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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

RIN 3170-AB14

Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Proposed rule with request for public comment.

SUMMARY: The Consumer Financial Protection Act of 2010 (CFPA) requires the Consumer Financial Protection Bureau (Bureau or CFPB) to monitor markets for consumer financial products and services for risks to consumers in order to support the various statutory functions of the CFPB, and to conduct a risk-based nonbank supervision program for the purpose of assessing compliance with Federal consumer financial law (among other purposes). Pursuant to these authorities, the CFPB is proposing a rule to require that nonbanks subject to its supervisory authority, with limited exceptions, register each year in a nonbank registration system established by the CFPB information about their use of certain terms and conditions in form contracts for consumer financial products and services that pose risks to consumers. In particular, these nonbanks would be required to register if they use specific terms and conditions defined in the proposed rule that attempt to waive consumers' legal protections, to limit how consumers enforce their rights, or to restrict consumers' ability to file complaints or post reviews. To facilitate public awareness and oversight by other regulators including the States, the Bureau is proposing to publish information identifying registrants and their use of these terms and conditions.

DATES: Comments should be received on or before [INSERT DATE 60 DAYS AFTER

PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments, identified by Docket No. CFPB-2023-0002 or RIN 3170-AB14, by any of the following methods:

- *Federal eRulemaking Portal*: *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email*: *2023-NPRM-ContractsRegistry@cfpb.gov*. Include Docket No. CFPB-2023-0002 or RIN 3170-AB14 in the subject line of the message.
- *Mail/Hand Delivery/Courier*: Comment Intake—Nonbank Registration and Collection of Contract Information, Consumer Financial Protection Bureau, c/o Legal Division Docket Manager, 1700 G Street NW, Washington, D.C. 20552. Because paper mail in the Washington, D.C. area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically.

Instructions: The Bureau encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *https://www.regulations.gov*.

All comments, including attachments and other supporting materials, will become part of the public record and are subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Comments will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Owen Bonheimer, Senior Counsel, Office of Supervision Policy, at 202-435-7700. If you require this document in an alternative electronic

format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

The proposal would establish a Bureau system for registration of nonbanks that use covered terms or conditions, as described below, in a new part 1092 in title 12 of the Code of Federal Regulations. Proposed subpart C would require annual registration by most nonbanks subject to the Bureau's supervisory authority under section 1024(a) of the CFPA[1] when they use certain terms or conditions that seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce or exercise their rights.[2] With limited exceptions, including an exception for certain small entities,[3] supervised registrants would be required to register annually in the system by submitting or updating their identifying information as well as information about their use of covered terms or conditions. The Bureau will provide filing instructions with details on how to register, the implementation date for the registration system, and the annual registration date. Under the proposal, the Bureau would publish this information on its website and potentially in other forms, as permitted by applicable law and described further in § 1092.303 of the proposed rule.

In particular, the Bureau is generally proposing 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

[1] 12 U.S.C. 5514(a).

[2] For brevity, the proposal refers to these nonbanks as "supervised nonbanks."

[3] Proposed § 1092.301(h) of the proposed rule would include certain exclusions from the registration requirements, including an exclusion for nonbanks with less than $1 million in annual receipts from offering or providing certain consumer financial products or services that would make the nonbank subject to the Bureau's supervisory authority.

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 defines these terms and conditions as covered terms and conditions. Covered terms and conditions would be covered by the proposal whether they are legally enforceable or not.[4]

Consistent with the risks to consumers posed by covered terms and conditions contained in form contracts as described below, Congress, States, the courts, the Bureau, the Federal Trade Commission (FTC), and other governmental bodies periodically have restricted their use in some contexts. In its statutory risk-based nonbank supervision program and in other activities, the Bureau also has identified risks posed by covered terms and conditions contained in form contracts. In addition, some States have begun to require registration and publication of form contracts in one market (private student lending).

The Bureau is proposing this rule, pursuant to CFPA sections 1022(b) and (c) and section 1024(b), to facilitate the Bureau's market monitoring functions and its risk-based supervisory processes, including by identifying an important subset of non-bank covered persons and the covered terms and conditions they use in form contracts for the consumer financial products or services they offer or provide. In exercise of its authorities discussed in part II.C.3 of the proposal, and consistent with general standards for transparency of government data, the Bureau preliminarily has determined that the Bureau would publish the information it collects as permitted by law and described in the proposed rule. Publishing this information would facilitate

[4] For brevity, the proposal generally uses the phrase "waivers and limitations" on consumer legal protections broadly, to include terms and conditions that seek to impose waivers and limitations whether or not they are enforceable. *See, e.g., Waiver*, *Black's Law Dictionary* (11th ed. 2019) (alternate definitions for the relinquishment or abandonment of a right, and for an instrument seeking to have that effect). This broad framing is reflected in the scope of proposed § 1092.301(d), which covers both effective and purported waivers and limitations, as discussed in the section-by-section analysis in part V below.

public awareness and oversight by other regulators of the use of covered terms and conditions including those that waive or limit consumer protections under State law and Tribal law.

The Bureau proposes to establish the registry to monitor risks to consumers from the use of covered terms or conditions in form contracts in today's marketplace and to inform its various functions, including supervision, enforcement, consumer education, and rulemaking. Most immediately, the information collected by the registry would facilitate the Bureau's prioritization and implementation of examination work in its statutorily-mandated risk-based nonbank supervision program.

II. Background and Rationale for the Proposed Rule

Fair, transparent, and competitive markets for consumer financial products and services depend on fair, transparent, and competitive contracting with consumers. Form contracts are the dominant means of setting terms and conditions for consumer financial products and services in today's marketplace. However, consumers face risks when businesses use form contracts to impose terms and conditions that seek to waive consumer legal protections or to limit how consumers enforce their rights or post complaints or reviews. There is often little choice for people except to sign these form contracts due both to the market pervasiveness of form contracts and the critical role the products and services play in consumers' daily lives.

In recognition of these risks to consumers, over the past several decades, many Federal, State, Tribal, and local laws and regulations have limited the use of these types of terms and conditions, including in form contracts for consumer financial products and services. Examples, discussed in part II.B, include the 1984 FTC Credit Practices Rule, which, among other things, prohibits contract terms purporting to waive State laws protecting consumer assets from seizure by unsecured creditors. In addition, the 2016 Consumer Review Fairness Act 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. Several Federal consumer financial laws the Bureau administers also restrict the use of certain covered terms and conditions in the offering or

provision of consumer financial products and services, including in markets where the CFPB exercises supervisory authority. The CFPB preliminarily has determined that a nonbank registration system to continuously and systematically monitor and assess these risks to consumers is needed to support its functions in promoting a fair, transparent, and competitive consumer financial marketplace, including its statutorily-mandated risk-based non-bank supervision program.

CFPA sections 1022(c) and 1024(b), respectively, require the Bureau to monitor for risks to consumers in markets for consumer financial products and services, and to conduct a risk-based supervision program for nonbanks operating in markets the Bureau supervises. As discussed in part II.A below, the use of form contracts to set terms and conditions for consumer financial products and services in general poses a degree of risk to consumers, particularly as to consumer understanding. As elaborated in part II.B, certain terms and conditions that often appear in these form contracts either waive or limit enforcement or exercise of applicable legal protections, or purport to do so. Such waivers of and limitations on applicable legal protections often pose risks to consumers, as evidenced by: (a) examples of Federal laws, State laws, and Tribal laws summarized in part II.B and also discussed in part II.C.2 restricting or invalidating the use of covered terms and conditions in certain contexts; and (b) examples discussed in part II.C.2 suggesting the prevalence of, and potential for consumer harm caused by, the use of covered terms and conditions in markets supervised by the Bureau. The risks that covered terms and conditions pose to consumers vary in degree or magnitude. And the degree to which specific examples would be covered by the proposed rule also may depend on the precise wording and context of their terms and conditions analyzed in light of the specific provisions of the proposed rule. But any time a consumer legal protection is being relinquished or constrained pursuant to a term or condition contained in a form contract, some degree of risk to the consumer arises. For that reason, an assessment of the risk is warranted. Accordingly, for the reasons explained in part II.C and elsewhere in the proposal, the Bureau seeks to collect information to monitor and

assess risks posed by covered terms and conditions that supervised nonbanks use to waive or limit applicable legal protections in the offering or providing of consumer financial products or services.[5] In developing the proposal, the Bureau has considered alternative approaches to achieving these goals, as discussed below including in part II.D and the section-by-section analysis of the proposed rule in part V.

A. Use of Form Contracts Poses Risks to Consumer Understanding of Terms and Conditions

Form contracts that establish terms and conditions are a standard feature of markets for consumer financial products or services. In the Bureau's experience and expertise, virtually all consumer financial products and services the Bureau supervises are governed by or operate largely on the basis of a paper or electronic written contract with the consumer, and sometimes on the basis of multiple such contracts. The consumer may enter the contract directly with a provider such as a lender, loan servicer, debt collector, remittance provider, or in some cases, a consumer reporting agency. The contract typically defines how the product or service works and the rights and obligations of the consumer, the provider, and, sometimes, third parties hired by the provider such as a loan servicer or debt collector.

Consumers generally do not choose most contract terms and conditions in their agreements for consumer financial products or services. Form contracts often specify a fixed set of terms and conditions which the consumer typically must accept in their totality. While form contracts may memorialize certain conspicuous financially "core deal terms," like price, payment methods, and a few others, other contract terms and conditions appear in fine print among a variety of "non-core standard contract terms" that the business requires.[6]

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[5] The examples provided in part II illustrate the types of terms and conditions that may pose risks to consumers by purporting to waive or limit legal protections applicable to consumer financial products or services. As noted above, the scope of the proposed rule is informed by these examples but will not necessarily cover each and every one of them or similar examples. The proposed regulation text as further explained in the section-by-section analysis in part V would govern whether the proposed rule would cover a particular term or condition.

[6] Restatement (Third) of Consumer Contracts (Tentative Draft No. 2, approved at ALI 2022 Annual Meeting) at 1. For convenience, the proposal refers to this source simply as the Restatement.

This type of contracting is ubiquitous in the modern economy and gives rise to certain risks. According to a leading treatise on contract law published by the American Law Institute, the prevalence of "standard-form" consumer contracts throughout the United States presents a "fundamental challenge . . . arising from the asymmetry in information, sophistication, and stakes between the parties to the contracts—the business and consumers."[7] This form of contracting risks turning the overall agreement into what sometimes is referred to as an "adhesion contract." That name derives from the notion that the consumer must *adhere* to the terms and conditions in the form contract; they are presented to the consumer on a take-it-or-leave-it basis and are non-negotiable by the consumer. A defining characteristic of these terms and conditions is "the absence of meaningful choice on the part of the consumer."[8]

Consumers also lack an incentive to review fully the terms and conditions in form contracts that they cannot negotiate. Form contracts often are lengthy, with terms and conditions written by the provider, often in fine print. With the expansion of the digital consumer economy, online contracting with features such as "click-through" contracts are the norm. The terms and conditions in electronic form contracts may not be visible on the page where the consumer is asked to indicate their agreement; consumers may be required to do additional clicking or downloading to view the terms and conditions.[9] Some terms or conditions may be de-emphasized. In some cases, some companies may also engage in risky digital design practices – termed "dark patterns" – that obscure certain terms and conditions in adhesion contracts or the adhesion contract itself.[10]

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[7] *Id.* at 1.

[8] *Id.* sec. 5(b)(2).

[9] *See generally, e.g., id.* at 55-62 (discussing numerous court decisions on so-called browsewrap and clickwrap electronic contracting processes).

[10] *See generally* FTC Staff Report, "Bringing Dark Patterns to Light" (Sept. 2022) at 7 ("[s]ome dark patterns operate by hiding or obscuring material information from consumers, such as burying key limitations of the product or service in dense Terms of Service documents that consumers don't see before purchase"), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf; Restatement at 116-17 (discussing relationship between the use of dark patterns and risk of procedural unconscionability in the contracting process, discussed in this proposal at part II.B.5).

Studies confirm that consumers rarely read adhesion contracts.[11] These studies validate conventional wisdom recognized by other academic research.[12] Moreover, consumers generally focus attention on salient terms such as price and quantity.[13] As a result, providers of consumer financial products and services may seek to insert terms and conditions that pose risks to consumers who may not notice, until the consumer has a problem that they need to resolve or the terms and conditions face wider public scrutiny. In a recent reported example, a provider of consumer financial products and services inserted a term or condition that purported to provide for a substantial fine on users of a payment processing platform for promoting so-called "misinformation."[14]

In some cases, consumers may have nominal choices, such as to opt-out of a particular term or condition, or they are given notice of certain terms and conditions that they cannot negotiate, or both. And, depending on the facts and circumstances, these choices may be constrained; for example, some negative options may not present a meaningful choice.[15]

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[11] *See, e.g.,* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, "Does Anyone Read the Fine Print?, Testing a Law and Economics Approach to Standard Form Contracts," 43 U. Chicago J. of Legal Studies 1 (2014) (describing study finding one or two of every 1,000 retail software shoppers access the license agreements and that most of those who do access it read no more than a small portion), https://www.jstor.org/stable/10.1086/674424; Carl Schneider & Omri Ben-Shahar, "The Failure of Mandated Disclosure," 159 U. Penn. L. Rev. 647, 671 (2011) (reciting research that "suggests that almost no consumers read [contract] boilerplate, even when it is fully and conspicuously disclosed"), https://www.jstor.org/stable/41149884#metadata_info_tab_contents; Uri Benoliel & Shmuel Becher, "The Duty to Read the Unreadable," Boston Col. L. Rev. 2255, 2270-81 (2019) (discussing empirical research), https://lira.bc.edu/work/ns/508eab7d-ddca-4829-be55-7aa6be4820b1; Jeff Sovern, "The Content of Consumer Law Classes III," 22 J. Consumer L. 1 (2018) (reporting 2018 update to survey finding 57% of professors surveyed rarely or never read contracts), http://www.jtexconsumerlaw.com/V22N1/V22N1_Classes.pdf.

[12] *See generally* Ian Ayres, "The No-Reading Problem in Consumer Contract Law," 66 Stanford L. Rev. 546 (2014), https://ianayres.yale.edu/sites/default/files/files/The%20No%20Reading%20Problem(2).pdf; Ian Ayres & Gregory Klass, "Responses: One-Legged Contracting," 133 Harv. L. Rev. Forum 1 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/Ayres-Klass_Online.pdf.

[13] *See generally* Robert Hillman & Jeffrey Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 450–54 (2002) (discussing research on how cognitive factors affect consumer decisions related to terms and conditions in form contracts, including consumer focus on salient terms).

[14] Xinyi Wan, "PayPal's 'Misinformation' Fine Sparks Backlash," Harv. J. L. & Tech. (Nov. 1, 2022) (describing how payment processor updated terms and conditions to claim authority to impose a $2,500 "fine" on consumers for promoting "misinformation" and then removed the update after public criticism), https://jolt.law.harvard.edu/digest/paypals-misinformation-fine-sparks-backlash (last visited Nov. 30, 2022).

[15] FTC Enforcement Policy Statement Regarding Negative Option Marketing, 85 FR 60822, 60823 (Nov. 4, 2021) (discussing how negative option marketing and contracting are "widespread in the marketplace" and that FTC and States "regularly bring cases challenging a variety of harmful negative option practices"). *See also* CFPB, Supervisory Highlights, 87 FR 26727, 26737 (May 5, 2022) (discussing examiner findings of consumer reporting agency using "digital dark patterns" to impose recurring payments that are difficult to cancel).

Alternatively, a contract may provide a process for the consumer to opt into a term or condition such as a waiver or limitation. Either way, the business, not the consumer, defines the option and drafts the associated terms and conditions. As discussed further below in part II.C, the use of so-called non-core contract terms and conditions seeking to waive or limit consumer legal protections raises questions about a consumer's understanding of these terms and conditions.

B. Public Policy Recognizes Risks to Consumers Posed by Contract Terms and Conditions that Seek to Waive or Limit Applicable Legal Protections

Many providers of consumer financial products and services regularly use form contracts to impose one or more contract terms or conditions that may effectively strip consumers of legal protections or diminish their adequacy, either through an express waiver of rights or other legal protections, or a limitation on how consumers may seek to enforce or exercise their rights. In this proposal, the Bureau is focused on terms and conditions in form contracts that expressly seek to impose the following limitations on consumer rights and other legal protections: 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.

Express waivers, by definition, purport to extinguish legal protections otherwise applicable to consumer financial products and services. Some of these legal protections may afford consumers rights, such as the right to assert claims in a legal action. Even when terms and conditions do not purport to set forth such express waivers, they may impose significant limitations on a consumer's ability to bring a legal action, such as by capping liability or restricting the timing, venue, or forum for a consumer to file a private legal action to enforce an applicable consumer legal protection. These limitations, like waivers, may diminish the

adequacy of the consumer legal protections to which they apply. Arbitration agreements also generally foreclose a consumer's choice to bring legal actions in court, sometimes with limited exceptions for individual actions in small claims court. Informal mechanisms, like filing a complaint or posting a review online, provide another mechanism for consumers to assert their rights and to identify business practices that, in some cases, may signify non-compliance with applicable legal protections or their inadequacy. Contract terms and conditions that restrict or limit consumers' ability to take those steps thus also undermine consumers' ability to prevent or obtain relief for violations of their rights.

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. For example, Bureau research suggests that public and private enforcement actions often have not overlapped, such that private enforcement often plays an additive, not duplicative, role in supporting the rule of law.[16] Even when private and public enforcement overlap, private enforcement can set the stage for public enforcement by identifying risky or unlawful conduct. The Bureau also may consider both private and public enforcement actions as field market intelligence for its supervisory prioritization process discussed in part II.C.2 below.

Public policy has long recognized the risk covered terms and conditions pose to consumers. This part II.B discusses below numerous examples of public policies prohibiting or restricting covered terms and conditions, dating back to regulations that the FTC issued before the 2010 CFPA established the Bureau and some of which the Bureau also now enforces. These examples generally confirm that covered terms and conditions pose risks to consumers by

[16] CFPB, Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act section 1028(a) (2015) at sec. 1.4.8 (summarizing Bureau research indicating that class action and public enforcement resolutions often do not both address the same claims), https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/.

undermining or diminishing the adequacy of existing legal protections.[17] The Bureau requests comment on the risks to consumers indicated by these examples, and requests that commenters provide additional examples of Federal, State, or Tribal laws that prohibit or restrict the use of covered terms and conditions, as well as additional enforcement and supervisory actions applying these prohibitions or restrictions.

1. *Consumer protection statutes and regulations administered by the FTC including trade regulations enforced by the CFPB*

In 1975, the FTC promulgated a trade regulation, titled "Preservation of Consumers' Claims and Defenses" (also known as the Holder in Due Course Rule or the Holder Rule). The Holder Rule 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.[18] The FTC adopted this regulation in part to prohibit merchant creditors from including a "waiver of defenses" clause in their installment sale and lease agreements.[19] "A 'waiver of defenses' is the consumer's written agreement that his installment purchase contract may be treated like a promissory note in the event it is sold or assigned to a credit company."[20] Absent the Holder

[17] To be sure, existing law permits certain contractual waivers or limitations in consumer contracts. *Cf. United States v. Mezzanatto*, 513 U.S. 196, 203 (1995) (citing presumption that legal rights generally, and in the criminal law context, evidentiary protections, may be voluntarily waived), *cited by Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1170 (9th Cir. 2006) (noting exceptions including for waivers that contravene statutory policy). However, as discussed in this part II, several examples in statutes and regulations applicable to supervised nonbanks explicitly restrict when and how waivers can be obtained. And while an expressly-prohibited waiver may risk deceiving consumers as to the nature of their rights (in the face of an express public policy recognizing the importance of the particular right), the risk of such provisions is not limited to this deception, but rather derives from the consumers inability to exercise the affirmative right lost through the contract clause.

[18] 16 CFR part 433 (Holder Rule), https://www.ecfr.gov/current/title-16/chapter-I/subchapter-D/part-433. A "seller" is a person that, in the ordinary course of business, sells or leases goods or services to consumers. 16 CFR 433.1(j).

[19] *See* 40 FR 53506, 53507 (Nov. 15, 1975) (issuing final Holder Rule). FTC Staff Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (May 4, 1976) at 5, https://www.ftc.gov/system/files/documents/rules/holder-due-course-rule/760504hidcrule.pdf (last visited Dec. 30, 2022).

[20] *Id.*

Rule, when such a promissory note was assigned to a third-party, the third-party would take it free of any claim or defense the buyer would have against the seller.

In adopting the Holder Rule, the FTC also acknowledged "widespread public concern about mechanical abrogations of consumer rights"[21] and noted that associated economic injury "results from terms contained in form contracts" that "consumers rarely comprehend . . . ."[22] The FTC explained that the "waiver of defenses are presented to consumers on a take-it-or-leave-it basis. These contracts are drafted by sellers and creditors, and they are not susceptible to modification at the point of sale."[23]

The Bureau also enforces the Holder Rule,[24] which applies in important ways in markets the Bureau supervises described in part II.C.2. For example, the regulation covers many types of consumer automobile finance agreements. As a result, under the rule, a consumer who obtains automobile financing through a dealer has the right to assert claims and defenses that they have against the dealer, as against an indirect automobile finance company, when the dealer sells the financing to that company. The Holder Rule also applies to credit contracts used to finance the sale of services such as trade or vocational school agreements.[25] In addition, U.S. Department of Education regulations specify that, in certain circumstances, the holder of certain types of Federal student loans is subject to "all claims and defenses that the borrower could assert against the school with respect to that loan . . . ."[26]

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[21] *See* 40 FR at 53508.

[22] *Id.* at 53523.

[23] *Id.* at 53524.

[24] The Bureau included the Holder Rule among the list of enforceable rules and orders it identified upon transfer of authorities to the Bureau in July 2011, pursuant to CFPA section 1063(i). *See* 76 FR 43569, 43571 (July 21, 2011), https://www.gpo.gov/fdsys/pkg/FR-2011-07-21/pdf/2011-18426.pdf.

[25] 40 FR at 53524.

[26] 34 CFR 682.209(g) (describing rules for FFEL loan program). *See also* 34 CFR 685.206 (Direct Loan program borrower defense regulations).

The FTC also addressed the issue of waivers and limitation of consumer rights in form contracts in its 1984 Credit Practices Rule, which the Bureau also enforces.[27] This trade regulation prohibits, among other practices, 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.[28] In adopting that rule, the FTC found that "creditors frequently include clauses in their consumer contracts that require consumers to waive [such] statutory protections."[29] It determined that such waivers can cause substantial injury because, without these assets, "the consumer can lose the basic necessities of life."[30] The FTC also determined that, when entering into contracts, "most consumers are neither aware of the rights they have under [asset seizure] exemption statutes nor of the presence or significance of waiver clauses in their contracts."[31] For one thing, the waivers relate to "elements of a transaction that are distant in time and probability."[32] As a result, the FTC found consumers could not bargain over this provision or shop for a contract without one.[33] Yet the FTC found that, when the time comes for collection of a debt, the waivers function as "*in terrorem* collection devices[.]"[34]

The 1984 FTC rule also prohibits creditors from using contract terms that waive consumers' due process rights, such as in the event of a future debt collection lawsuit.[35] The FTC similarly found that consumers either are not aware of or rarely understand the significance

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[27] 76 FR at 43571.

[28] 16 CFR 442(a)(2).

[29] 49 FR 7740, 7769 (Mar. 1, 1984), https://archives.federalregister.gov/issue_slice/1984/3/1/7708-7793.pdf#page=82.

[30] *Id.* at 7744.

[31] *Id.* at 7770.

[32] *Id.* at 7747.

[33] *Id.*

[34] *Id.* at 7769.

[35] 16 CFR 442(a)(1).

of these clauses, which are framed in technical, confounding language and presented in small print; thus, consumers cannot bargain over them or shop for alternatives.[36]

In addition, Congress, in the 2016 Consumer Review Fairness Act, generally prohibited the use of form contracts that limit how consumers communicate their reviews, assessments, or similar analysis of the sale of goods or services.[37] The statute also invalidates these types of contract terms and conditions.[38] As the legislative history noted, these so-called "[g]ag clauses have been imposed by many different types of businesses and come in different forms."[39] Congress noted that such clauses may "become widely adopted[.]"[40] Under the statute, use of these types of contract terms and conditions constitutes an unfair or deceptive act or practice.[41] The statute specifically authorizes enforcement by the FTC and State attorneys general. The FTC recently brought enforcement actions for violations of this statute by providers of credit repair services and a real estate investment training scheme.[42] One of the clauses purported to explicitly restrict the filing of complaints with government authorities.[43]

In early 2022, the Bureau issued a bulletin noting the public policy against that use of these types of terms and conditions. The bulletin warned that their use in contracts for consumer financial products and services also may constitute an unfair, deceptive, or abusive act or

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[36] 49 FR at 7749, 7753.

[37] 15 U.S.C. 45b(c); Consumer Review Fairness Act of 2016, Pub. L. 114-258 (Dec. 14, 2016), 130 Stat. 1355.

[38] *Id.* at 45b(b). California law also includes a similar protection against these types of terms and conditions in contracts for the sale or lease of consumer goods or services. Cal. Civ. Code 1670.8.

[39] H.R. Rep. No. 114-731 at 5 (Sept. 9, 2016).

[40] *Id.*

[41] 15 U.S.C. 45b(d)(1).

[42] *See FTC v. Grand Teton Professionals, LLC, et al.*, Case No. 19cv933 (D. Conn) (Complaint filed June 17, 2019), ¶¶ 62-63, 80-82, and 127-35; *FTC & Utah Div. of Cons. Prot. v. Zurixx, LLC*, Case No. 19cv713 (D. Utah) (Second Amended Complaint filed Feb. 12, 2021), ¶¶ 115-20, and 150-55.

[43] *Zurixx* Second Amended Complaint, ¶ 116.

practice (UDAAP). The bulletin stated that the Bureau intends to prioritize scrutiny of these provisions in its supervisory and enforcement activities.[44]

Finally, the FTC also administers the Credit Repair Organizations Act (CROA),[45] which prohibits waivers and attempts to obtain waivers of CROA's legal protections. The FTC has applied CROA to, among other businesses, foreclosure relief services.[46]

2. Federal consumer financial laws administered by the CFPB

Several other provisions in statutes and regulations the Bureau enforces include prohibitions and restrictions on waivers and limitations on the enforcement of consumer legal protections. These examples also reflect public policy concerns with the risks covered terms and conditions pose to consumers.

