodd-Frank Act provides a non-exhaustive set of examples of such material services. 12 U.S.C. 5481(26)(A).

[38] One commenter suggested that the Bureau publish a policy that it will not examine any service provider until after it has examined the entity receiving the services. The Bureau will consider this comment in the course of its supervision.

[39] For example, assume a nonbank consumer reporting entity's fiscal year ran from July 1 to June 30. Assume the entity had $8 million in receipts in each of the fiscal years of 2011, 2012, and 2013 (July 1, 2010 to June 30, 2011; July 1, 2011 to June 30, 2012; and July 1, 2012 to June 30, 2013, respectively). During the 2014 tax year, beginning on July 1, 2013, the three most recently completed fiscal years would be 2011, 2012, and 2013, with an average of $8 million in receipts. The entity would therefore be a larger participant during its 2014 tax year. Because that status lasts for two years, the entity would also be a larger participant during its 2015 tax year (from July 1, 2014 through June 30, 2015), even if its 2014 ''annual receipts'' were below $7 million. For example, suppose the entity had only $2 million in receipts for the completed 2014 fiscal year. The decreased receipts would first factor into the ''annual receipts'' calculation for 2015, when they would reduce the company's ''annual receipts'' to $6 million. But the company would still be a larger participant during that year, as a result of the above-threshold annual receipts calculated for the 2014 tax year.

[40] The Bureau believes that while it would have this authority under 12 U.S.C. 5514 even absent a regulation, a regulation is useful to provide clarity on the issue.

[41] 12 U.S.C. 5514(b)(7)(D) provides that in developing requirements or systems under that provision, the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration) where appropriate. Given the focus of these provisions of the Proposal on obtaining particularized information relevant to larger-participant status, the Bureau does not believe that such consultation is necessary or appropriate in connection with this final rule. The Bureau, however, requested comments from relevant State agencies on the Proposal, and did receive comments from a couple of State regulatory agencies expressing their belief that a certain company providing information services relating to payday lending should be excluded from the rule's coverage.

allowing a person to submit to the Bureau documents and information supporting the person's assertion that it is not a larger participant. A representative of the consumer reporting industry suggested that the Bureau create a mechanism and procedures for appeal. Another commenter stated that the proposed method of challenging larger-participant status violates due process.

The Bureau believes that the proposed procedure is an appropriate method by which a person may provide documents, records or other information to the Bureau if it wishes to dispute whether it meets the larger-participant threshold for a market. Due process concerns, as put forward by commenters, do not mandate any particular procedures for the initiation of supervision,[42] because a decision to initiate supervision does not implicate an interest protected by the Fifth Amendment. Supervision alone does not impose any penalty on an entity, does not deprive it of any property, and does not restrict its ability to engage in a viable business. Moreover, even if a protected interest were at stake, the rule provides procedures that are comparable to those offered in numerous other situations that implicate protected interests.[43] The Bureau will provide notice of its intent to supervise an entity; receive written submissions, accompanied by evidence; and entertain entities' arguments that they do not qualify as larger participants. Due process does not necessitate a hearing in every instance, and the evidence involved in assessing a larger participant's annual receipts from consumer reporting is not of the kind that requires oral presentation.[44] The Bureau proposed to respond to entities' challenges to larger-participant status because the Bureau believed it would be useful to have an informal method for resolving whether a person is a larger participant. For all the above reasons, the Bureau does not believe additional procedures are necessary to comport with due process.

Other commenters suggested that the 30-day time period allowed to challenge larger-participant status and provide the documents relied on for the challenge was not sufficient. One commenter representing the consumer financial services industry stated that nonbanks identified as larger participants should be able to provide additional arguments, records, documents, or other information to the Assistant Director as needed, particularly since the initial 30-day period is a narrow window and there is no deadline for a decision by the Assistant Director. Another industry representative said that it believes that 30 days is a wholly inadequate time period for a business to identify all of the relevant information and to prepare its argument, especially because of the difficulty of apportioning receipts. Similarly, a commenter representing the consumer reporting industry suggested eliminating or significantly revising the provision whereby a person that fails to respond to the Bureau within 30 days will be deemed to acknowledge that it is a larger participant. This commenter also stated that an entity should be able to challenge its status as a larger participant at any time if it has a good-faith basis for doing so, and failure to respond in any manner to a notice from the Bureau should not constitute waiver of the opportunity to submit evidence.[45] Various industry commenters suggested that the final rule allow greater response times to challenge larger-participant assessments that ranged from 60 to 90 days, to an unlimited period.

The Bureau, however, believes that it is necessary to have a firm time limit for this dispute process. Eliminating the deadlines and permitting additional records, documents, or other information to be presented to the Bureau at any time would create unnecessary uncertainty and be administratively difficult to implement. A firm deadline for submission of records, documents, or other information, on the other hand, would permit the timely and orderly resolution of an assessment of larger-participant status. Holding firms to have waived the opportunity to offer information and arguments that they do not present during the specified timeframe is an appropriate mechanism for enforcing the deadline.

At the same time, the Bureau recognizes that entities may need time to collect and assemble relevant documentation regarding larger-participant status. The Proposed Rule included a provision under which the Assistant Director might modify the response time on her or his own initiative or at the request, based on a showing of good cause, of the person responding. The Bureau adopts in the final rule this provision for requesting an extension. In addition, the Bureau concludes that increasing the general time limit for response from the proposed 30 days to 45 days strikes an appropriate balance between providing a reasonable opportunity to challenge larger-participant status and not allowing so much time as to be disruptive to the supervisory program.

A representative of the consumer reporting industry suggested that the final rule should require that the Bureau have a reasonable basis to believe that a person is a larger participant before sending a written communication initiating supervisory activity. As the Bureau has explained above, the Bureau expects to use various data sources, including publicly available data, to identify which nonbank covered persons appear to qualify as larger participants. The Bureau intends to use the best available data to make assessments regarding a person's status as a larger participant. If needed, the Bureau will request relevant information to help assess whether a person is a larger participant. Thus, the Bureau will make an informed assessment of larger-participant status. The Bureau believes neither that the Dodd-Frank Act requires, nor that it would be appropriate or necessary, for the Bureau to set forth in the regulation a specific standard regarding larger-participant status that must be met before the Bureau can undertake supervisory activity. The Bureau therefore declines to amend the Proposal in the manner suggested by this commenter.

An industry commenter suggested that the dispute process could be an inefficient and costly exercise if there is no intent to supervise a person. The Bureau notes, however, that the response process only comes into play if the Bureau informs a person that it intends to undertake a supervisory activity in connection with that person, and if that person decides to dispute whether it is a larger participant.

The Bureau also received a comment suggesting that the final rule provide a way for a person to request and obtain from the Bureau an advance larger-participant determination. The Bureau believes that providing an assessment as to whether a person qualifies as a larger participant, absent any intent of the Bureau to initiate supervisory activities in connection with the person, would be unnecessary and burdensome to the Bureau. A market participant should be

[42] In addition, the Dodd-Frank Act does not mandate any mechanism like what the rule provides.

[43] *See, e.g., Karpova* v. *Snow,* 497 F.3d 262 (2d Cir. 2007); *FDIC* v. *Coushatta,* 930 F.2d 1122 (5th Cir. 1991).

[44] *See Mathews* v. *Eldridge,* 424 U.S. 319, 344–45 (1976).

[45] Waiver, under this provision of the Proposed Rule, would apply with respect to the particular year for which an entity's status as a larger participant was at issue. If an entity's annual receipts declined in later years, and the Bureau nevertheless initiated supervisory activity, provided it is outside of the two-year supervision period, the entity would have a chance to dispute whether it was a larger participant in those later years.

capable of evaluating whether its activities qualify it as a larger participant. Additionally, such a process would be burdensome to the Bureau because, in addition to making such assessments with respect to market participants it considered examining, the Bureau could also be placed in the position of responding to myriad requests from market participants it does not have near-term plans to supervise. For these reasons the Bureau declines to amend the Proposed Rule to provide for advance determinations as described.

Finally, the Bureau received comments from attorney and industry representatives expressing concern that nonbank covered persons will be obligated to provide attorney-client privileged information when challenging larger-participant status, or when the Bureau requires a person to provide information to support the Bureau's evaluation of entities' larger-participant status. But the Proposal did not require that any covered person provide privileged documents to the Bureau to support a challenge of larger-participant status. Of course, a person may choose to submit privileged documents in the course of such a challenge, although it is difficult to conceive of a need to submit privileged information to document an entity's representations as to its annual receipts. Pursuant to a rule recently adopted by the Bureau, such a submission would not result in a waiver of any applicable privilege as to third parties.[46] Similarly, while under § 1090.103(d) the Bureau may require the submission of documents, the Bureau does not presently anticipate that, absent unusual circumstances, it would request attorney-client privileged material under this provision. In any event, the Bureau's recently adopted rule regarding submissions of privileged information would apply to material provided in response to such a request.

For the reasons discussed above, the Bureau adopts § 1090.103, as proposed in § 1090.104 of the Proposed Rule, amended to increase the response period for disputing larger-participant status from 30 days to 45 days with additional minor technical amendments for consistency.

Subpart B—Markets

Section 1090.104—Consumer Reporting Market

As discussed in the Summary of the Final Rule, above, the consumer reporting market is of fundamental importance to markets for many other consumer financial products and services, affecting hundreds of millions of consumers. The market includes consumer reporting agencies selling comprehensive consumer reports, consumer report resellers, analyzers, and specialty consumer reporting agencies (collectively these market participants are referred to as consumer reporting entities).

Several commenters criticized the Bureau's decision to supervise larger participants of the proposed consumer reporting market. They contended that the Dodd-Frank Act requires the Bureau to consider four specific factors in issuing a rule under 12 U.S.C. 5514(a)(2): ''The asset size of the covered person,'' ''the volume of transactions involving consumer financial products or services in which the covered person engages,'' ''the risks to consumers created by the provision of such consumer financial products or services,'' and ''the extent to which such institutions are subject to oversight by State authorities for consumer protection.''[47] These commenters argued that a failure to consider these four factors would be arbitrary and capricious.

The Bureau believes that these commenters have misinterpreted the scope and purpose of 12 U.S.C. 5514(b)(2). That subsection describes how the Bureau must ''exercise its authority under paragraph [(b)](1),''[48] which in turn authorizes the Bureau to supervise ''persons described in subsection (a)(1).'' The final rule does not exercise authority provided by subsection (b)(1). Rather, it ''describe[s],'' in part, a set of persons falling within subsection (a)(1), by defining a category of ''larger participant[s].'' In choosing which persons subject to that authority to supervise, the Bureau will consider the factors set forth in paragraph (b)(2). The Dodd-Frank Act does not mandate consideration of those factors before issuing the rule that establishes the category itself under paragraph (a)(1).[49]

The text of paragraph (b)(2) supports this interpretation. The factors to consider include ''the asset size of the covered person'' and the transaction volume of ''the covered person.'' These factors are relevant with respect to a particular person being considered for supervision. The reference to a single covered person suggests this provision does not apply to a rule, like the instant one, defining a category of many covered persons.

These commenters also asked the Bureau to explain why it is choosing consumer reporting as the subject of this rule, instead of some other market for a different consumer financial product or service. The Bureau has wide discretion in choosing markets in which to define larger participants. The Bureau need not conclude before issuing a rule defining larger participants of a given market that the market identified in the rule has a higher rate of non-compliance, poses a greater risk to consumers, or is in some other sense more important to supervise than other markets. Indeed, 12 U.S.C. 5514(b)(1), by recognizing that supervision's purposes include assessing compliance and risks posed to consumers, suggests that the Bureau need not determine the level of compliance and risk in a market before issuing a rule that renders larger participants of the market subject to supervision. Choosing consumer reporting as the subject of this rule is reasonable because consumer reporting, as defined in the rule, is an important activity that affects hundreds of millions of consumers and because supervision of larger participants of this market will be beneficial to consumers and markets and will further the Bureau's mission to ensure consumers' access to fair, transparent, and competitive markets for consumer financial products and services.

Section 1090.104 (a)—Market-Related Definitions

Annual receipts. The proposed definition of ''annual receipts'' was informed by the method of calculating ''annual receipts'' used by the SBA in determining whether a firm is a ''small business'' concern.[50] Under the proposed definition, for purposes of calculating ''annual receipts,'' the term ''receipts'' means ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms. Under the Proposal, the term would not include net capital gains or losses. As proposed, annual receipts are measured as the average of a person's three most recently completed fiscal years, as appropriate, or over the entire period the person has been in business if that is less than three

[46] 77 FR 39617 (July 5, 2012), codified at 12 CFR Part 1070.

[47] 12 U.S.C. 5514(b)(2).

[48] 12 U.S.C. 5514(b)(2).

[49] The rule defining larger participants must be promulgated ''in accordance with paragraph (2),'' which means paragraph (a)(2), not paragraph (b)(2). Paragraph (a)(2) does not refer to the multiple considerations listed in paragraph (b)(2).

