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Rulemaking Petitions Docket
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 (Docket No. CFPB-2022-0080).

Dear Director Chopra:

On behalf of the Association of Credit and Collection Professionals ("ACA International" or "Association"), I am writing in response to the Consumer Financial Protection Bureau's (the "Bureau" or "CFPB") Notice of Proposed Rulemaking ("NPRM") to require certain nonbank covered person entities that are under certain final public orders obtained or issued by a federal, state, or local agency in connection with the offering or provision of a consumer financial product or service to report the existence of such orders to a Bureau registry.[1]

ACA International represents approximately 1,800 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 125,000 people worldwide. Most ACA International member debt collection companies, however, are small businesses. Women make up 70% of the total diverse debt collection workforce.

I. Background about ACA International:

ACA International members play a critical role in protecting both consumers while providing liquidity to lenders. Association members work with consumers to resolve their debts, which in turn saves every American household, on average, more than $700, year after year. [2] The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. For example, in 2018 the ARM industry

[1] 12 CFR Part 1092 (the "Proposed Rule").
[2] 2020 State of The Industry Report, available at https://www.acainternational.org/kaulkin-ginsberg/ (2020).

returned over $90 billion to creditors for goods and services they had provided to their customers. And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA International members follow comprehensive compliance policies and have high ethical standards to ensure consumers are treated fairly. The Association contributes to this goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA International members are committed to assisting consumers as they work to resolve their financial obligations, all in accord with the Collector's Pledge that all consumers be treated with dignity and respect.

II. The CFPB Seeks to Use the Proposed Registry to Circumvent Existing Limitations On Its Statutory Authority:

In April 2022, the CFPB announced its intent to invoke its "dormant authority" under Section 1024 of the Dodd-Frank Act to expand its supervisory authority to include nonbank "fintechs," which are outside the express scope of the Dodd-Frank Act.[3] This dormant authority was initially implemented in a 2013 rule;[4] however, the April 2022 announcement was the first time the CFPB invoked that authority to expand its supervisory authority beyond the express parameters set forth under the Dodd-Frank Act.[5] The CFPB's rule does not prescribe the standard for when it has "reasonable cause," other than, of note, that it may base determination for cause on complaints it collects , or on information from other sources, such as judicial opinions and administrative decisions.[6]

Considering the CFPB's novel invocation of such dormant authority, despite the limited statutory basis it has for doing so, it appears that the Bureau has issued the "proposed rule" in order to obtain the information it needs to satisfy the "reasonable cause" standard set forth in Section 1024 of the Dodd-Frank Act. The fact that the "proposed rule" is looking for the very pieces of information the CFPB previously stated is necessary to have reasonable cause is, at best, suspicious. Accordingly, ACA International is concerned that the CFPB does not have legitimate statutory authority to require such a registry as set forth in the "proposed rule," and that it is instead relying on an overly broad provision in the Dodd-Frank Act that has only been invoked once in the Bureau's history to collect information from market participants for the express purpose of using it to expand its supervisory authority over such participants. This is a form of circular reasoning that is seemingly in contravention of the legislative intent behind enactment of the Dodd-Frank Act, and which represents a highly questionable expansion of the Bureau's authority.

III. Efforts to Publicly Shame Executives are Misguided and Implicate Significant Due Process and Free Speech Concerns:

The proposed rule's requirement for nonbank entities subject to the Bureau's supervision and examination authority to register with a CFPB-run registry and annually submit a written statement signed by a specifically designated attesting executive with respect to each applicable covered order

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[3] https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/
[4] 12 CFR Part 1091.
[5] *See id.*
[6] https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/

raises significant concerns from multiple perspectives, including, most notably (i) individual liability and free speech; (ii) due process; and (iii) inconsistent regulatory frameworks to which such covered entities are subject.