Regulation Z implements the Truth-in-Lending Act (TILA) prohibition against including, in a residential mortgage loan or open-ended consumer credit plan secured by the principal dwelling, terms requiring arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling claims arising out of the transaction.[47] Regulation Z also implements the TILA prohibition against applying or interpreting terms in agreements related to these transactions to bar a consumer from bringing a claim in court in connection with any alleged violation of Federal law.[48]

Several other provisions in the Bureau's consumer mortgage regulations also restrict waivers of specified rights or other protections, such as waivers of the right of rescission of

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[44] CFPB Bulletin 2022-05, "Unfair and Deceptive Acts or Practices That Impede Consumer Reviews," 87 FR 17143 (Mar. 22, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-policy-on-contractual-gag-clauses-and-fake-review-fraud/.

[45] *See, e.g., FTC v. United Credit Adjusters*, Case No. 09-cv-798 (D. N.J.) (consent order entered Feb. 4, 2010, with foreclosure relief firm resolving, among other allegations, an alleged violation of CROA); *FTC v. Lalonde*, 545 F. Appx. 825 (11th Cir. 2013) (upholding trial court decision finding violations of CROA by firm offering credit repair and foreclosure relief services).

[46] 15 U.S.C. 1679f(a)-(b).

[47] 12 CFR 1026.36(h)(1), implementing 15. U.S.C. 1639c(e)(1). For this reason, the Bureau's 2015 Arbitration Study generally did not study the mortgage market. *See, e.g.,* Arbitration Study sec. 5 n.34, sec. 8 at 8 & n.24.

[48] 12 CFR 1026.36(h)(2), implementing 15. U.S.C. 1639c(e)(3).

certain mortgage transactions, as well as the right to receive certain disclosures within a certain time period in advance of consummation.[49] By restricting the circumstances in which these waivers can be lawfully obtained, these regulations illustrate the risks that the waivers pose. For example, mortgage lenders cannot use "[p]rinted forms" for purposes of obtaining a waiver of the right of rescission.[50] In addition, consumers can only waive most of these protections when necessary to obtain a loan to meet a "bona fide personal financial emergency."[51] Federal regulators have rejected requests to allow such waivers in a broader set of circumstances. For example, in rejecting a request to broaden the exception to the general prohibition against waiving the right of rescission for certain mortgage transactions, the Federal Reserve Board stated in a 1981 rule as follows:

> before accepting a waiver [of the right of rescission], creditors must assure themselves that the reasons given for the waiver are both substantial and credible and that the waiver is in all respects bona fide. This requirement, combined with the prohibition on the use of preprinted forms, will prevent abusive practices, while at the same time permitting consumers to waive the rescission right in appropriate circumstances.[52]

More broadly across the markets the Bureau supervises, including when making payments to supervised nonbanks, consumers enjoy important protections afforded by the Electronic Fund Transfer Act (EFTA) and its implementing regulation, Regulation E.[53] EFTA prohibits contract terms that contain a "waiver of any right conferred" by EFTA.[54] Recognizing

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[49] 12 CFR 1026.15(e) (rescission); 12 CFR 1026.23(e) (same); 12 CFR 1026.19(a)(3), (e)(1)(v), (f)(1)(iv) (timing requirements for delivery of certain mortgage disclosures); 12 CFR 1026.31(c)(1)(iii) (timing requirement for delivery of certain disclosures for high-cost mortgages); 12 CFR 1024.10(c) (timing requirement for delivery of settlement statement); 12 CFR 1002.14(a)(1) (timing requirement for providing copy of appraisal or other writing valuation in certain mortgage transactions).

[50] 12 CFR 1026.15(e).

[51] *See* 12 CFR 1026.15(e); 12 CFR 1026.23(e); 12 CFR 1026.19(a)(3), (e)(1)(v), (f)(1)(iv); 12 CFR 1026.31(c)(1)(iii).

[52] Federal Reserve Board, Credit; Truth in Lending; Revision of Regulation Z, Final Rule, 46 FR 20848, 20872 (Apr. 7, 1981), https://www.govinfo.gov/content/pkg/FR-1981-04-07/pdf/FR-1981-04-07.pdf#page=190.

[53] 15 U.S.C. 1693 *et seq.*; 12 CFR part 1005.

[54] 15 U.S.C. 1693l.

that depriving consumers of a remedy undermines the right itself, EFTA section 914 also prohibits waiver of any "cause of action" under EFTA.[55]

3. Federal consumer bankruptcy statute protections

The Federal bankruptcy statute provides a legal process for liquidating the debts of consumers who cannot repay their debts. A fundamental goal of the bankruptcy laws enacted by Congress is to give debtors a financial "fresh start" from burdensome debts.[56] The Federal bankruptcy statute generally stays collection on most consumer debts during a bankruptcy proceeding,[57] which generally can result in discharge of those debts (under Chapter 7 of the Bankruptcy Code[58]) or a plan to facilitate repayment of those debts (under Chapter 13 of the Bankruptcy Code[59]). Consumers generally initiate the bankruptcy proceeding, which is overseen by the bankruptcy courts and bankruptcy trustees. The Bureau does not administer or enforce the Bankruptcy Code. However, Federal consumer financial law generally applies to consumer financial product and service providers' communications with consumers and other acts and practices relating to bankruptcy protections and the bankruptcy process.[60]

A number of bankruptcy courts long have held that creditors cannot enforce contracts purporting to waive consumers' statutory right to file for bankruptcy protection under the Federal bankruptcy statute.[61] Relatedly, since 1978, the Federal bankruptcy statute has explicitly stated

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[55] *Id.*

[56] *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (noting that a primary purpose of the bankruptcy law is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit [the debtor] to start afresh . . .," *citing Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554 (1915), and elaborating that the bankruptcy law "gives the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").

[57] 11 U.S.C. 362.

[58] *See generally* 11 U.S.C. chapter 7.

[59] *See generally* 11 U.S.C. chapter 13.

[60] *See, e.g.,* CFPB, Supervisory Highlights (Fall 2014) at 2.5.5 (describing examiner findings that one or more supervised entities were misrepresenting to consumers that student loans are never dischargeable in bankruptcy); Supervisory Highlights (Fall 2015) at 2.5.3 (same); Supervisory Highlights (Spring 2022) at 2.2.6 (describing examiner findings that certain furnishers violated the Fair Credit Reporting Act by, among other things, failing to promptly update account statutes to reflect the discharge of debt in bankruptcy).

[61] *See, e.g., In re Weitzen*, 3 F. Supp. 698, 699 (S.D.N.Y. 1933) (holding that a contract provision seeking to waive the benefit of bankruptcy is unenforceable because it would "frustrate the object of the Bankruptcy Act," which

that, in the event of discharge of a debt in bankruptcy, the debt may be voided "whether or not discharge of such debt is waived" by contract.[62] As discussed in part II.C.2 below, however, some lenders nevertheless may use contract terms that attempt or purport to limit or waive bankruptcy protections such as these.

4. Federal statutory protections for military families including protections enforced by the CFPB

Federal law also affords servicemembers other relevant protections when taking out mortgages and installment loans, including from lenders supervised by the Bureau such as mortgage lenders, payday lenders, private student lenders, and automobile finance lenders. The Bureau enforces the Military Lending Act (MLA), which covers many types of consumer credit, including payday and private student loans.[63] The MLA and its implementing regulations generally prohibit terms in 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 . . . ."[64] The MLA and its implementing regulations also prohibit arbitration agreements in these transactions.[65] These provisions do not apply, however, to certain consumer credit transactions, such as residential mortgage or automobile

would be "nullified in the vast majority of debts arising out of contracts, if this were permissible"); *In re Madison*, 184 B.R. 686, 690-692 (E.D. Pa. Bktcy. 1995) ("an agreement not to file bankruptcy is unenforceable because it violates public policy"). *See also* Paul R. Hage, "Border Control: The Enforceability of Contractual Restraints on Bankruptcy Filings, Part 1" (Dec. 14, 2019) ("Courts almost universally agree that the right to file a petition in bankruptcy is fundamental and cannot be waived . . . because of the strong public policy favoring access to bankruptcy relief."), https://www.americanbar.org/groups/business_law/publications/blt/2019/12/border-control/ (last visited Dec. 2, 2022).

[62] 11 U.S.C. 524(a)(1). *See* Bktcy. Reform Act of 1978, Pub. L. 95-598 (Nov. 6, 1978), 92 Stat. 2549, 2592 (codifying section 524(a)(1) provisions on non-waiver of discharge); H.R. Rep. No. 95-595 (Sept. 8, 1977) at 366 (anti-waiver provision "intended to prevent waiver of discharge of a particular debt from defeating the purposes" of the discharge provision in the bankruptcy statute); S. Rep. No. 95-989 at 80 (July 14, 1978) (same).

[63] 10 U.S.C. 987(f)(6) (authorizing Bureau enforcement of the Military Lending Act). *See also* 32 CFR part 232 (regulations implementing the Military Lending Act).

[64] 32 CFR 232.8(b), implementing 10 U.S.C. 987(e)(2).

[65] 10 U.S.C. 987(e)(3); 32 CFR 232.8(c).

finance transactions.[66] Congress enacted the MLA in 2006 at the recommendation of the Department of Defense, which in a 2006 report on predatory lending to servicemembers noted:

> Service[]members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service[]member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver is not a matter of "choice" in take-it-or-leave-it contracts of adhesion.[67]

The Bureau has alleged MLA violations with respect to the use of contract terms and conditions prohibited by the MLA, including when short-term small-dollar lenders allegedly provided servicemembers with loans at high rates prohibited by the MLA under contracts that included arbitration agreements.[68]

In addition, the Servicemembers Civil Relief Act (SCRA), among other things, allows servicemembers to reduce interest rates on preservice loans and includes certain protections against default judgments and automobile repossessions.[69] The SCRA also requires that any time period for servicemembers to file legal action or to enjoy certain defenses in mortgage transactions exclude periods of military service.[70] The SCRA further imposes specific requirements for any contractual waiver of a right or other protection afforded by the SCRA.[71] However, in a recent report, the U.S. Government Accountability Office (GAO) found that most of the stakeholders GAO interviewed who have regular contact with servicemembers or their

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[66] *See, e.g.,* 32 CFR 232.3(f)(2).

[67] Department of Defense Report (Aug. 6, 2006) at 7-8, https://apps.dtic.mil/sti/pdfs/ADA521462.pdf (last visited Dec. 2, 2022).

[68] *CFPB v. LendUp Loans, LLC*, Case No. 20cv8583 (Complaint filed Dec. 4, 2020) (N.D. Cal.), ¶¶ 13-16 (arbitration count), https://www.consumerfinance.gov/enforcement/actions/lendup-loans-llc/; *CFPB v. First Cash, Inc. & Cash America West, Inc.*, Case No. 21cv1251 (Complaint filed Nov. 12, 2021) (N.D. Tex.), ¶¶ 22-25 (same), https://www.consumerfinance.gov/enforcement/actions/firstcash-inc-and-cash-america-west-inc/; *CFPB v. MoneyLion Technologies Inc. et al.*, Case No. 22cv8308 (Compliant filed Sept. 29, 2022) (S.D.N.Y.), ¶¶ 65-68 (same), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-moneylion-for-overcharging-servicemembers-trapping-consumers-in-costly-memberships/.

[69] *See* 50 U.S.C. 3937 (interest rate cap); 50 U.S.C.3931 (protections against default judgments); 50 U.S.C. 3952 (protections against automobile repossessions); 50 U.S.C. 3953 (mortgage protections).

[70] 50 U.S.C. 3936(a) (tolling of statute of limitations); 50 U.S.C. 3936(b) (excluding period of military service from any time period provided by law for the redemption of real property sold or forfeited to enforce a mortgage obligation).

[71] 50 U.S.C. 3918(a)-(c).

representatives said that "servicemembers do not understand the waivers they are asked to sign[.]"[72] And, in resolving claims of SCRA violations, the Department of Justice often imposes detailed constraints on how lenders may obtain these waivers in order to further limit risks to consumers.[73]

5. State laws and Tribal laws

As discussed in this part II.B.5 and also in part II.C below, a number of State laws and Tribal laws specifically prohibit or restrict contractual waivers of or certain limits on enforcement and exercise of important consumer legal protections. These State and Tribal laws reflect a judgment that waivers and other such limitations may undermine the adequacy of legal protections. Some of these legal protections are so fundamental that waiving or otherwise limiting their enforcement or exercise through consumer contracts is prohibited under State or Tribal law. Other State and Tribal laws set specific standards for waivers of certain consumer legal protections or limits on their enforcement or exercise. These anti-waiver prohibitions, waiver restrictions, and prohibitions and restrictions on other limits on enforcement and exercise of legal protections appear in a variety of State laws and Tribal laws, including some of those that prohibit unfair and deceptive acts and practices, some consumer lending statutes, and other statutes setting forth specific types of protections, as well as in the general principles of State common law of contracts. While not summarized in detail in this part II.B, other similar prohibitions also appear in regulations and ordinances adopted at the local level.[74]

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[72] GAO Rept. 21-550R, Servicemember Rights: Stakeholders Reported Servicemembers Have Limited Understanding about Waivers of Their Consumer Rights and Protections (June 29, 2021) at 4-7 (reporting that 12 of 15 stakeholders interviewed reported that servicemembers have limited understanding about waivers of their rights and protections under SCRA, and the other three said they did not know or did not respond).

[73] *See e.g., United States v. Sallie Mae, Inc., et al.*, Case No. 14cv600 (D. Del.), Consent Order (Sept. 29, 2014), ¶¶ 36.c, 37-38 (requiring Department of Justice (DoJ) approval of procedures for obtaining waivers of SCRA legal protections); *United States v. 3rd Generation, Inc. & California Auto Finance*, Case No. 18cv523 (C.D. Cal.), Consent Order (Mar. 12, 2019), ¶ 10.e; *United States v. Westlake Services, LLC*, Case No. 17cv7125 (C.D. Cal.), Settlement Agreement (Sept. 27, 2017), ¶ 10.e; *see also generally* DoJ SCRA settlement agreements, https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-scra.

[74] *See, e.g.,* New York City Admin. Code sec. 20-701(4) (providing that "the degree to which terms of the transaction require consumers to waive legal rights" shall be a factor in considering whether to regulate an act or practice in connection with the extension of consumer credit or the collection of consumer debt as a prohibited

For example, the California Consumer Privacy Act affords consumers certain rights to know how their information is used and to instruct businesses not to sell personal information of the consumer.[75] That statute further states that "[a]ny provision of a contract or agreement of any kind, including a representative action waiver, 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, shall be deemed contrary to public policy and shall be void and unenforceable."[76] California's consumer credit reporting agencies statute includes a similar anti-waiver provision.[77] Similarly, the Model Tribal Consumer Protection Code also encourages Indian Tribes to establish privacy protections that are non-waivable.[78]

In addition, several State and Tribal laws specifically prohibit or restrict waivers of protections against unfair and deceptive acts and practices. Michigan law defines prohibited unfair, unconscionable, or deceptive methods, acts, or practices to include "[e]ntering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it."[79] Texas law prohibits waivers of consumer legal protections under the State deceptive trade practices statute as contrary to public policy, unenforceable, and void unless certain conditions are met and "the consumer is not in a significantly disparate bargaining position."[80] Other State laws contain outright prohibitions of waivers of legal protections in

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unconscionable trade practice); S.F. Police Code sec. 2704 (prohibiting attempts by mortgage modification consultants to induce real property owners to waive rights under municipal mortgage modification regulations); City of Los Angeles Muni. Code sec. 47.107 (same).

[75] *See generally* Cal. Civ. Code sec. 1798.100 *et seq*. described at https://oag.ca.gov/privacy/ccpa.

[76] Cal. Civ. Code sec. 1798.192.

[77] Cal. Civ. Code sec. 1785.36.

[78] First Nations Development Institute, Model Tribal Consumer Protection Code (2018) Ch. II – Privacy Protection – section D ("[a]ny waiver of a provision of this title is contrary to public policy and is void and unenforceable"), https://www.firstnations.org/publications/model-tribal-consumer-protection-code/ (last visited Dec. 5, 2022).

[79] Mich. Code 445.903 sec 3(1)(t).

[80] Tex. Bus. & Com. Code sec. 17.42.

general consumer protection laws. Illustrative examples include the laws of California,[81] Illinois,[82] Kansas,[83] and Tennessee.[84] Finally, the Navajo Nation unfair trade practices statute broadly prohibits acts or practices that take advantages of a lack of consumer understanding of contract terms to an unreasonably unfair degree.[85]

Some State consumer lending laws also generally prohibit waivers, either outright or by provisions rendering them void and unenforceable. Illustrative examples include the Virginia usury statute,[86] the Louisiana consumer credit law,[87] and the Nebraska loan brokers statute.[88] Other State laws generally prohibit waivers for certain types of loan and loan-related products. For example, the Florida payday lending statute expressly prohibits waiver of its protections, including a mandatory cooling-off period between payoff on an existing payday loan and origination of a new payday loan.[89] Several other State payday and short-term small-dollar lending statutes include similar prohibitions, whether against waivers generally[90] or waivers of certain rights such as jury trial waivers not contained in permissible arbitration agreements.[91] In the automobile lending market, the California automobile sales financing statute and the New

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[81] Cal. Civ. Code. sec. 1751 (barring waivers of protections under California Consumers Legal Remedies Act).

[82] Ill. St. Ch. 815 sec. 505(10c), Waiver or modification (barring waiver or modification of protections under consumer fraud and deceptive practices statute).

[83] 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).

[84] Tenn. Stat. 47-18-113(a) (generally prohibiting waivers "by contract, agreement, or otherwise" of provisions of the Tennessee Consumer Protection Act of 1977). *See also* Tenn. Stat. 47-18-113(c) (specifying conditions for waivers of other consumer protections in Tennessee law).

[85] NNCA Ch. 7 sec. 1103.E.1, https://www.nnols.org/wp-content/uploads/2022/05/1-5.pdf.

[86] Va. Code. Ann. 6-2-306, Waiver of rights violative of public policy.

[87] La. R. S. 9:3513 (barring waivers or agreements to forego rights or benefits under Louisiana Consumer Credit Law, except for settlement of a claim disputed in good faith).

[88] Neb. Stat. 45-191.05, Waiver of sections; attempt; prohibited.

[89] Fl. Stat. 560.404(10)(e) (general prohibition on waivers); Fl. Stat. 560.404(19)-(20) (cooling-off period provisions).

[90] *See, e.g.,* Ks. Stat. 16a-2-404(10)(d)(iii) (prohibiting use of terms and conditions in which the consumer agrees not to assert a claim or defense arising out of the contract); Oh. Stat. 1321.41(G) (prohibiting short-term loan licensees from requiring the borrower to "waive the borrower's right to legal recourse under any otherwise applicable provision of state or federal law"); Ill. Stat. Ch. 815 sec. 122/4-5(10)(D) (prohibiting "a provision in which the consumer agrees not to assert any claim or defense arising out of the contract").

[91] Ill. Stat. Ch. 815 sec. 122/4-5(10)(B).

Mexico motor vehicle sales financing statute include general prohibitions on waivers, and in the mortgage market, the New Mexico mortgage foreclosure relief statute does the same.[92] And in the context of secured lending nationwide, Article 9 of the Uniform Commercial Code (UCC) – adopted in both State and Tribal laws – identifies numerous consumer legal protections that may not be waived or varied, including, among others, a prohibition on extrajudicial repossession without breach of the peace.[93] Article 9 also restricts waivers of other consumer legal protections, including several that apply in the event of default on the loan.[94] Some State laws also set forth additional applicable legal protections against certain waivers in contracts for the financing of the sale of goods and services.[95]

Other provisions of State and Tribal laws prohibit contract terms and conditions that limit how consumers can enforce applicable legal protections. The California automobile sales financing statute, for example, prohibits contract provisions that limit liability for legal remedies available to the consumer.[96] Tennessee law, for example, prohibits specifying an out-of-state forum for adjudication of claims arising under the Tennessee consumer protection statute.[97]

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[92] Cal. Civ. Code sec. 2983.7(a) & (c), Prohibition on certain provisions (prohibiting automobile sale finance agreements that contain waivers of claims or defenses of consumers); N.M. Stat. 58-19-12, Waiver ("Any waiver of the provisions of this act shall be unenforceable and void"); N.M. Stat. 47-15-5.G(1) (prohibiting including a provision in a foreclosure consulting contract that "attempts or purports to waive an owner's rights" under the New Mexico foreclosure relief statute).

[93] UCC 9-602, Waiver and Variance of Rights and Duties. *See, e.g.,* CNCA, title 80, sec. 9-602 (Cherokee nation secured lending code restricting waiver and variance of rights), https://attorneygeneral.cherokee.org/media/5upcrg3j/word-searchable-full-code.pdf. *See also* First Nations Development Institute, Model Tribal Consumer Protection Code (2018) Ch. IV – Rental-Purchase Agreements – sec. F.1.e (defining "waiver by the consumer of claims or defenses" as an example of "[p]rohibited rental-purchase agreement terms; practices" in automobile finance agreements); Ch. V – Repossessions of Personal Property – sec. D.4.c (prohibiting any seller from "attempt[ing] to obtain a waiver of this section from any consumer, or to obtain such a waiver"), https://www.firstnations.org/publications/model-tribal-consumer-protection-code/.

[94] UCC 9-624, Waiver (placing restrictions on waivers of certain rights to notice of disposition of collateral, to require disposition of collateral, and to redeem collateral). *See, e.g.,* CNCA title 80, sec. 9-624.

[95] *See, e.g.,* N.J. Stat. 17:16C-38.2. *See also* Nat'l Conf. of Commissioners on Uniform Laws, Revised Model Tribal Secured Transactions Act (May 2017), sec. 9-403(a) (model statute for Tribal use providing that waivers of rights and defenses not enforceable in consumer finance agreements related to sale or lease of goods or services), https://www.uniformlaws.org/committees/community-home?CommunityKey=1f31aa7f-74be-457e-904b-ba3b6d7d3646#:~:text=The%20Model%20Tribal%20Secured%20Transactions,secured%20credit%20to%20their%20members.

[96] Cal. Civ. Code sec. 2983.7(e).

[97] Tenn. Stat. 47-18-113(b).

Minnesota law similarly prohibits specifying an out-of-state forum for resolution of disputes related to certain short-term loans.[98] Idaho law prohibits contract terms shortening the statute of limitations in some circumstances.[99] Cherokee Nation law prohibits waiver of numerous provisions in arbitration agreements.[100]

Even when State statutory law may not expressly prohibit or restrict waivers or limitations on how consumers may enforce or exercise their rights, the Restatement of the law of consumer contracts further articulates how the State common law of contracts scrutinizes certain standard terms and conditions for unconscionability. A similar analysis also may be applied under some Tribal laws.[101] The doctrine of unconscionability protects consumers against (1) fundamentally unfair or unreasonably one-sided terms and conditions that are (2) imposed through a contracting process that results in unfair surprise or results from the absence of meaningful choice on the part of the consumer.[102] The common law of contracts describes two distinct aspects of unconscionability: substantive and procedural. As the American Law Institute has explained, when consumer contract terms and conditions are substantively unconscionable, they "undermine the substantive rights consumers acquired under the contract."[103] Examples of substantively unconscionable terms and conditions include terms and conditions that unreasonably limit either liability for a consumer's loss "by an intentional or negligent act or omission of the business" or "the consumer's ability to pursue or express a

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[98] *See, e.g.,* Minn. Stat. 47.601 sec. 2 (prohibiting certain terms and conditions in contracts for short-term loans, including, among others, "a provision choosing a forum for dispute resolution other than the state of Minnesota.").

[99] *See, e.g., DelJack, Inc. v. U.S. Bank Nat'l Ass'n*, 2012 WL 4482049 at *6-*7 (D. Idaho 2012) (applying Idaho Code 29-110(1) to invalidate attempt to use a standard contract term to shorten statute of limitation). Under Idaho law, "[e]very stipulation or condition in a contract . . . which limits the time within which [any party thereto] may thus enforce [their] rights, is void as it is against the public policy of Idaho." Idaho Code 29-110(1) (also qualifying that section 110(1) does not apply to arbitration agreement allowing arbitration in Idaho).

[100] CNCA title 11, Ch.8, sec. 1304.B & C.

[101] *See, e.g., Green Tree Servicing, LLC v. Duncan*, 7 Am. Tribal Law 633, 640 (Navajo Nat'n Sup. Ct. 2008) (applying principles of unconscionability to invalidate an arbitration agreement associated with a mobile home loan), https://cite.case.law/am-tribal-law/7/633/.

[102] Restatement sec. 5.

[103] *Id*. at 97 (comment on sec. 5(c)(3)).

complaint or seek reasonable redress for a violation of a legal right."[104] The Restatement also expressly acknowledges the potential for overlap in circumstances involving terms and conditions that are unconscionable and UDAAPs under the CFPA.[105]

The Restatement discusses how the doctrine of unconscionability may render several types of contractual waivers and limitations on applicable legal protections unenforceable.

First, terms and conditions in consumer contracts may attempt to waive certain types of liability of the business. Public policy recognizes that these types of contract terms and conditions pose risks to consumers. As the Restatement explains, most State courts deem a contact term to be substantively unconscionable and thus, unenforceable, if it "unreasonably exclude[s] or limit[s] the business's liability or the consumer's remedies that would otherwise be applicable for . . . any loss to the consumer caused by an intentional or negligent act or omission of the business."[106]

Second, forum selection clauses often found in consumer contracts may designate a specific judicial forum to hear any ensuing disputes arising out of the contract.[107] In some cases, the designated forum might be so inconvenient as to eliminate the viability of pursuing legal action. The Restatement describes some examples that may pose risks to consumers, including the following:

- A business's standard contract terms include a dispute-resolution term specifying a forum in a distant location, such that the consumer would have to bear travel and accommodation expenses exceeding the value of the remedy sought. The dispute-resolution forum requires a non-refundable filing fee exceeding the value of the remedy sought. Either one of these two features unreasonably limits or imposes obstacles to the consumer's ability to enforce legal rights. That result applies to any type

[104] *Id.* at secs. 5(c)(1)(B) and 5(c)(2).

[105] *Id.* at 99 (citing 12 U.S.C. 5531 and 5536(a)).

[106] Standard contract terms stating that the liability or remedy limitations are specifically agreed upon, or that conduct that would otherwise be regarded by law as negligent is contractually-agreed upon to be non-negligent, do not necessarily render the limit on liability reasonable. Restatement at 93-94.

[107] Forum clauses were historically perceived as contrary to public policy and as preventing the proper forum from hearing the dispute. Now, courts generally enforce forum selection clauses unless exceptional circumstances exist. *M/S Bremen v. Zapata Off-Shore Corp.*, 407 U.S. 1, 15 (1972) (holding that, in an international commercial dispute, "the forum clause should control absent a strong showing that it should be set aside").

