



CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections; Withdrawal of Proposed Rule

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; withdrawal.

SUMMARY: The Consumer Financial Protection Bureau (Bureau or CFPB) is withdrawing its Notice of Proposed Rule: Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections, published on February 1, 2023 (Proposed Rule), and is providing this notice of withdrawal. The Bureau has determined that legislative rulemaking is not necessary or appropriate at this time to address the subject matter of the Proposed Rule. The Bureau will not take any further action on the Proposed Rule.

DATES: The Proposed Rule published February 1, 2023, 88 FR 6906, is withdrawn as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The docket for this withdrawn Proposed Rule is available at <https://www.regulations.gov/document/CFPB-2023-0002-0001>.

FOR FURTHER INFORMATION CONTACT: Dave Gettler, Paralegal Specialist, Office of Regulations, at 202-435-7700 or <https://reginquiries.consumerfinance.gov/>. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Summary

The Bureau is withdrawing the notice of proposed rulemaking, *Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections*, published on February 1, 2023, 88 FR 6906. The Proposed Rule would have required that most nonbanks subject to its supervisory authority register in a CFPB system information about their use of certain terms and conditions in form contracts, and would have required the Bureau to publish such information and registrants' identifying information.¹

The Bureau is withdrawing the Proposed Rule, as discussed in more detail in part VI below, based on its conclusion that the significant costs of the proposed registration and publication system are not justified by their uncertain and speculative benefits. As discussed in part VI below, the proposal would have imposed a significant burden on supervised nonbanks in order to collect and publish information of uncertain or speculative value or benefit, mostly about regulated entities' use of lawful terms and conditions. It also would have imposed significant burdens on the Bureau, beyond those the Bureau estimated when it issued the Proposed Rule, which are unwarranted in light of the speculative benefits and additional limitations on the Bureau's resources, as noted below. Given this and the Bureau's focus on limiting regulatory burdens on the American people, the Bureau believes it is appropriate to withdraw this proposal. The Bureau has also considered changes in and updates to its policies, agenda, and objectives in withdrawing the proposal.

II. Background on the Proposed Rule

A. Terms and Conditions in Form Contracts for Consumer Financial Products and Services

In the Background Section of part II, the Proposed Rule explained the prevalence of form contracts in markets for consumer financial products and services as well as the purported risks

¹ *Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections*, 88 FR 6096 (Feb. 1, 2023).

associated with certain terms and conditions in these form contracts. Part II.A of the proposal explained that consumer finance companies often include in their agreements with consumers for consumer financial products and services terms and conditions that are non-negotiable. Part II.B of the proposal explained how Federal, state, tribal and local laws disfavor a subset of these terms and conditions that seek to waive or limit the availability of certain legal protections, including those that Federal regulators, Congress, and the States have deemed to be legally impermissible or subject to additional requirements to be enforceable.² Finally, part II.C described some of the purported risks posed by such terms and conditions in form contracts, including risks related to consumer understanding, waivers of rights, and decreased deterrence, compliance, and accountability. Part II.C also provided an overview of certain terms and conditions that the proposal intended to cover and how nonbanks rely on such terms in different markets for consumer financial products and services.

However, the Background section largely described these risks to consumers in the abstract and, with the exception of unlawful terms and conditions as discussed further below, provided scant evidence quantifying risks of harm to consumers or the ways in which the proposal would mitigate risks. Moreover, none of the categories of terms and conditions

² For example, in 1984, the Federal Trade Commission (FTC) issued the Credit Practices Rule, which prohibited the inclusion of certain creditor remedies in consumer credit contracts and generally applied to nonbank creditors. *See Credit Practices Rule*, 49 FR 7740 (Mar. 1, 1984). Congress also has enacted numerous statutes limiting companies' ability to use certain contract terms. *See, e.g.*, 10 U.S.C. 987(e)(2) (expressly prohibiting waivers of right to recourse under any State or Federal law in contracts with covered servicemembers). *See also generally* Proposed Rule, 88 FR 6906 at 6908-14 (discussing other examples); Pub. L. 114-258, codified at 15 U.S.C. 45b (enacting the Consumer Review Fairness Act of 2016, which prohibits companies that use form contracts from restricting consumers' right to provide negative reviews).

identified in the Background section are *per se* unlawful and some are even favored by existing law.³

