names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Clay Coon, Office of Supervision Policy, at 202-435-7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The Bureau is proposing to establish and maintain a registry that would collect information about certain public agency and court orders and facilitate the Bureau's supervision of certain companies. In this way, the Bureau would more effectively be able to monitor and to reduce the risks to consumers posed by entities that violate consumer protection laws. The Bureau also proposes to publish the registry online for use by the public and other regulators.

The proposed rule would require certain nonbank covered person entities (with exclusions for insured depository institutions, insured credit unions, related persons, States, certain other entities, and natural persons) to register with the Bureau upon becoming subject to a public written order or judgment imposing obligations based on violations of certain consumer protection laws. 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. The Bureau would publish this information on its website and potentially in other forms.

The Bureau would also require certain nonbanks subject to the Bureau's supervisory authority under section 1024(a) of the Consumer Financial Protection Act of 2010 (CFPA)[1] annually to identify an executive (or executives) who is responsible for and knowledgeable of the firm's efforts to comply with the orders identified in the registry. The name and title of the executive would also be published in the registry. The supervised nonbank entity would also be required to submit on an annual basis a written statement signed by that executive (or executives) regarding the entity's compliance with each order in the registry.

Nonbank registrants would have to register in the Bureau system starting after both the effective date of the final rule and the launch of a registration system created by the Bureau. Details on how to register will be provided in the online system through filing instructions.

II. Background

A. The Bureau and Other Agencies Issue and Obtain Enforcement Actions Against Nonbanks to Protect Consumers

The Bureau administers and enforces Federal consumer financial laws against nonbanks in consumer financial markets. In addition to the Bureau, Congress authorized multiple other Federal and State agencies to enforce Federal consumer financial law, including the CFPA prohibition against unfair, deceptive, or abusive acts or practices (UDAAP) and enumerated statutes including the Truth in Lending Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and

[1] 12 U.S.C. 5514(a).

other statutes.[2] Several Federal agencies, most notably the Federal Trade Commission, also enforce section 5 of the Federal Trade Commission Act (FTC Act), which similarly prohibits unfair or deceptive acts or practices (UDAP).[3] The prohibitions against unfair and deceptive acts or practices in the CFPA were modeled after the same prohibitions in the FTC Act. Furthermore, States across the country began codifying State UDAP statutes modeled after the FTC Act starting in the 1960s and 1970s.[4] These laws differ in many respects from each other, but generally they hail from a common consumer protection tradition originating with the FTC Act, similar to the CFPA's prohibition on UDAAP.

The Bureau was created in the wake of the 2008 financial crisis, which was caused by a variety of overlapping factors including systemic malfeasance in the mortgage industry.[5] Since passage of the CFPA, the Bureau has brought more than 250 enforcement actions against nonbanks. When the Bureau issues an order against a covered person (often, but not always, as a consent order), the Bureau often follows up with supervisory or enforcement action to ensure the company's compliance with the

[2] *See* 12 U.S.C. 5481(12), 5552; 12 CFR part 1082; Bureau Interpretive Rule, Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 FR 31940 (May 26, 2022).

[3] 15 U.S.C. 45.

[4] Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 Antitrust L.J. 911, 912 (2017).

[5] *See* U.S. Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report*, at 104–11, 113–18 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf; *see also* S. Rep. No. 111-176, at 11 (2010) ("Th[e] financial crisis was precipitated by the proliferation of poorly underwritten mortgages with abusive terms, followed by a broad fall in housing prices as those mortgages went into default and led to increasing foreclosures.").

order. On numerous occasions, the Bureau has uncovered companies that failed to comply with consent orders that the companies entered into with the Bureau voluntarily.[6]

B. Congress Instructed the Bureau to Monitor Markets for Consumer Financial Products and Services

Congress established the Bureau to regulate (among other things) the offering and provision of consumer financial products and services under the Federal consumer financial laws, and it granted the Bureau authority to ensure that the Bureau could achieve that mission.[7] But it also understood that the Bureau could not fully and effectively achieve that mission unless it developed a clear window into the markets for and persons involved in offering and providing such products and services. To that end, Congress mandated that the Bureau "shall 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."[8]

Notably, Congress directed the Bureau to engage in such monitoring "to support its rulemaking *and other functions*,"[9] instructing the Bureau to use monitoring to inform all of its work. Congress separately described the Bureau's "primary functions" as "conducting financial education programs"; "collecting, investigating, and responding to consumer complaints"; "collecting, researching, monitoring, and publishing information

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[6] *See, e.g.*, *Bureau of Consumer Fin. Prot. v. Encore Capital Grp.*, No. 3:20-cv-01750-GPC-KSC (S.D. Cal. Oct. 16, 2020); *Sec. Nat'l Automotive Acceptance Co.*, CFPB No. 2017-CFPB-0013 (Apr. 26, 2017); *Military Credit Servs., LLC.*, CFPB No. 2016-CFPB-0029 (Dec. 20, 2016).

[7] *See* 12 U.S.C. 5511.

[8] *See* 12 U.S.C. 5512(c)(1).

[9] *Id.* (emphasis added).

relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets"; "supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law"; "issuing rules, orders, and guidance implementing Federal consumer financial law"; and "performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau."[10] Put simply, Congress envisioned that the Bureau would use its market monitoring work to inform its activities, all with the express purpose of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[11]

To achieve these ends, Congress took care to ensure that the Bureau had the tools necessary to effectively monitor for risks in the markets for consumer financial products and services. It granted the Bureau authority "to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers."[12] In particular, Congress authorized the Bureau to "require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under 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," that would furnish the Bureau with

[10] 12 U.S.C. 5511(c).

[11] 12 U.S.C. 5511(a).

[12] 12 U.S.C. 5512(c)(4)(A).

such information "as necessary for the Bureau to fulfill the monitoring . . . responsibilities imposed by Congress."[13]

To assist the Bureau in allocating resources to perform its monitoring, Congress also identified a non-exhaustive list of factors that the Bureau may consider, including "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service";[14] "understanding by consumers of the risks of a type of consumer financial product or service";[15] "the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers";[16] "the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers";[17] and "the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service."[18]

Congress also anticipated that the insights the Bureau would gain from such market monitoring should at times become available to a wider audience than just Bureau employees. Not only did Congress mandate that the Bureau "publish not fewer than 1 report of significant findings of its monitoring . . . in each calendar year," but it also instructed that the Bureau may make non-confidential information available to the public

[13] 12 U.S.C. 5512(c)(4)(B)(ii).

[14] 12 U.S.C. 5512(c)(2)(A).

[15] 12 U.S.C. 5512(c)(2)(B).

[16] 12 U.S.C. 5512(c)(2)(C).

[17] 12 U.S.C. 5512(c)(2)(E).

[18] 12 U.S.C. 5512(c)(2)(F).

"as is in the public interest."[19] Congress gave the Bureau discretion to determine the format of publication, authorizing the Bureau to make the information available "through aggregated reports or other appropriate formats designed to protect confidential information in accordance with [specified protections in this section]."[20] These instructions regarding public release of market monitoring information align with one of the Bureau's "primary functions" mentioned above—to "publish[] information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."[21]

The Bureau takes its market monitoring obligations seriously, and it has incorporated valuable insights gained to date from such monitoring in conducting the multiple functions assigned to it under the CFPA, including its supervisory and enforcement efforts, as well as its rulemaking, consumer education, and other functions.[22] As discussed in further detail below, this proposed rule seeks to continue and build upon that commitment by creating an order registry to accomplish a number of goals, with a

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[19] 12 U.S.C. 5512(c)(3).

[20] 12 U.S.C. 5512(c)(3)(B).

[21] 12 U.S.C. 5511(c)(3).

[22] *See, e.g.*, CFPB Semiannual Regulatory Agenda, 87 FR 5326, 5328 (Jan. 31, 2022) ("The Bureau's market monitoring work assists in identifying issues for potential future rulemaking work."); Payday, Vehicle, and Certain High-Cost Installment Loans, 82 FR 54472, 54475, 54488, 54498 (Nov. 17, 2017) (citing information obtained through Bureau market monitoring efforts); Arbitration Agreements, 82 FR 33210, 33220 (July 19, 2017) (same). *See also, e.g.*, Consumer Fin. Prot. Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf (publishing information obtained through Bureau market monitoring efforts); Consumer Fin. Prot. Bureau, *Consumer Credit Trends*: *Credit Card Line Decreases* (June 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-line-decreases_report_2022-06.pdf (same); Consumer Fin. Prot. Bureau, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf (same).

particular focus on monitoring for risks to consumers related to repeat offenders of consumer protection law. A public registry of agency and court orders issued or obtained in connection with violations of law would help the Bureau and the broader public monitor trends concerning corporate recidivism relating to consumer protection law, including areas where prior violations of law are indicia of risk to consumers.

More generally, entities subject to such public orders relating to the offering or provision of consumer financial products and services may pose ongoing risks to consumers in the markets for those products and services. A comprehensive collection of such public orders would shed light on how laws are being enforced across consumer protection laws, jurisdictions, and markets, and help identify trends and potential gaps in enforcement. Both heightened enforcement and the absence of enforcement could possibly provide information regarding risks to consumers—the former as evidence that government agencies with various jurisdictions have identified the need to enforce consumer protection laws, and the latter as potential evidence of less risk to consumers, or perhaps of inattention by regulatory agencies. A centralized, up-to-date repository of such public orders would provide valuable market-based insight that the Bureau could use both to identify concerning trends in these markets that it otherwise might miss and to decide which of several different policy tools would best address the consumer risks presented by these trends. In short, the information sought would significantly increase the Bureau's ability to identify, understand, and ultimately prevent harm in the markets for consumer financial products and services. These and other core goals of the information the Bureau proposes to collect are discussed further below at section IV.

C. Congress Authorized the Bureau to Supervise Certain Nonbank Covered Persons

One of the Bureau's key responsibilities under the CFPA is the supervision of very large banks, thrifts, and credit unions, and their affiliates, and certain nonbank covered persons. Congress has authorized the Bureau to supervise certain categories of nonbank covered persons under CFPA section 1024.[23] Congress provided that the Bureau "shall require reports and conduct examinations on a periodic basis" of nonbank covered persons subject to its supervisory authority for purposes of "assessing compliance with the requirements of Federal consumer financial law"; "obtaining information about the activities and compliance systems or procedures of such person[s]"; and "detecting and assessing risks to consumers and to markets for consumer financial products and services."[24] Pursuant to the CFPA, 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.[25] In making prioritization determinations, the Bureau considers several factors, including "the asset size of the covered person,"[26] "the volume of transactions involving consumer financial products or services in which the covered person engages,"[27] "the risks to consumers created by the provision of such consumer financial products or services,"[28] "the extent to which such institutions are subject to oversight by State authorities for consumer

[23] 12 U.S.C. 5514.

[24] 12 U.S.C. 5514(b)(1).

[25] 12 U.S.C. 5514(b)(2).

[26] 12 U.S.C. 5514(b)(2)(A).

[27] 12 U.S.C. 5514(b)(2)(B).

[28] 12 U.S.C. 5514(b)(2)(C).

protection,"[29] and "any other factors that the Bureau determines to be relevant to a class of covered persons."[30] CFPA section 1024(b)(7)(A)–(C) further authorizes the Bureau to prescribe rules to facilitate supervision and assessing and detecting risks to consumers, as well as to ensure that supervised nonbanks "are legitimate entities and are able to perform their obligations to consumers."[31]

Under those authorities, the Bureau is proposing to require that certain supervised nonbanks annually submit a written statement regarding the company's compliance with any outstanding registered orders. The statement would be signed by a designated senior executive. In the written statement, the attesting executive would generally describe the steps the executive has undertaken to review and oversee the company's activities subject to the applicable order for the preceding calendar year. The executive would then provide an attestation regarding the company's compliance with the order.

The Bureau believes that the proposed written statement would assist it in achieving each of the statutory objectives listed in CFPA section 1024(b)(7)(A)–(C). Therefore, each of those objectives would provide a distinct, independently sufficient basis for the proposed written-statement requirements.[32]

First, requiring submission of an annual written statement would facilitate Bureau supervision and the Bureau's assessment and detection of risks to consumers. In particular, as part of the Bureau's risk-based supervision program, the Bureau considers

[29] 12 U.S.C. 5514(b)(2)(D).

[30] 12 U.S.C. 5514(b)(2)(E).

[31] 12 U.S.C. 5514(b)(7)(A)–(C).

[32] For a more extended discussion of these matters, *see* section IV(D) below.

supervised nonbanks' compliance record regarding consumer protection law when prioritizing supervisory resources. The requirement would also provide valuable information in connection with other aspects of the Bureau's supervisory work and would assist the Bureau's monitoring efforts. For example, the Bureau recently announced that it is increasing its supervisory focus on repeat offenders, particularly those who violate agency or court orders.[33] As part of that focus, it created a Repeat Offender Unit within its supervision program focused on: (i) reviewing and monitoring the activities of repeat offenders; (ii) identifying the root cause of recurring violations; (iii) pursuing and recommending solutions and remedies that hold entities accountable for failing to consistently comply with Federal consumer financial law; and (iv) designing a model for order review and monitoring that reduces the occurrences of repeat offenses.[34] The Repeat Offender Unit is tasked more generally with enhancing detection of repeat offenses, developing processes for rapid review and response designed to address root causes of violations, and recommending corrective actions designed to stop recidivist behavior.[35] The Bureau anticipates that the proposed annual written statement would greatly facilitate that work, among other things.

Second, the proposed written statement requirements would help ensure the company providing the statement is a legitimate entity and is able to perform its obligations to consumers. Information regarding a company's compliance with

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[33] *See* Consumer Fin. Prot. Bureau, *Supervisory Highlights: Issue 28, Fall 2022*, at 2–3 (Nov. 2022), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-28_2022-11.pdf.

[34] *Id.*

[35] *Id.* at 3.

outstanding orders is probative of whether the company is willing and able to satisfy its legal obligations and of whether the company treats potential sanctions for repeat violations of relevant consumer protection laws as a mere cost of doing business. The Bureau also believes that the written-statement requirement would provide an incentive for supervised nonbanks to perform their obligations to consumers by requiring supervised nonbanks to specify which individual executives are responsible for achieving compliance with particular orders. Publication of the identity of this executive would enhance the incentive.

D. Consultation with Other Agencies in Exercising the Authorities Relied Upon in the Proposal

One of the authorities cited as a proposed basis for components of the Bureau's proposed rule is CFPA section 1022(c)(7), which provides that 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."[36] Congress provided that "[i]n developing and implementing registration requirements under [section 1022(c)(7)], the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate."[37] CFPA section 1024(b)(7)—the proposed statutory basis for the written-statement requirement—includes a similar consultation provision.[38]

[36] 12 U.S.C. 5512(c)(7)(A).

[37] 12 U.S.C. 5512(c)(7)(C).

[38] 12 U.S.C. 5514(b)(7)(D) ("In developing and implementing requirements under this paragraph, the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.").

Accordingly, the Bureau has consulted with State agencies, including State agencies involved in supervision of nonbanks and State agencies charged with law enforcement, in crafting the proposed registration requirements and system. In developing this proposal, the Bureau considered the input it received from State agencies, including concerns expressed regarding possible duplication between any registration system the Bureau might build and existing registration systems.

In addition, before proposing a rule under the Federal consumer financial laws, including CFPA sections 1022(b)–(c) and 1024(b), the Bureau must consult with appropriate prudential regulators or other Federal agencies regarding consistency with prudential, market, or systemic objectives administered by such agencies.[39] In developing this proposal, the Bureau consulted with prudential regulators and other Federal agencies and considered the input it received.

The Bureau also consulted with tribal governments regarding this rulemaking pursuant to CFPA sections 1022(c)(7)(C) and 1024(b)(7)(D).[40] Also, during the rulemaking process for issuing rules under the Federal consumer financial laws, Bureau policy is to consult with appropriate tribal governments.[41] In developing this proposal, the Bureau considered the input of tribal governments, including concerns tribal

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[39] 12 U.S.C. 5512(b)(2)(B) ("In prescribing a rule under the Federal consumer financial laws . . . the Bureau shall consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies . . . .").

[40] *See* 12 U.S.C. 5512(c)(7)(C), 5514(b)(7)(D) (requiring consultation with "State agencies"); *see also* 12 U.S.C. 5481(27) (term "State" includes "any federally recognized Indian tribe, as defined by the Secretary of the Interior under" 25 U.S.C. 5131(a)).

[41] *See* Consumer Fin. Prot. Bureau, *Policy for Consultation with Tribal Governments*, https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

governments expressed regarding maintaining tribal sovereignty.

III. Legal Authority

The Bureau is issuing this proposal pursuant to its authority under the CFPA. This section includes a general discussion of several CFPA provisions on which the Bureau relies in this rulemaking. Additional description of these authorities, and the proposal's reliance on them, is also contained in section IV below and in the section-by-section analysis.

A. CFPA Section 1022(b)

CFPA 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."[42] Among other statutes, the CFPA—i.e., title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)—is a Federal consumer financial law.[43] Accordingly, in issuing the proposed rule, the Bureau would be exercising its authority under CFPA section 1022(b) to prescribe rules that carry out the purposes and objectives of the CFPA and prevent evasions thereof. CFPA section 1022(b)(2) prescribes certain standards for rulemaking that the Bureau must follow in exercising its authority under section 1022(b)(1).[44] For a discussion of the Bureau's standards for rulemaking under CFPA section 1022(b)(2), see section VII below.

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[42] 12 U.S.C. 5512(b)(1).

[43] *See* 12 U.S.C. 5481(14) (defining "Federal consumer financial law" to include the provisions of title X of the Dodd-Frank Act).

[44] *See* 12 U.S.C. 5512(b)(2).

B. CFPA Section 1022(c)(1)–(4) and (7)

The CFPB's proposals to (1) require nonbank covered persons to inform the CFPB that they have an applicable order entered against them, (2) provide basic identifying and administrative information and information regarding the orders (including copies of the orders), and (3) publish this information, are authorized under CFPA sections 1022(c)(1) through (4) and 1022(c)(7), as well as CFPA section 1022(b).[45]

CFPA sections 1022(c)(1)–(4) authorize the CFPB to prescribe rules to collect information from covered persons for purposes of monitoring for risks to consumers in the offering or provision of consumer financial products or services. The CFPB is collecting this information to monitor, on an ongoing basis, both individual and market-wide compliance with consumer protection laws and orders for alleged violations of those laws. The CFPB considers violations of consumer protection laws probative of "risks to consumers in the offering and provision of consumer financial products or services."[46] In particular, the CFPB believes that entities subject to public orders enforcing the law relating to the offering or provision of consumer financial products and services may pose heightened and ongoing risks to consumers in the markets for those products and services. It further anticipates that monitoring for such orders would allow the CFPB to track specific instances of, and more general developments regarding, potential corporate recidivism, which presents special risks to consumers for reasons discussed in greater detail below. The Bureau also believes that enforcement trends, as shown by public

[45] 12 U.S.C. 5512(b), (c)(1)–(4).

[46] 12 U.S.C. 5512(c)(1).

orders enforcing the law across consumer protection laws, jurisdictions, and markets, would potentially shed light on risks to consumers in the offering or provision of consumer financial products or services. Heightened enforcement could indicate areas where numerous regulators have identified risk of harm to consumers. Conversely, the absence of enforcement in other areas could indicate less risk to consumers, or perhaps a lack of attention by regulators that shows a need for further monitoring.

More specifically, section 1022(c)(1) of the CFPA requires the Bureau to support its rulemaking and other functions by monitoring for risks to consumers in the offering or provision of consumer financial products or services, including developments in the markets for such products or services.[47] As discussed further below at section IV(B), section 1022(c)(2) of the CFPA authorizes the Bureau to allocate resources to perform the monitoring required by section 1022 by considering "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service," "understanding by consumers of the risks of a type of consumer financial product or service," "the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers," "rates of growth in the offering or provision of a consumer financial product or service," "the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers," and "the types, number, and other pertinent characteristics of

[47] 12 U.S.C. 5512(c)(1) ("In order to support its rulemaking and other functions, the Bureau shall 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.").

covered persons that offer or provide the consumer financial product or service."[48] Section 1022(c)(4)(A) of the CFPA authorizes the Bureau to conduct the monitoring required by section 1022 by "gather[ing] information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers."[49] The Bureau is authorized to gather this information by, among other things, requiring covered persons participating in consumer financial services markets to file annual or special reports, or answers in writing to specific questions, that furnish information "as necessary for the Bureau to fulfill the monitoring . . . responsibilities imposed by Congress."[50] The Bureau may require such information to be filed "in such form and within such reasonable period of time as the Bureau may prescribe by rule or order."[51]

Section 1022(c)(7)(A) of the CFPA further authorizes the Bureau to "prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person."[52] Section 1022(c)(7)(B) provides that, "[s]ubject to rules prescribed by the Bureau, the Bureau may publicly disclose registration information to facilitate the ability of consumers to identify

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[48] 12 U.S.C. 5512(c)(2)(A)–(F).

[49] 12 U.S.C. 5512(c)(4)(A).

[50] 12 U.S.C. 5512(c)(4)(B)(ii) ("In order to gather information described in subparagraph (A), the Bureau may . . . require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under 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.").

[51] 12 U.S.C. 5512(c)(4)(B)(ii).

[52] 12 U.S.C. 5512(c)(7)(A).

covered persons that are registered with the Bureau."[53] The Bureau interprets section 1022(c)(7)(B) as authorizing it to publish registration information required by Bureau rule under section 1022(c)(7)(A) so that consumers may identify the nonbank covered persons on which the Bureau has imposed registration requirements.

Finally, CFPA section 1022(c)(3) authorizes the Bureau to publicly release information obtained pursuant to CFPA section 1022, subject to limitations specified therein.[54] Specifically, section 1022(c)(3) states that the Bureau "may make public such information obtained by the Bureau under [section 1022] as is in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information in accordance with [specified protections in section 1022]."[55] Information submitted to the Bureau's registry is protected by, among other things, CFPA section 1022(c)(8), which states that "[i]n collecting information from any person, publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under [the Freedom of Information Act, 5 U.S.C. 552(b)] or [the Privacy Act of 1974, 5 U.S.C. 552a,] or any other provision of law, is not made public under [the CFPA]."[56] The CFPB's registry is designed to not collect any proprietary, personal, or confidential

[53] 12 U.S.C. 5512(c)(7)(B).

[54] *See* 12 U.S.C. 5512(c)(3)(B).

[55] 12 U.S.C. 5512(c)(3)(B).

[56] 12 U.S.C. 5512(c)(8).

consumer information, and thus, the CFPB will not publish, or require public reporting of, any protected information.

C. CFPA Section 1024(b)

As explained above, section 1024(b) of the CFPA authorizes the Bureau to exercise supervisory authority over certain nonbank covered persons.[57] Section 1024(b)(1) requires the Bureau to periodically require reports and conduct examinations of persons subject to its supervisory authority to assess compliance with Federal consumer financial law, obtain information about the activities and compliance systems or procedures of persons subject to its supervisory authority, and detect and assess risks to consumers and to markets for consumer financial products and services.[58] Section 1024(b)(2) requires that the Bureau exercise its supervisory authority over nonbank covered persons based on its assessment of risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable: "(A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person engages; (C) the risks to consumers created by the provision of such consumer financial products or

[57] The nonbank covered persons over which the Bureau has supervisory authority are listed in section 1024(a)(1) of the CFPA. They include covered persons that: offer or provide origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans; are larger participants of a market for consumer financial products or services, as defined by Bureau rule; the Bureau has reasonable cause to determine, by order, that the covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services; offer or provide private education loans; or offer or provide payday loans. 12 U.S.C. 5514(a)(1).

[58] 12 U.S.C. 5514(b)(1) provides: "The Bureau shall require reports and conduct examinations on a periodic basis of persons described in subsection (a)(1) for purposes of—(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of such person; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services."

services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons."[59]

Section 1024(b)(7) of the CFPA in turn identifies three independent sources of Bureau rulemaking authority. First, section 1024(b)(7)(A) requires the Bureau to prescribe rules to facilitate the supervision of nonbank covered persons subject to the Bureau's supervisory authority and assessment and detection of risks to consumers.[60] Second, section 1024(b)(7)(B) authorizes the Bureau to require nonbank covered persons subject to its supervisory authority to "generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers."[61] This section authorizes the Bureau to require nonbank covered persons subject to its supervisory authority to create reports regarding their activities for submission to the Bureau. "Records" is a broad term encompassing any "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form," or any "documentary account of past events."[62] Section 1024(b)(7)(B) thus authorizes the Bureau to require nonbank covered

[59] 12 U.S.C. 5514(b)(2).

[60] 12 U.S.C. 5514(b)(7)(A) ("The Bureau shall prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers.").

[61] 12 U.S.C. 5514(b)(7)(B) ("The Bureau may require a person described in subsection (a)(1), to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.").

[62] *Record*, *Black's Law Dictionary* (11th ed. 2019); *accord, e.g.*, *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1259 (9th Cir. 2019) (citing *Black's Law Dictionary* and *Webster's Third New International Dictionary* definitions of "record").

persons subject to its supervisory authority to "generate"—i.e., create[63]—reports regarding their activities and then "provide" them to the Bureau.[64]

The third source of authority, CFPA section 1024(b)(7)(C), authorizes the Bureau to prescribe rules regarding nonbank covered persons subject to its supervisory authority "to ensure that such persons are legitimate entities and are able to perform their obligations to consumers."[65] Under this section, the Bureau may prescribe substantive rules to ensure that supervised entities are willing and able to comply with their legal, financial, and other obligations to consumers, including those imposed by Federal consumer financial law. The term "obligations" encompasses "anything that a person is bound to do or forbear from doing," including duties "imposed by law, contract, [or] promise."[66] The Bureau construes the phrase "legitimate entities" as encompassing an inquiry into whether an entity takes seriously its duty to "[c]omply[] with the law."[67] Legitimate entities do not treat the risk of enforcement actions for violations of legal obligations as a mere cost of doing business. Instead, legitimate entities work in good

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[63] *See Generate*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/generate (defining "generate" as "to bring into existence").

[64] The Bureau's authority under section 1024(b)(7)(B) to require generation of records complements its authority under section 1024(b)(1) to "require reports . . . on a periodic basis" from nonbank covered persons subject to its supervisory authority. 12 U.S.C. 5514(b)(1).

[65] 12 U.S.C. 5514(b)(7)(C) ("The Bureau may prescribe rules regarding a person described in subsection (a)(1), 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.").

[66] *Obligation*, *Black's Law Dictionary* (11th ed. 2019).

[67] *Legitimate*, *Black's Law Dictionary* (11th ed. 2019) (defining "legitimate" as "[c]omplying with the law; lawful"); *see also Legitimate, Webster's Second New International Dictionary* (1934) (defining "legitimate" as "[a]ccordant with law or with established legal forms and requirements; lawful"); *Legitimate*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/legitimate (defining "legitimate" as "accordant with law or with established legal forms and requirements").

faith to have protocols in place aimed at ensuring compliance with their legal obligations and detecting and appropriately addressing any legal violations that the entity may commit.

While each of the three subparagraphs of section 1024(b)(7) discussed above operates as independent sources of rulemaking authority, the subparagraphs also overlap in several respects, such that a particular rule may be (and, in the case of this proposal, is) authorized by more than one of the subparagraphs. For example, rules requiring the generation, provision, or retention of records generally will be authorized under both subparagraphs 1024(b)(7)(A) and (B). That is so because subparagraph 1024(b)(7)(B) makes clear that the Bureau's authority under subparagraph 1024(b)(7)(A) to prescribe rules to facilitate supervision and assessment and detection of risks to consumers extends to requiring covered persons subject to the Bureau's supervisory authority "to generate, provide or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers."[68]

IV. Why the Bureau Is Issuing This Proposal

A. Overview

The Bureau is issuing this proposal to require nonbanks to report certain public agency and court orders because the Bureau believes that not only the Bureau, but also consumers, the public, and other potential users of the proposed registration system

[68] 12 U.S.C. 5514(b)(7)(B); *see also, e.g.*, *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) ("redundancies . . . in statutory drafting" may reflect "a congressional effort to be doubly sure"); *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020) (concluding that "Congress employed a belt and suspenders approach" in statute); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 383–85 (2013) (statutory language is "not . . . superfluous if Congress included it to remove doubt" about an issue).

would benefit from the creation and maintenance of a central public repository for information regarding certain public orders that have been imposed upon nonbank covered persons.

Agency and court orders are not suggestions. They are legally binding orders intended to prevent and remedy violations of the law. When an agency issues such an order, or seeks a court order, it typically has determined that the problems at the applicable entity are sufficiently serious to merit the expenditure of that agency's limited resources and perhaps the attention of the courts.

By establishing an effective system for collecting public orders enforcing the law across different sectors of entity misconduct, the proposed rule would allow the Bureau to more effectively monitor for potential risks to consumers arising from both individual instances and broader patterns of recidivism. Persons that are subject to one or more orders that would require registration under the proposal may pose greater risks to consumers than others. And the existence of multiple orders may serve as a particular "red flag" with respect to risks to consumers and as a signal of potential recidivism. The existence of multiple orders may also indicate broader problems at the entity that pose related risks to consumers—including lack of sufficient controls related to the offering and provision of consumer financial products and services, inadequate compliance management systems and processes, and an unwillingness or inability of senior management to comply with laws subject to the Bureau's jurisdiction.

The Bureau also believes that a comprehensive collection of public agency and court orders enforcing the law would help it identify broader trends related to risks to consumers in the offering and provision of consumer financial products and services.

Notably, by studying how laws are being enforced across consumer protection laws, jurisdictions, and markets, the Bureau believes it will be able to identify indications of risks to consumers. For example, the existence of enforcement activity in multiple jurisdictions among certain products, services, or features, or related to certain legal requirements, or concerning certain consumer risks, could indicate areas of heightened consumer risk that warrant further attention by regulators. By contrast, the absence of enforcement activity in certain areas could potentially indicate less risk to consumers or could be evidence of less attention by regulators and a need to increase monitoring activities. The Bureau thus believes that obtaining information regarding such orders will enable it to better monitor risks to consumers in the offering or provision of consumer financial products and services, including developments in the markets for such products and services, under its authority at CFPA section 1022(c).[69]

The Bureau further anticipates that making a registry of these orders publicly available would, among other things, allow other regulators at the Federal, State, and local level tasked with protecting consumers to realize the same market monitoring benefits that the Bureau anticipates obtaining from this rule. Publication would also facilitate the ability of consumers to identify the covered persons that are registered with the Bureau. In addition, publication would enhance the ability of consumer advocacy organizations, researchers, firms conducting due diligence, and the media to locate, review, and monitor orders enforcing the law.

[69] 12 U.S.C. 5512(c).

The Bureau believes that the proposal also will assist its supervisory work by collecting additional information in the form of a written statement from certain entities that are subject to the Bureau's supervision and examination authority. As explained in greater detail below, requiring certain supervised entities to designate a senior executive officer with knowledge of, and control over, the entity's efforts to comply with each relevant order, and requiring that executive to submit the information required to be contained in the proposed written statement, would facilitate Bureau supervision efforts by providing important information about the entity, helping to prioritize the Bureau's supervisory activities, and otherwise assisting the Bureau's supervisory work. These requirements would also help ensure that the relevant entities are "legitimate" and "are able to perform their obligations to consumers" under CFPA section 1024(b)(7)(C), in part by incentivizing entities who might otherwise not take seriously their obligations to instead endeavor to comply with consumer protection laws and by highlighting the designated senior executive's personal responsibility for such compliance.[70]

B. Why the Bureau Is Interested in Issuing a Rule to Monitor for Risks Associated with Certain Agency and Court Orders

The Bureau believes that requiring registration and submissions regarding certain agency and court orders as proposed would assist the Bureau in monitoring for risks to consumers in the offering or provision of consumer financial products or services, in accordance with CFPA section 1022(c).[71] The proposal's requirements to submit and update information regarding such agency and court orders related to the provision or

[70] 12 U.S.C. 5514(b)(7)(C).

