



MORTGAGE BANKERS ASSOCIATION

April 3, 2023

Comment Intake–Nonbank Registration and Collection of Contract Information
Consumer Financial Protection Bureau
1700 G Street NW,
Washington, D.C. 20552

Re: Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections [RIN 3170-AB14]

Dear Director Chopra:

The Mortgage Bankers Association (MBA)¹ writes to respond to the Consumer Financial Protection Bureau’s (CFPB or The Bureau) proposal requiring nonbanks subject to its supervisory authority to register and report their use of certain terms and conditions in form contracts for consumer financial products and services. The supervised nonbanks covered include, among others, a nonbank supervised person subject to supervision and examination of the Bureau offering a residential mortgage-related product or service.² These supervised nonbanks must report the use of “covered terms” in a “covered form contract,” defined as a pre-drafted contract used in multiple transactions which include covered terms.³

First, we urge the Bureau to focus on initiatives that will help lenders lower the cost of mortgage lending and support efforts to address the affordable housing crisis keeping many Americans from the dream of home ownership. Rather than creating a complex and difficult to comply with registry, the Bureau’s rulemaking resources should be directed to lowering the costs for borrowers instead of raising costs on mortgage lenders through a proposal that will provide little benefit to those consumers.

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 390,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,100 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, 88 Fed. Reg. 6906, 6966 (Feb. 1, 2023) (Proposed § 1092.301(g)(1)).

³ *Id.* (Proposed § 1092.301(b)).

Indeed, the Bureau has offered *no* data supporting this proposal to the extent it covers the mortgage industry or the costs it would impose on mortgage borrowers.⁴ The Proposal also does not make the case for why it would benefit consumers outside of a very limited context. The proposal is confusing as to what terms are covered, making compliance costly. In sum, the Bureau has not done the necessary cost-benefit analysis and should withdraw this proposal for further study and analysis.

To the extent the mortgage industry uses any of the terms covered under this proposed rule, such usage is already heavily regulated, monitored, and in many instances publicly available. Most of the forms provided to consumers are created by government agencies that insure or guarantee mortgages or created by the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively the GSEs) currently under the conservatorship of the Federal Housing Finance Agency (FHFA), or the Government National Mortgage Association (Ginnie Mae). While the Bureau acknowledges this to some degree by providing an exemption for many of these contracts, the exemption as written creates several compliance challenges. Additionally, it is unclear if the exemption as written fully covers the use of such publicly available form contracts.

Should the Bureau proceed, MBA recommends that the exemption be changed to a forms-based exemption from an entity-based exemption.⁵ This change would create clearer compliance instructions for nonbank mortgage lenders. Additionally, the exemption should be extended to other form contracts or agreements approved by agency or government regulators, insurers or guarantors related to a mortgage product or service.

MBA's concern about the coverage of the forms discussed below does not imply we believe those forms are or should be covered based on the presence of covered terms. Rather, our recommendation reflects the uncertainty of the requirements of the proposed rule. The proposal uses broad and unclear language in its categorization of covered terms. Such breadth is likely to cause confusion as to what is included, leading prudent companies to err on the side of over-inclusion in the registry to avoid penalties. Unfortunately, including those forms will also cause companies to incur the stigma of appearing in the CFPB's registry. Our comments below reflect the need to exempt other standard mortgage industry forms due in part to the difficulty of properly determining which form contracts are covered.

⁴ Arbitration agreements are generally prohibited in mortgage contracts, yet the Bureau acknowledges that its only data supporting the Proposed Rule concerns research and data on arbitration agreements. (88 Fed. Reg. 6906, 6917). Thus, this proposal lacks any justification for imposing regulatory burdens on businesses or why the proposed included other terms and conditions should be included in a public registry that requires both significant compliance burden and unwarranted reputational injury.

⁵ Our comments and suggested changes to this proposed rule does not constitute MBA taking the position that such a regulation or other activities would be constitutional in light of the current funding structure of the Bureau. The Bureau should carefully evaluate their authority to issue this or other rules before proceeding further. See *Cnty. Fin. Servs. Ass'n of Am. Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022).

