

## CFPB Proposes Public Registry of Form Consumer Contracts that Waive or Limit Consumer Rights

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The Consumer Financial Protection Bureau recently proposed a rule that would establish a public registry of supervised nonbanks' terms and conditions in "take it or leave it" form contracts that claim to waive or limit consumer rights and protections, like bankruptcy rights, liability amounts, arbitration rights, or complaint rights. If finalized, larger participants operating in automobile financing, among other larger participants, would be subject to the rule.

The significance of the proposed rule cannot be understated. If finalized, the rule would create an enormous incentive for nonbanks to review their form contracts and revise or remove terms that could attract unwanted attention from federal and state regulators and enforcers as well as plaintiffs' attorneys. It would also create a "hit list" of every nonbank that is required to register its form contracts with the CFPB.

Under the proposed rule, nonbank creditors subject to the CFPB's supervisory jurisdiction would be required to submit information on terms and conditions in form contracts they use that seek to waive or limit individuals' rights and other legal protections. That information would be posted in a registry that would be open to the public, including to other consumer financial protection enforcers like the Federal Trade Commission, the Department of Justice, state regulators, state attorneys general, and plaintiffs' attorneys. The CFPB may also use the information submitted to the nonbank registration system to determine when it will use its examination and/or enforcement authority against a nonbank.

Covered terms and conditions of form contracts that would fall under the scope of the proposed rule are extremely broad and would generally include any clause, term, or condition that expressly purports to establish a covered limitation on consumer legal protections applicable to the offering or provision of consumer financial products or services. The proposed rule includes terms or conditions that:

- preclude a consumer from bringing a legal action after a certain period of time;
- specify a forum or venue where a consumer must bring a legal action in court;
- limit the ability of a consumer to file a legal action seeking relief for other consumers or to seek to participate in a legal action filed by others;

- limit liability to a consumer in a legal action including by capping the amount of recovery or type of remedy;
- waive a cause of legal action by a consumer, including by stating that a person is not responsible to the consumer for a harm or violation of law;
- limit the ability of a consumer to make any written, oral, or pictorial review, assessment, complaint, or other similar analysis or statement concerning the offering or provision of consumer financial products or services by the registrant;
- waive, whether by extinguishing or causing a consumer to relinquish or agree not to assert, any other identified consumer legal protection, including any specified right, defense, or protection afforded to the consumer under constitutional law, a statute or regulation, or common law; or
- require that a consumer bring any type of legal action in arbitration.

The registry would not only include the contract terms and conditions but also company information, including the company's legal name, state of incorporation or organization, headquarters and principal place of business addresses, and unique identifiers issued by a government agency or standards organization.

Registrants would be required to submit or update their information each year. They also would be required to submit additional information regarding their use of covered terms or conditions in the previous year, including:

- the consumer financial products or services for which the registrant used covered terms or conditions;
- each state or other jurisdiction where the registrant offered or provided the consumer financial products or services;
- for each covered form contract, (i) which consumer financial products and services are affected by the covered term or condition and in which states;

(ii) all brand names and trade names used;

(iii) the legal names of any persons that entered into the covered form contract; (iv) the type of covered limitation on consumer legal protection, including any limitations on when a consumer may bring a legal action; (v) the name and place of the forum or venue for the consumer to bring a legal action; (vi) the type of legal action and participation to which the limitation applies; (vii) the text of the covered term or condition imposing a limitation on liability; (viii) the text of the covered term or condition imposing a waiver; (ix) the text of the covered term or condition imposing a limitation on a consumer review, assessment, complaint, or other similar analysis or statement; (x) for any other waiver of an identified consumer legal

protection, the text of the covered term or condition imposing the waiver; (xi) the state or other jurisdiction identified in any choice of law provisions in the covered form contract, as applicable; and (xii) for any form contract provided by a forms contract provider, the name of the contract provider and other information, such as the complete copyrighted name including any form number and date of the contract, necessary for the CFPB to identify the precise version of the standard form contract; and

- whether the registrant, as a party to a legal action, obtained one or more court or arbitrator decisions regarding enforceability of a covered term or condition in any covered form contract and, if so, (i) the consumer financial products or services to which the decisions relate; (ii) the types of covered terms or conditions at issue in the decisions; and (iii) whether the decisions enforced or declined to enforce the covered terms or conditions at issue.

Apart from certain exceptions, all nonbank creditors subject to CFPB supervisory jurisdiction, including those operating in payday lending, private student loan origination, and mortgage lending and servicing, would be subject to this proposed rule. Larger participants operating in student loan servicing, automobile financing, consumer reporting, consumer debt collection, and international remittances would also be subject to the rule. The proposed rule exempts certain entities from compliance, including nonbanks with less than \$1 million in annual receipts resulting from offering or providing certain consumer financial products or services that would make the nonbank subject to the CFPB's supervisory authority.

Public comments are due on or before April 3, 2023. The CFPB proposes that the final rule would be effective 30 days after it is published in the *Federal Register*. However, registration would be required after the nonbank registration system implementation date, which is likely to be no earlier than January 2024. The CFPB is also seeking comment on the proposed effective date, including whether it should be at a different time and, if so, when and why.

Nonbank financial service providers should review the proposed rule to determine if they will be impacted by the proposal and, if so, whether comment is warranted. ☒

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076  
410.684.3200

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