

September 25, 2025

Russ Vought
Acting Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Consumer Financial Protection Bureau Notice of Propose Rulemaking on the Legal Standard Applicable to Supervisory Designation Proceedings, CFPB-2025-0018, RIN 3170-AB41.

The Manhattan Institute for Policy Research is a 501(c)(3) nonprofit think tank committed to developing and disseminating new ideas that foster greater economic choice and individual responsibility. Legal Policy Fellow C. Jarrett Dieterle of the Manhattan Institute submits these comments in response to the Consumer Financial Protection Bureau’s Notice of Proposed Rulemaking on the Legal Standard Applicable to Supervisory Designation Proceedings.¹

My name is Jarrett Dieterle, and I am a legal policy fellow with the Manhattan Institute.² In this role, I develop and communicate novel, sound ideas on how to improve America’s constitutional, legal, and regulatory systems of governance. I have testified before Congress and submitted regulatory comments to federal agencies, as well as provided testimony and input to numerous state legislatures. I have authored many policy briefs, articles in journals including *National Affairs* and the *Georgetown Law Journal*, and short-form commentaries in popular publications such as the *New York Times*, *Wall Street Journal*, *USA Today*, and *Washington Post*.

I write in support of the proposed rulemaking and to point out the parallels between the Bureau’s supervisory designation authority and other forms of the so-called “shadow regulatory state.”

I. Background

The Consumer Financial Protection Act of 2010 grants the Consumer Financial Protection Bureau (CFPB) the authority to supervise nonbank entities that the Bureau has “reasonable cause” to believe are engaging in “conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.”³ No violation of a law or regulation need be shown in order for this

¹ CFPB Notice of Propose Rulemaking on the Legal Standard Applicable to Supervisory Designation Proceedings, Aug. 26, 2025, Docket No. CFPB-2025-0018, Doc. No. 2025-16352 (90 FR 41520), available at <https://www.consumerfinance.gov/rules-policy/rules-under-development/legal-standard-applicable-to-supervisory-designation-proceedings/>.

² I am submitting this comment letter in my individual capacity. Details regarding my professional affiliation are provided here for convenience and ease of reference only.

³ 12 U.S.C. 5514(a)(1)(C).

supervisory authority to be invoked.⁴ Sometimes referred to as the CFPB’s “dormant authority,” the use of this authority has seen an uptick in recent years.⁵

Under current CFPB rules, once the Bureau provides notice to a covered entity that it may have “reasonable cause” to assert supervisory authority, the covered entity can either voluntarily consent to supervisory authority or dispute the designation via written response within 30 days.⁶ In a series of amendments from 2022–2024, the Bureau provided for the public release of supervisory designation decisions and orders.⁷ After reply by the Bureau, and a subsequent period for oral and supplemental response by the covered entity, the CFPB Director finally makes a determination either subjecting the covered entity to supervisory authority or terminating the proceeding.⁸

Once an order enacting supervisory authority is handed down by the Director, the covered entity must wait two years before petition for termination of the order.⁹ If it is denied termination, it can petition for termination no more than once annually thereafter.¹⁰

As noted, the Director is empowered to decide whether the determination to exercise supervisory authority “will be publicly released on the Bureau’s website, in whole or in part.”¹¹ The Bureau initiated a proposed rulemaking in May of this year proposing to rescind the aforementioned 2022–2024 amendments providing for the public release of decisions and orders by the Director for supervisory authority.¹² Now, in this current proposed rulemaking, the Bureau is proposing to update the legal standards for supervisory designation authority.¹³

I will refrain from further reciting the ins-and-outs of the supervisory designation authority procedures given the Bureau’s familiarity with its own rules. I merely have laid out these basics to inform the remainder of this comment.

II. The Shadow Regulatory State in Action

The CFPB has theoretically possessed its supervisory authority powers since the passage of the CFPA in 2010, but it wasn’t until 2022 that the Bureau announced its intention to start using the authority and

⁴ In the Matter of: World Acceptance Corp., Supervisory Designation Proceeding, Decision and Order (Public Version), File No. 2023-CFPB-SUP-0001.

⁵ Jason Cover, et al., “A CFPB First: Bureau Publicly Asserts ‘Dormant’ Supervisory Authority Over Company,” *Consumer Financial Services Law Monitor*, Feb. 26, 2024, <https://www.federalregister.gov/documents/2025/08/26/2025-16352/legal-standard-applicable-to-supervisory-designation-proceedings>.

