



# The Impact and Implications of the CFPB’s New Registries

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## “Repeat Offender” Registry

### CFPB Proposes Registry to Detect Repeat Offenders

Registry of company and court order information will help the agency identify and mitigate risks to American households

DEC 12, 2022

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**WASHINGTON, D.C.** - Today, the Consumer Financial Protection Bureau (CFPB) proposed requiring certain nonbank financial firms to register with the CFPB when they become subject to certain local, state, or federal consumer financial protection agency or court orders. The CFPB has further proposed to publish the orders and company information via an online registry. Larger companies subject to the CFPB’s supervisory authority would be required to designate an individual to attest whether the firm is adhering to registered law enforcement orders. The CFPB’s proposed rule would help the agency identify and mitigate risks to American households and ensure that supervised companies perform their obligations to consumers.

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## “Repeat Offender” Registry

### Scope

- What nonbank entities are subject to the proposed rule?
- Which events trigger disclosure under the proposed rule?
  - Final agency and court orders and judgments
  - Violations of consumer financial protection laws
  - Violations of state UDAP/UDAAP laws

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## “Repeat Offender” Registry

### Impact and Relevant Concerns

Current Framework	Proposed Rule Framework
<ul style="list-style-type: none"><li>• Nonbanks who hold and manage state licenses through NMLS must upload documentation related to findings of violations of financial services-related regulations or statutes and any orders entered against the entity or a control affiliate in connection with a financial services-related activity</li><li>• Incentive to enter into settlements, which are not required to be made public</li><li>• Basic contact information available on NMLS</li></ul>	<ul style="list-style-type: none"><li>• Nonbank covered entities must report settlements, consent decrees, or stipulated orders and judgments by any federal, state, or local government agency for violations of certain consumer protection laws</li><li>• May deter settlements, increased risk of litigation</li><li>• Risk of additional state exams and investigations</li><li>• Submit annual written statements regarding compliance and identify central point of contact related to an entity’s compliance with reportable enforcement actions</li></ul>

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## Terms and Conditions Registry

### CFPB Proposes Rule to Establish Public Registry of Terms and Conditions in Form Contracts That Claim to Waive or Limit Consumer Rights and Protections

Companies can use terms and conditions in non-negotiable form contracts to try to hide consumer harm, to stifle criticism about products and services, and to undermine consumer financial protection law.

[Leer en español](#)

JAN 11, 2023

SHARE & PRINT



**WASHINGTON, D.C.** - Today, the Consumer Financial Protection Bureau (CFPB) proposed a rule to 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, or complaint rights. In some cases, terms and conditions in non-negotiable form contracts mislead consumers into believing the terms or conditions are legally enforceable. Under the proposed rule, nonbanks subject to the CFPB's supervisory jurisdiction would need 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 will be open to the public, including to other consumer financial protection enforcers.

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## Terms and Conditions Registry

### Scope

- Who will need to upload their terms and conditions?
- Does the proposal target all terms and conditions equally?
  - Focus on "take-it-or-leave-it" form contracts or contracts of adhesion.
- Specifically what kinds of terms and conditions is the Bureau targeting?
  - Terms that force consumers to waive legal protections
  - Terms that limit how consumers enforce their rights
  - Terms that restrict consumers' ability to file complaints or leave reviews

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## Terms and Conditions Registry

### Proprietary Terms

- The bureau is planning to make information from the registry public
  - Bureau is seeking comment regarding whether to make data from the registry system public on a periodic basis
- However, Section 1092.303(b) lays out exceptions to what the CFPB will make public, including information protected from public discourse under FOIA's Exemption 4
  - CFPB committing to ensure that proprietary, personal, or confidential consumer information that is protected under FOIA is not made public
    - Limited exemption

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## Terms and Conditions Registry

### Impact

- Open nonbanks up to scrutiny from both private and public litigants
- CFPB as information collector/aggregator
- Bureau struggling to reach its own goals for various reasons, so reporting to expansive use of its market-monitoring authority
- Legal challenges are sure to follow
  - Backlash from new GOP Majority in Congress is already evident

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## Terms and Conditions Registry – Sample Clauses

### Arbitration Clauses in the Spotlight

**Sample:**

**ARBITRATION AGREEMENT- Please read carefully**

Except as expressly provided below, I agree that any claim, dispute or controversy arising out of or that is related to [sources of dispute], whether based on statute, contract, tort or any other legal theory (any "Claim") shall be, at my or your election, submitted to and resolved on an individual basis by binding arbitration under the Federal Arbitration Act, 9 U.S.C. §§1 et seq. (the "FAA") before the American Arbitration Association (the "AAA") under its Commercial Arbitration Rules including the Supplementary Procedures for Consumer-Related Disputes, in effect at the time the arbitration is brought, or before any other party that you and I agree to in writing, provided that such party must not have in place a formal or informal policy that is inconsistent and purports to override the terms of this Arbitration Agreement. The AAA Rules are available online at [www.adr.org](http://www.adr.org)....

