

Nonbanks: The Consumer Financial Protection Bureau (CFPB) is refocusing priorities—will you soon be examined?

The CFPB is reenergized and investing in the infrastructure to significantly expand its supervisory oversight. Two specific examples that underscore this reinvigoration are (1) the CFPB's intent to use a long dormant (and previously procedural) rule to supervise nonbanks and (2) its willingness to make public notifications to individual nonbanks of the nature and timing of impending supervision, which has previously been considered confidential supervisory information (CSI) by the prudential banking regulators (e.g., Federal Reserve, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation).¹ Both developments, as announced by the CFPB on April 25, 2022, represent drastic changes that nonbanks should plan for and navigate through, going forward. The public comment period concerning the release of certain nonbank CSI expires May 31, 2022.²

Three of the many reasons why **nonbanks should consider refocusing on their compliance management system (CMS) and related federal consumer protection laws and regulations** include:

- **The CFPB has always had the authority to examine nonbanks;** the procedural rule simply lays out how the process will happen. The process is relatively quick, so nonbanks may not have enough advance notice of, or time to prepare for, examiners arriving onsite.
- **Nonbanks, as providers of consumer financial products and services, have always been expected to comply with federal consumer protection laws and regulations,** regardless of any past CFPB supervision and examination activities.
- **The CFPB anchors its supervisory approach on the components of a strong CMS** integrated into the overall framework for product design, delivery, and administration across the entire product and service life cycle.

Activation of the procedural rule

The CFPB's procedural rule outlines how supervisory authority will be communicated by the CFPB to these nonbank entities and an entity's options for challenging or consenting to this authority. The rule's preamble highlights that, "regardless of whether nonbanks offering or providing consumer financial products or services are subject to the Bureau's supervisory authority, they are subject to the Bureau's regulatory and enforcement authority and any applicable Federal consumer financial law."³

The CFPB's nonbank supervision program, as outlined in the Dodd-Frank Act, includes three categories of entities, with the third category being nonbank entities whose activities the CFPB has reasonable cause to determine pose risks to consumers with no specific ties to any consumer financial product or service.⁴ With regards to nonbank supervision, the agency's April 25, 2022, press release states that "such risky conduct may involve, for example, potentially unfair, deceptive, or abusive acts or practices, or other acts or practices that potentially violate federal consumer financial law." The CFPB's expanded supervisory oversight under the third category is expected to provide insight into these products and services and their broader market impact.

The CFPB's broader view of disparate practices will likely set internal precedents and create trends that inform the agency's supervisory perspective. As the agency gains insight into leading practices and common weaknesses at each firm, it will likely consider these key themes in future examination activities. Adverse CFPB assessments and examination findings from these supervisory activities may lead to enforcement actions, including Consent Orders and civil money penalties, as well as adversely worded CFPB press releases.

Request for comment on confidentiality

As previously mentioned, concurrent with the announcement to use the formerly dormant procedural rule, **the CFPB issued a precedential request for comment on the publication of certain CSI.** Specifically, the agency is considering making publicly available its communications to nonbanks indicating its intent to exercise supervisory authority. This CSI release may be problematic for individual nonbanks or categories of nonbanks depending on the content of the communications and the stated basis for supervision. **In this regard, disclosure of CSI could subject institutions to public exposure of potential compliance, control, and other weaknesses, which could cause reputational damage.**

Historically, protection of CSI was a major area of concern for the prudential regulators. In its Federal Register Notice, the CFPB indicated that the agency “consulted or offered to consult with the prudential regulators and the Federal Trade Commission” about implications of the rule regarding CSI.

Growing supervisory attention – Use of complaints

The CFPB monitors consumer complaint trends very closely and has expressed concerns about the spike in complaints at firms providing BNPL and cryptocurrency products and services. To the extent the CFPB has no other legal avenues to initiate an examination of a BNPL provider or cryptocurrency company or exchange, the agency may use these or other products and services as a potential target area to substantiate utilization of the procedural rule. For example, a review of issues within the CFPB’s consumer complaints portal showed the following potential UDAAP-related concerns that firms using BNPL products should be aware of:

