Submitted via electronic mail
March 31, 2023

Comment Intake—Nonbank Registration of Certain Agency and Court Orders
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: FTA Comment on the CFPB's Proposed Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders
(Docket No. CFPB–2022–0080; RIN 3170–AB13)

The Financial Technology Association (FTA) welcomes the opportunity to provide feedback on the CFPB's "Proposed Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders" (the "Proposal"). While FTA strongly supports consumer protection efforts, we have serious concerns regarding the purpose and effectiveness of—and the authority for—this Proposal. Not only would this Proposal fail to protect consumers, but it would arbitrarily, unfairly, and unnecessarily harm targeted nonbank financial services providers, thereby undermining pro-consumer competition that benefits the very consumers the Bureau seeks to protect.

More specifically, nonbank financial technology companies (or "fintechs") are a primary source of competition to legacy providers that have failed to serve traditionally unserved or underserved American consumers. Fintechs are providing consumers with tailored and improved products and services, unlocking financial choice, empowerment, and opportunity. Fintechs are already subject to robust oversight by state and federal financial regulators based on the same activities-based and entity-based regulatory frameworks that govern the entire U.S. financial services industry.[1] As with banks, fintechs comply with a range of state and federal laws designed to protect consumers.

[1] In many instances, nonbank fintechs that directly provide certain financial services to consumers and small businesses must secure state-based licenses. State regulators conduct examinations to ensure the nonbanks are complying with federal and state consumer financial protection laws. Generally, these licensed, nonbank fintech firms are also subject to the same consumer protection laws as banks, and indeed must comply with numerous state consumer protection laws that are preempted with respect to nationally-chartered banks.

Unfortunately, the Proposal unfairly targets certain nonbank providers and puts them at a competitive disadvantage relative to other providers that are exempted from this proposed rule.[2] This approach contradicts White House directives to facilitate pro-consumer innovation and competition. It instead imposes undue and unnecessary costs on a segment of financial services providers, and unfairly implies that such providers pose a greater risk of harm to consumers than some of their competitors. This is even more problematic given the fact these providers are already well-regulated at both the state and federal level.

Against this backdrop, and as detailed below, we encourage the Bureau to withdraw this Proposal in favor of more constructive efforts to safeguard consumers for the following reasons:

- The Proposal exceeds the Bureau's statutory authority;
- The Proposal is arbitrary and violates a rational cost/benefit analysis since it is not needed, nor effective, in protecting consumers;
- The Proposal is arbitrary and violates a rational cost/benefit analysis since it will undermine effective compliance; and
- The Proposal violates the U.S. federalist system by placing the Bureau above independent, state-level regulators.

I. The Development of an Elaborate New Database System and Executive Certification Requirement Exceeds the Bureau's Statutory Authority and Strains any Reasonable Understanding of a Market Monitoring Function.

A. Market monitoring authority is not limitless and Congress never intended for the arbitrary development of dragnet-style databases.

The Bureau asserts that pursuant to the Consumer Financial Protection Act of 2010 ("CFPA") Section 1022(c)(1)–(4) and (7), it has authority for its Proposal to require the development of an entirely new registry or database containing detailed information about court or agency orders only for certain nonbank entities. These sections define the Bureau's "market monitoring" authority,

[2] The arbitrary targeting of nonbanks is underscored by the fact that banks have been subject to some of the largest and most significant regulatory orders relating to consumer protection violations. For example, in December 2022, the Bureau fined one of the largest banks $3.7 billion for "widespread mismanagement of auto loans, mortgages, and deposit accounts." *See* CFPB, *CFPB Orders Wells Fargo to Pay $3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts* (Dec. 20, 2022), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-wells-fargo-to-pay-37-billion-for-widespread-mismanagement-of-auto-loans-mortgages-and-deposit-accounts/.

which throughout the history of the Bureau has largely been used for one-off information gathering, which more naturally fits with a common understanding of the term market monitoring.

Confirming that market monitoring authority is not limitless, Congress set parameters around the "collection of information" and explicitly stated that when "conducting any monitoring or assessment required by this section, the Bureau shall have the authority to gather information **from time to time**" (emphasis added). The Proposal to create a new, perpetual registration regime and accompanying database requiring ongoing submissions from certain entities clearly exceeds the statutory and common-sense market monitoring authority Congress provided to the Bureau. Additionally, Section 1022(c)(7) does not contemplate the creation of a registration requirement and bespoke database for a particular category of information, but rather outlines a path for registering a covered entity with the Bureau and sharing basic identifying information about the entity with the public.

