March 31, 2023

Via electronic mail to *2022-NPRM-OrdersRegistry@cfpb.gov*

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; RIN 3170–AB13)

Dear Director Chopra:

We appreciate the opportunity to respond to the CFPB's proposal to require certain nonbank covered person entities to report the existence of certain public agency and court orders to a Bureau registry.[1] The proposal also would 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 and control over the entity's compliance efforts. The Bureau explains that, consistent with the Consumer Financial Protection Act, "the Bureau implements a risk-based supervision program under which it prioritizes nonbank covered persons for supervision in accordance with its assessment of risks posed to consumers" and has issued this proposal in furtherance of that risk-based approach.[2]

BPI supports responsible innovation and welcomes competition in the market for consumer financial products and services when this innovation is conducted in a way that ensures consumers are protected through consistent regulation, supervision, and examination. Both customers and the U.S. financial system are put at risk when nonbanks offer banking products and services without adhering to all the consumer regulatory protections banking organizations are required to follow and with far more limited – if any – onsite supervision to determine compliance with those regulations. It is critical that consumers are afforded the same level of protection whether they obtain banking products and services from a traditional bank or nonbank entity. Banks are subject to supervision and regular examination for compliance with a host of consumer protection laws and regulations, including fair lending laws, such as the Equal Credit Opportunity Act, and laws prohibiting Unfair, Deceptive, and Abusive Acts and Practices, anti-steering requirements, and the Electronic Funds Transfer Act. By

[1] 88 Fed. Reg. 6088 (Jan. 30, 2023), *available at*: 2022-27385.pdf (govinfo.gov).

[2] 88 Fed. Reg. at 6090.

contrast, nonbanks are not subject to the same regular, direct supervision or examination as banks for compliance with these laws and regulations.

We support the Bureau's efforts to strengthen its oversight of nonbanks in order to help ensure that consumers are protected whether they obtain consumer financial products and services from a bank or nonbank. BPI has long advocated for the CFPB to exert its supervisory and examination authority over nonbanks, in addition to its enforcement authority.[3] We agree that this is an important area of focus, given the dearth of information about the number and type of nonbank entities subject to CFPB supervision and the importance of ensuring consumers are protected when they engage with both banks and nonbanks in seeking consumer financial products and services.

We have concerns about certain aspects of the proposal, however, that we detail further below. The CFPB lacks the authority to impose the proposed attestation requirement; even if it had such authority, the attestation requirement would ultimately harm, rather than help, consumers. The CFPB also lacks the authority to impose a registry requirement on insured depository institutions; the CFPA specifically authorizes the CFPB to require *nonbank*s to register with the CFPB but does not mention IDIs. Even if the CFPB had the authority to require IDIs to register, there is no reason to impose such a requirement, as the prudential banking regulators – and the CFPB itself – maintain lists of the entities subject to their respective supervision and examination and maintain a significant amount of information about IDIs, including consent orders and other supervisory or enforcement actions. Therefore, requiring IDIs to provide the information the Bureau proposes nonbanks provide to the proposed registry to identify IDIs subject to the CFPB's jurisdiction for consumer compliance or to track the consent and enforcement actions to which they are subject would impose a substantial burden on IDIs with no additional benefit. For these same reasons, IDI holding companies and affiliates should not be subject to the registration requirements: as entities subject to consolidated supervision by the prudential banking agencies, these entities' identities, and activities, including any consent orders or enforcement actions to which they are subject, are well-known to the banking agencies and other regulators from whom the CFPB may obtain such information. Furthermore, the CFPB itself has supervisory and examination authority over banks with $10 billion or more in total assets ***and their affiliates***.[4]

