



Financial Services Management

Nonbank Enforcement-Order Registry

Cite

CFPB, Proposed Rule with Request for Comment, Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

Recommended Distribution

Compliance, Risk Management, Policy, Legal, Government Relations

Website

https://files.consumerfinance.gov/f/documents/cfpb_proposed-rule_registry-of-nonbank-covered-persons_2022.pdf

Impact Assessment

- Although IDIs and service providers would be exempt for at least some period of time, BHCs would need to file and attest as other nonbanks subject to the CFPB.
- Filings could result in significant reputational risk as well as M&A impediments.
- Information that would come to be in the Bureau's possession could lead to indirect federal enforcement of local and state consumer-protection law by virtue of additional CFPB supervisory actions and/or public campaigns against certain practices.
- Attesting officers would take on personal compliance risks related to his or her firm's filings.

Overview

The CFPB is proposing to create a public registry of certain enforcement actions that would initially cover nonbanks (including BHCs) with a goal of drawing public and enforcement-agency attention to what the Bureau's director calls "serial offenders." The new filings would be extensive and likely expensive in terms not just of the filings, but also of the analytical processes needed to ensure accuracy and the internal controls assuring officers making requisite attestations that their statements are complete and accurate. Public disclosure of much in the filings – including information that companies consider confidential – would make it easier for other enforcement agencies to identify institutions that may also have violated their own standards as well as alert state and federal banking agencies to entities under their supervision with potential compliance and risk-management shortcomings. Authorities would also be better able to flag nonbanks providing services or engaging in business relationships with banks that pose risks. M&A approval is also likely to be more difficult due not just to heightened public opposition, but also greater information available to the FTC and Department of Justice.

Impact

The Bureau believes that this registry would increase its ability to govern nonbanks under its recent ruling about its considerable authority to do so,¹ a standard that focused only on nonbanks but implicitly captured BHCs as does this proposed rule. The Bureau also thinks the registry enhances its ability to track FTC and other federal-agency actions as well as those by the states under the expanded authority recently accorded them by another Bureau edict. As detailed below, the proposal provides that the Bureau has sweeping authority to mandate disclosure of actions related to all consumer-finance laws and rules by virtue of the statutory injunction that it “monitor” consumer-finance standards and use the information it gains thereby to protect the public.

However, opponents of this filing requirement have pointed out that it could give the Bureau de facto authority to enforce state and even local law even where federal law expressly preempts it. This would be the result for example of Bureau supervisory actions or public campaigns challenging a firm or a group of those cited in certain state and local orders the Bureau think demonstrate a problematic consumer-finance practice and/or corporate “recidivists.”

The Bureau also believes its registry is warranted because companies that violate state law may come to do the same or are already also violating federal consumer-protection standards. This is particularly true, it says, for violations of the state standards against unfair, deceptive, and abusive actors or practices (UDAAP) because of the importance of these standards to the Bureau.²

These goals might be accomplished if the agency created such a registry for its own use, but the proposal is also for public release, an action the Bureau believes would reduce the risk to consumers of doing business with companies with a track record of violating state or federal consumer law and rule. The NPR also defends this aspect of the proposal on grounds that Congress told the Bureau to educate the public about potential risks and publish reports as needed to do so.

As noted, these filing and attestation requirements would cover all nonbanks the Bureau believes subject to its authority, exempting insured depository institutions, service providers, natural persons, and certain others. While IDIs are exempted, BHCs do not appear to be, meaning that the Bureau would require and obtain information on all consumer-protection matters germane to a BHC in all of its non-IDI subsidiaries, with the proposal not making clear if these consolidated filings would need to cover subsidiary IDIs. By virtue of these filings, the Bureau would gain considerable authority over BHCs that would duplicate, supplement, or even supersede that of the FRB. This poses legal and reputational risk to BHCs but also accomplishes the Bureau’s goal of rooting out consumer malfeasance wherever it may be found in complex organizations with nationwide activities. As in the recent Wells Fargo case,³ the CFPB may well use its consumer-finance actions also to press the Fed and other banking agencies to

¹ See **CONSUMER44**, *Financial Services Management*, November 28, 2022.

² See **INFOSEC28**, *Financial Services Management*, August 17, 2022.

