U.S. Chamber of Commerce

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April 3, 2023

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

Re: Proposed Rule, Consumer Financial Protection Bureau; 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. 6,906-6,969, February 1, 2022) (Docket No. CFPB-2023-0002)

Dear Director Chopra:

This letter is submitted on behalf of the U.S. Chamber of Commerce by the Center for Capital Markets Competitiveness ("CCMC") and the U.S. Chamber Institute for Legal Reform ("ILR"). The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to function well in a 21st century economy. ILR champions a fair legal system that promotes economic growth and opportunity.

We write regarding the recent proposal by the Consumer Financial Protection Bureau to create a public registry of companies that use certain terms and conditions—including, most notably, arbitration agreements—in their contracts with consumers.[1] The core of this Proposed Rule is a thinly-veiled, wholly impermissible and unjustified, attack on arbitration agreements, violating, among other things, the protections for arbitration agreements that Congress put in place when it enacted the Federal Arbitration Act.

Agreements to arbitrate consumer disputes, including disputes involving consumer financial products or services, have been common for decades. Currently, there are hundreds of millions of consumer contracts that contain arbitration provisions. These provisions reduce transaction costs and enable fair, speedy, and efficient dispute resolution, thereby providing significant advantages to consumers and the public at large. Yet the Proposed Rule would brand companies as "risky" to consumers merely for exercising their federally protected right to use arbitration, or otherwise engaging in fully lawful and appropriate conduct—making those companies

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[1] *See* 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 (Feb. 1, 2023) ("Proposed Rule" or "Rule").

a special focus of the Bureau's supervisory and enforcement activities just because they use arbitration to resolve consumer disputes.

Equally troubling, the Bureau's proposal is an unlawful attempt to circumvent the limits on the Bureau's authority with respect to arbitration agreements imposed by Section 1028 of the Dodd-Frank Act and Congress's 2017 Congressional Review Act ("CRA") resolution disapproving the Bureau's prior attempt to limit the use of arbitration. In particular, by specifically addressing in Section 1028 the CFPB's authority to regulate arbitration, and imposing express limits on that authority, Congress made clear that the Bureau's only means of addressing arbitration is a regulation issued pursuant to that provision. And that authority is further limited as a result of Congress's action in 2017 under the Congressional Review Act.

The Proposed Rule is a backdoor attempt to circumvent these restrictions. Its goal is to discourage the use of arbitration by imposing unjustified and costly regulation: placing a public stamp of disapproval on companies, including third party companies not subject to the Bureau's supervision, that choose to enter into arbitration agreements with their customers. In turn, those companies using arbitration are threatened with greater supervisory and enforcement burdens.

The Bureau should withdraw the Proposed Rule. It would harm businesses without any benefit to consumers. Additionally, we believe that the proposed rule would, if promulgated, violate the procedural and substantive limits on the Bureau's authority imposed by the Dodd-Frank Act, the Congressional Review Act, the Federal Arbitration Act, and the Administrative Procedure Act.

This comment letter makes the following key points:

- The Bureau lacks legal authority to promulgate the Proposed Rule with respect to arbitration agreements because the Rule exceeds the Bureau's limited authority over arbitration set forth in Section 1028 of the Dodd-Frank Act. The Bureau's proposal to publicly disapprove of companies that enter into arbitration agreements further rests on an impermissible view of arbitration that violates the Federal Arbitration Act. The Proposed Rule also is precluded by Congress's 2017 Congressional Review Act resolution disapproving of the Bureau's previous attempt to regulate arbitration agreements, including its prior attempt to mandate arbitration-related disclosures.

- The Proposed Rule's targeting of arbitration is arbitrary, capricious, and ignores basic facts of the marketplace by relying on the false premises that arbitration is risky for consumers and the use of arbitration to resolve disputes makes companies more likely to violate federal consumer protection laws.

- The Proposed Rule is also unjustified with respect to non-arbitration contractual terms. The Bureau acknowledges that its only data supporting the Proposed Rule concerns arbitration agreements, and accordingly has failed to provide any justification whatever for imposing regulatory burdens on businesses that include other terms and conditions in their consumer contracts. In fact, new research demonstrates that there is no statistically significant relationship between the use of arbitration agreements and consumer complaints in the Bureau's database, nor between the use of arbitration agreements and CFPB enforcement actions.

- The Bureau's proposal is based on a deeply flawed cost-benefit analysis. As explained below, the Bureau has failed to meaningfully account for the impact of the Proposed Rule on small businesses; significantly underestimated the burdens that the Proposed Rule would impose on covered businesses; and failed to identify any benefits to consumers that could come close to outweighing the costs of complying with the Proposed Rule.

- The Fifth Circuit's recent decision holding the Bureau's funding structure unconstitutional will be considered by the Supreme Court in the Court's October 2023 Term.[2] Should the Supreme Court agree with the Fifth Circuit, this constitutional infirmity in the Bureau's structure will provide an additional reason why the Bureau lacks the lawful authority to promulgate the Proposed Rule, independent of the Rule's many significant flaws. The Bureau should not promulgate controversial rules while the constitutionality of its structure remains under review.

- Finally, if the Bureau nonetheless moves forward with the Proposed Rule, it should narrow the Rule significantly. Any rule should be limited to contract terms on which there is overwhelming consensus of their unlawfulness. It should apply only to contracts between supervised nonbanks and their customers—and not to terms and conditions between third parties and their customers that supervised nonbanks happen to invoke. Also, the information collected by the Bureau should not be made public and should not name specific companies. The registry will not be a useful tool for consumers but will instead mislead consumers based on the Bureau's biased and counterfactual view of the impact on consumers of the use of certain contract terms—most notably, arbitration agreements.