> of dispute-resolution forum clause in standard terms in a consumer contract that imposes such an unreasonable cost or personal burden, be it a public court or a private arbitration panel.[108]

Third, terms and conditions that impose unreasonably short limitations periods may pose risks to consumers by imposing challenges or creating hurdles for consumers in seeking redress. Terms and conditions that limit the period in which a consumer must bring an action to a shorter time period than underlying law may block the consumer from asserting an otherwise viable substantive claim. These terms and conditions reduce the time for a consumer to sue, which may result in fewer actions and otherwise actionable claims prematurely going stale. As noted above, some State laws prohibit these terms and conditions as void and against public policy in some circumstances. Absent an express prohibition in State law, though, the Restatement indicates that courts often enforce these terms and conditions, even when the parties have unequal bargaining power, as long as the resulting time period is reasonable (six months is an oft-mentioned floor).[109]

Fourth, some arbitration agreements may have features that unreasonably limit the consumer's ability to enforce their rights. The Restatement describes examples, including the following:

- A business's standard contract terms require consumers to resolve disputes through arbitration. If the costs of pursuing individual arbitration make it impractical for consumers to seek redress for breach of the contract, a court may determine that the provision in the contract barring class actions is not enforceable. In those circumstances where costs of pursuing individual arbitration are prohibitive, such arbitration clauses may still be enforceable where the arbitration forum permits class arbitration, but substantively unconscionable otherwise.[110]

- A business's standard contract terms include a class-action waiver and do not specify a choice of forum, thus allowing consumers to resolve disputes

[108] Restatement sec. 5 cmt. 7.

[109] Restatement sec. 5. The Restatement notes (at 98), however, that a business's standard contract terms that require that all claims against the business be made within three months after the conclusion of the transaction may be unenforceable to the extent that it covers claims for "latent defects" (claims not widely relevant to consumer financial products and services). *Cf.* UCC sec. 2-725(1).

[110] Restatement at 98 (example 9). The Department of Education also has proposed to prohibit the use of arbitration agreements and class action waivers in connection with Federal student loan programs. *See* Dept. of Educ. Proposed Rule, 87 FR 41878 (July 13, 2022).

> in court. A common grievance for consumers entering this contract involves low damages – no more than a few dollars each. Thus, these clauses may unreasonably limit consumers' ability to obtain a remedy for breach.[111]

While the Restatement expressly does not address "possible preemption under the Federal Arbitration Act,"[112] these examples nonetheless illustrate how arbitration agreements can pose risks to consumers.

Fifth, in addition to the Consumer Review Fairness Act discussed above and the Bureau's related policy statement, State law contract principles also illustrate how clauses that seek to restrict consumers from posting negative reviews or filing complaints may pose several risks to consumers. These restrictions may explicitly limit the ability of consumers to obtain informal resolution of a dispute. These restrictions also pose risks to other consumers who may be deprived of the benefits of information about the experiences of other consumers. As the Restatement explains, "[s]uch restrictions undermine the reputation mechanism. In consumer markets, in which legal forms of redress are often impractical or delayed, the existence of a robust reputation mechanism is particularly important. Contractual arrangements that seek to weaken it are therefore against public policy and substantively unconscionable."[113] When such restrictions are prohibited by law, they "may also be unenforceable under the doctrine of illegality or on grounds of public policy."[114]

C. Need for Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections

Accordingly, and in light of the considerations described in part II.C.1 below, the Bureau is proposing to collect information described in this rule to learn more about the business

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[111] Restatement at 98 (example 8).

[112] *Id.* at 97.

[113] *Id.* at 114; *see also id.* at 98-99 (discussing example where a business includes in its standard-form contract a clause that charges a high monetary penalty every time a consumer posts a negative review of the business online or obligates the consumer to indemnify the business for any loss caused by the negative review.").

[114] *Id.* at 107.

practices of supervised nonbanks that use the covered terms and conditions, and to monitor for associated risks to consumers that would inform the Bureau's evaluation of how it can utilize its functions to address those risks. Most immediately, as further described in part II.C.2 below, the proposal would facilitate the Bureau's risk-based nonbank supervision program, including through facilitating the assessment and detection of risks to consumers posed by covered terms and conditions. In addition, to support the public interest in promoting public understanding of the use of covered terms and conditions, as discussed in part II.C.3 below, the Bureau is proposing to make information collected public as described in § 1092.303 of the proposed rule. The proposal is thus authorized under the Bureau's monitoring, supervisory, and related nonbank registration authorities, described below and in part IV of the proposal. The proposed registry also would further these goals in ways that existing registration systems do not.

This proposal reflects a priority on establishing a system by rule for the collection of information on the use of covered terms and conditions from supervised nonbanks as a subset of covered persons. One of the reasons for prioritizing coverage of supervised nonbanks is the need to identify them, as discussed in part II.C.2 below. As discussed in the impacts analysis in part VII of the proposal, the Bureau estimates that there are thousands of nonbanks subject to its supervisory authority under CFPA section 1024(a). In addition, there is no comprehensive registry of identifying information for nonbanks subject to the Bureau's supervisory authority across supervised markets. Finally, in light of resource constraints, the Bureau does not regularly examine each of the thousands of nonbanks subject to its supervisory authority under CFPA section 1024. Rather, under CFPA section 1024(b)(2), the Bureau must implement a risk-based program for supervision of these nonbanks. By contrast, Federal prudential regulators track and already publicize information about the identity and size of depository institutions.[115]

[115] *See, e.g.,* FDIC Bank Find Suite, https://banks.data.fdic.gov/bankfind-suite/bankfind; Federal Financial Institutions Examinations Council National Information Center, https://www.ffiec.gov/NPW; OCC Financial Institutions Lists, https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html; Credit Union Locator, https://mapping.ncua.gov/.

These include depository institutions subject to the Bureau's supervisory authorities under CFPA sections 1025 and 1026. The Bureau also publicly identifies the fewer than 200 large depository institutions subject to its supervisory authority under CFPA section 1025, and it has procedures for regularly supervising them.[116] In light of all these considerations, the Bureau is prioritizing this proposal to establish a registration system for identifying those nonbanks that use covered terms or conditions and monitoring and assessing the associated risks to consumers as discussed in this part II above.[117] This proposal does not affect how the Bureau can apply its functions for monitoring and assessing risks posed by covered terms and conditions used by depository institutions and credit unions subject to its authority under CFPA sections 1022, 1025, and 1026.

1. *The proposed registry would support the Bureau in fulfilling its statutory mandate to monitor risks to consumers in markets for consumer financial products and services*

As recently discussed in the Bureau's proposal to register certain orders,[118] Congress established the Bureau to regulate (among other things) the offering and provision of consumer financial products and services under the Federal consumer financial laws, and it granted the Bureau authority to ensure that the Bureau could achieve that mission.[119] But it also understood that the Bureau could not fully and effectively achieve that mission unless it developed a clear

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[116] *See* CFPB, List of Depository Institutions and Depository Affiliates under CFPB Supervision, https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/; CFPB Supervision and Examination Manual, Overview at 5 (describing Bureau's approach to setting regular examination schedules for large depository institutions), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2022-09.pdf.

[117] In prioritizing this proposal, the Bureau also has considered other factors, including the following: The Bureau's existing regulations already require depository institutions to submit to the Bureau information about their agreements in certain markets, such as credit cards and prepaid accounts. The Bureau makes these agreements publicly available at https://www.consumerfinance.gov/credit-cards/agreements/ and https://www.consumerfinance.gov/data-research/prepaid-accounts/. In addition, CFPA sections 1022 and 1024 do not expressly authorize the Bureau to establish a registration system for depository institutions, which are excluded from the Bureau's registration authority under section 1022(c)(7)(A) and excluded from the scope of section 1024(b)(7). There is no parallel registration provision in the Bureau's authorities over depository institutions generally.

[118] *See generally* CFPB, Proposed Rule, Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders (Dec. 12, 2022), ("Nonbank Registration – Orders Proposal"), https://files.consumerfinance.gov/f/documents/cfpb_proposed-rule__registry-of-nonbank-covered-persons_2022.pdf.

[119] *See* 12 U.S.C. 5511.

window into the markets for and persons involved in offering and providing such products and services. To that end, Congress mandated that the Bureau "shall monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services."[120]

Notably, Congress directed the Bureau to engage in such monitoring "to support its rulemaking and other functions,"[121] instructing the Bureau to use monitoring to inform all of its work. Congress separately described the Bureau's "primary functions" as "conducting financial education programs"; "collecting, investigating, and responding to consumer complaints"; "collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets"; "supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law"; "issuing rules, orders, and guidance implementing Federal consumer financial law"; and "performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau."[122] Put simply, Congress envisioned that the Bureau would use its market monitoring work to inform its activities, all with the express purpose of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[123]

To achieve these ends, Congress took care to ensure that the Bureau had the tools necessary to effectively monitor for risks in the markets for consumer financial products and services. It granted the Bureau authority "to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service

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[120] *See* 12 U.S.C. 5512(c)(1).

[121] *Id.*

[122] 12 U.S.C. 5511(c).

[123] 12 U.S.C. 5511(a).

providers."[124] In particular, Congress authorized the Bureau to "require covered persons and service providers participating in markets for consumer financial products and services to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions," that would furnish the Bureau with such information "as necessary for the Bureau to fulfill the monitoring . . . responsibilities imposed by Congress."[125]

To assist the Bureau in allocating resources to perform its monitoring, Congress also identified a non-exhaustive list of factors that the Bureau may consider, including "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service";[126] "understanding by consumers of the risks of a type of consumer financial product or service";[127] "the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers";[128] "the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers";[129] and "the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service."[130]

The Bureau takes its market monitoring obligations seriously, and it has incorporated valuable insights gained to date from such monitoring in conducting the multiple functions assigned to it under the CFPA, including its supervisory and enforcement efforts, as well as its

[124] 12 U.S.C. 5512(c)(4)(A).

[125] 12 U.S.C. 5512(c)(4)(B)(ii).

[126] 12 U.S.C. 5512(c)(2)(A).

[127] 12 U.S.C. 5512(c)(2)(B).

[128] 12 U.S.C. 5512(c)(2)(C).

[129] 12 U.S.C. 5512(c)(2)(E).

[130] 12 U.S.C. 5512(c)(2)(F).

rulemaking, consumer education, and other functions.[131] As discussed in further detail below, this proposed rule seeks to continue and build upon that commitment by creating a registry of covered terms and conditions to accomplish a number of goals, with a particular focus on monitoring for risks to consumers related to the use of form contracts containing terms and conditions that waive or limit consumer legal protections.

How the proposed registry would support market monitoring

A registry of covered terms and conditions would further the Bureau's market monitoring activities in several ways. As discussed in further detail below, among other things, the registry would assist the Bureau in assessing the impact of the covered terms and conditions on the adequacy of applicable legal protections, and consumer understanding of covered terms and conditions included in form contracts.[132]

In particular, and as reflected in Congress' own judgment, the Bureau has a particular interest in exercising its market monitoring authorities to address questions or concerns regarding the "legal protections applicable" to consumer financial products and services "including the extent to which the law is likely to adequately protect consumers . . . ."[133] Numerous legal

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[131] *See, e.g.*, CFPB Semiannual Regulatory Agenda, 87 FR 5326, 5328 (Jan. 31, 2022) ("The Bureau's market monitoring work assists in identifying issues for potential future rulemaking work."); Payday, Vehicle, and Certain High-Cost Installment Loans, 82 FR 54472, 54475, 54488, 54498 (Nov. 17, 2017) (citing information obtained through Bureau market monitoring efforts); Arbitration Agreements, 82 FR 33210, 33220 (July 19, 2017) (same). *See also, e.g.*, Consumer Fin. Prot. Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf (publishing information obtained through Bureau market monitoring efforts); Consumer Fin. Prot. Bureau, *Consumer Credit Trends*: *Credit Card Line Decreases* (June 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-line-decreases_report_2022-06.pdf (same); Consumer Fin. Prot. Bureau, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf (same). *See also, e.g.*, Consumer Fin. Prot. Bureau, *Buy Now, Pay Later: Market trends and consumer impacts* (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf (publishing information obtained through Bureau market monitoring efforts); Consumer Fin. Prot. Bureau, *Consumer Credit Trends*: *Credit Card Line Decreases* (June 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-line-decreases_report_2022-06.pdf (same); Consumer Fin. Prot. Bureau, *Data Point: Checking Account Overdraft at Financial Institutions Served by Core Processors* (Dec. 2021), https://files.consumerfinance.gov/f/documents/cfpb_overdraft-core-processors_report_2021-12.pdf (same).

[132] 12. U.S.C. 5512(c)(2).

[133] 12 U.S.C. 5512(c)(2)(C). Inadequate legal protections also create risks the Bureau's monitoring program must consider under section 1022(c)(2)(A).

protections apply to consumer financial products and services. Federal, State, Tribal, and local government bodies have adopted these consumer protections in statutes and regulations. However, these laws may not adequately protect consumers when consumers are required through covered terms and conditions to waive the protections or agree to limits on their enforcement or exercise.

These types of provisions may simultaneously place consumers at an increased risk of harm from conduct the protections are designed to prevent, while making it more difficult for consumers to remedy those harms by enforcing the protections. Covered terms and conditions pose risks to consumers by potentially reducing deterrence, compliance, and accountability for non-compliance with the underlying legal protections to which they apply. Some of these legal protections are so fundamental that the use of covered terms and conditions is prohibited or restricted by law, as discussed in part II.C.1. As discussed above and in the section 1022(b) impacts analysis, when consumers cannot protect themselves, such as by directly enforcing legal protections or exercising informal mechanisms, there may be an increased risk that these protections will not be followed (less deterrence) and that they will not be remedied when violated (less accountability). These risks may be significant, given the prevalence of covered terms and conditions in supervised markets and the examples of harms identified in supervisory and enforcement actions discussed in part II.C. The proposed registry would allow for fuller and continuous monitoring of these risks, but the information already available suggests these risks warrant increased regulatory oversight of supervised market participants that use covered terms and conditions. Indeed, Federal, State, Tribal, and local regulators can enforce many of the legal protections constrained by covered terms and conditions, or analogous legal protections. The

GAO recently recognized, for example, that public enforcement of a Federal statute can be particularly important where private enforcement is constrained by contract.[134]

In addition to the foregoing risks, covered terms and conditions also may create the risk of a UDAAP violation whether they are expressly prohibited under existing statutes or regulations and thus unenforceable or whether no existing law expressly addresses the provision. In the former circumstance, as discussed below, the covered term or condition risks deceiving consumers into thinking the underlying legal protection no longer applies or that they cannot enforce a right, when in fact that is not this case. This misimpression is likely to dissuade consumers from availing themselves of available mechanisms to enforce or otherwise exercise their rights. In the latter circumstance, as also discussed below, the waiver still might constitute an unfair act or practice under Federal or State law. For example, Bureau examiners have found unfairness violations where, although not expressly prohibited under existing law, a waiver substantially injured consumers (through loss of the underlying right), was not reasonably avoidable (for example, because presented in a form contract on a take it or leave it basis), and did not have countervailing benefits to consumers or competition.[135]

Consumer understanding of the risks described above also is a factor the Bureau has considered in proposing the registry. Because covered terms and conditions are established through an adhesion-type contracting process, as discussed in part II.A above, consumers may not understand the covered terms and conditions or be aware that they have agreed to them and therefore may not recognize the ensuing risks from this agreement.

Of course, the Bureau does not supervise or enforce all consumer legal protections that are applicable to consumer financial products and services it supervises, including both the laws to which covered terms and conditions apply and the laws that may prohibit particular covered

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[134] *See* GAO Rept. 21-221, Servicemember Rights: Mandatory Arbitration Clauses Have Affected Some Employment and Consumer Claims but the Extent of Their Effects is Unknown (Feb. 2021) at 9-10 (describing instances where arbitration agreements prevented servicemembers from resolving SCRA claims in court, while noting that Federal enforcement under the SCRA is not limited by arbitration agreements).

[135] *See* discussion of examples from mortgage market supervision, part II.C.2 *infra*.

terms and conditions. But, even apart from a potential UDAAP violation as described above, a company that violates other applicable law may have a poor compliance management system and thus may be more likely to violate Federal consumer financial law. And the existence of a covered term or condition in some circumstances may be indicative of a violation of law, since a company that would go to such lengths to include certain terms or conditions in its contracts may be acting in other ways to undermine the underlying rights addressed by the waivers or limitations. Thus, the existence of covered terms and conditions may inform the Bureau's understanding of the adequacy of legal protections, including compliance with Federal consumer financial law, in protecting consumers who buy or use consumer financial products or services.

The Bureau can use that market monitoring information to support a variety of its functions, including through conducting consumer education (where a waiver or limit may risk deceiving consumers, or may be lawful but nevertheless harmful to consumers who lack understanding), bolstering its consumer response function (for example, through better understanding of whether consumer complaints the Bureau receives or does not receive may be driven by covered terms and conditions or the risks they pose), or identifying regulatory voids that it may consider filling through regulation implementing Federal consumer financial law, orders, or guidance (if another important protection is not adequate due to waivers or limitations).

A registry of covered terms and conditions would fill an important information gap on the topic of covered terms and conditions. Currently, there is limited information on the use of covered terms and conditions, especially at the individual provider/product level. Even at the market level, information is limited. The Bureau issued the latest comprehensive national study of one type of covered term or condition – arbitration agreements – in a report to Congress over seven years ago, discussed above. The Bureau requests information from commenters on other studies of the use of covered terms and conditions. The Bureau also has not identified any existing Federal, State, or Tribal system that collects information specifically about the use of

covered terms and conditions across markets the Bureau supervises.[136] The absence of this data leaves uncertain the degree to which the use of covered terms and conditions is eroding legal protections in many of the markets the Bureau oversees. Collection of that data and filling the gaps in available information on these issues would be important for the Bureau's efforts to monitor for risks to consumers in the offering of consumer financial products or services.

As indicated above, in developing the proposal, the Bureau has considered (among others) the factors listed at CFPA section 1022(c)(2), to the extent relevant here to the allocation of Bureau resources to perform market monitoring. For example, the proposed registry would help the Bureau to monitor the extent to which supervised nonbanks are using covered terms or conditions in form contracts in a manner that allows consumers to understand the risks that covered terms or conditions pose to consumers (*see* CFPA section 1022(c)(2)(B)). The proposed registry would help the Bureau to monitor potential effects of covered terms or conditions on the adequacy of legal protections to which they apply or which apply to them (*see* CFPA section 1022(c)(2)(C)). And relatedly, the proposed registry would help the Bureau to monitor likely risks and costs to consumers from buying or using consumer financial products or services that contain covered terms and conditions (*see* CFPA section 1022(c)(2)(A)).[137]

In addition, the information collected in the proposed registry may form the basis of additional focused assessments. For example, the information collected may help the Bureau to identify changes over time in the use of certain covered terms or conditions which may be relevant to assessing the rate of growth in the offering of consumer financial products and services that have different contractual frameworks (*see* CFPB section 1022(c)(2)(D)). In addition, to the extent that supervised nonbanks use covered terms or conditions in offering a consumer financial product or service to traditionally underserved consumers, the registry would

[136] As noted in this part II.C.2, the Bureau is only aware of existing registration systems that collect and publish limited information about standard contracts in private student loan markets in certain states and mortgage market contracts used for certain federally-related mortgage transactions.

[137] *See* 12 U.S.C. 5512(c)(2)(A)-(C).

enable comparisons to covered terms and conditions used by other supervised nonbanks offering similar consumer financial products or services. That information may help the Bureau to monitor whether the covered terms or conditions may disproportionately affect these consumers (*see* CFPB section 1022(c)(2)(E)). The registry also would enable other comparisons in the degree and type of covered terms and conditions used across supervised nonbanks in a given market and across supervised markets. These comparisons may identify pertinent characteristics of firms that use particular covered terms or conditions or combinations of covered terms or conditions (*see* CFPB section 1022(c)(2)(F)).[138]

Accordingly, for the reasons described in this part II., as elaborated elsewhere in the proposal, the Bureau proposes to establish a registration system to collect data on supervised nonbanks' use of covered terms and conditions, allowing it to monitor and assess the risks described above on a continuous basis in supervised markets.

2. *The proposed registry would facilitate the Bureau's statutorily-mandated risk-based nonbank supervision program*

As recently discussed in the Bureau's proposal to register certain orders,[139] one of the Bureau's key responsibilities under the CFPA is the supervision of very large banks, thrifts, and credit unions, and their affiliates, and certain nonbank covered persons. Congress has authorized the Bureau to supervise certain categories of nonbank covered persons under CFPA section 1024.[140] Congress provided that the Bureau "shall require reports and conduct examinations on a periodic basis" of nonbank covered persons subject to its supervisory authority for purposes of "assessing compliance with the requirements of Federal consumer financial law"; "obtaining information about the activities and compliance systems or procedures of such person[s]"; and "detecting and assessing risks to consumers and to markets for consumer

[138] *See* 12 U.S.C. 5512(c)(2)(D)-(E).

[139] *See generally* Nonbank Registration – Orders Proposal.

[140] 12 U.S.C. 5514.

financial products and services."[141] Pursuant to the CFPA, the Bureau implements a risk-based supervision program under which it prioritizes nonbank covered persons for supervision in accordance with its assessment of risks posed to consumers.[142] In making prioritization determinations, the Bureau considers several factors, including "the asset size of the covered person,"[143] "the volume of transactions involving consumer financial products or services in which the covered person engages,"[144] "the risks to consumers created by the provision of such consumer financial products or services,"[145] "the extent to which such institutions are subject to oversight by State authorities for consumer protection,"[146] and "any other factors that the Bureau determines to be relevant to a class of covered persons."[147] CFPA section 1024(b)(7)(A)–(C) further authorizes the Bureau to prescribe rules to facilitate supervision and assessing and detecting risks to consumers, as well as to ensure that supervised nonbanks "are legitimate entities and are able to perform their obligations to consumers."[148] Since it began its nonbank supervision program in 2012, the Bureau has provided further explanation to the public about the purposes of the program and how it works.[149]

How the proposed registry would facilitate risk-based nonbank supervision

Under those authorities, the Bureau is proposing the registry to facilitate its assessment of risks to consumers in connection with its nonbank supervision program. The proposed registry can facilitate the Bureau's risk-based nonbank supervision program in a number of ways. For

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[141] 12 U.S.C. 5514(b)(1).

[142] 12 U.S.C. 5514(b)(2).

[143] 12 U.S.C. 5514(b)(2)(A).

[144] 12 U.S.C. 5514(b)(2)(B).

[145] 12 U.S.C. 5514(b)(2)(C).

[146] 12 U.S.C. 5514(b)(2)(D).

[147] 12 U.S.C. 5514(b)(2)(E).

[148] 12 U.S.C. 5514(b)(7)(A)–(C).

[149] *See, e.g.,* Steve Antonakes and Peggy Twohig, "The CFPB launches its nonbank supervision program" (Jan. 5, 2012), https://www.consumerfinance.gov/about-us/blog/the-cfpb-launches-its-nonbank-supervision-program/; Lorelei Salas, "Explainer: What is nonbank supervision? (May 25, 2022), https://www.consumerfinance.gov/about-us/blog/explainer-what-is-nonbank-supervision/.

example, as discussed below, the proposed registry can facilitate the Bureau's prioritization of which entities to examine, as well as, relatedly, its identification of entities eligible for examination. The proposed registry also can facilitate the scoping of its examinations.

First, the Bureau can use the information collected on supervised nonbanks' use of covered terms and conditions to inform its prioritization process to determine which entities to examine. Prioritization is a fundamental component of the Bureau's supervision program, which has been designed to conduct slightly more than 100 on-site examinations per year, and less than 1,000 overall exam events per year.[150] As discussed in the impacts analysis in part VII of the proposal, the Bureau estimates that there are thousands of nonbanks subject to its supervisory authority under CFPA section 1024(a). Given resource constraints and the number of supervised nonbanks, the Bureau does not regularly examine each of the nonbanks subject to its supervisory authority under CFPA section 1024. Rather, pursuant to CFPA section 1024(b)(2), the Bureau implements a risk-based supervision program, prioritizing which supervised nonbanks it will examine in a given annual period based on information available about the risks they pose to consumers. By incorporating into its supervisory prioritization process the information it collects on supervised registrants' use of covered terms and conditions that pose risks to consumers, the Bureau's risk-based nonbank supervision program would be able to better take into consideration the "risks to consumers created by the provisions" of consumer financial products and services within the meaning of CFPA section 1024(b)(2)(C).[151]

The Bureau can use the information collected on supervised nonbanks' use of covered terms and conditions to assess potential risks to consumers posed by different covered terms and conditions, and combinations of covered terms and conditions. That assessment can inform its decisions prioritizing which supervised nonbanks to examine. For example, when covered terms

[150] *See* CFPB Annual Performance Plan and Report FY 2022 at Table 2.2.1.1 (on-site exams) & Table 2.2.1.2 (all supervisory events with significant activity), https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy22.pdf.

[151] 12 U.S.C. 5514(b)(2)(C).

and conditions violate anti-waiver and other legal prohibitions in Federal consumer financial law, the proposed registry could highlight where this may be a problem, potentially facilitating prioritization of supervisory action or, in some cases, potentially, enforcement action.

In addition, certain covered terms and conditions, such as non-disparagement clauses, also could be an important companion to the Bureau's existing prioritization process that is based in significant part on consumer complaints. Depending on the wording of these terms and conditions, they may pose varying degrees of risk of suppressing consumer complaints, which could result in an understatement of or gap in complaint information in the Bureau's consumer complaint database. Or they could deter online reviews, which the Bureau also may use as field market intelligence to inform its assessments of risks used for prioritization of its exam work.

In addition, by prioritizing based on the risks specifically posed by covered terms and conditions, the Bureau's risk-based supervision would better account for the limited extent to which this information is available to inform existing oversight by enforcers of Federal consumer financial law, including certain State authorities.[152] As discussed below, the universe of nonbanks supervised by the States and the Bureau overlaps but is not coextensive. Even with respect to areas of overlap, existing State registration systems generally do not collect information about the use of supervised entity's covered terms and conditions across the market. States have made only limited use of this option for specific markets. For example, Colorado, Louisiana, Maine, and Illinois recently adopted laws establishing registration systems for private student lenders that obtain their standard loan terms and conditions; the Colorado, Louisiana, and Maine statutes also require the registry to post these terms and conditions on a public website.[153]

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[152] *See* CFPB Consumer Financial Protection Circular 2022-01, "System of Consumer Financial Protection Circulars to Agencies Enforcing Federal Consumer Financial Law" (June 14, 2022), 87 FR 34868 (June 14, 2022) (discussing role of State attorneys general and State regulators in enforcing Federal consumer financial law as described in CFPA section 1042, codified at 12 U.S.C. 5552).