⁶ 12 C.F.R. § 1091.201-203.

⁷ CFPB Proposed Rulemaking on Procedures for Supervisory Designation Proceedings, May 14, 2025, Docket No. CFPB-2025-0013, Doc. No. 2025-08347 (90 FR 20401), available at <https://www.federalregister.gov/documents/2025/05/14/2025-08347/procedures-for-supervisory-designation-proceedings>.

⁸ 12 C.F.R. § 1091.204-206.

⁹ 12 C.F.R. § 1091.301(a).

¹⁰ *Ibid.*

¹¹ 12 C.F.R. § 1091.405(b).

¹² CFPB Proposed Rulemaking on Procedures for Supervisory Designation Proceedings, Docket No. CFPB-2025-0013.

¹³ CFPB Notice of Propose Rulemaking on the Legal Standard Applicable to Supervisory Designation Proceedings, Docket No. CFPB-2025-0018.

“created for itself the right to publicize its one-off supervisory designations.”¹⁴ It was hardly a secret that the Bureau began using its newly minted ability to publicize supervisory designations as a hardball tactic to secure compliance and cooperation for covered entities it targeted:

We also are aware that the CFPB has designated several nonbanks for supervision under this authority, keeping those designations confidential in exchange for the nonbanks’ agreements not to contest the designations. With this most recent action, the CFPB is making good on its threat to publicize the designation of nonbanks who resist the Bureau’s efforts to supervise them by announcing that they pose “risks to consumers.”¹⁵

In February 2024, the Bureau followed through on making its first supervisory designation order public. The order exerted supervisory authority over the installment lender World Acceptance Corp.¹⁶ The World Acceptance Corp. designation order is instructive in that it is entirely based on consumer complaints. As one commenter to the CFPB’s proposed rulemaking on the public release of supervisory designation orders put it: “The Bureau’s description in the Order of the conduct of the company is based exclusively on the allegations made in unverified consumer complaints—not on a fully developed record and finding that the company has violated a law or regulation.”¹⁷

As the Order itself states—numerous times—there is no need to determine if the covered entity’s conduct rises to the level of a legal violation because “section 1024(a)(1)(C) does not require an entity to have violated any law in order to be eligible for supervision.”¹⁸ As the aforementioned commenter rightly concluded:

Consequently, the release of the Order did not provide the public with guidance on specific conduct that violated a specific statute or regulation. Instead, the release of this (and potentially other) orders will exacerbate the challenges of “regulation by enforcement.” Public release will generate uncertainty among regulated entities and increase their legal exposure, which discourages innovation in the design and delivery of financial services.¹⁹

Similarly, in the other CFPB supervisory designation order to be made public—only after being contested by the covered entity, in this case Google Payment Corp.—the order “does not assert that [Google Pay] violated any laws or engaged in wrongdoing,” and “[i]nstead, it relies on a relatively small number of

¹⁴ Jason Cover, et al., “A CFPB First: Bureau Publicly Asserts ‘Dormant’ Supervisory Authority Over Company,” *Consumer Financial Services Law Monitor*.

¹⁵ *Ibid.*

¹⁶ In the Matter of: World Acceptance Corp., Supervisory Designation Proceeding, Decision and Order (Public Version), File No. 2023-CFPB-SUP-0001, available at https://files.consumerfinance.gov/f/documents/cfpb_world-acceptance_decision-and-order_2023-11.pdf.

¹⁷ Comment from American Bankers Association and Consumer Bankers Association, Docket No. CFPB-2025-0013, Comment ID CFPB-2025-0013-0005, available at <https://www.regulations.gov/comment/CFPB-2025-0013-0005>.

¹⁸ In the Matter of: World Acceptance Corp., Supervisory Designation Proceeding, Decision and Order (Public Version), File No. 2023-CFPB-SUP-0001, p. 9, 12, 14.

