



March 28, 2023

The Honorable Rohit Chopra
Director
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:

This letter is in reference to the Consumer Financial Protection Bureau's (CFPB) notice of proposed rulemaking (NPRM) on the *Registry of Nonbank Covered Persons Subject to Certain and Court Orders*.¹ Advocacy is concerned about the economic impact of the NPRM on small entities and encourages the CFPB to consider less burdensome alternatives.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration, so the views expressed by Advocacy do not necessarily reflect the views of the Small Business Administration or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act,³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁵

¹ 88 FR 6088, January 30, 2023.

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”⁶

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. The Office of Advocacy held a roundtable with small entities on February 6, 2023, to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy also held a conference call on this issue on March 17, 2023. Advocacy’s comments reflect the feedback that it received from the organizations about the potential impact of the proposal on their small members.

The Proposed Rule

On January 30, 2023, the CFPB published a notice of proposed rulemaking in the Federal Register on the Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders. The proposed rule has three provisions. The first proposed provision would require nonbank covered persons that are subject to agency and court orders to register with and submit copies of the orders to the CFPB (the registration provision). The registration provision includes consent and stipulated orders and judgments. The second proposed provision would require nonbank covered persons to prepare and submit an annual written statement, signed by a designated individual, regarding compliance with each covered public order (the supervisory reports provision). The third proposed provision describes the registration information the CFPB would make publicly available (the publication provision).⁷

The registration and publication provisions would affect such covered persons (as that term is defined in 12 U.S.C. 5481(6)) that are not insured depository institutions, insured credit unions, or related persons (as that term is defined in 12 U.S.C. 5481(25)), and have had covered orders issued against them, unless such covered persons are subject to certain exclusions.⁸

The supervisory reports provision would affect such covered persons that are subject to supervision and examination by the CFPB pursuant to the Consumer Financial Protection Act (CFPA) section 1024(a),²³² have had covered orders issued against them, and are at or above a \$1 million annual receipt threshold, unless such covered persons are subject to certain exclusions.

The Impact on Small Entities May Be Much Greater Than CFPB Describes

Pursuant to Section 605 of the RFA, the CFPB certified that the rule will not have a significant economic impact on a substantial number of small entities. Such a certification must be supported by a factual basis.⁹

⁶ Id.

⁷ 88 FR at 6134.

⁸ 88 FR at 6132-6133.

⁹ 5 USC 605(b).

In the certification, the CFPB states that, with certain exceptions, the proposed rule would apply to covered persons as defined in the CFPA, including persons that engage in offering or providing a consumer service. The products and services would generally include products that are offered or provided for use by consumers primarily for personal, family, or household purposes. Such services include:

- Extending credit and servicing loans.
- Extending or brokering certain leases of personal or real property.
- Providing real estate settlement services.
- Engaging in deposit-taking activities, transmitting, or exchanging funds, or otherwise acting as a custodian of funds.
- Selling, providing, or issuing stored value or payment instruments.
- Providing check cashing, check collection, or check guaranty services.
- Providing payments or other financial data processing products or services to a consumer by any technological means.
- Providing financial advisory services.
- Collecting, analyzing, maintaining, or providing consumer report information or certain other account information.
- Collecting debt related to any consumer financial product or service.¹⁰

The CFPB estimates that there are roughly 155,043 covered nonbanks. It further estimates that perhaps one percent and at most five percent of covered nonbanks are subject to covered orders and concludes that the proposed rule will impact between 1,550 and 7,752 covered nonbanks.¹¹ However, the information is not included in the certification because that estimate is for all nonbanks, not small nonbanks. In fact, the CFPB states that it does not have reliable data on the number of small firms that are subject to covered orders. As a result, the CFPB asserts that it cannot reliably estimate the number of small entities that would be impacted by the proposal.¹²

The CFPB estimates that the registration provision will have a cost impact of approximately \$300 per firm.¹³ For the supervisory reports provision, the CFPB estimates that the costs could be \$1800. However, the CFPB acknowledges that the costs could be higher if the small entity does not designate a high-ranking officer or employee with qualifications to serve as the attesting executive. The CFPB states that it believes that there would be few such entities without a qualified executive but provides no basis for that claim. The CFPB also fails to provide information about the costs that would be incurred to obtain a qualified executive to perform the supervisory reports provision duties.¹⁴

For the publication provision, the CFPB's conclusion about costs is confusing and contradictory. The CFPB acknowledges that consumers might interpret the presence of a noncovered bank on

¹⁰ 88 FR at 6135.

¹¹ 88 FR at 6131.

¹² 88 FR at 6135.

¹³ Id.

¹⁴ 88 FR at 6136.

the CFPB's website as negative information about that covered nonbank.¹⁵ The CFPB also states that a study on payday lending showed that providing borrowers with information about payday loans reduced payday loan borrowing. On the other hand, the CFPB states that information disclosures do not always affect consumer decision-making.¹⁶ The CFPB further states that most consumers would not change their behavior due to the provision so the impact on the affected entities would likely not be significant.¹⁷ However, the CFPB actually acknowledges that a few covered orders may be controversial enough that publication on the CFPB's website could impose a substantial impact on the firms that are affected by the orders.¹⁸ The CFPB then somehow certifies that the provision will not have a significant economic impact on a substantial number of small entities.¹⁹

Advocacy is concerned about this uncertainty and inconsistency in CFPB's certification, which must have a factual basis. As noted above, the CFPB cannot provide information about the number of small entities that will be impacted. Is it possible to obtain that information from the states or the federal agencies that have issued the orders? Is it possible for the CFPB to use economic data from the Census Bureau's Statistics of U.S. Businesses, which is detailed by industry and firm size, to extrapolate the number of affected small entities?