Individual Liability and Free Speech Concerns:

The proposed rule would require each attesting executive to (i) generally describe the steps that the executive has undertaken to review and oversee the entities' activities and (ii) attest whether, to the executive's knowledge, the applicable entity during the preceding year has identified any violations or other instances of noncompliance with any of the obligations that were imposed in a public provision of the covered order by the applicable agency or court based on a violation of an applicable law.[7] Further, each covered entity subject to the proposed rule must designate its highest-ranking duly appointed senior executive officer (or, if the entity does not have any duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the entity) whose assigned duties include ensuring the entity's compliance with federal consumer financial law, knowledge of the entity's systems and procedures for achieving compliance with the covered order, and control over the entity's efforts to comply with the covered order as its attesting executive.[8]

The CFPB would publish the name and title of each designated attesting executive in the proposed public registry. These requirements raise significant concerns related to free speech and individual liability.

Forcing an executive to sign the attestation places significant risk of personal liability for actions on individual persons, rather than the business as a whole. Further, the requirement that the designated attesting executive be the highest-ranking duly appointed senior executive officer (or, if the entity does not have any duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the entity) with specified responsibilities does not reflect real-world situations. Often, top executives within a corporate structure are not involved in the day-to-day ordinary course of business. Companies often have reporting chains to appropriately manage compliance that vary by organization. The CFPB's one-size-fits-all approach focused only on top executives does not align with how all companies manage risk and ensure compliance.

By imposing an attestation requirement and eliminating each covered entity's independence to designate the individual that would have the appropriate level of knowledge with respect to the entity's operations, the CFPB is not only (i) imposing significant levels of personal liability (which goes against the central tenet of corporate law that has prioritized the notion of the "corporate veil" for decades), but also (ii) forcing each designated attesting executive to sign a written document, in their individual capacity (without the protections they may be typically afforded under corporate law), which raises significant First Amendment and free speech concerns related to compelled speech. The attestation requirement, combined with removing a covered entity's autonomy to designate an applicable attesting executive, will undoubtedly invite litigation, particularly with respect to compelled speech. Accordingly, we urge the CFPB to reconsider this proposal that infringes on covered entities' day-to-day activities and their ordinary course of business. And, we ask that the CFPB remove the executive attestation, particularly its threat to use this in the enforcement context.

Due Process Concerns

[7] Proposed Rule at 6098.
[8] *Id*.

Further, the proposed rule implicates several due process concerns. The proposed rule seeks to publish the information collected, as well as the name and title of the attesting executives submitted by the supervised registered entity.[9] The proposed rule sets forth several reasons for publication of the collected information, and in particular, the name and title of the attesting executives—mainly that publication thereof will result in additional public transparency and pressure on such attesting executives to ensure compliance with the terms of the proposed rule.[10] However, such reasons ignore the CFPB's track record of publicly scrutinizing executives and other high-ranking corporate officials who have been charged with violations of consumer financial protection laws or other securities violations, but are ultimately acquitted in a court of competent jurisdiction.

For example, in *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co. (2018)*, Weltman, Weinberg & Reis Co., LPA ("Weltman"), a national creditors' rights and debt collection law firm, was sued by the CFPB for violations of the Consumer Financial Protection Act and the Fair Debt Collection Practices Act ("FDCPA").[11] The CFPB undertook a two-and-a-half-year investigation, which resulted in public scrutiny of the firm and its officials. Ultimately, despite the CFPB's public scrutiny and years long investigation, the U.S. District Court for the Northern District of Ohio ruled in favor of Weltman with a complete defense verdict.[12] This is a clear example of an increasingly troubling trend where it the CFPB rushes to judgment to publicly shame entities under its jurisdiction in the court of public opinion without awaiting full adjudication by a judicial court or jury, as applicable.

The foundation of any judicial proceeding or undertaking, be it a regulatory enforcement action or criminal litigation, is that each defendant is entitled to due process and the presumption of innocence until proven guilty. By publishing the name and title of each attesting executive of a covered entity and the collected information for covered orders that may not be fully adjudicated or may be subject to additional litigation, the proposed rule serves as a continuation of the CFPB's infringement on the basic doctrine of due process afforded to each individual in this country by virtue of the U.S. Constitution. We urge the CFPB to curtail the proposed rule's significant infringement on due process, and consider appropriate guardrails that will protect any individual or entity that may be subject to the proposed rule's purview.

