



Financial Services Management

Nonbank Consumer-Finance Supervision

Cite

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

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Impact Assessment

- 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 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 in some cases, perhaps leading to prolonged litigation rather than supervisory intervention and subsequent involuntary compliance with Bureau preferences and policies.
- Public orders related to nonbanks set precedent likely to increase transparency for banks and nonbanks as to likely Bureau UDAAP examination intervention.

Overview

Reviving what it calls “dormant” authority, the CFPB has finalized a proposed “procedural rule” expressly reiterating its right to govern an array of nonbanks and establishing procedures for making supervisory orders public.¹ As a result, a wide array of nonbank providers of consumer-financial products and services face increased legal and reputational risk as well as changes to the current business model and/or product/service design if orders made public by the Bureau lead to public or political backlash akin to that leading to the decisions at many banks to eliminate or alter overdraft fees after the Bureau voiced strong objections to them.

¹ See **CONSUMER38**, *Financial Services Management*, February 1, 2022.

Impact

Under the Dodd-Frank Act,² the CFPB has the authority to supervise certain nonbank financial companies after giving the company an order laying out the grounds for doing so. These orders must reasonably demonstrate risk to consumers, also giving the target of this order a chance to reply. With this new rule and accompanying statements, the Bureau has reaffirmed its plans 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 them. As a result, the Bureau is staking out a more expansive legal basis from which at the least it will designate nonbanks for supervision and, unless doing so might undermine ongoing supervisory action, also issue public orders identifying designated nonbanks asserting unfair, deceptive, or abusive acts or practices (UDAAP) with broader legal and reputational risk to the target entity.

Statements accompanying the proposed procedural rule focused on the agency's new policy on unfair, deceptive, or abusive practices (UDAAP),³ that significantly expand the types of activities or practices subject to agency sanctions not only directly to financial companies, but also to third parties working with a financial company even if the third party is expressly outside the CFPB's clear legal mandate.

The Bureau's new order asserts authority to demand books and records, which it may be found to have even if broader enforcement actions – e.g., fines, divestiture, modified business practices – are not asserted by the Bureau or overturned in the court. Books and records then made public by the CFPB may well be used to shame firms into best practices even if Bureau's supervisory authority does not extend to mandatory remedial action requirements.

Indeed, the Bureau is keenly aware of the impact public opinion may have if the Bureau releases information on firms engaging in practices it thinks constitute UDAAP or otherwise undermine its expansive vision of consumer-finance protection, fairness, and competition. The new procedural rule is principally designed to create the basis from which the Bureau may release orders issued to targeted nonbank firms and the grounds on which these orders are based, likely expecting that this transparency would lead to public and/or Congressional demands for rapid redress. Transparency about what it believes to be violations unveiled in these orders will also provide early warning to all consumer-finance companies of the actions the CFPB may censure at their own firms with perhaps more powerful enforcement tools to ensure that its will is executed.

What's Next

The final version of the rule was published in the *Federal Register* on November 21, the same date on which it became effective.

² See **CONSUMER14**, *Financial Services Management*, July 19, 2010.

³ See **CONSUMER39**, *Financial Services Management*, March 22, 2022.

Analysis

The rule 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 and codify a section detailing 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 ten days in which to object, providing information with which the director will determine whether or not to make the action public in whole or part.

There is no standard codified dealing with the conditions for 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 the final rule indicating the Bureau's commitment to keeping supervisory information confidential but also concluding that nonbank supervisory actions present "unique" implications requiring transparency. The Bureau observes in passing that disclosure will generally benefit covered nonbanks.