[50] 13 CFR 121.104.

completed fiscal years.[51] The proposed calculation of annual receipts would also implement the aggregation requirement in 12 U.S.C. 5514(a)(3)(B) by providing that the annual receipts of a person shall be added to the annual receipts of each of its affiliated companies. As proposed, such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

The Bureau received a number of comments relating to ''annual receipts.'' [52] Many commenters expressed concerns or raised objections to the use of annual receipts to measure participation in the consumer reporting market. One commenter asked whether the Bureau intends to bind itself to IRS guidance and related tax law and recommended that the Bureau provide examples of how different industry participants should calculate annual receipts under the final rule. The Bureau notes that to the extent IRS tax forms are utilized by a nonbank covered person to calculate receipts, which consist of ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold,'' the person should rely on IRS guidance. Additionally, the Bureau believes that there may be a variety of circumstances facing covered persons and the Bureau is not in a position to ascertain the most appropriate or useful examples to include in the final rule. Therefore, the Bureau declines to provide examples of how market participants should calculate annual receipts.

Several industry commenters argued that the definition of ''annual receipts'' counts part of a company's revenue twice, by including both total sales and cost of goods sold. These commenters suggested raising the threshold for qualifying as a larger participant of the consumer reporting market from more than $7 million to $14 million in annual receipts. Properly understood, the measurement of ''annual receipts'' does not involve double counting. In calculating total income, cost of goods sold is subtracted from various sources of income.[53] Thus, in calculating annual receipts, cost of goods sold is added back in to offset the original subtraction of the identical figure. The Bureau therefore declines to amend the definition of ''annual receipts'' based on this comment.

The Bureau received several comments on the appropriate measurement period for assessing larger-participant status (and thus when the supervision period begins). One consumer group suggested that to capture participants whose annual receipts are increasing, a person should be deemed a larger participant if the person had annual receipts meeting the applicable threshold either as an average of annual receipts over the last three fiscal years, or in the most recent fiscal year. Conversely, some commenters, believing the Proposal already specified that larger-participant status would be triggered by a single year's results, argued that businesses would forego growing in order to avoid accidentally coming within the Bureau's supervisory authority. One commenter suggested that an entity should qualify as a larger participant only if its receipts were above the threshold for three years in a row.

To clarify, under the rule ''annual receipts'' generally are not based solely on the receipts of a single year.[54] The Bureau agrees with those commenters who suggested that temporary fluctuations generally should not render an entity a larger participant. The proposed definition, by averaging a company's receipts over a three-year period, reduces the impact of sudden and potentially temporary fluctuations in receipts a company may experience—both decreases and increases. Thus the Bureau declines to include generally as larger participants persons who have receipts above the threshold in only the most recent fiscal year. For the reasons discussed above, the Bureau adopts the definition of annual receipts as proposed, with minor technical amendments, including a relocation of the definition into the section for consumer reporting market-specific definitions (Subpart B, § 1090.104(a)).

Consumer reporting. The final rule defines a market for ''consumer reporting,'' which is among the consumer financial products or services described in 12 U.S.C. 5481(15)(A)(ix) and (5)(B). Activities covered under these provisions of the Dodd-Frank Act include, subject to certain exceptions, ''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.'' [55] Under 12 U.S.C. 5481(5)(B), such activity is a ''consumer financial product or service'' when ''delivered, offered, or provided in connection with a consumer financial product or service.''

The final rule describes a market for products and services that fall within the category of consumer financial products and services described by these provisions of the Dodd-Frank Act. The final rule's definition of ''consumer reporting'' is not meant to track related provisions in the Dodd-Frank Act. The final rule has a different purpose: rather than describing the scope of a certain consumer financial product or service, it identifies a specific market for such a product or service. That market is not necessarily co-extensive with the statutory category into which the market activities fit. Indeed, the final rule excludes from ''consumer reporting'' the activities of persons that furnish information about their own, or their affiliates', experiences or transactions with consumers to consumer reporting entities and persons that use consumer report or other account information for their own purposes. Such activities may be within the ambit of the consumer financial products or services described in 12 U.S.C. 5481(15)(A)(ix) and (5)(B), but the Bureau does not regard them as part of the market covered by the final rule, for the reasons discussed in the paragraphs below.

The Proposal stated that the term ''consumer reporting'' means collecting, analyzing, maintaining, or providing consumer report information or other account information, used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service. The Bureau stated that the proposed definition would cover different types of consumer reporting entities such as credit bureaus, consumer report resellers, analyzers, and specialty consumer reporting agencies like those specializing in consumer check verification and reporting of payday lending transactions.[56] The proposed definition

[51] ''Completed fiscal year'' is a defined term under § 1090.101 of the final rule. A ''completed fiscal year'' means a ''tax year'' including any ''fiscal year,'' ''calendar year,'' or ''short tax year.'' A ''fiscal year'' is 12 consecutive months ending on the last day of any month except December 31. A ''calendar year'' is 12 consecutive months beginning on January 1 and ending on December 31. A ''tax year'' is an annual accounting period for keeping records and reporting income and expenses. An annual accounting period does not include a ''short tax year.'' A ''short tax year'' is a ''tax year'' of less than 12 months. IRS Publication 538, *available at http://www.irs.gov/publications/p538/ar02.html.*

[52] Comments relating solely to the debt collection market will be addressed in the final rule for that market.

[53] *See* IRS tax forms 1120 and 1120S.

[54] As noted in the Proposal, if an entity has not completed three fiscal years, its ''annual receipts'' will reflect the shorter period of its existence.

[55] 12 U.S.C. 5481(15)(A)(ix).

[56] This definition might also include entities such as credit scoring companies. Whether such an entity

also excluded several activities from the consumer reporting market. First, a person's providing information on its own transactions or experiences with consumers to its affiliates would not constitute consumer reporting. Second, a person's providing information on its own (or its affiliates') transactions or experiences to a consumer reporting entity would also be excluded. Third, the proposed definition incorporated the exclusion detailed in 12 U.S.C. 5481(15)(A)(ix) for information used solely in a decision regarding employment, government licensing, or residential leasing.

The final rule adopts the proposed definition of ''consumer reporting'' with several modifications. The final rule prescribes a broader exclusion for providing a company's information on its own transactions and experiences with consumers; the Bureau will not treat a company's provision of such information to any other person to be ''consumer reporting.'' The final rule also adds an exclusion for information that amounts to an authorization or approval of a specific extension of credit, directly or indirectly, by the issuer of a credit card or similar device.

The Bureau received many comments on the definition of the term ''consumer reporting.'' One category of comments focused on the relationship between the consumer reporting activities covered by the Proposed Rule and those subject to the FCRA. First, a number of commenters criticized the definition for departing from the definitions of ''consumer report'' and ''consumer reporting agency'' in the FCRA.[57] Several of these commenters suggested that the difference between the Proposed Rule and the FCRA would cause uncertainty and confusion. They argued that some persons that do not consider themselves to be in the consumer reporting market would, unknowingly, nevertheless be subject to Bureau supervision. Other persons, the commenters contended, would erroneously believe they were subject to supervision and would waste effort preparing for examinations.[58]

The Bureau did not intend the Proposal's definition of ''consumer reporting'' to mirror the scope of the FCRA's definitions of ''consumer report'' and ''consumer reporting agency.'' [59] In some respects the proposed definition of ''consumer reporting'' was narrower than these FCRA definitions because it excluded information to be used solely in a decision for employment, government licensing, or residential leasing or tenancy. In other respects the proposed definition may have been somewhat broader than the coverage of the FCRA. For example, ''consumer report information, or other account information,'' for purposes of the Proposed Rule, could include information beyond what would be considered a ''consumer report'' under the FCRA. Similarly, certain entities that are not ''consumer reporting agencies'' within the meaning of the FCRA—such as certain analyzers of consumer report information—may be larger participants of the consumer reporting market delineated by the final rule. The Bureau's rule and the FCRA serve two different purposes. The FCRA is a substantive consumer protection statute that governs the activities of consumer reporting agencies (and other persons that furnish information to or receive information from such agencies). The rule, by contrast, defines larger participants of a market for consumer reporting for purposes of initially delineating the scope of coverage of the Bureau's supervision authority.

The Bureau's supervisory activities will extend beyond assessing consumer reporting agencies' compliance with the FCRA. The Bureau will also assess compliance with other Federal consumer financial law, and compliance with such law by persons other than those that the FCRA defines as consumer reporting agencies. Moreover, the Bureau's supervisory activities will seek to obtain information regarding activities and compliance systems and procedures of supervised persons and to detect and assess risks to consumers and markets for consumer financial products or services.[60] The Bureau emphasizes that the proposed definition of ''consumer reporting'' is relevant only to the final rule and has no applicability to the scope, coverage, definitions, or any other provisions of the FCRA or any other law or regulation. Therefore, the Bureau declines to conform the proposed definition of ''consumer reporting'' to the FCRA's definitions of ''consumer report'' and ''consumer reporting agencies.''

Second, several commenters pointed to what they said was a particularly important departure from the FCRA. According to these commenters, the proposed definition of ''consumer reporting'' covered circumstances in which a person does not provide information to a third party, for the third party's use in connection with a decision regarding the offering or provision of a consumer financial product or service. As an initial matter, it should be noted in this context that the final rule excludes a person's provision for any purpose of information about its own transactions or experiences with consumers. Moreover, under the proposed definition, the consumer reporting market covered collecting, analyzing, maintaining, or providing consumer report or other account information for its use or expected use ''by another person'' in a decision regarding the offering or provision of a consumer

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is covered under this definition would depend upon its particular activities. To the extent that a credit scoring company is engaged in collecting, analyzing, maintaining, or providing consumer report or other account information for the purposes described above, it would be covered by the proposed definition. Several consumer groups suggested that the Bureau should explicitly state in the text of the regulation that credit scoring providers or developers are service providers. Assessing whether a particular entity is a service provider to a larger participant under the Dodd-Frank Act requires an evaluation of the person's activities. The Bureau declines to identify specific activities that might make a person a service provider to a larger participant, or to provide an exhaustive list of such activities.

[57] The FCRA defines ''consumer report'' as ''any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—(A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under [the FCRA].'' 15 U.S.C. 1681a(d)(1). There are several statutory exclusions, including one for reports of information relating solely to transactions or experiences between the consumer and the person making the report. 15 U.S.C. 1681a(d)(2). The definition of ''consumer reporting agency'' covers any person that, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating information on consumers for the purpose of furnishing consumer reports to third parties. 15 U.S.C. 1681a(f).

[58] The Bureau received several comments asserting that specific activities that the commenters described, or in a few cases specific companies, were not within the market described by the rule. For example, one commenter suggested that providing a credit report on the owner of a small business to support a lender's decision whether to extend credit to the business should not be within the scope of the consumer reporting market. The Bureau does not believe it is appropriate to address whether each activity or firm mentioned by a commenter would be covered by the final rule. Whether specific activities fall within the definition of ''consumer reporting'' will be assessed by the Bureau when considering whether to initiate supervisory activities relating to a given company.

[59] The Bureau also does not believe that it is necessary to define the term ''consumer reporting agency'' in the regulation, as one commenter requested. A person may look to the definition of ''consumer reporting'' to determine whether it engages in activities that may qualify it as a larger participant of that market. The Bureau refers to the various participants of the market, including credit bureaus, resellers, analyzers, and specialty consumer reporting agencies, collectively as consumer reporting entities.

[60] 12 U.S.C. 5514(b)(1).

financial product or service. Thus, the person using or expected to use the information must be different from the market participant collecting, analyzing, maintaining, or providing the information. It bears emphasizing, however, that the person using or expected to use the information in a decision regarding a consumer financial product or service need not be a market participant's immediate customer. For example, resellers generally assemble and merge information contained in the databases of other consumer reporting agencies, and then provide reports including that information to third parties such as creditors that use the information to make a credit decision. Providing consumer report information to a reseller is included in the market, even though the reseller itself may not make decisions regarding the offering or provision of consumer financial products or services.

Third, commenters also suggested dividing the consumer reporting market identified by the Proposal into submarkets. One commenter suggested, for example, defining a separate market to cover consumer reporting entities over which the Bureau wishes to exercise supervisory authority but that are not consumer reporting agencies under the FCRA. Another proposed having two markets, demarcated by a distinction that, the commenter said, the FCRA makes between national credit repositories and consumer report resellers.

The Bureau believes that resellers, national credit repositories, specialty consumer reporting agencies, analyzers, and others engaged in consumer reporting activities as defined in the final rule are properly included in a single market. These different types of firms all participate in the process of preparing consumer financial information for use in decisions regarding consumer financial products or services. Moreover, many of the same legal requirements cover repositories, resellers, and specialty consumer reporting agencies. To the extent that the activities of larger participants of the consumer reporting market differ, the Bureau can adjust the scope and focus of its supervision activities accordingly. Therefore, the Bureau declines to revise the definition of consumer reporting to establish separate markets for consumer report resellers, the national repositories, and others engaged in consumer reporting activities.

Another category of comments asked the Bureau to alter the scope of the proposed exclusions from the consumer reporting market. First, the Bureau received comments both in favor of expanding the exclusion for furnishing information and in favor of deleting that exclusion.

