MBA®
MORTGAGE BANKERS ASSOCIATION

March 31, 2023

Comment Intake – Nonbank Registry of Certain Agency and Court Orders
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders [RIN 3170-AB13]

Dear Director Chopra:

The Mortgage Bankers Association[1] (MBA) appreciates the opportunity to comment on the Consumer Financial Protection Bureau's (Bureau or CFPB) proposal requiring covered nonbank financial institutions to register with and report to the Bureau when they become subject to certain public local, state, or federal consumer financial protection agency or court orders. The orders and company information would be published on a publicly available online database. Additionally, the proposed rule would require certain larger nonbank entities subject to the Bureau's supervisory and enforcement authority to designate a senior-level individual to attest to compliance with each order.[2]

The Bureau has a duty to limit regulatory burden and consider costs and benefits. As written, this proposal fails on both accounts. MBA's foremost concern with the proposal is that all the information the Bureau seeks is public, and for mortgage companies many of the orders are captured through the Nationwide Multistate Licensing System (NMLS) Consumer Access. As part of its supervisory authority, the Bureau is required to the fullest extent possible to use reports that have already been provided to federal and state agencies and

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 390,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,100 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.
[2] Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, 88 Fed. Reg. 6088 (Jan. 30, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-01-30/pdf/2022-27385.pdf.

use information that has been reported publicly.[3] Additionally, the Bureau must tailor rules with consideration of the extent of current state supervision.[4]

By severely downplaying the role of NMLS and similar public registries, the Bureau is significantly overestimating the proposal's benefits to consumers. We discuss in further detail below why the Bureau should not proceed with this registry, or at the very least should exempt entities subject to registration requirements on a similar registry (i.e., NMLS Consumer Access). Moreover, requiring an individual to attest to compliance with consent orders will only serve as an unfair public shaming tool, which will discourage competent compliance and risk management professionals from serving in these important roles in the mortgage industry. The requirement is unlikely to improve outcomes for consumers as companies already have procedures set up to intake and escalate complaints due to the CFPB complaint portal. This requirement is also redundant as public consent orders are already signed by a company officer.

The MBA supports the Bureau's efforts to effectively deter unlawful behavior and to identify entities that engage in repeat violations of consumer financial services laws. However, the Bureau should be more focused on helping mortgage lenders lower origination costs by removing – and not proposing – duplicative regulatory requirements that will provide little benefit to consumers.

In order to lower the costs on covered entities and to mitigate the downstream effects of this registry, MBA suggests that the Bureau should:[5]

- exempt covered entities that participate in the Nationwide Mortgage Licensing System;
- eliminate the executive attestation requirement or raise the threshold triggering executive attestation; and
- limit the number of times a single instance of a violation needs to be reported.

I. The Bureau's Proposal Underestimates Costs and Overestimates Benefits.

The Bureau's proposal will increase the amount of time and money covered entities must spend on compliance. The Bureau, however, contends that the cost for covered entities to comply with the proposed rule will be minimal, costing entities roughly $1500 to both register and submit a supervisory report.[6] This calculation severely underestimates the cost of the internal review and due diligence incurred by fulfilling the reporting and attestation

[3] 12 U.S.C. 5514(b)(4) (use of existing reports).
[4] 12 U.S.C. § 5514(b)(2).
[5] Our comments and suggested changes to this proposed rule does not constitute MBA taking the position that such a regulation or other activities would be constitutional in light of the current funding structure of the Bureau. The Bureau should carefully evaluate their authority to issue this or other rules before proceeding further. *See* Cmty. Fin. Servs. Ass'n of Am. Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616 (5th Cir. 2022).
[6] 88 Fed. Reg. 6088, 6131-6132.

requirements. This cost is estimated to have next to no impact on consumers, yet the Bureau follows this statement with the acknowledgement that firms could respond to the costs by increasing prices for consumers. In general, the Bureau's analysis underestimates the costs to covered entities.