¹⁹ Comment from American Bankers Association and Consumer Bankers Association, Docket No. CFPB-2025-0013.

unverified consumer complaints to justify future examinations, even though Google Pay stopped offering the product.”²⁰

The Bureau’s hardball tactics regarding public release of the supervisory designation were again on display:

GPC [Google Pay] claims that the Bureau threatened to publicize the supervisory designation if GPC contested the allegations, while offering confidentiality if GPC consented to supervision. GPC also alleges that the CFPB leaked a copy of the order to the press at a time when GPC was statutorily barred from publicly commenting and, thus, unable to defend its reputation.²¹

Earlier this year, under new leadership, the CFPB withdrew the supervisory designation against World Acceptance Corp. and Google Pay.²² In the latter withdrawal order, the Bureau noted that, since the product in question had been taken off the market, extending Bureau supervision of Google Pay would be “be an unwarranted use of the Bureau’s powers and resources.”²³

While the Bureau’s reconsideration of its tactics in these proceedings is salutary, it also highlights the underlying problem. Agency leadership changes over time, and when agency rules do not have clear limiting principles and structure but rather proceed on an *ad hoc* basis, it puts enormous amounts of discretion in the hands of unelected government officials. This is particularly so in the realm of what my colleague Jim Copland has referred to as the “shadow regulatory state.”

In broad terms, the “shadow regulatory state” is the vast array of administrative powers, proceedings, guidance, agreements, and influencing techniques that federal government agencies exercise on a day-to-day basis. Most Americans support at least some form of appropriate regulation of individuals and businesses, but today less and less of this takes place through formal rulemakings or adjudicatory proceedings, and instead takes place behind closed doors.

The “shadow regulatory state” is often seen in particularly virulent form in the use of formal and informal—and non-public and public—enforcement proceedings of various types. As Copland has put it: “Through the threat of its enforcement power, the federal government has assumed a shadow regulatory power that in some ways is more unlimited than its ordinary administrative authority.”²⁴ Furthermore, this has only increased over time: “As the volume of rules has grown, so has the scope for discretionary use of government power through enforcement—and the threat of enforcement.”²⁵

²⁰ Keith J. Barnett, et al., “Google Challenges CFPB’s Supervisory Designation,” *Consumer Financial Services Law Monitor*, Dec. 11, 2024, <https://www.consumerfinancialserviceslawmonitor.com/2024/12/google-challenges-cfpbs-supervisory-designation/>.

²¹ *Ibid.*

²² In the Matter of: World Acceptance Corp., Supervisory Designation Proceeding, Withdrawal of Supervisory Designation, File No. 2023-CFPB-SUP-0001, available at https://files.consumerfinance.gov/f/documents/cfpb_world-acceptance-withdrawal_2025-05.pdf; In the Matter of: Google Payment Corp., Supervisory Designation Proceeding, Withdrawal of Supervisory Designation, File No. 2024-CFPB-SUP-0001, available at https://files.consumerfinance.gov/f/documents/cfpb_gpc-withdrawal_2025-05.pdf.

²³ In the Matter of: Google Payment Corp, File No. 2024-CFPB-SUP-0001.

²⁴ James R. Copland, *The Unelected: How an Unaccountable Elite Is Governing America* (Encounter Books 2020), p. 108.

²⁵ *Ibid.*, p. 8.

Our team at the Manhattan Institute has long tracked the “shadow regulatory state” in the realm of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs).²⁶ This is worth highlighting in the context of the CFPB’s nonbank supervisory authority given some of the parallels at play. DPAs and NPAs are settlements in which corporations agree to a “settlement” with federal prosecutors under the auspices of it being “voluntary.”²⁷ In reality, it’s under duress, as the alternative is criminal prosecution.²⁸

While DPAs follow the filing of criminal charges, NPAs precede any such filing, and in both cases the government uses the agreements to “modify, control, and oversee corporate behavior in ways they never could by taking the companies to court,” which it does despite the fact that the agreements “lack substantive judicial review, as well as transparency to the public and lawmakers.”²⁹ NPAs and DPAs can last for a number of years, and are functionally analogous in many ways to a *de facto* supervisory authority over companies.³⁰

For its part, the CFPB’s supervisory authority allows the Bureau to approach a company clandestinely, based solely on unverified consumer complaints, and exert supervisory authority. In turn, through this authority, the Bureau can substantially influence and control the company’s behavior in a way that is essentially behind-closed-doors-regulation.³¹ Once the supervisory designation authority is in place, the Bureau can insert itself into the internal machinations of the company by conducting examinations and analyzing everything from organizational charts and training protocols to internal reports and compensation practices.³²

