March 31, 2023

Consumer Financial Protection Bureau

Re: Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

Docket No. CFPB-2022-0080

RIN 3170-AB13

Submitted electronically.

The Consumer Relations Consortium (CRC) is an organization comprised of more than 60 national companies representing creditors, data/technology providers and compliance-oriented debt collectors that are larger market participants. Established in 2013, CRC is dedicated to a consumer-centric shift in the debt collection paradigm. It engages with all stakeholders—including consumer advocates, federal and state regulators, academic and industry thought leaders, creditors and debt collectors—and challenges them to move beyond talking points. The CRC's focus is on fashioning real world solutions that seek to improve the consumer's experience during debt collection. CRC's collaborative and candid approach is unique in the market.

CRC members exert substantial positive impact in the consumer debt space, servicing the largest U.S. financial institutions and consumer lenders, major healthcare organizations, telecom providers, government entities, hospitality, utilities and other creditors. CRC members engage in millions of compliant and consumer-centric interactions every month at all stages of the revenue cycle. Our members subscribe to the following core principle:

**"Collect the Right Debt, from the Right Person, in the Right Way."**

We appreciate the opportunity to comment on CFPB Proposed Rule (§1092.100 et seq) to Require Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders (Proposed Rule). The CRC believes the Proposed Rule is fatally flawed for the reasons detailed in the attached comment. However, the CRC is not opposed to a registry of responsible debt collectors, such as those that have already registered with the CFPB's complaint portal.

Sincerely,

*Missy Meggison*

Missy Meggison
Co-Executive Director, Consumer Relations Consortium

## COMMENTS TO REGISTRY OF NONBANK COVERED PERSONS SUBJECT TO CERTAIN AGENCY AND COURT ORDERS

The Consumer Relations Consortium (CRC) is submitting the following comments and feedback to the Consumer Financial Protection Bureau's (CFPB) Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders (Proposed Rule) published in the Federal Register January 30, 2023.

As explained in further detail below, the CRC's position is that the Proposed Rule is fatally flawed because (a) the CFPB failed to follow the Administrative Procedure Act; (b) it attempts to impose an improper designation of personal liability; (c) the CFPB does not have the legal authority to implement a "shame list;" and (d) it improperly interferes with state law. That said, the CRC is not opposed to the CFPB exercising its thus far ignored obligation to create a registry of responsible debt collectors.

### 1. Failure to Follow the Administrative Procedures Act

The CFPB failed to follow the Small Business Regulatory Enforcement Fairness Act (SBREFA) and convene a Small Business Review Panel (Review Panel) before seeking comments on this Proposed Rule. The SBREFA panel serves a critical function in the rulemaking process and the failure to convene a Review Panel disregards the requirements of the Administrative Procedures Act.

*A. The SBREFA Panel Serves a Critical Function in The Rulemaking Process.*

The Regulatory Flexibility Act, which was amended by the Dodd-Frank Act, requires the CFPB to convene a Review Panel when rulemaking efforts are expected to have a significant economic impact on a substantial number of small entities. Here, proposed § 1092.201(d) impacts ***all*** non-banks that are subject to a final order issued by a federal or state agency or court[1], regardless of size. [Emphasis added].

The CFPB's reasoning for not considering smaller entities and following SBREFA is concerning; it appears the CFPB conflates its own analysis of what is small with the Small Business Administration designation. The CFPB admitted that covered persons would include (1) those that are subject to supervision, (2) those that have covered orders against them and (3) those that generate in excess of $1 million in annual receipts, unless subject to certain exclusions. The CFPB seems to disregard the possibility that an entity may be subject to CFPB supervision and still qualify as a small entity pursuant to SBA rules where these proposed regulations will result in significant economic impact.

