



March 31, 2023

Comment Intake – Registry of Persons Subject to Orders  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

Re: Request for Public Comment Regarding Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, Docket No. CFPB–2022–0080

Dear Consumer Financial Protection Bureau,

Better Markets Inc.<sup>1</sup> appreciates the opportunity to comment on the above-captioned proposed rule (“Proposal”), issued by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”).<sup>2</sup> The Proposal would require certain nonbank financial institutions that are subject to public enforcement orders issued by Federal, State, or local agencies to report the existence of such orders to a Bureau registry. The Proposal would also require certain supervised nonbanks to submit annual written statements regarding compliance with each underlying order, signed by an attesting executive who has knowledge of the entity’s relevant systems and procedures for achieving compliance.

We appreciate the attention the Bureau is giving to nonbank providers of consumer financial services and the effort the Bureau is making to increase the quantity and accessibility of information that can benefit both consumers and regulators. We believe that the CFPB’s proposed registry will effectively further the Bureau’s mission by providing an invaluable resource with which regulators may better protect consumers and with which consumers may better protect themselves. The registry also promises to help prompt and guide the development of additional reforms that may be necessary to further protect consumers from predatory financial products and services.

---

<sup>1</sup> Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans’ jobs, savings, retirements, and more.

<sup>2</sup> Request for Public Comment Regarding Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders, Docket No. CFPB–2022–0080, 88 Fed. Reg. 6088 (Jan. 30, 2023) (hereinafter, “Request”), <https://www.federalregister.gov/documents/2023/01/30/2022-27385/registry-of-nonbank-covered-persons-subject-to-certain-agency-and-court-orders>.

While some in industry may complain that much of the information that the CFPB would include in this proposed registry is “publicly available,” we do not believe that this registry would be redundant. Presently, there is no public repository containing all the orders that have been issued by multiple regulators to nonbank entities across multiple product markets and geographies and jurisdictions related to consumer financial products and services. Any consumer or regulator seeking to gather this information would be required to conduct an exhaustive, time-consuming search across many state and federal court dockets, agency databases, and private registries—an unrealistic if not impossible task.

The Bureau has clear statutory authority to create this important registry, and we urge the Bureau to finalize the rule and compile the registry.

**I. THE PROPOSED REGISTRY IS NECESSARY TO BALANCE AGAINST THE RISING MARKET POWER OF NONBANKS AND THE DEARTH OF INFORMATION ABOUT THEIR PRACTICES.**

When large actors in consumer financial services, such as very large banks, engage in various forms of unlawful conduct, the misconduct is typically unearthed amid widespread news coverage. Consumers, notified of wrongdoing, may consult the websites of the relevant regulators, such as the CFPB or the Federal Trade Commission (“FTC”), for more information. This coverage informs those actors’ customers (as well as potential customers), who may choose to continue doing business with them or may take their business elsewhere. Regulators who are not directly responsible for bringing an enforcement action related to the wrongdoing take note of the action, learning from the nature of the offense(s) and identifying any regulatory and enforcement gaps that may warrant attention, all to further their regulatory missions.

Yet an enormous amount of consumer finance has shifted away from chartered commercial banks with familiar brand names. In 2020, three of the top-five lenders in the U.S. were nonbanks.<sup>3</sup> Since 2017, nonbanks have controlled over 50 percent of the U.S. lending market.<sup>4</sup> And there is also some evidence that, as nonbanks have increased their market share, the overall risk profile to consumers of credit has risen.<sup>5</sup> Even more recently, financial technology (“FinTech”) companies

---

<sup>3</sup> These lenders are Quicken Loans, United Wholesale Mortgage, and Penny Mac. See Alicia Phaneuf, *The Growing Market Share of Nonbanks and Alternative Financing in the Online Mortgage Lending Industry*, BUS. INSIDER (Jan. 19, 2021), <https://www.businessinsider.com/alternative-nonbank-mortgage-lending>; John Bancroft, *The Battle for Origination Supremacy: Nonbanks at 63% Market Share*, INSIDE MORTG. FIN. (Jun. 25, 2020), <https://www.insidemortgagefinance.com/articles/218443-the-battle-for-origination-supremacy-nonbanks-at-63-market-share>. See generally Kayla Shoemaker, *Trends in Mortgage Origination and Servicing: Nonbanks in the Post-Crisis Period*, 13 FDIC Q. 51 (2019), <https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article3.pdf> (discussing mortgage trends since the 1970s).