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[3] *See, e.g.,* BPI comment responding to the CFPB's Small Business Advisory Review Panel for Required Rulemaking on Personal Financial Data Rights: Outline of Proposals and Alternatives Under Consideration (Jan. 25, 2023), available at: BPI-CommentLetter-1033SBREFAOutline-2023.01.24.pdf; BPI comment in support of the joint trades petition for rulemaking defining larger participants of the aggregation services market (Oct. 3, 2022), available at: BPI-CFPBcommentreDataAggregatorPetitionforRulemaking-2022.10.03.pdf; BPI comment responding to the CFPB's ANPR re: Consumer Access to Financial Records (Feb. 4, 20210), available at: BPI-Comment-Letter-Responding-to-CFPB-1033-ANPR-2021.02.04.pdf; BPI comment responding to the CFPB's Notice and Request for Comment Regarding the CFPB's Inquiry Into Big Tech Payment Platforms (Dec. 10, 2021), BPI comment responding to the CFPB's Notice and Request for Comment Regarding the Inquiry into Buy-Now-Pay-Later (BNPL) Providers (March 25, 2022) available at: BPI-CommentCFPBBigTechInquiry-12-10-21final.forsubmission-CFPB-2021–0017.pdf; BPI Comments on CFPB Evaluation of Buy-Now-Pay-Later Providers - Bank Policy Institute.

[4] 12 U.S.C. § 5515(a).

I. The CFPB lacks authority to impose the attestation requirement.

The CFPB proposes to require "supervised registered entities"[5] to submit a written statement with respect to each covered order, which must be signed by an "attesting executive" on behalf of the supervised registered entity.[6] The proposal provides that the attesting executive shall:

- Generally describe the steps that the attesting executive has undertaken to review and oversee the supervised registered entity's activities subject to the applicable covered order for the preceding calendar year; and

- Attest whether, to the attesting executive's knowledge, the supervised registered entity during the preceding calendar year identified any violations or other instances of noncompliance with any obligations that were imposed in a public provision of the covered order by the applicable agency or court based on a violation of a covered law.[7]

First, the CFPB lacks the authority to impose such an attestation requirement. The CFPB cites its supervisory authority under 12 U.S.C. § 5514(b)(7)(A)-(C) to impose the executive attestation requirement. These sections provide that the CFPB "shall prescribe rules to facilitate supervision of" covered nonbanks and the "assessment and detection of risks to consumers;" that the CFPB "may require" a covered nonbank to "generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers;" and "may prescribe rules regarding" covered nonbanks "to ensure that such persons are legitimate entities and are able to perform their obligations to consumers. Such requirements may include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements." The proposed attestation requirement is not a "record" that the CFPB can require covered nonbanks to "generate, provide or retain for the purposes of facilitating supervision or assessing or detecting risks to consumers." A record is generally understood to be "something that records: such as "something that recalls or relates past events"[8] An attestation is not a description of

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[5] The proposal defines a "supervised registered entity" as "a registered entity that is subject to supervision and examination by the Bureau pursuant to 12 U.S.C. 5514(a) except as provided in paragraphs (o)(1) through (4) of this section." Pursuant to 12 U.S.C. 5514(a)(1) and (3), 5514(a) does not apply to "persons described in section 1025(a) or 1026(a)." 1025(a) applies, in part, to any covered person that is "an insured depository institution with total assets of more than $10,000,000,000 ***and any affiliate thereof***" (emphasis added). Thus, an IDI with total assets of more than $10 billion and any affiliate thereof would not be captured by the proposed definition of "supervised registered entity" and thus, the proposed attestation requirement would not apply to those entities. We provide comments on the attestation proposal because of the significant concerns we have with the negative effect such a requirement could have on consumers by discouraging qualified individuals from seeking employment with entities providing consumer financial products and services.

[6] 88 Fed. Reg. at 6098.

[7] 88 Fed. Reg. at 6132; proposed § 1092.203.