Commenters opposing the exclusion expressed the view that the Bureau must ensure that it supervises major furnishers of information to consumer reporting entities, in addition to such entities as depositories and payday lenders that are otherwise subject to the Bureau's supervisory authority. The Bureau believes that companies' supplying information to consumer reporting entities on their own, or their affiliate's, transactions or experiences with consumers was properly excluded from the Proposed Rule. Furnishing information of that type is typically incidental to the furnisher's primary business, and an enormously wide variety of businesses furnish such information to consumer reporting entities. Therefore, including such activity in the definition of ''consumer reporting'' could have the unintended consequence of delineating such a broad consumer reporting market that it would encompass, for example, many types of consumer creditors. Because furnishing a company's own transaction and experience data is fundamentally different from the activities defined by the rule as consumer reporting, the Bureau does not believe such furnishing should be included in the same market for purposes of implementing the nonbank supervision program for consumer reporting entities.[61]

Other commenters suggested broadening in various ways the exclusion for furnishing information. One commenter asked the Bureau to clarify that agents and contractors that transmit information about a company's transactions or experiences with consumers on that company's behalf do not thereby become participants of the consumer reporting market. It is the Bureau's view that such agents or contractors would not be participating in the consumer reporting market merely by providing technical or operational support services to facilitate a person's furnishing of its own transaction and experience information to a consumer reporting entity.[62]

Another commenter provided the example of a depository institution that provides information about a consumer's account balances to a mortgage lender deciding whether to extend a loan to the consumer. Because the Proposed Rule excluded only an entity's provision of its transaction or experience information to its affiliates or to consumer reporting entities, this commenter believed the provision of information in its hypothetical example would fall within the scope of consumer reporting activities. The Bureau agrees that an entity's providing its own transaction or experience information in this context should not be treated as a consumer reporting activity. Accordingly, the Bureau is adopting, in the final rule, a simpler, broader exclusion. The final rule excludes a person's collecting, maintaining, analyzing, or providing its own transaction or experience information for use or expected use by another person in a decision regarding a consumer financial product or service. Such activity is excluded from the consumer reporting market defined by the rule, regardless of what person receives the information.

A commenter also suggested excluding from the final rule providing information to process a transaction requested by a consumer, a possible activity of payment systems that process account transactions. The Bureau agrees that such payment system activities should be excluded from the final rule and amends the final rule by excluding any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.[63]

Another commenter stated that companies that provide information outside the scope of the FCRA, but for use by third parties in decisions regarding the offering or provision of

[61] The Bureau also noted in the Proposal that many large furnishers of information to consumer reporting entities are already subject to the Bureau's supervisory authority under the Dodd-Frank Act, and future larger participant rules may bring additional furnishers of information under the Bureau's supervisory authority. As noted above, 12 U.S.C. 5514 grants the Bureau authority to supervise, regardless of size, nonbank covered persons that offer or provide to consumers: (1) Origination, brokerage, or servicing of residential mortgage loans secured by real estate, and related mortgage loan modification or foreclosure relief services; (2) private education loans; and (3) payday loans. Additionally, the Bureau has the authority to supervise nonbank covered persons it has a reasonable cause to believe pose risks to consumers, after providing notice and a reasonable opportunity to respond. 12 U.S.C. 5514(a)(1)(C). Thus to the extent a significant nonbank covered person engaged in furnishing not otherwise covered is posing risks to consumers, the Bureau could exercise supervisory authority over the person on some other basis. Furthermore, under 12 U.S.C. 5515, the Bureau has the authority to supervise other furnishers such as very large banks, thrifts, and credit unions, and their affiliates.

[62] Because the Bureau is adding a broad exclusion permitting a person to provide its own transaction and experience information with other persons to the final rule, the exclusion for furnishing information to a consumer reporting entity has been amended to address only the activity of a person providing transaction and experience information of an affiliate to a consumer reporting entity.

[63] A similar exclusion is also included in the FCRA. 15 U.S.C. 1681a(d)(2)(B) (exclusion from the definition of ''consumer report'').

consumer financial products or services, do not operate in a market that could reasonably be considered a ''consumer reporting market.'' This commenter specifically referenced what it described as Gramm-Leach-Bliley Act (GLBA)-covered products, including consumer identification authentication, or fraud detection and identity theft protection, over which the commenter asserted the Bureau has no jurisdiction, as a result of 12 U.S.C. 5481(15)(B)(i). However, the cited provision says expressly that it applies ''[f]or purposes of (A)(xi)(II),'' and it does not purport to affect whether an activity constitutes a consumer financial product or service under any provision other than (A)(xi). For this and other reasons, the provision in question is not pertinent to this rulemaking. The Bureau therefore declines to alter the definition of ''consumer reporting'' in the way this commenter suggested.[64]

Another commenter asserted that the proposed definition of ''consumer reporting'' included too broad a scope of ''analytical services.'' The commenter suggested either excluding all analytical services or, at a minimum, providing other more limited exclusions for certain types of such services. The commenter also argued that analytical services should be excluded because the activity has a low risk of harm to consumers.

Analyzing consumer report information is an important activity in the consumer reporting market, and, as with collecting, maintaining, and providing information, can be an important factor in decisions regarding the offering or provision of consumer financial products or services. Additionally, the Bureau is aware of some entities that engage in reporting of consumer information and also analyze that information, deriving receipts from that analysis. Just as businesses extending credit rely on the collecting, maintaining, or providing of consumer report information, some also purchase analyses of the underlying consumer report information. Analyzing activity generally is done for compensation and may result in annual receipts for the entity providing analytical services, and a company that meets the threshold on the basis of its analyzing activities will likely affect many consumers. For these reasons, the Bureau declines to exclude analyzing consumer information in general from the consumer reporting market.[65]

The commenter also suggested that if analytical services are not generally excluded, the Bureau should exclude analytical services rendered for a particular consumer financial services provider using that provider's own information. The commenter argued that such services could be supervised in the context of examinations of the financial service provider itself, and that the Bureau's supervision program should not be duplicative by covering providers of such analytical services as ''larger participants.'' The commenter additionally suggested excluding analytical services other than certain modeling services,[66] arguing that the Bureau should focus its resources elsewhere.

The Bureau clarifies that the consumer reporting market delineated in the final rule does not include the activity of providing analytical services regarding another person's own information to that other person, where such analysis is used solely by that other person and is not provided to a third party (other than the other person's affiliated companies). Such activity is not treated differently, in the final rule, from a person's conducting its own analysis for its own use. A person's analyzing its own consumer report or other account information, without the expectation that the information will be used in connection with a decision ''by another person,'' is not included in the defined consumer reporting market. It is the Bureau's view that agents or contractors who analyze a person's data on that person's behalf, solely for that person's use, are similarly not analyzing consumer report or other account information for use ''by another person.''

The Bureau also received comments from consumer groups and consumers arguing that the market for consumer reporting should include background screening for employment purposes. The Bureau notes that the proposed definition of ''consumer reporting'' excluded collecting, analyzing, maintaining, or providing consumer report or other information to the extent that the information is used solely in a decision regarding employment, government licensing, or residential leasing, because these are explicit exclusions under 12 U.S.C. 5481(15)(A)(ix). Accordingly, the Bureau declines to amend the Proposal to include the activity of employment background screening in the final rule's definition of ''consumer reporting.''[67]

For the reasons stated above, the Bureau adopts the Proposal's definition of ''consumer reporting,'' amended as described above and with minor technical amendments for consistency.

Section 1090.104(b)—Test To Define Larger Participants

Criteria. As noted in the Proposal, the Bureau has broad discretion in choosing criteria for measuring whether a nonbank entity is a larger participant of any given market. In issuing the Proposal, the Bureau considered several criteria for measuring participants of the consumer reporting market. These included, among others, annual receipts; number of unique consumer reports sold or otherwise provided to a third party annually; number of individual consumers a nonbank covered person collects, analyzes, and maintains data about, or provides consumer reports on, annually; and number of employees.

The Bureau proposed to use annual receipts as the measure of participation in the consumer reporting market. As explained in the Proposal, the Bureau believes that annual receipts resulting from consumer reporting activities is a reasonable indication of a person's level of market participation and impact on consumers. Consumer reporting entities earn income from selling consumer reports and from other market-related activities that directly affect consumers. As a result, the greater the annual receipts of a consumer reporting entity, the greater its market participation and the greater its impact on consumers.

In addition, as set forth in the Proposal, the proposed definition of

[64] Should appropriate circumstances arise, the Bureau will consider whether the activities the commenter describes fit within the rule's definition of consumer reporting.

[65] Moreover, as to the assertion that analyzers pose low risk to consumers, the Bureau notes that, as discussed in the Summary of Final Rule (Section III), above, the market for consumer reporting identified by the rule, which includes analyzers of consumer report information, is a significant market that affects hundreds of millions of consumers. The extent to which specific activities within that market may pose greater or lower risks to consumers does not determine whether to include the activities within the market; risk posed by a particular larger participant within the market for consumer reporting will be considered pursuant to 12 U.S.C. 5514(b)(2), in the course of the Bureau's exercise of its supervisory authority.

[66] Modeling in the consumer reporting market often consists of licensing a statistical algorithm to other participants of the consumer reporting market. These statistical systems or tools that establish numerical values or categorizations can be used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors. These algorithms produce figures commonly known as ''credit scores,'' ''risk predictors,'' or ''risk scores.'' *See* 15 U.S.C. 1681g(f)(2)(A).

[67] As indicated above, the Bureau may supervise a larger participant's provision of consumer report information for employment screening, even though such activity does not count in the calculation of annual receipts that determines larger-participant status.

''annual receipts'' is adapted from the existing measure used by the SBA. Because the SBA uses a similar measure in its small business loan programs,[68] the proposed test is expected to be sufficiently straightforward so as not to put undue burden on nonbank covered persons in determining whether they are subject to the Bureau's nonbank supervision program. However, it bears noting that the Bureau's definition of ''annual receipts'' differs from the SBA's in important respects. For example, as discussed below, the Bureau's rule counts only receipts resulting from activities in the identified consumer reporting market; the SBA, by contrast, counts all receipts of entities engaged in certain consumer reporting activities. This difference excludes some receipts from the amount being counted toward the threshold that marks a larger participant.[69]

As further explained in the Proposal, the Bureau analyzed data from the 2007 Economic Census on annual receipts for businesses in North American Industry Classification System (NAICS) code 561450 (credit bureaus). One commenter noted that analyzers may not all be included in this NAICS code. The Bureau acknowledges that the Economic Census data have certain limitations and do not perfectly reflect the set of participants of the market defined by this rule. First, the Proposed Rule's definition of ''consumer reporting'' does not correspond precisely to the NAICS code, which encompasses both ''consumer credit reporting agencies'' and ''mercantile reporting agencies,'' [70] but may not include other participants covered by the final rule's definition of consumer reporting. Second, entities in NAICS code 561450 may report to the Census revenues that are not included in annual receipts resulting from consumer reporting as defined in the rule. Third, entities that fall within the NAICS code may not correctly identify themselves or may otherwise fail to respond to the Census. The Economic Census data are likely therefore both over- and under-inclusive. An additional limitation of the Economic Census data for these codes is that the Census keeps aggregated annual receipts data confidential in certain tiers.[71] Notwithstanding these limitations, the data reveal the general distribution of the size of participants of the consumer reporting market described in the final rule. In the Proposal, the Bureau invited commenters to provide additional data sources. None relevant to the consumer reporting market were identified.[72]

Commenters suggested a variety of alternative criteria such as the total number of unique consumer reports sold, the number of individual consumers on which an entity provides consumer reports, the number of complaints about an entity, an entity's relative market share, or the annual receipts of an entity in a given geographic or demographic segment. The Bureau has broad discretion in choosing criteria to define larger participants of a given market, and does not believe these criteria are superior alternatives. The available data do not permit the Bureau meaningfully to measure the general contours of the market based on these criteria and thus to devise a test for defining larger participants of the consumer reporting market on the basis of them or to apply the test efficiently. Further, as set forth in the Proposal, the Bureau believes that the number of employees is not a suitable alternative criterion because it could be difficult for a multi-line company to apportion employee time between market-related and other activities, and many responsibilities may be fulfilled by contractors rather than employees.

Several commenters in or representing the consumer report reseller industry asserted that using annual receipts would result in double counting of cost of goods sold and thus result in the rule's covering much smaller businesses than intended. As discussed in connection with the definition of ''annual receipts'' above, the cost of goods sold is not double counted.

For the reasons set forth above, the Bureau declines to amend the Proposed Rule to change the criterion used in the larger-participant test for the consumer reporting market and adopts the use of annual receipts as proposed.

Threshold. As noted in the Proposal, the Bureau has broad discretion in setting the threshold above which a nonbank covered person will qualify as a larger participant of the consumer reporting market. The Bureau proposed more than $7 million in annual receipts as the threshold to define larger participants of the consumer reporting market and adopts this threshold in the final rule for the following reasons.

Available data indicate that a threshold of $7 million in annual receipts from consumer reporting activities will enable the Bureau to cover in its nonbank supervision program the largest consumer reporting repositories as well as a range of other larger consumer reporting entities that play an important role in the consumer financial marketplace. Coverage likely will include a number of larger specialty consumer reporting agencies, resellers, and analyzers. The Bureau believes that this threshold will cover a sufficient number of market participants to enable the Bureau effectively to assess

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[68] Information concerning the SBA's loan programs is available at: *http://www.sba.gov/category/navigation-structure/loans-grants/small-business-loans/sba-loan-programs.*

[69] As another example, the Bureau's definition of control, which establishes an affiliation between companies such that their receipts are aggregated during the calculation of ''annual receipts,'' is broader than the SBA's definition of control.