[153] *See* Col. Rev. Stat. 5-20-203(2)(b)(V) (requiring private education lenders to annually provide model loan agreements) & *id.* 5-20-203(3)(c) (requiring copies of the model loan agreements for each registered private education lender to be posted on a publicly accessible website); La. Rev. Stat. 6:1401-1404 (added by HB 789 enacted June 18, 2022); Me. Rev. Stat. 9-A:15-102.1.B(5) & *id.* 15-102.2 (same); Il. Pub. Act. 102-0583 sec. 10(e). These websites are available at https://coag.gov/office-sections/consumer-protection/consumer-credit-unit/student-

Accordingly, the proposed rule would facilitate supervision on a topic – the use of covered terms or conditions in form contracts – that otherwise would not be overseen to the same extent by State authorities for consumer protection within the meaning of CFPA section 1024(b)(2)(D).[154]

Second, and relatedly, for those nonbank entities that use covered terms and conditions in offering consumer financial products or services in markets supervised by the Bureau, the proposed registry can facilitate a more efficient process for the Bureau to identify these nonbank entities. In particular, a registration system that more comprehensively and periodically collects identifying information about many nonbank entities subject to the Bureau's supervisory authority would facilitate the Bureau's nonbank supervision program at the most basic level – identifying who the Bureau could examine. As discussed below there is no comprehensive registry of identifying information for nonbanks subject to the Bureau's supervisory authority across supervised markets. Thus, the identifying information the proposal would collect would, in turn, enhance the Bureau's prioritization process discussed above.

The proposed registry would gather identifying information that would be uniquely useful to the Bureau's supervision of nonbanks. For most nonmortgage markets where the Bureau has supervisory authority, existing registration systems do not necessarily identify all nonbanks based on whether they are subject to Bureau supervisory authority.[155] While some States and Indian Tribes require licensing of participants in certain supervised markets, there is

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loan-servicers-act/private-education-lender-registration/registered-private-education-lenders/, https://www.maine.gov/pfr/consumercredit/student_loan_registry/index.html.

[154] 12 U.S.C. 5514(b)(2)(B) (describing "the extent to which supervised nonbanks are subject to oversight by State authorities for consumer protection" as something for the Bureau to consider in conducting risk-based supervision). As discussed in the section-by-section analysis of the exemption in proposed § 1092.301(h)(5) related to certain small entities, the Bureau also has considered the factors in CFPA section 1022(b)(2)(A) and (B). Other factors, such as risks from the provision of the consumer financial product or service, also are generally discussed throughout this part II.

[155] For mortgage markets, there is considerably more information available about who participates and may be subject to the Bureau's supervisory authority, in light of registration and licensing systems for mortgage originators under the SAFE Act (discussed in more detail at https://files.consumerfinance.gov/f/201203_cfpb_update_SAFE_Act_Exam_Procedures.pdf), data submission requirements of mortgage originators under the Home Mortgage Disclosure Act (HMDA) in Regulation C at 12 CFR part 1003, and call reports for mortgage servicers and others (described at https://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx (last visited Dec. 5, 2022)).

no comprehensive list of who participates in these markets. The full scope of State and Tribal licensing requirements across the States and Tribes is not co-extensive with the scope of the Bureau's supervisory authority across these markets, leaving geographic and market gaps where the Bureau supervises but States or Tribes do not license. Moreover, even for institutions that States or Tribes license, the data about them that States and Tribes collect does not consistently establish whether they engage in the specific activities, or volume of such activity, that would make them subject to the Bureau's supervisory authority.[156] As a result, for purposes of identifying Bureau-supervised nonbanks, information on providers licensed at the State and Tribal level is both overinclusive (of entities the Bureau does not supervise, such as persons who are not larger participants) and potentially underinclusive (not necessarily covering all markets as defined in the statute in all States).

The Bureau currently may draw upon information about who is licensed at the State and Tribal level to inform its assessment of who may be subject to the Bureau's supervisory authority. However, as described above, that information does not clearly or consistently identify which entities are subject to the Bureau's supervisory authority in many cases. As a result, in many cases, to determine whether it can commence an examination, the Bureau must first collect information directly from individual market participants about the nature, and in the case of markets subject to larger participant rules, the volume of certain consumer financial product and service offerings or associated receipts. This activity can be resource- and time-intensive and can lead to rescheduling of planned exams when the information collected indicates entities are not subject to supervisory authority. A registration system that more comprehensively collects and periodically updates identifying information about many nonbank entities subject to the Bureau's supervisory authority would facilitate the Bureau's nonbank supervision program at the most basic level – identifying who the Bureau could examine.

[156] For the international money transfer market, State registration money services business licensing data often is aligned with the Bureau's supervisory authority to facilitate the Bureau's identification of larger participants.

For that reason, the Bureau also considered proposing a registry that would require registration of all supervised nonbank covered persons, regardless of whether those persons use form contracts that impose covered terms and conditions that pose risks to consumers. However, the Bureau preliminarily has concluded that it is a higher priority to require registration of supervised nonbank covered persons that use covered terms and conditions contained in covered form contracts. The proposed registry therefore has a fundamentally different purpose from a universal registration system. This proposal would focus on identifying the supervised nonbanks offering consumer financial products and services that pose risks to consumers as identified above, rather than identifying all supervised nonbanks regardless of whether they present such risks. In this way, the proposed registry is almost fully distinct from the type of licensing and registration systems typically maintained by States and Tribes, which, as discussed above, generally do not focus on collection of covered terms and conditions contained in covered form contracts. As a result, this approach is even less likely to lead to duplication with State and Tribal licensing and registration systems. The Bureau requests comment on this approach.

Third, the information collected can form a basis for the Bureau to scope and conduct examinations of supervised nonbanks, enhancing its ability to detect and address violations and risks of violations of Federal consumer financial law or compliance management system deficiencies.[157] With respect to detecting and addressing violations, if the Bureau scheduled an examination at an entity who had registered its use of a covered term or condition that appeared to be prohibited by Federal consumer financial law, the Bureau likely would incorporate the use of this term or condition into the scope of an exam. More broadly, if the entity registered other covered terms and conditions, an examination could review and assess risks to consumers related to how the entity established, used, and applied these terms or conditions, including in the

[157] *See generally* CFPB Bulletin 2021-01, "Changes to Types of Supervisory Communications" (Mar. 31, 2021) (describing scope of Bureau supervisory communications as including findings of violations of laws the Bureau enforces, risks of violation, and compliance management system concerns), https://files.consumerfinance.gov/f/documents/cfpb_bulletin_2021-01_changes-to-types-of-supervisory-communications_2021-03.pdf.

contracting process or in response to consumer complaints. That review could inform examiners' conclusions concerning the presence of a UDAAP, a risk of a UDAAP, or a compliance management system concern. Examiners also could coordinate with other regulators about their findings, especially if they implicate consumer legal protections administered by the other regulators. In addition, prior to an examination, examiners could consult the registry and review any non-disparagement clause, which may inform how the examiners scope and conduct a review of consumer complaints. In these and other ways discussed in this proposal, by developing its examination scope based on the information it collects on supervised registrants' use of covered terms and conditions that pose risks to consumers, the Bureau's risk-based nonbank supervision program would be able to better take into consideration the "risks to consumers created by the provisions" of consumer financial products and services within the meaning of CFPA section 1024(b)(2)(C).[158]

Covered terms and conditions are prevalent in markets supervised by the Bureau

As discussed below, enforcement and supervisory findings in markets the Bureau supervises illustrate how covered terms and conditions used by nonbanks pose risks to consumers. The proposed registry would facilitate review and assessment of these types of risks more broadly throughout the Bureau's non-bank supervision program, as discussed above.

Mortgage markets

While the TILA and Regulation Z provisions discussed at the outset of part II.B.2 above may protect consumers against certain waivers and limitations on private enforcement in the mortgage market, the Bureau has routinely highlighted for the public examiner findings over the past decade that some mortgage originators and servicers have been engaging in acts and practices inconsistent with this prohibition and that the examiners found constituted UDAAPs.[159]

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[158] 12 U.S.C. 5514(b)(2)(C).

[159] *See, e.g.,* Supervisory Highlights (Fall 2022) at 2.6.2; Supervisory Highlights (Summer 2021) at 2.6.3; Supervisory Highlights (Summer 2017) at 2.6.2; Supervisory Highlights (Fall 2015) at 2.4.2; Supervisory Highlights (Summer 2015) at 2.4.5. *See also Lyons v. PNC Bank, N.A.*, 26 F.4th 180, 191 (4th Cir. 2022) (holding that an

In addition, even before the June 1, 2013 effective date of this provision of Regulation Z,[160] examiners found that two mortgage servicers engaged in an unfair practice in connection with the use of "across-the-board waivers of existing claims" in a "take it or leave it" loss mitigation agreements for forbearance or loan modification.[161]

In addition, the Bureau's supervisory authority over the mortgage market extends to nonbanks that offer or provide "loan modification or foreclosure relief services" in connection with residential mortgages.[162] Some nonbanks offering these products and services have used terms and conditions that pose risks. For example, as noted earlier, the FTC has taken action against a credit repair firm for its use of non-disparagement clauses in violation of a Federal statute.[163] In addition, the Bureau is aware of reports that a nonbank mortgage lender had imposed certain non-disparagement provisions in certain loan modification agreements associated with settlement of pending legal claims, until committing to the New York State financial regulator to stop doing so.[164]

Other credit markets (payday lending, private student lending, and automobile finance)[165]

The potential for significant prevalence in the use of contract terms and conditions seeking to waive or limit applicable legal protections in the automobile finance, private student lending, and short-term small-dollar markets is supported by the following examples:

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arbitration agreement related to a mortgage transaction was unenforceable in light of the restriction in TILA discussed in part II.B.2 above).

[160] 12 CFR 1026.36(h).

[161] Supervisory Highlights (Winter 2013) at 2.1.2 (covering results of supervision work completed between July and October 2013).

[162] 12 U.S.C. 5514(a)(1)(A).

[163] *FTC v. Grand Teton Professionals, LLC, et al.*, Case No. 19cv933 (D. Conn) (Complaint filed June 17, 2019).

[164] Peter Rudegeair, Michelle Conlin, "Exclusive: Ocwen Financial to stop gagging homeowners in mortgage deals," Reuters.com (June 3, 2014), https://www.reuters.com/article/us-banks-mortgages/exclusive-ocwen-financial-to-stop-gagging-homeowners-in-mortgage-deals-idUSKBN0EE1XG20140603 (last visited Dec. 2, 2022); Brena Swanson, "Ocwen will stop using mortgage gag orders," Housingwire.com (June 3, 2014), https://www.housingwire.com/articles/30196-ocwen-will-stop-using-mortgage-gag-orders/ (last visited Dec. 8, 2022).

[165] The Bureau supervises the automobile finance market pursuant to its rule defining larger participants in that market. *See* 12 U.S.C. 5514(a)(1)(B) & 5514(a)(2); 12 CFR 1090.108.

- Automobile finance lender engaged in a deceptive act or practice by using a contract term that created the impression consumers could not exercise a right to file bankruptcy when in fact consumers could file for bankruptcy in light of the public policy voiding waivers of individual's right to file for bankruptcy.[166]

- Private student lenders and servicers enjoined from enforcing borrower certifications in contracts entered into before filing for bankruptcy on the ground that such prepetition waivers of dischargeability in bankruptcy are unenforceable as against public policy.[167]

- Institutional private student lender violated the Holder Rule where it failed to include the notice required under that rule, and attempted to waive consumers' legal rights by including a contract clause purporting to "waive any claim or cause of action of any kind whatsoever that they may have" against the lender education institution.[168]

- Short-term small-dollar lender allegedly used contract term excluding lender liability for fees imposed by the borrower's bank as a result of lender's payment practices.[169]

- Short-term small-dollar lender allegedly frequently enforced a forum selection clause to file debt collection lawsuits in a State that was not where consumers resided or entered into the loan

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[166] *In re Nissan Motor Acceptance Corporation*, Admin. Proc. 2020-BCFP-0017 (Consent order filed Oct. 13, 2020), ¶ 46 *et seq.*, https://files.consumerfinance.gov/f/documents/cfpb_nissan-motor-acceptance-corporation_consent-order_2020-10.pdf.

[167] *In re Homaidan v Sallie Mae, Inc. Navient Sol'n, LLC, Navient Cred. Fin. Corp.*, 640 B.R. 810, 848 (E.D.N.Y. Bktcy. 2022). *See also In re Mazloom*, 2022 WL 950932 at *5 (N.D.N.Y. Bktcy. 2022) ("Courts are rightfully concerned that lenders would consistently take advantage of unsophisticated or desperate debtors by including pre-petition waivers of dischargeability in all loan agreements, thus vitiating one of the core protections of the bankruptcy process."); *Lichtenstein v. Barbanel*, 161 F. Appx. 461, 467 (6th Cir. 2005) (collecting earlier cases); *Klingman v. Levinson*, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy."), *cited by In re Palmer*, 2021 WL 1259258 at *10 (N.D. Ohio Bktcy. 2021) (holding "stipulation contained in the [student loan] Credit Agreement's boilerplate language is legally insufficient to determine nondischargeability in a later-filed bankruptcy case").

[168] *FTC v. Hum. Resc. Dev. Svcs., Inc., d/b/a Saint James Schools of Medicine and HRDS et al.*, Case No. 22cv1919 (N.D. Ill.) (Complaint filed Apr. 14, 2022), ¶¶ 28, 43-48 (citing violation of the Holder Rule); *id.* Stipulated Order dated Apr. 14, 2022) (settlement of allegations).

[169] *See, e.g.,* Klarna Pay Later in 4 Agreement (Oct. 26, 2022) (provision labelled "Fees Imposed By Your Financial Institution or Card Issuer" stating that lender "do[es] not have any liability to [consumer] for such fees"), https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/sliceitinx (last accessed Dec. 5, 2022). *Cf. Perks et al. v. Activehours, Inc. d/b/a Earnin*, Case No. 19cv5543 (N.D. Cal. 2019) (Complaint filed Sept. 3, 2019), ¶ 52, https://www.govinfo.gov/app/details/USCOURTS-cand-5_19-cv-05543/context. That matter resulted in a court order of final approval of a class action settlement. *Id.*, Order of Mar. 25, 2021, 2021 WL 1146038. In the Bureau's experience and expertise, payday lenders may also be incentivized to use provisions like this, given the potential their payment practices have to cause bank fees. *See generally CFPB v. ACE Cash Express*, Case No. 22cv1494 (N.D. Tex.), Complaint filed July 12, 2022, ¶¶ 79-84 (citing unfair practice for payment practices likely to result in bank fees).

agreement, leading to default judgments and their enforcement in garnishment actions against consumers.[170]

- Short-term small-dollar lender's standard terms set an unenforceable 30-day deadline for filing suit, attempting to shorten four-year period set by State law.[171]

- Short-term small dollar lender allegedly used term or condition attempting to limit or waive consumers' right to cancel preauthorized electronic funds transfers used to repay loan, despite anti-waiver provision in EFTA section 914.[172]

The Bureau also previously studied and reported on the prevalence of one type of contract term that limits enforcement of consumer rights in these markets – arbitration agreements. For more than a decade now, under U.S. Supreme Court precedent, the Federal Arbitration Act has preempted State law prohibitions on enforcement of arbitration agreements due to their containing a "no class" provision.[173] As a result, some supervised institutions have used arbitration agreements to block collective legal action by consumers. When that occurs, there is a risk that consumers may not receive relief for breach of consumer legal protections unless they pursue actions individually. And if the threat of individual action is lower, arbitration agreements also may reduce deterrence and in turn compliance with these consumer legal protections. This risk may be present across supervised markets.[174] For example, in its

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[170] *CFPB v. Freedom Stores, Inc., et al.* (E.D. Va. Case no. 2:14cv643) (Complaint filed Dec. 18, 2014), ¶¶ 50-59, 62-81 (alleging unfair and abusive acts and practices based on lender's filing "over 3,500 [collection] lawsuits in Norfolk, Virginia, against consumers who lived in distant venues and who were not physically present in Norfolk, Virginia, when they executed the underlying financing contract; almost all of the lawsuits resulted in a default judgment."), https://files.consumerfinance.gov/f/201412_cfpb_complaint_freedom-stores_va-nc.pdf. The Bureau entered into a 2015 settlement barring this company from filing distant-forum actions and providing relief for affected consumers. See https://files.consumerfinance.gov/f/201512_cfpb_stipulated-final-judgment-and-order-freedom-stores_va-nc.pdf.

[171] *Gandee v. LDL Freedom Enterprises, Inc.*, 293 P.3d 1197, 1201 (Wa. 2013).

[172] 15 U.S.C. 1693l. *See, e.g., Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164, 1179 (N.D. Ill. 1995) (rejecting motion to dismiss claim that nonbank lender violated EFTA anti-waiver provisions by using contract term purporting to waive right under EFTA to stop payment of preauthorized electronic funds transfers); *Baldukas v. B&R Check Holders, Inc.*, 2012 WL 7681733 at *5 (D. Colo. Oct. 2, 2012) (similar holding), adopted by 2013 WL 950847 (D. Colo. Mar. 8, 2013). *See also Jordan v. Freedom Nat'l*, 2016 WL 5363752 (D. Ariz. Sept. 26, 2016) (granting class certification for EFTA anti-waiver claims involving payment authorizations requiring consumers to agree that the payee "will not be responsible for claims relating to the debit or credit of my account").

[173] Arbitration Study at 4 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

[174] As noted in part II.B.2 above, Federal law (TILA) restricts the use of arbitration agreements in the mortgage market. But as discussed at the outset of this part II.C.2, the Bureau routinely finds acts and practices inconsistent with the TILA prohibitions and restrictions.

2015 Arbitration Study, the Bureau noted that nearly 84% of storefront payday loan agreements representing nearly 99% of storefronts sampled had arbitration clauses in their agreements in 2013 and 2014, with almost all of these agreements also limiting availability of class proceedings.[175] Similarly, over 85% of private student loan contracts sampled by the Bureau included arbitration clauses in 2014, with all of these limiting availability of class proceedings.[176] The 2015 Arbitration Study also found that, while consumers sometimes can obtain relief in class actions concerning these products,[177] arbitration agreements also can be used to block those efforts.[178] Although the Bureau had issued a 2017 regulation to prohibit limitations on class actions in arbitration agreements for many types of consumer financial products and services,[179] Congress overturned that rule later that year.[180] As a result, in the Bureau's experience and expertise, arbitration agreements remain a common term or condition in contracts for supervised consumer financial products or services. Arbitration agreements also may specify the location for an arbitration hearing[181] and may include provisions setting deadlines for filing of claims, raising a question of whether those deadlines are shorter than the time frame specified in State statutes.[182] Tracking on an ongoing basis when these agreements are used, by whom, and whether they are held to be enforceable, is important to the Bureau for the assessment of potential risks to consumers from such limitations on their ability to actually pursue and/or participate in legal action.

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[175] 2015 Arbitration Study sec. 2.3.4 & sec. 2.5.5 (describing prevalence of class action-limiting terms).

[176] *Id.* sec. 2.3.5 & sec. 2.5.5 (describing prevalence of class action-limiting terms).

[177] *Id.* sec. 8 Table 1 (number of Federal class action settlements, by market, identified from cases filed from 2010 to 2012) & Table 8 (gross monetary relief to class members, by market).

[178] *Id.* sec. 6.7.1 (motions to compel arbitration of putative class litigation filed in Federal court and selected State courts from 2010 through 2012 in payday loan, private student loan, and automobile finance markets).

[179] 82 FR 33210 (July 19, 2017).

[180] 82 FR 55500 (Nov. 22, 2017) (discussing adoption of joint resolution of Congress disapproving the 2017 rule, signed by the President).

[181] Arbitration Study sec. 2 at 56.

[182] *Id.* sec. 2.5.7 (noting three storefront payday loan agreements specified time limits for consumer claims).

Consumer reporting market[183]

In the credit monitoring market, contract waivers and other provisions may undermine the adequacy of the legal protections afforded to consumers under the Fair Credit Reporting Act (FCRA). The Bureau's Arbitration Study found that FCRA claims were the third most common type of Federal statutory claim in Federal class action settlements reviewed by the Bureau from selected cases filed from 2010 through 2012.[184] Moreover, class settlements of Federal class actions related to consumer reporting filed between 2010 and 2012 provided over $750 million in relief to consumers.[185] More recently, as discussed below, case law indicates that consumer reporting agencies may use arbitration agreements to block potential availability of this type of relief in this market.

For example, the Bureau has learned that some credit monitoring products that some consumer reporting agencies market by representing that they help consumers detect and fix inaccuracies in their consumer reports may undermine FCRA protections. For example, in one case, after consumers engaged the service, the consumer reporting agency used the terms of that service against the consumer to block a putative class action lawsuit. The consumer reporting agency used an arbitration agreement in the credit monitoring contract to block consumers' legal action seeking to remedy alleged failure to reasonably investigate inaccurate information on consumer reports in violations of the FCRA.[186] This outcome illustrates how consumer reporting agencies could use arbitration agreements to limit collective legal action seeking to remedy pre-existing inaccuracies in a consumer's credit report. This outcome also may indicate a broader trend: through its market monitoring activity, the Bureau also has seen several examples of national consumer reporting agencies imposing arbitration agreements when consumers use their

[183] The Bureau supervises the consumer reporting market pursuant to its rule defining larger participants in that market. *See* 12 U.S.C. 5514(a)(1)(B) & 5514(a)(2); 12 CFR 1090.104.

[184] Arbitration Study sec. 8.3.1 Figure 1.

[185] *Id.* sec. 8.3.3 Table 8.

[186] *See, e.g., Coulter v. Experian Info. Sols., Inc.*, Case No. 20-cv-1814 (E.D. Pa.) (Order Feb. 25, 2021), 2021 WL 735726.

online interface to obtain copies of their credit report or their credit score, to file a dispute, or to place a security freeze. The Bureau has a need, through its nonbank supervision program and market monitoring more broadly, to assess the potential magnitude of these risks across the consumer reporting market.

Consumer debt collection market[187]

Waivers and other limitations often found in the terms and conditions of a form contract can put consumers at risk during the debt collection process. For example, although debt collectors typically do not enter into arbitration agreements directly with consumers, nevertheless, they may attempt to use these and other limitations in the terms and conditions of the underlying consumer contract establishing the debt to block class actions.[188] When used in this manner, any valid claims that would have been asserted only on a class basis are suppressed. Such potential for claim suppression may pose risks to consumers. Indeed, the collective action mechanism can generate relief in this market, as the Bureau's Arbitration Study found that Fair Debt Collection Practices Act (FDCPA) claims were by far the most common type of claim in Federal class action settlements the Bureau analyzed from cases filed between 2010 and 2012.[189] And these settlements provided over $95 million in monetary relief to consumers.[190]

In addition, as discussed above, when setting up recurring payments or payment plans on loans, creditors or their collectors may use contract terms that attempt to limit or waive consumers' rights to cancel these payments, including in circumstances that violate the anti-waiver provision in EFTA section 914.[191]

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[187] The Bureau supervises the consumer debt collection market pursuant to its rule defining larger participants in that market. *See* 12 U.S.C. 5514(a)(1)(B) & 5514(a)(2); 12 CFR 1090.105.

[188] Arbitration Study sec. 6 at n.94 (describing examples).

[189] *Id.* sec. 8.3.1 Figure 1.

[190] *Id.* sec. 8.3.3 Table 3.

[191] 15 U.S.C. 1693l. *See, e.g., Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164, 1179 (N.D. Ill. 1995) (rejecting motion to dismiss claim that nonbank lender violated EFTA anti-waiver provisions by using contract term purporting to waive right under EFTA to stop payment of preauthorized electronic funds transfers); *Baldukas*, 2012 WL 7681733 at *5 (D. Colo. Oct. 2, 2012) (similar holding), adopted by 2013 WL 950847 (D. Colo. Mar. 8, 2013). *See also Jordan v. Freedom Nat'l*, 2016 WL 5363752 (D. Ariz. Sept. 26, 2016) (granting class certification for

Debt collectors also may seek to rely on other covered terms and conditions used by creditors. For example, debt collectors may seek to rely on contract terms in creditor contracts that seek to waive the right of consumers to revoke consent to receive autodialed calls under the Telephone Consumer Protection Act and its implementing regulations.[192] In the Bureau's experience and expertise, including based on findings in recent examination activity, waivers of that consumer right to revoke consent – an applicable legal protection administered by the Federal Communications Commission (FCC) – may make it challenging for consumers to exercise applicable legal protections under other statutes the Bureau administers to stop unwanted or even harassing or unlawful debt collection calls. The FCC has determined that consumers' right to revoke this consent cannot be waived.[193] But some courts have not embraced that position.[194] Creditor contract terms that waive any such right to revoke consent to so-called robocalls pose potential risk to consumers in debt collection markets. Similarly, to the extent that debt collectors contract directly with consumers, debt collectors also might attempt to directly deploy contract terms that seek to waive or otherwise limit consumer rights under the FDCPA and its implementing regulations[195] to stop collections communications or to specify inconvenient times, places, or media for collections communications.[196]

EFTA anti-waiver claims involving payment authorizations requiring consumers to agree that the payee "will not be responsible for claims relating to the debit or credit of my account").

[192] Under the TCPA, according to the FCC, such consent when given to a creditor in connection with an existing debt may also extend to the debt collector. Implementing the Telephone Consumer Protection Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling, 23 FCC Rcd 559, 563-65 (Feb. 1, 2008).

[193] *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC. Rcd. 7961, 7994-7999 (2015); *ACA International v. FCC*, No. 15-1211 (D.C. Cir. 2018). *See also Ginwright v. Exeter Finance Corp.*, 280 F.Supp.3d 674, 683-84 (D. Md. 2017) (holding that a standard contractual term in an automobile finance agreement prohibiting the consumer from revoking consent to be called would violate FCC ruling that a consumer has a right of revocation); *Jara v. GC Servs. LP*, 2018 WL 2276635 at *5 (C.D. Cal. May 17, 2018) (same, in private legal action by consumer against a debt collector).

[194] *Reyes v. Lincoln Automotive Fin. Svs.,* 16-2104-cv, 2017 WL 2675363 (2d Cir. June 22, 2017); *Medley v. Dish Network, LLC*, No. 18-13841 (11th Cir. 2020). *See also Harris v. Navient Sols., LLC*, 2018 WL 3748155 (D. Conn. Aug. 7, 2018) (applying *Reyes* to private legal action by consumer against student loan servicer).

