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HOW THE CFPB'S NEW REGISTRIES IMPACT COMPLIANCE

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Introduction

- The CFPB has proposed to create two public registries:
 - Terms and Conditions Registry
 - Repeat Offender Registry
- Certain nonbanks would be required to register
- Agenda for today:
 - Details of proposals, including which entities must register
 - Bureau's rationale
 - Criticisms of the proposals
 - Implications and risks for entities required to register

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Bureau's Power to Create the Registries

- To create the registries, the Bureau is relying on its authority under the Consumer Financial Protection Act (“CFPA”)
 - CFPA sections 1022(b) and (c) and 1024(b) - these sections require the Bureau to monitor for risks to consumers in markets for consumer financial products and services, and to conduct a risk-based supervision program for nonbanks operating in markets the Bureau supervises.
- Where did this idea come from?
- Registries are consistent with the CFPB’s focus on using its bully pulpit to shame entities into changing behavior

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Terms and Conditions Registry

- Nonbanks subject to its supervisory authority register in a nonbank registration system concerning the use of certain terms and conditions in form contracts
- Companies must report annually on use of standard-form contract terms that limit rights/legal protections
- Published in a publicly available/searchable database

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What's Included?

- Waivers of claims consumers can bring
- Limits on a company's liability to a consumer
- Time frame, forum, or venue restrictions
- Class action waivers/clauses
- Limits on ability for consumers to complain or post reviews
- Arbitration clauses

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Bureau's Rationale

- Market transparency
- Shed light on illegal practices
- Identifying non-bank actors that offer financial products and services
- Bolster its supervisory authority
- Name and Shame?
- End run to revive the arbitration rule?

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Compliance Considerations

- Huge administrative burden to decide what to include and what not to include
- Compliance departments need to be focused to ensure contracts adhere to applicable law
- Added compliance risk of legal but disfavored terms/conditions
- Buffet for plaintiffs lawyers?

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Repeat Offender Registry

- In December 2022, the Bureau proposed a rule that would require covered nonbanks to report certain agency and court orders related to consumer financial products or services.
- Certain larger supervised nonbanks would be required to designate a senior executive to attest regarding the entity's compliance with the orders.

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Bureau's Rationale

- The Bureau stated that comprehensive collection of public agency and court orders enforcing consumer financial law would help it identify broader trends and risks related to consumers.
- The registry would allow the Bureau to monitor for potential risks to consumers arising from patterns of recidivism.
 - "Persons that are subject to one or more orders may pose greater risks to consumers than others. Existence of multiple orders may serve as a 'red flag' and indicate broader problems at the entity that pose related risks to consumers..."
 - Consistent with the Bureau's focus on repeat offenders.
- Bureau could use information from registry in its rulemaking, supervisory, enforcement, and consumer education efforts.

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Which Entities Are Required to Register?

- Under the proposed rule, entities that meet the following criteria are required to register:
 - Nonbank covered persons
 - Subject to certain public agency and court orders

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Covered Nonbanks

- A “covered nonbank” means a covered person that does not fall into five exceptions.
 - Covered person has the same meaning as in the CFPB
 - Exceptions
 - An insured depository institution, insured credit union, or related person
 - A state
 - A natural person
 - Certain motor vehicle dealers
 - Persons that qualify as a covered person based solely on conduct that is the subject of, and that is not otherwise exempted from, an exclusion from the Bureau’s rulemaking authority

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Covered Orders

- “Covered orders” means orders that are:
 - Public and final
 - Preliminary injunctions, temporary restraining orders, etc. are excluded
 - Obligations that constitute CSI of another agency are excluded
 - Issued by either an agency or a court
 - Issued at least in part in any action or proceeding brought by any federal agency, state agency, or local agency
 - Must identify the covered nonbank by name as a party subject to the order
 - For example, indirect references to a covered nonbank as an “affiliate” of a named party are not covered orders