<sup>4</sup> See Kathryn Fritzdixon, *Bank and Non-Bank Lending Over the Last 70 Years*, 13 FDIC Q. 31, 34 (2019), <https://www.fdic.gov/bank/analytical/quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf>; see also Pedro Gete & Michael Rehr, *Mortgage Securitization and Shadow Bank Lending* 34 REV. OF FIN. STUD. 2236 (2020) (discussing the market share of nonbanks in mortgage origination).

<sup>5</sup> As of 2020, the average mortgage down-payment had dropped to 11.4% from 20%. Sara Ventiera, *Where Buyers Are Making the Lowest -- and the Highest -- Down Payments*, REALTOR.COM (Mar. 18, 2020), <https://www.realtor.com/news/trends/lowest-down-payment-cities/>. Meanwhile, FICO scores have dropped

have joined the influx of nonbank consumer financial companies. FinTech nonbanks originate mortgages much faster than traditional banks and are more likely to offer mortgages to consumers with lower income and credit scores and to offer personal loans to individuals who recently have been denied credit by another lender.<sup>6</sup> Some of these FinTech nonbanks (such as SoFi) have entered the banking regulatory scheme via mergers, while others remain nonbanks who may partner with chartered banks to offer various consumer financial products.<sup>7</sup> Meanwhile, many payday lenders, a significant source of nonbank consumer financing, continue to predate vulnerable borrowers with deceptive and abusive lending practices that ensnare consumers in debt traps that accumulate mountains of interest related charges and fees.<sup>8</sup>

Given the increasing relevance of nonbanks in consumer finance, the CFPB occupies an increasingly important regulatory role. Consumers are now able to access high-risk financial products via their smartphones and online portals without realizing that the nonbank providers of these financial services are often evading crucial state consumer protections and safety and soundness laws through partnerships with banks.<sup>9</sup> And when nonbanks partner with chartered banks, consumers are far too often left in the dark about their bank's relationship with a nonbank that is not subject to supervision.<sup>10</sup>

---

to a median of 710 out of 850, *What's the Average Credit Score in America?*, CAPITALONE (June 10, 2021), <https://www.capitalone.com/learn-grow/money-management/average-credit-score-in-america/> (reporting an average FICO score of 710 for 2020), concerningly close to the Crisis-era "subprime cutoff." Marshall Lux & Robert Greene, *What's Behind the Non-Bank Mortgage Boom?* 22 (Harv. Kennedy Sch., Mossavar-Rahmani Ctr. for Bus. & Gov., Working Paper No. 42, 2015).

<sup>6</sup> Dennis Kelleher & Philip Basil, *Fact Sheet: FinTech, Crypto, the Banking Industry and Regulation*, BETTER MKTS. (Jan. 19, 2023), <https://bettermarkets.org/analysis/fact-sheet-fintech-crypto-the-banking-industry-and-regulation/> (citing Andreas Fuster, Matthew Plosser & James Vickery, *How Is Technology Changing the Mortgage Market?*, FED. RSRV. BANK OF N.Y. (June 25, 2018), <https://libertystreeteconomics.newyorkfed.org/2018/06/how-is-technology-changing-the-mortgage-market/>; Erik Dolson & Julapa Jagtiani, *Which Lenders Are More Likely to Reach Out to Underserved Consumers: Banks versus FinTechs versus Other Nonbanks?* (Fed. Rsrv. Bank of Phila., Working Paper No. 21-17, 2021).

<sup>7</sup> *Id.* ("The largest FinTech firms are taking yet another approach by acquiring banks or even seeking their own bank charters. LendingClub acquired a bank last year, after 12 years as a nonbank online lending platform, to take advantage of the cheaper funding source of bank deposits—reportedly, a 90% savings for them—and the ability to warehouse its own loans. SoFi applied for a national bank charter from the OCC but eventually acquired a bank to expedite the process.")

<sup>8</sup> See generally Ronald Mann, *Assessing the Optimism of Payday Loan Borrowers*, 21 SUP. CT. ECON. REV. 105 (2013).