[8] *See* Merriam Webster Definition of "record," *available at*: Record Definition & Meaning - Merriam-Webster. Other examples given are: "an official document that records the acts of a public body or officer; an authentic official copy of a document deposited with a legally designated officer; and the official copy of the papers used in a law case."

past events, but rather an affirmative requirement imposed on a senior officer to certify to certain actions having been taken with legal implications for the executive. Moreover, in contrast to other statutes, Congress has not imposed an attestation or certification requirement on executives in this context.[9] The CFPB may not impose this requirement in the absence of clear authority to do so.

Nor is it of the type of rule contemplated as helping to "ensure such persons are legitimate entities and are able to perform their obligations to consumers." The types of requirements contemplated address the competency of management and financial requirements to ensure the entity's solvency. The proposed attestation requirement does not further either of those statutory purposes and thus is outside the scope of the CFPB's authority.

II. The proposed attestation requirement would harm, rather than help, consumers.

Even if the CFPB had the authority to impose the proposed attestation requirement, the attestation requirement would have significant negative consequences and ultimately harm consumers. The proposal states that while the proposed attestation requirement "would require the written statement to be signed by the supervised registered entity's attesting executive, it would not require the attesting executive to submit a statement subject to the penalty of perjury. Nevertheless, knowingly and willfully filing a false attestation or report with the Bureau may be subject to criminal penalties, citing 18 USC 1001, which subjects anyone who knowingly and willfully "makes any materially false, fictitious, or fraudulent statement or representation" to the government to a fine and imprisonment for not more than 5 years.

The CFPB reasons that "the signature requirement, and the consequent potential for criminal liability where a knowingly false attestation is made, would be likely to deter attesting executives from submitting written statements that are incorrect or based on incomplete or otherwise inadequate information. This requirement should significantly enhance the accuracy and usefulness of the written statement."[10]

Although the attestation seems to contemplate penalties only for intentionally false certifications by stating that the attestation is made "to the attesting executive's knowledge," the language above indicates that the attestation requirement "***would be likely to deter attesting executives for submitting written statements that are incorrect or based on incomplete or otherwise inadequate information."***[11] This latter statement does not make any reference to intent or the reasonable scope of the executive's knowledge. Thus, there could be a risk that a certifying officer who, in good faith, submits an attestation later deemed "incorrect or false" may nonetheless be found to be in violation of the proposed regulation and potentially held criminally liable.

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[9] For example, in order to take advantage of a specific exemption in the Volcker Rule to engage in prime brokerage transactions with a related covered fund, Congress required the banking entity's chief executive officer to certify in writing that the banking entity does not guarantee, assume, or otherwise insure the obligations or performance of fund. 12 U.S.C. § 1851(f)(3)(ii).

[10] 88 Fed. Reg. at 6125.

[11] 88 Fed. Reg. at 6125.

The CFPB, however, fails to consider the fact that the possibility of criminal liability will almost certainly have the counterproductive consequence of deterring talented and experienced individuals from seeking senior executive officer positions at entities subject to an attestation requirement – precisely the opposite result that the CFPB purports to seek to further in issuing this proposal – to "reduce the risks to consumers" posed by nonbanks engaged in the provision of consumer financial products and services.

Shifting sole responsibility with the potential for civil or criminal liability to an attesting officer or any individual is fundamentally unfair, as many individuals are responsible for compliance, and would encourage a mistaken notion that compliance is the sole responsibility of that individual, thus undermining the goal of creating a culture of compliance throughout the institution.

Additionally, the proposed regulation does not provide an opportunity to indicate that an institution identified noncompliance or areas requiring improvement and either completed related remediation efforts prior to year-end or continues to pursue remediation efforts, which should be relevant whenever any possible violation of law or noncompliance is discovered at a regulated entity generally.