Where Congress intends for the creation of a new database, it explicitly and clearly does so. For example, Section 1071 of the Dodd Frank Act clearly authorizes the Bureau to develop and maintain a small business lending database "to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses." Congress outlined the data to be collected and stated that such information should be "submitted annually to the Bureau" by market participants.

The example of Section 1071 stands in stark contrast to the Bureau's market monitoring authority, which as articulated by Congress would only permit information requests from "time to time." It strains any credible reading of the market monitoring authority as allowing for a permanent, annual registration and information-sharing requirement in the form of a new database that effectively serves as a dragnet. Such an interpretation would allow the Bureau limitless authority to request any and all information on an ongoing basis that would be captured in a public database based on the reasoning that any business activity could pose a risk to consumers. This is not an authority Congress has delegated to the Bureau.

With respect to a determination that certain agency and court orders are indicative of potential risk to consumers, FTA submits that the Proposal fails to provide any clear evidence that such resolved orders issued by independent state and federal courts and agencies provide meaningful information regarding a company's current potential risk to consumers, including when the findings of such orders may be contested by the involved company and subject to appeal. As discussed in more detail in the following section, it is antithetical to the American system of law to suggest that evidence of past activity is necessarily indicative of a likelihood of future risk.

Additionally, the Proposal for the first time in the Bureau's history attempts to eliminate a clear statutory firewall between the Bureau's market monitoring authority and its enforcement function. The market monitoring authority falls under the Bureau's Subtitle B "General Powers," and more specifically is captured within the Bureau's rulemaking power. This is a logical place for Congress to have granted such an authority as it permits the Bureau to better inform its rulemakings and Congressional research reports by collecting information from "time to time."

Notably, because of the way this information is being used, Congress did not provide the same degree of procedural safeguards as in the enforcement context to those subject to information requests beyond stating that such information should only be made public if it respects confidentiality, including through the use of aggregated reporting. Problematically, the Proposal does not adhere to these minimal protections given the expectation that specifics regarding orders and company information would be made available to the public.

Congress granted the Bureau a clearly separate enforcement authority under Subtitle E and nowhere states that such authority would be informed by the Section 1022 market monitoring functions. This separation is not surprising—and has historically been observed by the Bureau—given the risk that open and collaborative information-sharing by market participants will be severely undermined if such information is immediately leveraged for enforcement purposes. Information collected for enforcement purposes is subject to Section 1052 procedural safeguards and contemplates the use of civil investigative demands (CIDs) to determine whether there has been a violation of a law.

This clear statutory distinction has been observed by past market monitoring efforts at the Bureau where such requests historically have stated that they are **not** "being issued under section 1052 of the Dodd-Frank Act."[3] Only in its most recent market monitoring requests has the Bureau—for the first time in its history—dropped this language purportedly to imply that such information collected under its market monitoring authority could be used for enforcement purposes. This Proposal now makes clear the Bureau's intention to obliterate the statutory separation of

[3] CFPB, *Order to File Information on Payments Products* (Oct. 21, 2022), available at https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf.

information requesting authority for rulemakings and congressional reports as compared to its enforcement function, and their accompanying procedural safeguards. This is not proper, nor do we believe it is lawful.

B. The Bureau lacks authority to require an executive to certify compliance with orders issued by independent federal and state courts and regulatory agencies.

The Bureau cites CFPA Section 1024(b) as its authority to require certain nonbank covered entities to identify a senior executive who will be responsible for certifying compliance with past orders issued by independent courts and agencies. The cited section, however, does not contemplate, imply, or provide such authority to impose this obligation—and potential liability—on an individual officer. The section instead is authorization for imposing a traditional supervisory framework around an entity – a framework that, notably, is completely separate from the Bureau's market monitoring authority.

Because of the unusual nature of a certification requirement, Congress has been specific when it intends to confer authority to require as much. For example, the Dodd Frank Act specifically amended the Commodity Exchange Act (CEA) to impose requirements on the chief compliance officer of certain CFTC registrants, including requiring the signing or certification of an annual compliance report.[4] Had Congress intended for the Bureau to have similar authority to require compliance certifications from senior company officials in the Proposal's context, it would have said so. The Proposal, therefore, creates a new requirement that falls outside of the Bureau's authority.

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[4] *See* Dodd-Frank Act, Public Law 111-203, 124 Stat. 1376 (2010); Chief Compliance Officer Duties and Annual Report Requirements for Futures Commission Merchants, Swap Dealers, and Major Swap Participants, 83 Fed. Reg. 43510 (Aug. 27, 2018); *see also* Sarbanes-Oxley Act, Pub. L. No. 107-204 (2002), Section 302 (creating a congressionally authorized certification framework).

