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April 3, 2023

Via Electronic Submission

Comment Intake—Nonbank Registration and
Collection of Contract Information
Consumer Financial Protection Bureau
c/o Legal Division Docket Manager
1700 G Street NW
Washington, DC 20552

RE: Docket No. CFPB-2023-0002— Nonbank Registration and Collection of Contract Information

Dear Sir or Madam:

On behalf of this country’s community banks, the Independent Community Bankers of America (“ICBA”)¹ welcomes the opportunity to comment on the Consumer Financial Protection Bureau’s (“CFPB”) proposal to create a registry of nonbanks that use certain terms or conditions.² While ICBA believes that nonbank products and activity warrant supervision by the CFPB, this current proposal sets a scope that is too broad and casts a dragnet that will obfuscate the true bad actors in the unsupervised nonbank space. ICBA is concerned that the underlying terms or conditions that the Bureau is classifying as worthy of heightened scrutiny are so ubiquitous and expected that they are not good proxies for bad actors.

¹*The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services.*

With nearly 50,000 locations nationwide, community banks employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than \$5.8 trillion in assets, over \$4.8 trillion in deposits, and more than \$3.8 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

² 88 Fed. Reg. 6906 (Feb. 1, 2023).

The Nation’s Voice for Community Banks.®

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Background

The CFPB is proposing to require certain nonbanks to report whether they use terms or conditions for products or services that, among other matters, specify a venue for legal proceedings, seek remedies through participation in class action suits, set a predetermined calculation schedule on remedy, or require a consumer to bring any type of legal action in arbitration. The Bureau would then publish the information it collects in a registry.

The Bureau asserts that this registry would facilitate public awareness and oversight. The Bureau also contends that the registry would facilitate its risk-based nonbank supervision program, as well as inform its various functions, including monitor for risks to consumers, supervision, enforcement, consumer education, and rulemaking.

ICBA Comments

Nonbanks, including fintechs and big tech, deserve federal supervision

ICBA has been on record several times, asking the Bureau to exercise its statutory authority to actively supervise nonbank market participants.³ This supervision should include not only larger market participants, but also nonbank fintechs that often act similar to and offer products identical to supervised and examined community banks.

As we have stated in the past, ICBA welcomes the Bureau’s scrutiny of nonbanks, including fintechs and big tech.⁴ Because many nonbanks must comply with CFPB regulations, it stands to reason that the Bureau should also determine whether those regulations are actually being adhered to. Nonbank technology companies are continuously looking to increase their presence in the financial services ecosystem. However, given their growth and increasing power in the financial services market, there does not appear to be a commensurate growth in the active supervision and examination of these providers.

Nonbanks do not undergo routine examinations by federal agencies to ensure compliance with fair lending laws. Nor are these entities required to comply with data security and privacy standards, such as the Gramm-Leach Bliley Act with which community banks are required to comply. Certain nonbank technology companies might use loss leader products to generate and harvest consumer data to be used for other purposes, unbeknownst to the consumer or customer. Regulators must play an equally active role in defining and identifying the risks big tech poses to consumers and businesses alike.

³ See Emancipator, Michael, “ICBA Comment Letter RE: Docket No. CFPB-2022-0024—Supervisory Authority Over Certain Nonbank Covered Persons Based on Risk Determination; Public Release of Decisions and Orders,” May 31, 2022, *available at* https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/icba-comment-on-cfpb-nonbank-supervision.pdf?sfvrsn=25c21c17_5.

⁴ *Id.*

The current proposal casts too large a net and will not adequately distinguish nonbank firms

While ICBA believes that nonbanks, especially fintech and big tech companies, should be supervised, ICBA is concerned that the methods proposed here cast too large a scope that will add noise to the Bureau's market monitoring function, making it more difficult to find a signal that indicates illegal or abusive practices or products.

The contract terms and conditions on which the Bureau focuses the proposal are so ubiquitous that they serve as a poor proxy for distinguishing nonbank participants. The Bureau's proposal will yield a catalogue of companies that is so broad and unwieldy as to not be useful. The Bureau's proposal supports this assertion, stating, "[f]orm contracts are the dominant means of setting terms and conditions for consumer financial products and services in today's marketplace."⁵ It is cost-prohibitive for a company to engage legal counsel to develop a bespoke contract for every transaction that the company enters into with a consumer. As a result, form contracts prevail and are commonplace.

ICBA disagrees with the Bureau that the use of form contracts is risky. Even allowing that form contracts *are* risky, their prevalence makes them a dismal component to distinguish among entities in the marketplace. In order to instill a true risk-based supervisory assessment of nonbank companies, the Bureau should use variables that will differentiate among companies, allowing for the Bureau to compare and contrast. One such variable is the frequency and severity of complaints lodged in the Bureau's complaint database. Another example would be to collaborate with State attorney generals. But choosing a component that does not present any variation, i.e., form contracts, is by definition, not a variable. It's more akin to a control.

Conclusion

Because nonbanks continue to grow in size and expand their products and services, it is important that the CFPB oversee nonbank service providers, given that much of the federal consumer protection framework is dependent on ensuring compliance with laws and regulations. However, the proposed method of collecting and reporting the use of form contracts is too broad, thus negating its utility as a component in assessing nonbank risk.

⁵ *Supra* note 2, at 6907.

ICBA thanks the Bureau for the opportunity to comment on this procedural amendment. Should you like to discuss the recommendations made in this letter, please do not hesitate to reach me at Michael.Emancipator@icba.org or 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Vice President and Regulatory Counsel

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