- **Deception**
 - Terms not understood by the consumer (or not followed by the entity)
 - Unclear and potentially confusing marketing materials
 - Credit checks that impact credit scores, associated interest, and fees if consumers do not meet terms and conditions.
- **Unfairness**
 - Untimely processing of payments and resulting extra fees and interest, sometimes on top of fees and interest
 - Insufficient funds charges from duplicate payments leading to overdrawn accounts

Spotlight on fintech companies

As a subset of nonbanks, fintech companies represent a specific and potential target of the CFPB’s expansive use of its procedural rule. The CFPB’s examination of fintech companies seems to be a logical follow-up to recent CFPB tech-related information requests, used to inform the agency’s risk monitoring of changes to payments technologies and markets. Fintech companies’ fast-paced culture coupled with a lack of consistently applied regulatory oversight, may represent an opportunity for regulatory arbitrage. Offering seamless interfaces due to a lack of compliance with regulatory requirements should not be the basis for a competitive advantage at fintech companies.

The CFPB’s recent actions suggest that it plans to examine individual fintech companies based upon external risk insights and indicators (e.g., complaints data, news, and litigation). Further, the CFPB’s actions reflect concerns expressed by the Acting Comptroller of the Currency about the “Regulatory Perimeter” and the need for fintech companies to level up if they intend to provide bank-like products and services. Nonbanks should confirm their core and foundational capabilities are strong. These capabilities include governance, risk management practices and controls, and compliance with laws and regulations—both internally and in their external ecosystem of partners and third-party service providers.

Looking ahead

The CFPB’s actions to invoke this procedural rule highlights the extent of the agency’s supervisory reach and the intent of the agency to use the full scope of its examination authority. This heightened interest will likely push nonbanks to enhance their consumer compliance capabilities. Generally, nonbanks engaged in consumer-facing financial activities should have a compliance framework that sufficiently addresses their inherent risks with enough agility to accommodate changing supervisory requirements. However, **considering the evolving CFPB supervisory regime, nonbanks should proactively assess their CMS** emphasizing, among other things, risk identification and controls, consumer complaints response and analysis, monitoring and testing, and issue escalation and resolution.

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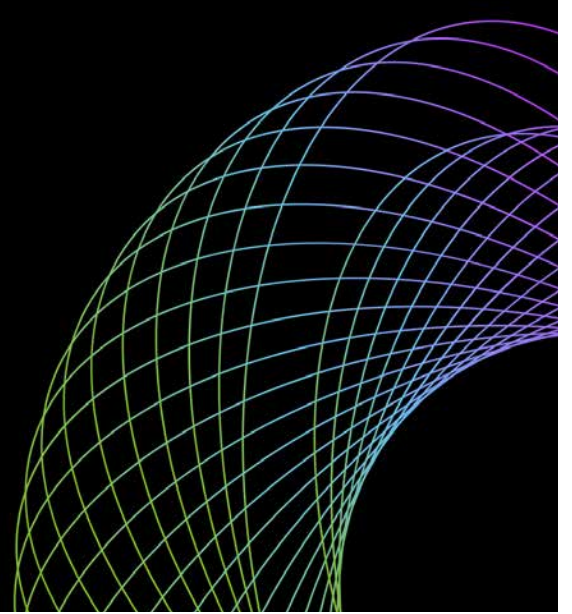
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Endnotes

1. Consumer Financial Protection Bureau (CFPB), [“Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders,”](#) procedural rule, April 25, 2022.
2. CFPB, [“CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers,”](#) press release, April 25, 2022.
3. CFPB, [“Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders,”](#) procedural rule, April 25, 2022.
4. The remaining two categories of nonbanks that the CFPB supervises are: (1) nonbank entities involved in the mortgage, private student loan, and payday loan industries, regardless of size and (2) “larger participants” in other nonbank markets for consumer financial products and services (e.g., consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing). CFPB, [“CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers,”](#) press release, April 25, 2022.
5. CFPB, [“CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers,”](#) press release, April 25, 2022.
6. Ibid.
7. CFPB, [“Consumer Financial Protection Bureau Opens Inquiry Into “Buy Now, Pay Later” Credit,”](#) press release, December 16, 2021.
8. CFPB, [“CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans,”](#) press release, October 21, 2021.
9. Ibid.
10. OCC, [“Acting Comptroller Michael J. Hsu Remarks before the American Fintech Council Fintech Policy Summit 2021: ‘Leveling Up Banking and Finance,’”](#) November 3, 2021.



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