[1] Proposed §1092.201(e)

*B. SBREFA Panel Requirements*

When the CFPB convenes a SBREFA panel, the panel must assess certain impacts of the proposed rules **before** their release for public comment as a Notice of Proposed Rulemaking. [Emphasis added]. Small entity representatives (SERs) are asked to participate in the Review Panel. Accordingly, topics of discussion for the Review Panel address subject areas that the CFPB is required to assess in its rulemaking. In particular, the CFPB must prepare an Initial Regulatory Flexibility Analysis with the following required elements:

- A description and estimate, where feasible, of the number of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule;
- An identification, to the extent practicable, of all relevant federal rules which may duplicate, overlap, or conflict with the proposed rule;
- A description of any significant alternatives to the proposed rule which accomplish the stated objectives of the applicable statute and which minimize any significant economic impact of the proposed rule on small entities;
- A description of any projected increase in the cost for small entities (and, if so, any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and minimize any increase in the cost of credit for small entities); and
- A description of the advice and recommendations of representatives of small entities relating to the issues described above. [2]

*C. A Cost Benefit Analysis is Required.*

The CFPB correctly concedes in its preamble to the Proposed Rule that the registry of non-bank orders would only have a primary benefit for the CFPB itself in its market monitoring functions, rather than provide any real benefit to consumers. The CFPB quotes figures of less than 5% of non-banks that are already subject a public order and would be required to register pursuant to the proposed rule. Further, to embark on such an undertaking without considering the impact upon small entities is a dereliction of the CFPB's primary function, which is to make consumer financial markets work for consumers, responsible providers, and the economy as a whole. The costs to

[2] 105 U.S.C. § 603 (b)-(d).

smaller entities should not be overlooked and SBREFA mandates the CFPB to engage in this assessment including the appropriate cost-benefit analysis.

The failure of the CFPB to consider the input from small entities results in a complete disregard of the Administrative Procedures Act, which will most certainly result in the repeal of the Proposed Rule – if it is enacted – at some time in the near future. The proposed rule must be withdrawn until such time that small entities can be heard on these proposals.

## 2. Improper Attempt to Designate Personal Liability.

The CFPB's attempt in the proposed rule to designate personal liability upon "attesting executives" of supervised entities may not only be unconstitutional as a violation of due process, but highly unique when compared to any other industry. Additionally, Congress has expressly disavowed attempts to single out individuals in the way the CFPB contemplates here.

### *A. The CFPB's Attempt to Require Individuals to Agree to Future Liability is a Violation of Due Process.*

Section 1092.203(b) of the proposed rule requires certain non-banks to designate an executive to submit a written statement attesting, under penalty of perjury,[3] to the executive's review and oversight regarding the supervised entity's compliance with the applicable order. This executive also must attest whether in the preceding year any "violations of other instances of noncompliance with any of the obligations" that were imposed by the order.[4] This attestation would include general statements usually found in most CFPB consent orders that requires the entity to otherwise not violate a particular federal consumer financial law in general as well as the Consumer Financial Protection Act, 12 USC § 5531 (Unfair, Deceptive or Abusive Acts or Practices [UDAAP]).

As the CFPB is aware, the interpretation of federal consumer law is an organic process subject to both judicial and agency input. More importantly, UDAAP is a nebulous, mostly undefined concept in Dodd-Frank, and instead, has developed through enforcement activities applied to specific instances of conduct. While compliance with a consent order addressing past practices that can be easily identified and remediated may an appropriate attestation to request, requiring any one to attest to future conduct that may not be a violation of law at the time of attestation is not prudent or appropriate.

For decades, the debt collection industry has been subject to various interpretations of the Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. § 1692 *et seq*. Although Regulation F sought to instill some clarity around certain aspects of the FDCPA, many divergent opportunities exist to interpret permissible and legal debt collection conduct as harassing and abusive. No attesting

[3] *See* p. 138 of the Proposed Rule.
[4] *See id.*

executive can possibly ensure that current debt collection procedures, while otherwise compliant with the existing interpretation of the law, would not otherwise run afoul of future interpretation of the law by the CFPB. This is especially the case when it comes to UDAAP. At a minimum, basic due process requires reasonable, advance notice of a government decision with respect to a law or related interpretation for which an executive will be held to in a sworn attestation.