II. ***Because the Proposal Will be Ineffective in Identifying Potential Risks to Consumers and Will Impose Significant Costs on Industry and the Bureau Alike, it is an Arbitrary and Capricious Rule and Violates a Reasonable Cost/Benefit Analysis.***

A. Evidence of past orders does not indicate current risk and violates basic tenets of American law.

As a threshold matter, the Bureau assumes, but does not substantiate, that evidence of past orders correlates with a higher risk of current harm to consumers. The Proposal includes two conclusory statements suggesting such a correlation, but offers no research or documented findings to back up the claim, which serves as the predicate for this rulemaking. More specifically, the Proposal states:

- "Persons that are subject to one or more orders that would require registration under the proposal **may** pose greater risks to consumers than others." (emphasis added)

- "In the Bureau's experience, entities that have previously been subject to enforcement actions, including those brought by local, State, and other Federal authorities, present an increased risk of committing violations of laws subject to the Bureau's jurisdiction, and thus causing the additional consumer harm associated with such violations."

Both of these assertions lack a sound basis and are not backed by documented research or facts. The anecdotal suggestion that the Bureau has witnessed an increased risk of additional violations of laws following a prior enforcement action, for example, may be better explained by the fact that such companies could face follow-up examinations and heightened scrutiny as compared to companies that have not previously been subject to an order. In other words, correlation says nothing here about causation and could have many other explanatory variables.

Additionally, the Proposal's premise that past violations or resulting orders (dating back as far as ten years) are evidence of current risk of harm contravenes a fundamental rule of evidence under American law. Under the Federal Rules of Evidence Rule 404, it is a central principle that a person's past acts are too prejudicial relative to their usefulness in determining whether a person is committing a bad act now. Rule 404(b) specifically prohibits using "evidence of any other crime, wrong, or act" in order "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Accordingly, the Proposal's attempt to effectively put a company in a permanent penalty box based on a past violation and imply ongoing risk of harm to consumers contravenes basic notions of fairness.

It is also important to note that orders brought by independent state regulators often reflect local priorities that may go beyond consumer risk considerations. By requiring these orders to be disclosed through a new public database, the Proposal effectively amplifies and substitutes another agency's judgment for the Bureau's and fails to perform a real-time consumer risk assessment based on current facts. The ten-year publication of such orders may also disincentivize company self-reporting and undermine prompt settlement of regulatory actions given the long-tail reputational harm such companies would now face under the Proposal. The costs of regulatory actions will accordingly rise for all stakeholders. As discussed in the next section, there are many better and lower-cost options available to the Bureau if its goal is to assess current and actual risk of harm to consumers.

B. *The Bureau has many options to assess risk of harm to consumers that are more effective and of significantly lower cost.*

The Bureau recently noted that "[p]rioritization is a fundamental component of the Bureau's supervision program, which has been designed to conduct slightly more than 100 on-site examinations per year, and less than 1,000 overall exam events per year."[5] Based on this reality, it is even more important for the Bureau to prioritize the most effective ways to gather information indicative of current risks to consumers.

Fortunately, the Bureau maintains a substantial consumer complaints database—developed at the specific direction of Congress as provided in the Dodd Frank Act—that captures real-time information regarding incidents involving consumers. Consumer complaints are amongst the most probative and effective sources of information available to the Bureau in assessing consumer risk.

Indeed, when discussing the initial launch of the Consumer Complaint Database in 2012, former Director Richard Cordray noted that "[w]ithin the Consumer Bureau itself, the information we have been gathering is very valuable, as it helps to inform our supervisory exams, enforcement actions, and rulemaking. Indeed, Congress authorized us to develop our priorities out of this data

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[5] *See* CFPB, *Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections*, Docket No. CFPB-2023-0002, available at https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf.

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. . ."[6] Further underscoring the value of this complaint information, Chris D'Angelo, former Associate Director of Supervision, Enforcement, and Fair Lending at the Bureau, stated that "[w]hen I was at the CFPB, complaints factored heavily into the enforcement actions that we brought. Often times if we have an area of concern, it's the entity where we're receiving the most complaints that we look to first to see if that concern has merit, and they're the ones that are going to be at the receiving end [of enforcement actions]."[7]

The Bureau performs frequent analysis of the complaints it receives, and one would reasonably assume uses this real-time information to prioritize supervision, examination, and enforcement activity. It would stretch reason to argue that evidence of past orders—dating back as far as ten years—is anywhere close to as probative of potential consumer harm than actual, real-time complaints of consumer harm. Such information is more likely to mislead or confuse consumers regarding the current state of the reporting company.