IMPORTANT WAIVERS: IF EITHER YOU OR I CHOOSE ARBITRATION, NEITHER PARTY WILL HAVE THE RIGHT TO A JURY TRIAL, TO ENGAGE IN DISCOVERY, EXCEPT AS PROVIDED IN THE APPLICABLE ARBITRATION RULES, OR OTHERWISE TO LITIGATE THE DISPUTE OR CLAIM IN ANY COURT (OTHER THAN IN AN ACTION TO ENFORCE THE ARBITRATOR'S AWARD). FURTHER, I WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. OTHER RIGHTS THAT YOU OR I WOULD HAVE IN COURT ALSO MAY NOT BE AVAILABLE IN ARBITRATION. THE ARBITRATOR SHALL HAVE NO AUTHORITY TO ARBITRATE CLAIMS ON A CLASS BASIS, AND CLAIMS BROUGHT BY OR AGAINST ME MAY NOT BE JOINED OR CONSOLIDATED WITH CLAIMS BROUGHT BY OR AGAINST ANY OTHER PERSON.

**RIGHT TO REJECT: I may reject this Arbitration Agreement by writing you at [name, address, timeframe]. Any rejection notice must include my name, address, e-mail address, telephone number and loan or account number. NOTICE – THIS ARBITRATION AGREEMENT WILL NOT APPLY IF (I) I NOTIFY [lender] OF REJECTION WITHIN [timeframe] AS OUTLINED ABOVE; (II) I AM A COVERED BORROWER AS DEFINED BY THE MILITARY LENDING ACT, 10 U.S.C § 987; OR (III) I AM AFFORDED STATUTORY PROTECTIONS THAT PROHIBIT SUBMISSION OF A DISPUTE TO ARBITRATION.**

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## Terms and Conditions Registry – Sample Clauses

### Contractual "Gag" Clauses

**Sample:**

Therefore, you or anyone affiliated with you **agree to not post ANY NEGATIVE REVIEWS against [REDACTED] whatsoever.** Any bad reviews posted against [REDACTED] on any social media platform or review sites will be deemed false and defamatory thus making the signer of this document liable in court for punitive damages. Also, a \$1000 defamation management fee will be added . . . if negative reviews are not removed after 3 days from being posted. You will be notified of this from [REDACTED].

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## Terms and Conditions Registry – Sample Clauses

### Limitation of Liability Clauses

Sample:

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, IN ADDITION TO THE DISCLAIMERS OF WARRANTY AND OTHER DISCLAIMERS IN THESE TERMS, IN NO EVENT SHALL COMPANY BE LIABLE FOR ANY DIRECT, INDIRECT, PUNITIVE, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR ACTUAL DAMAGES, INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, GOODWILL, USE, DATA OR OTHER INTANGIBLE LOSSES, ARISING FROM OR RELATING TO THE SERVICE OR COMPANY MATERIALS, OR THAT RESULT FROM THE USE OF, OR INABILITY TO USE, THE SERVICE OR COMPANY MATERIALS. UNDER NO CIRCUMSTANCES WILL COMPANY BE RESPONSIBLE FOR ANY DAMAGE, LOSS OR INJURY RESULTING FROM HACKING, TAMPERING OR OTHER UNAUTHORIZED ACCESS OR USE OF THE SERVICE OR YOUR ACCOUNT OR THE INFORMATION CONTAINED THEREIN.

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, COMPANY ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY (A) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT; (B) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO OR USE OF THE SERVICE; (C) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONALLY IDENTIFIABLE INFORMATION STORED THEREIN; (D) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM THE SERVICE; (E) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE THAT MAY BE TRANSMITTED TO OR THROUGH THE SERVICE BY ANY THIRD PARTY; OR (F) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE THROUGH THE SERVICE.

THIS LIMITATION OF LIABILITY SECTION APPLIES WHETHER THE ALLEGED LIABILITY IS BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, OR ANY OTHER BASIS, EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY SHALL APPLY TO THE FULLEST EXTENT PERMITTED BY LAW IN THE APPLICABLE JURISDICTION. NOTWITHSTANDING THE FOREGOING, SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES SO SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU. FURTHER, NOTHING IN THESE TERMS IS INTENDED TO LIMIT OR DISCLAIM COMPANY'S OBLIGATIONS UNDER THE GRAMM-LEACH-BLILEY ACT ("GLBA") AND TO THE EXTENT ANY PROVISION OF THESE TERMS ARE FOUND TO BE PROHIBITED BY, INVALID OR UNENFORCEABLE UNDER THE GLBA, THAT PROVISION WILL BE ENFORCED TO THE MAXIMUM EXTENT PERMISSIBLE AND THE OTHER PROVISIONS OF THESE TERMS WILL REMAIN IN FORCE.

IF THESE LIMITATIONS OR EXCLUSIONS ARE HELD TO BE INVALID OR UNENFORCEABLE FOR ANY REASON, UNLESS OTHERWISE PROHIBITED BY APPLICABLE LAW, THE MAXIMUM COLLECTIVE LIABILITY OF COMPANY, IF ANY, FOR LOSSES OR DAMAGES SHALL NOT EXCEED \$500. IN NO EVENT SHALL COMPANY BE LIABLE TO YOU FOR ANY LOSSES OR DAMAGES GREATER THAN THE AMOUNT REFERRED TO ABOVE.

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## Terms and Conditions Registry

### Other Terms and Conditions to Note

- Class action waivers
  - Including those that violate the Fair Credit Reporting Act ("FCRA")
- Any terms that limit consumers' ability to challenge data reported to credit bureaus
- Liability waivers
- Other terms impacting servicemembers

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Questions?

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