For example, in March 2022 the CFPB issued guidance and updated its UDAAP Examination Manual to address instances of "discriminatory conduct" for the entire consumer financial services ecosystem, including non-lending financial services entities. Notably, the CFPB guidance did not include a definition of "discriminatory conduct". What if two months earlier, in January 2022, an executive attested that its organization was complying with UDAAP but, in a subsequent examination by the CFPB, it was somehow determined that that executive's attestation was no longer valid based upon the CFPB's recent guidance that did not even exist at the time of attestation? This is a textbook example of a violation of due process. Ensuring that covered entities comply with the law as written and complying with specific mandates is the job of the CFPB. To require covered persons to anticipate how and in what manner the CFPB may subsequently interpret consumer financial law in the future – including across leadership changes – is simply unreasonable and will not advance the CFPB's goal of protecting consumers.

*B. No Other Industry Seeks to Impose Liability Upon Corporate Executives Acting in the Corporate Capacity*

A review of various regulations imposed upon other industries (like energy, insurance, transportation, medical, pharmaceutical and food) found no instances where an individual executive was required to formally attest to existing and future legal compliance under penalty of perjury. The CFPB fails to demonstrate why financial services executives of non-depository institutions should be treated differently and required to undertake such unlimited liability. In many instances, smaller entities have executives or upper management who undertake dual roles. Companies will now be forced to over-compensate and protect those individuals subject to attestation requirements regarding future rules the CFPB has yet to imagine, propose, or implement. While larger companies may have the resource to do so, forcing smaller companies to take on this risk will result in irreparable harm.

### 3. Implementing A "Shame" List is Not Approved by Congress And Contrary to Public Policy.

Regulatory agencies are given the authority to write and enforce rules. An agency's role is not to pick winners and losers. Here the CFPB desires not only to highlight who they believe to be bad actors, but personally name individuals associated with those organization.

Under Dodd-Frank, Congress granted the CFPB authority over various enumerated consumer protection laws.[5] None of those enumerated consumer protection laws provides for the implementation of any list, registry, or assumption of liability upon an individual. Under the Fair Debt Collection Practices Act, (FDCPA), 15 U.S.C. § 1692d(3), a debt collector is expressly prohibited from the publication of any list of consumers who allegedly refuse to pay debt. Certainly, Congress did not intend to grant the CFPB authority to engage in conduct that Congress expressly forbids, regardless of whether the action is directed to consumer or covered person.

### 4. The Proposed Rule Unlawfully Interferes with State Law.

The CFPB was created to provide a single point of accountability for enforcing *federal* consumer financial laws and protecting consumers in the financial marketplace. However, the Proposed Rule creates the potential for the CFPB to enforce state and local laws that are outside its authority under Dodd-Frank.

To prevent potential enforcement creep, the Proposed Rule should exclude orders arising purely under violations of state law. The CFPB proposes to define "covered orders" to be those that are both public and final, including both agency and court-issued orders, issued at least in part in any action or proceeding brought by any federal, state, or local agency.[6] Additionally, the definition of "covered law" should be revised as follows:

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

[5] 12 USC §5481
[6] Proposed Rule, 12 C.F.R. § 1092.201(e).

> ~~(6) A rule or order issued by a State agency for the purpose of implementing a prohibition on unfair, deceptive, or abusive acts or practices contained in a State law described in paragraph (4) or (5) of this paragraph (e).~~

12 C.F.R. § 1092.201(e).

This is especially relevant as more states create sophisticated laws concerning covered nonbanks and particularly debt collectors. Indeed, Appendix A of the proposed rule lists hundreds of covered state laws which would be subject to the rule. Nor is there any need for the CFPB to require publication of orders or decisions involving the FTC's authority under Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45 as it the FTC – not the CFPB – that exercises that authority. Therefore, it is appropriate for the FTC to determine how orders and decisions involving an exercise of the FTC's authority.

Finally, the CFPB has no legitimate interest in requiring companies to report on their compliance with orders issued by other federal or state agencies. Consent orders have monitoring components usually for a period of 5 years or more. The CFPB's imposition of additional and different reporting requirements could duplicate or even interfere with state processes. In addition, the CFPB already publishes its orders on its public, searchable website. An additional registry of such orders is entirely superfluous – and it for the states and the FTC to decide for themselves whether and how to publish their own orders.