Further, the proposed rule notes, "publication of the designation will identify for other regulators (and the general public) the person at the supervised registered entity who is ultimately responsible for compliance with the covered order as well as more general efforts to comply with federal consumer financial law" and "just as the possibility of Bureau scrutiny of the attesting executive's conduct is likely to motivate the executive to devote greater attention to compliance efforts, the additional scrutiny from others outside the Bureau will further promote compliance." [13] The underlying point of each of these statements is that the CFPB expressly expects that the establishment of a registry, including name and title of attesting executive(s), will enable other government agencies as well as private individuals, to engage in additional enforcement and litigation efforts against covered individuals and entities. In fact, the proposed rule expressly notes, "Other regulators, especially those that have issued covered

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[9] *Id.*
[10] *Id.* at 6100.
[11] *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co.*, L.P.A., Case No. 1:17 CV 817 (N.D. Ohio)
[12] *Id.*
[13] Proposed Rule at 6101-6102.

orders regarding the supervised entity, would likely benefit from understanding which executive(s) have been tasked with ensuring compliance with their orders."[14]

Despite the CFPB's explanation of the desired impacts of the publication requirements set forth in the proposed rule, the primary impact of such publication will be rewarding the trial bar by incentivizing further litigation that will have an incalculable cost from a financial and administrative perspective on covered entities. Enabling further enforcement actions and private litigation will only increase the significant administrative, compliance, and financial costs for covered entities. These additional costs will only serve to reduce the amount of economic output and investment that covered entities can devote to the ordinary course of business and their day-to-day activities. Ultimately, the proposed rule has the strong potential of significantly entangling several covered entities in a web of constant litigation and enforcement actions that may or may not be justified, as has been demonstrated with the CFPB's checkered history of undertaking litigation and enforcement efforts that are defeated in court.

Furthermore, the proposed coverage of a 10-year period is excessive. This essentially punishes business far past the timeframe where they may have fully corrected any compliance deficiencies. It will also almost certainly discourage self-reporting because once a company is "named and shamed" by the CFPB, it will be for an extremely extended period of time. ACA International suggests that the CFPB modify the proposed coverage to a reasonable period of time, such as two years, which would allow the company the time to identify compliance deficiencies and incentive to swiftly mitigate the issues to avoid any additional harm to their business.

In addition, the spirit of the NPRM conflicts with other actions of the CFPB. For example, the FDCPA and implementing regulations ("Regulation F") contain provisions that go above and beyond typical guardrails for protecting individual privacy. These limitations ensure that facts regarding a consumer's finances and debts owed to a creditor are not distributed in a public setting, including to third-parties that could negatively impact a consumer should they find out about this information (e.g., an employer learning of an employee's pending debts owed to a creditor, etc.). However, the CFPB is now supporting wide public disclosure of the collected information. While this might not directly conflict with the FDCPA, it could prompt additional interest in public information in court records and other materials that might embarrass consumers.

ACA International is additionally concerned that the NPRM includes no differentiation for various degrees of public orders. For example, a company could have made a minor oversight of a licensing requirement that would require the same level of attention as a more malicious violation of a consumer financial law. Putting these activities and compliance oversight conducted in the normal course of business in the same bucket will confuse and mislead the public about a company's efforts to comply with laws and regulations.

IV. The NPRM Impacts a Substantial Number of Small Entities; Therefore, the CFPB Must Undertake the Statutorily-Required SBREFA Review Process:

The Regulatory Flexibility Act ("RFA") provides that "[w]henever an agency is required . . . to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis."[15] Further, the statute notes,

[14] *See Id*. at 6102.
[15] *See* 5 U.S.C. §603(a).

"such analysis shall describe the impact of the proposed rule on small entities."[16] Through this provision of the RFA, Congress purposefully created the mechanism for an agency to conduct the required cost/benefit analysis, as well as other checks, precisely to ensure what an agency is doing is not in fact harming the broader public, small businesses, and the economy. Creating regulations without going through the required notice-and-comment process is not only legally impermissible, it is also bad policy. Uninformed policymaking undertaken in a bubble in Washington, D.C., will lead to bad outcomes for all stakeholders, including consumers and regulated entities.