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[2] *Community Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).

I. The Proposed Rule Constitutes an Unlawful and Unjustified Attack on Arbitration Agreements

The Proposed Rule represents an impermissible end-run around both the limits on the Bureau's arbitration authority under the Dodd-Frank Act and the 2017 Congressional Review Act resolution rejecting its earlier attempt to target arbitration agreements. Moreover, the Bureau's attempt to revive its attacks on arbitration is independently precluded by the Federal Arbitration Act.

In addition, the Proposed Rule is unjustified and arbitrary, capricious, and irrational. The Bureau offers no plausible justification for lumping arbitration agreements together with contract terms that the agency claims are "risky" to consumers. And the Bureau's primary premise—that the use of arbitration agreements poses risks to consumers and makes companies more likely to violate federal law—is simply false.

A. The Proposed Rule Clearly Targets the Use of Arbitration Agreements

There can be little doubt that arbitration agreements are the principal focus of the Proposed Rule. The Proposal mentions arbitration by name **152 times** in sixty-four pages of the Federal Register. It is also no coincidence that the Bureau issued the Proposed Rule shortly after receiving pressure from consumer groups calling for action to limit the use of arbitration.[3] Indeed, Director Chopra's statement regarding the Proposed Rule targets contract terms "waiv[ing] a consumer's right to file a lawsuit" in court—a focus further highlighted in the Rule itself.[4] That focus is an indisputably direct attack on arbitration: As Justice Kagan has explained in an opinion for the Supreme Court, "a waiver of the right to go to court and receive a jury trial" is a "primary characteristic" of arbitration agreements.[5]

The data offered by the Bureau in support of the Proposed Rule makes clear that arbitration agreements are the true focus and target of the Rule. As the Bureau acknowledges, its **only data** in support of the Proposed Rule relates to arbitration

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[3] *See* Letter from Consumer Groups to the Honorable Rohit Chopra, Director, Consumer Financial Protection Bureau (Sept. 13, 2022), https://www.citizen.org/wp-content/uploads/Consumer.Cltn_.to_.CFPB_September_2022.pdf.

[4] *See* Statement of CFPB Director Rohit Chopra on Proposed Registry of Supervised nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections (Jan. 11, 2023), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-proposed-registry-of-supervised-nonbanks-that-use-form-contracts-to-impose-terms-and-conditions-that-seek-to-waive-or-limit-consumer-legal-protections/; Proposed Rule, 88 Fed. Reg. at 6907-08.

[5] *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017).

agreements, and it has no evidence about the prevalence of any of the other contractual terms covered by the Rule.[6]

B. The Bureau Lacks the Legal Authority to Promulgate the Proposed Rule with Respect to Arbitration Agreements

The Bureau possesses only limited authority over arbitration, and it has not even attempted to exercise that authority in proposing the Rule. The Proposed Rule in addition rests on hostility to arbitration that violates the Federal Arbitration Act and the Supreme Court's decisions interpreting that statute. Finally, because Congress already rejected a substantially similar rule from the Bureau under the CRA, the CRA independently forecloses the Bureau from again attempting to mandate arbitration-related disclosures.

The proposed Rule exceeds the Bureau's limited authority over arbitration.

Congress declined to give the Bureau free-wheeling authority over arbitration. Instead, it chose to provide specific, limited authority under Section 1028 of the Dodd-Frank Act.[7] That provision allows the Bureau to regulate arbitration in the context of consumer financial products and services if, only after conducting a study,[8] the Bureau demonstrates that its regulation is "consistent with the study conducted under subsection (a)" and also finds that the regulation "in the public interest and for the protection of consumers."[9]

The Bureau sought to exercise this limited authority in 2015 when it issued a study on arbitration. That study was deeply flawed—for reasons the Chamber has previously explained in detail.[10] On the basis of that flawed study, the Bureau then, in 2017, issued a rule that would have effectively banned arbitration in consumer financial contracts.[11] But Congress disapproved the 2017 rule by a joint resolution under the

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6 *See* Proposed Rule, 88 Fed. Reg. at 6917 (acknowledging the "limited information on the use of covered terms and conditions"); *id.* at 6960 ("[T]he Bureau is unaware of any systematic data that would enable it to estimate the prevalence of prohibited covered terms or conditions or their harm to consumers."); *id.* ("Apart from data about the prevalence of arbitration agreements . . . the Bureau does not have systematic data on the use of covered terms and conditions that are not expressly prohibited by law.").

7 *See* 12 U.S.C. § 5518.

8 *Id.* § 5518(a).

9 *Id.* § 5518(b).

10 *See* U.S. Chamber of Commerce, *The CFPB's Flawed Arbitration "Study,"* https://www.uschamber.com/assets/archived/images/documents/files/cfpb_arbitration_study_critique.pdf.

11 *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (Jul. 19, 2017).

Congressional Review Act declaring that the Bureau's rule "shall have no force or effect."[12]

By separately addressing the Bureau's authority to regulate arbitration and imposing specific requirements for the exercise of that regulatory authority (such as mandating a study and specifying that any rule must be based upon the study's findings), Congress made clear that the Bureau may address arbitration only by exercising that specific authority. After all, Section 1028's limitations would be a dead letter if the Bureau could instead choose to regulate arbitration under its general rulemaking authority to "administer and carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof."[13]

The Proposed Rule does not invoke Section 1028.[14] Nor could the Bureau invoke Section 1028, because the Proposed Rule was not preceded by the study that Section 1028(a) requires. Rather, the Bureau is expressly relying on its general regulatory authority–citing its authority to monitor markets "for risks to consumers in the offering or provision of consumer financial products or services" or "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.'"[15]

But there can be no doubt that the Proposed Rule would impose significant burdens on the use of arbitration through its disclosure requirements, its identification of arbitration as a means of dispute resolution that carries heightened risks for consumers, and its targeting of companies that use arbitration with enhanced supervisory and enforcement activity. The Proposed Rule is therefore unlawful because its effect would be to regulate arbitration agreements in violation of the limits imposed by Section 1028 of the Dodd-Frank Act.[16]

The Proposed Rule impermissibly conflicts with the Federal Arbitration Act

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12 Pub. L. No. 115-74, 131 Stat. 1243 (Nov. 1, 2017).

