

March 31, 2023

The Hon. Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

**Re: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders,
Docket No. CFPB-2022-0080**

Dear Director Chopra,

The American Financial Services Association (“AFSA”)¹ appreciates the opportunity to comment on the Consumer Financial Protection Bureau’s (CFPB) proposed nonbank registry related to enforcement.² The proposed rule would require nonbank covered persons to register and submit to the proposed registry specific information about final, public orders issued by federal, state, or local agencies or courts.

AFSA and its members support consumer protection and compliance with the law, but we are concerned that the registry as proposed does not enhance those goals. This new registry seems currently structured to “name and shame” rather than act as a useful tool to effectively monitor and reduce any potential risks to consumers. Attacking companies that work to offer new and flexible options to American consumers is not the CFPB’s mission. Despite that, the phrase “repeat offenders”³ used to describe the proposed registry is a veiled reference to criminal laws of that nature and therefore seems to be unnecessarily inflammatory. The adversarial terminology appears designed more to raise ire against covered entities than to present useful information.

AFSA is not the only entity that finds recent actions like the proposed rule counter to what the CFPB should be drafting. In a letter sent to Director Chopra on December 14, 2022, House Financial Services Chairman Patrick McHenry (NC-10) and twenty-three other members of Congress stated that the consequence of the CFPB’s actions “will be fewer financial products and services available in the marketplace – an outcome in direct conflict with fostering increased competition and innovation.”⁴ The “scarlet letter” registry, in its proposed form, lacks clarity of authority, cools competition, and interferes with existing consumer protections and processes.

In addition, we are equally concerned with the personal attestation portion of the proposed rule. First, we are unaware of how the CFPB has the authority to require a personal attestation, and in fact, the provisions cited do not provide any support for such authority. In the proposed rule, the CFPB cites 12 USC 5514(b)(7)(A)-(C) in its “authority and purpose” section. However, these provisions do not support an attestation requirement and instead refer generally to rules to facilitate supervision, assessment, and detection of consumer risks. An attestation is not a “record” (as that term is typically defined) within the scope of that provision. Furthermore, it is an overreach to

¹Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, CFPB-2022-0080, December 12, 2022.

³ <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-registry-to-detect-repeat-offenders/>

⁴ https://financialservices.house.gov/uploadedfiles/2022-12-14_hfsc_cfpb_hearing_december_letter_final__final.pdf

attempt to impose personal federal liability on executives for their compliance *vel non* with state orders. This will create a disincentive for qualified individuals to take on that potential exposure to liability. This exposure could make it hard to hire qualified executives. The rule increases officer risk and personal liability. It is counterintuitive to consumer protection for the CFPB to pass rules that makes it harder for covered entities to fill compliance positions with strong candidates.

Second, the proposed rule is overly broad. Section 1021(a) limits the CFPB’s jurisdiction to implementing and enforcing the enumerated consumer laws that § 1002(12) defines. The proposal selects “covered law” as a term, and then broadly defines it far beyond the expanse of “enumerated consumer laws” to include acts that state and local agencies merely allege an entity engaged in. As a result, the focus of compliance programs would artificially shift to these state and local orders and judgements. This could result in other aspects of compliance programs suffering as they are deprioritized. Further, the rule proposes to require covered entities to report state orders tied to a list of over a hundred state unfair or deceptive acts and practices laws, as well as additional state laws that prohibit “unconscionable” conduct. The list of over a hundred state laws in Appendix A does not even include all the state laws prohibiting unconscionable conduct and is already unmanageably large. Moreover, state laws prohibiting unconscionable conduct address conduct beyond the scope of consumer protection laws and requiring entities to register regulatory actions with respect to such laws would be overly broad.

There are already a multitude of consumer protections in place that this proposed registry might conflict with and that make such a registry unnecessary. For example, many nonbank covered entities must already report regulatory enforcement actions and court orders to state regulators either directly or through the Nationwide Multistate Licensing System (NMLS). Nonbank covered entities must attest to the accuracy of their record, including the regulatory action disclosures, each time a filing is submitted in the NMLS and annually to satisfy license renewal requirements. In addition, most regulators periodically ask covered entities about regulatory actions taken by other regulators as part of supervisory exams, annual reports, license renewals, or otherwise in the normal course of business. There is a Memorandum of Understanding (MOU) in place between the CFPB and states to share this information and does need it to be listed by covered entities as a duplicative source. Leveraging processes already in place to exchange information on regulatory actions addresses the CFPB’s desire for this information without creating additional bureaucracy and unduly burdening businesses with additional paperwork.

Mortgage lenders that originate or service mortgages insured by the Federal Housing Administration must also submit notice to the Department of Housing and Urban Development (HUD) within 10 days of becoming the subject of allegations of violations of certain consumer financial laws or entering into agency or court orders that impose sanctions. In addition, HUD requires mortgagees to attest to compliance with those reporting requirements on an annual basis.

Many state regulators post orders online – either on agency websites or on the NMLS Consumer Access site – and state attorneys general and federal agencies regularly publish orders with press releases notifying the public and other regulators of enforcement actions against nonbank covered entities.

This newly proposed rule would be duplicative at best, and potentially violative of state supervisory privilege at worst. Once again, Congressional leaders share AFSA’s concerns with how the CFPB has structured this proposal. In his opening statement at the December 15, 2022, U.S. Senate Banking Committee hearing, Ranking Member Pat Toomey (R-Pa.) said “The CFPB doubled down on its use of name-and-shame tactics with a new proposed rule... This would effectively give the CFPB enforcement power over other agencies’ orders for violations of state and federal laws that the CFPB has no jurisdiction to enforce.”⁵

⁵ <https://www.banking.senate.gov/newsroom/minority/toomey-urges-congress-to-hold-cfpb-accountable-through-appropriations>

Finally, creating this registry as backward-looking is illogical. In the proposed rule, the CFPB defines “covered order” as “an order that has an effective date on or later than January 1, 2017.”⁶ Including historical state law violations could lead the CFPB to impose “repeat offender” penalties on a company that has had no prior CFPB consent order. This could lead to multiple actions by multiple regulators for the same activity that has already been addressed. Moreover, taking such backward-looking action contravenes the legal tradition that exists in this country where *ex post facto* laws that punish retroactively are prohibited.

The registry as proposed would create a chilling effect on the ability of nonbank financial institutions and state agencies to resolve matters. The institutions may be much less willing to enter into consent agreements if they know that it is going to be included in such a registry and leave them vulnerable as a potential target for trivial class action lawsuits. The attorneys that bring these class action suits would benefit more from the proposed rule than consumers would.

This is counter to both AFSA’s and the CFPB’s aim to ensure that American consumers have access to safe credit. The proposed registry does not align with these goals. There has been a lack of an adequate cost benefit analysis showing that the potential costs to covered entities outweighs the benefits to consumers. Instead, the proposal creates scare tactics and personal liability that provide no consumer protection, reduce quality senior officers and reduce quick resolution at a state level.

We are happy to discuss further. Please contact me at cwinslow@afsamail.org or (202) 776-7300 with any questions.

Sincerely,



Celia Winslow
Senior Vice President
American Financial Services Association

⁶ Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, CFPB-2022-0080, December 12, 2022.