



Financial Services Management

Form-Contract Registry

Cite

CFPB, 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

Recommended Distribution:

Compliance, Risk Management, Marketing, Policy, Legal, Government Relations

Website

https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf

Impact Assessment

- The CFPB appears to be adopting registries as a tool to instill market discipline in the absence of clear authority to mandate specific actions.
- Registries are likely to increase the odds of private, federal, or state-level enforcement actions, political inquiries, and advocacy-group demands on affected consumer-finance companies.
- Although limited to nonbanks, the Bureau may be setting precedent also for a similar registry for banking institutions.
- Agreements such as those for website use would be covered, giving the Bureau significant insight into nonbank payment and tech-platform companies and increasing the odds of enforcement action.
- Contracts related to agency mortgage origination are generally exempted, but limits apply.
- Nonbank secondary-market asset purchasers would assume new CFBP-filing obligations.

Overview

Building on its proposed nonbank registry related to enforcement orders,¹ the CFPB is now also proposing a public registry requiring posting of provisions in consumer-finance contracts the agency believes threaten consumer legal or free-speech rights when issued by supervised nonbanks. The agency's concern is based on its view that consumers generally have no ability to understand and alter the agreements presented to them as take-it-or-leave-it propositions with no choice other than a signature or an "agree" box to click. Further, many contractual terms are decided between originators and third parties – e.g., credit reporting agencies, loan servicers, and debt collectors – over which the consumer has no power of choice or ability. The registry is thus also intended to capture

¹ See **CONSUMER47**, *Financial Services Management*, December 21, 2022.

these sub-contracts determining back-end consumer risk, a move with considerable implications for proprietary relationships with these third-party providers. Much in the new standards strikes at mandatory arbitration – a longstanding consumer and trial-lawyer complaint – but much else reflects the new era of online offerings and resulting information asymmetry. Many of these concerns apply also to bank retail-finance offerings, suggesting that the CFPB will either address these in future supervisory or rulemaking efforts and/or develop a like-kind registry for banking organizations.

Impact

As with its enforcement-order registry proposal, the Bureau posits this one on provisions in its authorizing statute allowing it to “monitor” the consumer-finance market for problematic practices it is then authorized to sanction or otherwise illuminate. The Bureau also intends to use the information gleaned from registry postings to enhance the risk-based examinations of nonbank retail-finance companies it established in 2022 via a procedural rule.² Opponents of this proposal, as with the other registry, may counter that the Bureau’s monitoring authority allows it to undertake the usual research and data-gathering activities other regulatory agencies undertake in this regard; the CFPB is likely to counter assertions of limited authority by noting how much data the banking agencies require and then make public, but these public releases are largely limited to quantitative data and announcements related to mergers, enforcement actions, or other specific agency decisions.

As discussed below, covered contracts may include opt-outs or even give the consumer the option to negotiate some terms. The Bureau is casting a wide net on grounds that contract opacity and negative options do not give consumers a complete, clear understanding of choice options and risks. Further, a single consumer-finance transaction could require multiple registry filings, with covered contracts for example reaching not only a specific product, but also website-use terms and conditions if these pertain to it. The Bureau appears to intend that, as its drafting suggests, its reach would thus extend to tech-platform companies that frequently change terms of use with click-through agreements necessary for consumers not only to receive security or systems updates, but also make use of financial products offered on the tech platform. This would give the Bureau significant insights into the nonbank PP-payment companies it is reviewing for matters such as terms of use that restrict the ability to express political views and the overall role of nonbank tech-platform companies in retail financial services. Shortly after proposing this rule, the Bureau issued guidance effectively banning “dark subscriptions” that make it difficult for consumers to cancel any services they may have begun whether intentionally or not.

The Bureau may in part be proposing this registry not only to expand its reach, but also to encourage other regulators and enforcers to govern the form contracts it finds problematic. The NPR states that Congress, the courts, the FTC, and states have raised questions about form contracts, but it cites only one specific example of “some” states having begun to require registration of problematic terms in one consumer-finance product: student loans. As

² See **CONSUMER44**, *Financial Services Management*, November 28, 2022.

described below, the Bureau's rule would reach to all forms of consumer finance offered by nonbanks and a wide array of contracts, not just those with the mandatory-arbitration claims that have sparked the greatest interest not only from the CFPB in the past,³ but also numerous other terms and conditions related to legal rights as well as those to express product complaints and opinions (a recent FTC focus).

What's Next

The proposal was issued on January 11; comments are due by the later of March 13 or thirty days after *Federal Register* publication. Filing instructions and the registry's implementation date will be announced after the rule is finalized. Comment is solicited on how best to implement the registry and the timing for doing so.

Analysis

A. Construct

This rule tracks the other registry's description of legal authority, purpose, and the severability of each provision from the other in the event of successful court challenge. However, this proposal lacks the attestation, internal-control, and other compliance requirements in the enforcement-order registry proposal. Comment is sought on whether each nonbank registry should have a specific construct.

B. Covered-Contract Terms

1. Form Contracts

These are agreements in which a consumer enters prior to commencing a financial transaction the firm conducts with more than one consumer that contains a covered term or provision. This also includes website terms of use for consumer financial products or services as well as contracts (e.g., for loans) in which a consumer may negotiate some terms. Use of opt-out terms also would not obviate treatment as a form contract.

A particular transaction could thus be covered by numerous covered contracts requiring registration.

Forms required of the GSEs or federal mortgage agencies that are posted on public websites are not considered form contracts unless the party using the agreement obtained a court or arbitrator's decision in the prior calendar year on a covered-form contract's enforceability.

³ See **ARBITRATION**, *Financial Services Management*, May 11, 2012.

2. Covered Terms and Provisions

Regardless of whether or not a claim is legally enforceable, those that would require registry notification include form contracts with express provisions such as:

- waivers of legal claims;
- legal-liability limits;
- limits on legal rights related to timing, forum, or venue as well as restrictions on ability to participate in collective action (e.g., class action);
- liability limits related to a customer;
- limits on complaints or posting reviews;
- other restrictions on a consumer's ability to seek legal redress; and
- arbitration agreements.

Comment is sought on whether these covered terms should be limited only to those germane under federal consumer law and on how certain terms related to enforceability (e.g., statutes of limitation) are treated. Comment is also sought on any other form-contract terms that should be included.

C. Registry Operations

1. Coverage

As noted, supervised nonbank financial companies must file with the registry if their consumer agreements are form contracts containing the covered terms noted above. If other agreements are used, then no filing would be necessary and certain filing exemptions (e.g., for entities under temporary CFPB enforcement orders) are also provided. The Bureau considered whether all supervised nonbanks would need to file notices that they do not use covered agreements but feared so encompassing a registry would be unduly burdensome and create the impression that the CFPB licensed filing companies. Comment is sought on these provisions.

Filings would be on annual basis where applicable under procedures detailed in the NPR.

The proposal also details all the data factors that must be filed; these include the text of each covered provision in covered contract. If the covered provision is from a third-party service provider and the text is widely used, the name of the service provider would also be required to the extent to which covered terms were enforced would also have to be disclosed.

2. Public Disclosure

As noted, the Bureau plans to make filings public after removing certain identifying information. Although the NPR includes a lengthy defense of public release, comment is sought on the wisdom of doing so. The NPR also details information that would not be posted – e.g., administrative names, certain information deemed confidential, etc.

3. *Holder in Due Course*

A covered nonbank that acquires an obligation entered into by the consumer under a covered contract would need to file a registry notice even though it was not a party to the contract at origination and the seller may not have been subject to Bureau filing requirements.