<sup>9</sup> Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1743 (2021):

This spike in borrowing is being fueled, in part, by what has become known as America's new credit addiction — loans made over the internet and facilitated by partnerships between a small handful of state banks and flashy fintech companies. Many of these loans made to struggling families come at an extremely high-cost, carrying annual interest rates well over 100 percent. Moreover, these loans are made using a structure that aims to take advantage of the special legal treatment given to banks — benefits that have been forged over a long history and that are tied to a social contract between the banking sector and the public. Through these fintech-bank partnerships, nonbank credit accessed through smart phone apps and online portals is able to escape important state consumer protections and safety and soundness laws.

<sup>10</sup> Nonbanks target banks chartered in states with high and/or flexible interest rate limits for partnerships, and the chartered banks tend to obfuscate their relationships with predatory nonbank entities while framing their partnership-driven financial products in flowery terms. *Id.* at 1783-1785. In the lending context, these

The CFPB is well-equipped to address the proliferation of nonbank consumer finance through regulation and enforcement, and it has a proven track record of effective consumer protection, recouping over \$16 billion for harmed consumers since the Bureau's inception.<sup>11</sup> But the CFPB has also clearly recognized the value of equipping consumers to better protect themselves from abusive financial services firms. A prime example is the Bureau's complaint database, which provides consumers with critical information about predatory firms and possible patterns of unfair, deceptive, and even abusive behavior.<sup>12</sup> It is well established that markets function more fairly and efficiently when market participants are provided with the most complete and accurate information available.<sup>13</sup>

The Proposal advances this goal. The proposed nonbank registry would allow consumers to vet nonbanks for various forms of consumer financial misconduct, including trends of offenses that indicate pervasive abuse among certain nonbank entities, product types, and/or geographies. With this information, consumers will benefit not only from the protection of regulators but also from a greater ability to protect themselves from bad market actors.

Moreover, as the Bureau notes, this registry will be immensely useful for the Bureau and other federal and state regulators alike.<sup>14</sup> We agree that a central repository of orders issued against nonbanks will advance a wide variety of statutory objectives, streamline regulatory processes, and create efficiencies that will result in greater consumer protection.

## **II. THE CFPB HAS CLEAR STATUTORY AUTHORITY TO ESTABLISH THE REGISTRY.**

As a threshold matter, the Bureau is clearly authorized to create a registry of nonbank entities subject to orders via the Consumer Financial Protection Act ("CFPA"). The Bureau correctly cites three provisions of the CFPA that underlie this authority: (1) § 1022(b); (2) §§ 1022(c)(1)–(4) and (7); and (3) § 1024(b).

### *(1) CFPA § 1022(b)*

---

interstate practices often become usury problems, which the CFPB is explicitly prohibited from regulating against. *Id.* at 1786-87; 12 U.S.C. § 5517(o).

<sup>11</sup> Mike Litt & Ed Mierzwinski, *Watching Wall Street: Top 20 Actions the CFPB Took in 2022 Making the Marketplace Safer for Consumers*, PUB. INT. RSCH. GRP. (Mar. 16, 2023), <https://pirg.org/resources/watching-wall-street-top-20-actions-the-cfpb-took-in-2022-making-the-marketplace-safer-for-consumers/>.

<sup>12</sup> *Groups to CFPB: Don't Hide Consumer Complaints Database*, BETTER MKTS. (Aug. 27, 2020), <https://bettermarkets.org/newsroom/groups-cfpb-don-t-hide-consumer-complaints-database/>.

<sup>13</sup> See Douglas W. Arner, Giuliano G. Castellano & Eriks K. Selga, *Financial Data Governance*, 74 HASTINGS L. J. 235, 249 (2023) ("The social relationships composing financial markets are embedded in and represented by contractual arrangements, conveying critical financial information. Commercial and financial legal frameworks support the enforceability of obligations contained in such contracts and, together with regulatory regimes, promote certainty in financial transactions, provide essential information necessary for market functioning through disclosure requirements, and instill confidence in the financial systems.").

<sup>14</sup> Request, *supra* note 2 at 6093-94.

