March 29, 2023

NCBA Comment Letter
Proposed CFPB Rule - Registry of Offenders
Docket No. CFPB-2022-0080. RIN 3170-AB13

The Honorable Rohit Chopra
Director, Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Chopra:

We submit this comment on behalf of the National Creditors Bar Association ("NCBA") in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed rule seeking to establish a "Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders" (the "Proposed Rule"). 88 FR 6088.

NCBA is the only bar association in the country dedicated to promoting and protecting all creditors' rights attorneys, including attorneys who collect consumer debt using the legal process. NCBA member firms practice law in a manner consistent with their responsibilities as officers of the court and must adhere to rules of state civil procedure, state bar association licensing, certification requirements, and the rules of professional conduct of each state in which they practice.

NCBA's values are: Professional, Ethical, Responsible. NCBA members take compliance and consumer protection very seriously. Our goals are to effectively represent our clients while also preserving consumers' rights.

Important facts about NCBA member firms are as follows:

- Over 2,500 creditors' rights attorneys in over 400 law firms and other creditors' rights practices across the United States;

- The majority of NCBA law firms are considered small businesses pursuant to the Small Business Administration classification.

- 45% practice creditors' right law across multiple state jurisdictions;

- NCBA member law firms are subject to audits on a regular basis by their clients, many of whom are national banks, and devote significant time and resources on compliance and preparing for those audits; and

- NCBA member firms practice various subsets of creditors' rights law

The Proposed Rule requires covered attorneys and law firms to report certain state agency and court orders.

"Covered nonbanks" (or non-bank entities "NBEs") subject to the proposed rule include lawyers and law firms that engage in the practice of consumer debt collection law, including pursuing judgments and post-judgment remedies on behalf of their clients in state courts ("legal collections"). Such lawyers and law firms would be required to report certain state agency and court orders alleging violations of consumer financial products and services, including unfair, deceptive, or abusive acts or practices ("UDAAP") allegations. Final agency actions and court orders concerning the lawyers' or law firms' conduct when engaged in the practice of law would be required to be reported and could include privileged communications between the lawyer and their client as well information regarding their clients' confidential and proprietary business practices.

As noted previously by both the NCBA and the American Bar Association, the CFPB does not have the legal authority to compel supervised or unsupervised entities to disclose or provide access to attorney-client privileged information. In the case of NCBA members, the attorney-client privilege or work-product privilege can arise in two separate contexts: (1) where the NCBA lawyer or law firm received information from its creditor-client; and (2) where the NCBA lawyer or law firm is the client when they have retained outside counsel to represent them. Both such scenarios could arise under the orders subject to this proposed rule.

Proposed Rule Adversely Affects the Practice of Law

The attorney-client privilege is a bedrock legal principle of our free society. The United States Supreme Court notes that it is "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290). It enables both individual and organizational clients to communicate with their attorneys while preserving all clients' fundamental rights to effective counsel. The privilege also encourages clients to seek out and obtain legal guidance on confidential issues or novel legal theories without repercussions. The privilege also enables attorneys to fulfill their ethical duties to their clients by holding their clients' information in confidence and providing adequate counseling to their clients based on that information.

The Proposed Rule requires disclosure of federal, state, and local agency enforcement actions, consent orders, and stipulations. Each states' regulatory scheme and process differs. One can easily imagine a scenario where the mandatory public disclosure of a settlement order, by publication in the public arena on the CFPB's proposed registry, would be detrimental to either or both the creditor-client of an attorney or the law firm. That creditor-client otherwise would not be subject to public scrutiny or reputational risk by being mentioned in such an order, or such attention and risk would be short-lived. Publication in perpetuity on a federal registry creates a much more elevated level of scrutiny and risk upon NCBA members' clients.

NCBA opposes governmental regulations that interfere with the long-established principals that

only the judiciary is empowered to regulate the practice of law, including the attorney-client privilege and work-product doctrine.

Many NCBA members not only handle debt collection cases, but also other practice areas (e.g., hourly legal services, general corporate/transactional legal services, etc.). These practice areas are subject to review and oversight by state bar associations and courts of law. This Proposed Rule would impinge upon the exclusive authority and ability of state bar associations and the courts to regulate the practice of law in their jurisdictions, including the practice of legal collections. Another potentially harmful, although perhaps unintended, consequence of the Proposed Rule is the regulation of the practice of law outside of consumer debt collection, because those attorneys' or law firms' other business partners and/or clients could become subject to the vague Proposed Rule even though they themselves are beyond the reach of the CFPB's supervisory or enforcement powers as delineated in the Dodd-Frank Act. This overreach by the CFPB has serious implications for the regulation of the practice of law nationwide and should concern all attorneys, even those that do not engage in legal collections.