B. The Proposed Rule

In its proposal, the Bureau proposed to collect information about supervised nonbanks' use of terms and conditions in form contracts that expressly seek to impose the following limitations on consumer rights and other legal protections applicable to the offering or provision of consumer financial products or services in markets the Bureau supervises: waivers of claims a consumer can bring in a legal action; limits on the company's liability to a consumer; limits on the consumer's ability to bring a legal action by dictating the time frame, forum, or venue for a consumer to bring a legal action; limits on the ability of a consumer to bring or participate in collective legal actions such as class actions; limits on the ability of the consumer to complain or post reviews; certain other waivers of consumer rights or other legal protections; and arbitration agreements. The proposal defined these terms and conditions as covered terms and conditions. Covered terms and conditions would have been covered by the proposal even when they are legally enforceable.⁴ Indeed, the Proposed Rule identified a wide range of terms and conditions that would be covered even though they are legally permissible.⁵

Under the Proposed Rule, nonbank covered persons subject to the Bureau's supervisory authority would have been required to file annual reports with the CFPB regarding both the covered terms and conditions that they include in their form contracts, as well as any court or

³ See, e.g., *Morgan v. Sundance*, 596 U.S. 411, 418 (2022) (explaining how the Federal Arbitration Act contains a general "policy favoring arbitration" pursuant to arbitration agreements); 88 FR 6906 at 6910 (describing examples in Federal mortgage regulations specifically authorizing waivers when needed to facilitate loans to meet a *bona fide* personal financial emergency).

⁴ 88 FR 6906.

⁵ See, e.g., 88 FR 6906 at 6912 (Servicemembers Civil Relief Act expressly allows servicemembers to enter into certain waivers); *id.* (describing conditions in which State law permits certain waivers); *id.* at 6934 (describing how proposal covered liability limits "including when they are permitted by law"); *id.* at 6909 n.17 ("existing law permits certain contractual waivers or limitations in consumer contracts" that would be required to register); *id.* at 6911 (mortgage regulations permit consumers to waive rescission rights in certain circumstances); *id.* at 6913 ("permissible arbitration agreements").

arbitrator decision on the enforceability of such terms.⁶ The Proposed Rule estimated over 7,300 supervised nonbanks would be required to register, including those engaged in mortgage lending, private student loan origination, payday lending, and any of the five markets where the Bureau has defined nonbank larger participants – consumer reporting, consumer debt collection, automobile finance, student loan servicing, and international money transfers.⁷

The Proposed Rule would have excluded certain supervised nonbanks from its coverage. Notably, the proposal excluded States and federally recognized Indian Tribes but acknowledged that there may be some uncertainty whether a particular supervised nonbank is a State or Tribe. The proposal suggested that such nonbanks could choose to register without prejudice to their ability to dispute their coverage under the Proposed Rule, or file a notice of nonregistration, as described in the proposal, if they have a good-faith basis to believe they are a State or Tribe.

The Bureau proposed to establish subpart C of part 1092 for the registration and collection of this information.⁸

C. Legal Authority

The Bureau stated that it was proposing the rule, pursuant to CFPA sections 1022(b) and (c) and section 1024 discussed further below,⁹ principally to facilitate its market monitoring functions and its risk-based supervisory processes. It stated that the most immediate use of the proposed information collection would be in prioritization and implementation of its nonbank supervision program. The Bureau also stated that it had preliminarily determined to publish the information it collects under the proposal as permitted by

⁶ See proposed §§ 1092.301(i) (defining “[u]se of a covered term or condition”) and 1092.302 (proposing requirements for annual reporting on the “use of covered terms and conditions”).

⁷ 88 FR 6906 at 6957 (Table 3).

⁸ Under the proposal, this registration requirement would have been part of the general nonbank registration system established under proposed subpart A of part 1092.

⁹ 12 U.S.C. 5512(b) and (c) & 12 U.S.C. 5514.

law.¹⁰ In part II.C. of the proposal, the Bureau described these and related purposes in more detail.¹¹

III. Comments Received

The Bureau received 35 unique comments on the Proposed Rule. Comments generally opposed to the proposal included those from 12 Members of Congress, 4 Tribes, and 20 trade associations representing nonbank providers of consumer financial products and services, depository institutions, and credit unions. In addition, communications from the Small Business Administration Office of Advocacy (SBA) and mortgage market government-sponsored enterprises (GSEs)¹² raised specific points, noted below, and did not express support for the proposal. Finally, the Bureau received comments generally in support of the proposal from two coalitions encompassing 66 nonprofits and consumer advocacy organizations, 2 law professors, 4 law students, and 3 other individuals.

