April 3, 2023

By electronic submission to:
Comment Intake—Nonbank Registration of Certain Agency and Court Orders
c/o Legal Division Docket Manager
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Proposed Rule: ***Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections*** (Docket No. CFPB-2023-0002/ RIN 3170-AB14)

Dear Sirs and Madams:

The Online Lenders Alliance (OLA) welcomes the opportunity to respond to the Bureau's Proposed Rule to establishing a system for the registration of nonbanks subject to CFPB supervision that use "certain terms or conditions that seek to waive consumer rights.

About OLA

OLA represents the growing industry of innovative companies that develop and deploy pioneering financial technology, including proprietary underwriting methods, sophisticated data analytics and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA's members include online lenders, vendors and service providers to lenders, consumer reporting agencies, payment processors and online marketing firms.

Fintech companies are at the vanguard of innovative online tools that reach new customers, prevent, and mitigate fraud, manage credit risk, and service loans. As technology evolves and the public's consumer comfort with online financial transactions grows, protecting consumers will be more important than ever. OLA is leading the way to improve consumer protections, with a set of consumer protection standards to ensure that borrowers are fully informed, fairly treated, and using lending products responsibly. To accomplish this, OLA members voluntarily agree to hold themselves to a set of Best Practices, a set of rigorous standards above and beyond the current legal and regulatory requirements. These are standards that OLA members, the industry, and any partners with whom OLA members work use to stay current on the changing legal and regulatory landscape. OLA Best Practices covers all facets of the industry, including advertising and marketing, privacy, payments, and mobile devices. Most importantly, OLA Best Practices are designed to help consumers make educated financial decisions by ensuring that the industry fully discloses all loan terms in a transparent, easy-to-understand manner.[1]

Much of the innovation undertaken by OLA members has given consumers greater control over their financial future. This is especially the case when it comes to access to capital. Whether purchasing a home, starting a business, financing an education, or even paying for auto repairs, the ability to find and secure credit is often a determining factor in a consumer's financial wellbeing. Online lenders provide benefits to consumers, particularly those in underserved communities, with fast, safe, and convenient choices that simply are not available through traditional lending markets.

Overview

The proposed rule would establish a system for the registration of nonbanks subject to CFPB supervision that use "certain terms or conditions that seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce their rights." While the Bureau touts the proposed rule as a way to educate consumers, it seems to reinstitute a key provision of a previous rule that was overturned by congress, while its real intent appears to be to name and shame companies in a manner that will expose proprietary information. Worse, the proposed rule would cast so wide a net that virtually no contract will be excluded. OLA would like to take this opportunity to highlight our specific concerns with this proposal.

The Registry's Purpose is Inconsistent with Statutory Authority.

In undertaking this rulemaking, the Bureau cites its market-monitoring directive under Dodd/Frank. The market-monitoring authority gives CFPB the ability to request information and monitor the market for trends to drive further rulemaking. Historically, this has been employed by the Bureau for studies and information collection. However, the registry proposed by the CFPB is a substantive requirement, making it inconsistent with the statutory basis outlined in Dodd/Frank for the Bureau's market monitoring authority and past agency practices.

The Proposed Rule Recycles Provisions of the Bureau's Repealed Arbitration Rule.

The prosed registry is not the Bureau's first effort to deal with contract terms. Under former Director Richard Cordray, the CFPB attempted to promulgate a rule that would have severely restricted arbitration agreements by banning the use of class-action waivers in arbitration provisions in consumer finance contracts. That proposed rule also included a requirement that companies report certain information about consumer financial services arbitrations to the CFPB.

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[1] Online Lenders Alliance Best Practices https://onlinelendersalliance.org/best-practices/

This attempt to ban arbitration agreements was repealed shortly after the rule was finalized, when Congress utilized the Congressional Review Act (CRA) to override the regulation and former President Trump signed the CRA resolution into law on November 1, 2017.

As with the previously repealed arbitration rule, the proposed rule creating a registry for nonbanks that are supervised by the CFPB would require companies to report to the Bureau any use of arbitration provisions and class action waivers contained in contracts. These requirements appear to overlap, at least in part, with the Bureau's disapproved final arbitration rule insofar as they require the submission of information concerning arbitration proceedings to the Bureau.

