March 31, 2023

Comment Intake—Nonbank Registration of Certain Agency and Court Orders
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

To Whom It May Concern:

The undersigned trade associations appreciate the opportunity to submit comments to the Consumer Financial Protection Bureau ("CFPB") regarding its proposal to create a registry of nonbank covered persons subject to certain agency and court orders (the "Proposed Rule").[1]

The U.S. consumer financial services market serves consumers well, enabling families to pursue the American dream while also meeting life's unexpected challenges. It is one of the most highly regulated markets in the world. Consumer financial services companies invest substantial sums in ensuring compliance with the wide range of relevant statutes and regulations. Dedicated professionals work every day to serve consumers while maintaining scrupulous compliance with the law. This work is complicated, time-consuming, and expensive. Complex and opaque regulations make compliance a challenging endeavor. Indeed, companies regularly ask the CFPB for assistance in determining what the law requires.

The CFPB is increasingly abandoning its share of the hard work of making complex regulatory frameworks work most effectively for U.S. consumers. Instead, the CFPB appears focused on quick press wins that criticize financial services companies without providing concrete benefits to consumers. The CFPB's proposal to create a registry to help detect "repeat offenders" continues this unfortunate trend. In publicizing information that is already public, the Proposed Rule would not help consumers. In contrast, the Proposed Rule would impose very real costs upon consumer financial services companies that are subject to its requirements, including by driving up compliance costs through an unlawful executive attestation requirement.

The CFPB should withdraw this proposal. We stand ready to work with the CFPB on regulatory approaches and tools that will benefit consumers without creating undue negative consequences. The Proposed Rule does not meet that bar. Naming and

[1] *See* CFPB, Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, 88 Fed. Reg. 6,088 (Jan. 30, 2023).

shaming companies and their executives may win headlines and collecting consent orders may give plaintiffs' attorneys a roadmap for litigation, but neither helps consumers. The CFPB can and must do better.

We write to make the following four points in response to the Proposed Rule:

- The proposed executive attestation requirement is unlawful.
- The proposed creation of the public registry is arbitrary and capricious.
- The CFPB should focus instead on the enforcement of federal laws within its authority.
- The CFPB should clarify the scope of the Proposed Rule if it moves forward.

Analysis

1. The proposed executive attestation requirement is unlawful.

a. The CFPB lacks the authority to impose the executive attestation requirement.

The Bureau proposes "to require that certain supervised nonbanks annually submit a written statement regarding the company's compliance with any outstanding registered orders."[2] This statement would be "signed by a designated senior executive," who would "generally describe the steps the executive has undertaken to review and oversee the company's activities subject to the applicable order for the preceding calendar year."[3] This executive would attest whether, to their knowledge, the business identified any violations of the relevant court orders during the past year.

The CFPB lacks the legal authority to impose this executive attestation requirement. The CFPB purports to rely upon its supervisory authority under 12 U.S.C. § 5514(b)(7)(A)-(C) to do so. These sections allow the CFPB to require certain supervised entities "to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers." This authority is inadequate to impose the executive attestation requirement for at least two reasons.

[2] 88 Fed. Reg. at 6090.

[3] *See id. See also generally* Proposed Rule § 1092.203.

First, the contemplated attestation is not a "record." A "record," is "something that records"—in other words, something that "set[s] down in writing: furnish[es] written evidence" or "gives evidence of."[4] Numerous uses of the word "record" within Title 12 of the U.S. Code confirm that "record" should be read to mean evidence of the action of a relevant covered entity. For example:

- Federally insured depository institutions are required to make "a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected."[5]

- "Financial records" are defined in Chapter 35 of Title 12, on the right to financial privacy, as "an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution."[6]

- The Federal Reserve Board has the authority to subpoena persons to produce "books, papers, correspondence, memoranda, contracts, agreements, or other records," implying that records consist of books, papers, correspondence, memoranda, contracts, agreements, and similar items.