13 12 U.S.C. § 5512(b)(1).

14 *See id.* at 6907, 6926-27 (invoking other statutory provisions as basis for the Rule).

15 Proposed Rule, 88 Fed. Reg. at 6926-27 (quoting 12 U.S.C. §§ 5512(c)(1) & 5514(b)).

16 *See, e.g.*, *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (quotation marks and citations omitted).

Independently, the Federal Arbitration Act ("FAA") confirms that the Bureau lacks the power to promulgate the Proposed Rule.

The purpose and inevitable, intended effect of the Proposed Rule is to identify and then penalize companies that use arbitration, by subjecting them to increased enforcement and supervisory scrutiny on the theory that the use of arbitration somehow infringes consumers' substantive rights or demonstrates increased consumer risk. But that hostile view of arbitration contravenes the FAA, which is "a congressional declaration of a liberal federal policy favoring arbitration agreements."[17] Contrary to the Bureau's assertions that arbitration threatens to diminish consumers' substantive rights, the Supreme Court has repeatedly recognized that "[a]n arbitration agreement does not alter or abridge substantive rights; it merely changes how those rights will be processed."[18]

The Bureau's proposal to subject companies to heightened scrutiny for using arbitration agreements thus rests on an impermissible denigration of arbitration that squarely conflicts with the Supreme Court's repeated pronouncements "that the FAA was designed to promote arbitration" and the FAA's mandate to "place arbitration agreements on equal footing with all other contracts."[19] As the Ninth Circuit recently reiterated, "[i]n enacting the FAA, Congress intended to combat the longstanding 'hostility towards arbitration' that 'had manifested itself in a great variety of devices and formulas declaring arbitration against public policy.'"[20]

The Bureau's proposal to publicly disapprove of companies that enter into arbitration agreements is just such a "device." And it is no answer for the Bureau to say that the Proposed Rule avoids scrutiny under the FAA by regulating only form contracts. The Ninth Circuit rejected a similar attempt by California to salvage that State's anti-arbitration legislation, explaining that California's arguments had "no merit" because they "misunderstand basic principles of California contract law" and "Supreme Court caselaw regarding consent in arbitration cases"—both of which make clear that form contracts offered on a take-it-or-leave-it basis are fully valid and enforceable.[21]

The Proposed Rule violates limits on Bureau authority imposed by the Congressional Review Act

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17 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

18 *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1919 (2022) (citing *Preston v. Ferrer*, 552 U.S. 346, 359 (2008); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

19 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 345 (2011).

20 *Chamber of Commerce v. Bonta*, 62 F.4th 473, 483 (9th Cir. 2023).

21 *Id.* at 488.

The Bureau's promulgation of the Proposed Rule would in addition violate the Congressional Review Act. That is because the Bureau's 2017 rule—in addition to restricting the use of arbitration—would also have required providers of consumer financial products to make arbitration-related disclosures to the Bureau.[22]

Specifically, in the 2017 rule, the Bureau supported its disclosure mandates by invoking the same market monitoring authority it invokes in the Proposed Rule.[23] The 2017 rule required companies to disclose to the Bureau various arbitral and court records—including, most notably here, the underlying arbitration agreement invoked by the company.[24] The current Proposed Rule is substantially the same; it likewise requires companies subject to the Rule to disclose their arbitration agreements to the Bureau.

If anything, the Proposed Rule is more onerous than the disclosure requirement that Congress rejected in 2017. In 2017 the Bureau "did not propose to collect all pre-dispute arbitration agreements that are provided to consumers," citing "concerns relating to burden on providers."[25] The Bureau therefore limited the disclosure requirement to arbitration agreements that are the subject of an arbitration or court proceeding.[26] The Proposed Rule, however, contains no such limitation, and the Bureau has offered no explanation for its about-face on the concerns relating to burden that it had previously identified.

Congress necessarily rejected the Bureau's conclusion about "the importance of publishing arbitration records" when it exercised its authority under the Congressional Review Act to override the 2017 rule.[27] Congress's disapproval of the 2017 rule under the CRA prohibits the Bureau from promulgating a "new rule that is substantially the

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22 *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,375-33,378 (Jul. 19, 2017).

23 *Compare id.* at 33,247 *with* Proposed Rule, 88 Fed. Reg. at 6926.

24 Arbitration Agreements, 82 Fed. Reg. at 33,430 (requiring companies in an arbitration proceeding to submit to the Bureau "[t]he pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator"); *id.* (requiring companies that move a court to compel arbitration to submit "[t]he pre-dispute arbitration agreement relied upon in the motion or filing").

25 *Id.* at 33,379-80.

26 *Id.* at 33,380.

27 Arbitration Agreements, 82 Fed. Reg. at 33,385 ("The Bureau believes that its experience with the Study and other market monitoring efforts has clarified the importance of publishing arbitration records to assist research (by academics and policymakers) on consumer finance arbitration and to help regulators, including the Bureau and other State and Federal bodies, to analyze consumers' experiences with arbitration and determine if further action is needed."); *see* Pub. L. No. 115-74, 131 Stat. 1243 (2017) (CRA resolution).

same."[28] It thus precludes the Bureau from attempting once again to compel companies to make arbitration disclosures to the Bureau—in particular, to provide the Bureau with copies of their arbitration agreements—under the guise of its market monitoring authority.