[70] For the purposes of the Economic Census, mercantile reporting agencies are ''primarily engaged in compiling information on business firms, such as credit histories, and providing the information to financial institutions and others who have a need to evaluate the credit worthiness of those businesses.'' Consumer reporting agencies are ''primarily engaged in compiling information on individuals, such as credit and employment histories, and providing the information to financial institutions, retailers, and others who have a need to evaluate the credit worthiness of those persons.'' *http://www.census.gov/epcd/ec97/def/5614502.HTM* and *http://www.census.gov/epcd/ec97/def/5614501.HTM.*

[71] *Available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 561450. Many Census tiers have flags in the receipts category, which read ''withheld'' to avoid disclosing data for individual companies; data are included in higher-level totals. Other aggregated revenue data are available in a table showing the concentration of revenues among the largest firms, which extend through the top 50.

[72] In the Proposal, the Bureau made estimates based on data available from the 2007 Economic Census for NAICS code 561450. Since issuing the Proposal, the Bureau has learned of additional detailed Economic Census data for NAICS code 5614501, which encompasses ''consumer credit reporting agencies'' but not ''mercantile reporting agencies,'' in contrast to code 561450. These additional data have permitted the Bureau to refine its original estimates. First, the Bureau originally concluded that the consumer reporting market includes about 401 entities. This estimate was based on summary data for NAICS code 561450. The more detailed data permit the Bureau to refine its estimate to 410 consumer reporting entities. Second, the summary data for NAICS code 561450 informed the Bureau that about 75 percent of establishments in the code, over all sizes of firms, were consumer reporting entities. The more detailed data for NAICS code 5614501 reveal that the 75 percent figure is fairly consistent throughout the distribution of firm sizes. Third, the more detailed data for NAICS code 5614501 permit a closer estimate of the number of firms with receipts between the threshold and $10 million. This estimate does not change the Bureau's basic conclusions about how many firms are larger participants given the $7 million threshold; what fraction of the market they constitute; and what proportion of total receipts in the market they represent. The discussion of the threshold, below, will be based on the more refined data from NAICS code 5614501. The Bureau also received one comment suggesting that the Bureau use the Nationwide Mortgage Licensing System as a data source. However this source does not yet include data on the consumer reporting market. Another commenter suggested using a database maintained by the Federal National Mortgage Association. But that database only includes the names of a small set of reporting entities, and does not provide any other data.

compliance and identify and assess risks to consumers, but at the same time cover only entities that can reasonably be considered ''larger'' participants of the market.

As explained in the Proposal, while there are hundreds of consumer reporting entities, according to the 2007 Economic Census, a threshold of more than $7 million in annual receipts will cover approximately 30 consumer reporting entities, or 7 percent of market participants. The Bureau continues to estimate that a threshold of more than $7 million will cover approximately 30 out of 410 consumer reporting agencies,[73] which collectively generate 94 percent of industry receipts among consumer reporting agencies.[74] However, some of those consumer reporting entities may be specialty consumer reporting agencies providing, for example, consumer reports only for employment background screening or rental decisions. As noted above, such entities do not come within the market as defined by the final rule. For comparison, the Bureau estimates that the median value of annual receipts in this industry is less than $500,000, significantly below the proposed threshold.[75] Thus, the rule plainly brings within the scope of Bureau supervision only consumer reporting entities that can reasonably be described as larger participants of the consumer reporting market.

As explained in the Proposal, the threshold of more than $7 million in annual receipts is consistent with the objective of supervising market participants that have a significant impact on consumers, in terms of the number of consumers affected by their operations. In the consumer reporting industry, prices range from two to three cents for prescreening products, from seven cents to sixty two cents for credit scores, and from one to two dollars for consumer reports, while some specialty reports may cost several dollars.[76] Thus, a company with more than $7 million in annual receipts likely impacts several million consumers. Further, as stated above, the entities meeting the proposed threshold generate approximately 94 percent of industry receipts. The Bureau believes that this level of coverage is appropriate in light of the highly concentrated nature of the consumer reporting market and the different types of firms encompassed in the market. For example, based on the more granular Economic Census data recently made available, the Bureau estimates that the six largest consumer reporting entities account for 85 percent of industry receipts. The Bureau believes that there are firms in addition to the largest six entities that have such a high level of participation in the market that they are reasonably deemed larger participants, and thus covering a substantial portion of the annual receipts in this market is warranted.

The Bureau received comments from some consumer groups arguing that the threshold for qualifying as a larger participant of the consumer reporting market should be lowered. Other consumer group commenters suggested that the threshold should be revised to include any firm that has annual receipts of $7 million or more from any source, provided that at least $3.5 million are from consumer reporting—which would effectively lower the threshold for multi-line businesses. For the reasons discussed above, the Bureau believes that a threshold of $7 million in annual receipts from consumer reporting activities serves the purposes and objectives of the larger-participant supervision program. Accordingly, the Bureau declines to alter the threshold for the consumer reporting market in either manner suggested by these commenters.

As discussed in connection with the definition of ''annual receipts,'' other commenters suggested raising the threshold from more than $7 million to more than $14 million in annual receipts. The Bureau does not believe that setting the threshold higher than that proposed would result in sufficient coverage of the participants of the consumer reporting market. Defining the larger participants of the consumer reporting market as including more than just the largest firms serves the purposes and objectives of the Dodd-Frank Act. Some consumers may not have files at the largest consumer reporting agencies. Many consumers may not utilize a credit card or checking account, or otherwise participate in mainstream financial activities. As a result, the largest consumer reporting agencies may receive little, if any, data with which to maintain files on these consumers. However, these consumers may utilize alternative financial products such as payday loans or check cashing services, which in some instances may be reported to specialty consumer reporting agencies. Likewise, resellers may have a large impact on consumers in certain credit markets, such as the mortgage market.[77] Setting the threshold too high would make it less likely that the larger resellers and larger specialty consumer reporting entities that compile information about consumers in alternative financial markets would be subject to supervision.

Some commenters argued that the proposed threshold would cover firms with a relatively small amount of earnings. Implicitly, these commenters take issue with the use of annual receipts as a criterion and would prefer earnings as an alternative criterion. As discussed above, the Bureau believes annual receipts reasonably measure market participation and has not identified a superior alternative criterion for measuring such participation. Other commenters pointed out that the $7 million threshold would capture a relatively high percentage of firms in various market segments. The Bureau recognizes that the particular threshold of more than $7 million may capture more or fewer firms in specific market segments

[73] As noted above, the Bureau now has access to more detailed data relating solely to consumer reporting entities than it did when it published the Proposal. The more detailed supplemental data confirm the Bureau's original estimates; the Bureau relies on these data for the sake of improved accuracy. The Census data indicate there are 410 consumer reporting businesses in NAICS code 5614501. This figure is quite close to the number (401) estimated in the Proposal based on data for NAICS code 561450. The Bureau still regards 410 as only an estimate for the number of firms in the consumer reporting market, because, as discussed above, some firms may not report their activities properly and some firms (such as certain analyzers) may not fall within this NAICS code.

[74] *See http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 5614501. This calculation assumes that the 14 firms in the Census-defined tier between $5 million and $10 million are evenly distributed throughout the tier. Because of uncertainty over the distribution within this tier, the Bureau acknowledges that its estimate of 30 consumer reporting agencies is only approximate, and that between 21 and 35 consumer reporting agencies may meet the threshold based on Census data. The Bureau based the 94 percent calculation on the amount of annual receipts generated by the 30 largest consumer reporting agencies. The 20 largest consumer reporting agencies generate 92 percent of annual receipts in the industry. The Bureau estimates that the next 10 largest firms generate about 2 percent of annual receipts in the industry, for a total of 94 percent.

[75] The median is estimated from data *available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 5614501.

[76] As noted in the Proposal, the Bureau produced these estimates by analyzing General Services Administration schedules and other publicly available price quotes from several consumer reporting firms. The Bureau acknowledges that in some instances consumer reports may cost more.

[77] In the mortgage market, originators routinely purchase ''three-merged'' and other credit reports sold by resellers, in order to facilitate their credit decisions. For example, the Federal Home Loan Mortgage Corporation, a government-sponsored entity that securitizes mortgages, has a Loan Prospector service that aids mortgage credit decisions. Loan Prospector, in turn, draws on a large network of resellers to provide originators these types of credit reports. *See http://www.loanprospector.com/about/features/mergedcreditoptions.html.*

within the consumer reporting market. Any threshold that operates market-wide will inevitably draw in more firms in some market segments than in others. Given the range of consumer reporting entities in the consumer reporting market identified by the final rule, the Bureau does not think it is practical to prescribe differing thresholds for more narrowly defined segments of the market. Doing so would effectively segregate the consumer reporting market covered by the final rule, which, for the reasons described above, the Bureau has determined would be inappropriate.

One commenter, referring to the Bureau's supervisory authority, pursuant to 12 U.S.C. 5515, over ''very large'' depository institutions and credit unions, *i.e.,* those with over $10 billion in assets and their affiliates, argued that the Bureau correspondingly should supervise only very large nonbank entities. But the Dodd-Frank Act's division of supervisory authority for insured depository institutions and credit unions does not govern the supervision of nonbank entities. Unlike depository institutions and credit unions that are not subject to Bureau supervision under 12 U.S.C. 5515, nonbanks in the consumer reporting market that are not subject to supervision under 12 U.S.C. 5514 generally will not be subject to other Federal supervision for assessing compliance with Federal consumer financial law or for other purposes. Moreover, 12 U.S.C. 5514 authorizes the Bureau to supervise entities that are ''larger'' participants in a market, not merely ''very large'' participants. Accordingly, the Bureau declines to raise the proposed annual receipts threshold for the consumer reporting market in response to this comment.

The Bureau also received a comment asserting that the proposed threshold would not acknowledge the existence of a middle market in consumer reporting. A pre-existing SBA regulation classifies a business in the consumer reporting market to be a ''small business,'' for SBA purposes, if its annual receipts are below $7 million. The commenter argued that if a business with over $7 million in annual receipts is a ''larger participant'' under the Bureau's rule, then every business in the market is either ''small'' or ''larger,'' a result the commenter considered nonsensical.

The commenter appears to have assumed that ''larger participants,'' in 12 U.S.C. 5514(a)(2), refers to the absolute size of the businesses in question. That is not how the Bureau understands the term. The Bureau interprets ''larger participants'' to mean those persons that participate to a relatively large degree in the relevant market. Market participation often increases with the size of a business, but a small business for SBA purposes can in principle be a larger participant, depending on market structure. If the Bureau recognized a market in which all the participants happened to qualify as small businesses, under an SBA definition, that market could still have ''larger participants'' for purposes of the Dodd-Frank Act—a result the commenter's assumption would foreclose. As described above, in NAICS code 5614501, corresponding to consumer reporting, the median figure for annual receipts is less than $500,000.[78] Thus, many consumer reporting businesses that qualify as ''small businesses'' under the SBA regulation are actually larger than at least 50 percent of market participants.

The Bureau notes that the SBA has proposed to amend its size standard for the category corresponding to consumer reporting.[79] Under the SBA's proposed rule, a consumer reporting business would be a ''small business'' if it had $14 million or less in annual receipts. However, even if the SBA finalizes a regulation in accordance with this proposal, that change would not alter the degree to which various entities participate in the consumer reporting market.

Commenters may have misunderstood the relationship between the SBA's size standards and the measurement of ''larger participants'' of a market because the Bureau adapted its definition of ''annual receipts'' from the SBA's measure. The Bureau chose this approach for the convenience of covered persons. It did not intend, by doing so, to connect the SBA's ''small business'' size standard to the Bureau's larger-participant test, or to suggest that $7 million in annual receipts was chosen on that basis.[80] The SBA's measure and the Bureau's threshold are used for different purposes and targeted to different statutory objectives. In setting its size standard, the SBA considers myriad factors—such as eligibility for Federal small-business assistance and Federal contracting programs; startup costs, entry barriers, and industry competition; and technological change[81]—that differ from the concerns that motivate the Bureau's definition of ''larger participants'' in this rule. In addition, the Bureau's ''annual receipts'' criterion differs in important respects from the SBA's. For example, the SBA counts all of a person's receipts in calculating annual receipts, while the Proposed Rule counted only receipts resulting from a market-related activity. Additionally, for purposes of aggregating annual receipts, the SBA and the final rule use different tests to assess whether persons are affiliates. Under the SBA test, one person controls another (thus making the two affiliates), where one person owns at least 50 percent of voting stock of the other. Under the final rule, by contrast, for the reasons explained above, the power to vote 25 percent of a class of securities counts as control. Because of these differences, an entity's receipts as calculated under the SBA regulation may be greater than its receipts for purposes of this rule.