### 5. If The CFPB Creates Anything, it Should Create a Registry of Responsible Debt Collectors

The CFPB's proposal to create a "Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders" attempts to obscure its more than decade-long failure to implement a national registry of debt collectors, as the CFPB is clearly required to do by federal law.

The Proposed Rule would require only a tiny fraction of debt collectors – estimated by the CFPB to be less than 5% of all nonbanks – to register with the CFPB upon becoming subject to a public written order or certain judgments. Further, the proposed CFPB registry risks providing consumers with incomplete data relating to only a small handful of debt collectors subject to a public order or judgment:

> Those entities would be required to register in a system established by the Bureau, provide basic identifying information about the company and the order (including a copy of the order), and periodically update the registry to ensure its continued accuracy and completeness." *12 CFR Part 1092.*

In doing so, however, the CFPB's proposed limited registry will not serve to answer the single most asked question by a consumer when determining how to respond to a collection agency: "**Is this a legitimate company?**" Nor will the registry encourage or reward responsible actors by giving them visibility to consumers, clients, and regulators. Instead, by focusing exclusively on alleged "bad actors" and publicizing those entities, the CFPB's proposed registry perpetuates myths and falsehoods about the collections industry and obscures the significant efforts being made every day to ensure consumers experience compliant, professional collection activities.

The CFPB's supervisory authority arises under § 1024(a) of the Consumer Financial Protection Act of 2010 (CFPA). Congress authorized the CFPB to supervise debt collectors and debt buyers under § 1024.23 of the CFPA. Critically, § 1024(b)(7)(A)–(C) authorizes the CFPB to prescribe rules to ensure that supervised nonbanks ***''are legitimate entities and are able to perform their obligations to consumers.''*** 12 U.S.C. § 5514(b)(7)(A)–(C). The CFPB should honor its obligations pursuant to the CFPA and provide consumers with a published and accessible list of all of the legitimate debt collectors operating in the United States.

It is well within the CFPB's ability to develop and publicize an accessible list of legitimate debt collectors. For example, for nearly a decade, the CFPB has required all debt collectors register with it for purposes of responding to consumer complaints on the complaint portal and then publicized all of those complaints and related responses from registered debt collectors.

Relatedly, New York City is one of more than a dozen jurisdictions that requires all legitimate debt collectors to obtain a license and New York City further requires debt collectors to disclose in consumer communications the New York City license number:

**§ 1-05 License Number in Advertisements and Other Printed and Electronic Matter.**

Any advertisement, letterhead, receipt, online media, website, electronic advertisement, or other printed or electronic matter of a licensee must contain the license number assigned to the licensee by the Department. If a licensee uses email to communicate with consumers, the licensee's email must contain the license number assigned to the licensee by the Department. The license number must be clearly identified as a New York City Department of Consumer Affairs license number and must be disclosed and disseminated in a lawful manner. Any telephone listing consisting solely of the name, address, and telephone number of the licensee need not specify the licensee's license number. Licensees holding licenses for more than one location must also include their respective license number(s) clearly identified as New York City Department of Consumer Affairs license number(s) on all correspondence and other matter which contains or makes reference to one or more of such licensees' licensed location(s).

(Amended City Record 2/24/2020, eff. 3/25/2020)

Surely the CFPB is capable of following suit and providing all U.S. consumers with at least the same level of consumer protection afforded to residents of New York City and a handful of other states? The CFPB's continuing failure to expand the use of collection agency data it gathers with its massive annual budget of nearly $1 billion to finally provide consumers with a trusted, public resource to verify whether a collection agency is legitimate is baffling and is a dereliction of its responsibilities under the CFPA, as delegated to it by Congress.

**6. Conclusion**

As detailed in the foregoing, the Proposed Rule is fatally flawed. The CFPB must comply with the Administrative Procedure Act and remove the portions of the Proposed Rule that exceed its authority and violate due process. The CRC implores to reconsider its position on its Proposed Rule in light of the numerous issues outlined above.