



MORTGAGE BANKERS ASSOCIATION

CFPB Proposes Registry of Certain Nonbank Entities to Better Detect “Repeat Offenders”

December 14, 2022

Overview

On Monday, December 12, the Consumer Financial Protection Bureau (CFPB or Bureau) issued a proposed rule to require certain nonbank financial institutions to register with and report to the CFPB when they become subject to certain local, state, or federal consumer financial protection agency or court orders. These 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.

The proposal is available [here](#) and additional details of the proposal are provided below. The comment period will be open for 60 days following publication in the Federal Register. The proposed registry likely would not be launched until 2024, so while subjected entities will not be impacted in the immediate term, if the proposal is finalized and a final rule is issued, this will certainly impact many nonbank entities (many MBA members) in the near to medium term.

Why is the CFPB Issuing This Proposal?

The Bureau is issuing this proposal pursuant to its authority under the Consumer Financial Protection Act of 2010 (CFPA)¹. CFPA section 1022(b)(1) authorizes the Bureau to prescribe rules “as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”

The Bureau has said (in explaining why it is issuing this proposal) “because the issuance of agency and court orders serves as one of the most important tools to pursue lawbreakers in these markets, it is important that the CFPB maintain a central repository of nonbanks subject to agency and court orders. The repository will allow the CFPB to track and mitigate the risks posed by repeat offenders, while also being able to monitor all lawbreakers subject to agency and court orders.” Additionally, the Bureau states that it has uncovered companies that failed to comply with consent orders that the companies entered into with the Bureau voluntarily. This is part of the Bureau’s attempt to crack down on “repeat offenders” as it has indicated that it is considering launching a new unit in the agency’s supervision and enforcement to deal with repeat offenders.

More details on why the Bureau is issuing this proposed rule can be found starting on page 22 of the proposal.

¹ Sections 1022(b), 1022(c)(1)-(4) and (7), and 1024(b). The legal authority is discussed in depth on pages 14-22 of the proposal.

Summary of the Proposed Rule

At a high-level there are three major parts of the proposal:

➤ Collection and Submission of Certain Agency and Court Orders (the “Registration Provision”)

The Bureau is proposing to establish and maintain a registry where nonbanks would have to report final agency and covered court orders² and judgments, including consent and stipulated orders, brought under federal consumer financial protection laws or state laws regarding unfair, deceptive, or abusive acts or practices.³ Covered nonbanks would have submit copies of this information within the later of 90 days after the applicable nonbank registration system implementation date or 90 days after the effective date of any applicable covered order. This will mean that reporting entities will have to be vigilant and have an infrastructure in place to keep track of the reportable information and initially board their information.

➤ Senior Executive Attestation Requirement (the “Supervisory Reports Provision”)

The Bureau is proposing to require certain nonbanks⁴ subject to the Bureau’s supervisory and examination authority under section 1024(a) of the CFPA annually to identify a senior executive officer (or, if no such officer exists, the highest-ranking individual at the entity charged with managerial or oversight responsibilities) who is responsible for and knowledgeable of the firm’s efforts to comply with the orders identified in the registry. The name and title of the executive would also be published in the registry. The supervised nonbank entity would also be required to submit on an annual basis a written statement signed by that executive regarding the entity’s compliance with each order in the registry. The statement is not proposed to be submitted under penalty of perjury, but the Bureau notes that knowing and willful false submissions may bring criminal liability. Required entities would need to maintain records related to the written statement for five years.

➤ Public Release of Collected Information (the “Publication Provision”)

² “Covered order” means a final, public order issued by an agency or court, whether or not issued upon consent, that: (1) Identifies a covered nonbank by name as a party subject to the order; (2) Was issued at least in part in any action or proceeding brought by any Federal agency, State agency, or local agency; (3) Contains public provisions that impose obligations on the covered nonbank to take certain actions or to refrain from taking certain actions; (4) Imposes such obligations on the covered nonbank based on an alleged violation of a covered law; and (5) Has an effective date on or later than January 1, 2017.

³ “Covered law” means a law listed in paragraphs (1) through (6), to the extent that the violation of law found or alleged arises out of conduct in connection with the offering or provision of a consumer financial product or service: (1) A Federal consumer financial law; (2) Any other law as to which the Bureau may exercise enforcement authority; (3) The prohibition on unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, or any rule or order issued for the purpose of implementing that prohibition; (4) A State law prohibiting unfair, deceptive, or abusive acts or practices that is identified in appendix A of this part; (5) A State law amending or otherwise succeeding a law identified in appendix A, to the extent that such law is materially similar to its predecessor; or (6) A rule or order issued by a State agency for the purpose of implementing a prohibition on unfair, deceptive, or abusive acts or practices contained in a State law described in paragraph (4) or (5).

⁴ The “Supervisory Reports Provision” would affect such covered persons that (1) are subject to supervision and examination by the Bureau pursuant to CFPA section 1024(a), (2) have had covered orders issued against them, and (3) are at or above the \$1 million annual receipt threshold, unless such covered persons are subject to certain exclusions.

The Bureau is proposing to publish the registry online for use by the public and other regulators. Subjected entities would be required to register in a system established by the Bureau, provide basic identifying information about the company and the order (including a copy of the order), and periodically update the registry to ensure its continued accuracy and completeness. The Bureau would then publish this information on its website and potentially in other forms.

The proposal does briefly acknowledge the implications of this extensive centralized repository when it is made public. Specifically, the Bureau in its proposal states “because covered nonbanks would provide this information only if they are subject to covered orders, consumers might interpret the presence of a covered nonbank on the Bureau’s website as negative information about that covered nonbank. Therefore, this proposed provision may have negative reputational costs for the covered nonbank whose information is published on the Bureau website.”⁵

Finally, what is particularly noteworthy about the proposal is that insured depository institutions and credit unions are excluded. The CFPB reasons that in the case of insured banks and credit unions, their identity and size are known to the agency, they are covered by only four regulators and these regulators regularly publish their consumer financial protection orders. In its press release, the CFPB said, “in contrast, comprehensive, readily accessible information is lacking about the identity of orders issued against nonbanks subject either to the CFPB’s market monitoring authority or to its supervisory authority across the various markets for consumer financial protection products and services.”

How Does this Proposal Potentially Impact Mortgage Companies?

Section 1024(b) of the CFPA authorizes the Bureau to exercise supervisory authority over certain nonbank covered persons. The “nonbank covered persons” over which the Bureau has supervisory authority are listed in section 1024(a)(1) of the CFPA.

They include covered persons that: offer or provide origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans; are larger participants of a market for consumer financial products or services, as defined by Bureau rule; the Bureau has reasonable cause to determine, by order, that the covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services; offer or provide private education loans; or offer or provide payday loans.

This means that many MBA members will be required to register and submit the requested information to the Bureau if they are subject to any relevant consent orders.

Questions?

We are reviewing the scope of the information to be collected, the Bureau’s cited legal authority, the attestation requirements, compliance burdens, and the overall impact of the proposal on our members. We will continue to evaluate the proposal as we develop comments. If you have any questions or thoughts on the proposal, please contact Justin Wiseman at JWiseman@mba.org or Alisha Sears at Ascars@mba.org.

⁵ See proposal page 168.