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CFPB Emphasizes Voluntary Nonbank Consent to Supervision in Updated Procedural Rulemaking

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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.

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