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For all these reasons, the Bureau lacks legal authority to target arbitration agreements in the Proposed Rule.

C. The Proposed Rule's Targeting of Arbitration Agreements is also Arbitrary, Capricious, and Irrational

Even if the Bureau had the authority to regulate arbitration agreements, which as discussed above it does not, the Proposed Rule's attempt to regulate arbitration agreements is invalid because it constitutes agency action that is "arbitrary, capricious … or otherwise not in accordance with law."[29] The Bureau offers no plausible justification for categorizing arbitration agreements as a contract term that is "risky" to consumers. The Bureau offers no evidence about the risks posed by **any** term covered by the Proposed Rule, and the Bureau's premises that arbitration poses risks to consumers and makes companies more likely to violate federal law are simply false.

Modern arbitration clauses are fair, and courts and arbitration providers provide layers of oversight to further ensure fairness.

The Bureau expresses concern that "consumers face risks when businesses use form contracts to impose terms and conditions that seek to waive consumer legal protections or to limit how consumers enforce their rights or post complaints or reviews."[30] But arbitration agreements typically neither "waive consumer legal protections" nor impose a gag order on consumers. Again, the Supreme Court has repeatedly recognized that an arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed."[31]

As with any other contract, if an arbitration agreement is unfair, courts can and do step in to declare part or all of the agreement unenforceable. Indeed, in appropriate circumstances, courts already invalidate the provisions about which the Bureau has expressed concern, including

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28 5 U.S.C. § 801(b)(2).

29 5 U.S.C. § 706(2).

30 Proposed Rule, 88 Fed. Reg. at 6907.

31 *Viking River Cruises*, 142 S. Ct. at 1919.

- limits on recovery of damages permitted under state and federal law;[32]
- requirements that arbitration take place in inconvenient locations for claimants;[33]
- attempts to shorten the applicable statutes of limitations;[34] and

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32 *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 262-63, 267 (3d Cir. 2003) (arbitration agreement that barred punitive damages was unconscionable); *Ward v. Crow Vote LLC*, 2021 WL 5927803, at *7 (C.D. Cal. Oct. 7, 2021) (arbitration agreement that limited recovery to "out-of-pocket" charges substantively unconscionable because it limited remedies); *Cristales v. Scion Grp. LLC*, 478 F. Supp. 3d 845, 856 (D. Ariz. 2020), *appeal dismissed*, 2020 WL 6606367 (9th Cir. Sept. 23, 2020); *Ziglar v. Express Messenger Sys. Inc.*, 2017 WL 6539020, at *3 (D. Ariz. Aug. 31, 2017), *vacated on other grounds*, 739 F. App'x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Wernett v. Service Phoenix*, LLC, 2009 WL 1955612, at *5 (D. Ariz. July 6, 2009); *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.,* 2008 WL 3876341, *9 (E.D. Cal. Aug. 20, 2008), *aff'd*, 622 F.3d 996 (9th Cir. 2010) (exempting damages for fraud and misrepresentations permitted by state law rendered agreement substantively unconscionable); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash. 2d 293, 318 (2004) (agreement barring claimants punitive or exemplary damages for common law claims but permitting defendant to claim these damages substantively unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630, 634 (Fla. Dist. Ct. App. 2008); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 121 (2000) (arbitration agreement limiting damages to the amount of backpay lost up until the time of arbitration substantively unconscionable).

33 *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1287 (9th Cir. 2006) (travel from California to Massachusetts); *Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208, 1221 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807, 817-20 (D. Md. 2012) (travel from Maryland to Colorado); *Acosta v. Fair Isaac Corp.*, 669 F. Supp. 2d 716, 722 (N.D. Tex. 2009) (travel from Texas to California); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099, 1107-08 (D. Neb. 2007) (travel from Nebraska to Texas); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (travel from California to Utah); *Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.*, 2008 WL 3876341, at *10 (E.D. Cal. Aug. 20, 2008) (travel from California to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

34 *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. Apr. 3, 2013); *Ramirez v. Charter Commc'ns, Inc.*, 75 Cal. App. 5th 365 (2022) (agreement reducing statute of limitations from three years to one conflicts with the statutorily sanctioned period and thus substantively unconscionable); *Adler v. Fred Lind Manor*,

- excessive fees for asserting a claim.[35]

Additionally, there is nothing inherent in the arbitration process itself that imposes a gag rule on claimants. Most arbitration agreements do not limit the ability of consumers to discuss an arbitrator's decision or to report concerns about wrongdoing to federal, state, and local government officials. Numerous courts have invalidated arbitration agreements that provide otherwise.[36]

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103 P.3d 773 (Wash. 2004); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee).

35 The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g., Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1002 (9th Cir. 2021); *Shahandeh v. Smart & Final Stores LLC*, 2019 WL 8194733, at *5 (C.D. Cal. Nov. 25, 2019) (stating that "under California law, if a party is required by an arbitration agreement to pay costs she would not have to pay were she suing in court for certain claims, the arbitration clause is unconscionable.") (emphasis omitted); *Ortolani v. Freedom Mortg. Corp.*, 2017 WL 10518040, at *6 (C.D. Cal. Nov. 16, 2017); *Antonelli v. Finish Line, Inc.*, 2012 WL 525538, at *5 (N.D. Cal. Feb. 16, 2012); *see also Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the employee's claims"); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (recognizing that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable" for a plaintiff).