[71] 12 U.S.C. 5512(c).

offering of consumer financial products or services would provide important support for a variety of Bureau functions.

As the principal Federal regulator responsible for administering the Federal consumer financial laws, the Bureau's ability to effectively identify and monitor for potential risks to consumers arising out of apparent violations of core Federal and State consumer laws is vital to the Bureau achieving its statutory purposes and objectives. Such information will help the Bureau satisfy its statutory obligation to monitor for risks to consumers in the markets for consumer financial products and services.[72] For example, the system would enable the Bureau to better identify an increase in the number of orders in a particular product market, in a particular geographic market, addressing similar consumer risks, or with other common features. The Bureau would be able to use this information to identify areas of heightened consumer risk that warrant further attention, thus helping to inform and prioritize its other market monitoring efforts, including research regarding particular markets and the risks to consumers presented in such markets.[73] By contrast, the absence of enforcement activity in certain areas could indicate less risk to consumers, or it potentially could be evidence of less attention by regulators and a need to increase monitoring and other supervisory or regulatory activities.

Likewise, the Bureau's rulemaking efforts would benefit from information about such orders, so that the Bureau might, for example, consider drafting rules to address

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[72] *See* 12 U.S.C. 5512(c)(1).

[73] *See* 12 U.S.C. 5511(c)(3) (identifying as one of the "primary functions of the Bureau . . . collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets").

identified consumer risks.[74] The Bureau's consumer response function would be informed by increased monitoring of risks and trends, as the Bureau could direct resources or investigate risks in a certain area or on a certain topic.[75] And the Bureau may choose to direct its consumer education efforts toward educating consumers about risks identified via the proposed registry.[76]

The information that the Bureau would obtain under the proposed rule would also be valuable to the Bureau in exercising its supervisory and enforcement functions.[77] Among other things, the information may be informative when the Bureau makes determinations whether a covered person is engaging, or has engaged, in conduct that poses risk to consumers with regard to the offering or provision of consumer financial products or services under CFPA section 1024(a)(1)(C), such that the Bureau may determine to subject the covered person to Bureau supervision under that provision.[78] The information contained in the proposed registry may also be relevant in assessing civil penalties for violations of Federal consumer financial laws, given that Congress has

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[74] *See* 12 U.S.C. 5511(c)(5) (identifying as one of the "primary functions of the Bureau . . . issuing rules, orders, and guidance implementing Federal consumer financial law").

[75] *See* 12 U.S.C. 5511(c)(2) (identifying as one of the "primary functions of the Bureau . . . collecting, investigating, and responding to consumer complaints"); *see also* Consumer Fin. Prot. Bureau, *Consumer Response Annual Report: January 1 – December 31, 2021*, at 5–8 (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_2021-consumer-response-annual-report_2022-03.pdf (describing the Bureau's consumer-complaint process and how the Bureau uses complaint information).

[76] *See* 12 U.S.C. 5511(c)(1) (identifying as one of the "primary functions of the Bureau . . . conducting financial education programs").

[77] *See* 12 U.S.C. 5511(c)(4) (identifying as one of the "primary functions of the Bureau . . . supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law"). Section IV(D) below, and the section-by-section discussion of proposed § 1092.203, contain additional discussion of how the proposed rule would facilitate the Bureau's supervisory efforts.

[78] *See* 12 U.S.C. 5514(a)(1)(C) (authorizing Bureau orders subjecting nonbanks to supervision based upon consumer complaints "or information from other sources"); 12 CFR part 1091 (Bureau procedural rule to establish supervisory authority over certain nonbank covered persons based on risk determination).

provided that such penalties should take into account an entity's "history of previous violations" and "such other matters as justice may require."[79]

Furthermore, there is a heightened likelihood that entities that are subject to public orders enforcing the law and relating to the offering or provision of consumer financial products and services may pose risks to consumers in the markets for those products and services, and risk of consumer harm is a significant factor that weighs heavily in the Bureau's decisions regarding the general allocation of its resources. Knowledge of whether a covered person has engaged in previous violations of consumer financial protection laws is valuable information that the Bureau considers when evaluating the risk of consumer harm. In the Bureau's experience, entities that have previously been subject to enforcement actions, including those brought by local, State, and other Federal authorities, present an increased risk of committing violations of laws subject to the Bureau's jurisdiction, and thus causing the additional consumer harm associated with such violations. Prior enforcement actions are also likely to be a good indication of continuing risks to consumers present in a particular market for consumer financial products or services. Because the orders that would be covered by the proposed rule are regularly issued, modified, and terminated, the Bureau needs to collect this information regularly and on a timely basis in order to stay abreast of developments.

Although referrals from and other information provided by other agencies have been valuable to the Bureau's work, the Bureau currently often relies on other agencies to take proactive steps to contact it. Having access to a centralized list of all relevant orders

[79] *See* 12 U.S.C. 5555(c)(3)(D), (E). The Bureau may consider certain matters identified in previous enforcement actions published in the proposed registry to be relevant under these provisions.

entered against nonbanks would significantly increase the Bureau's ability to monitor the market so that the Bureau can identify, better understand, and ultimately, prevent further consumer harm, particularly from repeat offenders. Recidivism—whether in the form of a company that repeatedly violates the law and as a result becomes subject to multiple orders, or in the form of a company that violates the orders to which it is subject—poses particular risks to consumers. Companies that repeatedly violate the law do more than just deprive consumers of protections in the marketplace. They may also charge their customers more in order to cover the costs of any fines or other costs resulting from the company's legal violations. In other words, consumers may end up subsidizing corporate malfeasance. When government orders fail to deter future misconduct by a company, that company's operations are more likely to present risk to consumers. Thus, the existence of multiple orders may be highly probative of heightened risks to consumers in the markets for consumer financial products and services, including the risk of noncompliance with laws subject to the Bureau's jurisdiction.

The Bureau believes that collecting information about such public orders across markets and agencies as proposed will improve the Bureau's efforts to determine where entities, either as a group or individually, are repeatedly violating the law. The Bureau particularly needs to be made aware of entities that become subject to multiple orders, or that are found to be out of compliance with existing orders, as well as of trends in such developments. Systematic or repeat violations of the law may indicate broader problems within a market for consumer financial products and services. Such problems might include lack of sufficient controls related to the offering and provision of certain consumer financial products and services, inadequate compliance management systems

and processes within a set of market participants, and an unwillingness or inability of senior management at certain entities to comply with Federal consumer financial laws. The proposed registry would provide a valuable mechanism to help ensure that the Bureau is rapidly made aware of such repeat offenders across a range of markets and enforcement agencies.

The Bureau believes that the proposed registry would be especially useful with respect to the particular nonbank markets that are subject to the Bureau's supervision and examination authority under CFPA section 1024(a). In those markets, the Bureau would be able to take account of risks identified through the proposed registry in conducting its risk-based supervisory prioritization and enforcement work. The Bureau believes that the existence of an order that would require registration under the proposal is probative of a potential need for supervisory examination, to the extent that the nonbank is subject to the Bureau's supervision and examination authorities. Under CFPA section 1024(b)(2), the Bureau is required to exercise its supervisory authority in a manner designed to ensure that such exercise, with respect to persons described in CFPA section 1024(a), is based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets and taking into consideration the factors enumerated at CFPA section 1024(b)(2)(A)–(E).[80]

Depending upon the circumstances, the Bureau may consider the existence of an order requiring registration under the proposal to be a risk factor under these provisions for covered persons subject to the proposed rule. CFPA section 1024(b)(2)(C) refers to

[80] 12 U.S.C. 5514(a), (b)(2).

"the risks to consumers created by the provision of such consumer financial products or services."[81] The Bureau believes that the existence of an order that would require registration under the proposal would be probative of such risks to consumers. CFPA section 1024(b)(2)(D) provides that the Bureau shall also take into account "the extent to which such institutions are subject to oversight by State authorities for consumer protection."[82] The Bureau believes that the existence of one or more orders issued or obtained by the types of State agencies described in the proposal in connection with violations of law would provide important and directly relevant information regarding the extent to which nonbanks are subject to oversight by State authorities for consumer protection. CFPA section 1024(b)(2)(E) provides that the Bureau shall also take into account "any other factors that the Bureau determines to be relevant to a class of covered persons."[83] For the classes of covered persons subject to the proposal, the Bureau believes that the existence of an order that would require registration under the proposal would be a relevant factor under this statutory provision for the Bureau to take into consideration when exercising its supervisory authorities under CFPA section 1024. Thus, knowledge of such orders would be relevant information in prioritizing and scoping the Bureau's supervisory activities under CFPA section 1024(b) with respect to the markets subject to that provision. In exercising its authorities under section 1024(b), the Bureau may take into account any risks that it identifies in connection with a covered

[81] 12 U.S.C. 5514(b)(2)(C).

[82] 12 U.S.C. 5514(b)(2)(D).

[83] 12 U.S.C. 5514(b)(2)(E).

person's registration with the nonbank registration (NBR) system and any information submitted under the proposed rule.

In crafting the proposed requirements to register and submit certain agency and court orders, the Bureau has considered (among others) the factors listed at CFPA section 1022(c)(2), to the extent relevant here to the proposed allocation of Bureau resources to perform market monitoring. For example, the Bureau considered the "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service."[84] As discussed above, the Bureau believes companies that violate the law, especially repeatedly, generally pose more risk to consumers. The proposal will assist the Bureau in identifying and evaluating such risks—and their associated costs—across companies, industries, products, and regions.

The Bureau also considered the "understanding by consumers of the risks of a type of consumer financial product or service."[85] The Bureau is concerned that consumers currently may not adequately understand risks posed by certain institutions, including risks arising from recidivism. With a clear window into nationwide trends and gaps in nonbank covered persons' compliance with consumer protection laws, the Bureau can target its various functions—including consumer education—to ensure that consumers understand the risks and associated costs of such conduct on their use of certain consumer financial products or services.

The Bureau further considered "the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the

[84] 12 U.S.C. 5512(c)(2)(A).

[85] 12 U.S.C. 5512(c)(2)(B).

law is likely to adequately protect consumers."[86] The Bureau believes that the proposal would enhance the Bureau's ability to effectively assess whether and to what extent the orders themselves, as well as other relevant laws, in practice adequately protect consumers. Information collected in connection with this proposal would aid the Bureau in better understanding how effectively the nation's consumer protection laws operate in practice, which should assist the Bureau in determining (among other things) how best to allocate its resources to ensure consumers are adequately protected from bad actors.

The Bureau also considered "the extent . . . to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers."[87] The Bureau generally is concerned that traditionally underserved communities may be disproportionately the target of consumer protection violations—particularly, unfair, deceptive, or abusive acts or practices—in the offering or provision of consumer financial products or services. The information collected should provide the Bureau with robust nationwide data to identify and evaluate the extent to which this is the case.

Finally, the Bureau considered "the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service."[88] For the reasons discussed, law violator status—but especially repeat law violator status—is a highly pertinent characteristic. The Bureau believes that risks to consumers posed by law violators warrants market monitoring. In particular, it would

[86] 12 U.S.C. 5512(c)(2)(C).

[87] 12 U.S.C. 5512(c)(2)(E).

[88] 12 U.S.C. 5512(c)(2)(F).

provide greater visibility into nonbank covered persons' compliance with consumer protection laws in the offering or provision of consumer financial products and services, in addition to more generally aiding the Bureau's overall understanding of nonbank covered persons and the products or services they provide.

The Bureau has considered alternative means of collecting the information subject to the proposed rule, including requesting the information on an ad hoc basis from entities that are subject to relevant orders through a Bureau order issued pursuant to CFPA section 1022(c)(4)(B)(ii).[89] However, the Bureau believes this alternative would be inadequate. There is no existing comprehensive list of covered persons subject to Bureau regulation or supervision, so the Bureau would be unable to issue a standing order to such entities to produce information. It is not clear how the Bureau would obtain this information without issuing a rule. Also, the Bureau wishes to collect information that changes over time—for example, information regarding new orders and changes to orders, as well as with respect to changes in registration information. An order that required submission of information at a single point in time—assuming that the Bureau could identify the entities to which such an order should be addressed—would be inadequate to capture such changes in information. While the Bureau might issue frequently recurring orders under its market-monitoring authority, such an approach would be less reliable and predictable for all parties than a rule-based approach.

The Bureau further considered using its supervisory and examination authority to obtain information solely from entities that are subject to that authority. While the

[89] 12 U.S.C. 5512(c)(4)(B)(ii).

Bureau believes that approach would certainly provide the Bureau with invaluable information, it preliminarily concludes that collecting information from a wider range of covered persons is appropriate to achieve its market monitoring objectives.

The Bureau seeks comment on its preliminary conclusion that collecting and registering public agency and court orders imposing obligations based upon violations of consumer law would assist with monitoring for risks to consumers in the offering or provision of consumer financial products and services. The Bureau seeks comment on whether the types of orders described in the proposal, and the types of information that would be collected about those orders and covered nonbanks under the proposal, would provide useful information to the Bureau. The Bureau also seeks comment on any other risks that might be identified through collecting the information described in the proposal. Finally, the Bureau seeks comment on whether it should consider collecting any other information in order to identify risks to consumers associated with orders.

C. Why the Bureau Has Identified Orders Issued Under the Types of Laws Described in the Proposal as Posing Particular Risk

The proposal would prescribe registration requirements with reference to certain types of "covered laws" that served as the basis for an applicable order. As discussed herein, the Bureau believes that orders issued under the types of covered laws described in the proposal are likely to be probative of risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.[90]

[90] *See also* the discussion of the definition of the term "covered law" in the section-by-section discussion of proposed § 1092.201(c) below.

First, the Bureau is proposing to require registration in connection with orders issued under the Federal consumer financial laws, 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. As explained above, numerous Federal and State agencies besides the Bureau have authority to enforce Federal consumer financial laws. In matters where an agency other than the Bureau has issued or obtained a final, public order concluding that a covered person has violated Federal consumer financial law, the Bureau also will generally have jurisdiction over the conduct that resulted in that order. Requiring registration of such orders will facilitate effective market monitoring by providing the Bureau a tool to identify and understand the nature of the risks to consumers presented by the conduct addressed in those orders, including the risk that the conduct might continue unabated outside of the particular jurisdiction that issued the order. For example, such information may inform the Bureau's supervisory or enforcement activities, as the Bureau may consider bringing its own action in connection with the same or related conduct. Or the conduct may be probative of a more systemic problem with one or more entities' overall willingness or capacity to comply with Federal consumer financial law across different product lines or aspects of their operations. Likewise, requiring registration of orders involving Federal consumer financial law will facilitate effective market monitoring by ensuring that the Bureau can quickly and effectively identify patterns of similar conduct across multiple nonbank covered persons. The identification of such patterns may indicate a problem that the Bureau could best address by engaging in rulemaking to clarify or expand available consumer protections to

address emerging consumer risk trends. It may also prompt the Bureau to use other tools, such as consumer education, to address the identified risks.

Second, the Bureau is proposing to require registration of orders in connection with a violation of any other law as to which the Bureau may exercise enforcement authority, to the extent such violation arises out of conduct in connection with the offering or provision of a consumer financial product or service. The Bureau may enforce certain laws other than Federal consumer financial laws, as that term is defined in CFPA section 1002(14).[91] The Bureau believes that the proposed registry should collect information regarding orders issued under any law that the Bureau may enforce, where 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. By definition, the conduct addressed in such orders will generally fall within the scope of the Bureau's enforcement authority. More generally, the Bureau believes that evidence of such conduct could be probative of a broader risk that the entity has engaged or will engage in conduct that may violate Federal consumer financial law. For example, violations of the Military Lending Act, as to which the Bureau has enforcement authority, may overlap with, or be closely associated with, violations of the CFPA's UDAAP prohibitions[92] or the Truth in Lending

[91] *See, e.g.,* 10 U.S.C. 987(f)(6) (authorizing Bureau enforcement of the Military Lending Act). As the Bureau has explained in a recent interpretive rule, it also has authority to supervise nonbanks subject to its supervision regarding risks to consumers arising from conduct that violates the Military Lending Act. *See* Bureau Interpretive Rule, Examinations for Risks to Active-Duty Servicemembers and Their Covered Dependents, 86 FR 32723 (June 23, 2021). In this proposed rulemaking, however, the Bureau does not need to rely on the authority described in that interpretive rule. Instead, to the extent that the Bureau's proposal would collect information regarding orders issued under laws described in proposed § 1092.201(c)(2) for the purpose of facilitating the Bureau's supervisory activities, the Bureau would do so because the Bureau believes such orders may be probative of a broader risk that an entity has engaged or will engage in conduct that may violate Federal consumer financial law.

[92] 15 U.S.C. 5531, 5536(a)(1)(B).

Act,[93] among other Federal consumer financial laws. In addition, in the Bureau's experience, a violation of one law within the Bureau's enforcement authority may be indicative of broader inadequacies in an entity's compliance systems that are resulting or could result in other legal violations, including violations of Federal consumer financial laws. Furthermore, including in the registry orders issued under any law that the Bureau may enforce (where 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) would further the Bureau's objective of creating a registry that could serve as a single, consolidated reference tool for use in monitoring for risks to consumers, thereby increasing the Bureau's ability to use the registry to monitor for patterns of risky conduct of nonbank covered persons across entities, industries, and product offerings.

Third, the Bureau is proposing to require registration in connection with orders issued under the prohibition on unfair or deceptive acts or practices under section 5 of the FTC Act, 15 U.S.C. 45, or any rule or order issued for purpose of implementing that prohibition, 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. In matters where a government agency has reached a determination that an entity has violated section 5 of the FTC Act in connection with the offering or provision of a consumer financial product or service, the Bureau has reason to be concerned that the entity poses unusual risks to consumers in financial markets. For one thing, the conduct resulting in the order well might have violated Federal consumer financial law. CFPA

[93] 15 U.S.C. 1601 *et seq.*

section 1031, for example, authorizes the Bureau to take action "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service."[94] And CFPA section 1036(a)(1)(B) provides that "[i]t shall be unlawful" for a covered person "to engage in any unfair, deceptive, or abusive act or practice."[95] Congress modeled the CFPA's prohibition of unfair or deceptive acts or practices after the similar prohibition in section 5 of the FTC Act.[96] Therefore, violations of FTC Act section 5 in connection with the provision or offering of a consumer financial product or service is highly probative of a heightened risk that UDAAP violations subject to the Bureau's jurisdiction have occurred or are occurring.

Moreover, the high probative value of such orders is not simply a function of the likelihood that underlying conduct could violate Federal consumer financial law. The Bureau believes that, where an entity has engaged in conduct prohibited under FTC Act section 5 in connection with offering or providing a consumer financial product or service, there is a significant risk that upon closer inspection of the entity's activities it has engaged in other acts or omissions that either violate Federal consumer financial law or otherwise present risks to consumers in the consumer financial markets. For example, inadequacies in compliance systems are not likely limited to a particular Federal or State

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[94] 12 U.S.C. 5531(a).

[95] 12 U.S.C. 5536(a)(1)(B).

[96] *See* 15 U.S.C. 45; *see also, e.g.*, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 902–04 (S.D. Ind. 2015).

consumer protection law, and compliance-system inadequacies that result in FTC Act section 5 violations indicate a heightened risk of similar inadequacies related to the prevention of violations of Federal consumer financial laws. And, as described above, a registry of orders is particularly useful because a core purpose of the Bureau's monitoring efforts is to analyze patterns of risky conduct across entities, industries, product offerings, and jurisdictions. Such patterns would help the Bureau identify risks to consumers that warrant further action, such as more monitoring, increased supervisory attention in the case of supervised persons, regulation, or consumer education.

Fourth, the Bureau proposes to require registration in connection with orders issued under State laws prohibiting unfair, deceptive, or abusive acts or practices that are identified in proposed appendix A of part 1092, 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. State UDAP/UDAAP laws are generally modeled after—or otherwise prohibit conduct similar to that prohibited by—FTC Act section 5 or CFPA sections 1031 and 1036(a)(1)(B).[97] Therefore, violations of State UDAP/UDAAP law in connection with the provision or offering of a consumer financial product or service are similarly highly probative of a heightened risk that UDAAP violations subject to the Bureau's jurisdiction have occurred or are occurring. In addition, violations of

[97] 15 U.S.C. 45; 12 U.S.C. 5531. *See, e.g.*, Request for Information on Payday Loans, Vehicle Title Loans, Installment Loans, and Open-End Lines of Credit, 81 FR 47781, 47783 (July 22, 2016) ("In the 1960s, States began passing their own consumer protection statutes modeled on the [Federal Trade Commission] Act to prohibit unfair and deceptive practices.").

State UDAP/UDAAP law may be probative of the existence of violations of other laws within the Bureau's jurisdiction.[98]

Obtaining a better understanding of entities' compliance with State UDAP/UDAAP laws will assist the Bureau in the assessment and detection of risks for the same general reasons described with respect to alleged or found violations of FTC Act section 5—namely, that (i) conduct that violates State UDAP/UDAAP prohibitions commonly also violates laws under the Bureau's jurisdiction; and (ii) the Bureau believes that evidence of such conduct may be highly probative of a broader risk that the entity has engaged or will engage in similar conduct that may violate laws within the Bureau's jurisdiction, either as a result of a willingness to violate such laws or a lack of sufficient protections in place to prevent violations. Registration of State UDAP/UDAAP orders will facilitate effective market monitoring by ensuring that the Bureau can quickly and effectively identify patterns of risky conduct across entities, industries, consumer financial product or service offerings, and jurisdictions. The Bureau could then decide which Bureau functions are best suited to address the consumer risks raised by the orders.[99]

The Bureau seeks comment on its preliminary conclusion that these categories of public orders would assist with monitoring for risks to consumers in the offering or

[98] To take just one example, UDAAP violations in connection with debt-collection efforts may also violate the Fair Debt Collection Practices Act's prohibition against unfair, deceptive, or abusive debt-collection practices. *See* 15 U.S.C. 1692d–1692f.

[99] For discussion of the proposal's requirements with respect to State laws amending or otherwise succeeding a law identified in appendix A, and rules or orders issued by State agencies for the purpose of implementing State UDAP/UDAAP laws, *see* the section-by-section discussion of proposed § 1092.201(c) below.

provision of consumer financial products and services, including any information regarding whether and how the categories of orders described in the proposal correlate with additional risk to consumers, or conversely, any information indicating that these types of orders are overinclusive and do not correlate with additional risk to consumers.

D. Why the Bureau Is Proposing to Require Supervised Nonbanks to Designate Attesting Executives and Submit Written Statements

The proposal would also require entities above a certain size that are subject to the Bureau's supervision and examination authority to annually submit a written statement signed by a designated attesting executive regarding each covered order to which they are subject. In the written statement, the attesting executive would (i) generally describe the steps that the executive has undertaken to review and oversee the entity's activities subject to the applicable covered order for the preceding calendar year, and (ii) attest whether, to the executive's knowledge, the entity during the preceding calendar year has identified any violations or other instances of noncompliance with any of the 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. The proposed rule would further require that the entity designate as the attesting executive for each covered order its highest-ranking duly appointed senior executive officer (or, if the entity does not have any duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the entity) whose assigned duties include ensuring the entity's compliance with Federal consumer financial law, who has knowledge of the entity's systems and procedures for achieving compliance with the covered order, and who has

control over the entity's efforts to comply with the covered order. The Bureau would publish the name and title of that executive in the proposed public registry.

The Bureau believes these requirements would serve two sets of distinct purposes relating to its exercise of its supervisory and examination authorities under CFPA section 1024.

First, the Bureau believes the proposed requirements that certain supervised entities (which are referred to in the proposed rule as "supervised registered entities") designate attesting executives and provide written statements 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.[100] As discussed, the existence of one or more covered orders involving a supervised registered entity already raises red flags regarding the entity's compliance with Federal consumer financial law and the overall risk posed by such entity to consumers in the offering or provision of consumer financial products and services. Submission of a written statement indicating an absence of good faith efforts to comply with the law or identifying problematic instances of noncompliance with reported orders would provide the Bureau with important additional information regarding risks to consumers that may be

[100] *See* 12 U.S.C. 5514(b)(1), (7)(A)–(B). As explained in the "legal authority" section, 12 U.S.C. 5514(b)(7)(A) authorizes the Bureau to prescribe rules to facilitate Bureau supervision and the assessment and detection of risks to consumers, and 12 U.S.C. 5514(b)(7)(B) authorizes the Bureau to require supervised registered entities to "generate"—i.e., create—reports regarding their activities (including the proposed written statements) and then "provide" them to the Bureau.

associated with the orders. Such orders frequently contain provisions aimed at ensuring an entity's future legal compliance, such as reporting requirements, recordkeeping requirements, and provisions requiring the entity to obtain the issuing agency's nonobjection before adopting or amending relevant policies and procedures. An entity's sustained compliance with such provisions may mitigate the continuing risks to consumers presented by the entity and thus reduce the potential need for current supervisory activities. By contrast, an entity's noncompliance with the terms of an order may indicate a heightened need for current supervisory activities. And if an entity is committing significant or repeated violations of a covered order, or it is failing to take appropriate steps to address such violations and prevent their recurrence, that may indicate that the entity lacks the protocols and institutional commitment necessary to ensure compliance with legal obligations aimed at protecting consumers and ultimately with the Federal consumer financial laws. The Bureau believes that entities that fail to comply with orders enforcing the law may be at greater risk of violating one or more laws within the Bureau's jurisdiction. Submission of the proposed written statements would enable the Bureau to conduct additional supervisory reviews or to otherwise investigate the matter in order to identify any such violations and related risks.

As a result, the proposed written statements would be particularly relevant when prioritizing the Bureau's supervisory activities under CFPA section 1024(b). As discussed above at sections III and IV(B), CFPA section 1024(b)(2) requires that the Bureau exercise its authority under CFPA section 1024(a) in a manner designed to ensure that such exercise, with respect to persons described in section 1024(a), is based on the

assessment by the Bureau of certain identified risks.[101] For the reasons discussed above, the proposed written statements would help inform the Bureau's risk-based prioritization of its supervisory program under CFPA section 1024(b)(2). The Bureau anticipates that the written statements would be particularly helpful in assessing, among other things, "the risks to consumers created by the provision of . . . consumer financial products or services" and "the extent to which such institutions are subject to oversight by State authorities for consumer protection."[102]

The proposed written-statement requirement also would improve the Bureau's ability to conduct its supervisory and examination activities with respect to the supervised nonbank, when it does choose to exercise its supervisory authority. The Bureau exercises its supervisory authority with respect to supervised nonbanks for certain purposes, including assessing compliance with the requirements of Federal consumer financial law, obtaining information about the activities and compliance systems or procedures of supervised nonbanks, and detecting and assessing risks to consumers and markets for consumer financial products and services.[103] The Bureau expects a supervised nonbank's written statements as required under the proposal to provide important information relevant to all of these statutory purposes. As explained below, a supervised nonbank's failure to comply with a relevant order under a covered law could indicate that the entity more generally lacks the will or ability to comply with its legal obligations, including its

[101] 12 U.S.C. 5514(a), (b)(2).

[102] 12 U.S.C. 5514(b)(2)(C)–(D). *See* additional discussion of the factors for risk-based supervisory prioritization in section IV(B) above.

[103] 12 U.S.C. 5514(b)(1).

obligations under Federal consumer financial law. Such noncompliance may also indicate that the entity generally lacks adequate compliance systems or procedures, which in turn would create risks to consumers and to the markets for consumer financial products and services that the entity participates in. Thus, in cases where the Bureau determines to exercise its supervisory authorities with respect to a supervised nonbank required to submit written statements under the proposal, the Bureau would expect those written statements to be of value in conducting its examination work. For example, the Bureau may use the written statements in determining what information to require from a supervised nonbank, in determining the content of supervisory communications and recommendations, or in making other decisions regarding the use of its supervisory authority.[104]

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."[105] As discussed in section VII below, the Bureau believes that most supervised registered entities subject to covered orders endeavor in good faith to comply with consumer protection laws and, accordingly, have put in place some manner of systems and procedures to help achieve such compliance. But the Bureau also expects that other supervised registered entities will not take their legal obligations

[104] As explained below in the section-by-section discussion of proposed § 1092.203(e), the Bureau is proposing to require supervised registered entities to maintain records to support their written statements. That recordkeeping requirement will further facilitate the Bureau's supervisory and examination activities because it will ensure the availability of records for the Bureau to review regarding the matters addressed in the written statements.

[105] 12 U.S.C. 5514(b)(7)(C). As explained in the "legal authority" section above, 12 U.S.C. 5514(b)(7)(A), (B), and (C) provide independent sources of rulemaking authority.

seriously, including their obligations under Federal consumer financial law.[106] The proposed written statement would provide information that would help the Bureau assess in which category a particular entity falls. If, after reviewing a written statement, the Bureau concludes that 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. The 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 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.

To be clear, the proposed rule would not establish any minimum procedures or otherwise specify the steps the attesting executive must take in order to review and

[106] In several cases, the Bureau has found that entities have violated prior orders that the Bureau has issued or obtained. *See, e.g.*, *Discover Bank*, CFPB No. 2020-BCFP-0026 (Dec. 22, 2020); *CFPB v. Encore Capital Grp.*, No. 20-cv-01750-GPC-KSC (S.D. Cal. Oct. 16, 2020); *Military Credit Servs., LLC*, CFPB No. 2016-CFPB-0029 (Dec. 20, 2016).

oversee the supervised registered entity's activities. Nor would the proposal establish any minimum level of compliance management or expectation for compliance systems and procedures at such entities. However, as explained above, the Bureau expects that most supervised registered entities will be at least somewhat hesitant to repeatedly report the absence of good faith efforts to comply with covered orders. Also, the rule would require supervised registered entities to identify a central point of contact and responsibility regarding an entity's efforts to comply with a covered order.

The Bureau seeks comment on all aspects of the proposed written-statement requirement, including its preliminary findings that requiring supervised nonbanks to designate attesting executives and to submit certain written statements relating to compliance with reported orders will facilitate the Bureau's supervisory efforts and better ensure that supervised registered entities are legitimate entities and are able to perform their obligations to consumers. Among other things, the Bureau seeks comment on whether the proposed requirements would help ensure such entities are legitimate and are able to perform their obligations to consumers, and whether they would facilitate supervision of such entities and assessment and detection of risks to consumers. The Bureau also seeks comment on whether the proposed eligibility requirements regarding which individuals may be designated as attesting executives are too broad or too narrow. The Bureau also seeks comment on whether supervised registered entities should submit additional or different information to the Bureau.[107]

[107] *See* additional discussion about other information that the Bureau might seek to collect in the section-by-section discussion of proposed § 1092.203(d) below.

E. Why the Bureau Is Proposing to Publish the Information Collected Under the Proposed Registration Requirements

The Bureau is proposing to publish the information collected under the proposed registration requirements (except for the written statement submitted under § 1092.203, which would be treated as confidential supervisory information). While the orders that would be published under the proposal would already be public, they may not all be readily accessible in a comprehensive and collected manner, and some of the additional information submitted to the registry may not be readily available to the public. The Bureau is proposing to publish this information because it believes publication would provide benefits to the general public, other regulators, and to consumers, and would be consistent with Federal government efforts to make government data assets publicly available.[108] The Bureau has authority to publish the registration information under CFPA section 1022(c)(3)(B), which authorizes it to publish information obtained under section 1022 "as is in the public interest,"[109] and under CFPA section 1022(c)(7)(B), which authorizes the Bureau to "publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau."[110]

A variety of Federal regulators, including the prudential regulators, as well as State attorneys general and other State agencies, all have authority to issue orders to address legal violations in the provision or offering of consumer financial products or

[108] *See also* the discussion of these issues in the section-by-section discussion of proposed § 1092.204 below.