The CFPB also has failed to identify the benefits to the executive attestation requirement that could not readily be achieved through the exercise of its existing supervisory authorities with fewer negative consequences. The CFPB explains that the proposed attestation requirement would serve two purposes: first, it would "facilitate the Bureau's supervision efforts, including its efforts to assess compliance with the requirements of Federal consumer financial law, obtain information about supervised entities' activities and compliance systems or procedures, and detect and assess risks to consumers and to markets for consumer financial products and services."[12] Second, "the proposed written-statement requirements would help ensure that supervised registered entities "are legitimate entities and are able to perform their obligations to consumers."[13]

The CFPB explains further that the proposed written statement would help the Bureau assess whether an entity is working in good faith to comply with its legal obligations. If the Bureau determines an entity "is not working in good faith to comply with its legal obligations, that conclusion might provide grounds for prioritizing the entity for supervisory examinations to assess its compliance with Federal consumer financial law."[14] Furthermore:

> [t]he Bureau expects that the risk of such increased supervisory scrutiny will provide an incentive for some entities to improve their compliance efforts so that they can submit a written statement that is less likely to result in increased scrutiny from the Bureau. Thus, by making it more difficult to quietly disregard the law, the Bureau anticipates that the written-statement requirement would likely motivate at least a few supervised entities with substandard compliance practices to enhance their compliance efforts and comply with their legal obligations, including their obligations under Federal consumer financial law. The Bureau

[12] 88 Fed. Reg. at 6098 (internal citation omitted).

[13] 88 Fed. Reg. at 6099 (internal citation omitted).

[14] 88 Fed. Reg. at 6099.

> likewise believes that the proposed requirement to designate an attesting executive with knowledge of the entity's systems and procedures for achieving compliance with the covered order and with control over the efforts to comply with the covered order would likely provide an incentive to pay more attention to the entity's legal obligations.[15]

The goals the CFPB articulates for proposing to require the attestation could be achieved through the CFPB's supervisory process without the significant downsides that would result from requiring attestation by an executive officer with potential criminal liability implications. The CFPB also states that it is "considering imposing a requirement that the written statement contain a short description of the entity's compliance systems and procedures relating to the covered order, including a description of the processes for notifying the attesting executive regarding violations or other instances of noncompliance with the order."[16] This proposed short statement that would be included in the public registry, however, would not provide an adequate, accurate description of the compliance framework and could risk revealing confidential information about the entity or its compliance system or procedures. The CFPB could obtain more detailed and comprehensive information about the entity's compliance systems and procedures for complying with the order through the supervisory process.

The CFPB's proposed alternative proposal for an attestation based on an officer's "reasonable belief that in the executive's professional judgment, the entity's compliance systems and procedures are reasonably designed to detect violations of the applicable covered order" would not negate the concerns articulated previously about the attestation requirement. Executives likely would still have significant concerns with potential personal liability for such an attestation, and the attestation requirement may give the impression that the compliance burden rests solely with that executive officer rather than being an obligation of the entire organization. Thus, we believe that an attestation requirement – in any form – ultimately will undermine the fundamental goal of protecting consumers.

III. The CFPB lacks the authority to require registration by IDIs under section 1022.[17]

The CFPB states that it "might at some point consider collecting or publishing the information described in the proposal from" IDIs pursuant to its authority to issue rules mandating collection of information under section 1022(c)(4)(B)(ii)."[18] The CFPB also states that "[i]n addition, the proposal

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[15] 88 Fed. Reg. at 6099.

[16] 88 Fed. Reg. at 6126.

[17] 1022(c)(7)(A) provides that "IN GENERAL.—The Bureau may prescribe rules regarding registration requirements applicable to a covered person, ***other than an insured depository institution***, insured credit union, or related person" (emphasis added).