36 *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012); *Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042, 1067 (2018), *as modified* (Nov. 28, 2018) (provision requiring all aspects of the arbitration be maintained in strict confidence was substantively unconscionable). Further, government officials could pursue claims in court—including on behalf of consumers and employees—if they wish. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (arbitration agreements do not forbid the Equal Employment Opportunity Commission from seeking relief on behalf of one of the parties to the agreement).

Moreover, some state laws require disclosure of arbitration outcomes by arbitral forums such as the American Arbitration Association ("AAA"),[37] and courts often hold that the results of arbitration proceedings may be disclosed by either party.[38]

In addition to court supervision of the fairness of arbitration agreements, the nation's largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. The AAA, the country's largest arbitration provider, developed fairness rules for consumer arbitrations. It will not accept a case unless the arbitration agreement complies with those standards.[39] JAMS, another leading arbitration provider, requires similar protections.[40]

This oversight by courts and arbitration providers already ensures that businesses have an incentive to craft agreements that are fair to consumers—otherwise, the agreements will be invalidated. It is telling that the Bureau offers no evidence that this oversight has proven insufficient. And it also telling that the Bureau offers no data even hinting at a widespread problem that would warrant the additional burdens the Bureau seeks to impose on companies.

The Bureau's primary premises for targeting arbitration–that arbitration agreements pose risks to consumers and that companies using arbitration are more likely to violate federal law—are demonstrably false.

The Bureau also has no evidence to support its supposition that arbitration agreements pose risks to consumers. On the contrary, the most robust empirical studies show that claimants in arbitration fare better than or at least as well as claimants in court. For example, a recent study released by ILR surveyed more than 41,000 consumer

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37 *E.g.*, Cal. Code Civ. Proc. § 1281.96.

38 Courts have severed confidentiality provisions or invalidated on unconscionability grounds arbitration agreements requiring that outcomes be kept confidential. *See, e.g.*, *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017); *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1002 (9th Cir. 2010); *Davis*, 485 F.3d at 1079; *Ting v. AT&T*, 319 F.3d 1126, 1151-52 (9th Cir. 2003).

39 Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV.

40 JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), https://perma.cc/NBA4-4U3N.

arbitration cases and 90,000 consumer litigation cases resolved between 2014 to 2021.[41] The report found that:

- Consumers who initiate cases were over 12% more likely to win in arbitration than in court;[42]
- The median monetary award for consumers who prevailed in arbitration was *more than triple* the award that consumers received in cases won in court;[43] and
- On average, arbitration of consumer disputes is more than 25% faster than litigation in court.[44]

Prior studies of consumer arbitration similarly report that consumers in arbitration fare at least as well as consumers in court,[45] as do empirical studies in the employment context.[46]

In sum, these studies support then-Justice Breyer's observation that arbitration is especially important for individuals with modest claims—abandoning arbitration would "leav[e] the typical consumer who has only small damages claims (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but

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41 *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf.

42 *Id.* at 4-5 (41.7% in arbitration compared to 29.3% in court).

43 *Id.* at 4-5 ($20,356 in arbitration compared to $6,669 in court).

44 *Id.* at 4-5 (321 days in arbitration compared to 437 days in court).

45 *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

46 *See*, *e.g.*, Pham, *supra* note 41, at 4-5; Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison,* 58 Disp. Resol. J. 44, 45-50 (Nov. 2003/Jan. 2004).

a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[47]

There is similarly no evidence to support the Bureau's hypothesis that businesses that have consumer arbitration programs are at a higher risk of "noncompliance with Federal consumer financial law and other applicable legal protections." On the contrary, that hypothesis is flatly refuted by the Bureau's own data and assumptions. A new report analyzed the Bureau's data from 2018-2022 regarding consumer complaints, enforcement actions by the Bureau, and estimates of the number of companies using arbitration agreements across 44 categories of financial products.[48] That report shows that:

- There is *no statistically significant relationship* between the use of arbitration agreements and consumer complaints in the Bureau's database.[49]

- There is also *no statistically significant relationship* between the use of arbitration agreements and enforcement actions by the Bureau.[50]

- Among companies that use AAA and JAMS, the two largest arbitration providers, to arbitrate consumer disputes, *there is no increased risk of consumer complaints or Bureau enforcement actions compared to companies that do not use arbitration*.[51]

In short, this research shows no correlation—let alone causation—between a company's use of arbitration and either consumer complaints or Bureau enforcement activity regarding the company.

The Bureau's attempt to associate a company's use of arbitration with an increased likelihood of violating federal law is particularly hypocritical given the fact that Congress has **required** arbitration in some contexts. For example, the recently enacted No Surprises Act mandates arbitration of disputes over payments for out-of-

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47 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

48 *See* Nam D. Pham & Mary Donovan, *A Critique of the CFPB Proposed Rule: Companies that Use Arbitration Agreements Do Not Pose Any Greater Risks to Consumers Than Those That Do Not* (Mar. 2023), https://instituteforlegalreform.com/cfpb-report-final-march-29-2023/. A copy of this report is attached to this comment letter.

49 *Id.* at 1-2, 4-7.

50 *Id.* at 2, 8-10.

51 *Id.* at 2, 10-11.

network health care services.[52] Moreover, the Bureau concedes that other federal agencies enter into arbitration agreements and exempts those federal agencies from the Proposed Rule.[53] The Bureau offers no explanation why arbitration is fair to parties dealing with the government itself, but not for private parties contracting with one another.

The Bureau's asserted preference for class actions in court is unfounded

Finally, the Bureau repeatedly criticizes the fact that arbitration agreements require resolution of disputes on an individual basis and "generally do not allow class actions."[54] But the Bureau's preference for our broken class-action system ignores all of the reasons why consumers get little or no benefit from class actions. The real beneficiaries of class actions instead are the plaintiffs' attorneys who file them and receive large fees when the cases are settled, and the defense lawyers hired to defend against those lawsuits.

