

Consumer Financial Protection Circular 2024-03

Unlawful and unenforceable contract terms and conditions

June 4, 2024

Question presented

Can persons that include unlawful or unenforceable terms and conditions in contracts for consumer financial products and services violate the prohibition on deceptive acts or practices in the Consumer Financial Protection Act (CFPA)?

Response

Yes. “Covered persons” and “service providers” must comply with the prohibition on deceptive acts or practices in the CFPA.¹ The inclusion of certain terms in contracts for consumer financial products or services may violate the prohibition when applicable federal or state law renders such contractual terms, including those that purport to waive consumer rights, unlawful or unenforceable.

Background on Unlawful and Unenforceable Contract Terms

Many federal laws—including statutes enforced by the CFPB—render unlawful or unenforceable various contract terms in certain contexts. For example, as highlighted in a recent CFPB compliance bulletin,² the Consumer Review Fairness Act of 2016 generally prohibits the use of form contracts that limit how consumers communicate their reviews, assessments, or similar analysis of the sale of goods or services, and invalidates these types of contract terms and

¹ 12 U.S.C. 5481(6), (26), 5531, 5536. For simplicity, the remainder of this Circular refers to covered persons and service providers as “covered persons.”

² CFPB, Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews (Mar. 22, 2022), https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf.

conditions.³ As another example, Regulation Z, which implements the Truth-in-Lending Act (TILA), prohibits the inclusion in a residential mortgage loan or open-ended consumer credit plan secured by the principal dwelling of terms requiring arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling claims arising out of the transaction.⁴ The Electronic Fund Transfer Act (EFTA) prohibits contract terms that contain a “waiver of any right conferred” by EFTA and prohibits waivers of any “cause of action” under EFTA.⁵ And the Military Lending Act and its implementing regulations generally prohibit terms in certain consumer credit contracts that require servicemembers and their dependents to “waive the covered borrower’s right to legal recourse under any otherwise applicable provision of State or Federal law”⁶

In addition to express prohibitions like these, a recent federal district court decision held that the Servicemembers Civil Relief Act (SCRA) renders unenforceable provisions in contracts with servicemembers that purport to waive their right to participate in class actions to enforce the SCRA.⁷ The Federal Trade Commission also administers laws that forbid certain contractual

³ 15 U.S.C. 45b.

⁴ 12 CFR 1026.36(h)(1), implementing 15 U.S.C. 1639c(e)(1).

⁵ 15 U.S.C. 1693l; see also, e.g., *Choice Money Transfer, Inc. d/b/a Small World Money Transfer* at ¶¶ 79-83, File No. 2022-CFPB-0009 (Oct. 4, 2022) (consent order) (finding remittance transfer provider violated section 1693l by including waiver of consumer rights in disclosure consumers were required to sign); *Chime, Inc. d/b/a Sendwave* at ¶¶ 26-29, File No. 2023-CFPB-0012 (Oct. 17, 2023) (consent order) (finding violation of section 1693l where remittance transfer provider required consumers to sign a remittance services agreement containing language limiting consumers’ damages and claims for costs and attorney fees, contrary to the provisions for defendant liability contained in section 1693m(a)(3)).

⁶ 32 CFR part 232.8(b), implementing 10 U.S.C. 987(e)(2).

⁷ *Espin v. Citibank, N.A.*, No. 5:22-CV-383-BO-RN, 2023 WL 6449909, at *3 (E.D.N.C. Sept. 29, 2023) (denying defendant’s motion to compel arbitration and observing that the SCRA was “amended to codify the unwaivable right of servicemembers to bring and participate in class actions, ‘notwithstanding any previous agreement to the contrary’”) (quoting 50 U.S.C. § 4042(a)).

waivers.⁸ And certain state laws similarly prohibit or restrict the use of waivers in consumer contracts.⁹

Analysis

The CFPB is issuing this Circular to emphasize that covered persons who include unlawful or unenforceable terms in their consumer contracts may violate the CFPA’s prohibition on deceptive acts or practices.¹⁰