Instead of initiating the Small Business Regulatory Enforcement Fairness Act ("SBREFA") review process and hearing feedback from small entity representatives ("SERs") as required under the Dodd-Frank Act, the CFPB has issued the proposed rule and sought comment from the public. If the CFPB attempts to move forward in a rulemaking in this area, it must initiate its efforts through the SBREFA process.[17] The majority of ACA International members are small businesses and would be impacted by the proposed rule. In fact, it would not be surprising if certain small business members are unaware of the large impact the proposed rule would have on them once implemented.

Congress created extra protections for small businesses through the SBREFA panel process because they may not have the time and resources to be engaged in a rulemaking process without that extra support.

The proposed rule acknowledges the foregoing by noting, "The Bureau further considered using its supervisory and examination authority to obtain information solely from entities that are subject to that authority. While the Bureau believes that approach would certainly provide the Bureau with invaluable information, it preliminarily concludes that collecting information from a wider range of covered persons is appropriate to achieve its market monitoring objectives."[18]

Particularly, more recently, we have seen the CFPB fail to engage in the SBREFA process or approach it as a check-the-box exercise. We once again urge the CFPB to consider the value and importance of the SBREFA process in ensuring that small businesses in our membership can provide their input and, more importantly, that such input will be considered during the CFPB's internal rule formulation process. In fact, Congress recently reminded the Bureau that it must follow established requirements when considering issuing rules impacting small businesses.[19] If an agency fails to engage in this required regulatory flexibility analysis, direct harm to small businesses follows.[20]

During congressional testimony and public appearances, Director Chopra and senior CFPB leadership have often cited the importance of working with small businesses, community financial service providers, and other similarly situated entities. The proposed rule once again demonstrates a discrepancy between rhetoric of the CFPB's leadership and the actions taken by the agency. The ultimate impact of the CFPB's failure to comply with its statutory obligations with respect to the SBREFA process is that the CFPB itself will have a limited understanding of the full impact of the proposed rule on small businesses within our membership. Without comprehensive feedback, there is significant risk that the proposed rule will have far-reaching impacts that the CFPB

[16] *Id.*
[17] *See* 5 U.S.C § 609.
[18] *See* 12 CFR 1092 at 6096.
[19] *See* Letter from Blaine Luetkemeyer, House Committee on Small Business Ranking Member, and Roger Williams, House Committee on Small Business Vice Ranking Member, to the Hon. Rohit Chopra, Consumer Financial Protection Bureau Director (Oct. 24, 2022) http://bit.ly/3fRUVek.
[20] *See* 5 U.S.C. § 604(a)(2)–(6).

has not considered or been made aware of.

V. The CFPB Has Overextended Its Authority By Encompassing Orders Issued Under State Laws, Particularly When Federal Law Preempts State or Local Laws:

The proposed rule requires registration by covered entities in connection with orders issued under state laws prohibiting unfair, deceptive, or abusive acts or practices ("UDAAP"), 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.[21] In providing a rationale for including this information under the scope of the proposed rule, the CFPB cites the notion that state UDAAP laws are generally modeled after or otherwise prohibit conduct similar to that prohibited by certain federal laws, such as Section 5 of the Federal Trade Commission Act or Sections 1031 and 1036(a)(1)(B) of the Consumer Financial Protection Act under Dodd-Frank. Therefore, the CFPB asserts that violations of state UDAAP laws in connection with the provision or offering of a consumer financial product or service are highly probative of a heightened risk that UDAAP violations subject to the Bureau's jurisdiction and may be indicative of the existence of violations of other laws within the Bureau's jurisdiction.[22]

The CFPB's assertions in this regard are highly speculative, and once again, reflect the CFPB's misguided tendency to apply a one-size-fits-all approach to a set of issues that require additional nuance. For example, in linking potential violations under state law as probative of violations under similar federal law,[23] the CFPB is essentially giving itself de facto enforcement authority over state and local law, even when federal law would expressly preempt the state law. This is just one example of a nuance that the CFPB has not considered in issuing the proposed rule. Before expanding its jurisdiction to cover violations of state and local law, we urge the Bureau to consider additional nuances, such as those issues subject to federal preemption, that must be addressed prior to finalization of the proposed rule.