[109] 12 U.S.C. 5512(c)(3)(B).

[110] 12 U.S.C. 5512(c)(7)(B).

services. Consequently, similar conduct may be addressed through separate orders, by separate regulators, or across separate lines of business. Again, the orders that would be published under the proposal would already be public. But such orders, while public, are currently subject to distinct publication regimes. The distinct enforcement and publication regimes for the various agencies with authority over nonbank covered persons make it more difficult for the Bureau, consumers, and other interested parties to identify entities that engage in misconduct and repeatedly violate the law. The proposed rule would address that issue by creating such a single, consolidated registry of orders that enforce applicable law.

The Bureau recognizes that much public information about such orders already exists. The applicable Federal and State regulators generally each publish their own orders enforcing consumer financial law; thus, potential users may be able to access some of this information by means of the various websites and other databases maintained by individual agencies. Some information is also available to potential users through certain multiagency websites such as the Nationwide Multistate Licensing System & Registry (NMLS) owned and operated by the State Regulatory Registry LLC, which is owned and operated by the Conference of State Bank Supervisors. And still other information is published and maintained by private actors.

However, there appears to be limited collective information regarding all of the orders that have been issued by multiple regulators to particular entities across multiple product markets and geographic markets related to consumer financial products and services. To the Bureau's knowledge, there is currently no public government system at the Federal or State level for the collection of information about such orders across the

entities subject to the Bureau's jurisdiction (though privately maintained databases may exist). No government agency appears to maintain a publicly available repository of such orders and other related information with respect to particular entities as they relate to consumer financial products and services. Furthermore, while certain State regulators publish certain public enforcement actions to the NMLS, such publication does not extend to all of the orders and all of the agencies that are addressed by the proposal, including orders issued by Federal agencies. It is also limited to only certain industry sectors. The Bureau believes that consumers would benefit from a registration system that is maintained by the Federal government for the purpose of providing comprehensive information regarding such orders, including copies of the orders.

The Bureau believes that there would be significant value in creating a single public repository of information related to public agency and court orders that impose obligations based on violations of consumer protection laws, and the nonbanks that are subject to them.[111] The Bureau believes that publication of certain data collected pursuant to this rule is in the public interest in a variety of ways. By improving public transparency, the Bureau intends to mitigate recidivism and more effectively deter unlawful behavior. Providing better tools to monitor repeat law violators and corporate recidivism is in the public interest. Researchers would be able to use published information to better understand the markets regulated by the Bureau and the participants in those markets, and their efforts may result in more thorough understanding and promote compliance with the law. Non-government entities would likewise be able to

[111] *See also* the discussion of these issues in the section-by-section discussions of proposed §§ 1092.202(b) and 1092.204(a) below.

use published information in conducting their work and in identifying potential issues and risks affecting consumers in the markets for consumer financial protection and services. Industry could use the registry as a convenient source of information regarding regulator actions and trends across jurisdictions, helping industry actors to better understand legal risks and compliance obligations. Potential investors, contractual partners, financial firms, and others that are conducting due diligence on a registered nonbank would have a consolidated and updated source of accurate information regarding public orders. Establishing a source for reliable and public data on entity lawbreaking and recidivism will likely promote tracking and awareness of such matters by consumer groups, trade associations, firms conducting due diligence, the media, and other parties.

Government agencies—including, but not limited to, the Bureau—would also benefit from the proposed public registry. While the orders that would be published under the proposal would already be public, every Federal, State, and local agency with jurisdiction over a covered nonbank will benefit from access to a regularly maintained database providing up-to-date information on relevant public orders that have been issued against such entities. Such information will help agencies to detect risks to consumers, and to coordinate and maintain consistency with the Bureau and other agencies in their enforcement strategies and approaches. Agencies might use the published information to better identify registered nonbanks and determine their legal structure and organization, since the registry would require registered nonbanks to submit and maintain up-to-date identifying information, including legal name and principal place of business. The Bureau also believes that the publication of registration information and information regarding orders will assist other agencies in assessing the potential risks to consumers

that may be posed by registered nonbanks and in making their own determinations regarding whether to conduct examinations or investigations, bring enforcement actions against nonbanks, or engage in other regulatory activities. For example, a State regulator attempting to improve its assessments of consumer risk trends among nonbank payday lenders in its State should be able to use the registry to identify what other regulators of the same or similar nonbank providers or products have recently identified in terms of such risks. In addition, the Bureau believes that many agencies would find the published information useful in making other determinations regarding the nonbanks registered under the proposal. For example, an agency may be able to use this information when making determinations regarding an application or license, or to ask relevant questions regarding the information that is published. Thus, the Bureau believes that, with access to a single, public registry of these orders, those similarly tasked with protecting consumers in the markets for consumer financial products and services would obtain many of the same powerful market monitoring benefits that the Bureau anticipates obtaining from this rule.

In developing the proposal, the Bureau considered whether it might be better to use confidential channels, or perhaps a private electronic portal, to exchange this information with other government agencies. However, the Bureau believes that such an approach would be impractical. Not every agency that would be able to use the information would be aware of the need to request access to the information from the Bureau or would necessarily be able to expend the resources to maintain access. The Bureau would need to expend its own resources to establish and maintain such channels. And the Bureau believes that such a system would not achieve the benefits of disclosure

to consumers and the public discussed in this section. Publication also would formally align the proposed registration system with Federal government standards calling for publishing information online as open data.[112]

Consumers may also benefit from the collection and publication of the information collected by the system, including information about orders that are already public. The Bureau believes that, at least in certain cases, publishing information about the entity and its applicable orders in a public registry would potentially help certain consumers make informed decisions regarding their choice of consumer financial products or services. As discussed at section VII below regarding the Bureau's analysis of this proposal under CFPA section 1022(b),[113] the Bureau does not necessarily expect a wide group of consumers to rely routinely on the proposed registry when selecting consumer financial products or services. However, the Bureau believes that the registry would benefit certain consumers if the information in the registry is recirculated, compiled, or analyzed by other users such as consumer advocacy organizations, researchers, or the media. For example, media outlets could use the registry to report which entities have the most government orders enforcing the law against them, which could inform consumers about the most egregious repeat offenders.

The proposed registry may also facilitate private enforcement of the Federal consumer financial laws by consumers, to the extent those laws provide private rights of action, where consumers have been harmed by a registered nonbank. The information

[112] *See, e.g.*, Open, Public, Electronic, and Necessary Government Data Act, in title II of Pub. L. No. 115-435 (Jan. 14, 2019).

[113] 12 U.S.C. 5512(b).

that would be published under the proposal might be useful in helping consumers understand the identity of a company that has offered or provided a particular consumer financial product or service, and in determining whether to file suit or otherwise make choices regarding how to assert their legal rights. And availability of this information may lead consumers and other persons to report to the Bureau instances of similar conduct for the Bureau to investigate.

Under the proposal, the Bureau would not publish the written statement submitted by a supervised registered entity but would instead treat the written statement as Bureau confidential supervisory information subject to the provisions of its rule on the disclosure of records and information at 12 CFR part 1070. The Bureau does propose to publish the name and title of the attesting executive(s) submitted by the supervised registered entity. The Bureau proposes to disclose this name and title information because it believes publication of this information would be in the public interest—namely, it would help ensure accountability at the entity for noncompliance. The Bureau believes that the publication of the executive's name and title would provide an incentive to pay more attention to covered orders. The Bureau believes that designating an executive as ultimately accountable for ensuring compliance with a covered order will prompt the executive to focus greater attention on ensuring the entity's compliance, and in turn increase the likelihood of compliance. The Bureau believes that publication of this designation will increase the likelihood of these effects. Publication of the designation will identify for other regulators (and the general public) the person at the supervised registered entity who is ultimately responsible for compliance with the covered order, as well as more general efforts to comply with Federal consumer financial law. Just as the

possibility of Bureau scrutiny of the attesting executive's conduct is likely to motivate the executive to devote greater attention to compliance efforts, the additional scrutiny from others outside the Bureau will further promote compliance. Publishing the attesting executive's name and title thus dovetails with the supervisory goals discussed above in section IV(D).

The Bureau also believes that publishing the name and title of the executive who has knowledge and control of the supervised entity's efforts to comply with the covered order would benefit users of the system in other ways. Such information would enable employee whistleblowers, or other consumers who have knowledge and information about violations of the applicable order, to ensure that such information gets to the person who is in charge of such compliance. The Bureau also believes that the public would benefit from understanding the names and titles of the highest-ranking executive who is responsible for compliance with a public order enforcing the law, as this information could help consumers better understand and monitor the conduct of the entities with whom they do business. It would also inform consumers of a person to whom they could direct escalated complaints. Other regulators, especially those that have issued covered orders regarding the supervised entity, would likely benefit from understanding which executive(s) have been tasked with ensuring compliance with their orders. Finally, disclosure of this information would increase transparency regarding how the Bureau processes and verifies information submitted as part of the registration system. The Bureau requests comment on this provision, including whether this requirement would assist users of the NBR system and whether it would unduly interfere with the privacy interests of the attesting executive or other interests of the supervised registered entity.

The Bureau seeks comment on the proposed publication requirements and the above-stated rationales for them. Among other things, the Bureau seeks information on the current state of published information in existing systems or databases about the types of orders addressed in this proposed rule. The Bureau also seeks comment on whether the Bureau should publish less information in the proposed registry, or retain discretion to do so, and whether publication of the names and titles of attesting executives will have the desired effects.

V. Section-by-Section Analysis

Part 1092

Subpart A—General

Section 1092.100 Authority and Purpose

100(a) Authority

Proposed § 1092.100(a) would set forth the legal authority for proposed 12 CFR part 1092, including all subparts. Proposed § 1092.100 would refer to CFPA section 1022(b) and (c) and section 1024(b),[114] which are discussed in section III of the proposal above.

100(b) Purpose

Proposed § 1092.100(b) would explain that the purpose of part 1092 is to prescribe rules regarding NBR requirements, to prescribe rules concerning the collection of information from registered entities, and to provide for public release of that information as appropriate.

[114] 12 U.S.C. 5512(b), (c); 12 U.S.C. 5514(b).

Section 1092.101 General Definitions

Proposed § 1092.101 would define terms that are utilized elsewhere in proposed part 1092 of the rules. Proposed § 1092.101(a) would define the terms "affiliate," "consumer," "consumer financial product or service," "covered person," "Federal consumer financial law," "insured credit union," "person," "related person," "service provider," and "State" as having the meanings set forth in the CFPA, 12 U.S.C. 5481. Some of these terms would be used only in subpart B.

Proposed § 1092.101(b) would define the term "Bureau" as a reference to the Consumer Financial Protection Bureau.

Proposed § 1092.101(c) would clarify that the terms "include," "includes," and "including" throughout part 1092 would denote non-exhaustive examples covered by the relevant provision.[115]

Proposed § 1092.101(d) would define the term "nonbank registration system" to mean the Bureau's electronic registration system identified and maintained by the Bureau for the purposes of part 1092. Proposed § 1092.101(e) would define the term "nonbank registration system implementation date" to mean, for a given requirement or subpart of part 1092, the date(s) determined by the Bureau to commence the operations of the NBR system in connection with that requirement or subpart. The Bureau seeks comment on how much time entities would need to comply with the requirements of part 1092 and to register with the NBR system. The Bureau currently anticipates that the NBR system implementation date with respect to subpart B would occur sometime after the effective

[115] *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) (use of "includes" indicates that "the examples enumerated in the text are intended to be illustrative, not exhaustive").

date of the proposed rule, and no earlier than January 2024. The actual NBR system implementation date would depend upon the Bureau's ability to develop and launch the required technical systems that will support the submission and review of applicable filings, and on feedback provided by commenters regarding the time registrants would need to implement this part's requirements. The Bureau would provide advance public notice regarding the NBR system implementation date with respect to subpart B to enable entities subject to subpart B to prepare and submit timely filings to the NBR system.

Section 1092.102 Submission and Use of Registration Information

102(a) Filing Instructions

Proposed § 1092.102(a) would provide that the Bureau shall specify the form and manner for electronic filings and submissions to the NBR system that are required or made voluntarily under part 1092. The Bureau would issue specific guidance for filings and submissions. The Bureau anticipates that its filing instructions may, among other things, specify information that filers must submit to verify that they have authority to act on behalf of the entities for which they are purporting to register. The Bureau proposes to accept electronic filings and submissions to the NBR system only and does not propose to accept paper filings or submissions.

Proposed § 1092.102(a) also would state that the Bureau may provide for extensions of deadlines or time periods prescribed by the proposed rule for persons affected by declared disasters or other emergency situations. Such situations could include natural disasters such as hurricanes, fires, or pandemics, and also could include other emergency situations or undue hardships, including technical problems involving the NBR system. For example, the Bureau could defer deadlines during a presidentially

declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq*.) or a presidentially declared pandemic-related national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq.*). The Bureau would issue guidance regarding such situations. The Bureau seeks comment on the types of situations that may arise in this context, and about appropriate mechanisms for addressing them.

102(b) Coordination or Combination of Systems

Proposed § 1092.102(b) would provide that in administering the NBR system, the Bureau may rely on information a person previously submitted to the NBR system under part 1092 and may coordinate or combine systems with State agencies as described in CFPA sections 1022(c)(7)(C) and 1024(b)(7)(D). Those statutory provisions provide that the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate. This proposed section would clarify that the Bureau may develop or rely on such systems as part of maintaining the NBR system and may also rely on previously submitted information. The Bureau seeks comment on the types of coordinated or combined systems that would be appropriate and the types of information that could be obtained from or provided to State agencies.

102(c) Bureau Use of Registration Information

Proposed § 1092.102(c) would provide that the Bureau may use the information submitted to the NBR system under this part to support its objectives and functions, including in determining when to exercise its authority under CFPA section 1024 to

conduct examinations and when to exercise its enforcement powers under subtitle E of the CFPA.

The Bureau proposes to establish the NBR system under its registration and market-monitoring rulemaking authorities under CFPA section 1022(b)(1), (c)(1)–(4), and (c)(7), and under its supervisory rulemaking authorities under CFPA section 1024(b)(7)(A), (B), and (C). As discussed in greater detail elsewhere in this preamble, the Bureau intends to use the information submitted under the NBR system to monitor for risks to consumers in the offering or provision of consumer financial products or services, and to support all of its functions as appropriate, including its supervisory, rulemaking, enforcement, and other functions.

Proposed § 1092.102(c) also would provide that part 1092, and registration under that part, would not alter any applicable process whereby a person may dispute that it qualifies as a person subject to Bureau authority. For example, 12 CFR 1090.103 establishes a Bureau administrative process for assessing a person's status as a larger participant under CFPA section 1024(a)(1)(B) and 1024(a)(2) and 12 CFR part 1090. As specified in 12 CFR 1090.103(a), if a person receives a written communication from the Bureau initiating a supervisory activity pursuant to CFPA section 1024, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by 12 CFR part 1090 within 45 days of the date of the communication. 12 CFR 1090.103 establishes a process for review and determination by a Bureau official regarding the person's larger participant status. 12 CFR 1090.103(c) provides that, in reaching that determination, the Bureau official shall review the person's affidavit and related information, as well as any other information the official deems relevant.

Under proposed § 1092.102(c), a person may submit such an assertion regarding the person's status as a larger participant under 12 CFR 1090.103 notwithstanding any registration or information submitted to the NBR system under part 1092, including any submission of identifying information or a written statement, or any designation of attesting executive(s) for purposes of proposed subpart B. Submission of such assertions regarding larger participant status to the Bureau under 12 CFR 1090.103, including the Bureau's processes regarding the treatment of such assertions and the effect of any determinations regarding the person's supervised status, would be governed by the provisions of 12 CFR part 1090. The Bureau may use the information provided to the NBR system in connection with making any determination regarding a person's supervised status under 12 CFR 1090.103, along with the affidavit submitted by the person and other information as provided in that section. However, the submission of information to the NBR system would not prevent a person from also submitting other information under 12 CFR 1090.103.

Section 1092.103 Severability

Proposed § 1092.103 would provide that the provisions of the proposed rule are separate and severable from one another, and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect. This is a standard severability clause of the kind that is included in many regulations to clearly express agency intent about the course that is preferred if such events were to occur. The Bureau has carefully considered the requirements of the proposed rule, both individually and in their totality, including their potential costs and benefits to covered persons and consumers. In the event a court were to stay or invalidate one or more provisions of this

rule as finalized, the Bureau would want the remaining portions of the rule as finalized to remain in full force and legal effect.

Subpart B—Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

Section 1092.200 Scope and Purpose

200(a) Scope

Proposed § 1092.200(a) would describe the scope of proposed subpart B. Proposed subpart B would require nonbank covered persons that are subject to certain public agency and court orders enforcing the law to register with the Bureau and to submit copies of the orders to the Bureau and would describe the registration information the Bureau would make publicly available. It would also provide that proposed subpart B would require certain nonbank covered persons that are supervised by the Bureau to prepare and submit an annual written statement. The requirements regarding annual written statements are described in proposed § 1092.204. The Bureau solicits comment on this proposed statement of scope.

200(b) Purpose

Proposed § 1092.200(b) would explain that the purposes of the information collection requirements in proposed subpart B would be to support Bureau functions by monitoring for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services, pursuant to CFPA section 1022(c)(1); to prescribe rules regarding registration requirements applicable to nonbank covered persons, pursuant to CFPA section 1022(c)(7); and to facilitate the supervision of persons described in CFPA section

1024(a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers, and to assess and detect risks to consumers, pursuant to CFPA section 1024(b).[116] The Bureau solicits comment on this proposed statement of purpose.

Section 1092.201 Definitions

Proposed § 1092.201 would define terms used in proposed subpart B. These definitions would supplement the general definitions for the entirety of part 1092 that would be provided in proposed § 1092.101. The Bureau seeks comment on each of the definitions set forth in proposed subpart B and any suggested clarifications, modifications, or alternatives.

201(a) Administrative Information

Proposed § 1092.201(a) would define the term "administrative information" to mean contact information regarding persons subject to subpart B and other information submitted or collected to facilitate the administration of the NBR system. Administrative information would include information such as date and time stamps of submissions to the NBR system, contact information for nonbank personnel involved in making submissions, filer questions and other communications regarding submissions and submission procedures, reconciliation or correction of errors, information submitted under proposed §§ 1092.202(g) and 1092.203(f),[117] and other information that would be submitted or collected to facilitate the administration of the NBR system.

[116] More detailed discussions of how the proposal would achieve these purposes are contained elsewhere in this preamble.

[117] *See* discussion in the section-by-section discussion of these provisions below.

Proposed § 1092.204(a) would provide that the Bureau may determine not to publish such administrative information, as discussed below in the section-by-section discussion of proposed § 1092.204(a). The Bureau seeks comment whether any other information that might be collected through the NBR system should also be treated as administrative information.

201(b) Attesting Executive

Proposed § 1092.201(b) would define the term "attesting executive" to mean, with respect to any covered order regarding a supervised registered entity, the individual designated by the supervised registered entity to perform the supervised registered entity's duties with respect to the covered order under proposed § 1092.203. That section would require a supervised registered entity to designate as its "attesting executive" its highest-ranking duly appointed senior executive officer (or, if the supervised registered entity does not have any duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the supervised registered entity) whose assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law, who has knowledge of the entity's systems and procedures for achieving compliance with the covered order, and who has control over the entity's efforts to comply with the covered order.

Below, in the section-by-section discussion of proposed § 1092.203, the Bureau proposes requirements regarding attesting executives.

201(c) Covered Law

Proposed § 1092.201(c) would define the term "covered law" to mean one of several types of laws, as described. The proposed term "covered law" would be central

to defining which orders and portions of orders would be subject to the requirements of proposed subpart B. Proposed § 1092.201(e) would define the term covered order to include certain orders that impose certain obligations on a covered nonbank based on an alleged violation of a covered law. Thus, the proposed term "covered law" would help determine the application of proposed subpart B's registration requirements. The Bureau believes that requiring registration of covered nonbanks that are subject to covered orders issued under these laws would further the purposes of proposed subpart B.

Under the proposal, a law listed in proposed § 1092.201(c)(1) through (6) would qualify as a covered law only 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. The Bureau is interested in registering orders that relate to offering or providing consumer financial products or services. The Bureau recognizes that the laws listed in proposed § 1092.201(d)(1) through (6) may apply to a wide range of conduct not involving consumer financial products or services. While the Bureau believes that reporting on such violations could still be probative of risks to consumers in the markets for consumer financial products and services—as misconduct in one line of business is not necessarily cabined to that line of business—the Bureau believes that a more limited definition of covered law strikes the right balance between ensuring that the Bureau remains adequately informed of risks to consumers in the offering or provision of consumer financial products and services and minimizing the potential burden of the reporting requirements on nonbank covered persons. The Bureau seeks comment on whether this definition achieves this balance or should be modified to achieve it.

The proposal lists categories of laws that would constitute "covered laws" 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. For the reasons discussed above in section IV(C), the Bureau believes that orders issued under the types of covered laws described in the proposal are likely to be probative of risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

First, proposed § 1092.201(c) would define the term covered law to include a Federal consumer financial law, as that term is defined in proposed § 1092.101(a) and the CFPA.[118] The Bureau is charged with administering, interpreting, and enforcing the Federal consumer financial laws, which include the CFPA itself, 18 enumerated consumer laws (such as the Fair Credit Reporting Act and the Truth in Lending Act),[119] and the laws for which authorities were transferred to the Bureau under subtitles F and H of the CFPA, as well as rules and orders issued by the Bureau under any of these laws.[120]

The Bureau believes that requiring registration of covered nonbanks in connection with certain orders issued under Federal consumer financial laws will further the purposes of proposed subpart B. As discussed in section IV, "to support [the Bureau's] rulemaking and other functions," Congress mandated that the Bureau "shall monitor for risks to consumers in the offering or provision of consumer financial products or services,

[118] *See* 12 U.S.C. 5481(14).

[119] *See* 12 U.S.C. 5481(12).

[120] 12 U.S.C. 5481(14).

including developments in markets for such products or services."[121] In matters where an agency other than the Bureau has issued or obtained a final, public order concluding that an entity has violated Federal consumer financial law in connection with the offering or provision of a consumer financial product or service, the Bureau will generally have jurisdiction over the conduct that resulted in that order. The Bureau therefore has a clear interest in identifying and understanding the nature of the risks to consumers presented by such conduct, including the risk that the conduct continues outside the particular jurisdiction or in connection with other consumer financial products or services that are offered or provided by the covered nonbank. A pattern of similar alleged or found violations of Federal consumer financial law across multiple nonbank covered persons may indicate a problem that the Bureau can best address by engaging in rulemaking to clarify or expand available consumer protection to address emerging consumer risk trends, or by using other tools, such as consumer education, to address the identified risks. And, depending on the facts and circumstances, the Bureau may consider bringing its own supervisory or enforcement action in connection with the same or related conduct.[122] Thus, the Bureau believes that violations of the Federal consumer financial laws, and especially repeat violations of such laws, may be probative of risks to

[121] 12 U.S.C. 5512(c)(1).

[122] The Bureau is also proposing to require registration of orders that the Bureau has obtained or issued for violations of Federal consumer financial laws. While the Bureau is of course aware of such orders, collecting all orders for violations of covered laws—including those obtained or issued by the Bureau—within the proposed registry would benefit the Bureau, other regulators, and the general public by providing a single point of reference for such orders. The Bureau would also benefit from receiving the written statements required under proposed § 1092.203 with respect to orders it obtains or issues.

consumers and may indicate more systemic problems at an entity or in the relevant market related to offering or provision of consumer financial products or services.

The Bureau seeks comment on including Federal consumer financial laws in the definition of "covered law" and whether it should consider any related inclusions, exclusions, or conditions relating to Federal consumer financial laws.

Second, proposed § 1092.201(c)(2) would define the term "covered law" to include any other law as to which the Bureau may exercise enforcement authority. As explained above in section IV(C), the Bureau may enforce certain laws other than Federal consumer financial laws, such as the Military Lending Act.[123] The Bureau believes that the proposed registry should collect information regarding agency and court orders issued under any law that the Bureau may enforce, where 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. By definition, the conduct addressed in such orders will generally fall within the scope of the Bureau's enforcement authority. More generally, in the Bureau's experience, evidence of such conduct could be highly probative of a broader risk that the entity has engaged or will engage in conduct that may violate Federal consumer financial laws. For example, violations of the Military Lending Act may overlap with, or be closely associated with, violations of the CFPA's UDAAP prohibitions[124] or the Truth in Lending Act,[125] among other Federal consumer financial laws. In addition, in the Bureau's experience, a violation of one law within the Bureau's enforcement authority

[123] 10 U.S.C. 987(f)(6) (authorizing Bureau enforcement of the Military Lending Act).

[124] 15 U.S.C. 5531, 5536(a)(1)(B).

[125] 15 U.S.C. 1601 *et seq.*

may be indicative of broader inadequacies in an entity's compliance systems that are resulting in or could result in other legal violations, including violations of Federal consumer financial laws. Furthermore, including in the registry orders issued under any law that the Bureau may enforce (where 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) would further the Bureau's objective of creating a registry that could serve as a single, consolidated reference tool for use in monitoring for risks to consumers, thereby increasing the Bureau's ability to use the registry to monitor for patterns of risky conduct of nonbank covered persons across entities, industries, and product offerings.

The Bureau seeks comment on whether it should include the laws described in proposed § 1092.201(c)(2) in the definition of "covered law." The Bureau also seeks comment on whether it should consider any exclusions from, or revisions to, the description of the laws captured by proposed § 1092.201(c)(2).

Third, proposed § 1092.201(c)(3) would define the term "covered law" to include the prohibition of unfair or deceptive acts or practices under section 5 of the FTC Act, 15 U.S.C. 45, or any rule or order issued for the purpose of implementing that prohibition. The proposal would *not* include within the definition of "covered law" FTC Act section 5's prohibition of "[u]nfair methods of competition in or affecting commerce," or rules or orders issued solely pursuant to that prohibition.[126] The Bureau expects that entities would be aware in any specific case whether a provision of an applicable order has been issued under FTC Act section 5's prohibition of unfair or deceptive acts or practices (or a

[126] 15 U.S.C. 45(a)(1).

rule or order issued for the purpose of implementing that prohibition), as opposed to section 5's prohibition of "[u]nfair methods of competition in or affecting commerce" (or a rule or order issued thereunder), and thus whether the order provision was issued under a "covered law" or not. The Bureau understands that orders issued in connection with violations of FTC Act section 5 routinely distinguish between these two authorities, and that orders issued under FTC Act section 5's prohibition of "[u]nfair methods of competition in or affecting commerce" rarely, if ever, relate to UDAP violations involving the offering or provision of a consumer financial product or service. The Bureau requests comment on whether the proposal should also require registration of orders issued under FTC Act section 5's prohibition of "[u]nfair methods of competition in or affecting commerce," or rules or orders issued pursuant to that prohibition. The Bureau also seeks comment on whether the proposal should include measures to clarify any matters relating to this proposed distinction between types of FTC Act section 5 order provisions.

As discussed further in section IV(C) above, the Bureau believes that an order issued under FTC Act section 5's prohibition of unfair or deceptive acts or practices may be probative of violations of Federal consumer financial law, including CFPA sections 1031 and 1036(a)(1)(B).[127] Because the CFPA's prohibition of unfair or deceptive acts or practices is modeled after FTC Act section 5's similar prohibition,[128] conduct that constitutes a UDAP violation under FTC Act section 5 also likely violates the CFPA's UDAAP provisions. The Bureau also believes that FTC Act section 5 unfairness and

[127] 12 U.S.C. 5531, 5536(a)(1)(B).

[128] *See, e.g.*, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, 219 F. Supp. 3d at 902–04.

deception violations related to the offering or provision of consumer financial products or services may indicate more systemic problems at an entity that may impact the offering or provision of consumer financial products or services other than those issues specifically identified in the order. The Bureau would need to know about such findings so that it can assess whether the violation is indicative of a larger and potentially more systemic problem at the covered nonbank, or potentially throughout an entire market. And, as discussed, information about such violations would inform the Bureau's exercise of its various rulemaking, supervisory, enforcement, consumer education, and other functions.

"Covered law" under the proposal would include not only FTC Act section 5, but also any rules or orders issued for the purpose of implementing FTC Act section 5's UDAP prohibition.[129] Section 18 of the FTC Act, 15 U.S.C. 57a, authorizes the FTC to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of FTC Act section 5(a)(1).[130] These FTC rules, which are known as "trade regulation rules," would be covered laws under the proposed definition to the extent the conduct found or alleged to violate such rules relates to the offering or provision of a consumer financial product or service. Violations of these rules generally constitute violations of FTC Act section 5

[129] In certain circumstances, the Bureau may enforce a rule prescribed under the FTC Act by the FTC with respect to an unfair or deceptive act or practice. *See* 12 U.S.C. 5581(b)(5)(B)(ii). Such an FTC rule, where issued by the FTC to implement FTC Act section 5, would be a covered law under the proposed definition.

[130] 15 U.S.C. 57a(a)(1)(B).

itself.[131] And the Bureau believes that, like violations of FTC Act section 5 itself, violations of the rules issued under FTC Act section 5, where they arise out of conduct in connection with the offering or provision of consumer financial products or services, would likely be probative of risks to consumers and warrant attention by the Bureau.

The proposed definition of "covered law" would also include orders issued by the FTC itself under FTC Act section 5's UDAP prohibition, as well as by other agencies. The Bureau believes that violations of such orders present similar risks to consumers as those presented by violations of FTC Act section 5 and the rules issued thereunder. The Bureau seeks comment on including the prohibition on unfair or deceptive acts or practices under FTC Act section 5, and rules and orders issued for the purpose of implementing that prohibition, in the definition of "covered law," and whether it should consider any related inclusions, exclusions, or conditions.

Fourth, proposed § 1092.201(c)(4) would define the term "covered law" to include a State law prohibiting unfair, deceptive, or abusive acts or practices that is identified in appendix A of part 1092. Proposed appendix A provides a list of State statutes that prohibit unfair, deceptive, or abusive acts or practices and that the Bureau has reviewed and proposes to define as a covered law under this provision. As with the other laws described in proposed § 1092.201(c), a State UDAAP law would only qualify as a covered law to the extent the conduct found or alleged to violate the State UDAAP law relates to the offering or provision of a consumer financial product or service. The

[131] 15 U.S.C. 57a(d)(3) ("When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule.").

Bureau has reviewed the State statutes identified in proposed appendix A and as explained below, it believes that requiring registration of covered nonbanks that are subject to covered orders issued under such statutes would likely further the purposes of proposed subpart B.

Proposed appendix A includes State laws of general applicability that prohibit unfair, deceptive, or abusive acts or practices and that might apply to the offering or provision of consumer financial products or services. Although the scope and content of these State laws may vary at the margin, the Bureau believes these statutes cover a core concept of unfairness, deception, or abusiveness that makes violations of them likely probative of risks to consumers in the offering or provision of consumer financial products and services. These statutes may commonly be referred to as "UDAP" or "UDAAP" statutes, or "little FTC Acts," and are often labeled in State statutes as State "consumer protection acts" or as laws addressing "unfair" or "deceptive" "trade practices." State or local agencies may use these statutes to bring cases or actions with respect to practices that injure consumers. While these State statutes may also authorize private suits by consumers and other persons, the proposal would only require registration with respect to covered orders issued at least in part in any action or proceeding brought by any Federal agency, State agency, or local agency (as described further below in the section-by-section discussion of proposed § 1092.201(e)(2)).