The Bureau also overstates the benefits of the proposed rule to consumers. One of the purposes of the proposal is to provide information to the consumer so they can make an informed choice. However, many consumers lack the context to fully understand the complexity of the alleged violations. Without the background necessary to weigh the seriousness of an order, consumers may not understand or may exaggerate the scope of the harm of the underlying violation. Certainly, some orders will be serious and should inform consumer behavior. However, the registry will also include orders with small penalties which do not reflect on a covered entity's internal governance. This registry would provide no benefit to consumers who cannot understand a listed order and would levy additional costs on covered entities who will lose business from consumers who misunderstand the significance of some orders.

The benefits to enforcement agencies are similarly overstated.[7] As the Bureau notes, the orders published under the proposal would already be public.[8] Additionally, the Bureau or the appropriate state regulators already ensure compliance with certain orders through supervisory agreements and in the terms of the orders themselves.[9] All of these sources of information provide agencies with information for enforcement purposes.

Finally, in order to reduce compliance costs and burdens for all reporting entities, there should be a limit on the number of times a single instance of a violation needs to be reported. Otherwise, the registry will be both more burdensome to regulated entities and confusing to consumers. Currently, when more than one agency issues an order under its own authority, even where the orders involve the same set of facts, each order is considered a separate order and would need to be registered.[10] Entities should only need to provide one order per violation to avoid reporting multiple listings for one incident in a multi-state enforcement action. This would not deprive the public or the Bureau of any information, since under the proposed rule registered entities already need to identify the government entity that issued the order.[11]

II. The Bureau's Proposal Duplicates Existing Registries.

The types of orders the Bureau seeks to obtain and publish are almost entirely captured through the Nationwide Multistate Licensing System (NMLS) which is owned and operated by the Conference of State Bank Supervisors (CSBS) and represents the agencies with

---

[7] *Id.* at 6100.
[8] *Id.* at 6100.
[9] *See* TMX Finance LLC, File No. 2023-CFPB-0001 (Consumer Fin. Prot. Bureau, Consent Order, Feb. 23, 2023), Section XVI.
[10] 88 Fed. Reg. 6088, 6113.
[11] *Id.* at 6118 (Proposed Rule § 1092.202(d)(2)(i)).

primary supervisory and licensing responsibility for nonbank mortgage companies. Moreover, the orders are made available to the public in a consumer-facing database. In addition to the NMLS, there are other legal databases and existing registries maintained by individual regulatory agencies that capture most if not all the information the Bureau is attempting to collect. The Bureau specifically acknowledges in its proposal "that much public information about such orders already exists."[12]

The NMLS has been in successful operation for many years and MBA members are accustomed to its licensing and reporting requirements.[13] The NMLS Company Form (NMLS MU1 Form)[14] for example, asks for reporting companies to provide information on criminal, regulatory, and civil judicial actions. Additionally, as the Bureau's proposal notes, state regulators publish enforcement actions to the NMLS.[15] However, the CFPB's issue with NMLS appears to be that, not all the orders[16] (i.e., federal orders) or all relevant industry sectors it seeks to compile are reported.

The MBA supports the Bureau's efforts to effectively deter unlawful behavior and to identify entities that engage in repeat violations of consumer financial services laws. However, it is unclear how the Bureau's attempt to create its own public repository while shifting the reporting burden to nonbank entities will benefit the public given that the information is already accessible to the Bureau, consumer groups, trade associations, firms conducting due diligence, the media, and the wider public. As mentioned above, the Bureau is required to the fullest extent possible to use reports that have already been provided to federal and state agencies and information that has been reported publicly.[17] Rather than requiring