Further, the CFPB's overreach to require a registry of entities subject to orders issued under violations of state law strongly disincentivizes such entities from settling or entering into consent orders or decrees with state and/or local agencies under state law. For example, prior to issuance and future potential finalization of the proposed rule, there was a reasonable likelihood that an entity found to have violated state UDAAP laws would likely settle or enter into a consent decree with the applicable state or locality. However, we respectfully ask the CFPB to consider the impacts of the proposed rule on the mindset of such an entity. Such an entity would be much less willing to enter into a settlement or consent decree with a state or local agency if entering into such agreement means being subject to a covered order that would result in (i) entering into the terms of the settlement; (ii) paying a potential fine; *and* (iii) annual reporting obligations to the CFPB as part of the registry contemplated under the proposed rule; (iv) the threat of additional enforcement actions by the CFPB or another federal regulator following such entity's placement on the registry; (v) additional risk of regular examinations by the CFPB or other federal regulator; and (vi) significant risk of private litigation by plaintiff's attorneys and other trial lawyers who have access to the registry.

The undoubtable conclusion of this scenario is that very few, if any, covered entities would be willing to negotiate with and enter into settlements with state or local agencies if they were also subject to the

[21] Proposed Rule at 6098.
[22] *See Id.*
[23] *Id.* at 6098; *See* FN 97.

terms of the proposed rule. Accordingly, the proposed rule will be deeply determinantal to enforcement efforts by state or local agencies, and will simply usurp the authority of state and local agencies as the true purveyors of enforcing state and local law respectively.

IV. The CFPB Should Not be Engaging in Any Rulemaking Until the U.S. Supreme Court Has Ruled on Questions Regarding its Constitutional Structure:

As the CFPB is aware, on February 27, 2023, the Supreme Court of the United States (the "Supreme Court") announced that it granted certiorari to review the Fifth Circuit's decision in *Community Financial Services Association of America Ltd.* v. *CFPB*, which held that the CFPB's independent funding mechanism is unconstitutional under the appropriations clause set forth in Article I, Section 9 of the Constitution.[24] The *CFSA* court held that the CFPB's "double-insulated" funding violates the U.S. Constitution's Appropriations Clause, as well as the separation of powers principles on which it is based. Earlier this month, the CFPB filed its petition for certiorari with the Supreme Court to review this ruling since the *CFSA* decision held that "without its unconstitutional funding, the Bureau lacked any other means to promulgate the [payday] rule."[25] The CFPB in its brief acknowledged that the ambiguity "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector."

Further, the *CFSA* court also held that the plaintiffs, "were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking," entitling them to "a rewinding of [the Bureau's] action." Given the holdings in *CFSA* that directly and constitutionally undercut the legitimacy of the CFPB, all of which will be decided by the Supreme Court in the near-term, it is imprudent for the CFPB to not engage in further rulemaking until the *CFSA* case is resolved. If the CFPB were to move forward with rulemaking during this time of great uncertainty, significant judicial, consumer, and financial service market participant resources will be wasted, which is not beneficial to anyone. The CFPB in its petition in the *CFSA* case alludes to the lack of clarity surrounding its authority for rulemaking acknowledging, "the gravity of those consequences and the uncertainty that the court of appeals' decision has already created." We urge the CFPB to follow the warnings it itself described in its petition for *certiorari* by pausing the issuance and finalization of the proposed rule and any further rulemaking until the Supreme Court has ruled on the agency's constitutionality.

V. Conclusion

As outlined in detail in our comments, it is clear this NPRM appears to be a way for the CFPB to manufacture cause to investigate nonbanks or bring enforcement actions against nonbanks. The executive attestation appears to be an excuse to attempt to trap and embarrass companies and executives. It is unfortunate that the CFPB is taking such an extreme approach to regulation, which will without a doubt stymie innovation and stop businesses from coming forward to seek counsel and solutions from the CFPB for compliance complexities. The CFPB should be working with companies with shared goals to try to provide the best outcomes for consumers, not treating them as adversities that are guilty until proven innocent.

Thank you for your attention and due consideration. Please let me know if you have any questions.

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[24] *See* Community Financial Services Association of America Ltd. v. CFPB, 5th Cir., No. 21-50826, Opinion (Oc. 19, 2022)

[25] *See* Reply Brief for the Petitioners, Community Financial Services Association of America Ltd. v. CFPB, No. 22-448 (Feb. 2023)

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On behalf of ACA International