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.”<sup>15</sup> This provision of the CFPA applies *directly* to one of the key aspects and objectives of the proposed registry: providing the CFPB with a comprehensive repository of nonbank violators of *federal* consumer protection laws (along with those who violate state and local laws). Using the statutory language, the nonbank registry is “appropriate” to “prevent evasions” of “federal consumer financial laws.” The CFPB has clearly explained this process in the Proposal: The Bureau is proposing to require registration in connection with orders issued under federal consumer financial laws, which will improve the Bureau’s monitoring capabilities by providing the Bureau with a tool to identify and comprehend the nature of the risks to consumers presented by the federally illegal conduct addressed in the orders contained in the registry. Those risks include the danger that the misconduct might continue outside of the jurisdiction of a particular regulator or court that issued an order.<sup>16</sup> In other words, by increasing their knowledge of violations of federal consumer financial laws, the CFPB is better equipped to prevent future similar violations and prevent single instances of wrongdoing from developing into trends, thereby furthering its obligations to consumers as authorized by the CFPA.

Further, we are not aware of any judicial decisions interpreting Section 1022(b) as confining all actions taken by the CFPB to the exclusive realm of federal consumer financial law. In any event, as discussed below, we believe that Section 1022(c) provides explicit statutory authority for the Bureau to collect information about violations of state consumer financial law.

(2) *CFPA §§ 1022(c)(1)–(4) and (7)*

Sections 1022(c)(1)–(4) and (7), as a whole, authorize the Bureau to require the disclosure of and collect information “in order to support its rulemaking and other functions” and as a means to “monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.”<sup>17</sup> Here, the statutory authority for the proposed nonbank registry is explicit. One of the many ways the CFPB may monitor risks for the consumers it protects is by aggregating information on the risky and illegal conduct of nonbank entities. This includes violations of both federal and state consumer financial law, as both forms of lawbreaking are probative of heightened risks for consumers and borrowers. And, to satisfy the CFPA’s stringent requirements for safeguarding confidential and proprietary information, the Bureau will specifically design the registry to not collect any such information from nonbanks subject to orders.<sup>18</sup>

(3) *CFPA § 1024(b)*

Finally, Section 1024(b) authorizes the Bureau to exercise supervisory authority over certain nonbank covered persons.<sup>19</sup> The several provisions of § 1024(b) provide the CFPB with

---

<sup>15</sup> 12 U.S.C. 5512(b)(1).

<sup>16</sup> Request, *supra* note 2 at 6097.

<sup>17</sup> See generally 12 U.S.C. 5512(b), (c)(1)–(4), (7).

<sup>18</sup> Request, *supra* note 2 at 6092.

<sup>19</sup> 12 U.S.C. 5514(a)(1).

the authority to require periodic reports and disclosures from nonbank supervisees, while § 1024(b)(7)(C) specifically authorizes the Bureau to require documentation proving that the nonbank supervisees are operating “legitimately” (i.e., lawfully and in compliance with binding orders).<sup>20</sup>

While any of these three statutory provisions on their own would likely provide the CFPB with the authority to promulgate a rule creating the nonbank registry, their combined weight makes clear that the Bureau is well within its statutory authority to create the registry and require nonbank entities subject to orders to timely submit information required for the registry.

### **III. THE VALUE OF EMPOWERING CONSUMERS AND REGULATORS WITH INFORMATION ON ORDERS AGAINST NONBANK ENTITIES IS SIGNIFICANT, AND WHILE THE COSTS SHOULD BE CONSIDERED, THEY SHOULD NOT DETER THE BUREAU.**

Without clear disclosure and reporting standards in financial regulation, consumers are left with few, costly, and typically ineffective self-help alternatives.<sup>21</sup> Thus, it is essential that financial regulators, such as the Bureau, arm consumers with valuable information whenever possible. A comprehensive registry of nonbank entities subject to regulatory and judicial orders is an important element of the optimal informational framework for consumers.

As the Bureau notes, the orders that would be included in this registry are not mere indicia or suggestions of misconduct.<sup>22</sup> These orders come about only because a nonbank entity has broken the law. But when a nonbank offering what are often complicated financial products engages in unlawful conduct, there is no guarantee that consumers will learn of the wrongdoing.<sup>23</sup> A central repository of orders against nonbank entities will provide consumers with a “one stop shop” when deciding which nonbanks to do business with. That in turn will almost certainly create some heightened accountability and deterrent effect against illegality among nonbanks.<sup>24</sup>

---

<sup>20</sup> 12 U.S.C. 5514(b)(7)(C); *Legitimate*, *Black’s Law Dictionary* (11th ed. 2019) (defining “legitimate” as “[c]omplying with the law; lawful”).