It is important to note that the CRA prohibits a federal agency from promulgating a regulation that is substantially the same as the one that Congress has overridden. The Bureau's proposed rule, therefore, is little more than an attempt to accomplish indirectly what Congress prohibited it from doing directly when it disapproved the Bureau's final arbitration rule.

While some advocates may believe that the registry can serve as a deterrent, it is unrealistic to think companies will cease using arbitration clauses. Even the CFPB's arbitration report on the study it conducted before proposing the final arbitration rule concluded that the record did not support a ban on arbitration agreements.

The Broad Nature of the Proposed Rule's Covered Items Will Require Companies to Register Virtually all Contracts.

In its proposed rule, the CFPB has cast an extremely broad net, catching a tremendous number of contractual provisions. While much has been made of the impact on arbitration agreements, the proposed rule also will encompass every website agreement, closed end loan note, and credit agreement, all of which have terms that could be considered limitations. This raises a very important question: What are the true covered limitations?

In the Bureau's view, it seemingly does not matter whether the items are legally valid or enforceable. Under the proposal, there are eight categories of covered limitations and contractual terms, which are written so broadly that most contract provisions will potentially fall in to one or more categories – with arbitration possibly falling into all of them.

For example, terms that preclude the consumer from bringing a legal action after a certain period cover not just provisions that might shorten the statute of limitations, as well as pre-filing requirements and notification requirements. Under the proposed rule, any deadline, not just ones that shorten the statute of limitations, would be covered.

One group of provisions cited by the Bureau as a covered area is contract terms that specify a form or venue where a consumer must bring a legal action. This may seem fairly self-explanatory, but limiting the ability of the consumer to file a legal action seeking relief for others or seeking to participate in a legal action filed by others, is more than just a class action waiver, meaning that this provision could restrict participation in a representative action, limit joinder of actions with other ongoing cases, preclude intervening in an ongoing legal action, or preclude consolidation of legal actions or cases for an ongoing legal action.

Another example of a covered item are terms that limit liability by capping the amount of recovery or the type of remedy. This could include provisions like those contained in most website agreements involving consequential damages or lost profits. In addition, some agreements have provisions that limit recoveries to the cost of goods or services that have been obtained. Under the proposed rule, these types of actions may very well be deemed to be an attempt to cap the amount of recovery.

The proposed rule also could affect liquidated damages clauses, regardless of how much effort the creditor has made to appropriately estimate what those damages might be. Will this type of action be deemed by the Bureau as an attempt to cap the amount of recovery or type of remedy and thus require the company to report any contracts containing these provisions?

Even seemingly straightforward terms, such as those encompassing waiving the cause of legal action by the consumer, which may seem fairly clear, could be interpreted very broadly if they are outside the scope of the "holder in due course rule,"[2] where there may be provisions that waive or limit legal actions which could make the provision a covered item.

Limiting the ability of the consumer to complain, be that in the form of written, oral, or pictorial review, assessment, or other analysis or statement regarding a financial product or service, is another area of question. The CFPB acknowledges that this is covered by the Consumer Review Fairness Act (P.L. 114-258), which includes numerous exceptions that are not incorporated into the proposed rule. In effect, this means that non-disparagement clauses, or any provision that imposes a penalty in these areas, would trigger reporting. The proposed rule's definition of covered provisions would even go as far as to impact items that grant intellectual property rights in review, be that by statement or analysis.

The CFPB has stated that the limitation covering extinguishing or causing the consumer to relinquish or agree not to assert any other identified consumer legal protection of any sort is aimed at jury trial waivers. However, this would encompass far more contract terms, including the right to receive a disclosure and provisions that require the consumer to agree to not file for bankruptcy protections within a specified number of days, because those provisions would have the impact of limiting the consumer's ability to exercise that legal right.

Given how broadly these limitations are worded, it is unclear if the proposed rule would cover common provisions in notes like waiving the right of present, notice of dishonor, and waivers of defenses based on suretyship. Those kinds of provisions are ubiquitous, and commonly appear in many types of consumer contracts.