The Bureau is proposing to list these statutes in appendix A, and thus to include them in the proposed rule's definition of covered law, in part because those statutes are

generally analogous to CFPA sections 1031 and 1036(a)(1)(B) and FTC Act section 5.[132] Several of these State statutes specifically provide that "it is the intent of the legislature that in construing [the State statute], the courts will be guided by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act," or words to this effect.[133] Obtaining a better understanding of entities' compliance with State UDAP/UDAAP laws will assist the Bureau in the assessment and detection of risks for the same general reasons described with respect to alleged or found violations of FTC Act section 5. The Bureau believes that entities that have violated one of these State statutes, and especially repeat violators of such statutes, may pose heightened risks to consumers in the offering or provision of consumer financial products and services, including the risk that they have engaged, and may continue to engage, in unfair, deceptive, or abusive acts and practices in violation of CFPA section 1031. And information identifying patterns of such risky conduct across entities, industries, product offerings, or jurisdictions would be highly informative to the Bureau's monitoring work. The Bureau has attempted to identify all of the applicable State UDAP/UDAAP statutes of general applicability in appendix A, but requests comment on whether it has comprehensively done so. The Bureau proposes to include in appendix A all such State statutes and seeks comment on any additions, subtractions, or modifications to the State UDAP/UDAAP statutes of general applicability in appendix A.

The Bureau is also proposing to include in appendix A, and thus to include in the definition of the term covered law, certain other industry-specific State statutes that

[132] 12 U.S.C. 5531, 5536(a)(1)(B); 15 U.S.C. 45.

[133] *E.g.*, Mass. Gen. Laws ch. 93A, sec. 2(b); Conn. Gen. Stat. sec. 42-110b(b).

prevent unfair, deceptive, or abusive conduct in connection with certain specific consumer financial industries or markets. For example, proposed appendix A would include New York Banking Law section 719(2), regarding prohibited practices by student loan servicers. This State statutory provision prohibits "[e]ngag[ing] in any unfair, deceptive or predatory act or practice toward any person or misrepresent[ing] or omit[ting] any material information in connection with the servicing of a student loan."[134] The Bureau is proposing to include this New York State law and others like it in appendix A, to the extent that the conduct found or alleged to violate such law relates to the offering or provision of a consumer financial product or service.

As with State UDAP/UDAAP laws of general applicability, the Bureau believes that violation of such industry-specific State statutes that prohibit unfair, deceptive, or abusive acts or practices in connection with consumer financial industries or markets and in connection with the offering or provision of consumer financial products or services would be probative of potential violations of CFPA sections 1031 and 1036, and also of other related risks to consumers within the scope of the Bureau's jurisdiction. The Bureau believes that omitting these industry-specific statutes from the definition of "covered law" may cause the information submitted to the proposed registry to be incomplete. Among other things, the Bureau understands that many State agencies typically rely upon such industry-specific statutes to enforce prohibitions on conduct by covered nonbanks that is similar to that prohibited under UDAP/UDAAP laws of general applicability. Thus, the Bureau believes registration of orders issued under such State

[134] New York Banking Law sec. 719(2).

statutes would provide information that is probative of the types of risks the Bureau believes to be associated with orders issued under State UDAP/UDAAP laws of general applicability. The Bureau has attempted to identify applicable State UDAP/UDAAP statutes related to applicable consumer financial industries or markets in appendix A, but requests comment on whether it has comprehensively done so. The Bureau proposes to include in appendix A all such State statutes.

The Bureau proposes to require registration of all orders issued under State laws listed in appendix A, as long as the conduct at issue relates to the offering or provision of a consumer financial product or service, and the order satisfies the definition of "covered order" in proposed § 1092.201(e). The Bureau recognizes that some State UDAP/UDAAP statutes listed in appendix A may prohibit conduct that regulated entities might argue is not prohibited under CFPA sections 1031 and 1036(a)(1)(B). For example, State UDAP/UDAAP statutes modeled after FTC Act section 5 may include provisions that, in addition to prohibiting "unfair" and "deceptive" conduct, also prohibit "unfair methods of competition" in connection with antitrust or anticompetition matters. While it is possible that such orders *might* be less probative than other orders, the Bureau believes that limiting the scope of such covered laws to those involving the offering or provision of consumer financial products and services sufficiently assures that most orders reported will be valuable in effectively monitoring for risks to consumers in the offering or the provision of such products and services. Moreover, the Bureau anticipates that it will not always be the case that an agency or court order will clearly distinguish whether it is issued under State statutory provisions preventing "unfair," "deceptive," or "abusive" acts and practices on the one hand, or "anticompetitive" acts or practices on the

other—especially in cases where a State statute addresses all of them. Unlike orders issued under FTC Act section 5, it is not clear to the Bureau that orders issued under such State laws routinely distinguish between these two types of authorities. Therefore, attempting to carve out portions of State UDAP/UDAAP statutes that extend beyond the conduct prohibited by CFPA sections 1031 and 1036(a)(1)(B) would be impracticable and risk undermining the effectiveness of the rule. The Bureau thus proposes to define the term "covered law" by listing specific State statutes. Where a State statute is listed in appendix A and otherwise satisfies proposed § 1092.201(c), the Bureau would propose to treat it as a covered law, regardless of whether any specific order issued under that law expressly refers to the State law's prohibition of "unfair," "deceptive," or "abusive" acts and practices. In most cases, the Bureau anticipates that violations of the listed State statutes that relate to the offering or provision of a consumer financial product or service will be probative of risks to consumers within the Bureau's jurisdiction. The Bureau seeks comment on this approach, including whether it should further clarify the definition of covered law in this regard, and whether the proposed list at proposed appendix A adequately identifies such State laws.

The Bureau also seeks specific comment on whether to require registration, and to list in appendix A, additional State statutes that prohibit "unconscionable" conduct but do not also contain a specific reference to "unfair," "deceptive," or "abusive" conduct.[135] While the Bureau has not included such State laws in appendix A, the Bureau believes that such prohibitions on unconscionable conduct often reach conduct that qualifies as a

[135] *See, e.g.*, Kan. Stat. Ann. sec. 50-627.

UDAAP violation subject to the Bureau's jurisdiction under CFPA sections 1031 and 1036(a)(1)(B).[136] Therefore, the Bureau seeks comment regarding whether requiring nonbank covered persons to report violations of such State unconscionability prohibitions, when they relate to the offering or provision of a consumer financial product or service, would significantly assist the Bureau in effectively monitoring for risks to consumers within the Bureau's jurisdiction, or facilitate the Bureau's exercise of its rulemaking and other authorities.

The Bureau has not included laws of tribal governments in appendix A. While the Bureau believes that many orders issued under such laws may be highly probative of risks to consumers and could assist the Bureau in carrying out its market monitoring obligations—as well as assist the Bureau in assembling an effective nonbank registry—the Bureau preliminarily concludes that considerations of administrative efficiency favor focusing on other orders. The Bureau, however, is continuing to consider whether to include tribal UDAP/UDAAP laws in appendix A. The Bureau seeks comment on whether tribal UDAP/UDAAP laws should be included among the list of "covered laws," and if so, which specific tribal UDAP/UDAAP laws should be included in the list.

Fifth, proposed § 1092.201(c)(5) would include in the definition of the term "covered law" a State law amending or otherwise succeeding a law identified in appendix A, to the extent that such law is materially similar to its predecessor, and the conduct

[136] *Compare, e.g.*, Kan. Stat. Ann. sec. 50-627(b)(1) (providing that, in determining whether an act or practice is unconscionable, a court shall consider whether "[t]he supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor"), *with* 12 U.S.C. 5531(d)(2)(B) (act or practice is abusive if, among other things, it "takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service").

found or alleged to violate such law relates to the offering or provision of a consumer financial product or service.

The Bureau is proposing § 1092.201(c)(5) in order to clarify that appendix A is intended to capture certain future changes made by States to the State laws listed therein. States may make immaterial changes from time to time, including renumbering or amending the statutes listed in appendix A, in a manner that could cause proposed appendix A to become technically "incorrect" or "obsolete" in the view of some regulated entities. Proposed § 1092.201(c)(5) makes clear that is not the Bureau's intent. To the extent the amended or otherwise succeeding law is materially similar to its predecessor, proposed § 1092.201(c)(5) would ensure that it would still qualify as a "covered law." The definition of covered law thus would capture a successor to a law listed in appendix A if, for example, the conduct found or alleged to violate the successor law would have constituted a violation of the predecessor law were it still in effect. The Bureau seeks comment on all aspects of proposed § 1092.201(c)(5), including whether the Bureau should define successor laws covered by appendix A more broadly or narrowly than the approach adopted here, and whether regulated entities would benefit from any additional guidance in determining whether a successor law is materially similar to a predecessor law listed in appendix A.

Finally, proposed § 1092.201(c)(6) would include in the definition of the term "covered law" a rule or order issued by a State agency for the purpose of implementing a State law described in proposed § 1092.201(c)(4) or (5), to the extent the conduct found or alleged to violate such regulation relates to the offering or provision of a consumer financial product or service. Various State statutes authorize one or more State agencies

to issue regulations implementing the terms of those statutes, thereby authorizing the State agency to further define specific unfair, deceptive, or abusive acts or practices.[137] Proposed § 1092.201(c)(6) would include such State agency regulations within the meaning of the term "covered law."

The Bureau seeks comment on all aspects of proposed section § 1092.201(c), including whether the types of covered laws proposed are appropriate, whether they may be either overinclusive or underinclusive in light of the Bureau's objectives in this rulemaking, and whether the definition of the term "covered law" may be clarified or strengthened to achieve the purposes of proposed subpart B.

201(d) Covered Nonbank

The proposal would define the term "covered nonbank" to mean a covered person[138] that does not fall into one of five categories. First, the Bureau proposes to exclude from the definition insured depository institutions, insured credit unions, or related persons. The Bureau has considered proposing to collect information about relevant orders in place against such persons under its authority to issue rules mandating collection of information set forth in CFPA section 1022(c)(4)(B)(ii). While the Bureau might at some point consider collecting or publishing the information described in the proposal from such persons, the Bureau believes that there is currently greater need to

[137] *See, e.g.*, Cal. Fin. Code sec. 90009(c).

[138] As provided in proposed § 1092.101(a), the proposal would define the term "covered person" to have the same meaning as in 12 U.S.C. 5481(6). The proposal would not define "service providers," as defined in 12 U.S.C. 5481(26), as covered nonbanks *per se*. Entities that are service providers, however, may nevertheless also be covered persons under the CFPA. Among other things, a person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service. *See* 12 U.S.C. 5481(26)(C). And a service provider that acts as a service provider to its covered person affiliate may itself be deemed to be a covered person as provided in 12 U.S.C. 5481(6)(B).

collect this information from the nonbanks under its jurisdiction. Among other things, 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. Also, 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. As a result, there is a unique need to identify nonbanks subject to orders through this proposed registration system. In addition, the proposal 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.[139]

Second, the proposal would exclude from the definition of the term "covered nonbank" a "State," as defined in CFPA section 1002(27)—a term that includes "any federally recognized Indian tribe, as defined by the Secretary of the Interior" under section 104(a) of the Federal Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5131(a).[140] The Bureau has other avenues of collaborating with State partners (including

[139] An 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.

[140] 12 U.S.C. 5481(27).

tribal partners) and, out of considerations of comity, does not seek to subject them to an information collection requirement in this proposal.

Third, the proposal excludes natural persons from the definition of "covered nonbank." The Bureau is not proposing to impose subpart B's registration requirements on natural persons, even though natural persons may be covered persons and may be subject to the types of orders described in the proposal. (For example, a sole proprietor not incorporated as a legal entity could qualify as a covered person.) Under the proposed exclusion, for example, natural persons subject to orders issued under FTC Act section 5, removal and prohibition orders or orders assessing civil money penalties issued by an appropriate Federal banking agency under section 8 of the Federal Deposit Insurance Act,[141] or State licensing orders or orders issued under the S.A.F.E. Mortgage Licensing Act of 2008[142] would not be subject to the proposal's registration requirements. The "natural person" exception in proposed § 1092.201(c)(3) is intended only to exclude individual human beings from the definition of "covered nonbank." The definition of "covered nonbank" would include trusts and other entities that meet the definition of "covered person" under CFPA section 1002(6).[143] The Bureau is primarily interested in obtaining information regarding orders that apply to entities because it believes such orders will be most useful in identifying relevant risks to consumers. The Bureau believes that many of the agency and court orders enforcing the law issued against

[141] 12 U.S.C. 1818.

[142] 12 U.S.C. 5101 *et seq.*

[143] *See* 12 U.S.C. 5481(6). *See also* 12 U.S.C. 5481 (defining the term "person" to include, in addition to individuals, any "partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity").

individuals are highly specific to the facts and circumstances relevant to the individual's conduct and are less likely to implicate broader risks to consumers and markets. In addition, the Bureau is primarily interested in obtaining and publishing registration information regarding nonbank entities that are subject to its jurisdiction, which among other things would enable consumers to better identify such entities and would provide information to the public and other regulators. The Bureau is concerned that, if the Bureau should extend the registration requirement to natural persons, the information provided would be less relevant to consumers and the other users of the NBR system. Therefore, the potential benefit of extending the registration requirement to natural persons likely would not justify the additional Bureau resources that would need to be allocated to implement and administer such an expansion of the Bureau's registration system. The Bureau also believes that proposed § 1092.203's requirements to designate one or more attesting executives and submit written statements would not be appropriate for natural persons. The Bureau requests comment on this proposed exclusion.

Fourth, the proposal excludes from the definition of "covered nonbank" a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, within the meaning of 12 U.S.C. 5519(a), except to the extent such a person engages in functions that are excepted from the application of 12 U.S.C. 5519(a) as described in 12 U.S.C. 5519(b). CFPA section 1029 provides an exclusion from the Bureau's rulemaking authority for certain motor vehicle dealers.[144] However, CFPA section 1029(b) exempts certain persons from this

[144] 12 U.S.C. 5519 ("Exclusion for Auto Dealers").

exclusion. Persons covered by section 1029(a) *would* qualify as "covered nonbanks" under the proposal so long as they engage in the functions described in section 1029(b)—in which case they would be "covered nonbanks." Proposed § 1092.201(e), discussed below, would further provide that the only orders issued to such motor vehicle dealers that would require registration would be those issued in connection with the functions that are excepted from the application of 12 U.S.C. 5519(a) as described in 12 U.S.C. 5519(b).

Fifth, the proposal excludes a person from the definition of "covered nonbank" if the person qualifies 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 under 12 U.S.C. 5517.[145] This provision would clarify that persons whose activities are wholly excluded from the rulemaking authority of the Bureau under one or more of the provisions of section 1027 of the CFPA are not "covered nonbanks." However, where the CFPA provides that any of the activities engaged in by such persons *are* subject to the Bureau's rulemaking authority, this limitation would not exclude the person from qualifying as a "covered nonbank." For example, CFPA section 1027(*l*)(1) provides an exclusion from the Bureau's rulemaking authority for certain persons engaging in certain activities relating to charitable contributions.[146] Under the proposal, a covered person would not be deemed a "covered person" if it qualifies for this statutory exclusion and is not otherwise exempt from it. But CFPA section 1027(*l*)(2) exempts certain activities from this statutory exclusion by providing that "the exclusion in [CFPA

[145] 12 U.S.C. 5517.

[146] 12 U.S.C. 5517(l)(1) ("Exclusion for Activities Relating to Charitable Contributions").

section 1027(*l*)(1)] does not apply to any activities not described in [CFPA section 1027(*l*)(1)] that are the offering or provision of any consumer financial product or service, or are otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H."[147] As proposed, persons described in CFPA section 1027(*l*)(1) engaging in the activities described therein *would* qualify as "covered nonbanks" so long as they engage in any of the activities described in CFPA section 1027(*l*)(2), and they would thus be subject to all of the information-collection requirements of the rule applicable to "covered nonbanks," regardless of whether the applicable "covered order" addressed the conduct subject to the statutory exclusion.

The Bureau is also considering whether it should adopt an alternative approach that would limit all of the proposal's registration requirements to covered persons that are subject to the Bureau's supervision and examination authority under CFPA section 1024(a).[148] The Bureau believes this approach would significantly narrow the number of entities that would be required to register under proposed subpart B, and therefore would also limit the information provided to the NBR system. However, this alternative approach would nevertheless provide significant benefits to the Bureau and other users of the system. The Bureau would be able to use the information provided to identify risk to consumers, to prioritize its supervisory activities, and to support its other functions as described in this proposal. In addition, the Bureau has a particular interest in those supervised entities due to its exclusive Federal supervisory and enforcement authority,

[147] 12 U.S.C. 5517(*l*)(2).

[148] 12 U.S.C. 5514(a).

with certain exceptions as described in the CFPA.[149] The Bureau seeks comment on this alternative approach, including whether the proposed scope of the approach is appropriate and why or why not.

More generally, the Bureau seeks comment regarding the overall scope of the proposed definition of "covered nonbank," including whether the definition should be expanded or limited in light of the purposes and objectives of subpart B. The Bureau further seeks comment on whether a more limited or expanded approach to the registration of covered persons would be appropriate instead of the proposed requirements, whether it should consider any other modifications to the scope of the rule, and how such modifications would match the Bureau's policy goals.

201(e) Covered Order

The Bureau proposes to add proposed § 1092.201(e) to define the term "covered order." The proposal would define the term to include only orders that are both public and final. The term "public" is defined at proposed § 1092.201(k). The proposed term "covered order" is intended to cover only final settlement or consent orders, or final agency or court orders resulting from litigation or adjudicated agency proceedings. By "final" order, the proposal means to exclude such orders as preliminary injunctions, temporary restraining orders, orders partially granting and partially denying motions to dismiss or summary-judgment motions, and other interlocutory orders.[150] The proposed term would also exclude temporary cease-and-desist orders that come into effect pending

[149] *See* 12 U.S.C. 5514(c)(1), (d).

[150] *See, e.g.*, *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408–09 (2015) (discussing the meaning of "final decision" under 28 U.S.C. 1291).

the resolution of an underlying contested matter but would include a related final cease-and-desist or other order resolving the matter. The proposed term would also exclude notices of charges, accusations, or complaints that are part of disciplinary or enforcement proceedings but do not constitute a final order. The Bureau proposes to include orders that are final by their own terms or under applicable law, even where Federal, State, or local law allows for the appeal of such orders. Proposed § 1092.201(f), defining the term "effective date," addresses situations where an order is subject to a stay following issuance. The Bureau seeks comment on whether the term "final" should be further defined in the regulatory text. The Bureau also seeks comment on whether certain types of non-final orders should be included in the proposed definition of "covered order," or whether the Bureau should consider expressly excluding other types of orders.

The proposed definition includes orders issued by either an agency or a court. The proposal would clarify that the definition would include an otherwise covered order whether or not issued upon consent. Accordingly, "covered orders" may be issued upon consent or settlement. They may also be issued after the filing of a lawsuit or complaint and a process of litigation or adjudication. The proposed term would not include corporate resolutions adopted by an entity and not issued by an agency or court. Nor would the proposed term generally include licenses, including conditional licenses; but the term would include an order suspending, conditioning, or revoking a license based on a violation of law. Nor would the proposed term include related stipulations or consents, where those documents are not incorporated into or otherwise made part of the order. The Bureau seeks comment on whether certain types of orders should be categorically excluded from registration.

Proposed § 1092.201(e)(1) would also include, as a component of the definition of the term "covered order" for a given covered nonbank, a requirement that the order identify the covered nonbank by name as a party subject to the order. Thus, for example, orders that indirectly refer to a covered nonbank as an "affiliate" of a named party, but do not name the covered nonbank as itself a party subject to the order, would not be covered orders under proposed § 1092.201(e) with respect to the covered nonbank. Nor would orders that apply to a covered nonbank only as a "successor and assign" of a named party, where the order does not expressly identify the covered nonbank by name as a party subject to the order. The proposal would include in the definition a covered nonbank that is listed by name as a party somewhere within the body of the order, even if the covered nonbank is not listed in the order's title or caption. In other words, to fall within the proposed § 1092.201(e) definition, it would be sufficient that the order identifies the covered nonbank by name as a party subject to the order even if the covered nonbank is not listed in the title or caption of the order, or as the primary respondent, defendant, or subject of the order. A covered nonbank may satisfy the proposed definition even if the issuing agency or court does not list the covered nonbank as a party in related press releases or internet links. The Bureau seeks comment on the scope of proposed § 1092.201(e)(1)'s limitation of the definition of "covered order," and whether proposed § 1092.201(e)(1) should also include affiliates, successors and assigns, or other methods of identifying entities subject to orders, even though they are not expressly named in the order.

Proposed § 1092.201(e)(2) would include, as a component of the definition of the term "covered order," a requirement that the order have been issued at least in part in any

action or proceeding brought by any Federal agency, State agency, or local agency. The Bureau believes that limiting the registration requirement to orders involving such agencies will provide sufficient information to support Bureau functions. This proposed requirement would include orders issued by the Bureau itself, the "prudential regulators," as that term is defined at CFPA section 1002(24),[151] and any "Executive agency," as that term is defined at 5 U.S.C. 105. The proposed requirement would also include orders issued by "State agencies" as defined at proposed § 1092.201(n) and "local agencies" as defined at proposed § 1092.201(i). An order issued by a local agency would satisfy this proposed requirement, but such an order would not satisfy the requirement set forth in proposed § 1092.201(e)(4) (described below) unless the order imposes the obligations described in proposed § 1092.201(e)(3) on the covered nonbank based on one or more violations of a covered law. While certain Federal and State laws are included in the § 1092.201(c) definition of the term covered law, local laws are not. The Bureau seeks comment on its use and descriptions of the terms "Federal agency," "State agency," and "local agency" and whether the Bureau should consider excluding any agencies as defined or, conversely, broadening these terms to include other relevant agencies or entities.

Proposed § 1092.201(e)(3) further would include, as a component of the definition of the term "covered order," a requirement that the order contain public provisions that impose obligations on the covered nonbank to take certain actions or to refrain from taking certain actions. Such obligations may include, for example,

[151] 12 U.S.C. 5481(24).

injunctions or other obligations to cease and desist from violations of the law; to pay civil money penalties, refunds, restitution, disgorgement, or other money; to amend certain policies and procedures, including but not limited to instances where the order requires submission of the proposed amendments to policies and procedures for nonobjection; to maintain records or to provide them upon request; or to take or to refrain from taking other actions. An order suspending, conditioning, or revoking a license based on a violation of law would meet this requirement. An order that lacks any public provision imposing such an obligation on the covered nonbank would not meet the requirement in proposed § 1092.201(e)(3). An example of the type of orders that might not satisfy this requirement would be a declaratory judgment order finding that an entity has violated the law, but not imposing any remedial obligations. Other examples might include orders whose only public provisions are releases and general contractual terms frequently contained in consent orders, such as severability and counterpart signature provisions, but only to the extent these provisions do not impose any other obligations described by proposed § 1092.201(e)(3).

The proposed § 1092.201(e)(3) requirement would exclude order provisions that are not "public" as that term is defined in proposed § 1092.201(k). For example, obligations imposed by non-public provisions that constitute confidential supervisory information of another agency would not be considered when determining whether a particular order satisfies this proposed requirement. Proposed § 1092.201(e)(3) would also exclude orders that lack any public provision imposing an obligation on the covered nonbank to take certain actions or to refrain from taking certain actions. For example, an order that describes unlawful conduct but does not contain any such public provisions

imposing obligations described at proposed § 1092.201(e)(3) would not satisfy this requirement. The Bureau proposes to exclude from the rule's information-collection requirements nonpublic orders and portions of orders in order to help protect the confidential processes of other agencies, including their supervisory processes. The Bureau is concerned that requiring registration of confidential supervisory information might interfere with the functions and missions of other agencies and does not believe that requiring such registration is necessary to accomplish the purposes of the proposed rule. To the extent that the Bureau has a need to review nonpublic orders or nonpublic portions of orders, it may seek access to relevant information through inter-agency information sharing that protects applicable privileges and confidentiality. In addition, as discussed below in the section-by-section discussion of proposed § 1092.201(k), the Bureau believes that publication of nonpublic information, including but not limited to confidential supervisory information of the Bureau or other agencies, would be inappropriate. The Bureau requests comment on its proposed exclusion from the registry of nonpublic orders and nonpublic portions of orders, including whether these provisions would sufficiently protect confidential information of other agencies, and whether covered nonbanks would have sufficient information to comply with these provisions.

Proposed § 1092.201(e)(4) would also include, as a component of the definition of the term covered order, a requirement that the order impose one or more of the obligations described in proposed § 1092.201(e)(3) on the covered nonbank based on an alleged violation of a covered law. A covered order need not include an admission of liability or any particular factual predicate. The Bureau anticipates that agency and court orders will vary widely in form and content, depending in part on such matters as the

relevant individual laws being enforced, the historical practices of the various enforcement agencies, and the negotiations and facts and circumstances underlying specific orders. Because of these expected variations in form and content in the orders that the Bureau would expect to be registered under the proposal, the Bureau believes that requiring registration only of orders that contain an admission of liability, or a statement setting forth certain types of findings or other factual predicates underlying the order, would omit relevant orders. The Bureau believes that an order that contains neither an admission of liability nor a statement setting forth the factual predicate underlying the order may nevertheless be probative of risks to consumers of the type that the Bureau is obligated to monitor.

For purposes of this proposed definition, an obligation would be "based on" an alleged violation where the order identifies the covered law in question, asserts or otherwise indicates that the covered nonbank has violated it, and imposes the obligation on the covered nonbank at least in part as a result of the alleged violation.[152] This would include, for example, obligations imposed as "fencing-in" or injunctive relief, so long as those obligations were imposed at least in part as a result of the entity's violation of a covered law. This element of the definition would also be satisfied, for example, by any obligation imposed as part of other legal or equitable relief granted with respect to the violation, as well as by any obligation imposed in order to prevent, remedy, or otherwise address a violation of a covered law, or the conditions resulting from the violation.

[152] An obligation imposed based on multiple violations, some of covered laws and some of other laws, would qualify as an "obligation[] . . . based on an alleged violation of a covered law" within the meaning of proposed § 1092.201(e)(4), even if the violations of the non-covered laws would themselves have sufficed to warrant the imposition of the obligation.

However, an order that does not identify a covered law as at least one of the legal bases for the obligations it imposes on a covered bank would not satisfy the requirement set forth at proposed § 1092.201(e)(4). An order may identify a covered law as a legal basis for the obligations imposed by referencing another document, such as a written opinion, stipulation, or complaint, that shows that a covered law served as the legal basis for the obligations imposed in the order. But the requirements of proposed § 1092.201(e)(4) would not be satisfied where the legal basis for the obligations imposed is specified only in extrinsic documents not referenced in the order at issue, such as a press release or blog post.

The Bureau seeks comment on whether the requirement articulated in proposed § 1092.201(e)(4) is appropriate, and whether it should be expanded or restricted. The Bureau also seeks comment on whether this requirement would exclude a material number of otherwise applicable orders from the scope of proposed subpart B or would exclude otherwise applicable orders because of a particular agency or court drafting practice.

The § 1092.201(e)(4) requirement would include an order issued by an agency exercising any powers conferred on such agency by applicable law to enforce a covered law, so long as the order imposes one or more of the obligations described in proposed § 1092.201(e)(4) on the covered nonbank based on an alleged violation of a covered law. For example, certain Federal agencies may issue an order predicated on violation of a Federal consumer financial law under the authority of another enabling enforcement or licensing statute. Among other examples, an appropriate Federal banking agency may issue orders in connection with certain violations of Federal consumer financial law

under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), the Administrator of the National Credit Union Administration may issue such orders under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*), and the Securities and Exchange Commission may issue such orders under the Federal securities laws. Such an order issued in connection with violations of Federal consumer financial law would satisfy the requirement set forth in proposed § 1092.201(e)(4) in cases where the order imposes the obligations described in proposed § 1092.201(e)(3) on the covered nonbank based on one or more violations of Federal consumer financial law (or another covered law).

Other agencies also may rely upon their enforcement authorities under other laws in issuing orders in connection with violations of FTC Act section 5 (and rules and orders issued thereunder). For example, an appropriate Federal banking agency may issue orders in connection with violations of FTC Act section 5 by relying on its enforcement authorities under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818). Such an appropriate Federal banking agency order would satisfy the requirement set forth in proposed § 1092.201(e)(4) in cases where the order imposes the obligations described in proposed § 1092.201(e)(3) on the covered nonbank based on one or more violations of the prohibition on unfair or deceptive acts or practices under FTC Act section 5 (or a rule or order issued for the purpose of implementing that prohibition) or another covered law. The order would satisfy the requirement provided in proposed § 1092.201(e)(4) even though the FTC Act does not expressly authorize the federal banking agencies to enforce FTC Act section 5.

Similarly, an obligation is "based on" an alleged violation of a covered law where: (i) a State agency issues an order pursuant to certain State statutes that treat

violations of Federal or State laws as violations of the State statute;[153] and (ii) the order (or, as discussed above, an extrinsic document referenced in the order) states that one or more violations of a covered law (e.g., a Federal consumer financial law) served as the legal basis for imposing the obligations under such statute. In such cases, while the majority of these State laws do not themselves qualify as covered laws under proposed subpart B—and therefore are not captured in appendix A—the underlying law violation does so qualify. The Bureau believes including such instances is important, as it understands that State agencies sometimes issue orders in connection with violations of Federal consumer financial law relying on their authorities under these State licensing and other statutes that do not themselves satisfy the definition of covered law. Importantly, however, such an order would *not* meet the proposed definition of "covered order" unless the order itself (or, as discussed above, an extrinsic document referenced in the order) states that a covered law served as the legal basis for the obligations imposed in the order. A State order that relied upon such a statute, but that did not identify a covered law as the legal basis for the obligations imposed thereunder, would not satisfy the requirement set forth in proposed § 1092.201(e)(4).[154] Nor would an order that imposed obligations solely based on violations of other laws, even laws that are analogous to covered laws but do not themselves qualify as covered laws under proposed subpart B. This requirement is intended to capture only orders that impose obligations

[153] *See, e.g.*, Wash. Rev. Code sec. 19.146.0201(11).

[154] The obligations imposed in an order issued or obtained by a State agency under a State law that incorporates Federal law may be "based on" an alleged violation of Federal consumer financial law under proposed § 1092.201(e)(4), even if the Federal consumer financial law itself does not expressly authorize that State agency to enforce it. So long as the State agency states that the relevant order provisions are based on one or more violations of the Federal consumer financial law, it would be a covered order under the proposed definition.

based upon an agency's or court's determination that the applicable covered nonbank has actually violated the covered law itself.

The Bureau seeks comment on this aspect of the term "covered order," including the interaction between covered laws and related statutes providing for administrative enforcement, and whether these definitions should be modified to serve the identified purposes of the proposed rule. The Bureau also seeks comment on whether there may be alternative methods of identifying whether obligations contained in an order are "based on" a violation of a covered law.