I. The Bureau Should Change the Online Mortgage Form Exemption to a Forms-Based Exemption.

The Bureau provides an exemption for covered entities that solely use online forms that are publicly available on the internet and are required for insurance or guarantee by a federal agency or purchased by the GSEs, or Ginnie Mae (Online Mortgage Form Exemption). We discuss the need to expand this exemption below, but the most straightforward way for the Bureau to proceed is to simply exempt from coverage all forms, riders, addendums, state documents, and servicing documents used by or acceptable to government guarantors, insurers and the GSEs even if those forms are not publicly available. First, we assume it would be very easy for the Bureau to access these forms. Secondly, these forms are required by or accepted by the government, and the Bureau and its peer regulators have the control over their contents to discuss and amend them if they feel they contain inappropriate terms. Asking regulated entities to evaluate these agreements for inclusion is far more burdensome.

Currently, proposed section 1092.301(h)(7) excludes from the definition of supervised registrants entities that solely use covered terms or conditions in a covered form to enter a contract for residential mortgages.⁶ These forms must be publicly available on the internet and must be required for insurance or guarantee by a federal agency or purchased by the GSEs, or Ginnie Mae.⁷ This is an entity-level exemption which exempts those entities from having to register the covered terms in those forms. The entity's use of covered terms must meet certain conditions for an entity to be exempt. An entity does not need to register their use of covered terms in covered form contracts if they are used solely when entering into contracts for residential mortgages on a form made publicly available on the internet required for insurance or guarantee by a federal agency or purchase by the GSEs or Ginnie Mae.⁸

A blanket exemption would not upset the proposed rule's purpose. The Bureau states that the purpose of the proposed rule is to allow the Bureau to monitor the use of certain terms in contracts to which the Bureau would not otherwise have access, assess risks to consumers, provide information to the Bureau as to how to limit those risks, and assist the Bureau in carrying out examinations.⁹ However, since these forms are created by the GSEs under the conservatorship or regulation of FHFA or by government agencies such as the Department of Housing and Urban Development (HUD), the Bureau can easily ask for these forms. For this reason, the Bureau should already have access to these forms. To the extent these forms have covered terms which the Bureau believes should be disclosed on the registry, it is worth noting that mortgage companies receive these forms from HUD and FHFA and do not have control over the forms' contents. If the Bureau is concerned about terms used in government forms, those concerns can best be addressed by working with peer regulators.

⁶ 88 Fed. Reg. 6906, 6967 (Proposed Rule § 1092.301(h)(7)).

⁷ *Id.* (Proposed Rule § 1092.301(h)(7)).

⁸ *Id.* (Proposed Rule § 1092.301(h)(7)).

⁹ *Id.* at 6914.

In the alternative, the Bureau should adopt a forms-based exemption for government-mandated forms and forms required for agency or enterprise insurance or guarantee. The Bureau rejected the idea of a forms-based exemption because the incremental burden from registering the covered terms of an additional contract – compared to the burden of registering overall – would not be significant.¹⁰ However, this logic is contradicted by the mechanisms of the Online Mortgage Form Exemption. Under the proposed rule, if a covered entity were to use one covered term in a single product line contract that is not covered by the exemption, that entity would need to register all their covered terms even when the entity would otherwise be exempt. This registration mechanism combined with the uncertainty of which terms are covered means many covered entities may opt to register every use of a potentially or arguably covered term, effectively negating the purpose of the exemption. A forms-based exemption on the other hand creates clear expectations for compliance while fully addressing the intended purpose for the registry. A forms-based exemption will also benefit lenders who originate loans on GSE forms that will not be insured or guaranteed. These forms are available online and are similarly available to the public and regulators. We strongly urge the Bureau to adopt such an exemption.

II. The Bureau Should Ensure the Online Mortgage Form Exemption Covers All Relevant Forms.

The Online Mortgage Form Exemption in the proposed rule, as currently drafted, arguably only covers a subset of the forms used to provide residential mortgage products and services. In addition to changing the structure of the Online Mortgage Form Exemption, the Bureau should also provide clarity as to which contracts are included in the exemption. Specifically, the Bureau should clarify that riders, addenda, or loss mitigation forms required for insurance or guarantee by a federal agency or purchased by the GSEs, or Ginnie Mae as well as any forms required for participation in state housing purchase or assistance programs are covered by the Online Mortgage Form Exemption.