[18] 19 Fed. Reg at 6108. 1022(c)(4)(B)(ii) provides that "In conducting any monitoring or assessment required by this section, the Bureau shall have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers. (B) Methodology. In order to gather information described in subparagraph (A), the Bureau may— (i) gather and compile information from a variety of sources, including examination reports concerning covered persons or service providers, consumer complaints, voluntary surveys and voluntary interviews of consumers, surveys and interviews with covered persons and service providers, and review of available databases; and (ii) require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under

would conform with the Bureau's registration authority under CFPA section 1022(c)(7), which states that the Bureau may impose registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person."[19] Thus, it is not clear whether the CFPB believes that it has the authority to require registration by IDIs as contemplated in the proposal for certain nonbanks. However, the registration authority clearly carves out IDIs; had Congress intended to give the CFPB this same authority with respect to IDIs, it would have done so. Indeed, in the CFPB's similar proposal to create a registry of supervised nonbanks that use form contracts, the CFPB states that "***CFPA sections 1022 and 1024 do not expressly authorize the Bureau to establish a registration system for depository institutions, which are excluded from the Bureau's registration authority under section 1022(c)(7)(A) and excluded from the scope of section 1024(b)(7***). There is no parallel registration provision in the Bureau's authorities over depository institutions generally."[20]

IV. Collecting the proposed information from IDIs or IDI affiliates would not further the CFPB's goals in issuing the proposal and would be unduly burdensome and duplicative.

Even if the CFPB had the authority to impose the registration requirement on IDIs, which it does not, such a requirement would not further the CFPB's goals in issuing the proposal and would be unduly burdensome and duplicative for IDIs. The CFPB itself explains in the proposal why the information collection and registry requirement is appropriate for ***nonbanks rather than IDIs***. The CFPB asserts that there is a greater need to collect the proposed information from the nonbanks under the CFPB's jurisdiction because "the identity and size of all insured depository institutions and insured credit unions is known to the Bureau due to registration regimes maintained by the prudential regulators, which track and make public such information."[21] Moreover, the Bureau reasons, "there are only four prudential regulators, and they regularly publish their consumer financial protection orders. In contrast, comprehensive, readily accessible information is currently lacking about the identity of, and orders issued against, nonbanks subject either to the Bureau's market monitoring authority or to its supervisory authority across the various markets for consumer financial products and services."[22] In addition, the CFPB itself has supervisory and examination authority over banks with $10 billion or more in total assets and their affiliates.[23]

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oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions, furnishing information described in paragraph (4), as necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress."

[19] 88 Fed. Reg. at 6108.

[20] Emphasis added. *See* CFPB Proposed Rule with Request for Comment: "Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections (Jan. 11, 2023) at note 117, (internal citations omitted), *available at*: https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf.

[21] 88 Fed. Reg. at 6108.

[22] 88 Fed. Reg. at 6108.

[23] 12 U.S.C. § 5515(a).

The CFPB asserts similar reasons for prioritizing nonbank registration in connection with its parallel proposal regarding form contracts, which does not include IDIs or IDI affiliates within the proposed registration requirements.[24]

The CFPB also has memoranda of understanding in place through the Conference of State Bank Supervisors with various state financial regulatory authorities for "coordination and information sharing in supervision and enforcement work"[25] and with multiple state and municipal attorneys general offices to facilitate confidential data sharing.[26]

The scope of the proposed rule is unclear as to whether holding companies and nonbank affiliates of insured depository institutions will be subject to the proposed rule.[27] The proposed rule could be interpreted as stating that only insured depository institutions – and not holding companies and nonbank affiliates – will be exempt from the registration requirements under the proposed rule.[28] Subjecting holding companies and nonbank affiliates of insured depository institutions to the proposed