Another consumer reporting industry commenter stated that the Bureau should proceed very cautiously in setting the thresholds for coverage in the consumer reporting market until it has sufficient quantifiable data for establishing these thresholds. Although the Bureau has limited data, as described in the preceding section, the Bureau believes that these data are sufficient to understand the contours of the consumer reporting market and rationally set a threshold for larger participants of the market. In particular, the available data provide detail beyond summary statistics by grouping firms into size tiers, allowing the Bureau to estimate the general distribution of receipts throughout the market. This distribution of receipts, which the Bureau has relied upon for the estimates presented above, is adequate for defining a category of ''larger participants.''

In addition, the Bureau believes that one of the purposes of the nonbank supervision program as conceived by Congress is to gather more information about industries as to which little is known as compared to depository institutions. Congress underlined the importance of this effort by setting a one-year deadline for the initial larger participant rule. Thus, the Bureau believes that it should not delay its rulemaking because of imperfect data and acknowledges that the information gained from its supervisory and other activities may lead it to revise its thresholds over time.

[78] The median is estimated from data *available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 5614501.

[79] 76 FR 63510 (Oct. 12, 2011).

[80] The Proposal noted that with a threshold of more than $7 million, the category of larger participants would not include any small businesses (as defined by the SBA). The Bureau did not mean to suggest that small businesses cannot, in general, be ''larger participants.''

[81] 76 FR 63513.

Finally, a few commenters recommended that the Bureau index the threshold for annual receipts for inflation. At this time, the Bureau does not intend to index for inflation because, to the extent necessary or appropriate, it expects to make adjustments to the threshold through future rulemakings to reflect not only inflation, but also other shifts in the nature and structure of the consumer reporting market and additional data as it becomes available to the Bureau.

Apportionment. As noted in the Proposal, the Bureau recognizes that there are multi-line companies that derive only a portion of their annual receipts from activities related to the consumer reporting market. The Proposed Rule provided that the only annual receipts to be considered are those ''resulting from'' activities related to the consumer reporting market.

The Bureau received a number of comments on the issue of apportionment. One consumer reporting industry representative supported the concept of apportionment, but suggested that it would be difficult and unduly burdensome unless the Bureau defines the consumer reporting market in a manner consistent with applicable statutes and industry practices. Another industry representative said that apportionment would present substantial difficulties for multi-line companies because IRS forms generally do not differentiate between income streams within organizations, and a multi-line company will need to perform burdensome calculations beyond the calculations IRS forms require.[82] A group representing attorneys engaged in commercial law stated that the Proposed Rule would likely require participants to overhaul their accounting systems to segregate revenue by activity type, at a significant cost, in order to determine whether they are larger participants or to respond to Bureau assertions on that point. A consumer group suggested that the Bureau should count a company's total annual receipts, from any of its revenue streams, toward the larger-participant threshold. This commenter stated that determining a company's status as a larger participant using total annual receipts would be much simpler than trying to segregate annual receipts from market-related activities, and would serve to prevent evasion by reducing the temptation for companies to misclassify the source of their revenues to avoid supervision. A group representing attorneys recommended that the Bureau provide greater clarity in the definition of the categories of annual receipts to be calculated to put regulated parties on notice of the applicable measurement. Another commenter said that the Bureau should define the term ''apportionment'' and use that definition when describing the aggregation of annual receipts for affiliated companies.

The Bureau believes it is appropriate to permit apportionment of annual receipts. In some instances there may be nonbank covered persons that have significantly different business lines, with certain business lines not relating to the consumer reporting market. At the same time, the Bureau acknowledges the concerns regarding burdens associated with apportionment. The Bureau, however, believes that participants of the consumer reporting market are reasonably aware of the sources of their revenue, and should thus be able to apportion without undue burden. Moreover, it bears noting that market participants are not required to apportion their annual receipts on a periodic or other basis under the final rule. On the contrary, the Bureau has decided to permit apportionment, in part, to enable a nonbank covered person to apportion its annual receipts if it wished to challenge an assertion by the Bureau that it qualified as a larger participant. In such a case, the person may provide records, documents or other evidence to the Bureau reasonably identifying that portion of its annual receipts that do not result from market-related activities. Furthermore, if the person wishes not to apportion receipts in challenging such an assertion, it may forego doing so, with the sole result being that it will have higher annual receipts counted toward the $7 million threshold for larger-participant status. Many larger participants would be above the threshold with or without apportionment.

The Bureau does not believe that it would be helpful to provide specific guidance on what accounting methods entities should use to apportion annual receipts. The Bureau believes that nonbank covered persons facing different circumstances may appropriately use different apportionment methods that fairly reflect those circumstances and their business operations. Therefore the Bureau declines to set forth specific requirements or guidance on how to apportion annual receipts. The Bureau also declines to define the term ''apportionment.'' The term is not used in the regulatory text; rather, apportionment is a concept that conveys the inclusion of receipts ''resulting from'' activities related to the consumer reporting market. Accordingly, the Bureau adopts in the final rule the provision that the only receipts counting toward the calculation of ''annual receipts'' are those ''resulting from'' activities related to the covered market.

VI. Section 1022(b)(2)(A) of the Dodd-Frank Act

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts.[83] The Proposal set forth a preliminary analysis of these effects, and the Bureau requested and received comments on the topic. In addition, the Bureau has consulted or offered to consult with the Federal Trade Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the National Credit Union Administration in connection with this rulemaking, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

The final rule establishes, in part, the scope of the Bureau's nonbank supervision program, particularly with respect to ''larger participants of other

[82] This commenter appears to have misapprehended the Proposed Rule to mandate that IRS forms are the only permissible source of information about a company's annual receipts. The commenter recommended that the final rule state expressly that a market participant may make a good faith determination of its annual receipts based on records maintained in the ordinary course of business. The Bureau does not believe such an addition to the regulation is necessary, because the rule does not restrict companies to relying solely on their IRS forms. The criterion by which market participation is measured is annual receipts resulting from consumer reporting; the Bureau is aware that this specific quantity does not necessarily correspond, for every company, to a figure reported to the IRS. In addition, the Proposal explained that a person wishing to dispute whether it is a larger participant may provide the Bureau records, documents, or other evidence reasonably identifying what portion of its annual receipts result from activities falling outside a covered market.

[83] Specifically, 12 U.S.C. 5512(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in 12 U.S.C. 5516, and the impact on consumers in rural areas. In addition, 12 U.S.C. 5512(b)(2)(B) directs the Bureau to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which the provisions of 12 U.S.C. 5512(b)(2) apply to a rulemaking of this kind that does not establish standards of conduct is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the analysis and consultations described in those provisions of the Dodd-Frank Act.

markets for consumer financial products or services,'' made subject to supervision by 12 U.S.C. 5514(a)(1)(B). The rule establishes general definitions, concepts, protocols, and procedures relating to the Bureau's supervision of larger participants and the assessment of larger-participant status. The rule also identifies a market for consumer reporting in which the Bureau will conduct supervision and defines the ''larger participants'' of that market. Participation in this market is assessed on the basis of annual receipts, generally averaged over three years, resulting from consumer reporting activities. If a nonbank covered person's annual receipts from consumer reporting are over a threshold of $7 million, the entity is a larger participant subject to the Bureau's supervisory authority. With the rule in place, the Bureau will be able to commence supervisory activities in the identified consumer reporting market.

B. Potential Benefits and Costs to Consumers and Covered Persons

The analysis considers the benefits, costs, and impacts of the key provisions of the rule against a pre-statutory baseline; that is, the analysis evaluates the benefits, costs, and impacts of the relevant statutory provisions and the regulation combined.[84] Before the Dodd-Frank Act, there was no Federal program for supervision of nonbank participants of the consumer reporting market. With the statute and the final rule in effect, the Bureau will be able to supervise participants of the consumer reporting market who have annual receipts from consumer reporting of more than $7 million.

The Bureau notes at the outset that limited data are publicly available with which to quantify the potential benefits, costs, and impacts of the rule. For example, although the Bureau has general quantitative information, discussed above, on the number of market participants and their receipts, the Bureau lacks detailed information about their rate of compliance or non-compliance with Federal consumer financial law (including the FCRA) and about the range of compliance mechanisms and their costs to market participants. The Proposal requested information to support the analysis of benefits, costs, and impacts, but commenters did not provide, or identify sources for, relevant data.[85] Over time, the Bureau expects to develop information related to these topics through its supervisory activities.

In light of these data limitations, this analysis generally provides a qualitative discussion of the benefits, costs, and impacts of the final rule. General economic principles, together with the limited data that are available, provide insight into these benefits, costs, and impacts. Where possible, the Bureau has made quantitative estimates based on these principles and data as well as its experience of supervision.

The discussion below describes three categories of benefits and costs. First, after the rule authorizes Bureau supervision in the consumer reporting market, participants of the market may respond to the possibility of supervision by changing their systems and conduct. Second, when the Bureau undertakes supervisory activity at specific firms, those firms will incur costs from participating in supervision, and the results of these individual supervisory activities may also produce benefits and costs.[86] Third, the Bureau analyzes the costs associated with firms' efforts to assess whether they qualify as larger participants under the rule.

1. Benefits and Costs of Responses to the Possibility of Supervision

The final rule subjects larger participants of the consumer reporting market to the possibility of Bureau supervision. That the Bureau is authorized to undertake supervisory activities with respect to a nonbank covered person that qualifies as a larger participant does not necessarily mean the Bureau will in fact undertake such activities regarding that covered person in the near future or at all. Rather, as explained in the Proposal, supervision of any particular larger participant will be probabilistic in nature. For example, the Bureau will examine certain larger participants on a periodic or occasional basis. The Bureau's decisions about supervision will be informed by the factors set forth in 12 U.S.C. 5514(b)(2), relating to the size and transaction volume of individual participants, the risks their consumer financial products and services pose to consumers, the extent of State consumer protection oversight, and other factors the Bureau may determine are relevant. Each entity that believes it qualifies as a larger participant will know that it might be supervised and may gauge, given its circumstances, the likelihood that the Bureau will initiate an examination or other supervisory activity.

As the Proposal pointed out, the prospect of potential supervisory activity may create an incentive for larger participants to increase compliance with Federal consumer financial law. They may anticipate that by doing so (and thereby decreasing risks to consumers), they can decrease their chances of actually being subject to supervision as the Bureau evaluates the factors outlined above. In addition, an actual examination would likely reveal any past or present noncompliance, which the Bureau may seek to correct through supervisory activity or, in some cases, enforcement actions. Larger participants may therefore judge that the prospect of supervision has increased the potential consequences of noncompliance with Federal consumer financial law, and they may seek to decrease that risk by curing any noncompliance.

The Bureau believes it is likely that market participants will increase compliance in response to the Bureau's supervisory activities authorized by this rule. However, because the rule itself does not require any entity to alter its provision of consumer reporting products or services, any estimate of the amount of increased compliance would be a prediction of market participants' behavior. The data the Bureau currently has do not support a specific quantitative prediction. But, to the extent that entities increase their compliance in response to the rule, that response will result in both benefits and costs.[87]

[84] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[85] One commenter asserted without explanation that medium-sized firms would need to dedicate between three and eight employees to the supervision process during the two weeks before and two weeks of an examination. Several others suggested, also without explanation, that they would each need to hire an additional employee to respond to Bureau supervision.

[86] Pursuant to section 12 U.S.C. 5514(e), the Bureau also has supervision authority over service providers to nonbank covered persons encompassed by 12 U.S.C. 5514(a)(1), which includes larger participants. The service providers to consumer reporting larger participants might include data aggregators, law firms, account maintenance services, call centers, data and record suppliers, and software providers. The Bureau does not have data on the number or characteristics of service providers to the roughly 30 larger participants of the consumer reporting market. The discussion herein of potential costs, benefits, and impacts that may result from this Proposal generally applies to service providers to larger participants.

[87] Another approach to considering the benefits, costs, and impacts of the rule would be to focus almost entirely on the supervision-related costs for larger participants and omit a broader consideration of the benefits and costs of increased compliance. As noted above, the Bureau has, as a matter of discretion, chosen to describe a broader range of potential effects to more fully inform the rulemaking.

a. Benefits From Increased Compliance

Increased compliance would be beneficial to consumers that are affected by consumer reporting. As discussed above, the potential pool of affected consumers is very broad. Consumer reporting is integrally connected with many consumer financial products and services and plays a key role in decisions regarding such products and services. A number of Federal consumer financial laws, including, among others, the FCRA and Title X of the Dodd-Frank Act, and related regulations, offer substantive protections to consumers regarding consumer reporting products and services. Increasing the rate of compliance with such laws will benefit consumers by providing more of the protections mandated by those laws.

For example, the FCRA encourages providers of consumer reports (as defined in the FCRA) to ensure that they provide accurate information.[88] Therefore, increased compliance with the FCRA would likely result in the availability of more accurate consumer report information in the marketplace. Because consumer report information is often critical in decisions regarding consumer financial products and services, more accurate information could lead to better decisions.[89] Inaccurate information, for example, could lead to a consumer's being denied a loan that the consumer could afford to and would be likely to repay. Inaccurate information could also lead to a consumer's being offered credit at an interest rate higher than would be available if the creditor knew the consumer's true credit history. Conversely, some inaccuracies, by exaggerating some consumers' credit worthiness, may enable such consumers to receive lower interest rates than they otherwise would but understate their risk of default. In all these cases, increasing the accuracy of consumer report information should improve the pricing and allocation of credit.