III. The Bureau Should Exempt Entities That Use an Internet Accessible Rider, Addendum, or State Required Form.

Under the proposed rule, if an entity uses an internet accessible addendum, rider, or state required form to create a mortgage contract, that entity would arguably no longer be exempt from registration. As currently written, the exclusion would not apply if “the supervised nonbank used covered terms or conditions for consumer financial products or services... different from or in addition to any covered terms and conditions that appeared in these published form contracts.”¹¹ Notably, the exemption covers entities whose sole use of terms in covered forms appear in forms required for insurance or guarantee by a federal agency or purchase by the GSEs or Ginnie Mae.¹² However, it is unclear whether a rider, addendum, or state required form that is used as part of these contracts are included as part of this, since these forms by themselves may not be considered necessary for insurance or guarantee.

¹⁰ *Id.* at 6941.

¹¹ *Id.* at 6940.

¹² *Id.* (Proposed Rule § 1092.301(h)(7)).

MBA members believe the use of an addendum, rider, or state required form found on Fannie Mae's and Freddie Mac's website to enter into a mortgage contract should not lead to an entity losing its exemption. Fannie Mae and Freddie Mac both make these forms publicly available over the internet.¹³ As these forms are available online, their inclusion in the proposed exemption squarely fits within the stated purposes of the Online Mortgage Form Exemption. Conversely, uploading these internet accessible contracts will clutter the registry as they are commonly used, diminishing its usability.

IV. The Bureau Should Allow Servicers to Facilitate Loss Mitigation Without Losing Their Exemption.

The exemption covers entities that only use forms required for insurance or guarantee by a federal agency or purchase by the GSEs or Ginnie Mae. However, covered entities such as mortgage servicers are responsible for facilitating loss mitigation modifications provided by federal agencies. Servicers engaged in providing loss mitigation should not lose their exemption for facilitating these services.

MBA urges the Bureau to extend the Online Mortgage Form Exemption to cover forms servicers use to offer loss mitigation – even though those forms are not necessary for the loan to be insured or guaranteed – because they are required following the origination of the loan. Servicers offer loss mitigation using forms provided by federal agencies. These forms contain waivers that arguably could be defined as limiting the rights of borrowers in light of the breadth of the proposed covered terms.¹⁴ Clarity would help alleviate these concerns. Loss mitigation is an important part of providing relief to borrowers to stay in their homes and facilitating the insurance and guarantee of the underlying loan by allowing insurers and guarantors to avoid the costs of prolonged foreclosures. The documents used to facilitate loss mitigation modifications are similarly accessible to both the Bureau and the wider public.

¹³ Fannie Mae Legal Documents, Federal National Mortgage Association (July 2021), available at <https://singlefamily.fanniemae.com/fannie-mae-legal-documents#:~:text=Security%20instruments%20for%20regularly%20amortizing,which%20we%20purchase%20conventional%20mortgages>; Freddie Mac Uniform Instruments, Federal Home Loan Mortgage Corporation (July 2021), available at <https://sf.freddiemac.com/tools-learning/uniform-instruments/2021-updated-instruments#notes>.

¹⁴ FHA-HAMP Partial Claim Promissory Note and Partial Claim Subordinate Mortgage, FEDERAL HOUSING ADMINISTRATION, available at https://www.hud.gov/sites/documents/SFH_FHA-HAMPPARCLAIMSUBMGT.PDF; Loan Modification Agreement – Single Family – Fannie Mae UNIFORM INSTRUMENT (Form 3179), Federal National Mortgage Association, available at https://singlefamily.fanniemae.com/media/document/doc/form-3179?_ga=2.238916032.1110533734.1676059642-753523592.1660154082; Payment Deferral Agreement, Federal National Mortgage Association, available at <https://servicing-guide.fanniemae.com/COVID-19/Payment-Deferral-Agreement-COVID/1966863451/Payment-Deferral-Agreement.htm>.

V. Conclusion

The Bureau should change the Online Mortgage Form Exemption to a forms-based exemption as opposed to an entity-based exemption. Additionally, the exemption should be expanded to include the use of other form contracts or agreements approved by agency or government regulators, insurers or guarantors related to a mortgage product or service. Doing so will provide necessary clarity and will not upset the purpose of this proposed rule. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills", enclosed in a thin black rectangular border.

Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association