Covered persons may violate the CFPA’s prohibition on deceptive acts or practices if they include terms, including waiver provisions, in their consumer contracts that are rendered unlawful or unenforceable by federal or state law. Under the CFPA, a representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material. A representation is “material” if it “involves information that is important to consumers and, hence, likely to affect their choice of, or *conduct regarding*, a product.”¹¹ A contractual provision stating that a consumer agrees not to exercise a legal right is likely to affect a

⁸ See 16 CFR part 442(a)(2) (FTC’s 1984 Credit Practices Rule, prohibiting the use of contract terms purporting to waive a consumer’s state law right to block creditors from seizing personal or real property of the consumer in which they do not hold security interests). The FTC also has interpreted Section 604(b)(2)(A) of the Fair Credit Reporting Act (FCRA) to prohibit the inclusion of a waiver of consumer rights in a disclosure form required under that section, observing that “it is a general principle of law that benefits provided to citizens by federal statute generally may not be waived by private agreement unless Congress intended such a result.” FTC, Division of Credit Practices, Staff Opinion Letter (June 12, 1998), 1998 WL 34323756, at *1 (citing *Brooklyn Savings Bank v. O’Neill*, 324 U.S. 697 (1945)). In addition, while not an express prohibition on waivers, the FTC’s Preservation of Consumers’ Claims and Defenses rule, commonly known as the “Holder Rule” and also enforced by the CFPB, requires sellers of goods or services to consumers to include a provision in their finance contracts that ensures that if another person holds the loan or lease a consumer uses to finance acquisition of a good or service from a seller or lessor, then the holder is subject to the same consumer rights and defenses that the consumer had with respect to the seller or lessor, thereby emphasizing the importance of preserving consumer rights. 16 CFR part 433.

⁹ For instance, the California Consumer Privacy Act affords consumers certain rights to know how their information will be used, instructs businesses not to sell consumers’ personal information, and deems “void and unenforceable” any contractual provision “that purports to waive or limit in any way rights under this title, including, but not limited to, any right to a remedy or means of enforcement.” See generally Cal. Civ. Code sec. 1798.100 *et seq.* described at <https://oag.ca.gov/privacy/ccpa>; Cal. Civ. Code sec. 1798.192. Further, certain state laws, including those of California, Illinois, Kansas, and Tennessee, contain outright prohibitions of waivers of legal protections in general consumer protection laws. See Cal. Civ. Code. sec. 1751 (barring waivers of protections under California Consumers Legal Remedies Act); Ill. St. Ch. 815 sec. 505(10c), Waiver or modification (barring waiver or modification of protections under consumer fraud and deceptive practices statute); Kan. Stat. 50-625(a), Waiver (generally prohibiting waivers of rights or benefits under the Kansas Consumer Protection Act, unless otherwise specified in the statute); Tenn. Stat. 47-18-113(a) (generally prohibiting waivers “by contract, agreement, or otherwise” of provisions of the Tennessee Consumer Protection Act of 1977).

¹⁰ Covered persons also should comply with other consumer protection laws enforceable by the CFPB that may apply to their conduct, including but not limited to EFTA / Regulation E, RESPA / Regulation X, and TILA / Regulation Z.

¹¹ *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)) (emphasis added).

consumer’s willingness to attempt to exercise that right in the event of a dispute. Moreover, certain categories of information, including express representations, are presumptively material.¹²

In the recent compliance bulletin noted above, the CFPB reminded covered persons that they could be liable under the CFPA if they deceive consumers using form contract restrictions on consumer reviews that are unenforceable.¹³ The CFPB explained that “including an unenforceable material term in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable,” and that “disclaimers in a contract such as ‘subject to applicable law’ do not cure the misrepresentation caused by the inclusion of an unenforceable contract term.”¹⁴ Similarly, qualifying a provision that purports to waive a consumer right with “except where unenforceable” is unlikely to cure the provision’s misleading or material nature. Neither do disclaimers that are issued after the fact.¹⁵