With limited exceptions noted further below, most commenters generally agreed with or did not dispute the proposal's conclusion that most consumers do not read form contracts. However, most commenters focused their comments not on the risks posed by form contracts *per se*, but on the issue of registration and publication related to the use of covered terms and conditions. These commenters opposed and supported the Proposed Rule on various grounds.

Comments from industry, Members of Congress, and Tribes generally opposed the proposal.¹³ Among their numerous reasons for opposition, many stated that: (1) the paperwork burdens of registration would be unduly high;¹⁴ (2) the public registry would impose substantial,

¹⁰ 88 FR 6906 at 6907; *see also* proposed § 1092.303 (providing that the CFPB will publish and maintain a publicly-available source of information about supervised registrants and their use of covered terms and conditions).

¹¹ 88 FR 6906 at 6914-24.

¹² A summary of this *ex parte* communication by Fannie Mae and Freddie Mac was posted to the docket.

¹³ In addition, the GSEs generally implicitly opposed the proposal, suggesting that the proposal's exemption for form contracts made publicly available by GSEs was ambiguous and too narrow. The SBA also called on the Bureau to address a data deficiency in the final rule or convene a small business review panel.

¹⁴ Several industry commenters stated that the proposal underestimated the burdens of the proposed registration requirements. For example, a trade association described how supervised nonbanks would need to hire third-party lawyers and consultants. These commenters also pointed to other burdens, such as compliance, reporting, and

unaccounted for, and unwarranted reputational burdens on registrants for use of lawful terms and conditions;¹⁵ (3) the proposal unnecessarily included lawful terms and conditions,¹⁶ including arbitration agreements,¹⁷ other terms and conditions that State law expressly permits,¹⁸ and terms and conditions that pertain to the application of State laws;¹⁹ (4) under the proposal, the Bureau would collect very large quantities of information from supervised nonbanks about widely used, lawful terms and conditions that would be of little use to the Bureau and the public in assessing risk;²⁰ (5) it would be arbitrary, unfair, and undermine competition for the Bureau to impose the proposed burdensome requirements on supervised nonbanks and not on banks and credit unions using covered terms and conditions in the same markets; and (6) the proposal would infringe on Tribal sovereignty.²¹

Commenters in opposition also generally stated that the proposed exclusions, such as for firms with less than \$1 million in annual receipts from consumer financial products and services

technological investments. Another commenter also stated that the burden of reporting information about court and arbitrator decisions on enforceability of covered terms and conditions would be “massive,” and suggested the Bureau could instead research that information on its own. The Bureau discusses comments on impacts further below in part IV.

¹⁵ These comments generally described how the registry would create “negative innuendo” and “stigma” that would “scare and shame,” “brand,” and “penalize” the use of lawful terms and conditions, creating “nuisance exposure” and a “chilling effect.” One commenter noted that the proposal acknowledged this impact when it indicated that nonregistrants could seek to differentiate themselves in marketing. This commenter and other trade associations stated that the reputational impact would be significant enough to warrant the Bureau convening a small business review panel.

¹⁶ Two of these comment letters suggested that if the Bureau were to issue a final rule, it should limit the scope of required registration to terms and conditions for which there is “overwhelming consensus of their unlawful nature.”

¹⁷ Legal objections to the proposed coverage of arbitration agreements also are noted below.

¹⁸ A trade association stated that the proposal would apply to terms and conditions that legislatures and courts, including at the State level, have found to be lawful.

¹⁹ One of the trade associations therefore suggested that if the Bureau finalized the proposal, it should be further limited, such as to terms and conditions that violate Federal consumer financial law.

²⁰ Some commenters also stated that the proposal’s burdens outweigh its benefits.

²¹ All Tribe commenters generally supported the proposed exemption for States including Tribes, but several stated that it needed to be broadened to include State/Tribe-owned/controlled entities, which enjoy a right of self-determination as to their status as a sovereign entity. Relatedly, all of these commenters opposed what they viewed as the proposal’s implication that the Bureau is competent to determine whether entities that claim association with Tribes are by law part of the Tribe and entitled to Tribal sovereignty. For that reason, they stated that the proposal to allow such entities to file good faith notices of nonregistration was based on a faulty premise that the Bureau could evaluate the merits of those notices.

in supervised markets, were inadequate.²² Mortgage industry commenters similarly stated that the proposed exemption for certain GSE form contracts was inadequate, that the proposal would lead to unnecessary burden across market participants registering the same standard terms and conditions, and that the proposal generally was inappropriate for the mortgage market, where arbitration agreements generally are prohibited and State law already restricts many waivers.