[24] The NPR proposes to require "supervised nonbanks" to register under certain circumstances, where supervised nonbank is defined as "a nonbank covered person that is subject to supervision and examination by the Bureau pursuant to 12 U.S.C. 5514(a)." As noted previously, banks with greater than $10 billion dollars in assets and any affiliate thereof are carved out of 12 U.S.C. 5514(a). The CFPB explains in the proposal that the focus on supervised nonbanks "reflects a priority on establishing a system by rule for the collection of information on the use of covered terms and conditions from supervised nonbanks as a subset of covered persons. ***One of the reasons for prioritizing coverage of supervised nonbanks is the need to identify them . . .*** the Bureau estimates that there are thousands of nonbanks subject to its supervisory authority under CFPA section 1024(a). In addition, there is no comprehensive registry of identifying information for nonbanks subject to the Bureau's supervisory authority across supervised markets. Further, given resource constraints, the Bureau does not regularly examine each of the thousands of nonbanks subject to its supervisory authority under CFPA section 1024. Rather, under CFPA section 1024(b)(2), the Bureau must implement a risk-based program for supervision of these nonbanks. By contrast, Federal prudential regulators track and already publicize information about the identity and size of depository institutions. These include depository institutions subject to the Bureau's supervisory authorities under CFPA sections 1025 and 1026. The Bureau also publicly identifies the fewer than 200 large depository institutions subject to its supervisory authority under CFPA section 1025, and it has procedures for regularly supervising them. In light of all these considerations, the Bureau is prioritizing this proposal to establish a registration system for identifying those nonbanks that use covered terms or conditions and monitoring and assessing the associated risks to consumers" (internal citations omitted; emphasis added)." *See* CFPB Proposed Rule with Request for Comment: "Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections (Jan. 11, 2023), 70-71 (internal citations omitted), available at: https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf.

[25] *See* 201305_cfpb_state-supervisory-coordination-framework.pdf (consumerfinance.gov); The CFPB Establishes Framework to Better Coordinate with State Regulators | Consumer Financial Protection Bureau (consumerfinance.gov); Map of Signed States Revised 20140923.ppt (live.com).

[26] *See* List of MOUs (consumerfinance.gov).

[27] The CFPB states in footnote 139 that "[a]n 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" (emphasis added). 88 Fed. Reg. at 6108, note 139 (Jan. 30, 2023).

[28] The proposed rule provides greater clarity that neither IDIs with total assets of more than $10 billion nor any affiliate thereof would be subject to the attestation requirement. *See* note 4, *infra*.

rule does not align with the CFPB's stated intent of facilitating the CFPB's risk-based supervision program for covered nonbanks about which it lacks information.

Because the same pragmatic reasons for excluding IDIs from the registry requirement apply to IDI holding companies and nonbank affiliates of IDIs, we presume that the proposed registration requirement would not apply to those entities, as they are subject to comprehensive, consolidated regulation, supervision, and examination and known to the prudential regulators. Moreover, as noted, the CFPB has supervisory and examination authority over banks with $10 billion or more in total assets and their affiliates.[29] Thus, the CFPB may readily access information about those IDIs and their holding companies and affiliates relevant to its monitoring and supervisory authorities. The need articulated by the CFPB to identify nonbanks subject either to the Bureau's market monitoring authority or to its supervisory authority across the various markets for consumer financial products and services does not apply to IDI holding companies and nonbank affiliates of IDIs. We encourage the CFPB to continue to use its various authorities to help ensure that nonbanks that are not affiliated with IDIs are complying with consumer financial protection laws to help protect consumers across the consumer financial services marketplace.

The CFPB has provided no sufficient justification or basis for requiring IDI holding companies or nonbank affiliates to comply with the proposed registry requirement. If, despite there being no rationale for doing so, the CFPB intends to require IDI holding companies and nonbank affiliates to comply with the proposed registry requirement, the CFPB must repropose the rule to clarify this point and explain the purpose and justification for including these entities in the proposed registry requirement so that commenters have the opportunity to respond to that aspect of the proposal. More broadly, the CFPB should ensure that any rule it issues clearly identifies the intended scope so that responsible companies have a clear path to compliance.

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If you have any questions, please contact the undersigned by phone at 703-887-5229 or by email at paige.paridon@bpi.com.

Sincerely,

/s/ Paige Pidano Paridon

Paige Pidano Paridon
Senior Vice President,
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[29] 12 U.S.C. § 5515(a).