Under proposed § 1092.201(e)(5), the proposal would also define "covered order" to mean an order that has an effective date on or later than January 1, 2017. The Bureau believes that limiting the registration requirement to orders with more recent effective dates will provide sufficient information to support Bureau functions. Many orders issued by Federal, State, and local agencies do not have expiration dates or do not expire until after the passage of many years. While the Bureau believes that many earlier-in-time orders remain highly probative of ongoing risks to consumers and could assist the Bureau in carrying out its market monitoring obligations—as well as assist the Bureau in assembling an effective nonbank registry—the Bureau preliminarily concludes that considerations of administrative efficiency favor focusing on orders issued within approximately the first several years preceding any final rule. The Bureau seeks comment on this proposed approach.

Finally, proposed § 1092.201(e) would provide that the term "covered order" would not include an order issued to a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor

vehicles, or both, within the meaning of CFPA section 1029(a),[155] except to the extent such order is in connection with the functions that are excepted from the application of CFPA section 1029(a) as described in CFPA section 1029(b).[156] This provision would exclude certain orders issued to motor vehicle dealers that are described in CFPA section 1029(a), and would incorporate the definitions provided at CFPA section 1029(f).[157] CFPA 1029(a) establishes a statutory exclusion from the Bureau's authority; CFPA section 1029(b) excepts certain functions of motor vehicle dealers from that exclusion.[158] An order that is issued to a motor vehicle dealer that relates to the functions described in section 1029(a)—that is, the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both—generally would not be a "covered order" under this proposed definition. However, if the order related at least in part to a function excepted from the application of CFPA section 1029(a) as described in CFPA section 1029(b), this limitation would not apply, and the order would qualify as a "covered order." The functions described in 1029(b) include: "provid[ing] consumers with any services related to residential or commercial mortgages or self-financing transactions involving real property;" "operat[ing] a line of business–(A) that involves the extension of retail credit or retail leases involving motor vehicles; and (B) in which–(i) the extension of retail credit or retail leases are provided directly to consumers; and (ii) the contract governing such extension of retail credit or retail leases is not routinely assigned

[155] 12 U.S.C. 5519(a).

[156] 12 U.S.C. 5519(b).

[157] 12 U.S.C. 5519(f).

[158] 12 U.S.C. 5519(a), (b).

to an unaffiliated third party finance or leasing source;" and "offer[ing] or provid[ing] a consumer financial product or service not involving or related to the sale, financing, leasing, rental, repair, refurbishment, maintenance, or other servicing of motor vehicles, motor vehicle parts, or any related or ancillary product or service."[159]

Whereas the Bureau is confident that orders issued to nonbank covered persons involving conduct that is the subject of a CFPA section 1027 exclusion generally will be probative of risks to consumers in connection with conduct by such person that is *not* excluded under section 1027, the Bureau is less certain that the same is true with respect to orders issued to persons identified in section CFPA section 1029(a) involving conduct beyond the functions described in section 1029(b). To be sure, orders issued solely in connection with section 1029(a) conduct may nevertheless reflect upon a motor vehicle dealer's compliance systems and procedures and otherwise indicate potential risk to consumers that the Bureau might address through its authority as provided in 1029(b). But the Bureau is less certain that this is generally the case, given the nature and scope of the section 1029(a) exclusion relative to its exemptions under 1029(b). Notwithstanding this limitation, the Bureau is proposing to collect information regarding orders that relate to the functions conducted by motor vehicle dealers that are within the Bureau's jurisdiction under section 1029(b). The Bureau seeks comment on this limitation in the proposed definition of "covered order," including any reasons why orders issued to motor vehicle dealers should or should not be covered.

[159] 12 U.S.C. 5519(b).

201(f) Effective Date

The proposal would define the term "effective date" to mean, in connection with a covered order, the effective date as identified in the covered order; however, if no other effective date is specified, then the date on which the covered order was issued would be treated as the effective date for purposes of subpart B. The Bureau anticipates that the effective date for many covered orders will be evident from the face of the order, and in nearly all cases should be relatively easy to identify. The Bureau seeks comment on whether this definition would be sufficient to identify effective dates for covered orders.

Proposed § 1092.201(f) would also provide that if the issuing agency or a court stays or otherwise suspends the effectiveness of the covered order, the effective date shall be delayed until such time as the stay or suspension of effectiveness is lifted. Thus, the registration obligations under proposed subpart B would also be delayed accordingly. The Bureau anticipates that such situations would be rare and seeks comment on whether this proposal would adequately address them.

201(g) Identifying Information

Proposed § 1092.201(g) would define the term "identifying information." This term would describe the scope of identifying information a covered nonbank may be required to submit pursuant to proposed § 1092.202(c). Proposed § 1092.201(g) would limit this information to information that is already available to the covered nonbank, and which uniquely identifies the covered nonbank. As described in proposed § 1092.201(g), this information would include, to the extent already available to the covered nonbank, legal name, State of incorporation or organization, principal place of business address, and any unique identifiers issued by a government agency or standards organization.

Examples of the latter identifiers that entities might be required to provide under proposed § 1092.202(c) would include an 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),[160] and a Federal Tax Identification number.

This information will help the Bureau identify covered nonbanks with specificity, including ensuring that the Bureau can identify covered nonbanks' submissions to other registries and databases where applicable, such as the NMLS, and HMDA submissions. Furthermore, upon publication, this information will facilitate the ability of consumers to identify covered persons that are registered with the Bureau. The proposal would not require the entity to obtain an identifier. Thus, for example, if the NBR system were to ask about a particular type of identifier and that type of identifier had not been assigned to the covered nonbank, then under the proposal, the covered nonbank would be able to indicate the identifier is not applicable. The Bureau seeks comment on these proposed types of identifying information, and other types of identifying information that the NBR system might collect and publish.

201(h) Insured Depository Institution

The proposal would define the term "insured depository institution" to have the same meaning as in 12 U.S.C. 5301(18)(A). Section 5301(18)(A), in turn, incorporates

[160] *See* 12 CFR 1003.4(a)(1)(i)(A) (addressing LEIs).

the meaning of "insured depository institution" provided in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813.[161]

201(i) Local Agency

The proposal would define the term "local agency" to mean a regulatory or enforcement agency or authority of a county, city (whether general law or chartered), city and county, municipal corporation, district, or other political subdivision of a State, other than a State agency. The term would not include State agencies.

The Bureau proposes to require registration in connection with applicable orders issued or obtained by local agencies. The Bureau understands that local agencies do issue or obtain public orders under covered laws.[162] For the reasons described above with respect to orders issued by Federal and State agencies, the Bureau believes that such orders may indicate risk to consumers, and that obtaining information about these orders will support Bureau functions. The Bureau seeks comment on including local agency orders in the proposal and whether any aspects of local agency orders may require adjustments or tailoring of the registration requirements.

201(j) Order

The proposal would define the term "order" to include any written order or judgment issued by an agency or court in an investigation, matter, or proceeding. The term would include orders or judgments issued after trials or agency hearings. It would also include default judgments or orders issued after an entity fails to properly respond to

[161] *See* 12 U.S.C. 1813(c)(2) (defining "insured depository institution" as "any bank or savings association the deposits of which are insured by the [Federal Deposit Insurance] Corporation pursuant to this chapter").

[162] *See, e.g.*, Cal. Bus. & Prof. Code sec. 17204 (authorizing enforcement of Cal. Bus. & Prof. Code sec. 17200 by certain county counsel and city attorneys).

charges or claims made against it. In addition, it would include orders or judgments issued to resolve matters without the need for further litigation, including stipulated or consent orders, decrees, or judgments, as well as settlements, multistate settlements, or assurances of discontinuances embodied in orders or judgments issued by agencies or courts. Furthermore, the term would include cease-and-desist orders and orders suspending, conditioning, or revoking a license based on a violation of law. The proposed definition would also include legally enforceable written agreements under sections 8 and 50 of the Federal Deposit Insurance Act[163] or any State counterparts. The Bureau seeks comment on this definition, including whether any of these types of orders do not merit registration, and whether any other types of orders should be included in the definition.

The proposed definition of the term "order" would include an order or judgment issued by one agency or a single order or judgment jointly issued by multiple agencies. However, where more than one agency issues a distinct order under its own authority, or a court issues distinct orders with respect to the different parties in connection with various actions or proceedings, even where the orders involve the same subject matter or laws, each order would be considered to be a separate order under the proposed definition. The Bureau seeks comment on whether additional detail would be useful in applying the proposed definition.

[163] 12 U.S.C. 1818, 1831aa.

201(k) Public

The proposal would define the term "public" to mean, with respect to a covered order or any portion thereof, published by the issuing agency or court, or required by any provision of Federal or State law, rule, or order to be published by the issuing agency or court. The proposal would clarify that the term "public" does not include orders or portions of orders that constitute confidential supervisory information of any Federal or State agency.

The proposed term would include orders that are actually published by the issuing agency or court, as well as orders that are required by any provision of Federal or State law, rule, or order to be published by the issuing agency or court. For example, section 8(u) of the Federal Deposit Insurance Act[164] requires the publication of certain types of Federal banking agency orders. The proposed definition is intended to include those orders, as well as those required to be published by any other similar Federal or State law.

Under the proposal, an order would only be "public" if it has been released or disseminated (or is required to be released or disseminated) in a manner such that the order is accessible by the general public—for example, by posting the order on a publicly accessible website or by publishing it in a written format generally available to members of the public. The proposed term, however, would not include documents that are not made generally available but are disclosed to specific persons, such as in response to Federal or State Freedom of Information Act or open records law requests or as part of litigation discovery proceedings. Under the proposal, an order also would only qualify as

[164] 12 U.S.C. 1818(u).

"public" if it is published (or required to be published) "by the issuing agency or court." Therefore, independent publication by a third party, such as publication that may occur in connection with a covered person's securities disclosures, would not make an order "public" within the meaning of the proposal.[165] The Bureau does not anticipate that requiring registration of orders disclosed only through such methods as freedom-of-information requests or securities disclosures would materially improve the quantity and quality of the information provided to the NBR system. To the contrary, the Bureau anticipates that third-party disclosures in the securities context, or pursuant to freedom-of-information requests, may sometimes fail to capture all significant aspects of an order. The Bureau is also concerned that if such types of disclosures were included in the final rule, subpart B's registration requirements might affect an entity's decisions regarding securities or litigation disclosures in a manner not intended by the Bureau.

The Bureau seeks comment as to whether the term "public" should also include other types of disclosures, in addition to those proposed.

The proposed term would exclude orders or portions of orders that constitute confidential supervisory information of any Federal or State agency. The Bureau is concerned that requiring registration and disclosure of confidential supervisory information might interfere with the functions and missions of other agencies and does not believe that requiring such registration and disclosure is necessary to accomplish the purposes of the proposed rule. Such agencies may rely on confidential communications

[165] By contrast, an order would qualify as "public" where the issuing agency or court makes the order available to a third-party printing service or reporter for the purpose of publishing the order in a publicly available format.

with covered nonbanks in order to, for example, foster full cooperation between those institutions and their regulators and to protect those institutions and the public from harm that could result from the disclosure of agency concerns regarding the integrity and security of these institutions.[166] The proposed definition would therefore expressly exclude confidential supervisory information. Where an order is not clearly marked or otherwise designated by the regulator as confidential supervisory information, the Bureau would expect the entity to have confirmed the confidential supervisory information status of any order or portion of an order with its regulator before relying on that status in connection with subpart B's registration requirements.

201(l) Registered Entity

The proposal would define the term "registered entity" to mean any person registered or required to be registered under proposed subpart B. Entities that fail to comply with a requirement to register under proposed subpart B would nonetheless still be subject to all of the requirements applicable to registered entities under proposed subpart B. If such an entity would be a supervised registered entity, it would also be subject to the requirements applicable to a supervised registered entity under proposed subpart B.

[166] The Bureau has considered requiring covered nonbanks to submit to the Bureau portions of orders that constitute confidential supervisory information under proposed § 1092.202, but then exempting those confidential portions from publication under proposed § 1092.204. The Bureau, however, has preliminarily concluded that the administrative burden associated with implementing such an approach likely outweighs the advantage of collecting such confidential portions of orders under the proposed rule. The Bureau notes that it can use other mechanisms to obtain confidential supervisory information from other regulators in appropriate cases.

201(m) Remain(s) In Effect

The proposal would define the terms "remain in effect" and "remains in effect" to mean, with respect to any covered order, that the covered nonbank remains subject to public provisions that impose obligations on the covered nonbank to take certain actions or to refrain from taking certain actions based on an alleged violation of a covered law.

Proposed § 1092.202(a) would use this proposed term in defining the scope of proposed section 202's registration requirement. Proposed § 1092.202(f) would use this proposed term in specifying when a covered nonbank would be required to submit a final filing to the NBR system and would be permitted to cease updating its registration information and filing written statements with respect to a covered order.

201(n) State Agency

The proposal would define the term "State agency" to mean the attorney general (or the equivalent thereof) of any State and any other State regulatory or enforcement agency or authority. The Bureau intends this definition to encompass all State government officials and regulators authorized to bring actions to enforce any covered law, including actions to enforce the CFPA's provisions or regulations issued under the CFPA pursuant to CFPA section 1042(a)(1).[167] The Bureau seeks comment regarding whether its proposed definition is sufficiently expansive to accomplish this objective. The term would also include regulatory or enforcement agencies of certain tribal governments that are included in the CFPA's definition of the term "State."[168]

[167] 12 U.S.C. 5552(a)(1).

[168] *See* 12 U.S.C. 5481(27) (defining "State" to include "any federally recognized Indian tribe, as defined by the Secretary of the Interior under" 25 U.S.C. 5131(a)).

The Bureau also seeks comment on whether and to what extent (if any) the proposed definition should be limited.

201(o) Supervised Registered Entity

The proposal would define the term "supervised registered entity" to mean a registered entity that is subject to supervision and examination by the Bureau pursuant to CFPA section 1024(a),[169] with certain exceptions.[170] The CFPA authorizes the Bureau to require reports and conduct examinations of certain persons, as described in CFPA section 1024(a)(1)(A)–(E); the proposed term would refer to a registered entity that is subject to supervision and examination by the Bureau pursuant to any of those provisions.[171]

For purposes of proposed § 1092.201(o), the proposal would clarify that the term "subject to supervision and examination by the Bureau pursuant to CFPA section 1024(a)" would include an entity that qualifies as a larger participant of a market for consumer financial products or services under any rule issued by the Bureau pursuant to CFPA section 1024(a)(1)(B) and (a)(2) (providing Bureau supervisory authority over larger participants in certain markets as defined by Bureau rule), or that is subject to an order issued by the Bureau pursuant to CFPA section 1024(a)(1)(C) (providing Bureau supervisory authority over certain nonbank covered persons based on risk determination).

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[169] 12 U.S.C. 5514(a).

[170] An affiliate of an insured depository institution that is subject to examination and supervision by the Bureau under 12 U.S.C. 5515(a) would not be included in the proposed definition of supervised registered entity, where the affiliate is not subject to examination and supervision by the Bureau under 12 U.S.C. 5514(a). *See* 12 U.S.C. 5514(a)(3)(A) (providing that 12 U.S.C. 5514 shall not apply to persons described in 12 U.S.C. 5515(a) or 5516(a)).

[171] The proposal would not increase the number of entities subject to Bureau examinations or otherwise modify the scope of the Bureau's supervisory jurisdiction.

The Bureau is proposing this language in 1092.201(o)(2) only to clarify and make express that such persons would be included in the proposed definition of the term supervised registered entity. The Bureau is not proposing by means of this language to limit the scope of the term "supervised registered entity."

Under the proposed definition of "supervised registered entity," the Bureau need not have previously exercised its authority to require reports from, or conduct examinations of, a particular registered entity for that entity to qualify as a supervised registered entity. A registered entity would qualify as a supervised registered entity if the Bureau *could* require reports from, or conduct examinations of, that entity because it is a person described in CFPA section 1024(a)(1). Such an entity would be "subject to supervision and examination" within the meaning of the proposal even if the Bureau has never previously exercised its authority to require reports or conduct examinations with respect to that entity.

Persons would be subject to the proposal's requirements applicable to "supervised registered entities" so long as they satisfy the proposed definition of that term. The Bureau recognizes that certain entities may, in certain circumstances, satisfy the definition only for a limited period of time. For example, an entity's activity levels may change in such a manner as to cause the entity to cease to qualify as a larger participant of a market for consumer financial products and services as defined by CFPA section 1024(a)(1)(B) and 12 CFR part 1090,[172] or an entity may cease to be a person subject to

[172] Such a determination would be made under the provisions of 12 CFR part 1090. *See, e.g.*, 12 CFR 1090.102 (providing that "[a] person qualifying as a larger participant under subpart B of [12 CFR part 1090] shall not cease to be a larger participant under [12 CFR part 1090] until two years from the first day of the tax year in which the person last met the applicable test under subpart B").

Bureau supervision under CFPA section 1024(a)(1)(C) and 12 CFR part 1091.[173] An entity would be required to comply with the proposal's requirements applicable to "supervised registered entities" so long as it qualifies as such an entity, but not once it ceases to so qualify. Thus, for example, depending upon the timing of events, a supervised registered entity might be required to register with, and submit information to, the NBR system under proposed § 1092.202 but not subsequently submit a written statement under proposed § 1092.203 if it ceases to qualify as a supervised registered entity before § 1092.203(d)'s submission deadline.

The Bureau believes that applying proposed § 1092.203's requirements to supervised registered entities so long as they satisfy the proposed definition of that term, even if they do so for limited periods of time, would serve its goals in imposing such requirements, as described above in section IV(D). The Bureau does not believe that it should exempt, or otherwise distinguish for purposes of the proposal, entities that are subject to supervision under CFPA section 1024(a) for limited periods of time. The Bureau believes that it is important to obtain reports from such supervised registered entities under proposed § 1092.203 for the reasons discussed above in section IV(D), including to ensure they are legitimate entities and able to perform their obligations to consumers, to detect and assess risks to consumers related to entities subject to Bureau supervision, and to facilitate its assessments in connection with its risk-based supervisory program under CFPA section 1024(b)(2). In addition, requiring regular submission of written statements from such entities would assist the Bureau in determining whether the

[173] Such a determination would be made under the provisions of 12 CFR part 1091. *See, e.g.*, 12 CFR 1091.113 (regarding petitions for termination of an order issued under 12 CFR 1091.109).

entity should continue to be subject to Bureau supervision under CFPA section 1024(a)(1)(C), for example. However, the Bureau preliminarily concludes that obtaining such written statements from entities that are no longer subject to the Bureau's supervision and examination authority under CFPA section 1024(a) is not necessary to serve these purposes.

The Bureau seeks comment on its approach to persons whose supervisory status may vary over time. In particular, the Bureau seeks comment on whether to finalize an alternative arrangement whereby a qualifying entity would be deemed a supervised registered entity for purposes of the proposed rule for some set period of time—for example, for the remainder of the calendar year following a change in supervised entity status. The Bureau also seeks comment on an alternative arrangement that would permit individual entities to petition the Bureau for individualized treatment, or that would provide for specific and individual consideration regarding subjecting such entities to the proposal's reporting requirements.

The Bureau's proposed approach to applying the term "supervised registered entity" would also extend to the recordkeeping requirements proposed in § 1092.203(e). Proposed § 1092.203(e) would require a supervised registered entity to maintain certain documents and other records for five years after the submission of a written statement is required, and to make such documents and other records available to the Bureau upon request. Once a supervised registered entity ceases to qualify as a supervised registered entity under proposed § 1092.201(o), it would no longer be subject to § 1092.203(e)'s requirement to maintain and provide such records. (The entity may nevertheless be subject to other requirements to maintain and provide such records, where such

requirements are imposed by Federal consumer financial law or other applicable law.) If, because of a change in circumstances, the entity later once again qualifies as a supervised registered entity, the entity would once again become subject to proposed § 1092.203(e)'s recordkeeping requirement, but only as to conduct undertaken to comply with § 1092.203 that occurs after the entity requalifies as a supervised registered entity. The Bureau seeks comment on the proposed recordkeeping requirements for such entities.

The proposal would provide that the term "supervised registered entity" would not include a service provider that is subject to Bureau examination and supervision solely in its capacity as a service provider and that is not otherwise subject to Bureau supervision and examination. CFPA section 1024(e) authorizes the Bureau to exercise supervisory authority with respect to a service provider to a person described in CFPA section 1024(a)(1).[174] CFPA sections 1025(d) and 1026(e) authorize the Bureau to exercise supervisory authority with respect to certain other service providers.[175] This provision of the proposed definition clarifies that the term "supervised registered entity" would not include a registered entity that is subject to Bureau examination and supervision solely in its capacity as a service provider under any of these provisions. However, the term supervised registered entity would include a registered entity if the registered entity is otherwise subject to Bureau supervision and examination under CFPA section 1024(a)—i.e., if the registered entity is a person that is described in CFPA section 1024(a)(1)—even if the registered entity is also a service provider for some purposes

[174] 12 U.S.C. 5514(e).

[175] 12 U.S.C. 5515(d), 5516(e).

under the CFPA.[176] The Bureau preliminarily concludes that, at least in the first instance, the requirements set forth in proposed § 1092.203 are best directed at persons described in CFPA section 1024(a). The Bureau believes that it can achieve the anticipated benefits described above without extending its coverage to service providers subject to supervision under CFPA section 1024.

Proposed § 1092.201(o)(2) would provide that the term "supervised registered entity" would not include a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, within the meaning of 12 U.S.C. 5519(a), except to the extent such a person engages in functions that are excepted from the application of CFPA section 1029(a) as described in CFPA 1029(b).[177] Proposed § 1092.201(e), discussed above, would further provide that the only orders issued to such motor vehicle dealers that would subject the dealer to the requirements of proposed §§ 1092.202 and 1092.203 would be those issued in connection with the functions that are excepted from the application of CFPA section 1029(a) as described in CFPA 1029(b). The Bureau generally seeks comment on this proposed limitation.

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[176] As discussed above, entities that are service providers may nevertheless also be covered persons under the CFPA.

[177] 12 U.S.C. 5519 ("Exclusion for Auto Dealers"). Also, as with other supervised registered entities, the motor vehicle dealer would only qualify as a "supervised registered entity" if it were subject to the Bureau's supervisory jurisdiction under 12 U.S.C. 5514(a). Technically, the exclusion in proposed § 1092.201(o)(2) should be unnecessary because it is identical to the proposed exclusion from the definition of "covered nonbank" in proposed § 1092.201(d)(4), and only covered nonbanks can qualify as supervised registered entities. Nevertheless, the Bureau has proposed § 1092.201(o)(2) to reiterate that the exclusion described in proposed § 1092.201(d)(4) also limits which entities qualify as "supervised registered entities."

Proposed § 1092.201(o)(3) would provide that the term "supervised registered entity" would not include a person that qualifies 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 supervisory authority under CFPA section 1027.[178] This proposed component of the term "supervised registered entity" would be similar to a component in the proposed definition of the term "covered nonbank," as discussed in more detail in the section-by-section discussion of proposed § 1092.201(d), above. However, while proposed § 1092.201(d) would describe exclusions from the Bureau's rulemaking authority, proposed § 1092.201(o)(3) would describe exclusions from the Bureau's supervisory authority. This provision would clarify that persons excluded from the supervisory authority of the Bureau under one or more of the provisions of section 1027 of the CFPA would not be "supervised registered entities." However, where the CFPA provides that any of the activities engaged in by such persons *are* subject to the Bureau's supervisory authority, this limitation would not exclude the person from qualifying as a "supervised registered entity." For example, CFPA section 1027(*l*)(1) provides an exclusion from the Bureau's supervisory authority for certain persons engaging in certain activities relating to charitable contributions.[179] Under the proposal, a person would not be deemed a "supervised registered entity" if it qualifies for this statutory exclusion and is not otherwise exempt from it. But CFPA section 1027(*l*)(2) exempts certain activities from this statutory exclusion by providing that "the exclusion in [CFPA section 1027(*l*)(1)] does not apply to any activities not described in [CFPA section 1027(*l*)(1)]

[178] 12 U.S.C. 5517.

[179] 12 U.S.C. 5517(*l*)(1) ("Exclusion for Activities Relating to Charitable Contributions").

that are the offering or provision of any consumer financial product or service, or are otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H."[180] Under proposed § 1092.201(o), an entity described in CFPA section 1027(*l*)(1) engaging in the activities described therein *would* qualify as a "supervised registered entity" so long as it also engages in any of the activities described in CFPA section 1027(*l*)(2). And, as a "supervised registered entity" under the proposed § 1092.201(o), such entity would be subject to all of proposed § 1092.203's requirements applicable to "supervised registered entities" with respect to any "covered order," regardless of whether the applicable "covered order" addressed conduct subject to the statutory exclusion in CFPA section 1027(*l*)(1). The Bureau generally seeks comment on this proposed limitation.

Finally, proposed § 1092.201(o)(4) would provide that the term "supervised registered entity" would not include a person with less than $1 million in annual receipts. The exclusion would be based on the receipts resulting from offering or providing all consumer financial products and services described in CFPA section 1024(a).[181] The Bureau proposes to define the term "annual receipts" to have the same meaning as it has in § 104(a) at part 1090 of the Bureau's regulations, including the provisions of that definition at § 104(a)(i) regarding receipts, § 104(a)(ii) regarding period of measurement, and § 104(a)(iii) regarding annual receipts of affiliated companies.[182] The Bureau is proposing the exclusion in proposed § 1092.201(o) for two reasons. First, providers of

[180] 12 U.S.C. 5517(*l*)(2).

[181] 12 U.S.C. 5514(a).

[182] 12 CFR 1090.104(a).

consumer financial products and services with significantly lower levels of receipts generally pose lower risks because they engage with fewer consumers, obtain less money from those consumers, or both. Second, the information collection burdens on entities with receipts of $1 million or less, on a relative basis, generally would be higher than for larger entities.

The proposed exclusion from the definition of "supervised registered entity" based on volume of annual receipts would also be consistent with the CFPA's requirement that the Bureau take entity size into account as part of its risk-based supervision program.[183] Accordingly, the Bureau is proposing to exclude persons with less than $1 million in annual receipts from the proposed annual reporting requirements applicable to supervised registered entities under proposed § 1092.203.

However, the Bureau is not proposing to exclude such smaller entities from the information-collection requirements provided in proposed § 1092.202. The Bureau believes that the limited burden that would be imposed on such entities due to such information-collection requirements would be warranted in light of the market-

[183] *See* 12 U.S.C. 5514(b)(2)(A), (B) (requiring the Bureau to take into consideration "the asset size of the covered person" and "the volume of transactions involving consumer financial products or services in which the covered person engages"). Furthermore, while the Bureau does not believe that it needs to rely on its authority under 12 U.S.C. 5512(b)(3) to exempt classes of covered persons from rules in proposing this small-entity exclusion, the Bureau believes that the exclusion would be warranted as an exercise of its section 1022(b)(3) exemption authority, to the extent that provision was applicable. *See* 12 U.S.C. 5512(b)(3). As under 12 U.S.C. 5514(b)(2), an entity-size-based exclusion accords with 12 U.S.C. 5512(b)(3)(B)(i) and (ii), which instruct the Bureau to consider "the total assets of the class of covered persons" and "the volume of transactions . . . in which the class of covered persons engage" in issuing exemptions. 12 U.S.C. 5512(b)(3)(B)(i)–(ii). In addition, given the relatively limited scope of the harm to consumers that entities with annual receipts not exceeding $1 million would generally be able to cause, the Bureau does not believe that the factor articulated in 12 U.S.C. 5512(b)(3)(B)(iii) ("existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protection") weighs against adopting the proposed small-entity exclusion.

monitoring benefits to the Bureau and other users of the NBR system, as discussed elsewhere in this proposal. The Bureau could evaluate the need for additional supervisory attention related to a smaller supervised nonbank based on its submissions under proposed § 1092.202 and any additional information at its disposal. As discussed above in section IV and the section-by-section discussion of proposed § 1092.202, those submissions would provide additional information relevant to the Bureau's assessments of risk in connection with its prioritization efforts under CFPA section 1024(b)(2).[184]

The Bureau seeks comment on the scope of the proposed definition, including the proposed exclusions.

Section 1092.202 Registration and Submission of Information Regarding Covered Orders

Proposed § 1092.202 would require covered nonbanks to register with the NBR system by timely submitting information to the NBR system regarding covered orders. The proposed section would establish requirements regarding the timing and content of information to be submitted.

The Bureau believes that requiring covered nonbanks to register with the NBR system would further the objectives of proposed subpart B even in the event the Bureau were not to finalize proposed requirements that supervised registered entities submit written statements as described in proposed § 1092.203. Proposed § 1092.202 would apply to a broader set of entities than would proposed § 1092.203, and the Bureau believes that requiring registration of entities under proposed § 1092.202 would provide independent benefit to the Bureau and to consumers.

[184] 12 U.S.C. 5514(b)(2).

202(a) Scope of Registration Requirement

Proposed § 1092.202(a) defines the scope of the registration requirement. To maximize the value of subpart B's registration requirements, while taking into consideration administrative costs to the Bureau and covered nonbanks in keeping the registry updated, the Bureau proposes to limit § 1092.202 to covered orders (as that term is defined at proposed § 1092.201(e)) that have an effective date (as that term is defined at proposed § 1092.201(f)) on or after the effective date of subpart B, or that remain in effect (as that term is defined at proposed § 1092.201(m)) as of the effective date of subpart B. The Bureau preliminarily concludes that this limitation of the registration requirement's scope would help ensure that the most relevant orders are submitted into the NBR system. The Bureau recognizes that there is potential value in requiring registration with respect to older orders that no longer remain in effect. Among other things, such registration would help inform the Bureau and consumers regarding older orders and help to identify an even larger number of repeat offenders than could be identified through the registration requirement as proposed in § 1092.202. On the other hand, requiring covered nonbanks to identify and register older orders to which they were once subject, but that no longer impose any present obligations, may be burdensome. In addition, extending the registration requirement to older orders would impose additional administrative costs on the Bureau. The Bureau believes that limiting the registration requirement to covered orders with an effective date on or after the effective date of subpart B, or that remain in effect as of subpart B's effective date, strikes the appropriate balance in terms of establishing an informative and useful registry without imposing undue burdens on either industry or the Bureau. To maximize the value of subpart B's

registration requirements, while taking into consideration administrative costs to the Bureau and covered nonbanks in keeping the registry updated, the Bureau therefore proposes to limit § 1092.202 to covered orders (as that term is defined at proposed § 1092.201(e)) that have an effective date (as that term is defined at proposed § 1092.201(f)) on or after the effective date of subpart B, or that remain in effect (as that term is defined at proposed § 1092.201(m)) as of the effective date of subpart B. However, the Bureau seeks comment as to whether the registration requirement should be modified to include registration of older orders.

202(b) Requirement to Register and Submit Information Regarding Covered Orders

Proposed § 1092.202(b) would establish subpart B's requirements for covered nonbanks to register with the NBR system and to provide and maintain certain registration information.

Proposed § 1092.202(b)(1) would provide that each covered nonbank that is identified by name as a party subject to a covered order described in paragraph (a) shall register as a registered entity with the NBR system in accordance with proposed § 1092.202(b) if it is not already so registered, and shall provide or update, as applicable, the information described in subpart B in the form and manner specified by the Bureau. As discussed in connection with proposed § 1092.201(e)(1), a covered nonbank that is identified by name as a party subject to the order would be required to register under this paragraph even if the covered nonbank is not listed in the title or caption of the order, or as the primary respondent, defendant, or subject of the order. A covered nonbank may be subject to the requirements of proposed § 1092.202 even if the issuing agency or court does not list the covered nonbank as a party in related press releases or Internet links.