CFPB supervisory examiners have identified several violations of the CFPA’s prohibition on deception stemming from covered persons’ use of unlawful or unenforceable contract terms and conditions.¹⁶ In addition, in several prior enforcement matters, the CFPB has found covered persons to have violated the CFPA by including in contracts for consumer financial products or services terms that are unlawful or unenforceable under federal or state law, such as waivers that are prohibited by federal or state law. For example, the CFPB found that a respondent bank

¹² See, e.g., *CFPB v. Chou Team Realty LLC*, Case No. 8:20-cv-00043-SB-ADS, 2021 WL 4077110, at *4 (C.D. Cal. Aug. 10, 2021) (citing *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994)); *FTC v. NCH, Inc.*, Civ.A. No. CV-S-94-138LDG, 1995 WL 623260, at *8 (D. Nev. May 25, 1995) (“express representations that are shown to be false are presumptively material”) (citing *Cliffdale Assocs.*, 103 F.T.C. at 168, 182).

¹³ CFPB, Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews (Mar. 22, 2022), https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf (“Bulletin 2022-05”).

¹⁴ *Id.* at 4-5; cf. *Ruth v. Triumph P’ships*, 577 F.3d 790, 801-02 (7th Cir. 2009) (“To threaten to take some action ‘to the extent permitted by law[]’ . . . is to imply that, under some set of circumstances and to some extent, the law actually permits that action to be taken.”).

¹⁵ Bulletin 2022-05 at 5 (citing *FTC v. IAB Marketing Assocs., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014)).

¹⁶ See Supervisory Highlights: Summer 2015, at 15, available at https://files.consumerfinance.gov/f/201506_cfpb_supervisory-highlights.pdf (deceptive waivers of borrowers’ rights in mortgage loan agreements that were unenforceable under Regulation Z, implementing TILA); Supervisory Highlights: Fall 2015, at 17, available at https://files.consumerfinance.gov/f/201510_cfpb_supervisory-highlights.pdf (same); Supervisory Highlights: Summer 2017, 82 FR 48703, 48708 (Oct. 19, 2017) (deceptive waivers of borrowers’ rights in loss mitigation agreements that were unenforceable under Regulation Z, implementing TILA); Supervisory Highlights, Issue 24, Summer 2021, 86 FR 36108, 36117 (July 8, 2021) (deceptive waivers of rights in security deed riders that were unenforceable under Regulation X, implementing the Real Estate Settlement Procedures Act); Supervisory Highlights, Issue 28, Fall 2022, 87 FR 72449, 72455 (Nov. 25, 2022) (deceptive waiver of borrowers’ rights in loan security agreements that was unenforceable under Regulation Z, implementing TILA).

engaged in a deceptive practice under the CFPA when it represented to consumers that because they signed a deposit agreement including broad language directing the bank not to contest legal process, consumers had waived their right to hold the bank liable for improperly responding to garnishment notices; in fact, regardless of the language in the account agreement, consumers had the right to challenge the garnishments.¹⁷ In another matter, the CFPB found that a respondent auto loan servicer violated the CFPA’s deception prohibition when it used loan extension agreements or written confirmations that included language that created the net misimpression that consumers could not exercise bankruptcy protection rights, which was false.¹⁸ In fact, an agreement to waive an individual’s right to file for bankruptcy is void as against public policy,¹⁹ rendering terms that purport to waive such right generally unenforceable. The CFPB found in a different matter that a respondent non-bank remittance transfer provider engaged in a deceptive act or practice in violation of the CFPA when it made misleading statements in disclosures purporting to limit consumers’ error resolution rights, in violation of EFTA and the Remittance Rule.²⁰ And, in a recent report, the CFPB highlighted that certain student tuition payment plan agreements and financial responsibility agreements “include terms and conditions that purport to waive consumers’ legal protections, limit how consumers enforce their rights, or misrepresent the rights or protections available to consumers under existing law.”²¹ Some of these terms and conditions, such as purported waivers of the right to retain counsel and the right to seek discharge in bankruptcy proceedings, are likely unenforceable and thus similarly raise deception risk.