Beyond the Bureau's complaints database, the agency also has access to the FTC's Consumer Sentinel database, which includes consumer complaints from a broad range of contributors, including state Attorneys General, local law enforcement, the FTC, and the Better Business Bureau (BBB).[8] Many state regulators and Attorneys General also independently publish annual information regarding top categories of complaints.[9] Additionally, state and federal regulators, as well as the press, publicize meaningful enforcement actions and stories of consumer harm. Similarly, private consumer lawsuits against financial services providers are also well publicized and available based on a rudimentary search.[10] All of these categories of information are widely available, at little to no cost to covered entities or the Bureau.

[6] Director Richard Cordray, *Remarks by Richard Cordray on the Consumer Complaint Database* (June 19, 2012), available at https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-on-the-consumer-complaint-database/.

[7] Alex Baydin, *Monitoring Consumer Complaints Makes For A Better Compliance Program* (Nov. 21, 2019), available at https://performline.com/blog-post/monitoring-consumer-complaints-for-a-better-compliance-program-regulators/.

[8] Federal Trade Commission, *Consumer Sentinel Network* (last visited Mar. 21, 2023), available at https://www.ftc.gov/enforcement/consumer-sentinel-network.

[9] *See, e.g.,* Kate Capodanno, *Virginia's Attorney General shares top consumer complaints* (Mar. 15, 2023), available at https://www.wdbj7.com/2023/03/15/virginias-attorney-general-shares-top-consumer-complaints/.

[10] *See, e.g.*, Kelsey McCroskey, *Class Action Alleges Eagle Valley Lending, Fast Auto Loans Operate Illegal 'Rent-A-Tribe' Payday Loan Scheme* (Mar. 1, 2023), available at https://www.classaction.org/news/class-action-alleges-eagle-valley-lending-fast-auto-loans-operate-illegal-rent-a-tribe-payday-loan-scheme.

Finally, we note that the Bureau is authorized to share information with and receive information from federal agencies, including as provided in its Section 1022(c) market monitoring authority. This same authority allows the Bureau to share information with state regulators, which presumably reciprocate.

Overall, to the extent that evidence of past orders is at all relevant to a current investigation or assessment of current risk to consumers, it is far less probative than many other readily available categories of information, including those noted above. For this reason, it is arbitrary and unreasonable to impose costs on covered entities, as well as the Bureau, when the benefits are undocumented, unfounded, and unclear.

C. *The cost of the Proposal to covered entities (and the Bureau) far exceeds any purported benefits.*

The Bureau estimates that the annual cost of a firm complying with the Proposal's registration provision would be $300. We respectfully submit that this estimate dramatically underestimates the actual costs to a covered entity. First, the Proposal underestimates the operational costs of complying with an entirely new database and reporting system, which will require new internal compliance and reporting processes. This will also require technology integration investments, as we have seen with past Bureau Congressionally-authorized databases, such as the Home Mortgage Data Act (HMDA) database.

In addition to these operational and ongoing compliance costs, the covered entities will also need to invest resources into combatting the reputational damage incurred when only targeted nonbanks are required to publish historical information regarding state and federal orders. As the Proposal itself states, the envisioned database is intended to imply that registered companies pose greater risk of harm to consumers—an incredibly negative and harmful innuendo. It puts targeted nonbank firms at a competitive disadvantage to other financial services providers not registered in the database that may be subject to at least as many state and federal orders.

The reputational harm resulting from the Bureau's approach to target only certain nonbanks is difficult to quantify, but is substantial. Companies may lose consumer trust and business, thereby undermining their ability to compete with certain legacy providers. Covered companies will need to invest into marketing and public relations efforts in order to blunt the potential reputational damage.

Beyond the costs imposed on covered entities, the Bureau itself will need to expend substantial money in building yet another database. This is poor use of Bureau resources when there are far more effective and low cost investigatory tools available, as outlined above.

Taken together, it is clear that the costs of the Proposal significantly outweigh negligible purported benefits. The unnecessary creation of yet another database intended to create a dragnet based on unsubstantiated theories of potential consumer harm is arbitrary and capricious; the Proposal should accordingly be withdrawn.

III. The Proposal's Imposition of an Executive Certification Requirement will Undermine Effective Compliance and Impose Undue Costs on Covered Entities.

A. An executive certification requirement imposed by the Bureau regarding orders issued by independent governmental entities will have many undesired consequences that are inconsistent with sound compliance practices.

It is a bedrock of best practice that compliance is the responsibility of many at an organization and not just a single individual. Compliance professionals generally develop and operationalize "three lines of defense" to ensure that individuals ranging from the business lines to the Board are responsible for ensuring compliance with rules, policies, and regulations. The three lines of defense serve as a system of audits and checks, which allows any one of a number of individuals to identify and flag potential compliance risks or breaches.