---

[12] *Id.* at 6100.
[13] It is also generally concerning that the Bureau's mention of NMLS Consumer Access is limited, if not absent from its cost-benefit analysis.
[14] NMLS Company Form, Nationwide Multistate Licensing System & Registry, available at https://mortgage.nationwidelicensingsystem.org/licensees/resources/LicenseeResources/NMLS%20Company%20(MU1)%20Form.pdf.
[15] Information About NMLS Consumer Access, Nationwide Multistate Licensing System & Registry (Jan. 26, 2015) available at https://mortgage.nationwidelicensingsystem.org/slr/common/policy/Documents/InformationAboutNMLSConsumerAccess.pdf (State regulators may post regulatory action information to company and individual records in NMLS. State regulatory actions are administrative, or enforcement actions taken by a state agency in connection with a person or entity that is engaging in a business activity that is regulated by the agency. This information is viewable in NMLS Consumer Access for the public. While some state agencies may add actions taken in previous years against a licensee, the majority are adding only new actions from 2012 or later. To view complete information regarding regulatory actions posted by the state agency, visit the state's website.).
[16] The Bureau's weak rationale is that "while the orders published are already public, they may not all be readily accessible in a comprehensive and collected manner, and *some* of the additional information submitted to the registry may not be readily available to the public."
[17] 12 U.S.C. 5514(b)(4) (use of existing reports). The Bureau also cites CFPA sections 1022(b) and (c) as authority for the proposal. CFPA section 1022(c) provides for monitoring, and CFPA section 1022(c)(4)(B) regarding the methodology used by the CFPB to gather information, provides for the review of preexisting databases. CFPA section 1022(c)(3) does allow the Bureau to release a report and the report must be one of "significant findings." However, no part of the proposal provides any concrete or supportive evidence of a significant finding that justifies creating this database. While the Bureau may collect

covered entities to disclose the same information multiple times, we believe the Bureau should utilize and improve existing platforms by communicating and collaborating with other parties operating similar registries, particularly the NMLS, to reduce duplication of efforts.

The Bureau should work with CSBS and the appropriate regulators to identify any existing gaps and deficiencies with the scope of orders submitted in NMLS and avoid spending significant time, money, and personnel to create an entirely new reporting system with marginal new benefits. To reduce any redundancies and duplications, the Bureau should exempt all covered entities that participate in the NMLS and any other similarly robust registries. At a minimum, the Bureau should exempt the orders that are captured in NMLS or a similar registry.

In sum, the Bureau suggesting that its public registry would be a "better" more comprehensive way to display or make available the information will still burden entities, many of which are struggling with resource constraints given the current market, with no clear benefit to consumers. We therefore urge the Bureau to exempt entities that are covered under existing registries such as the NMLS.

III. The Bureau Should Reevaluate the Attestation Requirement.

The Bureau's proposal would require certain supervised nonbanks to submit annual written statements regarding compliance with each underlying order, signed by an attesting executive. The Bureau's attestation requirement should be eliminated. At the very least, the Bureau should not publicize the name and title of the executive, reconsider the supervised large nonbank threshold amount of $1 million in annual receipts, and provide more clarity on the steps and procedures the attesting executive must undertake.

First, the Bureau should eliminate the attesting individual's name and title on the public registry. As stated throughout the proposal, the information the Bureau seeks to collect already exists and most consent orders require signature from the subject company. The Bureau contends that the attestation requirement would help ensure the company providing the statement is a legitimate entity and that publicizing the identity of the attesting executive provides an enhanced incentive for supervised nonbanks to perform their obligations to consumers.[18] Since this information is already public in some other form, it is difficult to see how this requirement creates an "enhanced incentive" other than creating negative reputational costs. There are also other avenues to determine whether the company is a "legitimate company" and one that does not include listing a senior executive's name and credentials. Moreover, the Bureau's reasoning also makes very little sense and is difficult to understand – why would or what is the incentive for an illegitimate entity to post on the Bureau's public registry?

---

information from covered entities, subject to the limits enumerated above, the creation of a database by the CFPB is arguably not contemplated in the statute.

[18] 88 Fed. Reg. 6088, 6091.