Commenters in opposition also generally disagreed with the claims in the proposal that lawful covered terms and conditions, such as arbitration agreements, pose risks to consumers. One industry trade association also provided an economic analysis reporting no statistically significant relationship between companies' use of arbitration agreements and consumer complaints filed with the CFPB or enforcement actions filed by the CFPB. As a result, as noted above, these commenters generally stated that the public registry would be confusing and not allow for true discernment of risk.²³ Two industry commenters also disputed the proposal's preliminary finding that form contracts in general pose risks to consumers due to their being non-negotiable and consumers not reading them.²⁴

In addition, several commenters opposed to the proposal questioned the Bureau's legal authority to finalize it. They stated that: (1) the authorities relied upon in CFPA sections 1022 and 1024 do not authorize the Bureau to establish a registry of terms and conditions it deems to be risky;²⁵ (2) the proposal raised constitutional concerns;²⁶ (3) the proposal ran afoul of the major questions doctrine; (4) the proposed coverage of arbitration agreements would be

²² While these commenters advocated for a higher exemption, they did not state that would overcome their general opposition to the proposal.

²³ For example, one industry association noted how a registry of lawful terms and conditions would "mislead" consumers about their risks.

²⁴ In these commenters' view, the "opt out" provisions in their form contracts are a form of negotiability. In addition, one of these commenters noted that it requires consumers to check boxes confirming assent to individual terms.

²⁵ Another commenter indicated that the proposed registry was unprecedented and inappropriate.

²⁶ These grounds included due process and the 10th Amendment of the U.S. Constitution.

unlawful;²⁷ and (5) the proposal to publish registration information failed to consider the degree to which covered terms and conditions constitute confidential business information or protected intellectual property.²⁸

In contrast, most of the commenters in support stated that the proposed publication of registration information would present a more systematic picture of the level of risk that covered terms and conditions pose to consumers. Meanwhile, they cited data from the Bureau's 2015 Arbitration Study and elsewhere that indicated to them that arbitration agreements are prevalent in supervised markets, and they cited research that, in their view, established that consumers fare poorly in arbitration and disadvantaged groups even more so. And they pointed to anecdotal examples of nonbanks that used those and other covered terms and conditions in supervised markets, including some terms and conditions that were found unlawful and others the commenters viewed as risky.²⁹ These commenters also cited examples of firms that both used covered terms and conditions and faced enforcement actions finding other conduct that caused consumer harm in violation of consumer protection laws. In their view, overlap between use of

²⁷ Several commenters stated that the proposal to collect and publish information on the use of arbitration agreements was not permitted under section 1022 or section 1024, due to more specific authority to regulate arbitration agreements in section 1028. Several also stated that this aspect of the proposal violated the Congressional Review Act (CRA) resolution of disapproval of the Bureau's 2017 Arbitration Agreements Final Rule. *See* Final rule; CRA revocation, 82 FR 55500 (Nov. 22, 2017). Several also stated that the proposal was based on an arbitrary and capricious premise that arbitration agreements are risky, which, in their view, is inconsistent with the Federal Arbitration Act (FAA) and its jurisprudence.

²⁸ A law professor disagreed, stating that companies give the covered form contracts to consumers, so they are not trade secrets.

²⁹ Several commenters in support also called for the Bureau to expand the list of covered terms and conditions to include, among other provisions, specific aspects of arbitration agreements, such as provisions delegating the power to the arbitrator to determine arbitrability and provisions prescribing standards for so-called mass arbitration. Some also supported coverage of loser-pays provisions and choice-of-law provisions. One stated that the registry should cover implied waivers, including terms and conditions that do not contain the notice required by the FTC's Holder Rule, 16 CFR 433.2. Based on their review of a selection of income-share agreements to fund education expenses of postsecondary education students, they stated that these agreements, in their view, were subject to the Holder Rule and did not comply with that rule.

covered terms and conditions and such enforcement actions illustrated how covered terms and conditions reduced incentives to comply with the law and reduced remedies for noncompliance.