As another example, consumers have relatively little control over when and with whom a consumer reporting business shares information about them. Federal consumer financial law protects consumers by restricting the dissemination of certain information about them. Increased compliance would mean less disclosure of consumer information to improper recipients or in inappropriate circumstances.

b. Costs of Increased Compliance

On the other hand, as discussed in the Proposal, increasing compliance involves costs. In the first instance, those costs will be paid by the market participants that choose to increase compliance. Entities may need to hire or train additional personnel to effectuate any changes in their practices that are necessary to produce the increased compliance. They may need to invest in systems changes to carry out their revised procedures. In addition, entities may need to develop or enhance compliance management systems, to ensure that they are aware of any gaps in their compliance. Such changes would also require investment and incur operating costs.

An entity that does incur costs in support of increasing compliance may try to recoup those costs by increasing the prices of its consumer reporting products and services.[90] Whether and to what extent this increase occurs will depend on competitive conditions in the consumer reporting market. For example, if changed procedures produced more valuable consumer report information—for example, due to improved accuracy—a company might be able to charge more for the information. If demand for consumer report information is fairly inelastic, consumer reporting entities may, in the short or medium term, be able to shift to the users of consumer reports a larger portion of the cost of increased compliance.

2. Benefits and Costs of Individual Supervisory Activities

In addition to the responses of market participants anticipating supervision, the possible consequences of the rule include the effects of individual examinations or other supervisory activity that the Bureau may conduct in the consumer reporting market.

a. Benefits of Supervisory Activities

The information gathered during supervisory activity will be useful in several ways. For example, when an examination uncovers deficiencies in a company's policies and procedures, both the company and the Bureau will become aware of those deficiencies. The Bureau's examination manual calls for the Bureau to prepare a report of each examination and to assess the strength of the subject firm's compliance mechanisms and the risks the firm poses to consumers, among other topics. The Bureau will share the examination report with the subject firm, because one purpose of supervision is to inform the firm of problems detected by examinations.

Thus, for example, an examination may reveal that, due to the design of its procedures, a company has an unexpectedly high rate of errors in its consumer report information. Or an examination may determine that a company's handling of consumer information poses inappropriately high risk of improper disclosure. Examiners may find evidence of widespread noncompliance with Federal consumer financial law, or they may identify specific areas where a company has inadvertently failed to comply. The Bureau might conclude that an inadequacy in a company's information system poses avoidable risks to consumers. These examples are only illustrative of what kinds of information an examination might deliver.

Detecting and informing companies about such problems should be beneficial to consumers. When the Bureau notifies a company about risks associated with an aspect of its activities, the company is expected to adjust its practices to reduce those risks. That response may result in increased compliance with Federal consumer financial law, with benefits like those described above. Or it may avert a violation that would have occurred had Bureau supervision not detected the risk promptly. The Bureau may also inform companies about risks they pose to consumers short of violating the law. Action to reduce those risks would be a benefit to consumers.

Given the obligations consumer reporting entities have under Federal consumer financial law and the existence of efforts to enforce such law, the results of supervision may also benefit firms under supervision by detecting compliance problems early. When a firm's level of noncompliance has attracted an enforcement action, the company must both face the penalties for noncompliance and adjust its systems to cure the breach. Changing practices at this point can be expected to be relatively difficult, because a level of noncompliance that has attracted the attention of enforcement authorities or

[88] *See Safeco Ins. Co. of Am.* v. *Burr,* 551 U.S. 47, 52 (2007) (''Congress enacted the FCRA in 1970 to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.''); *see also Gelman* v. *State Farm Mut. Auto. Ins. Co.,* 583 F.3d 187, 191 (3d Cir. 2009); *Vassalotti* v. *Wells Fargo Bank,* 815 F.Supp.2d 856, 863 (E.D. Penn. 2011).

[89] Several studies have identified the problems that inaccurate consumer reporting creates in credit markets. *E.g.,* Avery, Robert B., et al., *Credit Report Accuracy and Access to Credit,* 2004 Federal Reserve Bulletin 297, 314–15 (estimating fraction of individuals for whom inaccuracies in credit reports might affect credit terms); *see also id.* 301–02 (citing prior research).

[90] Sometimes the providers of consumer financial products and services bear the cost of consumer reports; sometimes consumers pay directly for consumer reports, as when a creditor requires a consumer to pay for the report the creditor uses in reviewing the consumer's loan application.

private plaintiffs will sometimes be severe enough to represent a serious failing of a company's systems. Supervision may detect flaws at a point when correcting them is relatively inexpensive. And catching problems before they involve a company in costly enforcement or private litigation, and potentially the payment of legal penalties or other forms of relief, could save the company substantial time and money. In short, supervision might benefit firms under supervision by reducing the need for other activities, like enforcement and private litigation, to achieve a given compliance rate. Accordingly, a shift of some amount of regulatory oversight from enforcement to supervision would be beneficial to market participants.

Further potential benefits, to consumers, to covered persons, or to both, may arise from the Bureau's gathering of information during supervisory activities. The goals of supervision include informing the Bureau about activities of market participants and assessing risks to consumers and to markets for consumer financial products and services. The Bureau may use this information to improve regulation of consumer financial products and services and enforcement of Federal consumer financial law, and to better serve its mission of ensuring consumers' access to fair, transparent, and competitive markets for such products and services. Benefits of this type will depend on what the Bureau learns during supervision and how it uses that knowledge.

b. Costs of Supervisory Activities

The potential costs of actual supervision arise in two categories. The first involves the costs of individual firms' increasing compliance in response to the Bureau's findings during supervisory activity and to supervisory actions. These costs are similar in nature to the possible compliance costs, described above, that larger participants in general may incur in anticipation of possible supervisory activity. This analysis will not repeat that discussion. The second category is the cost of supporting supervisory activity.

As described in the section-by-section analysis of the definition of ''supervision and supervisory activity,'' in Section V above, supervisory activity may involve requests for information or records, on-site or off-site examinations, or some combination of these activities. For example, in an on-site examination, generally, Bureau examiners begin by contacting the firm for an initial conference with management. That initial contact is often accompanied by a request for information or records. Based on the discussion with management and an initial review of the information received, examiners will determine the scope of the on-site exam. While on-site, examiners will spend some time in further conversation with management about the firm's processes and procedures. The examiners will also review documents, records, and accounts to assess the firm's compliance and evaluate the firm's compliance management systems. As with the Bureau's bank examinations, examinations of nonbank covered persons will involve issuing confidential examination reports and compliance ratings. The Bureau's examination manual describes the supervision process and indicates what materials and information a firm can expect the examiners to request and review, both before they arrive and during their time on-site. The primary cost a firm faces in connection with an examination is the cost of employees' time to collect and provide the necessary information.[91]

At this early stage in its nonbank supervision program, the Bureau does not have precise estimates of the expected duration and frequency of its examinations and the resources that firms may expend to cooperate with such examinations. Further, the duration of any examination of a firm will depend on a number of factors, including the size of the firm, the compliance or other risks identified, whether the firm has been examined previously, and the demands on the Bureau's supervisory resources imposed by other firms and markets. Nevertheless, some rough estimates may be useful to provide a sense of the magnitude of potential staff costs that firms may incur.

At firms within the category of larger participants with annual receipts close to the threshold of more than $7 million, typical examinations might be relatively brief. Bureau examiners might review materials and interview employees for four weeks, and a firm might devote the equivalent of one full employee during that time and for two weeks beforehand to prepare materials for the examination. The typical cost of the employee involved in responding to supervision can be expected to be roughly $49 per hour.[92] Six weeks of such an employee's time would cost less than $12,000.[93] For a larger participant with annual receipts from consumer reporting of $7 million, this cost would represent 0.17 percent of those annual receipts.[94] Even if an examination required twice as much employee time, the cost would still come to only 0.34 percent of annual receipts for such a firm.[95]

By contrast, at the very largest firms in the market, supervisory activity could last much longer. Given the complexity of a very large company, Bureau examiners might need months to review the relevant materials. Such a company might dedicate the equivalent of two full-time employees to participate in the examination.[96] The cost of eight months of employee time (four months each for two employees) would be about $68,000, or about 0.07 percent of annual receipts for a firm with $100 million in receipts.

For a firm of a more typical size, which would be between the two size groupings discussed above, Bureau examiners might review materials and interview employees for eight weeks, and a firm might devote the equivalent of one full employee during that time

[91] The Bureau recognizes that responding to examinations and other supervisory requests will entail certain other costs, such as photocopying and other costs of producing information. The costs of collecting and producing information may include more general costs for evaluating how to participate in and respond to supervisory activity. The Bureau has focused on staff time in collecting and providing information in order to provide an approximate sense of the magnitude of the key cost involved.

[92] Bureau of Labor Statistics, (BLS), National Compensation Survey, Employment Cost Trends, available at *http://www.bls.gov/ncs/ect/*. BLS data for ''nondepository credit intermediation'' indicate that the mean hourly wage of a compliance officer in that sector is $33.40. BLS data also indicate that salary and wages constitute 67.5 percent of the total cost of compensation. Dividing the hourly wage by 67.5 percent yields a wage (including total costs, such as salary, benefits, and taxes), rounded to the nearest dollar, of $49 per hour.

[93] All figures assume 40 hours of work per week.

[94] The Proposal described four business-weeks of employee time as ''a fraction of a percent'' of revenues, for a service provider that was a small business. Six business-weeks is also a fraction of a percent, as estimated above.

[95] One commenter, the National Credit Reporting Association, reported that a survey of its members in April 2012 found that consumer reporting businesses with annual receipts near the threshold typically have net profit margins of six to eight percent. The commenter did not explain the methodology for its survey or explain what statistical concept it meant by ''typical.'' Accordingly, the Bureau does not regard the commenter's six to eight percent figure as scientifically reliable. However, if the commenter is correct that this range represents a profit margin the Bureau could reasonably assume for the smallest businesses qualifying as larger participants under the rule, the estimated upper bound for the cost of examinations (0.17 percent for businesses at the threshold of qualifying as larger participants and 0.008 percent industry-wide) is relatively minor.

[96] Of course, multiple individuals, both inside and outside a firm, might participate in a supervisory activity. This rough estimate is meant to represent the aggregate amount of labor resources a company might dedicate to responding to supervisory activity.

and for two weeks beforehand to prepare materials for the examination. Thus, a typical exam would take ten weeks of such an employee's time and would cost less than $20,000.

To put the market-wide impact of supervision in perspective, the Bureau estimates that the average annual market-wide cost of supervision is 0.008 percent of receipts. The Bureau does not expect to supervise every larger participant in every year. For purposes of estimation, the Bureau assumes that each of the six largest market participants will be examined every other year, at a cost of $68,000 each, giving an average annual cost of $204,000. The Bureau assumes that each of the remaining larger participants will be examined once every three years, at a cost of $20,000 each, giving an average annual cost of $160,000. The total staff cost of responding to supervision comes to approximately $364,000 annually.[97] This figure represents 0.008 percent of the aggregate annual receipts—$4.3 billion[98]—of the larger participants of the consumer reporting market.

The Bureau declines to predict, at this point, precisely how many examinations in the consumer reporting market it will undertake in a given year. Once the rule takes effect, the Bureau will be able to undertake supervisory activity in the identified market; neither the Dodd-Frank Act nor the final rule specifies a particular level or frequency of examination. The frequency of examination will depend on a number of factors, including the Bureau's understanding of the conduct of market participants and the specific risks they pose to consumers; the responses of larger participants to prior examinations; and the demands that other markets make on the Bureau's supervisory resources. These factors can be expected to change over time, and the Bureau's understanding of these factors may change as it gathers more information about the market through its supervision and by other means.

3. Costs of Assessing Larger-Participant Status

Finally, the Bureau acknowledges that in some cases companies may incur costs in assessing whether they qualify as larger participants and potentially disputing their status. The rule is designed to minimize those costs.

Larger-participant status depends on a quantity, annual receipts, that for many companies should correspond to data they already report to the IRS. For such companies, assessing whether they satisfy the rule's definition of larger participants will involve minimal expense. Potential differences from the IRS figures arise only for companies that have annual receipts arising from activities besides consumer reporting as defined in the rule. Some firms may have multiple distinct lines of business. The Bureau believes that such firms ordinarily have records for each division of the accounting quantities—income and costs—underlying the calculation of annual receipts.

If, in addition, a company provides consumer report information sometimes for purposes excluded from the market, such as employment screening, and sometimes for purposes that fit within the rule's definition of consumer reporting, the company's accounting systems might not distinguish the two types of sale. However, most larger participants should not need such detailed information. The rule does not require market participants to submit data regularly on their annual receipts. Most of the time, a firm only needs to know its annual receipts to the extent it wants to determine in advance of any supervisory activity by the Bureau whether it is a larger participant. A firm with receipts from all activities that are above the threshold will not necessarily need to trace precisely what quantity derives from activities other than consumer reporting (as defined by the rule). A rough estimate would suffice to inform such a firm whether its consumer-reporting receipts cross the threshold. Most likely, the only firms that might need a more precise calculation of annual receipts would be those that have total receipts near the threshold and significant receipts from activities (like supporting employment screening) that would be excluded from the calculation.