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Covered Orders

- Must contain public provisions that impose obligations on the covered nonbank to take certain actions or to refrain from taking certain actions
 - A declaratory judgment order finding that an entity violated the law but not imposing any remedial obligations would not qualify
 - Orders where the only public provisions are releases would not qualify
- Must impose one or more of the obligations on the covered nonbank based on an alleged violation of a covered law
 - “Based on” - orders that contain neither an admission of liability nor a statement setting forth the factual predicate may be relevant
- Has effective date on or later than January 1, 2017

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Covered Law

- “Covered law” means:
 - Federal consumer financial law as that term is defined in the CFPA
 - Any other law as to which the Bureau may exercise authority
 - e.g., the Military Lending Act
 - The UDAP prohibition under Section 5 of the FTC Act or any rule or order issued for the purpose implementing the prohibition
 - State laws prohibiting unfair, deceptive, or abusive acts or practices
 - Identified in Appendix A of the proposed rule
 - State law amending or otherwise succeeding a law identified in Appendix A
 - A rule or order issued by a state agency for purposes of implementing a prohibition on unfair, deceptive, or abusive acts or practices contained in a relevant state law

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Registration

- Each covered nonbank that is required to register provide:
 - Identifying information and administrative information
 - Information regarding covered orders including:
 - Copy of the order
 - Information identifying the government entity that issued the order, the effective date of the order, the expiration date, all covered laws found or alleged to have been violated
 - Submit a revised filing amending any information within 90 days after any amendments are made to the covered order

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Annual Reporting for Supervised Entities

- A supervised registered entity must designate a senior executive to attest regarding the entity's compliance with covered orders
- A "supervised registered entity" means an entity that is subject to Bureau supervision pursuant to the CFPB with certain exceptions
 - Includes larger participants
 - Includes entities supervised because Bureau has determined that the entity poses risks to consumers
 - Does not include:
 - Certain service providers
 - A person with less than \$1 million in annual receipts resulting from offering or providing certain consumer financial products or services

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Annual Reporting for Supervised Entities

- Supervised registered entities must annually submit a written statement with respect to each covered order that is signed by the attesting executive
- Among other things, the attesting executive’s statement must:
 - Generally describe the steps the executive has undertaken to review and oversee the entity’s activities subject to the applicable covered order for the preceding calendar year
 - Attest whether the supervised registered entity identified any violations or instances of noncompliance

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Criticisms of Proposal

- Commenters criticized the proposal:
 - CFPB underestimated costs of compliance
 - CFPB estimates \$1,500 cost, but commenters stated that this calculation “severely underestimates” the cost of internal review incurred by fulfilling the requirements
 - Significant share of covered public enforcement actions already reported by state regulators in the Nationwide Multistate Licensing System & Registry (“NMLS”), particularly for nonbank entities subject to CFPB supervisory authority
 - Appendix A of covered state laws does not provide a comprehensive view of state consumer protection efforts

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Criticisms of Proposal

- Information will not be useful to consumers
 - Many consumers lack the context to fully understand the complexity of the alleged violations
- There should be a limit on the number of times a single instance of a violation needs to be reported
 - In some cases, allegations arising out of the same set of facts form the basis for actions by multiple agencies
- The Bureau should not publicize the name and title of the attesting executive
 - Could suggest that consumers should contact that individual specifically to make a complaint
- Requirements and scrutiny on attesting executive could make it more difficult to hire and retain this person
- The \$1 million threshold is not a meaningful limiter
 - According to some commenters, nearly all nonbanks subject to the CFPB's supervision would meet this threshold.

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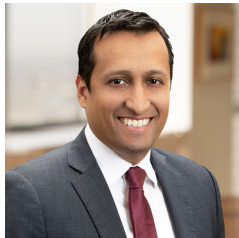
Compliance Considerations

- A final rule has not yet been released
- If the rule is finalized, complying with the requirements may not be procedurally difficult, but managing increased regulatory, litigation, and reputational risk resulting by the registry could be challenging
- May also impact entities' decisions of whether and when to settle.
 - Companies sometimes settle as a business decision to not incur the uncertainty and cost of litigation or to avoid conflict with a regulator. The registry may change this calculus.

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Questions?



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