It is important to note that standard contracts are not drafted to deceive the consumer in any way, but for ease of operation. With this proposal the Bureau will create an environment where companies would have to have hundreds of thousands of different versions of contracts. The net sum of these broad and undefined categories without additional clarification will be to deluge the bureau with every contract.

Parameters of Covered Form Contracts leave Gray Areas

The proposed rule states that a covered contract is a written agreement between a company and a consumer that was drafted before the transaction and is intended for use in multiple instances containing a covered term or condition. The rule is clear that such contracts can exist in paper or electronic form. Unfortunately, the Bureau does not provide much detail pertaining to an oral

[2] https://www.ftc.gov/legal-library/browse/rules/holder-due-course-rule

agreement that is recorded or reduced to writing. Would these types of agreements be covered as well? Before finalizing the rule, the Bureau should provide more guidance on this element.

The Rule Fails to Recognize the Proprietary Nature of Contracts.

In its proposed rule, the Bureau has stated that it will make contract terms public except as otherwise provided by exception 4 of FOIA,[3] which covers the non-disclosure of trade secrets and commercial and financial information. Companies do not post their contracts publicly because they are proprietary information. Companies spend substantial funds to develop and review contract documents that represent a significant investment in intellectual property they do not want competitors to steal.

The proposed rule seems to assume that companies do not make these documents public in an effort to mislead consumers. Nothing could be further from the truth. This raises a very important question about the extent to which the Bureau will honor FOIA exception 4. Under FOIA exemption 4, an item is protected if it is a trade secret, and companies receive assurance from the relevant federal agency that the information they provide will be kept confidential. In their proposal for a registry, the CFPB has made it clear that they will not keep this information confidential, which violates the test laid out in FOIA exemption 4 and case law. This raises sizable concerns around confidentiality, protection of trade secrets, and proprietary business terms.

As previously noted, the Bureau has stated that they are initiating the registry under their market monitoring authority. However, nothing in the provisions of Dodd-Frank that grant such market monitoring authority states that the information needs to be made public. The Bureau could simply collect the information, anonymize it and then publish a report.

Failure to safeguard companies' proprietary information has nothing to do with market monitoring. What will result is that companies will no longer invest in items that competitors can easily steal, which will reduce innovation leading to consumers having less options to meet their financial service's needs.

Ill-Defined Registration Requirements Will Leave Companies Susceptible to Unnecessary Enforcement Actions.

The proposed rule includes an option for companies to file notices of non-registration. A company using that option would be required to state that it is not registering "because it has a good faith foundation to believe that it is not a supervised registrant, or that it is not registering terms or conditions contained in its contracts and has a good faith basis to believe that the contract is not a covered form contract or that the terms or conditions are not covered."

More clarity is needed around how a company can determine that it is not a supervised registrant and what encompasses "good faith." What are the ramifications if a company does not provide the CFPB with all the information necessary to make such a determination, even though the company believes it has complied? What is a "good faith ," as defined by the Bureau? How does

[3] https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-4

the CFPB intend to define what is a “non-frivolous filing?” Given that the CFPB has a vested interest in having companies register, its view of good faith or non-frivolous filings may very well be different than those of the private sector. Given these questions and gray areas, the Bureau needs to provide more clarification before finalizing the rule.

Conclusion

While much of the discussion surrounding the registry has focused on attempts by the CFPB to address arbitration, the proposed rule contains many other provisions that will create unnecessary burdens and uncertainties on companies, which will have to allocate time and resources that could go to serving their customers.

The Bureau’s proposal has drawn criticism as an attempt by the Bureau to both scare and shame companies that use covered terms and conditions, thereby placing pressure on companies to discontinue their use even if legally permissible. The Bureau’s discussion of how the registry will facilitate its risk-based supervision of nonbanks seems to carry an implicit threat that companies that use covered terms and conditions are more likely to face heightened scrutiny, only reinforcing the perception that this is nothing more than an attempt to block companies from the utilization of legally permitted practice that the Bureau simply does not like.

OLA appreciates the opportunity to provide input on this initiative. If you have question or need additional information, please feel free to contact me at mday@OLADC.org.

Respectfully submitted,

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