Commenters in support described several benefits of the proposal. In their view, it would: (1) allow other regulators and the public to understand the prevalence of covered terms and conditions;³⁰ (2) make the public aware of trends and patterns in the use of covered terms and conditions, including adjudications of their enforceability;³¹ (3) help consumer organizations to publicly advocate for registrants to adopt terms more favorable to consumers;³² and (4) prevent supervised nonbanks from gaining a competitive advantage from use of covered terms and conditions in form contracts.³³

However, few commenters in support specifically addressed whether the proposed public registry would improve consumer understanding or shopping. None stated it would do so directly through widespread consumer use. And two suggested the proposed public registry could be confusing to the public unless the Bureau significantly invested in consumer education about the subject matter and reviewed the effectiveness of published information. Instead, a few of these commenters suggested the data in the public registry could be used to encourage companies to change their practices. For example, one commenter stated that, in its view, examples of consumer activism in other contexts³⁴ suggest that a small number of active and vocal consumers could analyze such information and use it to publicize their views as to which

³⁰ One of these commenters stated that, even though use of covered terms and conditions may be very common, a public registry can help the public to understand the true level of diminishment of their rights. In this commenter's view, that public understanding could reduce firms' use of covered terms and conditions.

³¹ However, in their view, the proposed collection of data on enforceability adjudications (i.e., decisions only) was too narrow. They stated data on pending and settled enforceability challenges, including mass challenges, would provide a clearer picture of the risk profile of covered terms and conditions. In their view, such broader information could provide an early indication of mass harms, and identify mass adjudications that are stalled by limitations in arbitration agreements.

³² One of these commenters stated that advocates would push for better practices by engaging in noisy criticism, and suggested the registry could lead to the creation of ratings organizations to evaluate quality or consumer-friendliness of covered consumer financial products or services.

³³ Many of these commenters stated that the lack of negotiability and generic language in form contracts allows firms, including monopolists, to prevent consumers from enjoying the full protection of the law.

³⁴ Yonathan Arbel & Roy Shapira, *The Theory of the Nudnik*, 73 Van. L. Rev. 929 (2020).

terms and conditions registrants should change. This commenter also suggested that a law review article analyzing certain public databases indicated that they could foster competition among companies to engage in a “race to the top” to stay out of such databases.³⁵ In the commenter’s view, companies could proactively remove or avoid use of covered terms and conditions as a marketing or branding strategy. More broadly, many of the commenters in support called on the Bureau to pursue a different or supplemental regulation restricting the use of covered terms and conditions, and arbitration agreements in particular.

Commenters in support also generally did not address the usefulness of the proposed information collection requirements to the Bureau in particular. One stated that the proposal would help the Bureau to monitor for systemic risks, including emerging risks, by identifying which covered terms and conditions are used across a market, and allowing the Bureau to link the use of covered terms and conditions with particular harms including repeat offenses.

With respect to the impacts of the proposal on covered persons, commenters in support also generally did not address this topic, except in certain limited respects. First, most commenters in support called for imposing similar requirements on depository institutions and credit unions. For example, one commenter stated that depository institutions use the same terms and conditions and should be covered on the same basis. However, another commenter agreed with the proposal’s focus on nonbanks because, in its view, nonbanks posed disproportionate risks to consumers not served or underserved by the banking sector. Second, a commenter suggested that registration of the entire form contract containing a covered term or condition would be less burdensome than the proposal to require submission of structured data about the use of specific covered terms and conditions. Third, another commenter stated that the proposal to collect information about court and arbitrator decisions on the enforceability of covered terms

³⁵ Nathan Cortez, *Regulation by Database*, 89 U. Colo. L. Rev. 1 (2018).

and conditions would pose low burden because, in their experience, such decisions were infrequent.

IV. Rationales for Withdrawing the Proposed Rule

As explained below, the Bureau is withdrawing the Proposed Rule because the purported benefits of the proposed registry and publication requirement do not justify the proposal's significant costs.³⁶ As also discussed below, the Bureau considered alternatives to full withdrawal of the proposal, but finds that those alternatives do not resolve these flaws.

A. The Purported Benefits of the Proposed Registration Requirements Do Not Justify the Costs

The Proposed Rule's findings regarding its necessity and value were based on speculative and unquantified benefits, which do not justify the steep burdens that would have been imposed on regulated entities subject to the Proposed Rule.³⁷

The Proposed Rule only quantified some of the estimated burdens to covered persons.³⁸ However, even the burdens it did quantify – the paperwork burdens of complying with the proposed registration requirements – were significant. Table 3 in the Proposed Rule estimated that supervised nonbanks would expend approximately 202,875 hours complying with the proposed registration requirements.³⁹ The estimated registration burden per firm ranged from 15 hours (for firms with a “simple” portfolio of about 10 contracts containing covered terms and conditions) to over 214 hours (for firms with a “complex” portfolio of about 250 contracts

³⁶ While the Bureau bases its withdrawal on its conclusion that the absolute burdens of compliance alone are significant enough that, in light of the speculative benefits, the proposed policy does not justify the costs, the Bureau acknowledges the persuasive nature of comments it received questioning the authority of the Bureau to create a registry as proposed, discussed in part III above. The Bureau is persuaded that further consideration of its authorities is merited before it may propose to establish such a registration regime.