The executive attestation is not a "record." While a description of actions taken by the business might constitute a "record," the attestation serves a different purpose. An attestation is "an official verification of something as true or authentic."[7] In other words, the "attestation" does not provide information about the activities of the business. Rather, it provides a statement to verify that the information provided is accurate. Indeed, confirming this distinctive character of the attestation, the CFPB would require the supervised entity to "maintain documents and other records sufficient to provide reasonable support" for the attestation.[8] The CFPB's authority regarding maintaining or producing records consequently does not include the separate authority to require an executive to verify the accuracy of their records. (Of course, were the CFPB to have a separate authority to require an attestation, the CFPB then could require the supervise entity to keep a copy of that attestation as a "record." But that does not transform the CFPB's authority over record keeping into an authority to require a supervised entity to create other documents. For example, the CFPB also could not rely on its authority over records to require the supervised entity to enter a contract and

[4] Merriam-Webster Dictionary, "Records."

[5] 12 U.S.C. § 1829b(d)(2).

[6] 12 U.S.C. § 3401(2).

[7] Merriam-Webster Dictionary, "Attestation."

[8] Proposed Rule §1092.203(e).

provide a copy to the CFPB or to put a statement on its website and provide a copy to the CFPB).

Second, the cited authority only allows the CFPB to require a supervised entity to produce records. It does not allow the CFPB to require an executive of a supervised entity to provide any such certification. Congress knows how to impose such certification requirements on executives or other stakeholders when it wants to do so. For example, as a part of the Volcker Rule, Congress specifically directed that a banking entity's chief executive officer annually certify in writing that the entity has a program in place to comply with the rule.[9] Congress similarly specified in the Sarbanes-Oxley Act that registered public accounting firms preparing or issuing audit reports for securities issuers must attest to the issuer's internal control assessment.[10] Congress did not choose to impose such a requirement here and the CFPB may not create one in the absence of congressional action.

b. The proposed executive attestation requirement is arbitrary and capricious.

"The [Administrative Procedure Act]'s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). The executive attestation requirement fails on both counts since the CFPB does not—and cannot—adequately explain how the benefits of the attestation requirement outweigh its clear negative consequences.

First, the CFPB does not consider how the executive attestation requirement would distort compliance programs. Financial service companies have finite resources. Compliance programs consequently prioritize the highest-risk areas. The executive attestation requirement is certain to push compliance with state and other orders to the top of the heap, earning them disproportionate attention within the company. Prioritizing compliance with state and other orders over other compliance obligations will distort compliance programs, creating unnecessary risks for consumers or raising costs that will ultimately be passed down to consumers.

Second, the CFPB does not consider the obvious chilling effect on the hiring and retention of senior executives responsible for compliance with consumer financial protection laws. The novel executive attestation requirement would create a new and substantial individual liability risk for relevant corporate leaders, both from CFPB action and private litigation. This personal liability risk is likely to play an important role in the employment decisions of relevant corporate leaders, from whether to take a job subject to the attestation requirement to whether to stay in that job. Covered nonbanks

[9] 12 U.S.C. § 1851(f)(3)(ii).

[10] 15 U.S.C. § 7262(b).

consequently will find it more difficult to fill compliance positions with the most qualified candidates if the Proposed Rule were adopted. Again, consumers could suffer the consequences if nonbank covered persons struggle to fill compliance positions with the most qualified candidates.

Third, the CFPB also fails to consider that the proposed executive attestation requirement may subject a company to contradictory reporting and governance regimes, creating confusion and competing obligations. The regulator that imposed each consent order is best positioned to determine what constitutes a violation of a consent order and what responsive action is appropriate. Interfering with those regulators' responsibility to oversee compliance with these consent orders would undermine those other regulators, creating unnecessary negative consequences for consumers and businesses.

The CFPB compounds its failure to consider the downsides of the attestation requirement by also failing to plausibly identify countervailing benefits from the creation of this requirement. The CFPB states that the attestation requirement will serve two purposes: (i) facilitating the Bureau's supervision efforts, "including its efforts to assess compliance with the requirements of Federal consumer financial law, obtain information about supervised entities' activities and compliance systems or procedures, and detect and assess risks to consumers and to markets for consumer financial products and services"; and (ii) improving the Bureau's ability to conduct its supervisory and examination activities with respect to the supervised nonbank. The CFPB fails to provide an adequate explanation, however, of the basis for its confidence in achieving these benefits or the scale of any benefit to consumers. The CFPB thus does not adequately explain how these stated purposes justify the imposition of an attestation requirement. Indeed, the CFPB could achieve the stated purposes by simply collecting public orders, including those resulting from a failure to comply with the terms of a prior order.

