

CFPB Emphasizes Voluntary Nonbank Consent to Supervision in Updated Procedural Rulemaking

April 23, 2024

On April 16, 2024, the Consumer Financial Protection Bureau (CFPB) issued a [final rule](#) revising its procedures for establishing supervisory authority over nonbank financial institutions on the basis that the institution poses a risk to consumers. In 2023, the CFPB initiated its first round of supervisory designation procedures under the old rules, and in February 2024 [made public the order stemming from its first contested proceeding](#). Although this update seeks to make the designation process more efficient based on the CFPB's recent experience in exercising its authority, it also promotes voluntary consent to CFPB supervisory authority by keeping such decisions confidential. The rule also highlights a forthcoming structural change at the CFPB creating separate, stand-alone supervision and enforcement divisions, both of which will report to the CFPB director.

New rule promotes voluntary consent, efficiency

The rule does not significantly change the substance of the overall designation process, but makes a few key adjustments to it.

1. Voluntary consent excluded from public release

Institutions noticed by the CFPB that voluntarily consent to its supervisory authority will not have the consent made public. In light of the characterizations made in the CFPB's February 2024 release, this could be a powerful incentive for institutions to voluntarily submit to supervision.

2. Duration flexibility for voluntary consent

The rule gives the CFPB flexibility to establish the duration of its supervisory authority, as opposed to setting forth a default two-year period.

3. Supplemental briefings in contested designations

The rule gives the CFPB director additional flexibility during a contested process to request a supplemental briefing prior to making a final determination as to whether to issue the order. A supplemental briefing was utilized in the first contested designation but was not expressly contemplated in the prior procedural rule.

4. Organizational changes

According to the updated rule, the designation process will now fall under the purview of a single person – the CFPB's new supervision director. This change is necessitated by what appears to be, according to the preamble of the rule, a new structural shift at the CFPB to create independent supervision and enforcement divisions – CFPB functions that previously came under the single division of Supervision, Enforcement and Fair Lending.

5. Express exhaustion provision

The procedural updates include an express issue exhaustion provision, which would require that for any argument that a nonbank financial institution has to support its position – including setting aside an action by the CFPB – the entity must raise it with the CFPB prior to filing a lawsuit.

Looking ahead

In 2022, the CFPB made a big splash when it promised to utilize its “dormant” authority to supervise high-risk nonbanks not otherwise subject to its automatic supervisory jurisdiction. After two years of utilizing that authority, its refined procedural rules reflect learnings from approaching nonbank institutions with high-risk designations. While the new process preserves procedural protections for institutions seeking to challenge the assertion of CFPB supervisory authority, the cost and risk associated with challenging such an assertion will need to be balanced with the commitment of confidentiality where the institution gives its voluntary consent.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as “Cooley”). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. This content may be considered **Attorney Advertising** and is subject to our [legal notices](#).

Key Contacts

Michelle L. Rogers Washington, DC	mrogers@cooley.com +1 202 776 2227
H Joshua Kotin Chicago	jkotin@cooley.com +1 312 881 6674
Jasmine A. Banks Washington, DC	jbanks@cooley.com +1 202 360 6565

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.