To begin with, most claims asserted by consumers are individualized and cannot be asserted as class actions. The Bureau's own data confirms as much: a study of complaints made by consumers—and not by class action lawyers—found that the overwhelming majority could not be asserted in a class action.[55]

The Bureau also ignores that most class actions do not produce any recovery for absent class members. For example, the Bureau's own study on arbitration found that 87% of the class actions it studied were resolved with no benefit to class members whatsoever.[56]

Moreover, even for the class members in the small percentage of cases that settle, the benefits are largely illusory, because the vast majority of class members do not file claims for payment from these settlement funds. Studies by both the Bureau and the Federal Trade Commission have repeatedly found that lawyer-driven class actions deliver *no benefit* to 96 percent of class members, reporting a "weighted mean"

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52 *See, e.g.,* 42 U.S.C. § 300gg111(c)(1)(B) (establishing independent dispute resolution process as part of No Surprises Act).

53 Proposed Rule, 88 Fed. Reg. at 6937, 6967.

54 *E.g.*, *id.* at 6924 n.215; *see also, e.g.*, *id.* at 6921 (protesting that arbitration agreements "block collective legal action by consumers").

55 Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941 at 3, Appendix A 13-14 (Aug. 22, 2016), https://www.congress.gov/115/meeting/house/106173/documents/HHRG-115-VR10-20170629-SD004.pdf.

56 Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* (Mar. 2015), perma.cc/8AX5-AYWN ("CFPB Study").

claims rate in class actions of just 4%.[57] That figure comports with academic studies, which regularly conclude that only "very small percentages of class members actually file and receive compensation from settlement funds."[58] Another empirical study explains that "[a]lthough 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total."[59] The author concluded that class actions "clearly do[] not achieve their compensatory goals."[60]

The Bureau's own study also demonstrates that class actions typically take significantly longer to resolve than arbitrations. That means class members must wait much longer to obtain relief. Specifically, the Bureau's study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.[61] And that two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached.

In any case, the Bureau's 2017 rule already attempted to regulate arbitration on the (erroneous) view that class actions are essential to protect consumers: that rule would have allowed consumers to bring class actions notwithstanding any limitation imposed by an arbitration agreement. By invalidating that rule under the CRA, Congress clearly and expressly rejected the Bureau's preference for class actions.[62] The Bureau cannot revive its rejected view of class actions as the justification for this new rule.

II. The Proposed Rule Is Also Unjustified with Respect to Non-Arbitration Provisions

The Bureau also has failed to justify the Proposed Rule with respect to non-arbitration provisions.

There simply is no support—in the proposal or otherwise—for the Bureau's assertion that customers face a heightened risk of unlawful conduct when they deal

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57 Fed. Trade Comm'n, *Consumers and Class Actions: A retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), https://perma.cc/CM66-ZVCX; *CFPB Study* at section 8, page 30 (reporting a "weighted average claims rate" in class actions of just 4%).

58 Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

59 Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

60 *Id.*

61 *CFPB Study* at section 8, page 37.

62 *See Arbitration Agreements*, 82 Fed. Reg. 33,210, 33,210, 33,216, 33,280-84 (Nov. 22, 2017); Pub. L. No. 115-74 (2017).

with a company that includes in agreements lawful non-arbitration terms covered by the Proposed Rule. Indeed, the Proposed Rule recognizes that the Bureau has no evidence at all with respect to these provisions.[63]

This fact further demonstrates that, as explained above, the true aim of the Proposed Rule is to impermissibly burden companies for using arbitration. It also means that the Proposed Rule is wholly unsupported and cannot stand with respect to the non-arbitration terms, which appear to have been included in the proposal for the primary purpose of attempting to mask the Bureau's long-standing hostility towards arbitration and to denigrate arbitration by (erroneously) equating it with contract provisions that affect substantive rights.

The proposed creation of the registry is therefore arbitrary, capricious, and irrational in its entirety and should be abandoned. The Bureau lacks any rational basis for imposing a significant burden on companies that has not been shown to be justified by any consumer benefit, as we next discuss in more detail.

III. The Bureau's Cost-Benefit Analysis Is Flawed

The Proposed Rule is fatally deficient for the additional reason that it rests on a seriously flawed cost-benefit analysis.

As an initial matter, the Bureau has inappropriately and unlawfully discounted the impact of the Proposed Rule on small businesses, violating its obligations under the Small Business Regulatory Enforcement Fairness Act ("SBREFA").[64] The Proposed Rule contains a *de minimis* exception for businesses that enter into fewer than 1000 contracts per year with covered terms,[65] but it is likely that even small businesses who enter into contracts with their consumers will do so at least 1000 times per year. Even the smallest businesses are likely to have thousands of customers over the course of a year—an average of just three customers a day would suffice to exceed the exception. The exception thus does nothing to protect small businesses from the increased regulatory burdens that the rule would impose. And the exception is undermined further still by the Bureau's proposal that any supervised registrant whose covered contract

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[63] *See* Proposed Rule, 88 Fed. Reg. at 6960 ("Apart from data about the prevalence of arbitration agreements . . . the Bureau does not have systematic data on the use of covered terms and conditions that are not expressly prohibited by law.").

[64] 5 U.S.C. §§ 601-612. *Cf.* Letter from Rep. Blaine Luetkemeyer, Ranking Member, House Committee on Small Business, to the Honorable Gene Dodaro, Comptroller General, U.S. Government Accountability Office (Dec. 7, 2022), https://smallbusiness.house.gov/uploadedfiles/12-7-22_-_admin_and_sbrefa_gao_letter_final_-_signed.pdf (calling for audit of agencies' implementation of Small Business Regulatory Fairness Act).