³ See *Client Report CONSUMER46*, December 20, 2022.

sanction a company on grounds outside the Bureau's purview (e.g., removing its status as a financial holding company).⁴

Records showing persistent consumer-finance violations are likely also to have significant impact on M&A decisions by the Department of Justice, FTC, and banking agencies. The DOJ and the FTC have recently adopted a far broader approach to M&A denial on public-welfare grounds, grounds consumer-finance violations could be seen to provide. The banking agencies now plan to include consumer-finance violations as a criterion for CRA compliance,⁵ with CRA ratings and related considerations having considerable bearing on bank M&A. The FDIC also expressly believes that these factors should be considered on their own.⁶

As discussed below, one provision in this rule would require a senior compliance officer of a covered company to attest to filings for the registry. The Bureau believes that this will allow it better to assure that companies are legitimate business enterprises as well as to create a compliance incentive because a specific individual would be responsible for the filing. However, this person would also come under new duties with significant risk of personal liability that may create the need for extensive internal controls and additional safeguards.

What's Next

This proposal was released on December 12, with comments due sixty days after publication in the *Federal Register*. At a recent Senate Banking [hearing](#), Director Chopra was sharply questioned by Ranking Member Toomey (R-PA) about this proposal, which he called a "name-and-shame initiative" although Mr. Chopra stoutly defended it. This is likely to remain the case even if Republican house members add this proposal to the list of those they will seek to block in the next Congress.

When the final rule is issued and effective, covered firms would need to identify themselves to the Bureau and then do so again when the Registry is launched. Thereafter, covered firms would need to file an annual statement for the registry. Compliance would begin no earlier than January 1, 2024, with the Bureau seeking comment on how long it would take firms to comply. Filing instructions would come in concert or shortly after a final rule.

Although IDIs are now exempt, the Bureau plans to consider them for mandatory filings once the nonbank registry is up and running.

Analysis

The NPR specifies that provisions in the final rule would be severable – that other provisions would remain in effect even if one or another is found invalid by the courts.

⁴ See **FHC19**, *Financial Services Management*, July 29, 2010.

⁵ See **CRA32**, *Financial Services Management*, May 17, 2022.

⁶ See **MERGER9**, *Financial Services Management*, December 16, 2021.

A. Scope

Nonbank covered entities (which exclude insured depositories and credit unions, related persons, and certain others) are entities engaged in consumer-finance otherwise subject to the CFPB under its new, expansive definition (see above). The rule includes a list of the services in which these firms may engage but its reach is not limited to entities in these generally traditional services. Notably, custody is listed among them, bringing nonbank crypto custody entities under the scope of this registry. Notably, covered entities do not include third-party service providers even though the Bureau's UDAAP policy expressly brings them under this authority.⁷ Providers whose total revenues from consumer-financial services are less than \$1 million would also be exempt.

Orders covered by this rule for purposes of individual filings and those for the registry include those based on violations of:

- laws subject to the CFPB's regulatory and/or enforcement authority;
- UDAP under the FTC Act;
- state laws prohibiting UDAAP identified within the proposal;
- other state consumer-protection laws; and
- state UDAAP-related enforcement orders.

Covered orders include those accepted by consent that identify the covered nonbank by name issued by any federal, state, or local authority that contain public provisions imposing a duty on the covered nonbank with an effective date on or after January 1, 2017.

B. Nonbank Submissions

Covered nonbanks would need to submit to the Bureau any enforcement or related order to which they are subject as well as make annual filings for the public registry. Any company not previously on the registry would need to file the information necessary to join it upon receipt of a covered order. Filings would need to be made within ninety days of the registry's start-up or receipt of any covered order. Filings would also be due ninety days after any change to an order (e.g., termination), with filings including information on all orders for at least ten years regardless of status. Specific filing instructions to be issued by the Bureau once this rule is effective, with the proposal specifying that filings would need to include all information germane to the order and clearly mark that which the filer wishes to remain confidential.

C. Annual Reporting Requirements

Each company that comes to be registered would need to appoint an "attesting officer" who would need to be its highest-ranking senior executive officer or person in firms without such a structure who is responsible for consumer-finance compliance with knowledge of its actions and responsible to govern them. Firms would be required to

⁷ See **CONSUMER39**, *Financial Services Management*, March 22, 2022.

give the attesting officer the information he or she needs to supervise work related to the registry and file the written statement that would then be required of him or her with regard to each order filed in the registry during the prior year. Records related to this process must be retained and made available to the Bureau as required.

D. Registry Publication

As noted, the CFPB will post the registry, making decisions on its own about whether to include all the information provided by the registrant with regard to reported orders. The attesting statement would not be made public, but the Bureau could use information on the registry in any other way it chooses (e.g., publicizing actions related to a single company).