



# **Financial Services Management**

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## **Nonbank Consumer-Finance Supervision**

### **Cite**

CFPB, Procedural Rule and Request for Comment, Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders

### **Recommended Distribution**

Policy, Legal, Government Relations

### **Website**

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/>

## **Impact Assessment**

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- CFPB orders highlighting consumer-protection concerns at fintechs, bigtech, and other nonbanks may reduce regulatory-arbitrage opportunities vis-à-vis banking organizations or those now understood to be clearly within the ambit of CFPB enforcement actions.
- Third parties working with these nonbanks on activities deemed UDAAP may also be subject to sanction and, to the extent this is made public, legal and reputational risk.
- However, the CFPB's ability to do more than publicize orders alleging UDAAP is unclear, perhaps leading to prolonged litigation rather than supervisory intervention and non-voluntary compliance with Bureau preferences and policies.

## **Overview**

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Using what it describes as "dormant" authority, the CFPB is seeking comment on a rule setting the procedures under which it expands its authority to nonbank financial companies it believes pose consumer-protection risk. The procedural rule is just what this term implies – one that establishes procedural standards that may change upon finalization – rather than a request for views on the extent to which the CFPB has the authority it claims. Indeed, the Bureau clearly intends to use the authority stipulated in this rule for supervisory interventions even as comment on the procedures has yet to be completed.

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## Impact

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Under the Dodd-Frank Act,<sup>1</sup> the CFPB has authority to supervise nonbank financial companies after giving the company an order laying out the grounds for doing so, which must reasonably demonstrate risk to consumers, also giving the target of this order a chance to reply to it. With this new rule, the Bureau is immediately announcing its intention to do so regardless of any inferences institutions may have drawn from prior CFPB actions or rulings that suggested the agency's authority is not broadly applicable to any company the Bureau believes engages in consumer-finance activities that have or could pose risk to vulnerable households. As a result, the Bureau is staking out a legal basis from which at the least it will issue public orders alleging unfair, deceptive, or abusive acts or practices (UDAAP) with broader legal and reputational risk to the target entity or person. As stipulated in its recent UDAAP examination-manual rewrite,<sup>2</sup> these charges and thus orders may also reach to third parties working with a financial company even if the third party is still more expressly outside the CFPB's clear legal mandate.

If the Bureau also believes it can enforce any such orders, then the risk to targets is of course also potentially significant in terms of immediate earnings and longer-term strategic objectives. The agency's enforcement authority is expressly limited to banking organizations and certain consumer-finance companies or companies presumed to be engaged in consumer finance with large on-balance sheet financial exposures. Many fintechs and even some of the huge tech-platform companies may not cross the Dodd-Frank Act's asset-based thresholds for explicit CFPB authority because their consumer-finance activities are fee-based or even undertaken without direct balance-sheet or earnings impact. This is because finance is part of a broader business ecosystem designed to generate data that then supports the company's commercial, advertising, social-media, or other activities. The Bureau's new order asserts authority over demanding books and records, which it may be found to have, and then to use this power to shame firms into best practices. The extent to which this occurs will depend in part on the attention such orders receive, the degree to which Congress reinforces them, and the response on which companies then decide.

As noted below, the rule establishing this authority is effective immediately even though comment is solicited on the procedures it establishes. The only question on which comment is expressly sought is the extent to which these orders should be made public, with the rule presuming that virtually all orders and most facts and circumstances in them will be released. One issue on which comment will nonetheless surely be devoted is the extent to which consumer-finance law and/or the Administrative Procedure Act allow the Bureau to set policy in this fashion.

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<sup>1</sup> See **CONSUMER14**, *Financial Services Management*, July 19, 2010.

<sup>2</sup> See **CONSUMER39**, *Financial Services Management*, March 22, 2022.

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## What's Next

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This proposal was released for comment on April 25, with its effective date set for that upon which it is published in the *Federal Register*. Comments are due thirty days thereafter.

At the Senate Banking hearing with the CFPB Director shortly after this release,<sup>3</sup> Republicans challenged the agency's authority to issue standards of this sort by executive action instead of a formal rulemaking. However, Democrats strongly supported it and even tougher action, making it clear that legislation to overturn this rule is unlikely. Even if a majority of Members could be found to oppose it, the agency's decision to pursue procedural standards – not formal rulemakings – insulates them for at least the next few months from the Congressional Review Act's reach even in the event that Republicans take over Congress within the timeframe during which Review Act initiatives reversing agency actions may be launched.

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## Analysis

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The proposal largely reiterates the Bureau's understanding of its statutory authority to govern a nonbank "covered person" (i.e., a company or individual engaged in financial services or management of a financial company), noting a 2013 agency action detailing how this would be done and determining now to add a section to that policy to detail when orders lodged against a nonbank may be made public and how they will otherwise proceed. The Bureau notes that making these orders public helps create precedent and enhance supervisory transparency. The new process gives someone receiving what is described as either a "decision" or order seven days in which to submit, from which the director will determine whether or not to make the action public in whole or part. There is no standard codified dealing with public release, but the Bureau "generally" expects to keep confidential that which is covered as trade secrets, personnel information, or otherwise treated as confidential under the Freedom of Information Act (FOIA). Information could also be kept confidential at Bureau discretion, with comment requested on whether this standard should in fact be codified. The Bureau observes in passing that disclosure will generally benefit covered nonbanks.

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<sup>3</sup> See *Client Report CONSUMER40*, April 26, 2022.