[65] *See* Proposed Rule, 88 Fed. Reg. at 6939-40, 6967.

terms are evaluated by **a single court or arbitrator** within the past calendar year be subject to the Rule's requirements—**even if the court or arbitrator upholds the contract.**[66]

The Proposed Rule is therefore invalid for failing to comply with the Bureau's obligations under the SBREFA to convene a Small Business Review Panel and conduct an initial regulatory flexibility analysis before proposing a rule that may have a substantial economic impact on a significant number of small entities.[67] The Bureau's toothless proposed *de minimis* exception fails to justify its assertion that these steps are unnecessary because "this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities."[68] The Bureau's minimization of the costs to small businesses from the Proposed Rule in attempting to support that assertion also ignores the potential reputational costs and increased risk of being subject to enforcement action, supervisory burdens, and private litigation after being branded a "risky" company by the agency—costs that will prove especially damaging to small businesses.

More fundamentally, the Bureau's discussion of the costs of the Rule downplays the significant burdens of requiring covered entities to submit detailed information to the agency. As with the Bureau's discussion of small businesses, again absent from the Bureau's broader discussion of costs are the potential reputational costs and increased risk of being subject to enforcement action, supervisory burdens, and private litigation after being branded a "risky" company by the agency. These are significant costs for any business that might find itself on the public registry—potentially for the sole reason that they use lawful contract terms approved of by courts and Congress.

On the other side of the ledger, the Bureau admits that it is unable to quantify **any** benefits to consumers resulting from the proposed registry.[69] The Bureau suggests that companies will cease using contract terms prohibited by law, but the CFPB's actual purpose is to discourage legally permissible practices.[70] And companies already have a strong incentive not to incorporate illegal terms into their agreements. Furthermore, the Bureau has no evidence that existing judicial and other enforcement mechanisms are insufficient.

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66 *See id.* at 6967 (providing that the *de minimis* exception does not apply to any entity that has "[o]btain[ed], as a party to a legal action, a court or arbitrator decision in the previous calendar year on the enforceability of a covered term or condition in a covered form contract").

67 *See* 5 U.S.C. §§ 603, 609(d).

68 Proposed Rule, 88 Fed. Reg. at 6964.

69 *See id.* at 6963.

70 *Id.*

In addition, the Bureau's principal focus is a contractual provision that is not prohibited by law: arbitration agreements. Therefore, this supposed "benefit" cannot justify the Proposed Rule's inclusion of arbitration agreements. And, as explained above, arbitration agreements *benefit* consumers and businesses alike. In addition, the Bureau admits it "does not have systematic data" about the use of any non-arbitration terms, "the relationship between these covered terms and conditions and risky or potentially illegal activity," or any "resulting harms to consumers."[71]

In sum, the Bureau presents no evidence about the consumer benefits of requiring a registry of non-arbitration covered terms, while its claims about arbitration are simply false. The Bureau thus has not shown that any potential benefits outweigh the burdens the proposed Rule would impose on businesses.

IV. The Bureau Lacks Authority to Promulgate the Proposed Rule Under the *Community Financial* Decision

The Bureau independently lacks the authority to promulgate the Proposed Rule because the agency is unconstitutionally funded, as the U.S. Court of Appeals for the Fifth Circuit recently held in *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*.[72] Because "the funding employed by the Bureau to promulgate" the Proposed Rule would be "wholly drawn through the agency's unconstitutional funding scheme," the rule would be invalid.[73]

At minimum, the Bureau should not issue a rule burdening business prior to the Supreme Court's definitive resolution of this serious constitutional question.

V. If the Proposed Rule Goes Forward, It Should Be Substantially Limited

The Bureau should not promulgate the Proposed Rule at all. But if the Bureau does go forward with the Proposed Rule, it should substantially limit the Rule's scope, in at least three ways. *First*, the Rule should be limited to specifically identified contract terms that are widely held unlawful as a matter of state law that is not preempted by federal law. *Second*, the Rule should be limited to contracts between supervised nonbanks and their customers and should not apply to contracts with third parties. *Third*, the information collected by the Bureau should not be made public at all, and any public registry should at minimum not name specific individual companies.

A. Any Rule Should be Limited to *Specifically Identified* Contract Terms on Which There is Overwhelming Consensus of Their Unlawful Nature

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[71] *Id.*

[72] 51 F.4th 616 (5th Cir. 2022), *cert. granted,* No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).

[73] *Id.* at 643.

The Proposed Rule's definitions of "covered term or condition" and "covered limitation on consumer legal protections" are broad, sweeping in numerous contract terms that the Bureau acknowledges are lawful.[74] But if contract terms are lawful, there has been a judgment by courts and legislatures that the terms are enforceable. The Bureau should respect those judgments, rather than trying to supplant them.

Congress did not authorize the Bureau to make new contract law, which is generally the province of State courts and legislatures. And the Bureau has no justification for imposing burdens on businesses that are engaged in lawful conduct. Moreover, requiring registration of contract terms "irrespective of [their] legal validity or enforceability"[75] would mislead consumers, by lumping together lawful and unlawful terms. This would obfuscate, rather than clarify, what contract terms covered by the rule, if any, pose unacceptable risks to consumers.

Nor could it be sufficient that one or a small handful of courts has deemed a contract term unenforceable. It is unreasonable and unworkable for companies to have to hunt through every state and federal decision regarding contract terms.

Relatedly, the Bureau's proposal to impose its own national standard for disfavored contract terms violates basic principles of federalism and comity. For example, what if a contract term is fully enforceable in the jurisdictions in which a company does business but unenforceable in one jurisdiction elsewhere? Under those circumstances, the company should not be punished for engaging in broadly lawful conduct.