Due Process and Fairness

NCBA believes the Proposed Rule should not be adopted without amendments that would curb the potential infringement into the regulation of the practice of law. As such, NCBA proposes that the CFPB strike the retroactive provision in the Proposed Rule. Stated differently, the Proposed Rule should be prospective only, and apply only to final public orders entered after the Proposed Rule's effective date. The provision in the Proposed Rule, that would require a look back starting in 2017, violates an entity's right to due process.

Companies, including law firms, make business and litigation decisions about defending enforcement actions based on the individual facts and circumstances in existence at the time. Most stipulated judgments or consent orders include a clear statement that the order is entered into without an admission or finding of fault on the part of target entity. It is doubtful that an entity would enter into such an order if they had known, at the time, that the order would be used as a "scarlet letter" against the entity many years in the future. At a minimum, the factors weighing into its calculation about whether to continue to fight the agency action or settle and enter into a consent order would be markedly different. It is patently unfair to impose a different outcome on such entities after the fact; doing so denies the entity basic due process.

NCBA also proposes changing the name from "repeat offender registry," which the CFPB has repeatedly used in public statements about this Proposed Rule. The name "repeat offender registry" implies that the party was already adjudicated to be "an offender" by a court or regulatory body, when no such determination has been made by any trier of fact. The mere act of registration by an NBE on this public registry implies some level of wrongdoing (despite the consent order expressly stating the contrary). The Proposed Rule is nothing more than an attempt to put a "scarlet letter" on NBEs who made a calculated business decision to resolve the regulatory matter or litigation without admitting any liability. Not only is the Proposed Rule unfair to NBEs who have received a public order since 2017, but it also undermines existing discussions between NBEs and regulators regarding settlements already in progress. As such, the Proposed Rule likely will have

a chilling effect on future amicable resolutions between attorneys and law firms, and federal, state, and local regulatory bodies.

Statutory Requirement for Risk Based Supervision Program Not Followed

Section 1024(b)(2) of Dodd-Frank requires the Bureau to tailor supervision of NBEs by asset size, volume, risks to consumers, and degree of state oversight:

> RISK-BASED SUPERVISION PROGRAM. The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons described in subsection (a)(1), 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, 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 services;
> (D the extent to which such institutions are subject to oversight by State authorities for consumer protection;
> (E) any other factors that the Bureau determines to be relevant to a class of covered persons.

The Proposed Rule does not properly assess the impact of the rule on attorneys and law firms, which are among the NBEs subject to the Proposed Rule. The Bureau should exempt NCBA members and their attorneys entirely from the Proposed Rule for at least two reasons: (1) Due to the compliance burdens unique to the practice of debt collection law, and (2) The overwhelming majority of NCBA members are small businesses. The Proposed Rule's burdens on attorneys and law firms substantially outweigh any potential consumer benefit of the registry.

1. NCBA members are heavily regulated by state regulators, state bars, and Attorneys General in the states in which they practice law,

Under Dodd-Frank Act Section 1024(b)(2)(D), the Bureau "shall" consider the impact of the Proposed Rule on creditors' rights attorneys and law firms. These attorneys and law firms already are heavily regulated since they are overseen by, at minimum, (a) state bars, (b) state consumer financial protection regulators, (c) state debt collection licensing regulators, and (d) state attorneys general. These regulations and requirements place a substantial compliance burden on creditors' rights attorneys and law firms, many of which are small businesses.

Many NCBA members practice in states that have enacted licensing requirements for debt collection and use the National Mortgage Licensing System ("NMLS"). Per NMLS rules, "collection agencies" (which sometimes include law firms, despite some state codes that exempt

them from this definition), that are licensed via NMLS already are required to disclose to regulators with access to NMLS (which includes CFPB) all state or federal regulatory actions and certain court actions. (*See Pages 6 and 7 NMLS Company Form , Version 11.0.*) The Proposed Rule would duplicate this disclosure requirement and add another regulatory burden on our members. At a minimum, the Bureau should exempt from the new registry any attorneys or law firm that already is registered within NMLS, because the CFPB (and public) already can access the desired information through NMLS.