The data the Bureau currently has do not support a detailed estimate of how many companies will incur such costs, or how much they might spend. Regardless, firms would be unlikely to spend significantly more on accounting systems than it would cost them to be supervised by the Bureau as larger participants. It bears emphasizing that expenditures on an accounting system intended to prove a firm is not a larger participant cannot necessarily protect a firm from being supervised. The Bureau can supervise a firm whose conduct the Bureau determines, pursuant to 12 U.S.C. 5514(a)(1)(C), poses risks to consumers. Thus, a firm choosing to spend significant amounts on an accounting system directed toward the larger-participant test could not be sure it would not be subject to Bureau supervision notwithstanding those expenses. The Bureau therefore believes it is unlikely that any but a very few firms would undertake such expenditures.

4. Consideration of Alternatives

The Bureau considered selecting different thresholds for larger-participant status in the consumer reporting market. If the threshold were much higher, say $100 million, then the Bureau's supervisory authority under the rule would reach only the very largest firms—about six entities—in the market. Such an approach would reduce both the expected benefits to consumers and the costs to covered persons, because fewer firms would be subject to the Bureau's supervisory authority. As the Proposal explained, if a change in a firm's systems or practices results in increased compliance with Federal consumer financial law, such a change would produce greater benefit at a large firm than at a smaller one. The largest firms are expected to affect the most consumers, and any increase in compliance by such firms would benefit a large number of consumers.

At which market participants supervision produces the greatest benefits or costs due to increased compliance depends on where the greatest risks to consumers lie. If some firms below $100 million in annual receipts have particular compliance problems, bringing such firms within the Bureau's supervisory authority, and conducting actual examinations at those firms, can be expected to produce larger increases in compliance than would supervising larger firms. The statutory criteria regarding supervision should ensure that those larger participants that are supervised are the same firms where the benefits from supervision are likely to be highest.[99] The selected threshold of $7 million gives the Bureau the flexibility to direct its supervisory resources to the firms where supervision will be of greatest use, even if they are not the very largest in the market.

5. Responses to Comments

The Bureau received a number of comments on its preliminary analysis under 12 U.S.C. 5512(b)(2).

Several comments related to the Bureau's characterization of supervision as probabilistic. One commenter

[97] As noted above, there are roughly 30 entities whose annual receipts from consumer reporting exceed the $7 million threshold.

[98] *See http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_56SSSZ4&prodType=table,* scroll to NAICS code 5614501. $4.3 billion represents 94 percent of all receipts for ''consumer credit reporting agencies,'' which total $4.55 billion.

[99] 12 U.S.C. 5514(b)(2).

criticized the Bureau for asserting that the rule only authorizes supervisory activities and that the Bureau will likely not supervise all larger participants in any given year. According to this commenter, the Bureau was trying to avoid acknowledging the costs of supervision. Later, when the Bureau actually undertakes supervisory activity, the commenter claims that the Bureau will not consider the benefits, costs, and impacts because such consideration is only necessary for rulemaking, not supervision. Another commenter argued that the Bureau had assumed the rule would produce increased compliance yet had discounted the costs as ''probabilistic.'' One commenter suggested that firms will make additional efforts at compliance, in anticipation that they might be supervised, and will therefore bear the resulting costs regardless of how often the Bureau actually conducts supervisory activity.

As reflected above, the Bureau continues to believe that supervision of specific entities is probabilistic in nature. The Bureau has recognized two stages in which the rule could increase compliance, with its attendant benefits and costs. First, the Bureau acknowledges that companies may respond to the possibility of the Bureau's supervision activity by changing their systems and conduct to produce more compliance with Federal consumer financial law. The discussion above presented benefits and costs associated with entities' changing their conduct in anticipation of possible supervision. Second, in the course of actual examinations, the Bureau may uncover specific problems that companies then correct.

Commenters offered somewhat contradictory comments regarding the rate of existing compliance. Some suggested that the Bureau had underestimated the power of firms' existing incentives—from sources such as enforcement and supervision by State regulators—to comply with law. Such commenters asserted that market participants are already aware of the risks of enforcement action and regulatory oversight and have effective compliance mechanisms. Thus, the commenter concluded, the benefits of the rule are smaller than the Proposal assumed. Another commenter stated that the rule will be more costly than the Proposal acknowledged, because firms will have to develop compliance policies and procedures, including by hiring new staff and developing new systems. Yet another commenter contended that because the rule is not substantive, but only establishes the possibility of supervision, the Bureau cannot assume that companies will increase their legal compliance in response.

The comments do not lead the Bureau to different conclusions regarding the benefits and costs of increased compliance as a potential effect of the rule. If the rule incentivizes companies to develop compliance management systems that they do not already have, that result would produce benefits in the form of improved compliance and costs involved in creating and administering such systems. As a general matter, the Bureau believes it is unlikely that companies can consistently comply with the law without having reasonably thorough systems for promoting and monitoring compliance. Without such systems, a company may happen to comply with law, but it cannot be assured whether it is doing so; cannot reliably learn of problems and fix them; and cannot modify its practices to keep up with changes in the law. If, therefore, the rule will motivate firms to develop compliance systems, the current rate of compliance is unlikely to be as high as some commenters suggested.

If, on the other hand, compliance levels are already high—in part because of incentives one commenter pointed out, arising from Federal and State enforcement and State supervisory activity—then the benefits of the rule will be lower. However, to achieve high levels of compliance, firms presumably already incur corresponding costs. The compliance-related costs of the rule will therefore be lower as well. In addition, the Bureau's likely level of supervisory activity over time will also be lower. The commenters provided no evidence of the existing level of compliance of firms in the consumer reporting market. In any event, whatever particular increase in compliance may occur as a result of the rule, the benefits and costs of that increase are associated.[100]

Commenters also questioned the Bureau's estimates of how much supervision would cost firms. An industry association asserted that the Bureau's estimate, for actual supervisory activity, of four full weeks of employee time at a small firm was a significant underestimate. The commenter did not offer an alternative estimate, but the commenter argued that even a month of employee time would be burdensome for a small business.[101]

The Bureau acknowledges that staff time can be a cost for a firm responding to particular supervisory activity. The Bureau has estimated the magnitude of that cost for firms of various sizes. The amount of staff time involved represents the Bureau's experience of supervision. That amount may be an underestimate or overestimate for some supervisory activities, depending on the circumstances. But even if all supervisory activity cost twice as much as the Bureau estimated, the cost would still, as noted above, be 0.34 percent of the annual receipts of an individual firm at the $7 million threshold.

Several commenters suggested that the rule would force companies to develop new accounting systems to generate data on the amount of receipts attributable to consumer reporting. It bears emphasis that the rule imposes no such requirement. The Bureau has not required market participants regularly to submit accounting data. Market participants might be motivated to alter accounting systems to some degree to improve their assessments of whether they qualify as larger participants, but the Bureau is not persuaded by these commenters that firms will spend significant amounts on such alterations. As noted above, a firm with multiple lines of business presumably knows basic accounting information, such as receipts, for each division. If existing accounting systems do not provide detailed information corresponding to the rule's definition of annual receipts, the discrepancy would only relate to the amount of sales a company makes for purposes, like employment screening, that the rule excludes from the consumer reporting market. As discussed above, a firm would only need to know such information in detail to the degree that the precise facts might render the firm not a larger participant. Moreover, firms would be unlikely to spend significantly more on accounting systems than it would cost them to be supervised by the Bureau.

[100] According to several commenters, the Bureau also overlooked the cost to firms organizing their compliance management policies in a format consistent with the Bureau's supervision manual. These commenters asserted that companies would, anticipating the possibility of supervisory activity, expand their compliance management systems beyond what is appropriate for assuring compliance. Yet the Bureau's examination manual does not specify a particular format for compliance management policies. Of course, some companies may develop more involved compliance management systems than would be necessary or appropriate for their circumstances. The Bureau has, and commenters provided, no information on the basis of which to assess the possible magnitude of such an effect.

[101] Several businesses with annual receipts near the $7 million threshold suggested they would each need to hire an additional employee to respond to Bureau supervision. None provided any support for the assertion that the Bureau's supervisory activity would require a dedicated employee at a firm of such size.

One commenter also discussed how the costs of supervision will affect the consumer reporting market. The commenter argued that the cost of undergoing examination will be most easily borne by large businesses. The commenter inferred that the existence of supervision would create an economy of scale that would favor the growth of large firms in the market at the expense of smaller participants. The commenter did not explain whether this hypothesized market effect would be beneficial or harmful, either to consumers or to covered persons.

Even if, as the commenter contends, a larger firm is better able to bear the costs of supervision, the rule as a whole does not necessarily burden smaller firms disproportionately. The Bureau may supervise the largest firms more frequently than those that are just above the threshold of qualifying as larger participants. As the Proposal noted, the benefits gained from detecting noncompliance are likely to be greater when the firm under examination is larger. Larger firms affect larger numbers of consumers. The benefit from any improvement in policies and processes will therefore be multiplied across the experiences of more consumers. In addition, participants' asset sizes and transaction volumes are among the 12 U.S.C. 5514(b)(2) factors that the Bureau will consider in prioritizing its supervisory activities. There is little reason to believe that the Bureau's general supervision of larger participants of this market will skew the playing field in favor of the largest firms—particularly in view of the fact, explained above, that the staff costs of responding to supervisory activity are likely to be small even for firms just above the larger-participant threshold.

This commenter also argued that the costs of examination will be passed on to consumers and will therefore increase the cost of credit. The commenter offered no data or argument to support this assertion. Whether and to what extent newly supervised firms shift the cost of supervision, or of increased compliance, to their customers who then pass the cost increase on to consumers will depend on complex market conditions. The Bureau believes any such effects are likely to be very small. In contrast, as discussed above, some consumers may see their costs of credit decrease, if the availability of more accurate consumer report information helps creditors assess them better as credit risks. Conversely, for some consumers, the availability of more accurate information may lead their costs of credit to increase. In general, the Bureau does not have enough information to assess in detail whether and for what fraction of consumers the rule might increase or decrease the cost of credit. But the overall result should be a more efficient allocation of credit.

C. Impact on Depository Institutions and Credit Unions With Total Assets of $10 Billion or Less, and Impact on Consumers in Rural Areas

The final rule does not apply to depository institutions or credit unions of any size.[102] Nor would the rule have a unique impact on rural consumers.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[103] The RFA defines a ''small business'' as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[104]

The RFA generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[105]

The undersigned certified that the Proposal, if adopted, would not have a significant economic impact on a substantial number of small entities and that an initial regulatory flexibility analysis was therefore not required. The final rule adopts the Proposal, with some modifications that do not lead to a different conclusion. Therefore, a final regulatory flexibility analysis is not required.

The rule will define a class of firms as larger participants of the consumer reporting market and thereby authorize the Bureau to undertake supervisory activities with respect to those firms. Because the rule adopts a threshold for larger-participant status of $7 million in annual receipts resulting from consumer reporting activities, larger market participants would generally be above the existing SBA small-business size standard for this market: annual receipts at or below $7 million. Moreover, the rule does not itself impose any obligations or standards of conduct on businesses outside the category of larger participants. The rule therefore does not have a significant impact on a substantial number of small businesses.[106]

Additionally, and in any event, the Bureau believes that the rule would not result in a ''significant impact'' on any small entities that could be affected. As previously noted, whether the Bureau would in fact engage in supervisory activity, such as an examination, with respect to a larger participant (and, if so, the frequency and extent of such activity) would depend on a number of considerations, including, among others, the Bureau's allocation of resources and the application of the statutory factors set forth in 12 U.S.C. 5514(b)(2). Given the Bureau's finite supervisory resources, and the range of industries over which it has supervisory responsibility for consumer financial protection, whether and when an entity in the consumer reporting market would be supervised is probabilistic. Moreover, even in cases where supervisory activity were to occur, the costs that would result from such activity are expected to

[102] As potential users of consumer reporting services, depository institutions and credit unions might see changes in the quality and pricing of such services. The Bureau knows of, and commenters have suggested, no reason to think that these entities would be negatively affected by the final rule.

[103] 5 U.S.C. 601 *et seq.* The Bureau is not aware of any governmental units or not-for-profit organizations to which the Proposal would apply.

[104] 5 U.S.C. 601(3). The Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment.

[105] 5 U.S.C. 609.