The Bureau considered but is not proposing alternative approaches, including applying the requirements of this section to any covered nonbank alleged or found in a covered order to have violated a covered law, even if such party were not expressly named. This alternative would capture circumstances where, for instance, a covered order applies to a category of entities, such as all affiliates of a particular named covered nonbank, but the order does not specifically name all of the entities that fall within that category (e.g., does not specifically list the names of all of the affiliates of the named covered nonbank). While this alternative would potentially widen the scope of information the Bureau would obtain relevant to its market monitoring objectives, it preliminarily concludes that the proposed approach would effectively achieve those objectives with greater administrative ease. The Bureau seeks comment on the scope of the proposed requirement, including this alternative approach and whether other means of identifying applicable covered nonbanks with respect to particular covered orders should be adopted.

As provided at § 1092.102(a), the Bureau proposes to specify the form and manner for electronic filings and submissions to the NBR system that are required or made voluntarily under part 1092, including §§ 1092.202 and 1092.204. The Bureau would issue specific guidance for filings and submissions.

Proposed § 1092.202(b)(2)(i) would require each covered nonbank that is required to register under proposed § 1092.202 to submit a filing containing the information described in proposed §§ 1092.202(c) and 1092.202(d) to the NBR system within the later of 90 days after the applicable NBR system implementation date or 90 days after the effective date of any applicable covered order. Thus, a covered nonbank

would not be required under proposed subpart B to register any covered orders to which it may be subject until 90 days after the NBR system implementation date for this provision. For covered orders with effective dates after the NBR system implementation date, an applicable covered nonbank would be required to register the covered order within 90 days after the covered order's effective date, as that term is defined at proposed § 1092.201(f). The Bureau believes the 90-day period would give sufficient time for a covered nonbank to collect and submit the applicable information to the NBR system and would also generally permit a sufficient length of time for any relevant agency or court stays to take effect. The Bureau seeks comment on the length of the 90-day period, including whether the filing deadline should be tied to the effective date of the order or some other date, and whether the Bureau should consider taking other measures to address agency or court stays. The Bureau also seeks comment on whether other issues may arise in connection with orders that would indicate a reason not to require registration under proposed § 1092.202(b) within the 90-day period.

As discussed above regarding proposed § 1092.101(e), the Bureau currently estimates that the NBR implementation date for proposed §§ 1092.202 and 1092.203 will be no earlier than January 2024 and may be substantially later. The exact NBR implementation date will depend upon, among other things, the comments received to this proposal and the Bureau's ability to launch the registration system.

Proposed § 1092.202(b)(2)(ii) would require each covered nonbank that is required to register under proposed § 1092.202 to submit a revised filing amending any information described in paragraphs (c) and (d) to the NBR system within 90 days after any amendments are made to the covered order or any of the information described in

paragraphs (c) or (d) changes. The Bureau believes that requiring entities to maintain up-to-date information with the NBR system will significantly enhance the usefulness of the NBR system for the Bureau, consumers, and other users of the NBR system.

The Bureau requests comment on the general requirements of proposed § 1092.202(b), including the requirement to register and update registration information within the specified timeframes. The Bureau requests comment on whether registration and registration updates should be required more or less often, and if so, why and in what circumstances.

202(c) Required Identifying Information and Administrative Information

Proposed § 1092.202(c) would require a registered entity to provide all identifying information and administrative information required by the NBR system. In filing instructions, the Bureau would issue under proposed § 1092.102(a), the Bureau would specify the types of identifying information and administrative information registered entities would be required to submit. Proposed § 1092.201(a) would define the term "administrative information," and proposed § 1092.201(g) would define the term "identifying information." Proposed § 1092.202(c) also would clarify that the Bureau's filing instructions may require joint or combined submissions to the NBR system by covered nonbanks that are affiliates as defined in proposed § 1092.101(a).

The Bureau requests comment on the general requirements of proposed § 1092.202(c), including the requirement to register and update identifying information and administrative information within the timeframes described in proposed § 1092.202(b). The Bureau requests comment on whether registration of updates with respect to this information should be required more or less often, and if so, why and in

what circumstances. The Bureau also seeks comment on the proposed distinctions between identifying information and administrative information, and whether collection of other types of information would help in the administration of the NBR system or benefit its users.

202(d) Information Regarding Covered Orders

Proposed § 1092.202(d) would require a registered entity to provide additional types of information more specifically related to each covered order subject to proposed § 1092.202. First, proposed § 1092.202(d)(1) would require a registered entity to provide a fully executed, accurate, and complete copy of the covered order, in a format specified by the Bureau. This information would help the Bureau more clearly identify the covered orders to which the registered entity is subject, as well as the terms of those orders, and would provide access to updated copies of those orders. The information would provide similar benefits to other regulators, consumers, and other users of the NBR system upon publication.

This proposed section would also provide that any portions of a covered order that are not public must not be submitted. These nonpublic portions would be required to be clearly marked on the copy submitted, to promote ease of use. For example, a nonpublic section could be redacted and marked as nonpublic. As discussed above regarding proposed §§ 1092.201(e)(3) and 1092.201(k), the Bureau is concerned that requiring registration and disclosure of confidential supervisory information or other nonpublic information might interfere with the functions and missions of other agencies and does not believe that requiring such registration and disclosure is necessary to accomplish the purposes of the proposed rule. The Bureau seeks comment on this aspect of the proposed

rule. The Bureau also seeks comment on whether the Bureau should permit covered nonbanks to submit only select portions of covered orders, and if so, what portions of such orders should be submitted, and which should be excluded from the submission requirement.

Proposed § 1092.202(d)(2) would require a registered entity to provide five additional types of data regarding each covered order subject to § 1092.202. The Bureau believes all of the described data fields would be useful to the Bureau in locating, understanding, organizing, and using the information submitted. Upon publication, the data fields will be similarly useful to other users of the NBR system as well. In addition, requiring covered nonbanks to identify and submit these fields will help ensure accuracy and lower administrative costs for the Bureau.

First, proposed § 1092.202(d)(2)(i) would require a registered entity to identify the government entity that issued the covered order. Second, proposed § 1092.202(d)(2)(ii) would require a registered entity to provide the covered order's effective date, as that term is defined at proposed § 1092.201(f). Third, proposed § 1092.202(d)(2)(iii) would require a registered entity to provide the date of expiration, if any, of the covered order, or a statement that there is none. Thus, for example, where a covered order expires by its own terms after perhaps five or some other term of years, the registered entity would be required to provide that information. The Bureau requests comment on whether the date of expiration of covered orders would be sufficiently clear to comply with this provision or whether additional specification on this point from the Bureau would be useful. Fourth, proposed § 1092.202(d)(2)(iv) would require a registered entity to identify all covered laws found to have been violated or, for orders

issued upon the parties' consent, alleged to have been violated, in the covered order. The Bureau would expect that registered entities would satisfy this requirement by providing accurate Federal or State citations for the applicable covered laws. The Bureau believes this information would increase the usefulness of the NBR system. It would better enable the Bureau to identify and assess any risks to consumers relating to the violations, and once published would also enable users of the system to more easily search and review filings.

Fifth, proposed § 1092.202(d)(2)(v) would require a registered entity to provide the names of any of the registered entity's affiliates registered under subpart B with respect to the same covered order. The Bureau anticipates that this information would be useful in identifying affiliate relationships between registered entities that are registered with the NBR system, which might not otherwise be obvious or apparent. Proposed § 1092.101(a) would define the term "affiliate" to have the meaning given to that term in the CFPA, which would include any person that controls, is controlled by, or is under common control with another person.[185]

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 for purposes of proposed § 1092.203 with respect to the covered order. The benefits of designating an attesting executive are discussed in detail above in section IV(D). In addition, the Bureau believes that its collection (and ultimate publication) in the registry of the name and title of a supervised registered entity's attesting executive

[185] *See* 12 U.S.C. 5481(1).

would be important to the Bureau and other users of the NBR system. Requiring the entity to identify the name and title of the attesting executive designated in connection with each covered order will assist the Bureau in administering the requirements in proposed § 1092.203 regarding annual written statements. In addition, as discussed below regarding proposed § 1092.203(b), collecting information regarding the name and title of the attesting executive for a given covered order will provide the Bureau with insight into the entity's organization, business conduct, and activities, and will inform the Bureau's supervisory work, including its risk-based prioritization process. Publishing this information will also provide benefits to the public and other users of the proposed NBR system, as discussed further below in connection with proposed § 1092.204(a).

The Bureau would rely on two separate statutory grants of authority in collecting the attesting executive's name and title, each of which would provide an independent statutory basis for proposed § 1092.202(d)(3). The Bureau would collect this information under its market-monitoring authority under CFPA section 1022(c)(1) and (4) to "gather information regarding the organization, business conduct, markets, and activities" of supervised registered entities.[186] The Bureau would also collect this information under its CFPA section 1024(b)(7) authority to prescribe rules regarding registration, recordkeeping, and other requirements for covered persons subject to Bureau supervision under CFPA section 1024.[187]

[186] 12 U.S.C. 5512(c)(1), (4).

[187] 12 U.S.C. 5514(b)(7).

The Bureau requests comment on whether proposed § 1092.202(d) should identify additional or different categories of information collected by the NBR system, including but not limited to information regarding covered orders or the registered entity.

202(e) Expiration of Covered Order Status

Proposed § 1092.202(e) would provide for an outer limit on the time period during which the existence of a covered order would subject a registered entity to the requirements of proposed subpart B. In circumstances where a covered order terminates (or otherwise ceases to remain in effect) within ten years after the order's effective date, the registered entity's obligations to update its filing under proposed § 1092.202 or to file written statements with respect to the covered order under proposed § 1092.203 would cease after its final filing under proposed § 1092.202(f)(1).[188] The Bureau, however, recognizes that some covered orders may not terminate (or otherwise cease to remain in effect) within ten years of the orders' effective dates. In such circumstances, proposed § 1092.202(e) would provide that a covered order shall cease to be a covered order for purposes of subpart B as of the later of: (1) ten years after its effective date; or (2) if the covered order expressly provides for a termination date more than ten years after its effective date, the expressly provided termination date.

The Bureau preliminarily concludes that, in most cases, it may be less likely to obtain meaningful information in connection with existing orders after ten years have passed since their effective dates. The Bureau also preliminarily concludes that maintaining the proposal's registration and written-statement requirements for at least ten

[188] *See* the discussion of proposed § 1092.202(f) below.

years after the effective date of covered orders that remain in effect would provide useful information to the Bureau and other uses of the system, as described in this proposal. Among other things, maintaining the obligation to update registration information for ten years would better enable the Bureau to identify covered nonbanks in the event a subsequent covered order requires additional registration. Limiting registration obligations to more recent orders should also help limit the burden imposed by proposed subpart B's requirements on covered nonbanks. However, where a covered order expressly provides for a later termination date, the Bureau believes that it should continue to collect and publish information on the order under the provisions of proposed § 1092.202 through 204. The Bureau seeks comment on all aspects of proposed § 1092.202(e). In particular, the Bureau seeks comment on whether to adopt a different approach to setting and determining the sunset period for orders, and on whether the proposed baseline ten-year period should be longer or shorter. The Bureau also seeks comment on whether registered entities would benefit from additional guidance in determining whether a covered order expressly provides for a termination date more than ten years after its effective date, and what constitutes the expressly provided termination date of such a covered order.

The Bureau also seeks comment on whether the applicable sunset period should depend upon the content of the order. For example, the Bureau considered whether the sunset period for a covered order should be shorter where the only obligations based on alleged violations of covered laws and imposed in the public provisions of such order were to pay money (such as payment of a civil money penalty or fine, or payment of refunds, restitution, or disgorgement). Under this alternative approach, for such covered

orders without express termination dates, the orders would have ceased being covered orders for purposes of subpart B after some period shorter than the ten-year sunset proposed here. The Bureau is not proposing this approach for reasons of simplicity and administrative efficiency, and because the Bureau believes that the sunset provision in proposed § 1092.202(e) would generally be preferable for most such covered orders. However, the Bureau seeks comment on this proposed alternative and, more generally, on whether and why it should adopt a shorter sunset period for these orders. The Bureau also seeks comment on other approaches that would establish different sunset periods depending on the content of the order, and other types of orders that might have different sunset periods.

The Bureau further considered requiring registered entities to continue treating an order that would otherwise sunset under the proposal as a covered order for purposes of this proposed rule if the Bureau determined, after providing the entity notice and an opportunity to respond, that continuing to do so was necessary for the Bureau to fulfill its monitoring or supervisory responsibilities. For example, based on information supplied by another agency or otherwise in its possession, the Bureau may have cause to believe that the nonbank continued to be in violation of the order. For such cases, the Bureau considered requiring continued compliance with the requirements of subpart B beyond the expiration period if the Bureau ultimately concluded doing so was necessary for the Bureau to fulfill its monitoring or supervisory responsibilities. The Bureau is not proposing this approach for reasons of simplicity and administrative efficiency, and because the Bureau believes that the proposed sunset provision would be likely to provide sufficient information regarding most covered orders. However, the Bureau

seeks comment on whether it should include this additional requirement in the final rule and whether any additions or subtractions to it would better achieve its intended purpose. The Bureau also seeks comment on whether, if it included this additional requirement in a final rule, it should specify any alternative or additional criteria that the Bureau might consider in reaching its determination whether a particular covered order should remain subject to the requirements of subpart B.

202(f) Requirement to Submit Revised and Final Filings with Respect to Certain Covered Orders

Proposed § 1092.202(f) would address situations where a covered order is terminated, modified, or abrogated (whether by its own terms, by action of the applicable agency, or by a court). It would also address situations where an order ceases to be a covered order for purposes of subpart B by operation of proposed § 1092.202(e). In all such cases, proposed § 1092.202(f)(1) would require the registered entity to submit a revised filing to the NBR system within 90 days after the effective date of the order's termination, modification, or abrogation, or after the date the order ceases to be a covered order. This requirement will help in administering the registry, and it will support the Bureau's monitoring work by ensuring that the registry is up to date.

Proposed § 1092.202(f)(2) would address situations where a covered order no longer remains in effect or no longer qualifies as a covered order due to the covered order's termination, modification, or abrogation, or the application of § 1092.202(e). In such cases, proposed § 1092.202(f)(2) would clarify that following its final filing under paragraph (1) with respect to the covered order, the registered entity would have no further obligation to update its filing or to file written statements with respect to such

covered order under proposed subpart B. However, the Bureau would expect to make historical information publicly available via the NBR registration system. As provided at proposed § 1092.201(m), the proposal would define the term "remains in effect" to mean that the covered nonbank remains subject to public provisions of the order that impose obligations on the covered nonbank to take certain actions or to refrain from taking certain actions based on an alleged violation of a covered law. Once a covered nonbank no longer remains subject to such public provisions, proposed § 1092.202(f)(2) would permit the covered nonbank to cease updating its registration information and filing written statements with respect to the order.

The Bureau seeks comment on all aspects of proposed § 1092.202(f).

202(g) Notification by Certain Persons of Non-Registration Under This Section

Proposed § 1092.202(g) would provide that a person may submit a notice to the NBR system stating that it is not registering pursuant to this section because it has a good faith basis to believe that it is not a covered nonbank or that an order in question does not qualify as a covered order. Such a filing may be combined with any similar filing under proposed § 1092.203(f).[189] Proposed § 1092.202(g) would also require the person to promptly comply with § 1092.202 upon becoming aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a covered nonbank or that an order in question does not qualify as a covered order. The Bureau is proposing to treat information submitted under this paragraph as "administrative information" as defined by proposed § 1092.201(a).

[189] *See also* the section-by-section discussion of proposed § 1092.203(f), which would provide a similar option with respect to proposed § 1092.203.

While the Bureau believes the reporting and registration requirements under proposed § 1092.202 impose very minimal burden on nonbank covered persons, and that determining an entity's status as a covered nonbank (or an order's status as a covered order) should be a straightforward task for the vast majority of relevant persons, the Bureau is proposing § 1092.202(g) as an additional means of providing flexibility to those few entities where uncertainty in some respect raises good faith concerns that they do not meet the definition of a covered nonbank (or an order does not meet the definition of a covered order). Under the proposal, such persons could elect to file a notice under proposed § 1092.202(g). When a person makes a non-frivolous filing under proposed § 1092.202(g) stating that it has a good faith basis to believe that it is not a covered nonbank (or that an order is not a covered order), the Bureau would not bring an enforcement action against that person based on the person's failure to comply with proposed § 1092.202 unless the Bureau has first notified the person that the Bureau believes the person does in fact qualify as a covered nonbank (or that an order does qualify as a covered order) and has subsequently provided the person with a reasonable opportunity to comply with proposed § 1092.202.

Among other things, the Bureau would permit entities to file notifications under proposed § 1092.202(g) when they have a good faith basis to believe that they do not qualify as a "covered nonbank" because they constitute part of a "State," as that term is defined in CFPA section 1001(27).[190] Under proposed § 1092.102(c), the filing of such a

[190] 12 U.S.C. 5481(27). As discussed above, proposed § 1092.201(d)(2) would exclude States from the definition of "covered nonbank."

notification would not affect the entity's ability to dispute more generally that it qualifies as a person subject to Bureau authority.[191]

The Bureau anticipates that, in most cases, it would not respond to § 1092.202(g) notices with the Bureau's views on whether filers in fact qualify as covered nonbanks (or whether orders in fact qualify as covered orders). The Bureau also emphasizes that a non-response from the Bureau should not be misapprehended as Bureau acquiescence in the filer's assertions in the notice (or in the legitimacy of the filer's assertion of good faith). The Bureau, however, preliminarily concludes that obtaining these notifications may assist the Bureau in better understanding how potentially regulated entities interpret the scope of proposed § 1092.202.

The Bureau considered alternatives to § 1092.202(g), including an alternative whereby entities would *not* file a notice of non-registration with the Bureau, but could avoid penalties for non-registration if in fact they could establish a good faith belief that they did not qualify as covered nonbanks subject to § 1092.202 (or their orders did not qualify as covered orders). Under this alternative, entities would maintain such good faith belief so long as the Bureau had not made clear that § 1092.202 would apply to them (or their orders). Although the Bureau preliminarily concludes that this alternative is not preferable to requiring entities to actually file a notice of non-registration, the Bureau seeks comment on whether it should finalize this alternative instead. It also seeks comment on whether, if it finalized this alternative, entities would require additional

[191] As an alternative to filing a notification under proposed § 1092.202(g), an entity could simply choose to register under the proposal, even though it has a good faith basis for believing that it does not qualify as a covered nonbank (or that its order does not qualify as a covered order). Under proposed § 1092.102(c), such registration would not prejudice the entity's ability to dispute the Bureau's authority over it.

guidance on the circumstances pursuant to which an entity could no longer legitimately assert a good faith belief that § 1092.202 would not apply to its conduct. While the Bureau anticipates that such circumstances would certainly include entity-specific notice from the Bureau that § 1092.202 applies, the Bureau does not believe such notice should be required to terminate a good faith defense to registration. Among other circumstances, the Bureau anticipates that at least formal Bureau interpretations of (for example) the definition of a "covered person" under the CFPA, or published Bureau interpretations specific to the scope of the proposed registration requirements, would generally suffice to terminate such belief.

Finally, as the Bureau does not believe proposed § 1092.202's reporting and registration requirements impose significant burdens on covered nonbanks, the Bureau also seeks comment on whether it should not finalize proposed § 1092.202(g).

Section 1092.203 Annual Reporting Requirements for Supervised Registered Entities

203(a) Scope of Annual Reporting Requirements

Proposed § 1092.203(a) would provide that the proposed section would apply only with respect to covered orders with an effective date (as that term is defined at proposed § 1092.201(f)) on or after the NBR system implementation date for proposed § 1092.203.

This section would apply only to certain larger supervised entities.[192] The Bureau preliminarily concludes that the reporting requirements set forth in this section—which

[192] As discussed above in the section-by-section discussion of proposed § 1092.201(o)(4), the proposal would exclude from the term "supervised registered entity" persons with less than $1 million in annual receipts resulting from offering or providing all consumer financial products and services described in 12 U.S.C. 5514(a).

focus specifically on larger supervised entities' compliance with the orders registered pursuant to § 1092.202— should apply only prospectively to those covered orders with an effective date on or after the NBR implementation date for proposed § 1092.203. The prospective application of § 1092.203 would ensure that entities faced with enforcement actions that might result in covered orders could take § 1092.203's requirements into account in their decisionmaking. While the Bureau does not believe that compliance with § 1092.203's requirements would materially affect an entity's decisionmaking about how to respond to a prospective enforcement action—as discussed in further detail in section VII, for the vast majority of entities, the Bureau generally does not anticipate any of the proposed rule's reporting and publication requirements imposing meaningful burden either operationally or on their bottom line—the Bureau proposes this provision out of an abundance of caution. In addition, this limitation would help ensure that supervised registered entities would be required to submit reports only after the NBR system implementation date. The Bureau seeks comment on whether § 1092.203(a)'s proposed limitation of § 1092.203's scope is warranted. The Bureau also seeks comment on whether any further limitation of or adjustments to § 1092.203's scope may be appropriate, and whether the Bureau should consider excluding any additional persons, orders, laws, or other matters from proposed § 1092.203's reporting requirements.

203(b) Requirement to Designate Attesting Executive

Proposed § 1092.203(b) would require a supervised registered entity subject to an applicable covered order to designate as its attesting executive for purposes of subpart B its highest-ranking duly appointed senior executive officer (or, if the supervised registered entity does not have any duly appointed officers, the highest-ranking individual

managerial or oversight responsibility for the supervised registered entity who meets those three criteria.

As explained below in the discussion of proposed § 1092.203(d), the Bureau is proposing that the attesting executive would attest to and sign a written statement submitted by the supervised registered entity regarding the entity's compliance with covered orders. That proposal would have the benefit of ensuring that the supervised registered entity's reporting obligations under proposed § 1092.203 have received attention from the highest applicable level of a supervised registered entity's management. The Bureau is proposing this requirement in proposed § 1092.203(b) in order to ensure that the person who attests and signs the written statement has sufficient authority and access to all the relevant company stakeholders to ensure that the report is as complete and accurate as possible. The Bureau believes that the language of proposed § 1092.203(b) would ensure that the supervised registered entity designates an appropriately high-ranking employee as its attesting executive. Such a person will be in the best position to know all relevant information with respect to the order, and to provide a reliable attestation in the written statement regarding the entity's compliance with the covered order.

The Bureau anticipates that this individual will in most cases likely be a top senior executive of the entity. For entities that are not organized as corporations, and thus may not have duly appointed officers, the proposed § 1092.203(b) clarifies that the attesting executive may be another individual who is charged with managerial or oversight responsibility for the supervised registered entity. The Bureau anticipates that this individual will in most cases serve in a capacity equivalent to a high-ranking senior

executive at a corporation. For example, a supervised registered entity organized as a limited liability company that is run by an individual managing member and lacks executive officers may designate the managing member as its "attesting executive," where the managing member's assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law and the managing member has the requisite knowledge and control as described in proposed § 1092.203(b). Likewise, a supervised registered entity organized as a general or limited partnership may designate an individual partner who otherwise satisfies the requirements set forth in proposed § 1092.203(b). The use of the term "executive" is not intended to preclude the designation of such persons as "attesting executives" where the supervised registered entity otherwise lacks a senior executive officer who satisfies proposed § 1092.203(b)'s requirements.

The Bureau anticipates that entities would take appropriate steps to ensure compliance with the proposed rule in the event that an executive leaves employment or changes duties, or a higher-ranking executive is put in place. For example, a supervised registered entity might consider designating an alternate attesting executive for each covered order to address such possibilities, including by ensuring that they have sufficient knowledge of the entity's systems and procedures for achieving compliance with the applicable covered order(s) and control over the entity's efforts to comply with the covered order(s).

The proposal would also require that the supervised registered entity designate as its attesting executive for a covered order a person who has knowledge of the entity's systems and procedures for achieving compliance with the covered order. The Bureau

anticipates that this requirement would help ensure that the annual written statement is completed by an individual with sufficient knowledge of the entity's systems and procedures for achieving compliance to make the written statement required by proposed § 1092.203(d). The Bureau expects that an executive who lacked knowledge of those compliance systems and procedures would not be in the best position to identify violations of the order. Therefore, without the proposed knowledge requirement, the attestation proposed at § 1092.203(d)(2) would lose much of its usefulness.

Proposed § 1092.202(b) would also require that the attesting executive be required to have control over the entity's efforts to comply with the covered order. By this requirement, the Bureau means to require that the executive have the ability, under the entity's existing compliance systems and procedures, to direct and supervise the entity's efforts to comply with the applicable covered order. This proposed requirement would complement the knowledge requirement discussed above, since the Bureau believes an executive with control over the entity's efforts to comply with the covered order will be more likely also to have (and to demand) the requisite knowledge regarding the entity's related compliance systems and procedures. It is possible that an executive with knowledge of an entity's related compliance systems and procedures, but who does not have control over the entity's efforts to comply with an applicable covered order, would not be fully informed regarding violations of the order. The Bureau would also be able to use information regarding which executives have control of the entity's efforts to comply with specific covered orders in connection with its supervisory reviews of the entity's compliance systems and procedures, compliance with Federal consumer financial law, and risks to consumers and markets.

In addition, the Bureau expects that the proposal's requirements to designate an attesting executive who has knowledge of the entity's systems and procedures for achieving compliance with its covered orders, and who has control over the entity's efforts to comply with its covered orders, would create an additional incentive for certain entities to comply with their obligations to consumers. The Bureau believes that most supervised registered entities would comply with covered orders even without the proposal. However, these requirements would motivate additional compliance efforts at certain entities that have failed to take adequate steps to comply with the order. The Bureau also believes that if a particular executive is identified to the Bureau as the person ultimately accountable for ensuring compliance with a covered order, the clear delineation of that executive's responsibility will prompt the executive to focus greater attention on ensuring compliance, which in turn will increase the likelihood of compliance.

In addition, the Bureau anticipates that obtaining information about which senior executive officer(s) at a supervised registered entity have knowledge of the entity's systems and procedures for achieving compliance with specific covered orders, and who have control over the entity's efforts to comply with those covered orders, would facilitate the Bureau's ability to identify situations in which individual executives have recklessly disregarded, or have actual knowledge of, the entity's violations of covered orders. The Bureau believes that this information would better enable the Bureau to identify risks to consumers related to such orders and the entity's compliance systems and procedures, and to take steps to address such risks through its supervisory or other authorities. Where the applicable covered order is a Bureau order, such information will

also facilitate the Bureau's efforts to assess compliance with the order and to make determinations regarding any potential related Bureau supervisory or enforcement actions. For example, where information obtained under proposed § 1092.203 indicates that a high-ranking executive has knowledge of (or has recklessly disregarded) violations of legal obligations falling within the scope of the Bureau's jurisdiction, and has authority to control the violative conduct, the Bureau could use that information in assessing whether an enforcement action should be brought not only against the nonbank covered person, but also against the individual executive.

In developing this proposal, the Bureau considered various options other than requiring entities to designate a senior executive officer as an attesting executive. The Bureau considered permitting entities to designate lower ranking individuals whose assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law and who possessed sufficient knowledge and control to provide a written statement under proposed § 1092.203. However, the Bureau believes that requiring entities to designate their highest-ranking executive officer would better help ensure that all relevant information was considered when submitting the written statement. In addition, because the attestation that would be provided under proposed § 1092.203(d)(2) would be subject to the knowledge of the attesting executive, the Bureau believes this requirement would help enhance the reliability of that attestation, and thus the accuracy of the written statement. Lower-ranking managers at the entity might not be aware of all relevant facts. Also, the Bureau believes that the designation requirement will provide an important piece of information regarding the organizational structure of an entity's compliance management system—namely, the identity of the

entity's highest-ranking executive whose assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law, and who has the requisite level of knowledge and control. This information will be valuable to the Bureau's understanding of the supervised registered entity's compliance systems and procedures and its organization, business conduct, and activities subject to the covered order. Such information would inform the Bureau's functions, including its use of its supervisory and enforcement authorities.

As another alternative to imposing this requirement, the Bureau might instead require the entity to appoint an individual with a given title—for example, the entity's Chief Compliance Officer (CCO), or equivalent. However, the Bureau does not have comprehensive information regarding the organizational structures of the entities it supervises, and the Bureau expects that many supervised registered entities may have organizational structures that do not provide for a CCO or other officer title. The proposed requirement to designate the entity's highest-ranking executive who satisfies the specified criteria would help ensure that an appropriately high-level individual was designated but would retain flexibility to accommodate a range of entity organizational structures. And as discussed above, the Bureau believes that requiring the entity to designate its attesting executive for each covered order would provide the Bureau with information regarding the entity, including its compliance systems and procedures and its organization, business conduct, and activities subject to the covered order.

As another alternative to the approach proposed in § 1092.203(b), the Bureau might require supervised registered entities to obtain a review or audit by an independent third-party consultant of the entities' written statements and the facts underlying the

written statements. However, the Bureau believes this alternative would impose costs on the entity that would largely be avoided by the proposal's requirement to designate an attesting executive already providing services to the entity and would require the Bureau to impose controls on such reviews in order to ensure their usefulness. In addition, this alternative would not provide the Bureau with the information regarding the entity described above.

The Bureau requests comment on all aspect of proposed § 1092.203(b), including any additions or alterations of the proposed requirement, as well as comment on each of the alternative approaches discussed above. The Bureau seeks comment as well on whether this provision provides sufficient guidance to supervised registered entities regarding which individuals may be designated as "attesting executives." The Bureau also seeks comment on whether additional clarification should be provided with respect to supervised registered entities that are organized as entities other than corporations. The Bureau further seeks comment on whether the definition identifies an appropriate individual at the supervised registered entity for purposes of fulfilling the obligations set forth in proposed § 1092.203.

Requirement to Designate an Attesting Executive for Each Covered Order on an Annual Basis

Proposed § 1092.203(b) would require a supervised registered entity to annually designate one attesting executive for each applicable covered order to which it is subject and for all submissions and other purposes related to that covered order under proposed subpart B. The Bureau believes that requiring a supervised registered entity to designate an attesting executive for each covered order will facilitate the Bureau's supervision of

the supervised registered entity by, among other things, facilitating the Bureau's supervisory communications with the supervised registered entity regarding the covered order, including any related supervisory concerns. The Bureau would also be able to contact the attesting executive with questions and to understand how the executive's responsibilities relate to the entity's obligations under its covered orders. The Bureau thus believes that this proposed designation requirement would help ensure compliance with the proposed rule, facilitate the Bureau's supervision of the supervised registered entity, help the Bureau assess and detect risks to consumers, and help ensure that the entity is legitimate and able to perform its obligations to consumers.

The Bureau expects that under most circumstances, a supervised registered entity would designate one single individual as its attesting executive for all of the covered orders to which it is subject. However, there may be situations in which there is no one senior executive officer with the requisite knowledge of the entity's systems and procedures for achieving compliance with all of the covered orders to which the entity is subject, and who has control over the entity's efforts to comply with those orders. In such a case, the entity could designate different attesting executives for the covered orders. By requiring a supervised registered entity to designate one attesting executive for each covered order described in proposed § 1092.203(a) to which it is subject, proposed § 1092.203(b) would enable the Bureau to better identify such situations. The Bureau seeks comment on this approach, including whether it adequately ensures the submission of informed, accurate, and meaningful written statements under proposed § 1092.203, and whether supervised registered entities should be required to designate one single executive to submit a written statement with respect to all of the covered

orders to which the supervised registered entity is subject. The Bureau also seeks comment on whether supervised registered entities are likely to be organized in such a way as to make this provision useful, or whether under the proposed requirements an entity would likely be required to designate a single attesting executive in nearly all cases.