³⁷ Withdrawing the proposed rule also furthers the Administration's goals of limiting regulatory burdens on the American people. *See, e.g.*, E.O. 14219 of February 19, 2025, Ensuring Lawful Governance and Implementing the President's “Department of Government Efficiency” Deregulatory Initiative, 90 FR 10583 (Feb. 25, 2025).

³⁸ For example, it did not quantify the burdens supervised nonbanks would face as a result of the proposal to publish registration information. 88 FR 6906 at 6961-62.

³⁹ 88 FR 6906 at 6957 (Table 3).

containing covered terms and conditions).⁴⁰ The Proposed Rule estimated that half of the paperwork burden would involve reviewing consumer form contracts to identify covered terms and conditions.⁴¹ Over a third of the estimated paperwork burden would involve completing the registration process.

As noted above, some industry commenters stated that the Proposed Rule underestimated the paperwork burdens. For example, they generally suggested that supervised nonbanks would have more covered terms and conditions to register than the CFPB expected due to its inclusion of a wide range of lawful terms in the scope of registration. In the view of some commenters, the Proposed Rule also did not adequately account for burdens on supervised nonbanks such as instituting new internal compliance and reporting processes, making technology integration investments, consulting with outside legal counsel, and making marketing changes and engaging public relations services to address reputational impacts.

The Bureau agrees with commenters that the burdens would have been unduly high and unwarranted, particularly in light of the speculative nature of the benefits. The proposal's impacts analysis identified the "primary benefit" of the proposal as increasing compliance among covered supervised nonbanks by qualitatively increasing the incentive for supervised nonbanks to refrain from using noncompliant covered terms and conditions, and through more targeted scrutiny by the Bureau and other regulators.⁴²

Neither the Bureau nor commenters established that the proposed registration requirements would have any deterrent effect, much less an effect that would be commensurate with the significant burden such requirements would impose. Moreover, the Bureau believes, after consideration of comments, that, as a policy matter, the Proposed Rule's attempt to disincentivize conduct through the collection of vast amounts of data regarding typically lawful

⁴⁰ *Id.* at 6956 (Table 2).

⁴¹ *Id.*

⁴² 88 FR 6906 at 6953.

contract terms amounts to regulatory overreach, and is a misguided use of the Bureau's authorities that dilutes the Bureau's ability to identify true risk to consumers.

The proposal acknowledged that the Bureau lacked data about the frequency of use of unlawful covered terms and conditions.⁴³ Thus, although it claimed that the use of noncompliant terms and conditions would be "significantly reduce[d],"⁴⁴ the proposal did not adequately quantify this purported benefit. The proposal also did not establish that such an incentive was necessary given restrictions in existing law on use of such terms and conditions. In fact, much of the anecdotal evidence the Bureau cited to justify the proposal involved the enforcement of existing law to deter this very conduct.⁴⁵

The Proposed Rule also did not quantify any other benefit from the registration of lawful terms and conditions, including by helping the Bureau to detect risk to consumers and to prioritize its examination work on that basis. For example, the Proposed Rule stated a theory that public oversight should be heightened when entities use covered terms and conditions that limit or restrict private enforcement.⁴⁶ But it did not provide evidence to support this theory, much less quantify any purported benefit. The Bureau seeks to avoid imposing steep compliance burdens on regulated entities when benefits to consumers or the public are unclear.

As noted above, one commenter suggested that the Proposed Rule's registry would help the Bureau to monitor for systemic and emerging risk (such as from detecting widespread use of potentially harmful terms and conditions, or a connection between their use and other harmful

⁴³ See *id.* at 6954 ("The Bureau does not possess data on the frequency of use of such terms[.]") and *id.* at 6960 ("The Bureau does not have data on the prevalence of covered waivers and other covered terms and conditions that are expressly prohibited by Federal, State, and Tribal laws, or on the prevalence of covered terms and conditions that may constitute UDAAPs.").

⁴⁴ *Id.* at 6960.

⁴⁵ See generally examples in part II of the proposal.