<sup>21</sup> See Cf. Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. ILL. L. REV. 277, 290 (2022) (“In the absence of a clear mandatory framework, investors do have self-help mechanisms at their disposal to elicit more information or push for better ESG reporting practices. These include direct shareholder engagement with corporate management, deploying specialized surveys, or relying on information obtained from private ESG data providers. As I have observed in prior work, all of these methods are costly to investors, and also to companies, who must expend resources to respond to repeated information requests and to engage with or resist investors’ case-by-case disclosure demands.”).

<sup>22</sup> Request, *supra* note 2 at 6093.

<sup>23</sup> For example, the CFPB’s order in *Choice Money Transfer, Inc. d/b/a Small World Money Transfer*, Docket No. 2022-CFPB-0009 (Oct. 4, 2022) was only picked up by niche publications such as the Consumer Finance Monitor, PYMNTS.com, and JDSupra. The same can be said for *TMX Finance LLC*, Docket No. 2023-CFPB-0001 (Feb. 23, 2023), *Servicio UniTeller, Inc.*, Docket No. 2022-CFPB-0012 (Dec. 22, 2022), and several other orders against nonbank entities providing consumer financial services.

<sup>24</sup> See Yussuf A. Aleem, *Soft Law: The Optimal Legal Framework for Global Financial Regulation*, 9 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 1, 13 (2022) (noting that, in the context of financial regulation, “name-and-shame” approaches hold the “shamed” entities to some level of accountability, often resulting in market consequences).



Further, the CFPB and other regulators will benefit from the creation of the nonbank registry. Given the lack of a central repository of nonbank orders at present, regulators are faced with the same piecemeal research challenges that consumers face when trying to identify trends in wrongdoing and enforcement among nonbanks. As the Bureau highlights, this registry would quickly become an essential tool in the CFPB’s rulemaking and enforcement arsenal, allowing the Bureau to pinpoint “red flags” within certain sectors and geographic areas of consumer financial services. The benefits are many: The Bureau will be better able to focus its surveillance resources and to identify recalcitrant firms that deserve heightened scrutiny and enforcement attention. The registry will also stimulate the promulgation and enforcement of new rules that may be necessary to stop harmful trends in their tracks. The same can be said for state attorneys general, state consumer financial regulators, and other state and federal agencies who will use this registry to better protect their constituencies.

To be sure, nonbank entities subject to orders would bear some compliance costs if the Proposal creating the nonbank registry were to go into effect. The CFPB is clearly aware of these costs, as the Request notes several areas where the Bureau is determining what nonbanks must affirmatively disclose. In today’s litigation environment, the CFPB is undoubtedly aware that allegedly “inadequate” cost-benefit analyses are one of industry’s go-to arguments when they seek to attack rules and ultimately challenge them in court. As a general matter, these arguments are unfounded, both legally and factually.<sup>25</sup> They distort the Bureau’s legal obligation to conduct cost-benefit analyses; they exaggerate the alleged costs and burdens of compliance with the new rules; and they downplay (if not ignore) the enormous benefits that the rules will confer, both individually and as part of a collection of rules that will work together to achieve market reforms, prevent financial crises, and most relevant here, protect millions of consumers from the financial and emotional damage that comes with victimization at the hands of unscrupulous business practices.

Under Section 1022(b)(2)(A) of the Dodd-Frank Act, the CFPB is instructed to “consider” costs and benefits to consumers and covered entities, but it is nowhere required to quantify and weigh costs and benefits against each other. As the U.S. Supreme Court made clear decades ago, an agency’s duty to consider various economic factors in the rulemaking process entails wide agency discretion. When statutorily mandated “considerations” are not “mechanical or self-defining standards,” as they are not under the CFPB, those considerations “in turn imply wide areas of judgment and therefore of discretion.”<sup>26</sup> In its Request, the Bureau asks covered entities to weigh in on the scope of what must be disclosed by nonbanks and published in the registry, with an eye toward compliance costs, privacy interests, and certain confidential information. Clearly, the CFPB has and will continue to satisfy its obligation to “consider” costs in this proposed rulemaking and should bear in mind that the many benefits conferred by this registry (to both consumers and regulators) may prove difficult to quantify despite their indisputably enormous value in terms of transparency, consumer protection, and regulatory oversight and enforcement.<sup>27</sup>