The Bureau also believes that by requiring the entity to designate its attesting executive(s) on an annual basis, the proposal would better enable the Bureau to understand the reporting relationships within the entity and the entity's compliance systems and procedures. The Bureau seeks comment on the requirement to designate attesting executives on an annual basis.

203(c) Requirement to Provide Attesting Executive(s) with Access to Documents and Information

Proposed § 1092.203(c) would require a supervised registered entity subject to proposed § 1092.203 to provide its attesting executive(s) with prompt access to all documents and information related to the supervised registered entity's compliance with all applicable covered order(s) as necessary to make the written statement(s) required in proposed § 1092.203(d).

The Bureau believes that this proposed requirement would help ensure that the attesting executive for an applicable covered order has timely access to the documents and information needed to submit an informed and accurate written statement under proposed § 1092.203(d). A supervised registered entity would not be permitted to refuse or deny to its attesting executive access to documents or information related to the supervised registered entity's compliance with the covered order. Under the proposed

requirement, the Bureau would expect the attesting executive to have prompt access to all such documents and information, notwithstanding, for example, any privileges that may apply to the documents and information, or where or how the documents and information are stored.

The Bureau believes that this requirement would enhance the accuracy and usefulness of the written statement, which in turn would enhance the Bureau's ability to supervise the entity effectively, assess and detect risks to consumers, and ensure the entity is legitimate and able to perform its obligations to consumers. The Bureau requests comment on the need for this requirement and whether other requirements, modifications, or amendments to proposed § 1092.203(c) should be considered in order to ensure the accuracy and usefulness of the written statement.

203(d) Annual Requirement to Submit Written Statement to the Bureau for Each Covered Order

Proposed § 1092.203(d) would require, on or before March 31 of each calendar year, that the supervised registered entity submit to the NBR system, in the form and manner specified by the Bureau, a written statement with respect to each covered order described in proposed § 1092.203(a). In the written statement, the attesting executive would be required to provide a summary description of the executive's efforts to review and oversee compliance with the applicable order, and to attest regarding the entity's compliance with the order.

Proposed § 1092.203(d) would require the written statement to be signed by the supervised registered entity's attesting executive for the reasons discussed above.

Proposed § 1092.203(d)(1) would require the written statement to contain a general summary description of the steps, if any, 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. This proposal is intended to provide information to the Bureau regarding the compliance monitoring efforts that have been undertaken by the executive during the applicable time period in connection with the order. The proposed rule would not establish any minimum procedures or otherwise specify the steps the executive must take in order to review and oversee the entity's activities. Instead, the rule would require only that the executive provide the Bureau with a general description of the steps the executive has already taken in this regard. The Bureau believes that this information would enhance the usefulness of the written statement by providing valuable context regarding the basis of the attesting executive's knowledge and by assisting the Bureau with determining the degree to which the Bureau may rely on the written statement. The Bureau believes that this information would be useful because the proposal would not by itself establish minimum requirements regarding the attesting executive's review and oversight of the entity's activities.

Proposed § 1092.203(d)(2) would require the attesting executive to 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. The attestation would be provided subject to the attesting executive's knowledge. As discussed above with respect to proposed § 1092.203(b) and proposed § 1092.203(c), the Bureau anticipates

that the attesting executive would have adequate knowledge of the entity's systems and procedures for achieving compliance with the covered order to provide a useful attestation. The Bureau seeks comment as to whether the proposed rule contains sufficient safeguards to achieve this desired outcome.

The written statement described in the proposal would address violations and other instances of noncompliance with obligations that are "based on" a violation of a covered law. Consistent with the discussion above in the section-by-section discussion of the definition of "covered order" at proposed § 1092.201(e)(4), for purposes of this proposed requirement, an obligation would be "based on" an alleged violation where the order identifies the covered law in question, asserts or otherwise indicates that the covered nonbank has violated it, and imposes the obligation on the covered nonbank as a result of the alleged violation.[193] This would include, for example, obligations imposed as "fencing-in" or injunctive relief, so long as those obligations were imposed at least in part as a result of the entity's violation of a covered law. The proposed written statement would also need to address, for example, any obligation imposed as part of other legal or equitable relief granted with respect to the violation of a covered law, as well as any obligation imposed in order to prevent, remedy, or otherwise address a violation of a covered law, or the conditions resulting from such violation. As discussed above, an order may identify a covered law as the legal basis for the obligations imposed by referencing another document, such as a written opinion, stipulation, or complaint, that

[193] As in the context of proposed § 1092.201(e)(4), an obligation imposed based on multiple violations, some of covered laws and some of other laws, would qualify as an "obligation[] . . . based on an alleged violation of a covered law" within the meaning of § 1092.203(d)(1), even if the violations of the non-covered laws would themselves have sufficed to warrant the imposition of the obligation.

shows that a covered law served as the legal basis for the obligations imposed in the order. The Bureau is proposing this approach because an order may satisfy the proposed definition of "covered order" but nonetheless contain provisions that are entirely unrelated to covered laws. This element of the requirement in proposed § 1092.203(d)(2) is intended to exclude such provisions that are entirely unrelated to violations of covered laws. The Bureau seeks comment on this proposed approach.

The supervised registered entity would be required to state whether it has or has not identified instances of noncompliance with respect to each covered order. If no such instances of noncompliance have been identified, the supervised registered entity would be required to so state. The proposed rule would not establish any minimum procedures or otherwise impose or specify steps a supervised registered entity must take in order to review or monitor compliance with each covered order.[194] Instead, the proposed rule would merely require supervised registered entities to report violations and noncompliance that they have already identified in the course of their own compliance reviews and assessments. The Bureau believes that supervised registered entities likely already conduct reviews to determine their compliance with covered orders, and those reviews would assist in completing the required written statements. The Bureau would not expect the proposal to amend or affect any review, reporting, or recordkeeping requirement contained in any covered order or other provision of law. The Bureau, however, seeks comment on whether the proposed rule should prescribe minimum requirements for supervised registered entities' review of their compliance with the

[194] As discussed above in section IV(D), the Bureau expects that some supervised registered entities may bolster their compliance efforts in response to the proposal.

covered orders to which they are subject. The Bureau also seeks comment on whether the proposal should include other requirements for the written statement to provide related information.

While proposed § 1092.203(d) 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.[195] The Bureau believes 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. The Bureau seeks comment on its proposal to require the attesting executive's signature on the statement but not to require a statement subject to the penalty of perjury.

The Bureau relies on its rulemaking authority under CFPA section 1024(b)(7)(A)–(C) in requiring supervised registered entities to submit written statements.[196] Each of those paragraphs provides independent authority for the requirement to submit written statements. First, CFPA section 1024(b)(7)(A) and (B) authorize these written-statement requirements because the statements would facilitate the Bureau's supervision efforts and its assessment and detection of risks to

[195] *See* 18 U.S.C. 1001.

[196] 12 U.S.C. 5514(b)(7)(A)–(C).

consumers.[197] As discussed in more detail above in section IV(D), the Bureau believes the proposed written statement would facilitate the Bureau's supervision efforts, including by providing the Bureau with important additional information regarding risks to consumers that may be associated with the covered order; informing the Bureau's risk-based prioritization of its supervisory activities under CFPA section 1024(b); and improving the Bureau's ability to conduct its supervisory and examination activities with respect to the supervised nonbank, when it does choose to exercise its supervisory authority. Submission of a written statement that identifies noncompliance with reported orders would provide the Bureau with important information regarding risks to consumers that may be associated with the order. Such orders themselves frequently contain provisions aimed at ensuring an entity's future legal compliance with the covered laws violated. An entity's compliance with such provisions may mitigate the continuing risks to consumers presented by the entity and thus the potential need for current supervisory activities. By contrast, evidence of noncompliance with an order requiring registration under the proposal would be probative of a potential need for supervisory examination of the supervised nonbank and would be a relevant factor for the Bureau to consider in conducting its risk-based prioritization of its supervisory program under CFPA section 1024(b)(2), including (b)(2)(C), (D), and (E). Likewise, in cases where the Bureau determines to exercise its supervisory authorities with respect to a supervised nonbank required to submit written statements under the proposal, the Bureau would

[197] As explained in the "legal authority" section above, 12 U.S.C. 5514(b)(7)(A) and (B) provide independent sources of rulemaking authority. Also, for the reasons explained in the "legal authority" section, 12 U.S.C. 5514(b)(7)(B) authorizes the Bureau to require supervised registered entities to "generate"—i.e., create—the written statement and then "provide" it to the Bureau.

expect those written statements to provide important information relevant to conducting examination work. For example, the Bureau may use the written statements in determining what information to require from a supervised nonbank, in determining the content of supervisory communications and recommendations, or in making other decisions regarding the use of its supervisory authority.[198]

Second, the Bureau has authority to require preparation of the written statements under CFPA section 1024(b)(7)(C) because the written statements will help ensure that supervised registered entities "are legitimate entities and are able to perform their obligations to consumers."[199] As explained above in section III(C), the Bureau interprets CFPA section 1024(b)(7)(C) as authorizing it to prescribe substantive rules to ensure that supervised entities are willing and able to comply with their legal obligations to consumers, including those imposed by Federal consumer financial law. As discussed in more detail above in section IV(D), the Bureau believes that the proposed requirement to submit an annual written statement will help ensure that the supervised registered entity takes its legal duties seriously, and that it is not treating the risk of enforcement actions for violations of legal obligations as a mere cost of doing business. If an entity reports under proposed § 1092.203(d)(2) that it has violated its obligations under covered orders, that may indicate that the entity lacks the willingness or ability more generally to comply with its legal obligations, including its obligations under the Federal consumer financial

[198] The Bureau would anticipate that the proposed requirements in § 1092.203 would promote these objectives with respect to entities subject to Bureau supervision even in the event the Bureau did not require registration and publication of identifying information regarding covered nonbanks as described in proposed §§ 1092.202 and 1092.204.

[199] 12 U.S.C. 5514(b)(7)(C).

laws that the Bureau enforces. That would especially be the case if an entity reports violations under proposed § 1092.203(d)(2) in multiple years or with respect to multiple covered orders, or if the violation amounts to a repeat of the conduct that initially gave rise to the covered order. Under CFPA section 1024(b)(2),[200] the Bureau may prioritize such an entity for supervisory examination to determine whether the entity has worked in good faith to maintain protocols aimed at ensuring compliance with its legal obligations and detecting and appropriately addressing any legal violations that the entity may commit. In this way, the written statement required by § 1092.203(d)(2) would assist the Bureau in ensuring that supervised registered entities are legitimate entities and are able to perform their obligations to consumers.

The Bureau seeks comment on all aspects of proposed § 1092.203(d), including whether to provide for increased frequency of reporting in the event of certain violations or other instances of noncompliance, such as instances of noncompliance that the Bureau believes may have resulted in more significant harm to consumers.

The Bureau also seeks comment on whether the proposal should include other requirements for a supervised registered entity to submit information related to its compliance with covered orders. The Bureau considered proposing additional requirements that would require a supervised registered entity to submit more detailed information regarding compliance with each covered order. In particular, the Bureau considered adopting a requirement that the written statement contain a written description of the instances of noncompliance that have been identified. This information would

[200] 12 U.S.C. 5514(b)(2).

enable the Bureau to identify and assess the nature and extent of such noncompliance and related risks to consumers as part of its risk-based supervision program.

The Bureau is also considering adopting 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. The Bureau expects that many executives may choose to provide such information in the summary narrative portion of the written statement required in proposed § 1092.203(d)(1), as part of describing the steps that the attesting executive has undertaken to review and oversee the supervised registered entity's activities subject to the applicable covered order, but seeks comment on whether to expressly require submission of such information in the final rule. The Bureau is also considering adopting a requirement that the attesting executive attest 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 and ensure that such violations are reported to the attesting executive. Such a requirement would provide the Bureau with information regarding the adequacy of the entity's compliance management system and would enable the Bureau to better assess the reliability of the written statement.

Like the requirements in proposed § 1092.203(d) previously discussed, these additional requirements would help ensure that the entity has reasonable measures in place to inform the attesting executive about violations of covered orders and would thus help ensure that the written statement is useful to the Bureau. These requirements would also provide an incentive for those entities that do not take their legal obligations

seriously to take additional steps to enhance compliance. Notwithstanding these benefits, the Bureau has not included these additional requirements in the current proposal because it preliminarily concludes that the proposed written statement should provide sufficient information to permit the Bureau to determine on a case-by-case basis whether to request such additional information from filers. That is, rather than automatically requiring submission of such information by all supervised registered entities, the Bureau anticipates that the proposed written statement will position the Bureau to inquire further about such submissions to the registry as needed on a case-by-case basis in the normal course of its supervision of supervised registered entities. However, the Bureau seeks comment on whether it should adopt any of these additional requirements for the written statement in the ordinary course.

203(e) Requirement to Maintain and Make Available Related Records

Proposed § 1092.203(e) would impose recordkeeping requirements with respect to the preparation of the written statement. These requirements are designed to promote effective and efficient enforcement and supervision of proposed § 1092.203. The Bureau would rely on its rulemaking authorities under CFPA section 1024(b)(7)(A)–(C) in imposing proposed § 1092.203(e)'s recordkeeping requirements.

Proposed § 1092.203(e) would require a supervised registered entity to maintain documents and other records sufficient to document the entity's preparation of the written statement, to provide reasonable support for the written statement, and to otherwise demonstrate compliance with the requirements of proposed § 1092.203 with respect to any submission under that section. The proposed section would require the supervised registered entity to maintain those documents and records for five years after such

submission is required. The proposal would also require the supervised registered entity to make such documents and other records available to the Bureau upon the Bureau's request. The purpose of this requirement would be to enable the Bureau to assess, as part of its normal supervisory process, the supervised registered entity's compliance with proposed § 1092.203. The Bureau would expect such documents and other records to be in a form sufficient to enable the Bureau to conduct this assessment. The Bureau believes that the five-year time period would appropriately facilitate the Bureau's examination and enforcement capabilities with respect to compliance with proposed § 1092.203's requirements.

The Bureau requests comment on all aspects of proposed § 1092.203(e). In particular, the Bureau requests comment as to whether the proposed recordkeeping requirements ensure adequate support for the written statement and whether the Bureau should impose additional or alternative recordkeeping requirements—for example, by specifying additional requirements for the records' contents or requiring that the records be memorialized in written memoranda or reports. The Bureau also seeks comment on whether it should consider requiring records to be maintained for a different period of time.

203(f) Notification of Entity's Good Faith Belief that Requirements Do Not Apply

Proposed § 1092.203(f) would provide that a person may submit a notice to the NBR system stating that it is neither designating an attesting executive nor submitting a written statement pursuant to § 1092.203 because it has a good faith basis to believe that it is not a supervised registered entity or that an order in question is not a covered order.

Such a filing may be combined with any similar filing under proposed § 1092.202(g).[201] Proposed § 1092.203(f) would also require the person to promptly comply with § 1092.203 upon becoming aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a supervised registered entity or that an order in question is not a covered order. The Bureau is proposing to treat information submitted under § 1092.203(f) as "administrative information" as defined by proposed § 1092.201(a).

The Bureau is proposing § 1092.203(f) for several reasons. First, while determining whether a company qualifies as a "supervised registered entity" (or whether an order is a covered order) should be straightforward in most cases, some persons may be uncertain about whether they are a supervised registered entity (or whether an order is a covered order). Even when they have a good faith basis to believe they are not a supervised registered entity (or an order is not a covered order), they could annually designate an attesting executive and file annual written statements if they did not want to incur the risk of violating the requirements of proposed § 1092.203. But that approach could impose burden on persons who ultimately are not supervised registered entities (or whose orders are not covered orders). The Bureau therefore proposes an alternative option for these persons. Rather than facing the burden of designating an attesting executive and filing written statements, such an entity could elect to file a notice under proposed § 1092.203(f). When a person makes a non-frivolous filing under proposed § 1092.203(f) stating that it has a good faith basis to believe that it is not a supervised

[201] *See also* the section-by-section discussion of proposed § 1092.202(g), which would provide a similar option with respect to proposed § 1092.202.

registered entity (or an order is not a covered order), the Bureau would not bring an enforcement action against that person based on the person's failure to comply with proposed § 1092.203 unless the Bureau has first notified the person that the Bureau believes the person does in fact qualify as a supervised registered entity (or the order in question qualifies as a covered order) and has subsequently provided the person with a reasonable opportunity to comply with proposed § 1092.203.[202]

The Bureau also believes that filings under proposed § 1092.203(f) may reduce uncertainty by the Bureau about why certain entities are not designating an attesting executive or providing a written statement under proposed § 1092.203. These notifications also may provide the Bureau with information about how market participants are interpreting the scope of proposed § 1092.203, about the potential need for the Bureau to instruct certain persons to designate an attesting executive and provide written statements, and about the potential need for guidance or rulemaking clarifying the scope of proposed § 1092.203.

As in the case of proposed § 1092.202(g), the Bureau has considered an alternative to proposed § 1092.203(f) under which entities would *not* file a notice with the Bureau, but they could avoid penalties for non-compliance with § 1092.203 if in fact they could establish a good faith belief that they did not qualify as supervised registered entities subject to § 1092.203 (or their order was not a covered order). Under this alternative, entities would maintain such good faith belief so long as the Bureau had not made clear that § 1092.203 would apply to them. Although the Bureau preliminarily

[202] Under proposed § 1092.102(c), the filing of a notification under § 1092.203(f) would not affect the entity's ability to dispute more generally that it qualifies as a person subject to Bureau authority.

concludes that this alternative is not preferable to requiring entities to actually file notices under proposed § 1092.203(f), the Bureau seeks comment on whether it should finalize this alternative instead. It also seeks comment on whether, if it finalized this alternative, entities would require additional guidance on the circumstances pursuant to which an entity could no longer legitimately assert a good faith belief that § 1092.203 would not apply to its conduct. While the Bureau anticipates that such circumstances would certainly include entity-specific notice from the Bureau that § 1092.203 applies, the Bureau does not believe such notice should be required to terminate a good faith defense to registration. Among other circumstances, the Bureau anticipates that at least formal Bureau interpretations of (for example) the provisions of CFPA section 1024(a)(1) would generally suffice to terminate such belief.[203]

The Bureau also seeks comment on whether it should not finalize proposed § 1092.203(f) or the potential alternative to that provision.

Section 1092.204 Publication and Correction of Registration Information

204(a) Internet Posting of Registration Information

Proposed § 1092.204(a) would require the Bureau to make available to the public the information submitted to it by persons pursuant to proposed § 1092.202, except that the Bureau may choose not to publish certain administrative information or other information that the Bureau determines may be inaccurate, not required to be submitted under subpart B, or otherwise not in compliance with part 1092 and any accompanying guidance. Proposed § 1092.204(a) would further provide that the Bureau may make

[203] 12 U.S.C. 5514(a)(1).

registration information available to the public by means that include publishing it on the Bureau's publicly available Internet site within a timeframe determined by the Bureau in its discretion. However, as discussed below regarding proposed § 1092.204(b), the proposal would specifically provide that the Bureau would not disclose the written statement submitted under proposed § 1092.203.

Publication of registered entities' identifying information would facilitate the ability of consumers to identify covered persons that are registered with the Bureau.[204] And the Bureau believes that publication of additional information about registered entities and covered orders would be in the public interest.[205] Namely, as discussed in more detail in section IV(E) above, proposed § 1092.204(a) would provide information of use to consumers, other regulators, industry, nongovernment organizations, and the general public. Proposed § 1092.204(a) also would formally align the proposed NBR system with Federal government emphasis on making government data available to and usable by the public, by default, to the greatest extent possible.[206]

As discussed in more detail in section IV(E) above, making the data collected publicly available would further the rationale of the proposal—that is, enhancing oversight and awareness of covered orders and the covered nonbanks that are subject to them. Regulators and other agencies at all levels of government (not just the Bureau) could use the information the Bureau makes publicly available to set priorities. The

[204] 12 U.S.C. 5512(c)(7)(B).

[205] 12 U.S.C. 5512(c)(3)(B).

[206] *See, e.g.*, Open, Public, Electronic, and Necessary Government Data Act, in title II of Pub. L. 115-435 (Jan. 14, 2019); Office of Management and Budget, M-19-18, *Federal Data Strategy – A Framework for Consistency* (June 4, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-18.pdf.

Bureau believes publication is also in the public interest because researchers could analyze the information the Bureau makes publicly available to gain valuable insight into the issues addressed in the nonbank registry system. For example, they could produce reports that may inform consumers and the public more broadly of potential risks related to covered orders, or otherwise use the public data to promote private innovation. Organizations representing consumer interests could also use the information to assist with their consumer protection efforts. Publication can also help inform the public, including industry actors, about how regulators are enforcing Federal consumer financial laws and other similar laws. For example, industry actors could use the registry as a convenient source of information regarding regulator actions and trends across jurisdictions, helping them to better understand legal risks and compliance obligations. At least in certain cases, consumers may be able to use the information in the registry to make informed choices regarding consumer financial products and services, including potentially using the information to assist with the assertion of private rights of action that might be available under the Federal consumer financial laws. Finally, publication would help promote Bureau accountability by helping the public better see and understand the results of the nonbank registry initiative, and to help the public gain greater insight into Bureau decision-making. As discussed above in section IV(E), the Bureau believes that identifying the executive who has knowledge and control of the supervised entity's efforts to comply with the covered order would provide particular benefits to the Bureau, the public, and other users of the system.

The Bureau seeks comment on potential costs and benefits of making data from the nonbank registry system publicly available. In particular, the Bureau seeks comment

on whether it should decline to finalize the provisions in proposed § 1092.204, and whether it should not publicize some of the information collected pursuant to proposed § 1092.202. The Bureau appreciates that there may be some risk that publication would deter some entities from consenting to agency and court orders that they might otherwise agree to, due to the potential for additional attention created by the registry, any additional burden that may be imposed by the requirement to submit annual written statements, and any other deleterious effects that the entities may perceive related to registration requirements. This effect in turn may impact the Bureau's enforcement efforts and those of other Federal, State, and local agencies. The Bureau seeks comment on such potential effects, on how those effects might weigh against the benefits of publication, and on whether the Bureau might adopt any mechanisms to help prevent or minimize any concerns relating to the enforcement activities of the Bureau or other agencies.

In addition, there may be some uncertainty over the degree to which consumers would use the publicized information and, when they do, over how consumers could interpret such information. For example, consumers may misunderstand registration to mean that registered entities are "legitimate," that registration itself serves as an endorsement by the Bureau, or that all registered entities are supervised, or regularly supervised, by the Bureau. Registration would not in and of itself establish the entity's legitimacy or serve as a Bureau endorsement in any way. Moreover, proposed subpart B would not constitute a licensing system or an authorization by the Bureau for covered nonbanks to engage in offering or providing consumer financial products or services. For these reasons, the Bureau continues to evaluate the possibility that publishing information

collected under subpart B has the potential to create confusion, which, to the extent it occurs, is unlikely to serve the public interest. If the Bureau finalizes proposed § 1092.204, it would consider options for publishing the information in a manner that mitigates this risk.

Proposed § 1092.204(a) would provide that the Bureau may choose not to publish certain administrative information or other information that the Bureau determines may be inaccurate, not required to be submitted under subpart B, or otherwise not in compliance with part 1092 and any accompanying guidance. The Bureau proposes to exclude administrative information, as defined at proposed § 1092.201(a), from the proposed publication requirement because it believes the publication of such information may not in all instances be especially useful to external users of the system. Administrative information is likely to include information such as time and date stamps, contact information, and administrative questions. The Bureau anticipates that it may need such information to work with personnel at nonbanks and in order to administer the NBR system. The Bureau believes that publishing such information would not be in the public interest because publication would be unnecessary and likely would be counterproductive to the goals of ensuring compliance with the proposal and publishing usable information.

The Bureau would also reserve the right not to publish any information that it determines may be inaccurate, not required to be submitted under subpart B, or otherwise not in compliance with part 1092 and any accompanying guidance. For example, persons may submit unauthorized or inadvertent filings, or filings regarding orders that would not require registration under the proposal, or other inaccurate or inappropriate filings. The

Bureau believes it would require flexibility not to publish such information in order to maintain the accuracy and integrity of the NBR system and the data that would be published by the Bureau. And publication of information that the Bureau determines is, or may be, inaccurate, not required to be submitted under subpart B, or that is otherwise not appropriately submitted under the proposal and accompanying guidance, would not further the goals of the proposal. The Bureau seeks comment on this approach and whether it should provide any additional flexibility, or add any restrictions, with respect to the publication required by this section.

Furthermore, consistent with CFPA section 1022(c)(8),[207] the Bureau would not publish information protected from public disclosure under 5 U.S.C. 552(b) or 552a of title 5, United States Code, or any other provision of law. The Bureau, however, does not believe that any of the information proposed to be collected under proposed § 1092.202 would be protected from public disclosure by law. The Bureau requests comments on this question, and whether any other steps should be taken to protect this information from public disclosure.

The Bureau recognizes that by relying in part on its supervisory authority in section 1024 of the CFPA to require submission of information to the nonbank registry, registry information could be construed to be "confidential supervisory information" as defined in the Bureau's confidentiality rules at 12 CFR 1070.2(i). Public release of

[207] 12 U.S.C. 5512(c)(8) ("In . . . publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under [the FOIA] or [the Privacy Act of 1974, 5 U.S.C. 552a,] or any other provision of law, is not made public under [the CFPA].").

information pursuant to § 1092.204(a) would be authorized by the Bureau's confidentiality rules at 12 CFR 1070.45(a)(7), which permits the Bureau to disclose confidential information "[a]s required under any other applicable law." The Bureau does not believe that the information proposed to be published under § 1092.204(a) would raise the concerns generally addressed by the Bureau's restrictions on disclosure of confidential supervisory information. For example, the Bureau anticipates that the information collected pursuant to § 1092.202 would otherwise be subject to disclosure under the Freedom of Information Act and would not be particularly sensitive to financial institutions or compromise any substantial privacy interest; that disclosure of the information would not impede the confidential supervisory process; and that disclosure would not present risks to the financial system writ large.

204(b) Exclusion of Written Statement

Proposed § 1092.204(b) would provide that the publication described in proposed § 1092.204(a) would not include the written statement submitted under proposed § 1092.203, and that such information would be treated as confidential supervisory information subject to the provisions of part 1070. The Bureau proposes to require the submission of the written statement pursuant to CFPA section 1024(b)(7), which authorizes the Bureau to prescribe rules regarding registration, recordkeeping, and other requirements for covered persons subject to its supervisory authority under CFPA section 1024. The Bureau believes that treating the written statements that it receives under proposed § 1092.203 as confidential, and not publishing them under proposed § 1092.204, would facilitate the Bureau's supervision of supervised registered entities by enabling the Bureau to obtain frank and candid assessments and other information from

supervised registered entities regarding violations and noncompliance in connection with covered orders. This information in turn would better enable the Bureau to spot emerging risks, focus its supervisory efforts, and address underlying issues regarding noncompliance, compliance systems and processes, and risks to consumers.

There may be some benefit to other users of the NBR system from publishing the written statements that it receives under proposed § 1092.203, including enhancing the ability of other agencies and affected consumers to monitor compliance. However, the Bureau believes that these potential benefits are likely to be outweighed by increased candor and compliance with proposed § 1092.203. The Bureau's supervision program depends upon the full and frank exchange of information with the institutions it supervises. Consistent with the policies of the prudential regulators, the Bureau's policy is to treat information obtained in the supervisory process as confidential and privileged.[208] For example, the Bureau will treat all such information as exempt from disclosure under exemption 8 of the Freedom of Information Act.[209] The Bureau believes that these considerations would also underlie supervisory communications with supervised registered entities under proposed § 1092.203, and that the proposed approach would enhance the usefulness of submissions under proposed § 1092.203, increase the

[208] *See* CFPB Compliance Bulletin 2015-01 (Jan. 27, 2015), https://files.consumerfinance.gov/f/201501_cfpb_compliance-bulletin_treatment-of-confidential-supervisory-information.pdf; CFPB Bulletin 2012-01 (Jan. 4, 2012), https://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf. Also consistent with the policies of the prudential regulators, the Bureau recognizes that the sharing of confidential supervisory information with other government agencies may in some circumstances be appropriate, and in some cases, required. *See id.* For example, in accordance with the scheme of coordinated supervision established by Congress, the Bureau's policy is to share confidential supervisory information with the prudential regulators and State regulators that share supervisory jurisdiction over an institution supervised by the Bureau. *See id*.

[209] *See* 5 U.S.C. 552(b)(8).

Bureau's ability to detect and assess potential noncompliance and emerging risks to consumers, and promote compliance with the law.[210]

The Bureau seeks comment on the proposed approach, whether treatment of such submissions as Bureau confidential supervisory information is warranted, and whether the Bureau should consider taking other steps to facilitate the submission of written statements.

204(c) Other Publications of Information

Proposed § 1092.204(c) would provide that the Bureau may, at its discretion, compile and aggregate data submitted by persons under proposed subpart B and may publish such compilations or aggregations (in addition to any other publication under proposed § 1092.204(a)). Any such publication that relates to annual written statements submitted under proposed § 1092.203 would be in a form that is consistent with the Bureau's treatment of those annual written statements as Bureau confidential supervisory information.[211]

204(d) Correction of Submissions to the NBR System

Proposed § 1092.204(d) would clarify that a covered nonbank must correct an information submission within 30 days of when it becomes aware or has reason to know the submitted information was and remains inaccurate. Proposed § 1092.204(d) would

[210] Proposed § 1092.102(c) would provide that proposed part 1092 would not alter applicable processes whereby a person may dispute that it qualifies as a person subject to Bureau authority. The Bureau believes written statements submitted to the NBR system under proposed § 1092.204 would constitute Bureau confidential supervisory information under the regulatory definition of that term even if the submitter later disputes that it qualifies as a person subject to the Bureau's supervisory authority. *See* 12 CFR 1070.2(i) (defining Bureau confidential supervisory information), (q) ("Supervised financial institution means a financial institution that is or that may become subject to the Bureau's supervisory authority.").

[211] *See, e.g.*, 12 CFR 1070.41(c).

(Legal Occupations, Business and Financial Operations, and Office and Administrative Support) would support the attesting executive in preparing the statement. Assuming that satisfying the written-statement requirement would take twenty hours of employees' time, and that the average cost to entities of an employee's time is roughly $60 an hour as discussed above, yields an estimate that the cost of this requirement on covered entities would be roughly $1200 per firm.

The Bureau acknowledges that, under the baseline, some supervised registered entities may not have in place systems and procedures to allow them to confidently identify violations or other instances of noncompliance with any obligations that were imposed in a public provision of the covered order. As discussed elsewhere in this preamble, the Supervisory Reports Provision would likely prompt some such entities to adopt new or additional compliance systems and procedures, imposing a greater cost on them. However, as noted above, based on its experience and expertise, the Bureau believes that most entities subject to covered orders endeavor in good faith to comply with them and will already have in place some manner of systems and procedures to help achieve such compliance. Therefore, the Bureau believes that the number of supervised registered entities that would put in place significant new compliance systems and procedures as a result of the rule would be relatively small.

In addition, the Supervisory Reports Provision would require entities to maintain records related to the written statement for five years. Conservatively assuming that ensuring the necessary documents are properly stored also requires ten hours of employee time adds $600 to the costs to affected entities of this proposed provision.

Note that, for the purposes of this proposed rule, the term "supervised registered entity" excludes persons with less than $1 million in annual receipts resulting from offering or providing consumer financial products and services described in CFPA section 1024(a).[221] Therefore, the combined costs of around $1800 imposed by the Supervisory Reports Provision on the majority of affected entities should be roughly 0.2 percent or less of annual receipts. The costs may be higher at larger entities because identifying instances of noncompliance with obligations imposed in a public provision of a covered order may be more complex at larger entities. The costs would also likely be higher at entities with multiple instances of noncompliance with public provisions of covered orders, or with multiple covered orders.