Many NCBA members practice law in states with heavy state consumer financial protections laws and must comply with those laws (e.g., New York, California, Massachusetts, etc.). Similarly, many NCBA members practice in states with very active attorney general enforcement of consumer financial protection laws. All NCBA members are subject to oversight and regulatory enforcement by their state bars and by the courts in which they practice law.

In sum, creditors' rights attorneys and law firms already are heavily regulated at the state level, and therefore should be exempted entirely from the Proposed Rule.

2. <u>Attorneys are personally liable for all actions taken under their supervision.</u>

The Bureau should have considered the unique characteristics of creditors' rights law firms, which comprise one segment of the debt collection industry, as "a class of covered persons," before making them subject to the Proposed Rule, as required by the Dodd-Frank Act Section 1024(b)(2)(E). The Bureau has not done so. NCBA urges the Bureau to exempt attorneys and law firms practicing in legal collections completely from the Proposed Rule.

Creditors' rights law firms generally are small to medium-sized partnerships and privately held professional corporations, owned personally and directly by licensed attorneys, and usually practicing in 1-3 states, with an even smaller group practicing in 3-10 states. As licensed attorneys, these creditors' rights law firm owners are personally responsible and liable for compliance with all laws and ethical duties applicable to their area of legal practice, including for mistakes made by their staff or due to inadequate supervision over non-legal staff members or associate attorneys. Attorneys that are found by a court or bar association to violate a state's rules of professional conduct, not only face fines, but the potential suspension of their ability to practice law completely.

The Bureau specifically requested comments about the impact on supervised NBEs of the annual attestation requirement. 88 Fed Reg. at 6101. This requirement would be especially burdensome on the senior executive of a creditors' rights law firm. Such an executive, an attorney, is already personally liable for everything done by their firm. The requirement for this individual's name and title to be posted publicly on the Bureau's registry would unduly interfere with the privacy rights of that attorney and might encourage private actions to be filed by consumers and others against that attorney personally. This outcome is contrary to the purpose stated in the Proposed

Rule for collecting that information and making it public.

In sum, NCBA members, as a group, are in a different "class" of debt collector and should be considered separately pursuant to Section 1024(b)(2)(E) of the Dodd-Frank Act; NCBA proposes that they be exempted from the Proposed Rule entirely.

Burden on Small Business

Creditors' rights attorneys and law firms generally have a number of small balance consumer matters placed with them for legal collections by a small number of clients and perform legal collections services on those matters on a contingency fee basis. While the gross annual receipts earned by those firms may look significant, the fees earned on those receipts is a fraction of that total. In addition, most NCBA members are small businesses, as defined by the U.S. Small Business Administration ("SBA"), pursuant to the Proposed Rule's citation of "debt collection" NAICS code 561440 as the one that defines the size of creditors' rights attorneys and law firms as small businesses.

The Proposed Rule discusses three categories of debt collectors:

- Larger Participants Debt Collectors (Supervised NBEs). The larger participant rule applicable to debt collection states that any creditors' rights attorney or law firm earning more than $10 million in annual receipts from consumer debt collection is a larger participant, subject to CFPB supervision. Those entities would be subject to all aspects of the Proposed Rule, including the annual senior executive attestation requirement.
- Exempted Debt Collectors. The Proposed Rule exempts entirely from its application, any debt collector with less than $1 million in annual receipts "resulting from offering or providing all consumer financial products and services." Those entities would not be subject to any aspect of the Rule.
- Debt Collectors who are NBEs but not Supervised NBEs. For those creditors' rights attorneys and law firms with between $1 million and $10 million in annual receipts, they would be required to register any orders to which they are subject on the registry but would not be required to submit the annual senior executive attestation to the CFPB.

NAICS code 561440 defines small business as any business in this industry with annual revenue less than $16.5 million. This means that creditors' rights attorneys and law firms with annual receipts of over $10 million but less than $16.5 million, are considered both supervised NBEs, subject to the burdensome annual senior executive attestation requirement, and also small businesses under the SBA. The Proposed Rule does not contain any assessment as to the burden the Proposed Rule places on creditors' rights attorneys and law firms of this size.

Without adequate justification in the Proposed Rule of its burden on this segment of the debt collection market, NCBA urges the Bureau to amend the Proposed Rule to exempt all debt collectors with annual revenues of less than $16.5 million from the annual senior executive attestation requirement in the Rule to align with the SBA.