As these examples demonstrate, the inclusion of unlawful or unenforceable terms and conditions in consumer contracts is likely to mislead a reasonable consumer into believing that the terms are lawful and/or enforceable, when in fact they are not. Further, the representations made by the presence of such terms are often material, presumptively so when they are made expressly. In particular, consumers are unlikely to be aware of the existence of laws that render the terms or conditions at issue unlawful or unenforceable, so in the event of a dispute, they are

¹⁷ In the Matter of Bank of America, N.A. (2022-CFPB-0002), <https://www.consumerfinance.gov/enforcement/actions/bank-of-america-na/>.

¹⁸ In the Matter of Nissan Motor Acceptance Corp. (2020-BCFP-0017), <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/nissan-motor-acceptance-corporation/>.

¹⁹ See 11 U.S.C. 524(a) (providing that a bankruptcy discharge under title 11 voids judgments and operates as an injunction against the commencement or continuation of an action “whether or not discharge of such debt is waived”).

²⁰ In the Matter of Trans-Fast Remittance LLC, also d/b/a New York Bay Remittance (2020-BCFP-0010), <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/trans-fast-remittance-llc/>.

²¹ CFPB, Tuition Payment Plans in Higher Education (Sept. 2023), at 29-30, available at https://files.consumerfinance.gov/f/documents/cfpb_tuition_payment_plan_report_2023-09.pdf.

likely to conclude they lawfully agreed to waive their legal rights or protections after reviewing the contract on their own or when covered persons point out the existence of these contractual terms and conditions. Deceptive acts and practices such as these pose risk to consumers, whose rights are undermined as a result, and distort markets to the disadvantage of covered persons who abide by the law by including only lawful terms and conditions in their consumer contracts.

Thus, the inclusion of unlawful or unenforceable terms in consumer contracts, including unlawful or unenforceable waiver provisions, may violate the CFPA's prohibition on deceptive acts or practices.

About Consumer Financial Protection Circulars

Consumer Financial Protection Circulars are issued to all parties with authority to enforce federal consumer financial law. The Consumer Financial Protection Bureau (CFPB) is the principal federal regulator responsible for administering federal consumer financial law, *see* 12 U.S.C. 5511, including the Consumer Financial Protection Act's prohibition on unfair, deceptive, and abusive acts or practices, 12 U.S.C. 5536(a)(1)(B), and 18 other "enumerated consumer laws," 12 U.S.C. 5481(12). However, these laws are also enforced by state attorneys general and state regulators, 12 U.S.C. 5552, and prudential regulators including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the National Credit Union Administration. *See, e.g.,* 12 U.S.C. 5516(d), 5581(c)(2) (exclusive enforcement authority for banks and credit unions with \$10 billion or less in assets). Some federal consumer financial laws are also enforceable by other federal agencies, including the Department of Justice and the Federal Trade Commission, the Farm Credit Administration, the Department of Transportation, and the Department of Agriculture. In addition, some of these laws provide for private enforcement.

Consumer Financial Protection Circulars are intended to promote consistency in approach across the various enforcement agencies and parties, pursuant to the CFPB's statutory objective to ensure federal consumer financial law is enforced consistently. 12 U.S.C. 5511(b)(4). *Consumer Financial Protection Circulars* are also intended to provide transparency to partner agencies regarding the CFPB's intended approach when cooperating in enforcement actions. *See, e.g.,* 12 U.S.C. 5552(b) (consultation with CFPB

by state attorneys general and regulators); 12 U.S.C. 5562(a) (joint investigatory work between CFPB and other agencies).

Consumer Financial Protection Circulars are general statements of policy under the Administrative Procedure Act. 5 U.S.C. 553(b). They provide background information about applicable law, articulate considerations relevant to the CFPB's exercise of its authorities, and, in the interest of maintaining consistency, advise other parties with authority to enforce federal consumer financial law. They do not restrict the CFPB's exercise of its authorities, impose any legal requirements on external parties, or create or confer any rights on external parties that could be enforceable in any administrative or civil proceeding. The CFPB Director is instructing CFPB staff as described herein, and the CFPB will then make final decisions on individual matters based on an assessment of the factual record, applicable law, and factors relevant to prosecutorial discretion.