---

<sup>25</sup> Stephen W. Hall, *The Ongoing Use and Abuse of Cost-Benefit Analysis in Financial Regulation*, BETTER MKTS. (Mar. 23, 2023), [https://bettermarkets.org/wp-content/uploads/2023/03/BetterMarkets\\_Report\\_Cost\\_Benefit\\_Analysis\\_03-2023.pdf](https://bettermarkets.org/wp-content/uploads/2023/03/BetterMarkets_Report_Cost_Benefit_Analysis_03-2023.pdf).

<sup>26</sup> *Sec’y of Agriculture v. Cent. Roig Refining Co.*, 338 U.S. 604, 611-12 (1950).

<sup>27</sup> Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV’T L. REV. 1, 40 (2017) (“[V]alues such as dignity, equity, and fairness might be relevant, and they might prove difficult or impossible to quantify.”).

#### **IV. THE FORM AND SUBSTANCE OF THE PROPOSED REGISTRY WILL EFFECTIVELY FURTHER THE CFPB'S REGULATORY OBLIGATIONS.**

As the Request indicates with its questions for commenters, the form and substance of the proposed registry are subject to change as the Bureau receives new information. Having reviewed the proposed sections implementing the proposed registry, we believe that the form and substance of the proposed registry are largely effective. We have included responses to several of the Bureau's areas of inquiry below:

##### **A. Proposed § 1092.102, Submission and Use of Registration Information.**

(1) *102(b) Coordination or Combination of Systems – The Bureau should embrace existing resources and expertise when formulating the registry.*

We agree that the CFPB, in administering the nonbank registry, should rely on information an entity previously submitted to the registry under Part 1092 and coordinate or combine systems with state agencies. Not only would this provision allow for more efficient implementation of the registry by avoiding duplicative or redundant efforts but would also reflect the importance of this registry to both federal and state regulators. The Bureau should consider coordination with existing state consumer financial protection agencies, such as the California Department of Financial Protection and Innovation,<sup>28</sup> the Illinois Department of Financial and Professional Regulation,<sup>29</sup> the Massachusetts Division of Banks,<sup>30</sup> and the New York Department of Financial Services,<sup>31</sup> whose existing databases and systems may provide the CFPB with a significant body of relevant information and best practices for the implementation of the proposed nonbank registry.

##### **B. Proposed § 1092.201, Definitions.**

(1) *201(c) Covered Law – The Bureau should take an inclusive approach, guided by the objectives of the registry.*

We recognize that there is some boundary line between the information that should go into the registry and information that may not be appropriate insofar as it does not have a sufficient nexus to consumer financial products or services. However, we emphasize that a holistic examination of nonbank covered entities would almost certainly produce information that is probative of risks to consumers, and in the realm of conduct relating to consumer financial products or services, it is very clear that the Bureau should take an expansive approach. If the CFPB has rulemaking and enforcement authority under a certain federal law, for example, then orders arising

---

<sup>28</sup> CALIF. DEP'T OF FIN. PROT. & INNOVATION, ACTIONS, ORDERS AND ADMINISTRATIVE HEARING DECISIONS (last accessed Mar. 13, 2023), <https://dfpi.ca.gov/actions-orders-and-administrative-hearing-decisions/>.

<sup>29</sup> ILL. DEP'T OF FIN. & PROF. REG., ENFORCEMENT ACTIONS (last accessed Mar. 13, 2023), <https://idfpr.illinois.gov/News/Disciplines/DiscReportsDefault.asp>.

<sup>30</sup> MASS. DIV. OF BANKS, ENFORCEMENT ACTIONS ISSUED BY THE DIVISION OF BANKS (last accessed Mar. 24, 2023), <https://www.mass.gov/info-details/enforcement-actions-issued-by-the-division-of-banks>.

<sup>31</sup> N.Y. DEP'T OF FIN. SRVS., ENFORCEMENT AND DISCIPLINE (last accessed Mar. 24, 2023), [https://www.dfs.ny.gov/industry\\_guidance/enforcement\\_actions\\_lfs](https://www.dfs.ny.gov/industry_guidance/enforcement_actions_lfs).



under that federal law must be included in the registry for the registry to serve its intended purposes. This includes laws that are not by definition “consumer financial protection laws,” such as the Military Lending Act (“MLA”), as violations of the MLA may overlap with, or be closely associated with, violations of the CFPB’s unfair, deceptive, or abusive acts or practices (“UDAAP”) prohibitions or the Truth in Lending Act (“TILA”).