The imposition of the executive certification requirement consequently would be arbitrary and capricious, and invalid under the Administrative Procedure Act, even if the CFPB had the necessary legal authority to impose this element of the proposal.[11]

2. The proposed creation of the public registry is arbitrary and capricious.

As discussed above, agency action must be reasonable and reasonably explained. The CFPB fails that standard in proposing the creation of a public registry of

[11] This may in part reflect the failure of the CFPB to properly consider the impact on small businesses of the executive attestation requirement. We would urge the CFPB to meet its obligation to convene a panel as required under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") to consider how small businesses would be burdened by future regulatory proposals.

consent orders. This proposed creation of the public registry consequently would be arbitrary and capricious in violation of the Administrative Procedure Act.

First, the CFPB substantially underestimates the costs that the public registry requirement would impose upon covered entities and the negative consequences it would have in the marketplace.

- The CFPB understates the costs to covered nonbanks and individuals from creation of the contemplated registry. For example, the CFPB substantially undervalues the costs for many companies associated with the executive attestation. Covered nonbanks are likely to spend far more than the CFPB's estimated amount of $1,200 prior to making such an attestation. The analysis also understates the reputational costs for covered nonbanks and executives. Although the CFPB discounts this cost by saying the information would be public without the Proposed Rule, the CFPB also acknowledges that the Proposed Rule could make the final order "more readily accessible."

- The CFPB fails to consider how the contemplated public registry will misinform consumers. Specifically, the contemplated public disclosures will lack critical context, particularly when a final order does not disclose potential weaknesses in the agency's case, the reasons the company chose to enter a settlement agreement, and whether the company admitted fault. The existence of a consent order (or consent orders) likely will be only a very crude predictor of the risk that a company will violate the law in the future. As a result, the proposed requirement is likely to both impose undue reputational harm on individual companies and create a misleading picture of the market for consumers.

- The CFPB also fails to consider how the creation of the public registry will also discourage settlements in future regulatory proceedings. By adding another negative consequence to settlement, the public registry requirement will prolong litigation, raising costs and worsening outcomes. This is likely to be particularly true for settlement of minor matters. Unfortunately, the Proposed Rule would fail to place any sort of threshold, monetary or otherwise, on which orders must be filed. As a result, even a small consent order would be subject to the reporting requirement—discouraging settlement.[12]

[12] As noted above, the CFPB failed to meet its legal obligation to convene a SBREFA panel before proceeding with the public registry portion of its proposal. Like the executive attestation portion of the proposal, the creation of the public registry would impose significant costs on small businesses. Here again, the CFPB did not explain how it reached the conclusion that the public registry portion of its proposal is not covered by SBREFA.

Second, the proposed public registry will have limited or no benefit. As the CFPB acknowledges, all of the information that would be contained in the registry is already publicly available, with the exception of the name and title of the attesting executive(s) submitted by the supervised registered entity.[13] If this information were indeed valuable, consumers could have sought it out themselves or a market-based solution would have emerged. But not only has that not happened, but even the CFPB does not appear to have chosen to collect this information previously. Further, the CFPB acknowledges that the usefulness of already-published information is limited. Indeed, one of the reasons the CFPB states it is not requiring depository institutions to be included in the register is that such depository institutions "regularly publish their consumer financial protection orders." Yet, all the orders that would be included in the registry are already public, published orders. Indeed, the CPFB suggests that most consumers would not change their behavior due to the Proposed Rule, confirming that the proposed creation of the registry would have very limited value for any consumers.

The CFPB's proposal to create a public registry of consent orders is unreasonable in light of its significant negative consequences and limited (if any) benefits. While the registry may serve as a roadmap for trial lawyers, that does not justify the proposal. Instead, the proposed creation of the public registry is arbitrary and capricious in violation of the Administrative Procedure Act.