[195] *See* Bureau's Regulation F at 12 CFR part 1006.

[196] *Cf. Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1170 (9th Cir. 2006) (applying heightened standard of voluntariness but finding that consumer's initiation of contact with a debt collector constituted a limited waiver of the consumer's cease communications request under the FDCPA).

As also discussed above, under FTC rules, in consumer credit and collection markets, consumers have important rights to limit the types of assets that can be seized or garnished to enforce a court order to pay a debt. As noted above, terms and conditions may directly flout those rules and the rules may not be comprehensive enough to prevent contract terms that waive or undermine these rights. For example, the Bureau recently found that a very large depository institution sought to limit its liability to consumers for failing to follow these laws.[197] Garnishor creditors or their debt collectors may seek to utilize similar contract terms and conditions.

Further, the Bureau notes that the FDCPA prohibits debt collectors from bringing legal actions in certain inconvenient venues, generally requiring that debt collectors only file suit where the consumer resides or entered into the contract, or in the case of real property, where the real property is located.[198] Forum selection clauses in terms or conditions may suggest otherwise. For example, similar to the case involving a short-term small-dollar lender described above, a debt collector could seek to use such a clause as a basis for filing actions in venues not permitted under the FDCPA.

Finally, some larger participant debt collectors the Bureau supervises also collect medical debt. Collection of amounts subject to waiver, arbitration agreements, or both can pose risks to consumers in the medical debt context. For example, the Department of Health and Human Services (HHS) recently finalized rules implementing the No Surprises Act. Under these implementing regulations, when an insured consumer seeks non-emergency treatment at a hospital, the hospital may use a contract that includes a waiver of the consumer's new Federal law protections against surprise bills. The regulations require that these waivers must meet certain standards, including that they are "provided voluntarily, meaning the individual is able to

[197] *In re Bank of America, N.A.*, Admin. Proc. 2022-CFPB-0002 (Consent Order filed May 4, 2022), ¶ 49 *et seq.* (citing deposit agreement provision stating that bank has "no liability to" the consumer if it follows the provisions of the contract), https://files.consumerfinance.gov/f/documents/cfpb_bank-of-america_consent-order_2022-05.pdf.

[198] 15 U.S.C. 1692i(a).

consent freely, without undue influence, fraud, or duress . . . ."[199] HHS estimated that hospitals may deploy these contract waivers nearly 2.5 million times each year.[200] Debt collectors may attempt to collect amounts hospitals charge on the basis of such waivers. Depending on the circumstances of the waiver, this may raise risks to consumers including under applicable legal protections such as the FDCPA and the FCRA.[201] If a consumer contests such an amount in a legal action, a debt collector could seek to enforce the underlying waiver to block such a claim. If a consumer asserts the waiver is invalid, that may raise questions of whether the Holder Rule, described above, applies to ensure the consumer may assert that defense. Or the debt collector could seek to enforce an arbitration agreement the hospital may enter into with the consumer. In addition, in a different medical debt context, debt collectors could seek to enforce arbitration agreements in long-term care facility admission contracts. If a debt collector uses an arbitration agreement in that context, its use may raise a question about whether the consumer was given a choice to accept the arbitration agreement as is required by HHS regulations and whether the arbitration agreement complies with other requirements in the HHS regulations.[202]

Student loan servicing market[203]

As in the consumer debt collection market discussed above, student loan servicers may attempt to rely on waivers or other covered terms and conditions in creditor contract clauses to defend against legal actions by consumers. Examples of waivers that may pose risks to consumers include terms and conditions attempting to waive dischargeability of loans prior to the filing of a bankruptcy petition. In addition, depending on the facts and circumstances and

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[199] 45 CFR 149.420(c)(2)(i).

[200] HHS Supporting Statement – Part A, Requirements Related to Surprise Billing: Qualifying Payment Amount, Notice, and Consent, Disclosure on Patient Protections Against Balance Billing, and State Law Opt-in (CMS-10780/OMB control number: 0938-1401) at 16.

[201] *See* CFPB Bulletin 2022-01, "Medical Debt Collection and Consumer Reporting Requirements in Connection with the No Surprises Act," 87 FR 3025 (Jan. 20, 2022).

[202] *See* 42 CFR 483.70(n)(2).

[203] The Bureau supervises the student loan servicing market pursuant to its rule defining larger participants in that market. *See* 12 U.S.C. 5514(a)(1)(B) & 5514(a)(2); 12 CFR 1090.106.

applicable law, student loan servicers may use creditor contracts to compel arbitration of claims consumers file in court.[204] As noted above, while class actions can provide relief to student loan borrowers, arbitration agreements in private student loan contracts can be used to block that relief. Further, as with creditors and their debt collectors discussed above, loan servicers also could attempt to use terms and conditions for payment authorizations that attempt to limit or waive consumers' rights to cancel these payments – including in circumstances that may violate the anti-waiver provision in EFTA section 914.

Remittance market[205]

Remittance transfer service agreements may contain rights waivers that are prohibited by statute. The Bureau recently resolved an enforcement action for violations of EFTA's anti-waiver provision by a remittance provider.[206] In addition, the Bureau recently reported that examiners found multiple instances of such violations in remittance transfer service agreements with consumers in direct violation of the law. Specifically, examiners found terms and conditions that expressly limited consumer rights under EFTA section 916 to bring legal action against the institution and to recover costs and attorney's fees.[207]

In addition, with respect to arbitration agreements and waivers of collective legal action, the Bureau's Arbitration Study noted an example of $5.5 million in monetary relief in a Federal class action settlement in the remittances market.[208]

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[204] *See, e.g., Howard v. Navient Solutions, LLC*, 2018 WL 5112634 at *4 (W.D. Wa. 2018) (granting student loan servicer's motion to compel arbitration of consumer's claims based on arbitration provision in original promissory note).

[205] The Bureau supervises the remittance market (International Money Transfer Market) pursuant to its rule defining larger participants in that market. *See* 12 U.S.C. 5514(a)(1)(B) & 5514(a)(2); 12 CFR 1090.107.

[206] *In re Choice Money Transfer, Inc.*, Admin. Proc. 2022-CFPB-0009 (Oct. 4, 2022), ¶¶ 79-83 (consent order citing a waiver of liability that was inconsistent than rights conferred by regulations implementing EFTA).

[207] *See* Supervisory Highlights (Spring 2022) at sec. 2.8.2.

[208] Arbitration Study sec. 8 at 25.

3. Making information collected in the registry publicly available would serve the public interest

The public transparency provisions in proposed § 1092.303, described in the section-by-section analysis in part V below, also accomplish core elements of the Bureau's mission.

Congress anticipated that the insights the Bureau would gain from mandatory market monitoring should at times become available to a wider audience than just Bureau employees. Not only did Congress mandate that the Bureau "publish not fewer than 1 report of significant findings of its monitoring . . . in each calendar year," but it also instructed that the Bureau may make non-confidential information available to the public "as is in the public interest."[209] Congress gave the Bureau discretion to determine the format of publication, authorizing the Bureau to make the information available "through aggregated reports or other appropriate formats designed to protect confidential information in accordance with [specified protections in this section]."[210] These instructions regarding public release of market monitoring information align with one of the Bureau's "primary functions" mentioned above—to "publish[] information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."[211] CFPA section 1022(c)(7)(B) similarly contemplates that publishing registry information for this purpose can be beneficial to consumers, authorizing the Bureau to "publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau."[212]

The Bureau believes that publication of registration information is in the public interest for a variety of reasons as discussed below and in the section-by-section analysis of proposed § 1092.303.

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[209] 12 U.S.C. 5512(c)(3).

[210] 12 U.S.C. 5512(c)(3)(B).

[211] 12 U.S.C. 5511(c)(3).

[212] 12 U.S.C. 5512(c)(7)(B).

Other regulators would be able to quickly access the centralized, publicly-accessible database, facilitating their efficient prioritization of oversight of supervised nonbanks that, in their judgment, use particularly risky covered terms and conditions. These regulators could associate the data the Bureau publishes with other information they have about supervised nonbanks, providing a better picture of their practices. This oversight would be particularly valuable when the covered terms and conditions limit private enforcement or exercise of rights. Some regulators also may identify published covered terms and conditions explicitly prohibited by laws they enforce or supervise, including some of the laws discussed in part II.B above and similar laws. This information may spur action by those regulators to enjoin or otherwise stop further use of those covered terms and conditions. However, as discussed in part VII.E below, the registry already would disincentivize use of expressly prohibited covered terms and conditions. Thus, it is uncertain how prevalent use of expressly prohibited covered terms and conditions would be in the registry.

More broadly, use of form contracts and covered terms and conditions have long been topics of public debate in consumer finance markets and beyond, informing adoption of the legal protections applicable to consumer financial products and services offered in markets supervised by the Bureau discussed in part II.B and the broader public policy they reflect. The registry would provide reliable, comprehensive, and periodically updated data about this matter of significant public import. For example, regulators, legislatures, courts, the legal profession, researchers, universities, and other non-governmental organizations, the press, and the general public would be able to use data from the registry to monitor trends and to identify high-risk areas affecting consumers in markets for consumer financial products and services. Indeed, as described above, some statutory consumer legal protections either specifically contemplate waivers or are silent on the topic. A registry of waivers could highlight legal protections that are at risk of being undermined.

Currently, there appears to be no similar database of covered terms and conditions available to the public with widespread coverage of one or more markets for consumer financial products and services. The public appears to have access to only limited data, such as form contracts used by certain private student lenders registered in the few States that collect and publish the entire form contract, form contracts for first-lien mortgages on site-bult homes insured, guaranteed, or eligible for purchase in Federal mortgage programs, and to some degree, form contracts marketed by form providers for automobile finance transactions. As a result, a comprehensive, periodically-updated database focused on the use of covered terms and conditions would substantially inform that debate and more fully ground it in data.[213]

Other benefits exist as well. For example, other regulators, researchers, consumer advocacy organizations, the press, and others could review this information and, where it indicates a concern, potentially educate consumers about identifying and managing these risks. Those activities could complement the Bureau's consumer education functions. Based on information gleaned from trends in the information collected, researchers, non-governmental organizations, and other regulators could provide timely and well-informed consumer education materials. And companies that do not include covered terms or conditions in their contracts may consider using their absence from being required to register and other information in the registry from competitors to market their consumer financial products or services as potentially less risky to consumers.

Similarly, publication of registration information would facilitate the ability of consumers to identify supervised nonbank covered persons that are registered with the Bureau. CFPA section 1022(c)(7)(B) contemplates that publishing registry information for this purpose can be beneficial to consumers.[214] Publishing registration information identifying the supervised

[213] The Bureau's recent proposal to register orders also, in conjunction with data gathered under this proposal, can help the public to understand when contract terms and conditions limiting private action are associated with conduct that leads to public orders. *See* Nonbank Registration – Orders Proposal.

[214] 12 U.S.C. 5512(c)(7)(B).

nonbanks that use covered terms and conditions could help consumers when disputes or problems arise. When a consumer has a dispute with a supervised registrant giving rise to a potential legal claim, the consumer or their representative could quickly check the Bureau's website to see if the supervised registrant was identified as using covered terms or conditions for that type of consumer financial product or service.[215] Reviewing information in a published registry would not be a substitute for reviewing the covered form contract. But the registry can be a resource that may be easier for consumers to perform an initial check quickly, before obtaining and reviewing their entire contract. It also may identify additional covered terms or conditions that may affect to the consumer's account or transaction.

All of the above groups and the rest of the general public also would have access to identifying information collected on the nonbank itself, affording a better understanding of which specific nonbanks are subject to supervision and examination by the Bureau.

Finally, publication would formally align the proposed nonbank registration system with the Federal government's emphasis on making government data available to and usable by the public, by default, to the greatest extent possible.[216]

D. Other Alternatives Considered

As explained in part II.C and in the section-by-section analysis in part V, the Bureau has considered a number of alternatives to the scope of the rule and the coverage of particular provisions. In addition to those alternatives, the Bureau has considered several other alternatives.

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[215] This information could indicate whether the consumer's covered terms and conditions were typical of those offered to other consumers. But the consumer's form contract itself (which a consumer's representative may already have) typically would be used with many consumers by its very nature. And arbitration agreements generally do not allow class actions, as discussed elsewhere in this part II. Thus, for these and other reasons discussed in part VII.E, a significant increase in class action litigation as a result of the proposal is unlikely. Indeed, 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.

[216] *See, e.g.,* Open, Public, Electronic and Necessary Government Data Act, in title II of Pub. L. 115-435 (Jan. 14, 2019); Office of Management & Budget, M-19-18, "Federal Data Strategy – A Framework for Consistency" (June 4, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-18.pdf (last visited Dec. 7, 2022).

The Bureau considered proposing that supervised nonbanks submit their covered form contracts, instead of providing information about them. That alternative might reduce burdens on some registrants, who would not have to review their contracts in order to provide standardized data. However, that type of registry would result in a much greater volume of information collected and published. As discussed in this part II above, the Bureau is concerned that terms and conditions waiving or limiting enforcement of consumer legal protections may not receive adequate attention by consumers or the public. Publication of additional information unrelated to those types of terms could reduce the attention to those type of terms in the registry. At the same time, the Bureau also lacks the resources to engage in an annual review of the full text of all of the standard contracts of every nonbank subject to its supervisory authority. In particular, the Bureau lacks the resources to extract from such standard contracts the standardized data on the clauses of concern described in the proposal. Therefore, collecting this data from the supervised registrants themselves would establish a registration system that is more effective.

The Bureau also has considered alternative means of collecting information relating to use of covered terms and conditions, including requesting the information on an *ad hoc* basis from supervised entities, whether during examinations or through an order pursuant to CFPA section 1022(c)(4)(B)(ii). However, these alternatives generally would be infeasible for accomplishing the goals of the proposed rule. As discussed in the impacts analysis in part VII, there are thousands of nonbanks subject to the Bureau's supervisory authority. By contrast, the Bureau's supervision program historically has been designed to conduct slightly more than 100 on-site examinations per year, and less than 1,000 overall exam events per year.[217] In addition, as discussed in this part II above, existing systems do not generate a comprehensive list of

[217] *See* CFPB Annual Performance Plan and Report FY 2022 at Table 2.2.1.1 (on-site exams) & Table 2.2.1.2 (all supervisory events with significant activity), https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy22.pdf.

persons the Bureau may supervise.[218] In addition, an important purpose of the proposal is to facilitate an assessment of the adequacy of applicable legal protections for consumers whose contracts contain covered terms and conditions. These legal protections are not *ad hoc* or time-limited. Furthermore, the Bureau's need to consider their adequacy as part of its monitoring and supervisory work is similarly ongoing, and so is best served by a system that collects information on a recurring basis. In addition, these alternatives would not be as effective at informing the Bureau's ongoing prioritization of its supervisory resources for examining nonbank covered persons. Nonbank covered persons' use of covered terms and conditions may change over time, as business structures, product offerings, and markets evolve. In the Bureau's experience and expertise, supervised registrants frequently make changes in terms and conditions in their form contracts, including to alter or add covered terms or conditions. Doing a one-time collection or performing point-in-time collections would be less useful to the Bureau's continuous prioritization. And for the same reasons, it would be less useful to the public as well.

Further, the Bureau has considered the alternative of not specifying in the rule whether information collected would be publicly released. After all, the Bureau has authority to publicly release information under CFPA section 1022(c)(3) without first promulgating a rulemaking. In addition, the information collection under proposed § 1092.302 would enable the Bureau to monitor for risks to consumers and to prioritize its resources based on risk indicators, even without publication of the information as described in proposed § 1092.303. Thus, the information collection requirements in proposed § 1092.302 can operate independently of the publication requirements in proposed § 1092.303.

[218] For markets where the Bureau has information about many of the participants, the Bureau also has considered the alternative of issuing orders on a recurring basis, which might approximate an annual collection. However, a general plan for such orders, even if recurring, would not establish a rule that creates predictability, reliability, and certainty that a rule provides. For example, the proposed rule would require nonbanks to collect the relevant information. Absent that requirement in regulation, supervised nonbanks could find responding to an order more burdensome.

However, the Bureau is proposing to specify expectations about public release in the rule. Without specifying these expectations, the rule itself would lack transparency, and submitters of information, and the public (consumers, competitors, and researchers, among others) would be less certain about how the Bureau will use and disclose the information. In addition, by including in the proposed regulation its plans to disclose the data, the Bureau will gain the benefit of public comment on those plans in the rulemaking process, including comment on the degree to which the submitters of collected information may keep that information confidential (a topic on which the Bureau requests comment in the section-by-section analysis of proposed § 1092.303 below). In any event, the Bureau requests comment on whether there is an important reason for nondisclosure of the information collected when disclosure otherwise would be permitted by law.

Finally, this proposal reflects a priority on establishing a system by rule for the collection of information on the use of covered terms and conditions from supervised nonbanks as a subset of covered persons. One of the reasons for prioritizing coverage of supervised nonbanks is the need to identify them, as discussed in this part II.C.2 above. As discussed in the impacts analysis in part VII of the proposal, the Bureau estimates that there are thousands of nonbanks subject to its supervisory authority under CFPA section 1024(a). In addition, there is no comprehensive registry of identifying information for nonbanks subject to the Bureau's supervisory authority across supervised markets. Further, given resource constraints, the Bureau does not regularly examine each of the thousands of nonbanks subject to its supervisory authority under CFPA section 1024. Rather, under CFPA section 1024(b)(2), the Bureau must implement a risk-based program for supervision of these nonbanks. By contrast, Federal prudential regulators track and already publicize information about the identity and size of depository institutions.[219] These

[219] *See, e.g.,* FDIC Bank Find Suite, https://banks.data.fdic.gov/bankfind-suite/bankfind; Federal Financial Institutions Examinations Council National Information Center, https://www.ffiec.gov/NPW; OCC Financial Institutions Lists, https://www.occ.treas.gov/topics/charters-and-licensing/financial-institution-lists/index-financial-institution-lists.html; Credit Union Locator, https://mapping.ncua.gov/.

include depository institutions subject to the Bureau's supervisory authorities under CFPA sections 1025 and 1026. The Bureau also publicly identifies the fewer than 200 large depository institutions subject to its supervisory authority under CFPA section 1025, and it has procedures for regularly supervising them.[220] In light of all these considerations, the Bureau is prioritizing this proposal to establish a registration system for identifying those nonbanks that use covered terms or conditions and monitoring and assessing the associated risks to consumers as discussed in this part II above.[221] This proposal does not affect how the Bureau can apply its functions for monitoring and assessing risks posed by covered terms and conditions used by depository institutions and credit unions subject to its authority under CFPA sections 1022, 1025, and 1026.

III. Outreach

The Bureau received feedback from external stakeholders in developing this proposal. The following is a brief summary of that effort.

A. State agencies and Tribal governments

As required by CFPA sections 1022(c)(7) and 1024(b)(7),[222] the Bureau consulted with State agencies and Tribal governments, including agencies involved in supervision of nonbanks and agencies charged with law enforcement, in crafting the proposed registration requirements and system.[223] In developing this proposal, the Bureau considered the input it received from

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[220] *See* CFPB, List of Depository Institutions and Depository Affiliates under CFPB Supervision, https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/; CFPB Supervision and Examination Manual, Overview at 5 (describing Bureau's approach to setting regular examination schedules for large depository institutions), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2022-09.pdf.

[221] In prioritizing this proposal, the Bureau also has considered other factors, including the following: The Bureau's existing regulations already require depository institutions to submit to the Bureau information about their agreements in certain markets, such as credit cards and prepaid accounts. The Bureau makes these agreements publicly available at https://www.consumerfinance.gov/credit-cards/agreements/ and https://www.consumerfinance.gov/data-research/prepaid-accounts/. In addition, CFPA sections 1022 and 1024 do not expressly authorize the Bureau to establish a registration system for depository institutions, which are excluded from the Bureau's registration authority under section 1022(c)(7)(A) and excluded from the scope of section 1024(b)(7). There is no parallel registration provision in the Bureau's authorities over depository institutions generally.

[222] 12 U.S.C. 5512(c)(7)(C); 12 U.S.C. 5514(b)(7)(D).

[223] During the rulemaking process for issuing rules under the Federal consumer financial laws, Bureau policy is to consult with appropriate Tribal governments. *See* https://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

State agencies and Tribal governments. This input included concerns State agencies expressed regarding possible duplication between any registration system the Bureau might build and existing registration systems. This input also included concerns Tribal governments expressed regarding maintaining Tribal sovereignty.

B. Federal regulators

Before proposing a rule under the Federal consumer financial laws, including CFPA sections 1022(c) and 1024(b), the Bureau must consult with appropriate prudential regulators or other Federal agencies regarding consistency with prudential, market, or systemic objectives administered by such agencies.[224] In developing this proposal, the Bureau consulted with prudential regulators and other Federal agencies and considered the input it received.

IV. Legal Authority

The Bureau is issuing this proposal pursuant to its authority under the CFPA.[225]

A. CFPA Sections 1022(b) and (c)

CFPA section 1022(b)(1) authorizes the Bureau to prescribe rules "as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[226] Among other statutes, the CFPA—i.e., title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)—is a Federal consumer financial law.[227] Accordingly, in issuing the proposed rule, the Bureau would be exercising its authority under CFPA section 1022(b) to prescribe rules that carry out the purposes and objectives of the CFPA and prevent evasions thereof. CFPA section 1022(b)(2) prescribes certain standards for rulemaking that the Bureau must follow in

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[224] 12 U.S.C. 5512(b)(2)(B).

[225] Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L, 111-203, 124 Stat. 376 (2010).

[226] 12 U.S.C. 5512(b)(1).

[227] 12 U.S.C. 5481(14) (defining "Federal consumer financial law" to include the provisions of title X of the Dodd-Frank Act).

exercising its authority under section 1022(b)(1).[228] For a discussion of the Bureau's standards for rulemaking under CFPA section 1022(b)(2), see part VII below.

CFPA sections 1022(c)(1)-(4) authorize the CFPB to prescribe rules to collect information from covered persons for purposes of monitoring for risks to consumers in the offering or provision of consumer financial products or services. More specifically, CFPA section 1022(c)(1) requires the Bureau to support its rulemaking and other functions by monitoring for risks to consumers in the offering or provision of consumer financial products or services, including developments in the markets for such products or services.[229] CFPA section 1022(c)(2) authorizes the Bureau authorizes the Bureau to allocate resources to perform monitoring required by section 1022(c)(1) by considering "likely risks and costs to consumers associated with buying or using a type of consumer financial product or service," "understanding by consumers of the risks of a type of consumer financial product or service," "the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers," "rates of growth in the offering or provision of a consumer financial product or service," "the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers," and "the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service."[230] CFPA section 1022(c)(4)(A) authorizes the Bureau to conduct monitoring required by section 1022(c)(1) by "gather[ing] information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers.[231] The Bureau is authorized to gather this information by, among other things, requiring covered persons participating in markets for consumer financial products and services to file annual or

[228] 12 U.S.C. 5512(b)(2).

[229] 12 U.S.C. 5512(c)(1).

[230] 12 U.S.C. 5512(c)(2)(A)–(F).

[231] 12 U.S.C. 5512(c)(4)(A).

special reports, or answers in writing to specific questions, that furnish information "as necessary for the Bureau to fulfill the monitoring . . . responsibilities imposed by Congress."[232] The Bureau may require such reports to be filed "in such form and within such reasonable period of time as the Bureau may prescribe by rule or order . . . ."[233]

CFPA section 1022(c)(7)(A) further authorizes the Bureau to "prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person."[234] Section 1022(c)(7)(B) provides that, "[s]ubject to rules prescribed by the Bureau, the Bureau may publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau."[235] The Bureau interprets section 1022(c)(7)(B) as authorizing it to publish registration information required by Bureau rule under section 1022(c)(7)(A) so that consumers may identify the nonbank covered persons on which the Bureau has imposed registration requirements.

Finally, section 1022(c)(3) authorizes the Bureau to publicly release information obtained pursuant to CFPA section 1022(c), subject to limitations specified therein.[236] Specifically, section 1022(c)(3) states that the Bureau "may make public such information obtained by the Bureau under [section 1022] as is in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information in accordance with [specified protections in section 1022]."[237] Information submitted to the Bureau's registry is protected by,

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[232] 12 U.S.C. 5512(c)(4)(B)(ii) ("In order to gather information described in subparagraph (A), the Bureau may . . . require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions, furnishing information described in paragraph (4), as necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress.").

[233] *Id*.

[234] 12 U.S.C. 5512(c)(7)(A).

[235] 12 U.S.C. 5512(c)(7)(B).

[236] 12 U.S.C. 5512(c)(3) & 5512(c)(7)(B).

[237] 12 U.S.C. 5512(c)(3)(B).

among other things, section 1022(c)(8), which states that "[I]n … publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under [the Freedom of Information Act, 5 U.S.C. 552(b)] or [the Privacy Act of 1974, 5 U.S.C. 552a], or any other provision of law, is not made public under [the CFPA]."[238]

B. CFPA Section 1024(b)

As explained above, section 1024(b) of the CFPA authorizes the Bureau to exercise supervisory authority over certain nonbank covered persons.[239] Section 1024(b)(1) requires the Bureau to periodically require reports and conduct examinations of persons subject to its supervisory authority to assess compliance with Federal consumer financial law, obtain information about the activities and compliance systems or procedures of persons subject to its supervisory authority, and detect and assess risks to consumers and to markets for consumer financial products and services.[240] Section 1024(b)(2) requires that the Bureau establish a risk-based nonbank supervision program. In particular, section 1024(b)(2) requires that the Bureau exercise its supervisory authority over nonbank covered persons based on its assessment of risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable: "(A) the asset size of the covered person; (B) the volume of transactions involving consumer financial products or services in which the covered person

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[238] 12 U.S.C. 5512(c)(8).

[239] The nonbank covered persons over which the Bureau has supervisory authority are listed in CFPA section 1024(a)(1). They include covered persons that: offer or provide origination, brokerage, or servicing of loans secured by real estate for use by consumers primarily for personal, family, or household purposes, or loan modification or foreclosure relief services in connection with such loans; are larger participants of a market for consumer financial products or services, as defined by Bureau rule; the Bureau has reasonable cause to determine, by order, that the covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services; offer or provide private education loans; or offer or provide payday loans. 12 U.S.C. 5514(a)(1).