[106] The Proposal hypothesized two circumstances in which a business might be a larger participant of the consumer reporting market yet be a small business for RFA purposes. First, a nonbank covered person that was not a small business might become a small business during the second year after it qualified as a larger participant. This occurrence would be rare, because relatively few nonbank covered persons appear (according to the Economic Census data) to have annual receipts near the $7 million threshold. Moreover, the general method of averaging a business's receipts over three years reduces the sensitivity of the ''annual receipts'' criterion to fluctuations from a single year. The second hypothesized circumstance involves the rule's definition of ''control,'' which is somewhat more expansive than the SBA's. A company might be affiliated with another company for purposes of this rule, so that the two companys' receipts would be aggregated towards the $7 million threshold. Yet the SBA's method might not treat the two companies as affiliated, and their separate receipts might not cross the $7 million line. The Bureau anticipates no more than a very few such cases in the market covered by today's rule.

be minimal in relation to the overall activities of the firm.[107]

Finally, 12 U.S.C. 5514(e) authorizes the Bureau to supervise service providers to nonbank covered persons encompassed by 12 U.S.C. 5514(a)(1), which includes larger participants. As the Bureau noted in the Proposal, because the rule does not address service providers, effects on service providers need not be addressed for purposes of this RFA analysis. Even were such effects relevant, the Bureau continues to believe that it is very unlikely that any supervisory activities with respect to the service providers to the approximately 30 larger participants of the consumer reporting market delineated in the rule would result in a significant economic impact on a substantial number of small entities.[108]

One commenter pointed out that the SBA has issued a notice of proposed rulemaking, considering an increase in the small business size standard for the consumer reporting market to $14 million in annual receipts. The SBA's proposal does not affect the accuracy of the Bureau's RFA analysis, because the size standard has not yet changed. In any event, even if a $14 million standard applied, the rule would still not impact a ''substantial number'' of small entities. The Bureau estimates, using the Economic Census data, that the rule treats as larger participants approximately 30 consumer reporting entities out of approximately 410 firms in the market. Out of these 410 entities, the Bureau estimates that approximately 393 market participants would be small business entities under the SBA's proposed size standard of $14 million. Meanwhile, among the about 30 larger participants of the consumer reporting market, about 13 might fall below a $14 million threshold. Thus, the final rule would impact only 3.3 percent of consumer reporting entities that might be considered small businesses under the SBA's proposal, and the impact on these entities would not be significant anyway. The rule would thus not have a significant impact on a substantial number of small entities, even if the SBA were to adopt its proposed change to the relevant definition of small business.

One commenter argued that the Bureau was incorrect in taking the positions that ''[t]he rule would not itself impose any obligations or standards of conduct on larger participants for purposes of [Regulatory Flexibility Act] analysis'' and that ''whether and when an entity in the * * * consumer reporting market[] would be supervised is probabilistic.'' [109] This commenter stated that the actual imposition of examination requirements will have an effect on small businesses, because the consequences of supervision could include an increase in the cost of credit and a diminution in access to credit. The commenter argued that the Bureau should not have certified the Proposed Rule and should have convened a panel and consulted representatives of small entities in compliance with the small business protection requirements set forth in the Small Business Regulatory Enforcement Fairness Act (SBREFA), as amended by Section 1100G of the Dodd-Frank Act.

The Bureau believes that its certification of the Proposed Rule was appropriate and that, as a result, the convening of a panel to consult with small entities was not required under the RFA. The Proposed Rule would not have imposed any obligations or standards of conduct on entities for purposes of RFA analysis, but rather would have authorized the Bureau to exercise its supervisory authority with respect to a class of entities. Thus, the Proposal, like the final rule, does not give rise to a regulatory compliance burden for small entities. In any event, the Bureau properly found (as described above with respect to the final rule) that even if the Proposed Rule were considered to impose regulatory obligations for purposes of RFA analysis, it would not have created a significant impact on a substantial number of small entities.

Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

[107] As discussed above, the cost of participating in an examination might be roughly 0.17 percent of annual receipts for a firm near the $7 million threshold. The proportion would be larger for a smaller firm, but the impact will still not be substantial.

[108] As the Bureau noted in the Proposal, it reaches this judgment in light of the number of relevant small firms in the relevant NAICS codes. For example, many of these service providers would be considered to be in industry 522390, ''Other activities related to credit intermediation,'' or 518210, ''Data Processing, Hosting, and Related Services.'' According to the 2007 Economics Census, there are more than 5,000 small firms in the first industry group and nearly 8,000 in the second. The number of firms connected to the 30 larger participants of the consumer reporting market is likely to be only a small fraction of these two figures. Moreover, the impact of supervisory activities at such service providers would likely be no more intensive—and probably much less, given the Bureau's exercise of its discretion in supervision—than at the larger participants themselves. As discussed above, supervisory activities at larger participants would not be expected to give rise to a significant economic impact. Finally, because it is very unlikely that the Bureau would supervise many of such entities, a substantial number of entities would not be involved.

[109] 77 FR 9606.

VIII. Paperwork Reduction Act

The Bureau determined that the Proposed Rule would not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would constitute collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* The Bureau did not receive any comments regarding this conclusion, to which the Bureau adheres. The Bureau concludes that the final rule, which adopts the Proposal in relevant respects, also imposes no new information collection requirements subject to the Paperwork Reduction Act.

List of Subjects in 12 CFR Part 1090

Consumer protection, Credit.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau of Consumer Financial Protection adds Part 1090 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1090—DEFINING LARGER PARTICIPANTS OF CERTAIN CONSUMER FINANCIAL PRODUCT AND SERVICE MARKETS

Subpart A—General

Sec.

Subpart B—Markets

Authority: 12 U.S.C. 5514(a)(1)(B); 12 U.S.C. 5514(a)(2); 12 U.S.C. 5514(b)(7)(A); and 12 U.S.C. 5512(b)(1).

Subpart A—General

§ 1090.100 Scope and purpose.

This part defines those nonbank covered persons that qualify as larger participants of certain markets for consumer financial products or services pursuant to 12 U.S.C. 5514(a)(1)(B) and (a)(2). A larger participant of a market covered by this part is subject to the supervisory authority of the Bureau under 12 U.S.C. 5514. This part also establishes rules to facilitate the Bureau's supervision of such larger participants pursuant to 12 U.S.C. 5514(b)(7).

§ 1090.101 Definitions.

For the purposes of this part, the following definitions apply:

Affiliated company means any company (other than an insured depository institution or insured credit union) that controls, is controlled by, or is under common control with, a person.

(1) For purposes of this definition ''company'' means any corporation, limited liability company, business trust, general or limited partnership, proprietorship, cooperative, association, or similar organization.

(2) A person has control over another person if:

(i) The person directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities or similar ownership interest of the other person;

(ii) The person controls in any manner the election of a majority of the directors, trustees, members, or general partners of the other person; or

(iii) The person directly or indirectly exercises a controlling influence over the management or policies of the other person.

Assistant Director means the Bureau's Assistant Director for Nonbank Supervision or her or his designee. The Director of the Bureau may perform the functions of the Assistant Director under this part. In the event there is no such Assistant Director, the Director of the Bureau may designate an alternative Bureau employee to fulfill the duties of the Assistant Director under this part.

Bureau means the Bureau of Consumer Financial Protection.

Completed fiscal year means a tax year including any fiscal year, calendar year, or short tax year. ''Fiscal year,'' ''calendar year,'' ''tax year,'' and ''short tax year'' have the meanings attributed to them by the IRS as set forth in IRS Publication 538, which provides that:

(1) A ''fiscal year'' is 12 consecutive months ending on the last day of any month except December 31.

(2) A ''calendar year'' is 12 consecutive months ending on December 31.

(3) A ''tax year'' is an annual accounting period for keeping records and reporting income and expenses, or, if appropriate, a short tax year. An annual accounting period does not include a short tax year.

(4) A ''short tax year'' is a tax year of less than 12 months.

Consumer means an individual or an agent, trustee, or representative acting on behalf of an individual.

Consumer financial product or service means any financial product or service, as defined in 12 U.S.C. 5481(15), that is described in one or more categories under:

(1) 12 U.S.C. 5481(15)(A) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(2) Clause (i), (iii), (ix), or (x) of 12 U.S.C. 5481(15)(A) and is delivered, offered, or provided in connection with a consumer financial product or service referred to in paragraph (1) of this definition.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Larger participant means a nonbank covered person that has met a test under subpart B of this part within the period provided in § 1090.102 of this part.

Nonbank covered person means, except for persons described in 12 U.S.C. 5515(a) and 5516(a):

(1) Any person that engages in offering or providing a consumer financial product or service; and

(2) Any affiliate of a person that engages in offering or providing a consumer product or service if such affiliate acts as a service provider to such person.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Supervision and supervisory activity mean the Bureau's exercise, or intended exercise, of supervisory authority, including by initiating or undertaking an examination, or requiring a report of a person, pursuant to 12 U.S.C. 5514.

§ 1090.102 Status as larger participant subject to supervision.

A person qualifying as a larger participant under subpart B of this part shall not cease to be a larger participant under this part until two years from the first day of the tax year in which the person last met the applicable test under subpart B.

§ 1090.103 Assessing status as a larger participant.

(a) If a person receives a written communication from the Bureau initiating a supervisory activity pursuant to 12 U.S.C. 5514, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by this part within 45 days of the date of the communication. Such response must be sent to the Assistant Director by electronic transmission at the address included in the communication and must include an affidavit setting forth an explanation of the basis for the person's assertion that it does not meet the definition of larger participant of a market covered by this part and therefore is not subject to the Bureau's supervisory authority under 12 U.S.C. 5514. In addition, a person may include with the response copies of any records, documents, or other information on which the person relied in making the assertion.

(b) A person shall be deemed to have waived the opportunity, at any time that it may dispute that it qualifies as a larger participant, to rely on any argument, records, documents, or other information that it fails to submit to the Assistant Director under paragraph (a) of this section. A person who fails to respond to the Bureau's written communication within 45 days will be deemed to have acknowledged that it is a larger participant.

(c) The Assistant Director shall review the affidavit, any attached records, documents, or other information submitted pursuant to paragraph (a) of this section, and any other information the Assistant Director deems relevant, and thereafter send by electronic transmission to the person a statement explaining whether the person meets the definition for a larger participant of a market covered by this part.

(d) At any time, including prior to issuing the written communication referred to in paragraph (a) of this section, the Assistant Director may require that a person provide to the Bureau such records, documents, and information as the Assistant Director may deem appropriate to assess whether a person qualifies as a larger participant. Persons must provide the requisite records, documents, and other information to the Bureau within the time period specified in the request.

(e) The Assistant Director, in her or his discretion, may modify any timeframe prescribed by this section on her or his own initiative or for good cause shown.

Subpart B—Markets

§ 1090.104 Consumer Reporting Market.

(a) *Market-Related definitions.*

Annual receipts means receipts calculated as follows:

(i) *Receipts* means ''total income'' (or in the case of a sole proprietorship, ''gross income'') plus ''cost of goods sold'' as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule C for sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the entity or its employees; and amounts collected for another (but fees earned in connection with such collections are receipts). Items such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes are included in receipts.

(ii) *Period of measurement.* (A) Annual receipts of a person that has been in business for three or more completed fiscal years means the total receipts of the person over its three most recently completed fiscal years divided by three.

(B) Annual receipts of a person that has been in business for less than three completed fiscal years means the total receipts of the person for the period the person has been in business divided by the number of weeks in business, multiplied by 52.

(C) Where a person has been in business for three or more completed fiscal years, but one of the years within its period of measurement is a short tax year, annual receipts means the total receipts for the short year and the two full fiscal or calendar years divided by the total number of weeks in the short year and the two full fiscal or calendar years, multiplied by 52.

(iii) *Annual receipts of affiliated companies.* (A) The annual receipts of a person are calculated by adding the annual receipts of the person with the annual receipts of each of its affiliated companies.

(B) If a person has acquired an affiliated company or been acquired by an affiliated company during the applicable period of measurement, the annual receipts of the person and the affiliated company are aggregated for the entire period of measurement (not just the period after the affiliation arose).

(C) Receipts are calculated separately for the person and each of its affiliated companies in accordance with paragraph (ii) of this definition even though this may result in using a different period of measurement to calculate an affiliated company's annual receipts. Thus, for example, if an affiliated company has been in business for a period of less than three years, the affiliated company's receipts are to be annualized in accordance with paragraph (ii)(B) of this definition even if the person has been in business for three or more completed fiscal years.

(D) The annual receipts of a formerly affiliated company are not included if affiliation ceased before the applicable period of measurement as set forth in paragraph (ii) of this definition. This exclusion of annual receipts of formerly affiliated companies applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

Consumer reporting means:

(i) *In general.* Consumer reporting means collecting, analyzing, maintaining, or providing consumer report information or other account information used or expected to be used in any decision by another person regarding the offering or provision of any consumer financial product or service.

(ii) *Exclusion for transaction and experience information.* Consumer reporting does not include the activities of a person to the extent that a person collects, analyzes, maintains, or provides information that relates solely to the person's transactions or experiences with consumers.

(iii) *Exclusion for furnishing affiliate information to a consumer reporting entity.* Consumer reporting does not include the activities of a person to the extent that a person provides information that solely relates to transactions or experiences between a consumer and an affiliate of such person to another person that is engaged in consumer reporting.

(iv) *Exclusion for certain authorizations or approvals.* Consumer reporting does not include any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

(v) *Exclusion for providing information to be used solely in a decision regarding employment, government licensing, or residential leasing or tenancy.* Consumer reporting does not include the activities of a person to the extent that a person provides consumer report or other account information that is used or expected to be used solely regarding a decision for employment, government licensing, or a residential lease or tenancy involving a consumer, or 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.

(b) *Test to define larger participants.* A nonbank covered person that offers or provides consumer reporting is a larger participant of the consumer reporting market if the person's annual receipts resulting from consumer reporting are more than $7 million.

Dated: July 13, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2012–17603 Filed 7–17–12; 4:15 pm]

BILLING CODE 4810–AM–P