3. The CFPB should focus instead on the enforcement of federal laws within its authority.

The Proposed Rule would expand the CFPB's market monitoring powers well beyond the limits Congress set in passing the Dodd-Frank Act. Not only is this unlawful for the reasons described above, but it also represents a missed opportunity. The CFPB should focus on implementing and enforcing the numerous federal laws within its expansive authority. Congress gave the CFPB robust authorities. The CFPB should prioritize using those authorities to protect consumers over claiming authorities it lacks—and that would not benefit consumers even if they could be properly wielded by the CFPB.

The CFPB was given, and throughout the Bureau's history has used, its market monitoring powers to gather information about particular products, services and practices. Indeed, under the Dodd-Frank Act, Congress spelled out what the CFPB may consider when allocating resources to perform monitoring. These considerations all assume that the CFPB will be using its resources to monitor a particular "type of consumer financial product or service."[14] Historically, the CFPB has interpreted its market monitoring authority in this way, by using it to request information from

[13] The CFPB could not publish non-public information in this public registry, as such information would constitute confidential supervisory information under state or federal law.

[14] *See* 12 U.S.C. § 5512(c)(2).

companies that provide distinct consumer financial products and services, such as companies offering buy now, pay later products[15] and payments systems services.[16]

It is not a productive use of these market monitoring powers, in contrast, to intrude into companies' interactions with other regulators. The CFPB makes that very mistake here, however. By putting itself into the position of judging companies' compliance with consent orders that it did not issue, the CFPB has given itself the task of having to interpret and enforce those consent orders—and thus the underlying state laws. The CFPB is unqualified for this task. It lacks authority over state law, expertise in interpreting such laws, and knowledge of the circumstances under which a consent order was negotiated. The CFPB's planned approach consequently will lead both to unreasonable outcomes for covered entities and consumers, and wasted time for the CFPB. The CFPB has more important work to do than attempting to indirectly enforce state or federal laws over which it lacks authority or interpreting consent orders to which it was not a party. The CFPB should allow other regulators to do their jobs. The CFPB, for its part, should focus on the enforcement of the numerous federal laws over which it has authority, clarifying regulatory requirements,[17] and supporting the development of innovative services that help consumers.

4. The CFPB should clarify the scope of the Proposed Rule if it moves forward.

The scope of the Proposed Rule is unclear as drafted. In particular, the Proposed Rule does not specify whether holding companies and/or nonbank affiliates of insured depository institutions would be subject to its requirements. We understand that such holding companies and nonbank affiliates would not be subject to the requirements under the Proposed Rule. Subjecting holding companies and nonbank affiliates of insured depository institutions to the Proposed Rule would contradict stated purpose of the Proposed Rule, namely, facilitating the CFPB's risk-based supervision program for covered nonbanks. However, the CFPB should further clarify this point to the extent

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[15] CFPB, Buy Now, Pay Later: Market Trends and Consumer Impacts (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

[16] CFPB, CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans (Oct. 21, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/.

[17] Like existing regulatory frameworks, the Proposed Rule also suffers from a lack of clarity. For example, we read the Proposed Rule not to cover bank holding companies and nonbank affiliates of banks, as the CFPB stated that its intent in issuing the Proposed Rule was to focus on nonbanks that are not subject to registration regimes and the authority of the prudential regulators. The Proposed Rule is not fully clear on this point, however. It could be interpreted as stating that only insured depository institutions and insured credit unions – and not holding companies and nonbank affiliates – will be exempt from the Proposed Rule's requirements. Such an approach would be a mistake. To the extent that the CFPB proceeds with a version of the Proposed Rule that meets legal requirements, it should also ensure that any such amended version is clear and comprehensible.

that it proceeds with any final rule. In contrast, if the CFPB does intend for the Proposed Rule to apply to holding companies and nonbank affiliates of insured depository institutions, it should clearly state this intention, explain why it determined the requirements should apply, and provide a sufficient opportunity to comment. More broadly, the CFPB should ensure that any rule it issues clearly identifies the intended scope so that responsible companies understand the rule's applicability to their businesses.

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We thank you for your consideration of these comments and would be happy to discuss these issues further.

ACA International

American Financial Services Association

Consumer Data Industry Association

Electronic Transactions Association

Financial Technology Association

U.S. Chamber of Commerce