[240] 12 U.S.C. 5514(b)(1), provides: "The Bureau shall require reports and conduct examinations on a periodic basis of persons described in subsection (a)(1) for purposes of—(A) assessing compliance with the requirements of Federal consumer financial law; (B) obtaining information about the activities and compliance systems or procedures of such person; and (C) detecting and assessing risks to consumers and to markets for consumer financial products and services."

engages; (C) the risks to consumers created by the provision of such consumer financial products or services; (D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and (E) any other factors that the Bureau determines to be relevant to a class of covered persons."[241]

CFPA section 1024(b)(7) in turn identifies three independent sources of Bureau rulemaking authority. First, section 1024(b)(7)(A) requires the Bureau to prescribe rules to facilitate the supervision of nonbank covered persons subject to the Bureau's supervisory authority and assessment and detection of risks to consumers.[242] Second, section 1024(b)(7)(B) authorizes the Bureau to require nonbank covered persons subject to its supervisory authority to "generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers."[243] This section authorizes the Bureau to require nonbank covered persons subject to its supervisory authority to create reports regarding their activities for submission to the Bureau. "Records" is a broad term encompassing any "[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form," or any "documentary account of past events."[244] Section 1024(b)(7)(B) thus authorizes the Bureau to require nonbank covered persons subject to its supervisory authority to "generate"—i.e., create[245]—reports and then "provide" them to the Bureau.[246]

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[241] 12 U.S.C. 5514(b)(2).

[242] 12 U.S.C. 5514(b)(7)(A) ("The Bureau shall prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers.").

[243] 12 U.S.C. 5514(b)(7)(B) ("The Bureau may require a person described in subsection (a)(1), to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.").

[244] *Record*, *Black's Law Dictionary* (11th ed. 2019); *accord, e.g.*, *Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1259 (9th Cir. 2019) (citing *Black's Law Dictionary's* and *Webster's Third New International Dictionary's* definitions of "record").

[245] *See Generate*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/generate (defining "generate" as "to bring into existence").

[246] The Bureau's authority under section 1024(b)(7)(B) to require generation of records complements its authority under section 1024(b)(1) to "require reports . . . on a periodic basis" from nonbank covered persons subject to its supervisory authority. 12 U.S.C. 5514(b)(1).

The third source of authority, CFPA section 1024(b)(7)(C), authorizes the Bureau to prescribe rules regarding nonbank covered persons subject to its supervisory authority "to ensure that such persons are legitimate entities and are able to perform their obligations to consumers."[247] Under this section, the Bureau may prescribe substantive rules to ensure that supervised entities are willing and able to comply with their legal, financial, and other obligations to consumers, including those imposed by Federal consumer financial law. The term "obligations" encompasses "anything that a person is bound to do or forbear from doing," including duties "imposed by law, contract, [or] promise."[248] As discussed in the Bureau's recent proposal to establish a nonbank registration for certain orders, the Bureau construes the phrase "legitimate entities" as encompassing an inquiry into whether an entity takes seriously its duty to "[c]omply[] with the law."[249]

While each of the three subparagraphs of section 1024(b)(7) discussed above operates as independent sources of rulemaking authority, the subparagraphs also overlap in several respects, such that a particular rule may be (and, in the case of this proposal, is) authorized by more than one of the subparagraphs. For example, rules requiring the generation, provision, or retention of records generally will be authorized under both subparagraphs 1024(b)(7)(A) and (B). That is so because subparagraph 1024(b)(7)(B) makes clear that the Bureau's authority under subparagraph 1024(b)(7)(A) to prescribe rules to facilitate supervision and assessment and detection of risks to consumers extends to requiring covered persons subject to the Bureau's

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[247] 12 U.S.C. 5514(b)(7)(C) ("The Bureau may prescribe rules regarding a person described in subsection (a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers. Such requirements may include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements.").

[248] *Obligation*, *Black's Law Dictionary* (11th ed. 2019).

[249] *Legitimate*, *Black's Law Dictionary* (11th ed. 2019) (defining "legitimate" as "[c]omplying with the law; lawful"); *see also Legitimate, Webster's Second New International Dictionary* (1934) (defining "legitimate" as "[a]ccordant with law or with established legal forms and requirements; lawful"); *Legitimate*, *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/legitimate (defining "legitimate" as "accordant with law or with established legal forms and requirements"). *See also* Nonbank Registration – Orders Proposal at 21.

supervisory authority "to generate, provide or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers."[250]

V. Section-by-Section Analysis

Part 1092

Subpart A—General

Proposed subpart A is identical to proposed subpart A in the Bureau's separate proposal relating to the registration of certain orders.[251] The Bureau is proposing a common, identical subpart to be shared between the two rulemakings due to the commonality of provisions regarding authority and purpose, submission and use of registration information, and severability. However, the Bureau would consider separate or independent subparts if warranted, based on public comments received in each rulemaking. The Bureau seeks comment on both approaches, i.e., common or separate subparts for the two rules, specifically including comments on whether subpart A should remain separate from subpart C.

Section 1092.100 Authority and purpose

100(a) Authority

Proposed § 1092.100(a) would set forth the legal authority for proposed 12 CFR part 1092, including all subparts. Proposed § 1092.100 would refer to CFPA sections 1022(b) and (c) and 1024(b),[252] which are discussed in sections II.C and IV of the proposal above.

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[250] 12 U.S.C. 5514(b)(7)(B); *see also, e.g.*, *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) ("redundancies . . . in statutory drafting" may reflect "a congressional effort to be doubly sure"); *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020) (concluding that "Congress employed a belt and suspenders approach" in statute); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 383–85 (2013) (statutory language is "not . . . superfluous if Congress included it to remove doubt" about an issue).

[251] Nonbank Registration – Orders Proposal. That proposal also would establish specific registration requirements in subpart B of part 1092.

[252] 12 U.S.C. 5512(b), (c); 12 U.S.C. 5514(b).

100(b) Purpose

Proposed § 1092.100(b) would explain that the purpose of this part is to prescribe rules regarding nonbank registration requirements, to prescribe rules concerning the collection of information from registered entities, and to provide for public release of that information as appropriate.

Section 1092.101 General definitions

Proposed § 1092.101 would define terms that are used elsewhere in proposed part 1092 of the rules. Proposed § 1092.101(a) would define the terms "affiliate," "consumer," "consumer financial product or service," "covered person," "Federal consumer financial law," "insured credit union," "person," "related person," "service provider," and "State" as having the meanings set forth in the CFPA, 12 U.S.C. 5481. Some of these terms would be used only in subpart B if the Bureau adopts its separate proposal relating to the registration of certain orders.[253]

Proposed § 1092.101(b) would define the term "Bureau" as a reference to the Consumer Financial Protection Bureau.

Proposed § 1092.102(c) would clarify that the terms "include," "includes," and "including" throughout part 1092 would denote non-exhaustive examples covered by the relevant provision.[254]

Proposed § 1092.101(d) would define the term "nonbank registration system" to mean the Bureau's electronic registration system identified and maintained by the Bureau for the purposes of part 1092. Proposed § 1092.101(e) would define the term "nonbank registration system implementation date" to mean, for a given requirement or subpart of part 1092, the date(s) determined by the Bureau to commence the operations of the nonbank registration system in connection with that requirement or subpart. The Bureau currently anticipates that the

[253] Nonbank Registration – Orders Proposal.

[254] *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012) (use of "includes" indicates that "the examples enumerated in the text are intended to be illustrative, not exhaustive").

nonbank registration system implementation date with respect to proposed subpart C would occur sometime after the effective date of the proposed rule and no earlier than January 2024. The actual nonbank registration system implementation date would depend, in significant part, upon the Bureau's ability to develop and launch the required technical systems that will support the submission and review of applicable filings. For subpart C, the Bureau also would establish an annual registration date as defined in proposed § 1092.301(f). As discussed in the section-by-section analysis of proposed § 1092.301(f), the annual registration date will occur after the system implementation date for subpart C.

In connection with setting both the nonbank registration system implementation date and the annual registration date, the Bureau seeks comment on how much time entities would need to comply with the requirements of part 1092 and to register with the nonbank registration system including under subpart C. The Bureau would set these dates after considering feedback provided by commenters regarding the time registrants would need to implement the requirements of this part including its subpart C. In particular, the Bureau would provide advance public notice regarding the nonbank registration system implementation date with respect to subpart C and the annual registration date to enable entities subject to subpart C to prepare and submit timely filings to the nonbank registration system.

Section 1092.102 Submission and use of registration information

102(a) Filing instructions

Proposed § 1092.102(a) would provide that the Bureau shall specify the form and manner for electronic filings and submissions to the nonbank registration system that are required or made voluntarily under part 1092. The Bureau would issue specific guidance for filings and submissions. The Bureau anticipates that its filing instructions may, among other things, specify information that filers must submit to verify that they have authority to act on behalf of the entities for which they are purporting to register. The Bureau proposes to accept electronic

filings and submissions to the nonbank registration system only and does not propose to accept paper filings or submissions.

Proposed § 1092.102(a) also would state that the Bureau may provide for extensions of deadlines or time periods prescribed by the proposed rule for persons affected by declared disasters or other emergency situations. Such situations could include natural disasters such as hurricanes, fires, or pandemics, and also could include other emergency situations or undue hardships including technical problems involving the nonbank registration system. For example, the Bureau could defer deadlines during a presidentially-declared emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq*.) or a presidentially-declared pandemic-related national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq*.). The Bureau would issue guidance regarding such situations. The Bureau seeks comment on the types of situations that may arise in this context, and about appropriate mechanisms for addressing them.

102(b) Coordination or combination of systems

Proposed § 1092.102(b) would provide that in administering the nonbank registration system, the Bureau may rely on information a person previously submitted to the nonbank registration system under part 1092. This proposed section would clarify, for example, that the registration process for proposed subpart C may take account of information previously submitted, such as in a prior annual registration under subpart C or, if applicable, a registration of certain orders and related information under subpart B.

Proposed § 1092.102(b) also would provide that in administering the nonbank registration system, the Bureau may coordinate or combine systems with State agencies as described in CFPA sections 1022(c)(7)(C) and 1024(b)(7)(D). Those statutory provisions provide that the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate. This proposed section would clarify that the Bureau may develop or rely on such systems as part of maintaining

the nonbank registration system and may also rely on previously submitted information. The Bureau seeks comment on the types of coordinated or combined systems that would be appropriate and the types of information that could be obtained from or provided to State agencies. For example, as discussed in part II.C above, some States have begun implementing public registries for private student loan agreements. The Bureau requests comment on whether the proposed nonbank registration system should identify whether a covered form contract also appears in such State registries, and whether and how the Bureau's nonbank registration should utilize information already collected by State registries in the process of registering covered terms and conditions in covered form contacts.

102(c) Bureau use of registration information

Proposed § 1092.102(c) would provide that the Bureau may use the information submitted to the nonbank registration system under this part to support its objectives and functions, including in determining when to exercise its authority under CFPA section 1024 to conduct examinations and when to exercise its enforcement powers under subtitle E of the CFPA.

The Bureau proposes to establish the nonbank registration system under its registration and market-monitoring rulemaking authorities under CFPA section 1022(b)(1), (c)(1)-(4) and (c)(7), and under its supervisory rulemaking authorities under CFPA section 1024(b)(7)(A), (B), and (C). As discussed in greater detail in part II.C above, the Bureau would be able to use the information submitted under the nonbank registration system to monitor for risks to consumers in the offering or provision of consumer financial products or services, and to support all of its functions as appropriate, including its supervisory, rulemaking, enforcement, and other functions. Among other things, the Bureau may rely on the information submitted under this part as it considers whether to initiate supervisory activity at a particular entity, in determining the frequency and nature of its supervisory activity with respect to particular entities or markets, in prioritizing and scoping its supervisory, examination, and enforcement activities,

and otherwise in assessing and detecting risks to consumers. In particular, the Bureau may consider this information in developing its risk-based supervision program and in assessing the risks posed to consumers in relevant product markets and geographic markets and the factors described in 12 U.S.C. 5514(b)(2) with respect to particular covered persons, and for enforcement purposes.[255]

Proposed § 1092.102(c) also would provide that part 1092, and registration under that part, would not alter any applicable process whereby a person may dispute that it qualifies as a person subject to Bureau authority. For example, 12 CFR 1090.103 establishes a Bureau administrative process for assessing a person's status as a larger participant under CFPA section 1024(a)(1)(B) and (2) and 12 CFR part 1090. As specified in 12 CFR 1090.103(a), if a person receives a written communication from the Bureau initiating a supervisory activity pursuant to CFPA section 1024, such person may respond by asserting that the person does not meet the definition of a larger participant of a market covered by 12 CFR part 1090 within 45 days of the date of the communication. Section 1090.103 of part 1090 establishes a process for review and determination by a Bureau official regarding the person's larger participant status. Section 1090.103(c) of part 1090 provides that, in reaching that determination, the Bureau official shall review the person's affidavit and related information, as well as any other information the official deems relevant.

Under proposed § 1092.102(c), a person may submit such an assertion regarding the person's status as a larger participant under 12 CFR 1090.103 notwithstanding any registration or

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[255] *See, e.g.*, 12 U.S.C. 5514(b)(2)(C), (D), and (E) (providing that in prioritizing examinations the Bureau shall take into account "the risks to consumers created by the provision of such consumer financial products or services," "the extent to which such institutions are subject to oversight by State authorities for consumer protection," and "any other factors that the Bureau determines to be relevant to a class of covered persons"). Depending upon the circumstances, the Bureau may consider registration under this part to be a risk factor under these provisions for those covered persons subject to the proposed rule. *See also, e.g.,* 12 U.S.C. 5565(c)(3)(D) and (E) (providing that in determining the amount of civil money penalties the Bureau shall take into account "the history of previous violations" and "such other matters as justice shall require").

In exercising its authorities under any of these provisions, the Bureau may take into account any risks that it identifies in connection with a covered person's registration with the nonbank registration system and any information submitted under the proposed rule.

information submitted to the nonbank registration system under part 1092, including any submission of identifying information. Submission of such assertions regarding larger participant status to the Bureau under 12 CFR 1090.103, including the Bureau's processes regarding the treatment of such assertions and the effect of any determinations regarding the person's supervised status, would be governed by the provisions of 12 CFR part 1090. The Bureau may use the information provided to the nonbank registration system in connection with making any determination regarding a person's supervised status under 12 CFR 1090.103, along with the affidavit submitted by the person and other information as provided in that section. However, the submission of information to the nonbank registration system would not prevent a person from also submitting other information under 12 CFR 1090.103.

Section 1092.103 Severability

Proposed § 1092.103 would provide that the provisions of the proposed rule are separate and severable from one another, and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect. This is a standard severability clause of the kind that is included in many regulations to clearly express agency intent about the course that is preferred if such events were to occur. The Bureau has carefully considered the requirements of the proposed rule, both individually and in their totality, including their potential costs and benefits to covered persons and consumers. In the event a court were to stay or invalidate one or more provisions of this rule as finalized, the Bureau would want the remaining portions of the rule as finalized to remain in full force and legal effect.

Subpart B—Reserved

Subpart B of part 1092 would be reserved for rules relating to the registration of orders. Those rules are the subject of a separate proposal.[256]

Subpart C—Use of Form Contracts to Impose Certain Terms and Conditions that Seek to Waive

[256] Nonbank Registration – Orders Proposal.

or Limit Consumer Legal Protections

The Bureau proposes that subpart C of part 1092 specify requirements for supervised nonbanks to register in the nonbank registration system their identifying information and information about certain terms and conditions in form contracts they use that seek to waive consumer legal protections or limit private enforcement or exercise of consumer rights, defined in proposed § 1092.301(c) as covered terms or conditions. The Bureau requests comment on each of the provisions of proposed subpart C, including whether they should be modified and whether proposed subpart C should include additional provisions, and if so, what the modifications or additions should be and why.

Section 1092.300 Scope

Proposed § 1092.300 would describe the scope of subpart C of part 1092 in two parts. First, subpart C would require supervised nonbanks to collect and submit information to the Bureau's nonbank registration system regarding their use of form contracts to impose certain terms and conditions that seek to waive or limit consumer legal rights and other applicable legal protections. Second, subpart C would provide for the Bureau to make this information publicly available when permitted by law.

Section 1092.301 Definitions

Proposed § 1092.301 would define key terms used in subpart C.

301(a) Administrative information

Proposed § 1092.301(a) would define the term administrative information, for purposes of subpart C, to include contact information and other information submitted or collected in the nonbank registration system to facilitate administration of the nonbank registration system including nonregistration notices submitted to the nonbank registration system under proposed § 1092.302(d). Some of the information submitted or collected in the nonbank registration system would be for purely administrative purposes. For example, proposed § 1092.302(a) would require a supervised registrant to submit contact information for a

person to whom the Bureau could direct its questions about registration. In addition, notices by persons that they believe in good faith that they are not required to register certain information due to not being covered by subpart C also generally would be administrative in nature. As discussed in the section-by-section analysis in proposed § 1092.302(d) and in the impacts analysis in part VII, these notices would help the Bureau to understand who is not registering and why, and facilitate guidance the Bureau may provide.

Under proposed § 1092.303, the Bureau would publish information collected pursuant to subpart C, subject to certain exceptions in proposed § 1092.303(b), including an exception for administrative information. Administrative information is separate from identifying information, defined in proposed § 1092.301(e), and is separate from information regarding the use of covered terms and conditions by supervised registrants, collected under proposed § 1092.302(a). Information collected for a purely administrative purpose should not be made publicly available. The identifying information collected under proposed § 1092.302(a) already would facilitate the ability of consumers to identify covered persons for purposes of the Bureau's authority in CFPA section 1022(c)(7)(B) to publicly disclose registration information discussed in part II.C.3 above.[257] Including administrative information with other information the Bureau publishes pursuant to proposed § 1092.303 also is unlikely to serve the public interest for purposes of the Bureau's authority to publish information under CFPA section 1022(c)(3) discussed in part II.C.3 above.[258] The publication of administrative information may not in all instances be especially useful to external users of the system. Administrative information is likely to include information such as time and date stamps, contact information, and administrative questions. The Bureau may need such information to work with personnel at nonbanks and in order to administer the nonbank registration system. Even in the case of nonregistration notices, they would not be required to include information about the use of covered terms or conditions

[257] 12 U.S.C. 5512(c)(7)(B).

[258] 12 U.S.C. 5512(c)(3).

collected under proposed § 1092.302(a). Publishing such information would not be in the public interest because it is unclear what use the public would have for such information and likely would be counterproductive to the goals of ensuring compliance with the proposal.

Proposed § 1092.301(a) would define the term administrative information to clarify the scope of that exception to publication in proposed § 1092.303(b). The Bureau seeks comment on the proposed definition of administrative information in proposed § 1092.301(a) and on the Bureau's proposal not to publish administrative information as reflected in proposed § 1092.303(b).

301(b) Covered form contract

The proposal would require supervised registrants to provide information to the nonbank registration system relating to covered form contracts they use in offering or providing consumer financial products or services as relevant to proposed § 1092.301(g). Proposed § 1092.301(b) would define a covered form contract as any written agreement between a covered person and a consumer that has two features: (1) It was drafted prior to the transaction for use in multiple transactions between a business and different consumers; and (2) It contains a covered term or condition as defined in proposed § 1092.301(c).

The Bureau proposes to use the term covered form contract as a reference to the overall written agreement that contains a covered term or condition. By using this term, the proposal would be more precise as to the information the agency would collect, and, as applicable, distinguish the contract provision at issue from the contract itself.

Under proposed § 1092.301(b), the Bureau would limit the information collection to information about covered terms or conditions contained in written agreements, including paper and electronic versions.[259] The Bureau interprets the term "written agreement" as including

[259] The Bureau does not propose to collect information about oral agreements that have no written component. For such oral agreements, it is unclear these are used to seek to waive or limit enforcement of applicable legal protections; it also may be burdensome for the supervised registrant to generate responsive information concerning oral agreements for purposes of the proposed rule.

electronic form contracts such as website terms of use that govern the offering or provision of consumer financial products or services. A given transaction therefore may be subject to multiple covered form contracts, such as website terms of use for online applications, a transaction agreement for approved applicants, and an arbitration agreement that may be provided separately. The Bureau also interprets the term "written agreement" for purposes of proposed § 1092.301(b) as potentially including agreements reached orally that are recorded or otherwise documented in writing. For example, as Bureau guidance has clarified, phone recordings evidencing assent to a standard-form preauthorized payment authorization may be considered a written authorization.[260] However, such a written agreement would not necessarily constitute a covered form contract. As described in proposed § 1092.301(b)(1), discussed below, a covered form contract also must have been drafted prior to the transaction for use in multiple transactions.[261]

Proposed § 1092.301(b) is not itself limited to agreements between the supervised registrant and the consumer. Rather, proposed § 1092.301(b), if the conditions in proposed § 1092.301(b)(1) and (2) are also present, could reach any written agreement between a consumer and a covered person as that term is defined in the CFPA, and without regard to whether the covered person is excluded from authorities under CFPA sections 1027 or 1029. While those covered persons are not covered by the rule or in some cases subject to the authority of the Bureau, the agreements they enter into potentially could be subject to the rule when used by a supervised registrant. For example, if an agreement meeting the definition of covered form contract also contained covered terms and conditions under proposed § 1092.301(c) (which must relate to a consumer financial product or service described in proposed § 1092.301(g)), and those

[260] *See* CFPB Compliance Bulletin 2015-06 (Nov. 23, 2015), https://files.consumerfinance.gov/f/201511_cfpb_compliance-bulletin-2015-06-requirements-for-consumer-authorizations-for-preauthorized-electronic-fund-transfers.pdf.

[261] In addition, as described in proposed § 1092.301(h)(6), registration would not be required by persons who, in the previous calendar year, entered into covered form contracts containing any covered term or condition fewer than 1,000 times and did not obtain a court or arbitrator decision on the enforceability of a covered term or condition.

covered terms or conditions are also used by a supervised registrant, as discussed in the section-by-section analysis of proposed § 1092.301(i), then the supervised registrant would be required to comply with proposed § 1092.302.

As discussed in part II, risks to consumers posed by certain contractual terms and conditions may be magnified through the use of adhesion contracting, or "take-it-or-leave-it" non-negotiable contracting processes. And many covered form contracts will be entered into in this way. The Bureau also recognizes that the definition of covered form contract in proposed § 1092.301(b) would cover contracts even if they include terms and conditions that may be, in some sense, negotiated. For example, even if a consumer and a lender bargain over the price of credit, the resulting loan agreement typically still would be a covered form contract. Even if the lender offers the consumer an opportunity to opt out of a covered term or condition as defined in proposed § 1092.301(c), the resulting contract typically still would be a covered form contract. As discussed in the section-by-section analysis of proposed § 1092.301(b)(1), the Bureau is concerned about potential risks to consumers from the use of covered terms and conditions that the company drafts, even if they are in contracts that appear to include some aspects of consumer choice. Such terms, conditions, and choices are defined in advance by the company, not the consumer. And, depending on the facts and circumstances, these choices may be constrained; for example, some negative options may not present meaningful choices.[262] The Bureau therefore is not proposing to expressly limit the definition of a covered form contract to contracts that do not reflect any negotiation.

However, proposed § 1092.301(b)(1) would limit the covered terms or conditions about which the proposal would collect information to those that are drafted prior to the transaction for use in multiple transactions between a business and different consumers. This component of the proposed definition of covered form contract borrows from the definition of a "standard contract

[262] FTC Enforcement Policy Statement Regarding Negative Option Marketing, 85 FR 60822, 60823 (Nov. 4, 2021) (discussing how negative option marketing and contracting are "widespread in the marketplace" and that FTC and States "regularly bring cases challenging a variety of harmful negative option practices").

term" from the Restatement.[263] As the Restatement explains, this definition "focuses on the pre-drafting factor, which captures a key feature of consumer contracts: their multi-transaction application. Pre-drafting also implies that there is no negotiation between the business and the consumer over the language of those terms." Under this approach, even optional terms are standard contract terms if drafted in advance by the business "because the method for specifying their content is set up by the business and has a multi-transaction application."[264] This limitation on the proposed definition of a covered form contract would provide clarity and thus reduce potential burden. Contracts which are truly non-standard – where the business and the consumer can unilaterally modify any pre-drafted content of the proposed agreement – would not be covered form contracts as defined by the proposal. For example, based on the clarification in proposed § 1092.301(b)(1), supervised registrants would not be required to collect or submit information about unique contracts that consumers specifically drafted or attempted to draft. Nor would the proposal cover handwritten modifications by individual consumers to covered terms and conditions, because these would not be contained in the covered form contract drafted for use in multiple transactions. As a result, the information collection requirement under proposed § 1092.302(a) would not require supervised registrants to track or report on such *ad hoc*, nonstandard variances.

In addition, based on this component of the definition in proposed § 1092.301(b)(1), proposed § 1092.302(a) would collect only information on standard terms that businesses draft to use in multiple transactions with more than one consumer. Thus, if a business drafted a contract prior to a transaction for use by a single consumer to engage in multiple transactions, such as a contract to establish an open-end credit line for a single consumer that is not the same contract used for other consumers, under proposed § 1092.301(b)(2), that contract would not be a covered

[263] Restatement sec. 1(5).

[264] *Id.* sec. 1 cmt. 4.

form contract if the business did not draft the contract for use in transactions with other consumers as well.

Further, settlement agreements resolving specific legal actions typically would not be covered by proposed § 1092.301(b) for several reasons. First, many settlement agreements are drafted for the particular claims involved and may be unique to that case; these types of settlement agreements would not be drafted for use in multiple settlements with different consumer parties within the meaning of proposed § 1092.301(b)(1). In addition, for class action settlements, members of a class generally are not "parties" to the settlement agreement.[265] The Bureau is not proposing to include these types of settlement agreements in the registration requirements in subpart C because they typically differ, in process and substance, from the covered form contracts used to offer the products or services in the first place. For example, in formal proceedings, consumers may be represented by counsel or others. Indeed, under Federal Rule of Civil Procedure 23 and State analogues, the terms of a consumer class action settlement must be negotiated at arms-length between the defendant and attorneys representing the interests of consumers. Courts review the settlement process and terms for compliance with these and other requirements.[266] Under the Class Action Fairness Act, appropriate Federal and State regulators also receive information about class action settlements proposed in Federal court, including in cases removed from State court due to a higher amount in controversy.[267]

The Bureau requests comment on the definition of covered form contract in proposed § 1092.301(b), including on whether the proposal should instead define covered form contracts with reference to their negotiability, similar to the definition of that "form contract" in the Consumer Review Fairness Act: "a contract with standardized terms . . . imposed on an

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[265] *See, e.g.,* Fed. R. Civ. P. 23 (generally distinguishing between parties and class members).