The other purpose of this requirement, as the Bureau states, is to give the information of an executive to which consumers can direct their complaints.[19] However, covered entities already have procedures for the intake and escalation of consumers complaints in response to the Bureau's existing complaints database without the need to create a false perception that reaching out to a particular executive would be more effective. Other than publicly shaming an entity and individual and pinpointing that individual for a disgruntled consumer to go after, it is difficult to understand the purported benefits of this requirement. In fact, the shaming aspect could discourage competent compliance and risk management professionals from serving in these important roles in the mortgage industry.

Second, the Bureau needs to reconsider the threshold amount. The proposal consistently references the attestation requirement as only applying to large, supervised nonbanks. However, the $1 million in gross receipts exemption threshold is essentially meaningless. Nearly all nonbanks, and most MBA members, will be subject to this requirement. In fact, this artificially low threshold appears contrary to section 1024(b)(2) of the Dodd-Frank Act which requires the Bureau to tailor supervision of nonbanks by asset size, volume, risks to consumers, and degree of state oversight. Again, if the Bureau does not eliminate the attestation requirement, we suggest the threshold that is currently set be significantly increased to a more acceptable level and one that truly exempts the smaller entities.

Third, the responsibilities of the attesting individual meant to ensure compliance under the proposed rule are unclear. While this might be revelatory of the Bureau's own recognition of the limited benefits outside of public exposure to this requirement in light of all the other supervisory and legal requirements, it will create confusion for the prospective registrants. Specifically, the Bureau states "the proposed rule would not establish any minimum procedures or otherwise specify the steps the attesting executive must take to review and oversee the supervised registered entity's activities."[20] This lack of clarity could make it difficult to hire the right people to oversee compliance with the rule and is generally concerning.

Finally, as many of our members report, the Bureau's proposal completely fails to consider that this may discourage some covered entities, particularly smaller nonbanks, from retaining compliance professionals who must assist in the process. Furthermore, the availability of the individuals' information may give rise to unrelated frivolous litigation and "fishing expeditions" by plaintiffs' counsel. The cost of insurance will undoubtedly increase as a result of the new exposure and litigation.

In sum, we believe the requirement is unnecessary, onerous, vague, and adds little to no value to the Bureau fulfilling its objectives. We urge the Bureau to eliminate the attestation requirement. At a minimum, the Bureau should eliminate the publication requirement, reconsider the large supervised nonbank threshold, and clarify the attestation requirements.

---

[19] *Id.* at 6102.
[20] *Id.* at 6100.

IV. The Bureau's Proposal Will Impact How Covered Entities Settle Lawsuits.

The Bureau's proposal may have an impact on a company's decision to settle lawsuits quickly because of the increased publicity and the costs of submitting, monitoring, and updating the information the Bureau requests. Where covered entities would otherwise settle, the effects of registering an order may push covered entities to litigate enforcement or civil actions.

Companies often settle as a business decision not to incur the cost, delay and/or uncertainty of a defense. Companies often will settle with regulators without admission of liability in order to avoid conflict with their respective regulators, which may expedite consumer relief. Companies may similarly settle with consumers even when they might not have a solid case for liability, because it is often less expensive to provide redress than it is to dispute the underlying claim—particularly for technical violations. However, this registry will likely change that calculus. Instead of deciding to settle a lawsuit to expedite resolution, covered entities may opt in favor of litigating an issue for fear of having to participate in the registry. As discussed above, the average consumer may not understand the significance of settling for a minor penalty. Given this, covered entities will want to avoid having to list any orders in the registry even if the order concerns a minor infraction.

V. Conclusion

For the reasons stated above, the Bureau should withdraw this proposal with respect to those already subject to the NMLS Consumer Access and similar registries. Doing so is consistent with both the Bureau's statutory obligations and proper analysis of the costs and benefits of this proposal.

Thank you in advance for your consideration of these comments. Should you have questions or discuss further, please contact me at (202) 557-2878 and pmills@mba.org or my colleagues Justin Wiseman at (202) 557-2854 and jwiseman@mba.org or Alisha Sears, at (202) 557-2930 and asears@mba.org.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association