⁴⁶ 88 FR 6906 at 6909 ("By eliminating or diminishing private enforcement or exercise of rights, covered terms and conditions risk harming consumers. Indeed, given the limited resources of public regulators, private enforcement and other forms of exercising rights play an important role in incentivizing compliance with the laws applicable to consumer financial products and services.") & n.215 ("[A] chief purpose of the proposal is to increase public oversight of covered terms and conditions precisely because of the limitations covered terms and conditions impose on private enforcement.").

conduct). However, neither the Proposed Rule nor commenters explained why a rule mandating permanent, recurring collection of data on the use of covered terms and conditions by nonbanks across supervised markets was necessary, compared with more targeted, less burdensome use of the Bureau's market monitoring or supervisory authorities. For example, as one industry association noted, the Bureau could gather similar information through its examinations, which would avoid the burden from establishing the proposed registry.

The Bureau also is withdrawing the Proposed Rule because the proposal's speculative and unquantified benefits do not justify the significant costs to the Bureau. The Proposed Rule would have required the Bureau to expend significant resources—not only to establish and operate a registration system, but also to use that system to assess risks. Yet the proposal considered only some of the resources the Bureau would have to expend to fully realize the Rule's purported benefits. The Proposed Rule estimated that operation of the nonbank registry (including this proposal and the rule establishing the nonbank orders registry) would cost approximately \$2.5 million for vendor support as well as over 10,000 hours of Federal staff time annually.⁴⁷ Those estimates, however, did not include the cost to use the collected data, which would include standardizing unstructured data and analysis as part of supervisory prioritization (which the Proposed Rule described as the most immediate use). Moreover, the Proposed Rule also would have required the Bureau to determine which information collected is legally permissible to publish and should be published. That too would require significant Bureau resources. These significant costs to the Bureau are not justified, especially when the statutory cap on the Bureau's resources has been significantly reduced since the Bureau published the Proposed Rule.⁴⁸

⁴⁷ See *Paperwork Reduction Act Supporting Statement*, Item 14 at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202407-3170-001.

⁴⁸ See 12 U.S.C. 5497(a)(2)(A)(iii).

Finally, the Proposed Rule would have led to collection of large quantities of data about terms and conditions most of which are likely to be lawful and commonly used in the marketplace. Nothing in the comment record or the proposal suggests that the Bureau could discern which of these terms and conditions, if any, pose risks to consumers without expending substantial resources.⁴⁹ Thus, the Bureau does not believe that collecting this vast amount of data would be useful to the exercise of its functions. At best, the proposed information collection would be a poorly designed distraction. At worst, it would be an unjustified overreach that places significant, unwarranted burdens on industry and the Bureau. Regardless, if the Bureau found evidence that such an information collection is warranted, it could use other authorities to collect data in a more targeted and efficient manner. It also can exercise its supervisory and enforcement authorities to take action against the usage of terms and conditions in the consumer financial services marketplace that are prohibited by Federal consumer financial law, to the extent such terms and conditions are used.

B. The Proposed Publication Provisions Do Not Justify the Costs

The Bureau is also withdrawing the Proposed Rule because the proposed public registry's speculative and unquantified benefits to the public do not justify the costs and potential harm imposed on regulated entities.

The Proposed Rule's main rationale for making the registry publicly available was a theory that the rule would serve consumers and the public interest by, for example, facilitating oversight of supervised nonbanks by regulators other than the Bureau, contributing to public debates over form contracts and certain terms and conditions, providing outside groups with resources to educate consumers, and assisting consumers in identifying supervised nonbanks

⁴⁹ See 88 FR 6906 at 6953 (the Bureau "believes that the use of covered terms and conditions is widespread"). Indeed, a number of industry commenters stated that the Proposed Rule would not enable the Bureau to discern risks to consumers. These commenters believed that most industry participants used at least some covered terms and conditions, which would render the data collected devoid of usefulness or benefit. For example, one commenter stated that the proposed information collection and public registry would "cast a dragnet" that "obfuscates" and "adds noise" to the Bureau's market monitoring, rather than serving as a "proxy" or "signal" for identifying bad actors or illegal or abusive practices or products. Another stated that the Proposed Rule would "deluge" the Bureau with registrations.

registered with the Bureau. However, the Proposed Rule acknowledged both that it would have “a minimal impact on consumer behavior” and, similar to the discussion above, that the Bureau lacks sufficient data to quantify the proposal’s purported benefits to the public interest.