We also agree that the proposed registry should include orders related to violations of the prohibition of unfair or deceptive acts or practices (“UDAP”) under § 5 of the Federal Trade Commission Act (“FTCA”). While we acknowledge that the CFPB’s UDAAP authority and the FTC’s UDAP authority are distinct, of course, both prohibitions cover the types of orders that the proposed registry is intended to include<sup>32</sup> and fall well within the scope of the CFPB’s consumer financial protection authority.<sup>33</sup>

We also agree that the CFPB should include orders arising under state laws prohibiting unfair, deceptive, or abusive acts or practices to the extent those orders relate to the offering or provision of a consumer financial product or service, as well as industry-specific laws such as New York Banking Law § 719(2). Based on our own research, we believe that Appendix A to the proposed rulemaking comprehensively includes all state UDAP/UDAAP laws. We agree that violations of these state laws are almost certainly probative of potential violations of CFPB §§ 1031 and 1036 and that the registry would be incomplete without their inclusion.

Further, we believe that the CFPB should include the laws of states who supplement or alter their UDAP/UDAAP laws with “unconscionable” conduct, as unconscionable conduct is often conduct that qualifies as a UDAP/UDAAP violation subject to the Bureau’s jurisdiction under CFPB §§ 1031 and 1036. Given the similarity between the standards of “unconscionability” and “unfairness” under UDAP law, it is warranted to include such orders in the registry. Indeed, it seems undeniable that unconscionability contains an inherent element of unfairness by its very nature.<sup>34</sup> Many courts have recognized this close relationship between unfairness and unconscionability, holding that unconscionable conduct could trigger liability under states’ unfair

---

<sup>32</sup> See generally Rebecca Schoenberg, *Introducing “Abusive”: A New and Improved Standard for Consumer Protection*, 100 CALIF. L. REV. 1401 (2012).

<sup>33</sup> Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 132 n.111 (2013):

Title X makes clear that it does not alter or limit the existing powers of the FTC, other than the transfer of rulemaking powers under federal consumer financial law. *Id.* § 5581(b)(5)(C)(i). Although the FTC does not have authority over banks, savings and loan associations, or federal credit unions, the agency and the CFPB still have overlapping authority as to a wide range of individuals and institutions involved in consumer finance, including nonbank mortgage lenders, private student lenders, credit card companies, payday lenders, and credit bureaus. See 15 U.S.C. § 45(a)(2) (FTC power); 12 U.S.C. § 5531(a)-(b) (CFPB power). In each case, the FTC has power under FTCA’s UDAP ban, and the CFPB has power under Title X’s UDAAP ban. On account of this overlap, Title X requires the two agencies to negotiate an agreement with respect to rulemaking so as to avoid duplication or conflict between rules prescribed by each agency. 12 U.S.C. § 5581(b)(5)(D).

<sup>34</sup> See RESTATEMENT OF CONSUMER CONTRACTS, § 5 *Unconscionability*, at 74 (ALI Council Discussion Draft No. 4, 2017) (“Importantly, substantive unconscionability is closely related to the standard of ‘unfairness’ under FTC law.”).

competition statutes.<sup>35</sup> It is therefore plainly apparent that orders arising out of such laws should be included in the Bureau’s registry and that the registry would be incomplete without their inclusion.

(2) *201(d) Covered Nonbank – The Bureau should include natural persons in the registry.*

We disagree with the Bureau’s proposed exclusion of natural persons from the proposed registry’s definition of “covered nonbank.” As the Bureau notes, natural persons are capable of the violations that result in the orders to be included, whether they are acting within a corporate entity or as a sole proprietor not incorporated as a legal entity.<sup>36</sup> Indeed, as we often argue, banks don’t commit fraud; bankers do.<sup>37</sup>

While the Bureau correctly identifies that the inclusion of natural persons is unlikely to help the Bureau identify trends of misconduct at the nonbank entity-level, the proposed registry is also designed as a “self-help” measure for consumers. While the CFPB would undoubtedly incur additional up-front costs to include natural persons in the proposed registry, the inclusion of natural persons subject to orders would provide consumers with an additional resource to identify bad actors in consumer financial services. The attestation requirement would also provide additional assurances surrounding compliance in the context of natural persons.