As explained in greater detail in section V(D) above, the Supervisory Reports Provision would facilitate the Bureau's risk-based supervision efforts, including its efforts to assess compliance with the requirements of Federal consumer financial law, obtain information about the supervised entities' activities and compliance systems or procedures, and detect and assess risks to consumers and to markets for consumer financial products and services. All of these effects would benefit consumers. Moreover, while as noted above the Bureau believes that most entities subject to covered orders endeavor in good faith to comply with them and will already have in place some manner of systems and procedures to help achieve such compliance, it is also likely that this proposed provision would cause a few entities without such systems and procedures to develop them. This would also benefit consumers. The Bureau does not have any data to

[221] 12 U.S.C. 5514(a).

quantify this benefit. The Bureau requests comments and information on ways to quantify these benefits.

3. Publication Provision

For affected covered nonbanks, the main effect of this provision would be that (1) their identifying information and administrative information, (2) information regarding covered orders that they provide to the Bureau, and (3) for supervised registered entities, the name and title of the attesting executive, could be posted on the Internet by the Bureau. Much of this information would be public even under the baseline, so the additional direct effect of this information being posted on the Bureau's website should be small.

However, because covered nonbanks would provide this information only if they are subject to covered orders, consumers might interpret the presence of a covered nonbank on the Bureau's website as negative information about that covered nonbank. Therefore, this proposed provision may have negative reputational costs for the covered nonbank whose information is published on the Bureau website. Yet, covered orders would be public information even under the baseline with no rule. Therefore, this proposed provision would not make public any non-public orders. This would limit the likely costs on covered nonbanks of the proposed provision.

This proposed provision would allow information related to covered orders that is already available to the general public to be centralized on the Bureau's website. This could make the information more readily accessible than it would otherwise be. A large body of research has studied the circumstances under which providing consumers better

access to information does, and does not, improve consumer outcomes.[222] One consensus from this research is that well-designed information disclosures can be effective at directing consumer attention. For example, one study found that providing payday loan borrowers with information about the costs of payday loans reduced payday loan borrowing.[223] However, another consensus from this research is that information disclosures do not always materially affect consumer decision-making, and that the impact of information disclosures on consumer decision-making depends on their design and implementation. Impactful information disclosures are typically more direct (e.g., disclosing the costs of payday loans to payday loan borrowers) and more timely (e.g., disclosed to payday loan borrowers at the time they are obtaining a payday loan) than the information that would be centralized and published under this proposed provision. Therefore, the Bureau believes that most consumers would not change their behavior due to this proposed provision, so the impact of this proposed provision on most affected entities would likely not be significant. The Bureau acknowledges that the issues disclosed by a few covered orders may be so controversial among consumers that their publication on the Bureau website could impose a substantial impact on the firms affected by those orders. However, as noted above, covered orders would be public information even under the baseline with no rule. Therefore, covered orders that disclose particularly controversial practices would likely be well-known among consumers even under the baseline.

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[222] For one review of this research, *see* Thomas A. Durkin and Gregory Elliehausen, *Truth in Lending: Theory, History, and a Way Forward* (2011).

[223] *See* Marianne Bertrand and Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 The Journal of Finance 1865, 1865–93 (2011).

This proposed provision could benefit firms in affected markets, even those without covered orders, by centralizing information on covered orders. This could give firms a clearer picture of how consumer financial protection laws are enforced across agencies and jurisdictions, and could reduce costs for firms that would conduct research into this question under the baseline. The Bureau does not have any data with which to quantify these benefits.

For consumers, one effect of the proposed provision would be improved access to information about covered nonbanks with covered orders. However, as noted above, this information would be public even under the baseline. Moreover, as discussed in more detail above, impactful information disclosures are typically more direct and more timely than the information that would be centralized and published under this proposed provision. Therefore, the Bureau believes that most consumers would not change their behavior due to this proposed provision. The Bureau acknowledges that the issues disclosed by a few covered orders may be so controversial among consumers that their publication on the Bureau website could impose a substantial impact on the firms affected by those orders. However, as noted above, covered orders would be public information even under the baseline with no rule. Therefore, covered orders that disclose particularly controversial practices would likely be well-known among consumers even under the baseline.

By centralizing information on covered orders, another effect of the proposed provision would be to improve the ability of regulatory agencies besides the Bureau to conduct their activities, including supervision, enforcement, regulation, market

monitoring, research, and consumer education. This would benefit consumers. The Bureau does not have any data to quantify this benefit.

This proposed provision would likely not impose any significant costs on consumers. As noted above, this proposed provision could impose some costs on some firms, and it is possible that those firms would respond to these increased costs by increasing prices for consumers. But as discussed above, the costs of this proposed provision on affected firms would be limited, so any cost increases caused by the rule would be limited at affected firms. Moreover, many firms would not be affected at all by this proposed provision and so would not raise prices because of this proposed provision.

E. Potential Specific Impacts of the Proposed Rule

1. Depository Institutions and Credit Unions with $10 Billion or Less in Total Assets, As Described in Section 1026

This proposed rule would only apply to nonbanks. Therefore, it would have no direct impacts on any insured depository institutions or insured credit unions. The rule might have some indirect effects on some insured depository institutions and insured credit unions with $10 billion or less in total assets. For example, insured depository institutions and insured credit unions that are affiliated with affected entities might experience indirect costs, because the proposed rule could impose some costs on their nonbank affiliates. Insured depository institutions and insured credit unions that compete with affected entities might experience indirect benefits because of the proposed rule, because the proposed rule would impose some costs on their competitors. But as noted above, even for nonbanks that are directly affected by the proposed rule, the Bureau does not anticipate that the rule's impact will be significant in most cases. Therefore, the

Bureau anticipates that any indirect effects on insured depository institutions or insured credit unions with $10 billion or less in total assets would be even less significant.

2. Impact of the Proposed Rule on Access to Consumer Financial Products and Services and on Consumers in Rural Areas

By imposing some costs on affected covered nonbanks, the proposed rule could cause affected covered nonbanks to provide fewer financial products and services (or financial products and services at higher cost) to consumers. However, as noted above, the proposed rule would likely impose only limited costs on a limited number of covered nonbanks. Therefore, the impact of the proposed rule on consumer access to financial products and services would be limited even at affected covered nonbanks. Moreover, bank and nonbank entities that would not be directly affected by the proposed rule could provide financial products and services to consumers that would otherwise obtain these financial products and services from affected covered nonbanks. Therefore, the negative impact of the proposed rule on consumer access to financial products and services would be limited. By improving the ability of the CFPB to conduct its activities, including supervision, enforcement, regulation, market monitoring, and consumer education, the proposed rule would likely improve the functioning of the broader market and so may also have positive effects on consumer access to consumer financial products or services provided in conformity with applicable legal obligations designed to protect consumers.

Broadly, the Bureau believes that the analysis above of the impact of the proposed rule on consumers in general provides an accurate analysis of the impact of the proposed rule on consumers in rural areas. The impact of the proposed rule on consumers in rural areas would likely be relatively smaller if the proposed rule would affect fewer entities in

rural areas. High-quality data on the rural market share of entities that would be affected by the proposed rule does not exist, so the Bureau cannot judge with certainty the relative impact of the rule on rural areas. However, for certain large and well-studied markets, there is evidence that nonbanks have larger market shares in urban areas and smaller market shares in rural areas.[224] Based on this limited evidence, the Bureau expects that the impact of the proposed rule would be smaller in rural areas.

VIII. Regulatory Flexibility Act Analysis

A. Overview

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[225] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives before proposing a rule for which an IRFA is required.[226]

An IRFA is not required for this proposed rule because for the reasons explained below the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

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[224] For evidence on the mortgage market, *see* Julapa Jagtiani, Lauren Lambie-Hanson, and Timothy Lambie-Hanson, *Fintech Lending and Mortgage Credit Access*, 1 The Journal of FinTech (2021). For evidence on the auto loan market, *see* Donghoon Lee, Michael Lee, and Reed Orchinik, *Market Structure and the Availability of Credit: Evidence from Auto Credit*, MIT Sloan Research Paper (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966710.

[225] 5 U.S.C. 601 *et seq*.

[226] 5 U.S.C. 609.

B. Impact of Proposed Provisions on Small Entities

The proposed rule has three provisions, which are separately analyzed below. The first proposed provision (hereinafter referred to as the "Registration Provision") would require nonbank covered persons that are subject to certain public agency and court orders enforcing the law to register with the Bureau and to submit copies of such public orders to the Bureau. The second proposed provision (hereinafter referred to as the "Supervisory Reports Provision") would require nonbank covered persons that are supervised by the Bureau to prepare and submit an annual written statement, signed by a designated individual, regarding compliance with each covered public order. The third proposed provision (hereinafter referred to as the "Publication Provision") describes the registration information the Bureau would make publicly available.

The analysis below evaluates the potential economic impact of the proposed provisions on small entities as defined by the RFA.[227] The RFA's definition of "small" varies by type of entity.[228]

With certain exceptions, the proposed rule would apply to covered persons as defined in the CFPA, including persons that engage in offering or providing a consumer

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[227] For purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[228] U. S. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, https://www.sba.gov/sites/default/files/2022-09/Table%20of%20Size%20Standards_NAICS%202022%20Final%20Rule_Effective%20October%201%2C%202022.pdf (current SBA size standards).

financial product or service.[229] Among others,[230] these products and services would generally include those listed below, at least to the extent they are offered or provided for use by consumers primarily for personal, family, or household purposes.

- Extending credit and servicing loans;
- Extending or brokering certain leases of personal or real property;
- Providing real estate settlement services;
- Engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds;
- Selling, providing, or issuing stored value or payment instruments;
- Providing check cashing, check collection, or check guaranty services;
- Providing payments or other financial data processing products or services to a consumer by any technological means;
- Providing financial advisory services;
- Collecting, analyzing, maintaining, or providing consumer report information or certain other account information; and
- Collecting debt related to any consumer financial product or service.[231]

The Registration and Publication Provisions would affect such covered persons (as that term is defined in 12 U.S.C. 5481(6)) that (1) are not insured depository institutions, insured credit unions, or related persons (as that term is defined in 12 U.S.C. 5481(25)), and (2) have had covered orders issued against them, unless such covered persons are subject to certain exclusions. The Supervisory Reports Provision would

[229] For the full scope of the term "covered person," *see* 12 U.S.C. 5481(6).

[230] For the full scope of the term "consumer financial product or service," *see* 12 U.S.C. 5481(5).

[231] *See* 12 U.S.C. 5481(15) (defining term "financial product or service").

affect such covered persons that (1) are subject to supervision and examination by the Bureau pursuant to CFPA section 1024(a),[232] (2) have had covered orders issued against them, and (3) are at or above the $1 million annual receipt threshold, unless such covered persons are subject to certain exclusions.

A major benefit of the proposed rule would be that it would give the Bureau higher-quality data on covered orders. Currently, the Bureau does not have high-quality data on the number of covered orders, nor does it have reliable information on the number of small, covered firms that are subject to covered orders. Therefore, the Bureau cannot reliably estimate the number of small entities that would be impacted by the proposed rule.

1. Registration Provision

The first proposed provision would require covered firms to register using the NBR system and submit certain required information. Required information includes identifying and administrative information, as well as information regarding covered orders. This information should be readily accessible to almost all entities affected and providing it through the NBR system should be straightforward. Firms would not have to purchase new hardware or software, or train specialized personnel, to comply with this proposed provision.

To obtain a quantitative estimate of the cost of this proposed provision, the Bureau assesses the average hourly base wage rate for the reporting requirement at $43.60 per hour. This is the mean hourly wage for employees in four major occupational

[232] 12 U.S.C. 5514(a).

groups assessed to be most likely responsible for the registration process: Management ($59.31/hr); Legal Occupations ($54.38/hr); Business and Financial Operations ($39.82/hr); and Office and Administrative Support ($20.88/hr).[233] We multiply the average hourly wage of $43.60 by the private industry benefits factor of 1.42 to get a fully loaded wage rate of $61.90/hr.[234] The Bureau includes these four occupational groups in order to account for the mix of specialized employees that may assist in the registration process. The Bureau assesses that the registration process will generally be completed by office and administrative support employees that are generally responsible for the registrant's paperwork and other administrative tasks. Employees specialized in business and financial operations or in legal occupations are likely to provide information and assistance with the registration process. Senior officers and other managers are likely to review the registration information before it is submitted and may provide additional information. The Bureau requests any information that would inform its estimate of the average hourly compensation of employees required to register under the proposed rule. Assuming as outlined above a fully loaded wage rate of roughly $60, and that complying with this proposed provision would take around five hours of employees' time, yields a cost impact of around $300 per firm. Therefore, the impact of this proposed provision on affected firms would be limited.

[233] *See* U.S. Bureau of Labor Statistics, National Occupational Employment and Wage Estimates Statistics for May 2021, https://www.bls.gov/oes/current/oes_nat.htm.

[234] As of March 2022, the ratio between total compensation and wages for private industry workers is 1.42. *See* U.S. Bureau of Labor Statistics, Employer Costs for Employee Compensation: Private industry dataset (March 2022), https://www.bls.gov/web/ecec/ecec-private-dataset.xlsx.

2. Supervisory Reports Provision

This second provision would require that affected supervised entities designate an attesting executive. The attesting executive would be a duly appointed senior executive officer (or, if no such officer exists, the highest-ranking individual at the entity charged with managerial or oversight responsibilities) (i) whose assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law, (ii) who possesses knowledge of the supervised entity's systems and procedures for achieving compliance with the covered order, and (iii) who has control over the supervised entity's efforts to comply with the covered order. The Bureau believes that, even under the baseline scenario, most supervised entities would be taking active steps to comply with covered orders, and therefore would already have such an officer or individual in place to oversee the entity's compliance with its obligations under the covered order. Therefore, the Bureau anticipates that this designation requirement would impose little or no additional impact on most supervised registered entities. The Bureau notes that the impacts may be higher for supervised entities that lack a high-ranking officer or other employee with the requisite qualifications to serve as an attesting executive, but the Bureau believes that there would be few such entities. The Bureau seeks comment on whether proposed section 203(b)'s designation requirement is likely to impose material additional impacts on supervised registered entities, beyond the impacts those entities are already likely to incur as part of fulfilling their obligations under the covered orders to which they are subject.

The Supervisory Reports Provision would also require that the supervised registered entity submit a written statement signed by the applicable attesting executive

nonbanks whose information is published on the Bureau's website. Yet covered orders would be public information even under the baseline with no rule. Therefore, this proposed provision would not make public any non-public orders. This would limit the likely costs on covered nonbanks of the proposed provision.

This proposed provision would allow information related to covered orders that is already available to the general public to be centralized on the Bureau's website. This could make the information more readily accessible than it would otherwise be. A large body of research has studied the circumstances under which providing consumers better access to information does, and does not, improve consumer outcomes.[235] One consensus from this research is that well-designed information disclosures can be effective at directing consumer attention. For example, one study found that providing payday loan borrowers with information about the costs of payday loans reduced payday loan borrowing.[236] However, another consensus from this research is that information disclosures do not always materially affect consumer decision-making, and that the impact of information disclosures on consumer decision-making depends on their design and implementation. Impactful information disclosures are typically more direct (e.g., disclosing the costs of payday loans to payday loan borrowers) and more timely (e.g., disclosed to payday loan borrowers at the time they are obtaining a payday loan) than the information that would be centralized and published under this proposed provision. Therefore, the Bureau believes that most consumers would not change their behavior due

[235] For one review of this research, see Thomas A. Durkin and Gregory Elliehausen, *Truth in Lending: Theory, History, and a Way Forward* (2011).

[236] *See* Marianne Bertrand and Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 The Journal of Finance 1865, 1865–93 (2011).

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposal will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

If applicable, the notice of final rule will display the control number assigned by OMB to any information collection requirements proposed herein and adopted in the final rule.

List of Subjects

Administrative practice and procedure, Consumer protection, Credit, Intergovernmental relations, Law enforcement, Nonbank registration, Registration, Reporting and recordkeeping requirements, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to add part 1092 to chapter X in title 12 of the Code of Federal Regulations, to read as follows.

PART 1092—NONBANK REGISTRATION

Subpart A—General

Sec.

Authority: 12 U.S.C. 5512(b) and (c); 12 U.S.C. 5514(b).

Subpart A—General

§ 1092.100 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau pursuant to section 1022(b) and (c) and section 1024(b) of the Consumer Financial Protection Act of 2010 (CFPA), codified at 12 U.S.C. 5512(b) and (c), and 12 U.S.C. 5514(b).

(b) *Purpose*. The purpose of this part is to prescribe rules governing the registration of nonbanks, and the collection and submission of registration information by such persons, and for public release of the collected information as appropriate.

(1) Subpart A contains general provisions and definitions used in this part.

(2) Subpart B sets forth requirements regarding the registration of nonbanks subject to certain agency and court orders.

(3) Subpart C is reserved.

§ 1092.101 General definitions.

For the purposes of this part, unless the context indicates otherwise, the following definitions apply:

(c) *Bureau use of registration information.* The Bureau may use the information submitted to the nonbank registration system under this part to support its objectives and functions, including in determining when to exercise its authority under 12 U.S.C. 5514 to conduct examinations and when to exercise its enforcement powers under subtitle E of the CFPA. However, this part does not alter any applicable process whereby a person may dispute that it qualifies as a person subject to Bureau authority.

§ 1092.103 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

Subpart B—Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders

§ 1092.200 Scope and purpose.

(a) *Scope.* This subpart requires nonbank covered persons that are subject to certain public agency and court orders to register with the Bureau and to submit a copy of each such public order to the Bureau. This subpart also requires certain nonbank covered persons that are supervised by the Bureau to prepare and submit an annual written statement, signed by a designated individual, regarding compliance with each such public order. Finally, this subpart also describes the registration information the Bureau will make publicly available.

(b) *Purpose.* The purposes of the information collection requirements contained in this subpart are:

(1) To support Bureau functions by monitoring for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services, pursuant to 12 U.S.C. 5512(c)(1);

(2) To prescribe rules regarding registration requirements applicable to nonbank covered persons, pursuant to 12 U.S.C. 5512(c)(7);

(3) To facilitate the supervision of persons described in 12 U.S.C. 5514(a)(1), pursuant to 12 U.S.C. 5514(b);

(4) To assess and detect risks to consumers, pursuant to 12 U.S.C. 5514(b); and

(5) To ensure that persons described in 12 U.S.C. 5514(a)(1) are legitimate entities and are able to perform their obligations to consumers, pursuant to 12 U.S.C. 5514(b).

§ 1092.201 Definitions.

For the purposes of this subpart, unless the context indicates otherwise, the following definitions apply:

(a) *Administrative information* means contact information regarding persons subject to this subpart and other information submitted or collected to facilitate the administration of the nonbank registration system.

(b) *Attesting executive* means, with respect to any covered order regarding a supervised registered entity, the individual designated by the supervised registered entity to perform the supervised registered entity's duties with respect to the covered order under § 203 of this part.

(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

(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 (c).

(d) *Covered nonbank* means a covered person that is not any of the following:

(1) An insured depository institution, insured credit union, or related person;

(2) A State;

(3) A natural person;

(4) A motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both, within the meaning of 12 U.S.C. 5519(a), except to the extent such a person engages in functions

purposes of this subpart. If the issuing agency or a court stays or otherwise suspends the effectiveness of the covered order, the effective date shall be delayed until such time as the stay or suspension of effectiveness is lifted.

(g) *Identifying information* means existing information available to the covered nonbank that uniquely identifies the covered nonbank, including the entity's legal name, State of incorporation or organization, principal place of business address, and any unique identifiers issued by a government agency or standards organization.

(h) *Insured depository institution* has the same meaning as in 12 U.S.C. 5301(18)(A).

(i) *Local agency* means a regulatory or enforcement agency or authority of a county, city (whether general law or chartered), city and county, municipal corporation, district, or other political subdivision of a State, other than a State agency.

(j) *Order* includes any written order or judgment issued by an agency or court in an investigation, matter, or proceeding.

(k) *Public* means, with respect to a covered order or any portion thereof, published by the issuing agency or court, or required by any provision of Federal or State law, rule, or order to be published by the issuing agency or court. The term does not include orders or portions of orders that constitute confidential supervisory information of any Federal or State agency.

(l) *Registered entity* means any person registered or required to be registered under this subpart.

(m) *Remain(s) in effect* means, with respect to any covered order, that the covered nonbank remains subject to public provisions that impose obligations on the covered

(c) *Required identifying information and administrative information.* A registered entity shall provide all identifying information and administrative information required by the nonbank registration system. In filing instructions issued pursuant to § 1092.102(a), the Bureau may require that covered nonbanks that are affiliates make joint or combined submissions under this section.

(d) *Information regarding covered orders.* A registered entity shall provide the following information for each covered order subject to this section:

(1) A fully executed, accurate, and complete copy of the covered order, in a format specified by the Bureau; provided that any portions of a covered order that are not public shall not be submitted, and these portions shall be clearly marked on the copy submitted;

(2) In connection with each applicable covered order, information identifying:

(i) The government entity that issued the covered order;

(ii) The effective date of the covered order;

(iii) The date of expiration, if any, of the covered order, or a statement that there is none;

(iv) All covered laws found to have been violated or, for orders issued upon the parties' consent, alleged to have been violated; and

(v) The names of any of the registered entity's affiliates registered under this subpart with respect to the same covered order; and

(3) If the registered entity is a supervised registered entity, the name and title of its attesting executive for purposes of § 1092.203 with respect to the covered order.

(e) *Expiration of covered order status.* A covered order shall cease to be a covered order for purposes of this subpart as of the later of:

(1) Ten years after its effective date; or

(2) If the covered order expressly provides for a termination date more than ten years after its effective date, the expressly provided termination date.

(f) *Requirement to submit revised and final filings with respect to certain covered orders.*

(1) If a covered order is terminated, modified, or abrogated (whether by its own terms, by action of the applicable agency, or by a court), or if an order ceases to be a covered order for purposes of this subpart by operation of paragraph (e) of this section, the registered entity shall submit a revised filing to the nonbank registration system within 90 days after the effective date of such termination, modification, or abrogation, or the date such order ceases to be a covered order.

(2) If, due to such termination, modification, or abrogation of a covered order, or due to the application of paragraph (e) of this section, the order no longer remains in effect or is no longer a covered order, then, following its final filing under paragraph (f)(1) of this section with respect to such covered order, the registered entity will have no further obligation to update its filing or to file written statements with respect to such covered order under this subpart.

(g) *Notification by certain persons of non-registration under this section.* A person may submit a notice to the nonbank registration system stating that it is not registering pursuant to this section because it has a good faith basis to believe that it is not a covered nonbank or that an order in question does not qualify as a covered order.

Such person shall promptly comply with this section upon becoming aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a covered nonbank or that an order in question does not qualify as a covered order.

§ 1092.203 Annual reporting requirements for supervised registered entities.

(a) *Scope of annual reporting requirements*. This section shall apply only with respect to covered orders with an effective date on or after the nonbank registration system implementation date for this section.

(b) *Requirement to designate attesting executive*. A supervised registered entity subject to a covered order described in paragraph (a) of this section shall designate as its attesting executive for purposes of this subpart its highest-ranking duly appointed senior executive officer (or, if the supervised registered entity does not have any duly appointed officers, the highest-ranking individual charged with managerial or oversight responsibility for the supervised registered entity) whose assigned duties include ensuring the supervised registered entity's compliance with Federal consumer financial law, who has knowledge of the entity's systems and procedures for achieving compliance with the covered order, and who has control over the entity's efforts to comply with the covered order. The supervised registered entity shall annually designate one attesting executive for each such covered order to which it is subject and for all submissions and other purposes related to that covered order under this subpart. The supervised registered entity shall authorize the attesting executive to perform the duties of an attesting executive on behalf of the supervised registered entity with respect to the covered order

as required in this section, including submitting the written statement described in paragraph (d) of this section.

(c) *Requirement to provide attesting executive(s) with access to documents and information.* A supervised registered entity subject to this section shall provide its attesting executive(s) with prompt access to all documents and information related to the supervised registered entity's compliance with all applicable covered order(s) as necessary to make the written statement(s) required in paragraph (d) of this section.

(d) *Annual requirement to submit written statement to the Bureau for each covered order*. On or before March 31 of each calendar year, the supervised registered entity shall, in the form and manner specified by the Bureau, submit to the nonbank registration system a written statement with respect to each covered order described in paragraph (a) of this section. The written statement shall be signed by the attesting executive on behalf of the supervised registered entity. In the written statement, the attesting executive shall:

(1) 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

(2) 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.

(e) *Requirement to maintain and make available related records.* A supervised registered entity shall maintain documents and other records sufficient to provide reasonable support for its written statement under paragraph (d) of this section and to otherwise demonstrate compliance with the requirements of this section with respect to any submission under this section, for five years after such submission is required. The supervised registered entity shall make such documents and other records available to the Bureau upon request.

(f) Notification of entity's good faith belief that requirements do not apply. A person may submit a notice to the nonbank registration system stating that it is neither designating an attesting executive nor submitting a written statement pursuant to this section because it has a good faith basis to believe that it is not a supervised registered entity or that an order in question is not a covered order. Such person shall promptly comply with this section upon becoming aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a supervised registered entity or that an order in question is not a covered order.

§ 1092.204 Publication and correction of registration information.

(a) *Internet posting of registration information.* The Bureau shall make available to the public the information submitted to the nonbank registration system pursuant to § 1092.202, except that the Bureau may choose not to publish certain administrative information or other information that the Bureau determines may be inaccurate, not required to be submitted under this subpart, or otherwise not in compliance with this part and any accompanying guidance. The Bureau may make registration information

available to the public by means that include publishing it on the Bureau's publicly available Internet site within a timeframe determined by the Bureau in its discretion.

(b) *Exclusion of written statement.* The publication described in paragraph (a) of this section will not include the written statement submitted under § 1092.203. Such information will be treated as Bureau confidential supervisory information subject to the provisions of part 1070 of this chapter.

(c) *Other publications of information.* In addition to the publication described in paragraph (a) of this section, the Bureau may, at its discretion, compile and aggregate information submitted by persons pursuant to this subpart and make any compilations or aggregations of such information publicly available as the Bureau deems appropriate.

(d) *Correction of submissions to the nonbank registration system*. If any information submitted to the nonbank registration system under this subpart was inaccurate when submitted and remains inaccurate, the covered nonbank shall file a corrected report in the form and manner specified by the Bureau within 30 calendar days after the date on which such covered nonbank becomes aware or has reason to know of the inaccuracy. In addition, the Bureau may at any time and in its sole discretion direct a covered nonbank to correct errors or other non-compliant submissions to the nonbank registration system made under this subpart.

Subpart C—[Reserved]

APPENDIX A TO PART 1092 —LIST OF STATE COVERED LAWS

Alabama

- Ala. Code sec. 5-18A-13(j).
- Ala. Code sec. 8-19-5.

Alaska

- Alaska Stat. sec. 06.20.200.
- Alaska Stat. sec. 06.40.090.
- Alaska Stat. sec. 06.60.320.
- Alaska Stat. sec. 06.60.340.
- Alaska Stat. sec. 45.50.471.

Arizona

- Ariz. Rev. Stat. sec. 6-611.
- Ariz. Rev. Stat. sec. 6-710(8).
- Ariz. Rev. Stat. sec. 6-909(C).
- Ariz. Rev. Stat. sec. 6-947(D).
- Ariz. Rev. Stat. sec. 6-984(D).
- Ariz. Rev. Stat. sec. 6-1309(A).
- Ariz. Rev. Stat. sec. 44-1522(A).
- Ariz. Rev. Stat. sec. 44-1703(4).

Arkansas

- Ark. Code Ann. sec. 4-88-107.
- Ark. Code Ann. sec. 4-88-108(a)(1).
- Ark. Code Ann. sec. 4-90-705.
- Ark. Code Ann. sec. 4-107-203.
- Ark. Code Ann. sec. 4-115-102.
- Ark. Code Ann. sec. 23-39-405.

California

- Cal. Bus. & Prof. Code sec. 17200 to 17209.
- Cal. Bus. & Prof. Code sec. 17500.
- Cal. Civ. Code sec. 1770.
- Cal. Civ. Code sec. 1788.101(a), (b)(1), (7), (8), (9), (10).
- Cal. Fin. Code sec. 4995.3(b).
- Cal. Fin. Code sec. 22755(b), (i).
- Cal. Fin. Code sec. 90003.

Colorado

- Colo. Rev. Stat. sec. 5-3.1-121.
- Colo. Rev. Stat. sec. 5-20-109(b).
- Colo. Rev. Stat. sec. 6-1-105.

Connecticut

- Conn. Gen. Stat. sec. 36a-498(g)(2).
- Conn. Gen. Stat. sec. 36a-539(d)(2), (6).
- Conn. Gen. Stat. sec. 36a-561(3), (4).
- Conn. Gen. Stat. sec. 36a-586(d)(2), (5); (e)(2).
- Conn. Gen. Stat. sec. 36a-607(c)(2)(5).
- Conn. Gen. Stat. sec. 42-110b.

Delaware

- Del. Code Ann. tit. 5, sec. 2114.
- Del. Code Ann. tit. 5, sec. 2209(a)(3).

- Del. Code Ann. tit. 5, sec. 2315(a)(3).
- Del. Code Ann. tit. 5, sec. 2418(2), (9).
- Del. Code Ann. tit. 5, sec. 2904(a)(3).
- Del. Code Ann. tit. 6, sec. 2513.
- Del. Code Ann. tit. 6, sec. 2532, 2533.

District of Columbia

- D.C. Code sec. 26-1114(d)(2), (9).
- D.C. Code sec. 28-3904.

Florida

- Fla. Stat. sec. 501.204.
- Fla. Stat. sec. 560.114(1)(d).
- Fla. Stat. sec. 560.309(10).
- Fla. Stat. sec. 687.141(2), (3).

Georgia

- Ga. Code Ann. sec. 7-7-2(1), (3), (4).
- Ga. Code Ann. sec. 10-1-372.
- Ga. Code Ann. sec. 10-1-393.

Hawaii

- Haw. Rev. Stat. sec. 454F-17(2), (9), (14).
- Haw. Rev. Stat. sec. 480-2.
- Haw. Rev. Stat. sec. 480J-45(7), (10).
- Haw. Rev. Stat. sec. 481A-3.

- Haw. Rev. Stat. sec. 489D-23(2), (4).

Idaho

- Idaho Code sec. 26-31-317(2), (9).
- Idaho Code sec. 26-2505(2).
- Idaho Code sec. 28-46-413(8).
- Idaho Code sec. 48-603.
- Idaho Code sec. 48-603A.

Illinois

- 815 Ill. Comp. Stat. sec. 122/4-5(3), (8).
- 815 Ill. Comp. Stat. sec. 505/2 to 505/2AAAA.
- 815 Ill. Comp. Stat. sec. 510/2.
- 815 Ill. Comp. Stat. sec. 635/7-13(2), (9).

Indiana

- Ind. Code sec. 24-4.4-3-104.6(b), (i).
- Ind. Code sec. 24-4.5-7-410(c), (g).
- Ind. Code sec. 24-5-0.5-3.
- Ind. Code sec. 24-5-0.5-10.

Iowa

- Iowa Code sec. 535D.17(2), (9).
- Iowa Code sec. 537.3209(1).
- Iowa Code sec. 538A.3(4).
- Iowa Code sec. 714.16(2)(a).