August 23, 2024

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

Re: Privacy Act of 1974; System of Records (89 FR 59900)

Dear Director Chopra,

The American Financial Services Association ("AFSA")[1] appreciates the opportunity to further relay concerns with the Consumer Financial Protection Bureau's (CFPB) nonbank registry related to enforcement.[2] The rule requires 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.

At the outset, AFSA reiterates that the rule is overly broad and conflicts with a multitude of consumer protections already in place at both the federal and state levels. Such a backward-looking registry is illogical and could lead to multiple actions by multiple regulators for the same activity that has already been addressed. Perhaps most importantly though, the CFPB does not have the authority to create the executive attestation requirement.

In its notice of a new system of records, the CFPB lists five purposes for this nonbank registry. Below are our responses to each reason:

(1) To effectively monitor and understand financial markets related to nonbanks or nonbank institutions and (2) To monitor for risks to consumers in the offering or provision of consumer financial products or services

This new registry seems currently structured to "name and shame" rather than act as a useful tool to effectively monitor and understand financial markets related to nonbanks 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; rather, one of the CFPB's statutory objectives is to ensure that "markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation."[3] Despite that, the phrase "repeat offenders"[4] 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.

[1]Founded 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, 89 FR 56028 (July 8, 2024). https://www.govinfo.gov/content/pkg/FR-2024-07-08/pdf/2024-12689.pdf
[3] 12 U.S.C. 5511(b)(5).
[4] https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-registry-to-detect-repeat-offenders/

(3) To facilitate the CFPB's risk-based nonbank supervision program

The rule is too broad to properly facilitate an effective risk-based nonbank supervision program. Section 1021(a) limits the CFPB's jurisdiction to implementing and enforcing the Federal consumer financial laws that § 1002(14) defines. The proposal selects "covered law" as a term, and then broadly defines it far beyond the expanse of "Federal consumer financial laws" to include state and other federal laws. As a result, the attention of the CFPB will be shifted away from the laws that it actually implements and enforces. Therefore, the rule will not properly facilitate the risk-based nonbank supervision program.

(4) To ensure that registered nonbanks subject to the CFPB's supervisory authority are legitimate entities and are able to perform their obligations to consumers, including their obligations under Federal consumer financial law

The CFPB has indicated that the inclusion of the personal attestation portion of the rule is to ensure that supervised entities "take their obligations seriously." However, such a requirement will create a disincentive for qualified individuals to take on potential exposure to liability, and will make it harder for institutions to fill compliance positions and perform obligations to consumers.

It is an overreach to attempt to impose personal federal liability on executives for their compliance with state orders. The rule unnecessarily increases officer risk and personal liability, when there does not appear to be any basis for this requirement in the first place. We are not aware of the CFPB having any difficulty collecting fines from companies that it has found to be in violation of the law, so this requirement appears to be a gratuitous and redundant effort to punish. It not only increases unnecessary risk, but also subjects those individuals to third party lawsuits, when normally they would not have that exposure. It is counterintuitive to consumer protection for the CFPB to issue rules that make it harder for covered entities to fill compliance positions with strong candidates.

Furthermore, per *Loper Bright*, the CFPB fails to make a reasonable construction of the statute. The Consumer Financial Protection Act provides that the CFPB may "prescribe rules regarding a person described in subsection (a)(1) [supervised entities], to ensure that such persons are legitimate entities and are able to perform their obligations to consumers." 12 U.S.C.A. § 5514(b)(7)(c). However, the attestation requirement is not of like kind to the examples provided in the statute. Specifically, the statute describes the following examples as the types of requirements that the CFPB may prescribe by regulation: "background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements." *Id.* The attestation requirement is not of a like kind contemplated by the statute. Under the canon of *ejusdem generis*, a more general term following specific terms in a list is construed to embrace only objects similar in nature to those items enumerated by the preceding specific words. *Epic Sys. Corp. Lewis Ernst & Young LLP Morris Nat'l Lab. Rels. Bd. v. Murphy Oil USA, Inc.*, 584 U.S. 497, 513 (reviewing specific terms preceding a general term; holding that "there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors."). The attestation requirement is not similar in nature to the examples provided in the statute. CFPB has exceeded its authority in interpreting the statute to require such attestation.

(5) To maintain a central public registry of information on nonbanks to facilitate public awareness and oversight.

This effort to create a central registry is unnecessary at best and harmful at worst when it conflicts with the multitude of consumer protections and reporting structures already in place that are accessible to consumers and the CFPB alike. 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, issues regarding individual qualifications for licenses, 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 it does not need 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 and costs.

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.

The final rule is counter to both AFSA's and the CFPB's aim to ensure that American consumers have access to safe credit. The new nonbank registry does not align with these goals. There has been a lack of an adequate cost benefit analysis reflecting a proper consideration of the potential costs to covered entities. Instead, the proposal creates an atmosphere of intimidation and personal liability exposure that provide no consumer protection, reduces quality senior officers and reduces 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