Vagueness

The Proposed Rule is particularly vague when outlining the responsibilities of the attorney or partner designated as the attesting executive, for purposes of the annual attestation requirement for larger participant creditors rights law firms. As the Bureau itself acknowledges, in the preamble to the Proposed Rule:

> 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 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.

88 FR at 6100.

As already discussed, creditors' rights attorneys and law firms are subject to significant oversight and regulation by state bars and regulators. The Proposed Rule should not increase this burden because of a lack of specificity or minimums as to the expected standards.

Estimate of Burden for Compliance

The Proposed Rule contains an assessment of the estimated time and cost that a supervised NBE would incur to prepare the annual attestation by the senior executive. 88 FR at 6130-33. NCBA believes that these estimates are severely underestimated and should be reconsidered.

Because of the vagueness in the Proposed Rule as to the minimum standards for what the Bureau would consider to be an acceptable attestation and the acceptable documentary basis for such attestation, supervised NBE creditors' rights law firms will be required to make their own determinations about how to go about preparing this annual attestation. While responsible industry participants, including NCBA members, consistently endeavor in good faith to watch for compliance problems and issues within their company, including relying upon internal self-reporting and other best practice methods for identifying potential violations and remediating them, it is unclear in the Proposed Rule whether that would be a sufficient basis for the annual attestation statement.

Given this vagueness, it is very likely that most supervised NBEs will develop new reports and other documentation to support the annual attestation. These reports will require significant time from high-level executives and partners within the company, given the federal regulatory requirements involved. NCBA conservatively estimates that their members would be required to spend between 60-80 hours annually to meet the Proposed Rule's vague requirement. In addition, the employees involved in developing such reporting are likely to be partners or senior attorneys whose rate of pay is conservatively estimated to be between $70-$90 an hour. As a result, NCBA

estimates that the annual costs to the supervised NBE will not be $1,200 as stated in the Proposed Rule, but rather at least $4,200 - $7,200. In addition, many supervised NBEs will consult with outside counsel and other experts for guidance on preparing reporting and documentation for the annual attestation, for an estimated cost of 10 hours at an average of $400 per hour ($4,000 total). Therefore, the costs of this annual attestation likely will exceed $8,000 for each supervised NBE.

Comments on Section-By-Section Analysis

The Bureau has sought public comment on multiple specific topics. NCBA provides comments on several of them.

Section 1092.201(c), Definitions, "Covered Law"

NCBA advocates for the removal of state and federal UDAAP and similar laws from the list of "covered laws" in the Proposed Rule, or, at a minimum, removing these laws from the annual attestation requirement. The term "covered laws" is used in the Proposed Rule to (1) define which laws cited in an order that would make the order subject to the registration requirements (see §§ 1092.201(e)(4), 88 FR at 6139), and (2) describe the scope of the potential violations of law which the attesting executive would need to cover in the annual attestations (see 1092.203(d)(2), 88 FR at 6140). UDAAP laws are typically general and there is little to no specific guidance to industry as to how they are to be interpreted and applied in various contexts. Asking an NBE executive to attest that no possible additional violations of such laws have occurred since the order, would be asking the executive to certify to the impossible.

Section 1092.201(d), Covered Nonbank

The Bureau asks for comment as to whether the Bureau should limit the scope of the Proposed Rule to apply only to supervised NBEs. NCBA supports elimination of the requirement for NBE creditors' rights attorneys and laws firms with annual receipts below $10 million to have to register their public orders on the registry. While this may limit the number of orders published in the registry, it will greatly reduce the compliance burden on small businesses, include NCBA members, and who are already heavily regulated at the state level.

Section 1092.201(e), Covered Order

NCBA advocates for the elimination of "local agency" orders from the Proposed Rule. Local regulatory and enforcement agencies may be subject to more local, provincial issues, local control, and local political trends, and be less likely to produce orders that are based on broader consumer financial protection issues. As a result, these orders are unlikely to fulfill the Bureau's stated purposes in collecting orders in a public repository.

Conclusion

As always, NCBA appreciates the opportunity to provide comments to the CFPB, this time on the Proposed Rule, and point out the serious and unique concerns for NCBA members. NCBA

respectfully requests that the Bureau revise to the Proposed Rule based on our comments, before finalizing the proposal.

If you have any questions regarding NCBA's position on the Proposed Rule, please contact NCBA's Government Affairs Officer, Nathan Willner at 410-382-7588 or Nathan@creditorsbar.org.

Sincerely,

Liz Terry
Executive Director
National Creditors Bar Association