If the entity resists, the Bureau can threaten to make its supervisory designation order public, thereby causing reputational harm to the entity based on unverified claims that it poses “risks to consumers.” With this Damoclean sword hovering just above, it’s little wonder that most entities choose to quietly comply with Bureau dictates. While a supervisory designation authority may not be viewed by some as a

²⁶ See, e.g., James R. Copland, “The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements” (Manhattan Institute 2012), available at <https://manhattan.institute/article/the-shadow-regulatory-state-the-rise-of-deferred-prosecution-agreements>; Copland & Isaac Gorodetski, “The Shadow Lengthens: The Continuing Threat of Regulation by Prosecution” (Manhattan Institute 2014), available at <https://manhattan.institute/article/the-shadow-lengthens-the-continuing-threat-of-regulation-by-prosecution>; Copland & Gorodetski, “Without Law Or Limits: The Continued Growth of the Shadow Regulatory State” (Manhattan Institute 2015), available at <https://manhattan.institute/article/without-law-or-limits-the-continued-growth-of-the-shadow-regulatory-state>; Copland & Rafael A. Mangual, “Justice Out Of the Shadows” (Manhattan Institute 2016), available at <https://manhattan.institute/article/justice-out-of-the-shadows-federal-deferred-prosecution-agreements-and-the-political-order>; Copland & Mangual, “The Shadow Regulatory State at the Crossroads” (Manhattan Institute 2017), available at <https://manhattan.institute/article/the-shadow-regulatory-state-at-the-crossroads-federal-deferred-prosecution-agreements-face-an-uncertain-future>.

²⁷ Copland & Mangual, “The Shadow Regulatory State at the Crossroads,” p. 5.

²⁸ Ibid.

²⁹ Ibid.

³⁰ See generally Copland, “The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements.”

³¹ Christa L. Bieker and Joy Tsai, “CFPB Issues Order Establishing Supervisory Authority Over Nonbanks,” Mayer Brown, Mar. 6, 2024, <https://www.mayerbrown.com/en/insights/publications/2024/03/cfpb-issues-order-establishing-supervisory-authority-over-nonbanks>.

³² Jonathan L. Pompan, “What to Know about CFPB Supervision and Examination,” Venable, July 2013, <https://www.venable.com/insights/publications/2013/07/what-to-know-about-cfpb-supervision-and-examination>.

traditional “enforcement” action compared to, for instance, a more formal agency adjudicatory proceeding, it’s clear that the Bureau itself views it as a preliminary stage in the enforcement process.³³

To be sure, there are certainly differences between DPAs/NPAs and the CFPB’s supervisory authority—such as criminal charges being at play in the former—but it’s worth noting that the Bureau’s centralized structure likely makes it *more* able to pursue a cohesive regulatory agenda via enforcement by using its supervisory authority. It’s also clear that the Bureau has used hardball tactics in a similar way to how prosecutors have used DPAs and NPAs. With DPAs/NPAs, prosecutors threaten criminal prosecution in the absence of cooperation; with the Bureau’s supervisory authority, it threatens to make supervisory designation orders public if entities don’t toe the line.

Anytime a particularly problematic shadow in the “shadow regulatory state” is identified, we should have a vested interest as Americans to disinfect it with sunlight. In this vein, it’s appropriate for the Bureau to recognize the need to actually define “risks to consumers” under its supervisory authority capacities, rather than relying on an unaccountable—and in fact unknowable—*ad hoc* standard.

The Bureau’s proposal to define risks to consumers as involving conduct that “presents a high likelihood of significant harm” to consumers and that is “directly connected to the offering or provision of a consumer financial product or service” is not a massive defanging of agency powers. Instead, it seems prudently targeted at concentrating the Bureau on its core mission of protecting consumers from substantial harm caused by consumer financial products and services.



For the reasons laid out above, I urge the Bureau to finalize its proposed rulemaking. It’s time we start shortening, rather than lengthening, the regulatory shadow.

Respectfully submitted,

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³³ Consumer Financial Protection Bureau, “CFPB Supervisory Examinations Find Credit Reporting Failures, Junk Fees, and Mishandling of COVID-19 Protections,” Nov. 16, 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervisory-examinations-find-credit-reporting-failures-surprise-junk-fees> (“For more serious violations or when companies fail to take corrective actions, the CFPB opens investigations for potential enforcement actions.”)