Instead, any rule should be limited to requiring registration of contract provisions on which there is overwhelming consensus of their unlawful nature. And the Bureau must identify each such covered provision so that there is no uncertainty about which terms trigger the registration requirement.

B. Any Rule should be Limited to Contracts Between Supervised Nonbanks and their Customers, and Should not apply to Contracts with Third Parties

The Bureau overreaches in appearing to propose that supervised nonbanks register any third-party contracts that they invoke, even when the third parties are not subject to the Bureau's jurisdiction. According to the Bureau, the proposed Rule "is not itself limited to agreements between the registrant and the consumer," but instead sweeps in any contract "used by a supervised registrant," even if the business that

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74 *See id.* at 6932 (explaining that a term would be covered "irrespective of its legal validity or enforceability").

75 *Id.*

entered into the contract with the customer is "not covered by the rule" or "subject to the authority of the Bureau."[76]

That approach is breathtaking in its implications. It threatens to affect businesses far beyond the supervised nonbanks that the Bureau is purporting to regulate, and it stretches far beyond the Dodd-Frank Act's definition of the "covered persons" that the Bureau is empowered to supervise.[77] The proposed Rule plainly exceeds the Bureau's authority under the Dodd-Frank Act by requiring registration of terms from businesses that the Bureau itself concedes are not subject to its authority. Under the Bureau's proposal, for example, debt collectors seemingly would have to register the terms and conditions for **every company** that hires the debt collector to collect a customer's debt owed under the contract.[78]

The Bureau must adhere to, rather than violate, the limits on its jurisdiction set forth by Congress. Any rule must be limited to contracts between supervised nonbanks and their customers.

C. The Information Collected by the Bureau should not be Made Public, and at Minimum a Public Registry should not Name Individual Companies

The Bureau's proposal to make the registry public does not at all further the market monitoring or supervisory purposes it has asserted as justifications for the Proposed Rule.[79] Instead, the proposal appears designed to place a stamp of disapproval on any company that uses any of the covered terms and conditions.

This Bureau's proposal to publicly brand companies with disfavored status is wholly unsupported, and unsupportable. It rests on the unsubstantiated and false premise that use of any one of the numerous types of terms and conditions covered by the proposed Rule—including terms that are lawful—means a company is engaged in "risky" behavior. The Bureau admits that it intends inclusion on the registry to be a black eye for businesses, suggesting that companies that do not use covered terms and conditions "us[e] their absence from being required to register and other information in

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76 *Id.* at 6930-31.

77 *See* 12 U.S.C. § 5481(6) (defining "covered individual" as "any person that engages in offering or providing a consumer financial product or service," and "any affiliate" who "acts as a service provider to such person"); *id.* § 5511(c)(4) (detailing the Bureau's function in "supervising covered persons for compliance with Federal consumer financial protection law").

78 *See* Proposed Rule, 88 Fed. Reg. at 6922 ("Debt collectors also may seek to rely on other covered terms and conditions used by creditors.").

79 *See id.* at 6907, 6925 (asserting monitoring and supervisory purpose of rule).

the registry from competitors to market their consumer financial products or services as potentially less risky to consumers."[80]

But, as discussed above, federal statutes and federal agencies use arbitration to resolve disputes—but the Bureau has omitted those arbitration agreements from its Proposed Rule. And, as also discussed above, the Federal Arbitration Act bars the Bureau from imposing requirements that disfavor arbitration, and that is precisely what the Bureau seeks to do via the public disclosure requirement.

Attempting to place the Bureau's public stamp of disapproval on businesses engaged in perfectly lawful activity will not protect consumers. In fact, it will do the opposite. The proposed registry's complete absence of context and the Bureau's bias against lawful contract terms such as arbitration agreements **threaten to misinform consumers**. As the Bureau itself acknowledges, "consumers might view a supervised nonbank's registration in the Bureau's nonbank registration system as an indicator that their covered terms and conditions pose a substantial risk."[81] Yet companies on the registry may be engaged in fully lawful and appropriate behavior, such as choosing to enter into arbitration agreements. The predictable effect of the Bureau's making its proposed registry public therefore is to mislead consumers rather than to protect them.

The Bureau also points to its desire to share information with other regulators.[82] But that is no reason to make the registry public; the Bureau could achieve that interest through a private registry accessible only to government agencies.

Alternatively, if the registry does become public in some form, the information should be aggregated and anonymized, without naming specific companies. The Bureau may make information public under Section 1022(c)(3) of the Dodd-Frank Act only "as is in the public interest, through **aggregated reports** or other appropriate formats."[83]

The Bureau has not offered any persuasive public interest justification for naming individual companies. As explained above, the information on the proposed registry will be of no real value to consumers. Rather, it is designed, and intended, to provide a mechanism for the Bureau to express to the public its disapproval of arbitration agreements.

Finally, the Bureau offers no justification for its bare assertion that "legislatures, courts, the legal profession, researchers, universities, and other non-governmental

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80 *Id.* at 6924.

81 *Id.* at 6948.

82 *Id.* at 6923.

83 15 U.S.C. § 5512(c)(3) (emphasis added).

organizations, the press, and the general public" should also have access to a registry comprised of company-specific information.[84]

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For all these reasons, the Bureau should not promulgate the Proposed Rule. At a minimum, if the Bureau does decide to move forward with the Proposed Rule, it should substantially narrow the Rule as detailed above.

Sincerely,

Matthew D. Webb	William R. Hulse
Senior Vice President	Vice President
Institute for Legal Reform	Center for Capital Markets Competitiveness
U.S. Chamber of Commerce	U.S. Chamber of Commerce

84 Proposed Rule, 88 Fed. Reg. at 6923.