If the Bureau believes that a more limited approach to natural persons is necessary, then it should consider including natural persons but excluding them from the § 1092.203’s requirements to designate one or more attesting executives and submit written statements. In that case, natural persons subject to orders would be required to register with the Bureau and to submit copies of the orders to the Bureau, but without attestations. This exception, however, should not deter the Bureau from choosing a nonbank entity size threshold that maximizes the number of nonbanks subject to orders submitting annual written statements signed by a designated attesting executive.

### **C. Proposed § 1092.204, Publication and Correction of Registration Information.**

(1) *204(a) Internet Posting of Registration Information – The Bureau is taking effective steps to ensure holistic publication of the nonbanks subject to orders while protecting those nonbanks’ privacy interests to the extent required by law.*

---

<sup>35</sup> See e.g., *Shadoan v. World Sav. & Loan Ass’n*, 219 Cal. App. 3d 97, 101–02 (Cal. Ct. App. 1990) (“[T]hat a contractual provision is unconscionable may be relevant to the question of whether a party who drafted—and seeks to enforce—the provision, has committed an unfair business practice.”); *Brecher v. Citigroup Glob. Mkts., Inc.*, No. 3:09—cv—1344 AJB (MDD), 2011 WL 3475299, at \*7 (S.D. Cal. 2011) (“An unconscionable [contract] provision is certainly ‘unfair.’ . . . Because the [contract] provision could be unconscionable, it could be unfair under the [Unfair Competition Law], and therefore Plaintiffs have sufficiently stated a claim under the [Unfair Competition Law].”); see also *Cal. Grocers Ass’n v. Bank of America*, 22 Cal. App. 4th 205, 217 (Cal. Ct. App. 1994) (assuming in dicta that California’s state UDAP law — which equips consumers with an affirmative cause of action against “unfair” business conduct — “encompass[es] an affirmative cause of action for unconscionability”).

<sup>36</sup> Request, *supra* note 2 at 6108.

<sup>37</sup> Stephen W. Hall *et al.*, THE SECURITIES AND EXCHANGE COMMISSION: REGULATION AND ENFORCEMENT IN 2022, at 15 (Feb. 1, 2023) (special report), <https://bettermarkets.org/newsroom/sec-performance-report-major-progress-but-more-work-to-do/>.

We are not aware of any legal protections against public disclosure of the information the Bureau would require for inclusion in the registry. As the Bureau notes in proposed § 1092.201(g), “identifying information” is limited to already publicly available information, such as a nonbank’s common name and/or DBA, NMLS identifier, a Home Mortgage Disclosure Act (“HMDA”) Reporter’s Identification Number, the Legal Entity Identifier (“LEI”) issued by a utility endorsed by the LEI Regulatory Oversight Committee or endorsed or otherwise governed by the Global LEI Foundation (“GLEIF,” or any successor of the GLEIF), and a Federal Tax Identification number. Further, the Bureau is taking steps to protect confidential and otherwise nonpublic information relevant to orders. Proposed § 1092.202(d) includes a reporting exception that allows covered nonbanks to withhold confidential and nonpublic from inclusion in registry entries. And while proposed § 1092.202(d)(3) would require a registered entity, if the registered entity is a supervised registered entity, also to file the name and title of its attesting executive, the Bureau is able to make clear that the attesting executive is just that, and not necessarily an at-fault individual.

## **CONCLUSION**

We hope the Bureau finds these comments helpful.

Sincerely,



Stephen W. Hall  
Legal Director and Securities Specialist

Brady Williams  
Legal Counsel

Andrew Ehler  
Legal Extern

Better Markets, Inc.  
1825 K Street, NW  
Suite 1080  
Washington, DC 20006  
(202) 618-6464

[shall@bettermarkets.org](mailto:shall@bettermarkets.org)  
[bwilliams@bettermarkets.org](mailto:bwilliams@bettermarkets.org)  
[aehler@bettermarkets.org](mailto:aehler@bettermarkets.org)

<http://www.bettermarkets.org>