[266] *See, e.g.,* Fed. R. Civ. P. 23(e)(2) (requiring that the court consider, *inter alia*, that the proposal was "negotiated at arm's length" and that "the class representatives and class counsel have adequately represented the class"). Almost all States have adopted class action procedures analogous to Federal Rule 23. *See* Marcy Hogan Greer, "A Practitioner's Guide to Class Actions," at 142 (A.B.A. 2010).

[267] 28 U.S.C. 1715 (providing for notification of proposed class action settlements to appropriate Federal and State officials), *codified by* Class Action Fairness Act (CAFA), Pub. L. 109-2, 119 Stat. 4 (2005).

individual without a meaningful opportunity for such individual to negotiate the standardized terms."[268] However, as discussed above, the Bureau is proposing to cover form contracts that may present some element of choice, for which the Restatement definition may be a better model.

301(c) Covered term or condition

As discussed in the section-by-section analysis of proposed § 1092.301(b) above, for a contract to be a covered form contract, it must, among other things, contain a covered term or condition. Proposed § 1092.301(c) would define a covered term or condition as a clause, term, or condition that expressly purports to establish a covered limitation on consumer legal protections, as that term is defined in proposed § 1092.301(d), applicable to a consumer financial product or service described in proposed § 1092.301(g). In particular, the definition would apply to those consumer financial products or services offered or provided by covered persons specified in CFPA section 1024(a), including those supervised under larger participant rules adopted under that authority.

If a term or condition expressly seeks to establish a covered limitation on consumer legal protections, it would be covered irrespective of its legal validity or enforceability. For example, an arbitration agreement in a loan agreement with a servicemember that violates the MLA would still be a covered term or condition. At the same time, the proposed definition would only cover those terms and conditions that expressly attempt to establish the covered limitation. If a term or condition does not expressly attempt to establish the covered limitation, it would not be covered, even if it may contradict or violate an applicable legal protection. For example, an interest rate in a loan agreement with a servicemember that violates the MLA interest rate cap would not necessarily be a covered term or condition, unless it expressly seeks to impose a covered limitation on consumer legal protections. As discussed in the section-by-section analysis of

[268] 15 U.S.C. 45b(a)(3).

proposed § 1092.301(d)(7), the Bureau understands that these definitions generally would exclude the collection of terms or conditions that may constitute implied waivers. For the reasons discussed there, however, at this time the Bureau proposes to limit the information collection to express waivers.

In addition, in the context of automobile finance agreements, to the extent that a limitation on protections in the sale also purports to establish a covered limitation on legal protections the consumer may have, including recourse, against a finance company purchasing the associated retail installment contract, then that limitation also may qualify as a covered term or condition under proposed § 1092.301(c).

301(d) Covered limitation on consumer legal protections

As discussed in part II above, the Bureau is concerned with potential risks posed by terms or conditions that seek to waive consumer legal protections or limit the ability of consumers to enforce or exercise rights. The Bureau is proposing to collect information about supervised registrants' use of these terms and conditions. In particular, proposed § 1092.301(d) would define eight specific types of terms and conditions, each described below, about which the nonbank registration system would collect the information described in proposed § 1092.302(a). In general, these terms and conditions expressly seek to waive applicable legal protections or place express limitations on their exercise or enforcement. These terms and conditions may extinguish or seek to extinguish certain applicable legal protections including obligations of supervised nonbanks under Federal consumer financial law. These limitations also may affect when, where, or how a consumer may file or participate in a legal action, or whether a consumer may file a legal action at all. These limitations also may affect the ability of the consumers to assert their rights and protections through filing reviews and complaints. As a result, the Bureau is concerned that these types of terms and conditions may pose potential risks to consumers as described in more detail in part II of the proposal above.

There may be overlap in definitions of the types of covered terms and conditions. As a result, some terms and conditions may fall into more than one category. The proposal and information collections pursuant to proposed § 1092.302(a) would account for that possibility. The Bureau requests comment on the proposal's inclusion of each term or condition described in each paragraph in proposed § 1092.301(d), including on the relationship or overlap between each of these proposed terms and conditions.

The Bureau also seeks comment on whether certain definitions of covered terms or conditions should be narrowed to apply only when the legal protection limited is a Federal consumer financial law. As proposed, the definitions in proposed § 1092.301(d), as incorporated into the definition of a covered term or condition in proposed § 1092.301(c), would apply to any limitation on a consumer legal protection applicable to a consumer financial product or service described in proposed § 1092.301(g). This approach may be more administrable for supervised registrants, avoiding the need for them to make determinations about which types of applicable legal protections are affected by specific terms and conditions. Some terms and conditions, such as arbitration agreements, limits on time, forum, or venue for legal actions, and liability limits may apply generally, and not be tied to a specific applicable legal protection. Other terms and conditions may explicitly affect legal protections other than Federal consumer financial law, but also could raise risks to consumers under Federal consumer financial law. For example, using unenforceable or prohibited terms or conditions (even if only unenforceable or prohibited by a law other than Federal consumer financial law) may risk deceiving consumers, as discussed in part II above. By collecting information about waivers and limitations on all legal protections applicable to the consumer financial products and services described in proposed § 1092.301(g), the definitions in proposed § 1092.301(d) would provide an integrated understanding of the regulation of a given consumer financial product or service, consistent with the monitoring purposes of informing different Bureau functions as discussed in part II.C.1 above.

Proposed § 1092.301(d)(1) would define a covered limitation on consumer legal protections to include precluding the consumer from bringing a legal action after a certain period of time. Deadlines for consumers to file legal actions to enforce legal protections generally are set by statute, such as in many cases State laws specifying statutes of limitation. There is a risk that terms or conditions may seek to set deadlines that are earlier than the default deadline set by statutory law. As discussed in part II above, in some cases a contract may set a deadline so early that it is unenforceable. But whether or not the contractual deadline is enforceable, this type of term or condition may pose potential risks to consumer. For example, if the consumer would have had more time under the statute of limitations law to enforce the applicable legal protection, then the term or condition would be taking away that additional time during which the consumer could have enforced the applicable legal protection. That loss of time to enforce rights may pose potential risks to consumers, raising the need for greater public oversight to protect those rights. Proposed § 1092.301(d)(1) is not limited, however, to terms and conditions that clearly set deadlines earlier than applicable law. It may be burdensome for supervised registrants to evaluate all potentially applicable statutes of limitation and assess whether the deadline set by the contract is earlier than the most likely applicable statute of limitation. For example, such an analysis may involve review of multiple statutes of limitation potentially under the laws of multiple States. Therefore, the Bureau is proposing a definition that would be broader and likely simpler for supervised registrants to implement. If a contract specifies a deadline, it would be a covered limitation for purposes of subpart C, regardless of what the underlying limitation would have been absent the contractual deadline. The Bureau requests comment on this approach and whether proposed § 1092.301(d)(1) should be more limited, and if so, how and why, and whether proposed § 1092.301(d)(1) should be expanded, and if so, how and way. For example, the Bureau requests comment on whether the final rule should limit proposed § 1092.301(d)(1) to only terms and conditions that set deadlines that are shorter than applicable law, or deadline that

often may be unreasonable and therefore unenforceable (such as six months or less – the time period identified in the Restatement as discussed part II.B.5 above).

In addition, the Bureau requests comment on whether proposed § 1092.301(d)(1) should be expanded to cover standard terms and conditions that also may have an effect on when a consumer can file a legal action, such as terms and conditions that impose pre-filing requirements not otherwise specified in the law before a consumer can file a legal action. Terms and conditions that impose pre-filing requirements may have the effect of shortening the overall time period during which the consumer may be eligible for file a legal action because they purport to make the consumer ineligible to file a legal action until after certain steps are completed. Pre-filing requirements in some arbitration agreements also have spurred some consumers to claim they are so onerous as to be unconscionable.[269] In addition, the MLA expressly prohibits "onerous legal notice provisions" in consumer credit contracts subject to the MLA.[270] For these reasons, the Bureau requests comment on the degree of risk that pre-filing requirements may pose, including to the ability of consumers to meet other deadlines for filing legal action, whether set by a State statute of limitations or a covered term or condition in a contract.

Proposed § 1092.301(d)(2) would define a covered limitation on consumer legal protections to include specifying a forum or venue where a consumer must bring a legal action in court. The Bureau understands that State and Federal laws often already specify standards for determining where a consumer may file a legal action in court, and that it therefore is not legally necessary for a contract to make that determination. Thus, to the extent a supervised registrant seeks to set a requirement of this nature in a covered form contract, there is a risk that

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[269] *See, e.g., Bielski v. Coinbase, Inc.*, 2022 WL 1062049 at *3 (N.D. Cal. Apr. 8, 2022) (describing virtual currency exchange operator's form contract terms and conditions that seek to require the consumer to follow specific procedures for engaging in the company's informal and formal complaint processes before proceeding to arbitration or small claims court), *cert granted Coinbase, Inc. v. Bielski*, 2022 WL 17544994 (U.S. Dec. 9, 2022); *Suski v. Marden-Kane, Inc.*, 2022 WL 103451 at *1 (N.D. Cal. Jan. 11, 2022) (same).

[270] 10 U.S.C. 987(e), implemented at 32 CFR 232.8(c).

requirement may limit the otherwise available legal options of the consumer. Because proposed § 1092.301(d)(8) would separately identify the existence of arbitration agreements, proposed § 1092.301(d)(2) would not apply to arbitration agreements. Arbitration agreements also identify the forum to act as administrator of the arbitration, as well as in some cases a particular venue or place for the arbitration to be conducted, if not online. As discussed in the section-by-section analysis of proposed § 1092.302(a), the Bureau requests comment on whether the nonbank registration system should also collect forum or venue requirements for arbitration agreements pursuant to proposed § 1092.301(d)(2).

Proposed § 1092.301(d)(3) would define a covered limitation on consumer legal protections to include limiting the ability of the consumer to file a legal action seeking relief for other consumers or to participate in or seek to participate in a legal action filed by others. The Bureau is concerned that, in circumstances where consumers likely would not seek legal relief individually, but may claim relief in collective actions, potential risks may arise when they are prohibited by contract from doing so. For example, there is a risk that small-dollar harms affecting larger numbers of consumers may go unremedied; and public regulators such as the Bureau may wish to prioritize their oversight role to transactions when this risk is present. For example, the Bureau could use information indicating that private class action relief is cutoff, in conjunction with other information used to assess risk, to decide whether to prioritize examination of a given supervised nonbank in response to certain consumer complaints. This type of information also could inform the Bureau's use of its other functions discussed in part II.C above. Accordingly, proposed § 1092.301(d)(3) would include limits on (including waivers of) the consumer's ability to participate in a legal action where one or more parties seek or obtain class treatment pursuant to Federal Rule of Civil Procedure 23, any analogous State process, or rules providing for class arbitration. Proposed § 1092.301(d)(3) also would cover limitations on (including waivers of) the consumer's ability to participate in legal actions through procedures such as representative actions, joinder, intervention, or consolidation. A standard

term or condition specifying such limits would be covered by proposed § 1092.301(d)(3) even if it appears in an arbitration agreement described in proposed § 1092.301(d)(8). This approach will avoid supervised registrants having to determine whether these types of limitations are part of an arbitration agreement. This approach also will ensure that the Bureau obtains information about these types of limitations on the same basis regardless of whether they appear in arbitration agreements, while still taking into account the existence of an arbitration agreement.

On the other hand, the Bureau understands that any arbitration agreement – even absent such a limitation – may be construed as limiting class actions. For example, the U.S. Supreme Court recently held that arbitration agreements generally do not authorize class arbitration unless by affirmative consent of the parties.[271] Therefore, arbitration agreements that do not evince affirmative consent of the parties to class arbitration also, by their very nature, may limit the ability of consumers to participate in class actions filed in court. In its experience and expertise, the Bureau has found that it is exceedingly rare, if ever the case, that a supervised registrant has included a provision in an arbitration agreement expressly authorizing class arbitration. Thus, under current law, arbitration agreements reported under proposed § 1092.301(d)(8) discussed below often, if not always, would not permit class actions, even when the supervised registrant does not report the use of an express class waiver under proposed § 1092.301(d)(3). As a result, the Bureau is not proposing to separately collect information on the degree to which arbitration agreements contain such an authorization. The Bureau requests comment on whether there is data indicating that a significant number of supervised registrants use arbitration agreements that do authorize class arbitration, and if so, whether the proposed § 1092.302(a) should be broadened to require supervised registrants to review their arbitration agreements and report whether they contain a class arbitration authorization.

[271] *See generally Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1410 (2019) (acknowledging that class arbitration can occur on the consent of the parties).

Proposed § 1092.301(d)(4) would define a covered limitation on consumer legal protections to include limiting liability to the consumer in a legal action including by capping the amount of recovery or the type of remedy. Just as applicable law generally defines statutes of limitation and standards for where a consumer may file a legal action, applicable legal protections generally define the scope of a firm's liability to the consumer including what remedies are available to the consumer in a civil action in court. The Bureau is concerned about risks to consumers from terms and conditions that take away potentially-available relief. Risks may arise when consumers are unable to exercise otherwise available rights to seek consequential damages, statutory damages, punitive damages, or other forms of relief such as declaratory or injunctive relief, as well as to recover attorneys' fees when the law so permits. The Bureau also believes proposed § 1092.301(d)(4) would cover liquidated damages clauses which set a specific amount, or maximum amount, recoverable to a certain type of injury. While liquidated damages clauses may be based on estimates made in advance of relief available in the future, they nonetheless can serve as a limit on actual relief available. To the extent that these types of limitations described in proposed § 1092.301(d)(4) appear within an arbitration agreement described in proposed § 1092.301(d)(8), these types of limitations would be separately reportable from the existence of an arbitration agreement as a different type of covered term or condition under proposed § 1092.302(a). This will avoid supervised registrants having to determine whether these types of limitations are part of an arbitration agreement, and will ensure that the Bureau obtains information about these types of limitations on liability on the same basis regardless of whether they appear in arbitration agreements.

Proposed § 1092.301(d)(4) would cover liability limits including when they are permitted by law. For example, the Bureau is aware that some covered form contracts include a standard term or condition that states that "[t]o the extent permitted by law" the seller has "no responsibility" for remedies such as consequential damages or lost profits of the consumer. This

would be a limit on liability to the consumer within the meaning of proposed § 1092.301(d)(4).[272]

However, the Bureau does not anticipate that proposed § 1092.301(d)(4) generally would cover terms and conditions that allow the prevailing party to recover attorney's fees. These provisions do not limit the liability of the provider to the consumer, but rather expand that liability in certain circumstances, while also potentially establishing an obligation on the consumer to pay the attorney's fees of the provider in other circumstances. In any event, the Bureau's 2015 Arbitration Study found that terms and conditions requiring consumers to pay the legal fees of the company if it prevails were rare, generally used in less than 1% of the agreements sampled.[273] The Bureau requests comment on the prevalence of these provisions, the degree to which they alter the underlying legal protections (such as laws governing the recovery of attorney's fees), and the degree to which they pose a risk of limiting consumer enforcement despite their authorizing the consumer to recover legal fees if the consumer prevails.

Proposed § 1092.301(d)(5) would define a covered limitation on consumer legal protections to include waiving a cause of action by the consumer, including by stating that a person is not responsible to the consumer for a harm or violation of law or that a consumer is exclusively responsible for the injury. If a legal protection applicable to the offering or providing of a consumer financial product or service would hold a supervised registrant accountable for a particular injury, there risks to consumers can arise when a term or condition takes away that form of accountability. For example, as discussed in part II.C. above, some lenders have included terms or conditions in form contracts that seek to disclaim responsibility

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[272] However, as explained above, coverage of a limitation imposed by a term or condition under proposed § 1092.301(d) alone does not determine whether that triggers a reporting obligation under the proposal. To be a reportable as a covered term or condition, the term or condition must affect legal protections applicable to consumer financial products and services as relevant to proposed § 1092.301(g), and the clause must be used as defined in proposed § 1092.301(i) by a supervised registrant as defined in proposed § 1092.301(h). Through these integrated definitions, proposed subpart C would ensure that the information reported has a meaningful nexus to the offering or provision of consumer financial products and services when subject to the scope of the Bureau's supervisory authority.

[273] Arbitration Study sec. 2 Table 14.

for bank fees caused by their payment processing practices. Proposed § 1092.301(d)(5) therefore would cover waivers of causes of action for violation of legal protections. Operating in conjunction with the definition of a covered term or condition in proposed § 1092.301(c), proposed § 1092.301(d)(5) would make these waivers reportable under proposed § 1092.302(a) if the waived legal protection applies to the offering or provision of a consumer financial product or service described in proposed § 1092.301(g).[274]

Proposed § 1092.301(d)(6) would define a covered limitation on consumer legal protections to include limiting the ability of the consumer to engage in certain types of communications about the consumer financial products or services offered by the supervised registrant. Proposed § 1092.301(d)(6) would cover limitations on any written, oral, or pictorial review, assessment, complaint, or other similar analysis or statement. Non-disparagement clauses (also referred to as so-called gag clauses) generally would fall into this category, whether they limit reviews or assessments posted online for the public to see, complaints filed with government regulators, or otherwise. The term "limitation" is broad and would encompass provisions that outright prohibit these types of analysis and statements by consumers, as well as provisions that impose a penalty for making such analysis or statements or that require consumers to grant the business exclusive intellectual property rights in the content of their analysis or statements.[275]

As discussed above in part II.C.2, some consumer complaints may be an indicator of violations or risks of violation of applicable legal protections. And the Consumer Review Fairness Act separately protects a consumer's right to complain, generally prohibiting the use of non-disparagement terms and conditions in form contracts for the sale of goods and services. As a result, these terms or conditions may limit consumer protections, such as those afforded under

[274] *See* proposed § 1092.301(c) (limiting the definition of covered term or condition to those that impose a limitation on a legal protection applicable to the offering or provision of a consumer financial product or service).

[275] *See generally* 15 U.S.C. 45b(b)(1) (Consumer Review Fairness Act listing these three types of invalid contractual limitations that impede consumer reviews).

the Consumer Review Fairness Act or related laws,[276] limit recourse consumers may have through complaints concerning violations of applicable legal protections, or both.

And whether or not a statute expressly prohibits a contract from including a term or condition of this type, the term or condition generally may have the effect of restricting the flow of information about potential concerns with the consumer financial product or service – whether through public online review fora, or through consumer complaints filed with regulators. Collecting consumer complaints is a primary function of the Bureau under CFPA section 1021(c)(2). The Bureau relies on consumer complaints for, among other purposes, its risk-based supervision program.[277] Other reviews consumers post may qualify as field market intelligence, which the Bureau may consider in its risk-based supervision program.[278] And both consumer complaints to the Bureau and publicly posted consumer reviews are information the Bureau may consider in its role in monitoring the markets for risks to consumers. These contract terms carry the potential to discourage consumers from providing this information, which could understate or obscure the risk profile of a supervised registrant. It is therefore important for the Bureau's supervisory prioritization and examination work and for its market monitoring to be able to assess when this may be happening.

Notably, the statutory prohibition against non-disparagement clauses in the Consumer Review Fairness Act includes certain exceptions, generally allowing contractual provisions that prohibit disclosure or submission of, or reserve the right to remove trade secrets or commercial or financial information obtained from a person and considered privileged or confidential, certain personnel and medical files, certain information compiled for law enforcement purposes, content containing computer viruses and other potentially damaging code, and content that is clearly false or misleading, is unrelated to the goods or services offered, contains personal information

[276] *See also* CFPB Bulletin 2022-05.

[277] *See generally* CFPB Examination Manual at 11 (describing prioritization process).

[278] *Id.*

or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic.[279] The Bureau requests comment on whether proposed § 1092.301(d)(6) should be narrowed to explicitly include these types of exceptions or whether the nonbank registration system should allow supervised registrants to identify when limitations in a term or condition covered by proposed § 1092.301(d)(6) are only those that would qualify for an exception from the Consumer Review Fairness Act. The Bureau preliminarily believes that a more detailed criteria for proposed § 1092.301(d)(6) that includes these exceptions could be more burdensome for supervised registrants to apply. Under proposed § 1092.302(a)(3)(iv)(F), the proposal would collect the text of the term containing the limitation. To the extent the limitation fell within the statutory exclusions described above, the Bureau may be able to identify that when assessing the risk posed by the term.

Proposed § 1092.301(d)(7) would define a covered limitation on consumer legal protections to include waiving, whether by extinguishing or causing the consumer to relinquish or agree not to assert, any other identified consumer legal protection including any specified right, defense, or protection afforded to the consumer under Constitutional law, a statute or regulation, or common law. This sort of catch-all provision would capture other terms or conditions not already covered by proposed § 1092.301(d)(1) through (6) that expressly waive or expressly attempt to waive an identified legal protection of the consumer.

There are different ways a term or condition could waive or attempt to waive a "consumer legal protection" for purposes of proposed § 1092.301(d)(7). A term or condition may waive or attempt to waive an identified legal right the consumer might exercise, or a legal obligation the supervised registrant owes to the consumer. This could include, for example, a

[279] 15 U.S.C. 45b(b)(2)-(3).

waiver of a right to a jury trial, or a waiver of a substantive legal protection such as a right to receive a disclosure.

Proposed § 1092.301(d)(7) would explicitly cover express waivers that extinguish, or in which a consumer relinquishes, rights or other applicable legal protection.[280] In addition, proposed § 1092.301(d)(7) would cover a consumer's express agreement not to assert rights or other applicable legal protections.[281] For example, as discussed in part II.C.2 above, in 2020 the Bureau resolved an enforcement action over a provision in an automobile loan extension agreement affecting at least tens of thousands of consumers. The loan extension agreement included a term and condition that required the consumer to "agree that [the consumer] will not file for bankruptcy protection within 120 days[.]"[282] This term did not use the word "waive" or "waiver" in its text. However, the express language of this term or condition, at least for the 120-day period, purported to extinguish the identified protection (bankruptcy protection), which is a legal protection. As the Bureau concluded, the agreements "created the net impression consumers could not file for bankruptcy."[283] On that basis, the Bureau indicated that the term may be reasonably understood to be a "waiver of an individual's right to file for bankruptcy [that] is void as against public policy."[284] Thus proposed § 1092.301(d)(7) expressly applies to this type of waiver, just as a number of anti-waiver statutes discussed in part II.B expressly apply to agreements not to assert rights or protections.

Proposed § 1092.301(d)(7) refers to waivers of "other" consumer legal protections to simplify the regulation and reduce burden by distinguishing the coverage of proposed § 1092.301(d)(7) from the other subparagraphs of proposed § 1092.301(d). As a result,

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[280] *See, e.g., Waiver*, *Black's Law Dictionary* (11th ed. 2019) (common definition of "waiver" including "relinquishment" of a legal right or advantage).

[281] *See, e.g., id.* (common definition of "waiver" also including "abandonment" of a legal right or advantage).

[282] *In re Nissan Motor Acceptance Corporation*, Admin. Proc. 2020-BCFP-0017 (Consent order filed Oct. 13, 2020), ¶ 47.

[283] *Id.* ¶ 49.

[284] *Id.* ¶ 50.

if a term or condition already is covered by an earlier category under proposed § 1092.301(d)(1) through (6), then it would not be necessary for supervised registrants to determine whether the term or condition also would be covered by the catch-all.

In addition, an arbitration agreement would not be *per se* covered by proposed § 1092.301(d)(7). But if an arbitration agreement specifies waivers, those waivers may fall separately under proposed § 1092. 301(d)(1) through (6), as applicable, or otherwise under proposed § 1092.301(d)(7). For example, if an arbitration agreement classified under proposed § 1092.301(d)(8) discussed below also expressly refers to a waiver of a right to a jury trial, the jury trial waiver would be separately reportable under proposed § 1092.301(d)(7).

Proposed § 1092.301(d)(7) would act as a sort of catch-all, but it would not extend to implied waivers, which might arise from a term or condition that violates a consumer legal protection but does not expressly purport to accomplish a waiver of that legal protection. As discussed in the section-by-section analysis of proposed § 1092.301(c) above, the Bureau is not seeking in this proposal to require supervised registrants to evaluate the legality of all terms and conditions for potential implied waivers. The Bureau requests comment on that approach. For example, the Bureau requests comment on whether proposed § 1092.301(d) should be expanded to cover clauses purporting to obtain the agreement of the consumer to a limitation or restriction that is inconsistent with the applicable legal protections. As discussed in part II above, for example, the Bureau has identified instances of agreements containing terms or conditions that purport to block the ability of consumers to take specified action. These terms or conditions do not necessarily clarify that action may amount to an exercise of certain potentially applicable consumer rights – such as a right, under certain appellate and agency precedents, to revoke consent to receive debt collection calls. The degree to which proposed § 102.301(d)(7) would cover those terms or conditions will depend in part on whether they identify a consumer legal protection that is being waived, relinquished, or the consumer is agreeing not to assert.

For some other agreements, for other reasons, it is unlikely they would contain express waivers. For example, agreements to receive electronic disclosures and other electronic communications commonly are used in the marketplace. In particular, when consumer disclosures required by statute, regulation, or other rule must be in writing, the consumer may consent to receive electronic disclosures pursuant to the process specified in the Electronic Signatures in Global and National Commerce (E-Sign) Act.[285] The E-Sign Act states that it does not "limit, alter, or otherwise affect any" requirement of law "other than a requirement that contracts or other records be written, signed, or in nonelectronic form."[286] Because the E-Sign Act expressly affects existing legal requirements, the Bureau does not understand an agreement that forgoes receipt of a disclosure in nonelectronic form, when the agreement complies with the E-Sign Act, would constitute an express waiver of a written disclosure right for purposes of proposed § 1092.301(d)(7). Rather, the E-Sign Act clarifies that a compliant consent agreement "satisfies the requirement that such information be in writing[.]"[287] The Bureau requests comment on whether it should expand the scope of proposed § 1092.301(d)(7) or otherwise clarify that subpart C may cover E-Sign Act consent to receive electronic disclosures and communications, and if so, for what types of agreements, why, and how.

And in situations involving legitimate uncertainty over the coverage of a particular term or condition under subpart C, supervised nonbanks could file a notice of non-registration as described in proposed § 1092.302(d). Still, terms and conditions that may be characterized as purported implied waivers also can pose risk to consumers, including a risk of deceiving consumers about their underlying legal rights. Notwithstanding that risk, the Bureau has not proposed that subpart C would cover these types of terms and conditions. The Bureau's preliminary assessment is that the burden of identifying these types of terms and conditions may

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[285] 15 U.S.C. 7001 *et seq*.

[286] 15 U.S.C. 7001(b)(1).

