June 20, 2025

Submitted via www.regulations.gov

Russell T. Vought
Acting Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Comment Regarding "Rescission of State Official Notification Rules" Direct Final Rule, Docket No. CFPB-2025-0016, 90 Fed. Reg. 21691 (May 21, 2025)

Dear Acting Director Vought:

Governing for Impact ("GFI") submits this significant adverse comment on a direct final rule, "Rescission of State Official Notification Rules" ("DFR"), issued by the Consumer Financial Protection Bureau ("CFPB") on May 21, 2025.[1] GFI is a regulatory policy organization dedicated to ensuring that the federal government operates more effectively for everyday working Americans.[2] We appreciate the opportunity to comment, and we write in opposition to the DFR. As detailed below, the DFR: (1) exceeds the CFPB's statutory authority; (2) is arbitrary and capricious because it fails to justify the agency's change in position and otherwise demonstrate reasoned decisionmaking; and (3) violates the Administrative Procedure Act ("APA") by failing to properly employ direct final rulemaking. For these reasons, the DFR should be withdrawn.

I. The DFR exceeds the CFPB's statutory authority because it rescinds regulations that are required by statute without replacing them.

Agency regulations violate the APA if they are "not in accordance with law" or "in excess of statutory ... authority." 5 U.S.C. § 706(2)(A), (C). The DFR is contrary to 12 U.S.C. § 5552(c), which states that the CFPB "shall prescribe regulations to implement the requirements of this section." 12 U.S.C. § 5552 allows state attorneys general to bring civil claims under the Consumer Financial Protection Act, requiring them to notify the CFPB in advance ("state notification requirement"). Pursuant to 12 U.S.C. § 5552(c), the regulation being rescinded specified the contours of the state notification requirement, including the notice's content and process for submission.[3] In other words, Congress expressly required that the CFPB issue and maintain the very regulations that the DFR now rescinds. The statute is clear: "shall," 12 U.S.C. § 5552(c), means shall.[4] And the D.C. Circuit has previously held the same; in one case, the court explained that a statute "require[d]" an agency to promulgate rules because its language provided that the agency "*shall* promulgate regulations...."[5] Although the DFR cites 12 U.S.C. § 5552(c) as its "[l]egal [a]uthority,"[6] the provision actually forbids the agency from issuing this DFR.

---

[1] 90 F.R. 21691 (May 21, 2025).
[2] Governing for Impact, https://governingforimpact.org/.
[3] *Compare* 12 C.F.R. § 1082(c)(1)(viii), (e) (specifying disclosure and privilege requirements), *with* 12 U.S.C. § 5552 (no disclosure or privilege requirements mentioned).
[4] *See Maine Cmty. Health Options v. United States*, 590 U.S. 296, 310 (2020) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement.") (quotation omitted).
[5] *Nat'l Assoc. for Surface Finishing v. EPA*, 795 F.3d 1, 4 (D.C. Cir. 2015); 42 U.S.C. § 7412(d) (emphasis added).
[6] 90 F.R. at 21691.

If further confirmation were needed, interpreting 12 U.S.C. § 5552(c) as a whole points squarely toward requiring the CFPB to promulgate and maintain a state notification regulation.[7] The second part of 12 U.S.C. § 5552(c) requires the CFPB to "provide guidance in order to further coordinate actions with" state actors "from time to time." This confirms Congress's overall intent for the CFPB to provide regulations and guidance implementing the state notification requirement.[8] Additionally, Congress included a temporal qualification ("from time to time") for the section's guidance requirement but not the regulation requirement. Therefore, had Congress intended to relax any part of the regulation requirement, it would have done so.[9] And if any *further* confirmation is needed, one need look no further than past opinions of the CFPB itself. In promulgating the regulation the DFR rescinds, the CFPB acknowledged the mandatory nature of 12 U.S.C. § 5552(c)'s command: the CFPB stated that it is "required to issue regulations" under the statute.[10] The agency's conclusion now that the regulation is "unnecessary" is not a sufficient basis to disregard or overcome Congress's instruction—an instruction which the CFPB itself had previously recognized.

II. The DFR is arbitrary and capricious because it fails to acknowledge the agency's change in position and otherwise does not show reasoned decisionmaking.

The DFR also violates the APA because it is arbitrary and capricious, 5 U.S.C. § 706(2)(A), in that it silently and without explanation departs from the CFPB's prior interpretation of 12 U.S.C. § 5552(c): "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position,"[11] and, as discussed, the CFPB has previously recognized 12 U.S.C. § 5552(c)'s mandatory nature. However, the DFR does not acknowledge the agency's previous prior (correct) interpretation of the statute. Similarly, "[w]hen an agency changes course," as the CFPB did here, "it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[12] The DFR makes no attempt to address whether states or other actors have come to rely upon the regulation being rescinded.[13]

The DFR also more generally departs from the APA's requirement of "[r]easoned decision-making,"[14] as the CFPB's meager attempt at a policy justification fails. The DFR claims that the rescinded regulations are "unnecessary" because "[w]here Congress's statutes are sufficiently clear and prescriptive, regulations do little more than increase costs and cause confusion."[15] But Congress made a different judgment about the necessity of regulations when enacting the statute, 12 U.S.C. § 5552(c), and Congress's judgment controls, not the agency's. Moreover, the DFR also states that the rescinded regulation only contains unnecessary "minor tweaks" to the

---

[7] *See King v. Burwell*, 576 U.S. 473, 486 (2015) (explaining that the court's "duty, after all, is to construe statutes, not isolated provisions") (quotations omitted).
[8] *See Sierra Club v. U.S. EPA*, 99 F.3d 1551, 1555 (10th Cir. 1996) ("If congressional intent is clear, we must give effect to that intent.").
[9] *See Nken v. Holder*, 556 U.S. 418, 430-31 (2009) (if Congress includes "particular language in one section" and not another, "it is generally presumed that Congress acts intentionally in the disparate inclusion or exclusion").
[10] 77 F.R. 39112, 39112 (Jun. 29, 2012).
[11] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[12] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020) (quotations omitted).
[13] 90 F.R. at 21691-92.
[14] *Physicians for Sec. Resp. v. Wheeler*, 956 F.3d 634, 644 (D.C. Cir. 2020).
[15] 90 F.R. at 21691.

notification procedures set forth in the statute, but neither explains what the minor tweaks are nor why the agency considers them unnecessary.

