



MEMORANDUM

TO: Federal Financial Analytics Clients
FROM: Karen Petrou
DATE: January 23, 2023

Last week, we provided clients with an [in-depth analysis](#) of the CFPB's latest nonbank registry as well as a hard look at its impact on [mortgage securitization](#). Any nonbank subject to the CFPB will find its legal arsenal much depleted by the registry's requirements, a point already well understood by opponents. Far less noticed but of still greater consequence to all consumer-finance companies is another implication of the Bureau's actions here and in another recent registry [proposal](#): even where the CFPB has little to no regulatory authority, it will deploy its formidable ability to gain public attention to make unbearable the reputational risk of any practice it abhors.

Justice Brandeis is often quoted as saying that sunshine is the most powerful disinfectant and Director Chopra clearly plans to cast companies under a scorching sun. That is works was demonstrated by his decision to detail the ways in which he believes overdraft fees support predatory earnings at considerable cost to vulnerable consumers. That most banks charged overdraft fees in strict compliance with current rules made enforcement action at best a challenging route to reform. Rewriting the rules would have gotten the Bureau where it wanted to go, but only over at least a year of wrangling. Set out in the merciless sun by Mr. Chopra and Congressional Democrats, many banks decided that the political and reputational risk of continuing overdraft fees was just too high.

Overdraft reform thus proved easy to say and then to do. So it is likely to prove on other CFPB targets when even the Bureau's other controversial rulemaking tools – circulars, advisories, and the like – can't expunge the consumer-finance sins of omission and commission Mr. Chopra thinks damnable.

Importantly, the registries don't just capture violations of the federal consumer law which the Bureau was created to govern. As the contract proposal expressly stipulates, terms that would trigger registration are not just those clearly – critics will say not at all – covered by federal consumer law.

Consumer financial-product risk has long been understood as that which is directly financial – e.g., "junk fees" – or indirectly costly – e.g., credit discrimination. It is at best unclear if denying consumers the rights to post negative reviews falls within this financial purview or if doing so transgresses on the right of free speech. Much as the CFPB might care about it, ensuring constitutional liberty is nowhere in its mandate as I understand it.

It's of course possible that the technical obstacles to mounting and releasing these registries will prove more daunting than the CFPB's "just-you-wait-and-see" discussion in each proposal. But if the Bureau can actually follow through, then registries for nonbanks and who knows whom else for God knows what transgressions are next.

Each of the registry proposals is replete with belt-and-suspenders legal reasoning designed to bolster the Bureau against legal challenge that it lacks the authority to make requisite data public or is reaching companies outside its ambit. More than unpersuaded, Republicans are already lambasting this proposal,

the latest they say stray far afield from appropriate consumer protection. However, in a divided Congress, efforts to force retraction by rhetoric or force of law will fail. Thus, only lengthy litigation or a new director will decide the registries' destiny. For now, nonbanks will need to tell all and banks might soon also have to do the same.