CFPB's treatment of costs is contradictory. Advocacy encourages the CFPB to do further research and perform outreach in order to provide clear information about the potential economic impact of the rulemaking. If, after performing the additional analysis, the CFPB is unable to decisively conclude and explain in clear language why the rulemaking will not have a significant economic impact on a substantial number of small entities, certification under Section 605 is unavailable to the CFPB, which must then convene a SBREFA panel under Section 609 and prepare an initial regulatory flexibility analysis under Section 603 before proceeding with the rulemaking.

Consent Orders Should Not Be Included

The proposed rule includes all orders, including consent and stipulated orders. A consent order is a settlement agreement approved by a court. Parties enter into settlement agreements for various reasons. It does not necessarily mean that a person or company acknowledges fault.²⁰ Indeed, Federal Rule of Evidence 408(a) prohibits the use of compromise offers and negotiations to prove or disprove the validity of a disputed claim.²¹ It is unfair to require businesses that opted for a consent order to comply with the registry requirements.

As noted above, the CFPB acknowledges that consumers might interpret the presence of a noncovered bank on the CFPB's website as negative information about that covered nonbank. As

¹⁵ Id.

¹⁶ 88 FR at 6137

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

²⁰ See, e.g., Super Lawyers, *A Business Settling Out of Court Doesn't Mean Admission of Guilt*, Feb. 22, 2023, <https://www.superlawyers.com/resources/business-litigation/colorado/a-business-settling-out-of-court-doesnt-mean-admission-of-guilt/>.

²¹ Fed. R. Evid. 408, available at https://www.law.cornell.edu/rules/fre/rule_408.

such, the proposal may have negative reputational costs for the covered nonbanks that are on the website.²² A consumer may assume that the business is a bad actor because it is on the registry and not consider the fact that there was a consent order. Such an assumption could lead to a decrease in business. Advocacy encourages the CFPB not to require consent orders and other stipulated orders to be included in the registry.

Small Entities Should be Removed from the Registry When the Order Expires

Section 1092.202 (e) states that a covered order shall cease to be a covered order for purposes of this subpart as of the later of ten years after its effective date or if the covered order expressly provides for a termination date more than ten years after its effective date, the expressly provided termination date.²³

Advocacy is concerned that requiring an order to be a covered order for ten years after its effective date is overly punitive. The order should no longer be considered a covered order when it is no longer in effect. Otherwise, small entities will continue to incur costs, be punished, and branded as “bad actors” even after they have met the requirements of the underlying order. The rule does not allow a small entity to redeem itself and move on, which is unfair. Advocacy encourages the CFPB to limit the publication term to the effective term of the covered order.

The CFPB Should Clarify Which Entities Are Affiliates and Subject to the Rulemaking

The type of affiliates that may be subject to the rulemaking is unclear. On page 6108, the CFPB states that the proposal would conform with the CFPB’s registration authority under the CFPA section 1022(c)(7), which states that the CFPB may impose registration requirements applicable to a registered person, other than an insured depository institution, insured credit union, or related person. However, the statement has a footnote. Footnote 139 states:

“An affiliate of an insured depository institution, insured credit union, or related person could be subject to the proposed rule if it is not itself an insured depository institution, insured credit union, or related person.”

Small bank holding companies are affiliates of banks, for example. It is unclear whether they will be subject to the rulemaking. Advocacy encourages the CFPB to clarify what types of affiliates will be subject to the rulemaking.²⁴

Advocacy Questions the Need for the Proposal

Advocacy questions whether this action is needed. Trade groups have indicated that most of the information that the CFPB is attempting to collect is collected by the Conference of State Bank Supervisors (CSBS). CSBS operates the National Multistate Licensing System (NMLS). According to the industry, NMLS includes most of the data the CFPB would be looking to collect in the nonbank registry for judgments and orders. Moreover, consumers can research a

²² 88 FR at 6136.

²³ 88 FR at 6140.

²⁴ 88 FR at 6108.

company on the internet and learn about a company's business practices. The information is not limited to court orders. There are several websites that allow consumers to review a business and to read reviews about a business's practices. If the information is already available, the system that the CFPB is proposing is an unnecessary action that may be burdensome for small businesses.

As noted above, the factual basis for the RFA certification states that the CFPB does not think that the proposal would influence consumer behavior. If the purpose is to protect consumers but the CFPB does not think the registry will influence consumer behavior, the proposed rule will not achieve its intended purpose. Advocacy encourages the CFPB to consider whether the information sought is available elsewhere and whether the rulemaking is necessary to meet its intended goals. If the rulemaking is not necessary, Advocacy encourages the CFPB to withdraw the proposed rule.

Clear Guidance

If the CFPB decides to proceed with the rulemaking, Advocacy encourages the CFPB to provide guidance to assist small entities in complying with the requirements of the rulemaking. There are aspects of this rulemaking that may be difficult for small entities to implement, resulting in costs for additional executive level personnel, outside counsel, or both. Providing clear guidance for complying with the CFPB requirements would be helpful.

Conclusion

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding this request or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

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/s/

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