III. The DFR improperly employs direct final rulemaking, violating the APA's procedural requirements.

Direct final rulemaking dispenses notice and comment on the theory that the rule in question is so non-controversial that the agency expects to receive no adverse comments with respect to it, in reliance on the APA's "good cause" exception to notice and comment where such procedures are "unnecessary." 5 U.S.C. § 553(b)(B).[16] Importantly, if the agency turns out to be wrong and receives a significant adverse comment, the agency must withdraw the DFR and proceed with normal notice and comment by issuing a notice of proposed rulemaking.[17] The DFR improperly uses direct final rulemaking by failing to explicitly invoke the "good cause" exception to notice and comment; defining "significant adverse comment" in a manner inconsistent with the "good cause" exception; and setting forth an erroneous course of action in the event that the CFPB does receive a significant adverse comment on the DFR.

Invoking "good cause." The DFR violates the APA's procedural requirements for invoking "good cause." To invoke good cause, an agency must "incorporate" a good cause "finding and a brief statement of reasons therefor in the rule[]." 5 U.S.C. § 553(b)(B). The CFPB failed to do so here.[18]

Justifying "good cause." The DFR's narrow definition of the kind of "significant adverse comment" is also inconsistent with the "good cause" exception's "unnecessary" prong. According to the DFR, such a "significant adverse comment" must "oppose[] the rule and raise[], alone or in combination with other comments, a sufficiently serious issue under each of the independent grounds provided."[19] But this definition is inconsistent with the "unnecessary" prong of the "good cause" exception for two reasons.

First, the "unnecessary" prong is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[20] Therefore, a singular comment raising a non-trivial issue—for example, a comment criticizing an agency action as contrary to law—would indicate that the DFR does not involve the sort of mundane rule that the "unnecessary" prong is designed for. To put a finer point on it: comments need not raise a "sufficiently serious issue," as the DFR suggests, but only an issue indicating that the DFR is not, as the agency had guessed, confined to trivial matters.

Second, without explanation, the CFPB's narrow definition of a "significant adverse comment" requires commentators to rebut "each of the [DFR's] independent grounds," but the CFPB has only provided a *single*

---

[16] *See* Ronald M. Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1, 2 (1995); *see also* Administrative Conference of the United States, Recommendation 95-4: Procedures for Noncontroversial and Expedited Rulemaking, 60 FR 43110 (Aug. 18, 1995).

[17] Levin, *supra* fn. 16, at 2.

[18] *See* 90 F.R. at 21691-92 (no findings or brief statement of reasons).

[19] *Id*.

[20] *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012) (quotation omitted); *see N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987).

justification for the DFR.[21] Regardless of whether this was a drafting error or there is more than one justification that is not readily apparent, the unclear requirement creates confusion that could deprive interested parties from being heard. After all, direct final rulemaking is intended to skip notice and comment—a critical process intended to "foster public participation and facilitate reasoned decisionmaking"—when the agency believes the rule is so mundane the public won't participate.[22] But if commenters do not know how to submit a "significant adverse comment" in order to trigger notice and comment, then the underlying legal theory for DFRs breaks down.[23] If a direct final rule receives no significant adverse comments as a result of poor communication to the public, not because the public has nothing to say, then the absence of comments cannot confirm the agency's guess as to whether there is utility for notice and comment.

Course of action upon receiving a significant adverse comment. The DFR states that "notice will be published in the Federal Register before the effective date either withdrawing the rule or issuing a new *final rule* that responds to significant adverse comments and carries a new effective date."[24] The latter would not be appropriate: if a significant adverse comment is received, the agency must at minimum withdraw the rule before its effective date,[25] and it may then issue a *proposed rule* as part of a normal APA rulemaking process, but it may not once again skip directly to a final rule absent sufficient invocation of good cause.[26]

IV. Conclusion

The CFPB's DFR is contrary to law because it rescinds a regulation required by statute without replacing it. In addition to exceeding the agency's statutory authority, the DFR is also arbitrary and capricious because it does not provide reasoning for departing from a previous agency position or otherwise engage in reasoned decisionmaking. Finally, the DFR further fails to properly employ direct final rulemaking, depriving interested parties of the opportunity to participate as required under the APA. For these reasons, the CFPB should withdraw the DFR.

Sincerely,

Mia Harris
Legal Policy Intern, Governing for Impact
Email: mharris [at] governingforimpact.org

Reed Shaw
Policy Counsel, Governing for Impact
Email: rshaw [at] governingforimpact.org

[21] 90 F.R. at 21691.
[22] *Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 41 F.4th 564, 568 (D.C. Cir. 2022) (quotation omitted).
[23] Levin, *supra* fn. 16, at 11-12.
[24] 90 F.R. at 21691 (emphasis added).
[25] Office of the Federal Register, A Guide to the Rulemaking Process 9, https://uploads.federalregister.gov/uploads/2013/09/The-Rulemaking-Process.pdf.
[26] 5 U.S.C. § 553(b)(B).