In addition to the steep costs to regulated entities and the Bureau associated with the proposed public registry, the proposal also acknowledges that it may impose potential costs and harms on consumers, the public, and regulated entities. The proposal noted that publication “has the potential to create confusion” among consumers and the public. For example, consumers could view a firm’s registration as a sign that the supervised nonbank poses substantial risk (despite that the covered terms and conditions most likely to be registered would be lawful, as discussed above).

Further still, many industry trade association commenters stated that the proposal would cause significant reputational harm because it would “name and shame” or “scare and shame” supervised nonbanks. More specifically, it would impose a “stigma” and “public stamp of disapproval” that “implies potential wrongdoing” and “negative inuendo.” In their view, this “branding” and “penaliz[ing]” effect was unwarranted, given how it would be based largely on the use of lawful contract terms. In addition, some industry commenters stated that the reputational impacts would be substantial, calling into question the proposal’s certification that it would not have a significant impact on a substantial number of small entities. Some consumer groups also admitted they would plan to use appearance on the registry to embarrass companies, which the Bureau finds concerning given that the registry would contain many lawful contract provisions.

Given that some commenters stated their plan to use the public registry to challenge registrants’ reputations, the Bureau views the industry comments as raising reasonable concerns about reputational harm. The proposal did not consider this impact, and the Bureau does not believe it can be quantifiable, given the unprecedented nature of the proposed registry. The Bureau nevertheless believes, as it does with the registration requirement discussed above, after

consideration of comments, that the Proposed Rule's publication requirement was a misguided attempt to stigmatize regulated entities into changing form contracts that, by and large, contain lawful terms⁵⁰ with little, if any, evidence to justify such aggressive regulatory overreach.

C. Alternatives Considered

In withdrawing this Proposed Rule, the Bureau considered several possible alternatives. First, the Bureau considered the alternative identified in the proposal of requiring registration of all supervised nonbanks, regardless of their use of covered terms and conditions. The proposal stated that the Bureau did not pursue that alternative because it preliminarily concluded it was a higher priority to register users of covered terms and conditions.⁵¹ A general registration requirement for supervised nonbanks would be an entirely different type of policy from this proposal, which focuses on covered terms and conditions, and the Bureau declines to consider such an alternative further.

Second, the Bureau considered commenters' suggestion of limiting the definition of covered terms and conditions to include only those covered limitations on consumer legal protections that are prohibited by law. Although this alternative could reduce the number of terms and conditions that would be subject to the paperwork burdens of reporting information to the Bureau, it may increase the overall burdens of identifying such terms and conditions. There are practical difficulties in determining whether certain terms and conditions are indeed prohibited by law, and regulated entities may have to spend significant resources to do so.⁵² Moreover, this approach would still suffer from the same infirmities that permeate the Proposed Rule as discussed more fully above, not least of all that neither the Bureau nor commenters have

⁵⁰ See, e.g., 88 FR 6906 at 6957 (discussing how the paperwork burdens of the rule create incentives to remove covered terms and conditions beyond merely those that are unlawful).

⁵¹ *Id.* at 6919.

⁵² Several industry associations acknowledged these difficulties, stating that the alternative should be limited to those limitations for which there is "overwhelming consensus of their unlawfulness." However, such an approach would only increase burden on the Bureau (if it attempted to establish such a list, as one of these commenters suggested) or otherwise on supervised nonbanks, which would have to engage in further evaluation, for each limitation, of whether the law as a whole establishes such a consensus.

data to quantify the prevalence of such prohibited terms and conditions, or to establish the inadequacy of existing law to deter the use of prohibited terms and conditions. Thus, the Bureau believes that the costs to regulated entities and the Bureau are not justified to achieve speculative benefits of even this narrower alternative.

Third, the Bureau considered whether it should collect more data to help better quantify any potential benefits of the Proposed Rule. Without existing evidence that would support the proposal's aggressive regulatory theory, the Bureau does not believe it would be prudent to impose significant additional burdens on industry or to commit the Bureau's more limited resources to the pursuit of uncertain results.

Fourth, the Bureau considered eliminating the publication requirement. While withdrawing this part of the Proposed Rule may have reduced some of the costs to the Bureau and regulated entities, the publication requirement only represented a portion of the costs associated with the proposal such that eliminating this requirement alone would not sufficiently reduce costs to justify imposing the remaining burdensome requirements of the proposal.

Withdrawal of Proposed Rule

For each of the independently sufficient reasons set forth in part IV above, the Bureau is withdrawing the proposed rule titled, "Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections," published in the *Federal Register* on February 1, 2023.

Russell Vought,

Acting Director, Consumer Financial Protection Bureau.