The notion of a singular executive being held responsible for certifying compliance with past state and federal orders is inconsistent with these compliance practices and realities. No one individual should be expected to certify compliance, as doing so sends the message that other individuals are somehow less responsible for ensuring compliance. This is a dangerous consequence of an executive certification requirement.

It is additionally unlikely that an individual certification holds much meaning in confirming actual compliance. This is because a single individual cannot possibly hold first-hand knowledge of the activities and findings of all individuals involved in ensuring compliance and operationalizing the three lines of defense. Instead, it is the constant interplay of company personnel responsible for compliance that drives detections of potential or actual risks.

The Proposal is also problematic in its ambiguity regarding potential liability and intent standards for a certifying executive. While the Proposal indicates that the signatory will not be subject to a penalty of perjury attestation, it nevertheless notes the potential for criminal liability for a false attestation that is made knowingly. It further states that an attestation may be knowingly false if it is "based on incomplete or otherwise inadequate information." These terms are ambiguous in the context of certifying compliance with potentially complex orders issued by independent, third-party agencies, and the mere potential for liability is a significant deterrent to a covered entity being able to retain leading compliance executives. This requirement could perversely undermine the retention of talent and overall compliance programs at covered nonbank companies.

B. Because the Proposal for executive certification will likely undermine compliance efforts, the costs cannot be justified.

As noted above, covered entities will be subject to a number of costs in seeking to comply with the executive certification requirement. For example, it may become more difficult and more expensive for covered entities to hire or retain compliance professionals who may be subject to potential criminal liability and to having their personal information shared in a public database. These costs should be considered especially in the context of small businesses required to comply with the Proposal. For this reason, if the Bureau does not withdraw this Proposal, it should at the least subject this rulemaking to a proper SBREFA process to ensure feedback from small businesses.

IV. The Proposal Violates our Federalist System by Placing the Bureau above other State and Federal Regulators.

The Proposal asserts that the Bureau is well-positioned to adjudicate whether a covered entity is in compliance with an order issued by another, independent state agency responsible for enforcing consumer protection laws subject to its jurisdiction. We respectfully submit that the Proposal accordingly violates basic principles of our country's federalist system by putting the Bureau in a position to supplant the proper role of a state regulator in interpreting laws and monitoring compliance with its own orders and also of state courts that would otherwise be called upon to adjudicate disputes concerning those orders.

More specifically, the Proposal could result in a number of outcomes that demonstrate the need for proper respect for the roles and authority of independent regulators under our federalist system.

As an initial matter, the Proposal appears to duplicate reporting requirements under the Nationwide Multistate Licensing System and Registry ("NMLS"). It is inefficient and unwarranted for the Bureau to impose additional costs on the industry and replicate what the states already have in place.

Additionally, when assessing whether a covered entity is in compliance with a particular order, the Bureau may reach conclusions inconsistent with the very same state regulator responsible for issuing the order or state courts whose role it would be to adjudicate disputes regarding whether an order had been violated. This underscores the problem with the Bureau assuming a role as an adjudicator of an order that it did not issue in the first instance. This is an improper role for the Bureau and a usurpation of the authority of the states and state courts.

To this end, the Proposal indicates that some states have shared concerns or objections with the Bureau, but the Proposal does not disclose the substance of those concerns or how those concerns have been addressed. Instead, the Proposal simply states that "[i]n developing this proposal, the Bureau considered the input it received from State agencies, including concerns expressed regarding possible duplication between any registration system the Bureau might build and existing registration systems."

This single statement does not give proper consideration to the potential undermining of our federalist system, the judicial system, and the independent authority and jurisdiction of the Bureau's peer, state regulators, including through their NMLS system. Instead, the Proposal, in its totality, seeks to place the Bureau above all other regulators and empowers it to be the final arbiter of state orders. This is further evidence of the arbitrary nature of this Proposal—especially against the backdrop of a lack of congressional authorization for developing a new database system—that should weigh in favor of the Bureau withdrawing this rulemaking.

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We appreciate the opportunity to provide feedback on the Bureau's Proposal. While we strongly encourage the Bureau to withdraw this rulemaking, we remain committed to working constructively with it on alternative ways to enhance and reinforce consumer protection. As leaders in the financial services industry, FTA members are focused on safely and responsibly increasing consumer access to better financial services and products. We believe robust competition can improve consumer outcomes and support policies that evenly facilitate such competition. We thank you for your consideration of our comments and look forward to ongoing engagement with the Bureau.

Sincerely,

Penny Lee
CEO
Financial Technology Association