[287] 15 U.S.C. 7001(c)(1).

be relatively higher, depending not just on identifying a limitation or restriction in the term or condition, but on its relationship to all potentially applicable legal protections that are not expressly identified in the text of the term or condition. There also may be more uncertainty about when a contract condition is inconsistent with an applicable legal protection. To the extent that a commenter nonetheless believes these types of terms and conditions should be covered, the Bureau requests comment on how to clearly define these terms and conditions in a manner that could be implemented to allow supervised registrants to detect the clauses without significant burden.

The Bureau also requests comment on whether proposed § 1092.301(d)(7) is sufficiently clear to identify which terms and conditions are covered by it, and whether additional clarifications would be useful, and if so, what clarifications.

Finally, proposed § 1092.301(d)(8) would cover arbitration agreements, defined as a term or condition requiring that a consumer bring any type of legal action in arbitration. Because these agreements require consumers to assert certain privately-actionable legal claims only in arbitration, they by definition limit how consumers can bring legal action by removing the option of asserting those claims in court.

The Bureau considered, but is not proposing, covering other types of terms and conditions that may, to one degree or another, affect the ability of consumers to enforce or exercise applicable legal protections. For example, the Bureau notes that the proposal would not identify a choice of law provision as itself a covered limitation on applicable consumer legal protections. These clauses also can alter the rights of consumers, particularly when providers choose laws less favorable to the consumer that bear little relation to the transaction. Nevertheless, the Bureau believes that requiring registration of all uses of choice of law provisions would lack utility, as these clauses are nearly universal, and the Bureau understands that they may present lower risk in some circumstances, such as when they are used to provide clarity and certainty without limiting consumer rights or ability to vindicate rights.

The Bureau proposes that if a provider uses any one or more of the covered terms and conditions, then the proposed rule would require the supervised registrant to submit data on choice of law provisions governing the covered term(s) or condition(s) as discussed in the section-by-section analysis of proposed § 1092.302(a). Under this approach, if a provider does not use any of the covered terms or conditions defined in proposed § 1092.301(d), but does use a choice of law provision, then it would not be required to register or submit information collected under proposed § 1092.302(a).

The Bureau believes that this approach strikes the right balance to help it monitor for risks to consumers and inform the Bureau's risk-based supervision program because there is a need to identify and understand the use of choice of law clauses in contexts that already pose risks to consumers. Conditioning the reporting of a choice of law clause on the existence of other terms and conditions defined in proposed § 1092.301(d) is appropriate because a provider using a choice of law provision that poses significant risks to consumers is likely to also use one or more of the other covered terms or conditions addressed by the proposed rule. While the other clauses may be very common, one purpose of the proposed rule is to understand and track how common; by contrast, the Bureau is already confident that choice of law clauses are ubiquitous if not universal. The Bureau seeks comment on this approach, and whether it should instead require registration of choice of law provisions, even when a provider does not use any of the covered terms or conditions defined in proposed § 1092.301(d).

The Bureau requests comment on its proposed definition in § 1092.301(d), including on whether modifications or additions to the definition are necessary to accomplish the objectives of the proposal.

301(e) Identifying information

Proposed § 1092.301(e) would define the term identifying information. This term describes the scope of identifying information a supervised registrant would be required to submit pursuant to proposed § 1092.302(a). Proposed section § 1092.301(e) would limit this

information to information that is already available to the supervised registrant, and which uniquely identifies the supervised registrant. As described in proposed § 1092.301(e), this information would include, to the extent already available to the supervised registrant, the supervised registrant's legal name(s), State of incorporation or organization, headquarters and principal place of business addresses, and unique identifiers issued by a government agency or standards organization. Examples of addresses that entities may be required to provide under proposed § 1092.302(a) include addresses used for conducting business with consumers, including both physical addresses and electronic addresses such as Internet website addresses. Examples of the identifiers issued by a government agency or standards organization that entities may be required to provide under proposed § 1092.302(a) include the Nationwide Multistate Licensing System and Registry identifier (NMLSR ID), the HMDA Reporter's Identification Number (HMDA RID), the Legal Entity Identifier (LEI) issued by a utility endorsed by the LEI Regulatory Oversight Committee or endorsed or otherwise governed by the Global LEI Foundation (GLEIF, or any successor of the GEIF), and a Federal Tax Identification number.[288]

This information will help the Bureau identify supervised registrants with specificity, including ensuring that the Bureau can relate their submissions to other registries and databases where applicable, such as the NMLS, and HMDA submissions. Furthermore, upon publication, this information will facilitate the ability of consumers to identify covered persons that are registered with the Bureau, as discussed in part II.C.3 above.

The proposal would not require the entity to obtain an identifier. Thus, for example, if the nonbank registration system were to ask about a particular type of identifier and that type of identifier had not been assigned to the supervised registrant, then the Bureau expects that the supervised registrant would be able to indicate the identifier is not applicable.

[288] The Bureau's HMDA Regulation C specifies the collection of a LEI or GLEIF for reporters subject to that rule. *See* 12 CFR 1003.4(a)(1)(i)(A).

The Bureau seeks comment on these proposed types of identifying information, and other types of identifying information that the nonbank registration system might collect and publish.

301(f) Annual registration date

Proposed § 1092.301(f) would define the annual registration date as the day during the calendar year by which a supervised registrant must complete its annual registration required by proposed § 1092.302(a). As explained in proposed § 1092.301(f), annual registration dates would not occur until after the nonbank registration system implementation date defined pursuant to proposed § 1092.101(e). When the Bureau issues filing instructions as described in proposed § 1092.102(a), the Bureau would set the precise timing for the annual registration date and any extensions to that date during emergencies. Proposed § 1092.301(f) also would provide that the Bureau will specify the annual registration date under proposed subpart C including the process for filing for an automatic extension of the annual registration date for up to 30 days. The Bureau's filing instructions under proposed § 1092.102(a) would clarify the process for obtaining such an extension. The Bureau seeks comment on the process, length, and frequency for automatic extensions under this proposed provision.

301(g) Supervised nonbank

The proposal generally would apply to nonbank covered persons that are subject to supervision by the Bureau under its statutory authorities in CFPA section 1024(a). Proposed § 1092.301(g) would define the term supervised nonbank by reference to the relevant provisions of the CFPA that establish the Bureau's supervisory authority over nonbank covered persons in CFPA section 1024(a). For clarity, proposed § 1092.301(g) would reiterate, as provided in the CFPA, that persons are not supervised nonbanks with respect to activities that are excluded from the supervisory authority of the Bureau under one or more of the provisions of CFPA section 1027 or section 1029.

301(h) Supervised registrant

Proposed § 1092.301(h) would define the term supervised registrant as those supervised nonbanks that are subject to proposed subpart C. The term would cover supervised nonbanks, as defined in proposed § 1092.301(g), that are subject to the Bureau's supervisory authority under CFPA section 1024(a) and are not specifically excluded from coverage of this proposal by one or more of the exclusions in the paragraphs in proposed § 1092.301(h). Under the proposed definition of "supervised registrant," the Bureau need not have previously exercised its authority to require reports from, or conduct examinations of, a particular supervised nonbank for that entity to qualify as a supervised registrant. A supervised nonbank would qualify as a supervised registrant if the Bureau could require reports from, or conduct examinations of, that entity because it is a covered person described in CFPA section 1024(a)(1). Such an entity would be "subject to supervision and examination" within the meaning of the proposal even if the Bureau has never previously exercised its authority to require reports or conduct examinations with respect to that entity.

Proposed § 1092.301(h)(1) and (2) would clarify that certain governments, as described in these subparagraphs, would not be covered by the proposal. Proposed § 1092.301(h)(1) would clarify that an agency of the Federal government, as defined in 28 U.S.C. 2671, would not be covered by the proposal. The Bureau has other avenues of collaborating with Federal agencies and, out of considerations of comity, does not seek to subject other Federal agencies to an information collection requirement in this proposal.

For parity, comity, and other reasons described below, proposed § 1092.301(h)(2) also would exclude certain other types of governmental bodies. Specifically, proposed § 1092.301(h)(2) would exclude a State as defined in CFPA section 1002(27), which includes a federally-recognized Indian Tribe.[289] The Bureau also collaborates with State and

[289] In this proposal, when the Bureau uses the term "Tribe," it is referring to any federally-recognized Indian Tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1998, 25 U.S.C. 5131(a).

Tribal regulators and does not seek to subject their governments to an information requirement in this proposal. Governmental bodies described in proposed § 1092.301(h)(2) generally are immune from private suit already.[290] Therefore, the Bureau does not have the same concerns about the risk that terms and conditions in form contracts would limit availability of suit, given that the law itself already limits such suits against these persons.

There may be some uncertainty about when a particular supervised nonbank is a State (including for purposes of the CFPA, a Tribe) and thus enjoys the sovereign immunity from private suit typically conferred upon a State (including a Tribe). Such an entity could register under the proposal, since, as clarified in proposed § 1092.102(c), registration is without prejudice to the ability of the entity to dispute that it is subject to the Bureau's authority over it. Or, if the entity has a good faith basis to believe it is a State (including a Tribe), such as by virtue of enjoying its sovereign immunities, it could voluntarily file with the nonbank registration system a notice of nonregistration as described in proposed § 1092.302(d). At the same time, courts have found that immunities are not available to some providers of consumer financial products or services subject to the Bureau's supervisory authority, notwithstanding their claims to have a nexus with a State or a Tribe.[291] In those circumstances, the entities could face private enforcement, and covered terms or conditions purporting to limit private enforcement would pose the types of risks to consumers as described in this proposal.[292] Therefore, the Bureau is not proposing an exemption for all State or Tribe-affiliated businesses, regardless of whether they are part of the State (including a Tribe). The Bureau requests comment on this approach.

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[290] In proposed § 1092.301(h)(2), the Bureau specifically identifies a "Tribe" as an entity included in the exemption. Because sovereign immunity only applies to the sovereign, the Bureau believes that an entity that is eligible for the sovereign immunity conferred upon a Tribe would be considered the "Tribe" for purposes of proposed § 1092.301(h)(2).

[291] *See, e.g., Great Plains Lending, LLC v. Department of Banking*, 259 A.3d 1128, 1134 (Conn. 2021) (holding that Great Plains Lending, LLC, had established sovereign immunity, but that there was insufficient evidence to conclude that another lender formerly known as American Web Loan, Inc., had sovereign immunity, and remanding on that issue); *Solomon v. American Web Loan*, 375 F.Supp.3d 638, 660 (E.D. Va. 2021) (holding that American Web Loan did not share tribe's sovereign immunity).

[292] *Solomon v. American Web Loan, Inc.*, Case No. 17cv0145 (E.D. Va.) (Final Approval Order for Class Action Settlement July 9, 2021), https://www.awlsettlement.com/ (last visited Dec. 6, 2022).

The Bureau also requests comment on whether the exemption in proposed § 1092.301(h)(2) should be limited in some way. For example, although State and Tribal governments generally have sovereign immunity from private suit, that immunity may be waived by the government itself or in some cases by law, such as a clear statement in a Federal statute.[293] The Bureau requests information on how common it is for waivers of sovereign immunity to occur in the provision of supervised consumer financial products or services, and whether the exemption in § 1092.301(h)(2) should not apply when the sovereign immunity has been waived.

In addition, for clarity and administrability, proposed § 1092.301(h)(2) would not subject State and Tribal governments to a partial registration requirement. However, the Bureau requests comment on whether the Bureau should finalize a different approach, under which a State or a Tribe should be required to register covered terms or conditions that are not expressly framed as limitations on private suit. Such terms could include, for example, outright waivers of legal protections that do not establish a private right of action in the first place or non-disparagement clauses impeding exercise of rights. Even when entities are not subject to private suit in the first place, these terms or conditions may pose risks to consumers.

The Bureau also requests comment on whether the exclusions in proposed § 1092.301(h) should be broadened to include other governments, and if so, which ones and why. The Bureau understands the local governments do not enjoy the same degree of sovereign immunity as States and Tribes.

Proposed § 1092.301(h)(3) would clarify that the proposal would not cover nonbank persons who are subject to the Bureau's supervisory authority solely in either of two capacities. First, proposed § 1092.301(h)(3)(i) would clarify that the proposal would not cover nonbank persons who are subject to the Bureau's supervisory authority solely under

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[293] *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (citing *C&L Enters, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411 (2001)).

CFPA section 1024(e), section 1025(d), or section 1026(e), which describe the Bureau's supervisory authority over service providers to supervised persons. The Bureau is prioritizing in this proposal the registration of nonbank covered persons subject to its supervisory authority under CFPA section 1024(a). The Bureau believes that it can achieve the anticipated benefits described above without extending its coverage to entities solely supervised as service providers subject to supervision under CFPA section 1024. Registering entities solely supervised as service providers may introduce complexity and would add burden and broaden the scope of the nonbank registration system in a manner the Bureau is not prepared to do at this initial stage of nonbank registration rulemaking. In any event, if a person is a service provider to a supervised person and also is itself supervised under CFPA section 1024(a), then the proposal already would cover that person. For example, the proposal would apply to a larger participant in the consumer debt collection market including when the debt collector is acting as a service provider to a payday lender or a credit card issuer.

Second, proposed § 1092.301(h)(3)(ii) would clarify that the proposal would not cover an entity that is subject to the Bureau's supervisory authority solely in its capacity as an entity supervised for a period of two years or less pursuant to an order issued by the Bureau pursuant to 12 U.S.C. 5514(a)(1)(C). For example, proposed § 1092.301(h)(3)(ii) would exclude a person supervised by the Bureau solely based on a consent agreement by which an entity may voluntarily consent to the Bureau's supervisory authority as described in 12 CFR part 1091. The Bureau already will have identified such an entity, likely will have plans to examine it under that order based on its determination that the entity's conduct poses risks to consumers, and the Bureau may obtain information about its covered terms and conditions through the normal examination process. At the same time, given the limited duration of such an order, if the proposed rule were to apply to it, it may only be subject to registration for one annual registration date. For these reasons, the registration information for such an entity may be less useful to the Bureau's risk-based non-bank supervision program. Collection of that information also would

generate only a discrete amount of information about a single entity, typically in a market not otherwise generally supervised and subject to the proposal. For these reasons, the Bureau is not proposing to cover these entities under this proposed rule. However, the Bureau requests comment on this approach, including whether the final rule should not include this exemption, should include an exemption for all such orders even when they result in supervisory authority for a longer period of time, or should include a provision that would allow such an order itself to subject the entity to the rule, whether in whole or in part (for example, registration but not publication), which determinations would be made in the orders themselves on an order-by-order basis. For example, under that alternative, if an order that established supervisory authority for a two-year period were renewed for another two-year period, then if the original order did not subject the entity to the rule, the renewal order could do so.

Proposed § 1092.301(h)(4) would exclude natural persons from the requirements of proposed subpart C. Many supervised nonbanks are not natural persons. However, some natural persons may fall within the scope of the provisions of CFPA section 1024(a), including those that broker mortgages. For example, a natural person may act in the capacity as sole proprietor of a sole proprietorship that is not incorporated as a distinct legal entity. Such a natural person could qualify as being subject to the Bureau's supervisory authority, which applies to supervised covered persons, a term defined in CFPA section 1002(6) by reference to "any person" which, under CFPA section 1002(19) includes an "individual." The Bureau does not believe, however, that individual natural persons typically would be likely to enter into a significant number of covered form contracts with consumers. Such persons might qualify for the exclusion from subpart C under proposed § 1092.301(h)(5) for persons with receipts of less than $1 million, or for the exclusion under proposed § 1092.301(h)(6) for persons with *de minimis* levels of use of covered terms and conditions. Yet there still may be burden involved in analyzing the regulation and assessing eligibility for these exclusions. The Bureau requests comment on this exclusion, including any data on whether natural persons enter into large numbers of covered form contracts

containing covered terms or conditions and have receipts of over $1 million from offering or providing these consumer financial products or services.

Proposed § 1092.301(h)(5) would exclude supervised nonbanks with less than $1 million in annual receipts resulting from offering or providing all consumer financial products and services as relevant under proposed § 1092.301(g). For purposes of this exclusion, proposed § 1092.301(h)(5)(i) would clarify that the term "annual receipts" has the same meaning as that term has in 12 CFR 1090.104(a), including the provisions of that definition at 12 CFR 1090.104(a)(i) regarding receipts, 12 CFR 1090.104(a)(ii) regarding period of measurement, and 12 CFR 1090.104(a)(iii) regarding annual receipts of affiliated companies.

In addition, for purposes of this exclusion, proposed § 1092.301(h)(5)(ii) would clarify that receipts that count toward determining larger participant status under a larger participant rule would count toward this exclusion, even if the person ultimately did not qualify as a larger participant. This clarification would address the example of a person offering or providing both consumer mortgages, private student loans, or payday loans, on the one hand, and consumer financial products or services identified in a larger participant rule, on the other hand. In that example, even if the person did not meet the threshold for larger participant status under the larger participant rule, the receipts from offering or providing the consumer financial product or service covered by the larger participant rule still would count as receipts for purposes of the exclusion in this proposal.

Under this proposed definition, the exclusion would be based on the receipts resulting from offering or providing all consumer financial products and services as relevant under proposed § 1092.301(g), including such receipts from affiliated companies as defined in the Bureau's regulations at 12 CFR 1090.101. The receipts test in proposed § 1092.301(h)(5) does not refer to when the underlying consumer contract that generated the receipt was entered into, or whether the underlying consumer contract that generated the receipt was a covered form contract or included a covered term or condition. Therefore, if a supervised nonbank earned receipts in

the previous calendar year from a consumer financial product or service as relevant under proposed § 1092.301(g) originally offered or provided in prior years, those receipts still would count toward the threshold. In addition, if a supervised nonbank earned receipts in the previous calendar year from consumer financial products or services as relevant under proposed § 1092.301(g) that were not subject to covered terms and conditions in covered form contracts, those receipts still would count toward the threshold.

The Bureau is proposing the exemption in proposed § 1092.301(h)(5) for two reasons. First, consumer financial product and service providers with significantly lower levels of receipts generally may pose lower risks because they engage with fewer consumers, obtain less money from those consumers, or both. Second, the information collection burdens on entities with receipts of $1 million or less, on a relative basis, generally would be higher than such burdens on larger entities.[294]

The Bureau requests comment on this approach, including whether the exemption in proposed § 1092.301(h)(5) should apply on a fiscal-year basis, as an alternative to the proposed calendar-year basis or as an additional basis for exemption, and why or why not. The calendar-year measurement generally would align with the period used to define reporting obligations under proposed § 1092.302(a). However, the Bureau notes that receipts calculations for larger participant determinations in the debt collection and consumer reporting markets are on a fiscal-year basis, as provided for in part 1090. The Bureau also requests comment on whether the

[294] *See* 12 U.S.C. 5514(b)(2)(A), (B) (requiring the Bureau to take into consideration "the asset size of the covered person" and "the volume of transactions involving consumer financial products or services in which the covered person engages"). Furthermore, while the Bureau does not believe that it needs to rely on its authority under 12 U.S.C. 5512(b)(3) to exempt classes of covered persons from rules in proposing this small-entity exclusion. The Bureau believes that the exclusion would be warranted as an exercise of its section 1022(b)(3) exemption authority, to the extent that provision was applicable. *See* 12 U.S.C. 5512(b)(3). As under 12 U.S.C. 5514(b)(2), an entity-size-based exclusion accords with 12 U.S.C. 5512(b)(3)(B)(i) and (ii), which instruct the Bureau to consider "the total assets of the class of covered persons" and "the volume of transactions . . . in which the class of covered persons engage" in issuing exemptions. 12 U.S.C. 5512(b)(3)(B)(i)–(ii). In addition, given the relatively limited scope of the harm to consumers that entities with annual receipts not exceeding $1 million would generally be able to cause, the Bureau does not believe that the factor articulated in 12 U.S.C. 5512(b)(3)(B)(iii) ("existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protection") warrants not proposing the proposed small-entity exclusion.

proposed exemption should be automatically adjusted for inflation, such as every five years or at some other interval.

Proposed § 1092.301(h)(6) would exclude supervised nonbanks that, together with their affiliates, engaged in no more than a *de minimis* level of use of covered terms or conditions in the previous calendar year. In general, risks to consumers from covered terms and conditions may be greater for covered terms and conditions used more frequently, such as in more transactions or with more consumers. Relatedly, as discussed in the section-by-section analysis of the definition of a covered form contract in proposed § 1092.301(b)(1), the proposal would focus on risks related to terms and conditions in form contracts used repeatedly in multiple transactions. The Bureau also recognizes the burdens of the information collection discussed in more detail in parts VII, VIII, and IX. By not proposing to collect information about supervised nonbanks' relatively infrequent use of covered terms and conditions, the proposal seeks to balance that burden in light of the potentially lower risks from infrequent use. For these reasons, proposed § 1092.301(h)(6) would exclude from the definition of supervised registrant those supervised nonbanks engaged in no more than a *de minimis* level of use of covered terms or conditions.

Under proposed § 1092.301(h)(6), if a supervised registrant meets two conditions, its use of covered terms and conditions would qualify as *de minimis*. First, the supervised registrant must not have entered into covered form contracts containing any covered term or condition 1,000 or more times during the previous calendar year. Proposed § 1092.301(i)(1) describes the ways in which a supervised registrant would enter into a covered form contract for purposes of subpart C. This test would count the number of times the supervised registrant entered into covered form contracts in the previous calendar year, for consumer financial products and services as relevant under proposed § 1092.301(g).[295] Entering into covered form contracts for a

[295] This would include activity subject to an order under CFPA section 1024(a)(1)(C) that is not excluded by proposed § 1092.301(h)(3)(ii), because that activity falls within the definition of covered term or condition in

consumer financial product or service subject to a larger participant rule would count toward this threshold even if the person did not qualify as a larger participant. In addition, regardless of how many covered terms and conditions are contained in the covered form contract, each time the supervised registrant enters into the covered form contract would count only once toward the 1,000-use cutoff for this component of the proposed *de minimis* threshold. As a result, if a supervised registrant entered into only one covered form contract, that covered form contract contained multiple covered terms or conditions, and the supervised registrant entered into the contract 999 or fewer times, it would satisfy this component. As noted in the section-by-section analysis of proposed § 1092.301(c), some transactions may be governed by multiple covered form contracts. For that reason, the Bureau seeks comment on whether this component of the proposed exclusion should be revised to be based on the number of times the supervised registrant entered into all form contracts for the same consumer financial product or services. The Bureau also requests comment on whether to adopt a different threshold for what is a *de minimis* number of times for a supervised registrant to enter into a covered term or condition.

Second, the supervised registrant must not have received, as a party to a legal action, court or arbitrator decision(s) ruling on the enforceability of a covered term or condition in the previous calendar year. Such decisions could include orders or opinions terminating, dismissing, staying, deferring, suspending, restricting, limiting liability for a claim filed by the consumer pursuant to a covered term or condition in a covered form contract. As discussed in the section-by-section analysis of proposed § 1092.301(i)(2) below, administrative tribunals are less likely to be charged with ruling on the enforceability of a contract term; for that reason, proposed § 1092.301(h)(6)(ii) would not cover administrative decisions.

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proposed § 1092.301(c). Proposed § 1092.301(c) covers the described terms or conditions when they apply to a consumer financial product or service "described in" proposed § 1092.301(g). When a supervised registrant's consumer financial product or service is specified in an order issued under CFPA section 1024(a)(1)(C), then for the supervised registrant, that consumer product or service would be one that is "described in" proposed § 1092.301(g) for purposes of the definition in proposed § 1092.301(c).

The Bureau requests comment on whether a *de minimis* use exclusion is appropriate, and if not, why not. The Bureau also requests comment on its proposed levels of use to define *de minimis* use. For the component of the threshold related to decisions in legal actions, the Bureau requests comment on whether the final rule should adopt a higher threshold, or a different threshold for individual and putative or certified class actions, and if so, what the threshold(s) should be and why. The Bureau is not proposing a different threshold for these different types of cases. Even decisions in individual legal actions may have precedential, authoritative, or persuasive impact beyond the individual case, whether for other courts, arbitrators, or the public. For that reason, such decisions may have impact beyond those consumers who are party to an individual legal action or potential members of a class action.

Proposed § 1092.301(h)(7) would exclude supervised nonbanks whose use of covered terms or conditions in covered form contracts in the previous calendar year was limited to entering into contracts for residential mortgages in a form made publicly available on the Internet required for insurance or guarantee by a Federal agency or purchase by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or the Government National Mortgage Association. This exclusion would not apply if the supervised nonbank used covered terms or conditions for consumer financial products or services as relevant to proposed § 1092.301(g) that were different from or in addition to any covered terms and conditions that appeared in these published form contracts. In addition, this exclusion would not apply if the person obtained a court or arbitrator decision in the previous calendar year regarding the enforceability of a covered term or condition in a covered form contract as described in proposed § 1092.301(i)(2).

The Bureau is proposing this exclusion because, as discussed in the impacts analysis in part VII, these standard federally-adopted contracts are publicly-available on the Internet websites of Federal agencies or enterprises overseen by Federal agencies and are in general use throughout the market for first-lien mortgages on site-built homes that are insured, guaranteed, or

purchased by these Federal agencies or enterprises supervised by Federal agencies. Covered terms and conditions may appear in these covered form contracts. However, the Bureau and the general public already have access to these contracts on the websites of these Federal agencies or the enterprises they oversee. The Bureau already can use that information as part of its market monitoring and risk assessments. It therefore does not propose to require registration from supervised nonbanks whose sole use of covered terms or conditions consists of entering into those contracts. The exemption in proposed § 1092.301(h)(7) would not apply, however, if the supervised nonbank obtained a court or arbitrator decision enforcing a covered term in such a covered form contract. The Bureau and the public do not have general knowledge of all such decisions, and the value in collecting information about them from a risk monitoring and assessment perspective therefore is similar to the value of registering decisions related to covered terms and conditions in other covered form contracts. In addition, if the supervised nonbank uses covered terms and conditions contained in covered form contracts, other than the contracts described in proposed § 1092.301(h)(7), then the entity would not be eligible for this exemption. For entities not eligible for an exemption in proposed § 1092.301(h), the Bureau is not proposing a blanket exclusion for the contracts described in proposed § 1092.301(h)(7) because the incremental burden from registering an additional contract (compared to the burden of registering overall) should not be significant, particularly as the nonbank registration system can streamline how it collects information about supervised registrants' use of these type of standard form contracts that have widespread market usage.

Finally, proposed § 1092.301(h)(8) would clarify that the proposal would not cover a person who is a covered person solely by virtue of being a related person as defined in CFPA section 1002(25).[296] Under CFPA section 1002(25), certain persons are "deemed to mean a covered person for all purposes of any provision of Federal consumer financial law[.]"[297]

[296] 12 U.S.C. 5481(25).

[297] 12 U.S.C. 5481(25)(B).

However, CFPA section 1022(c)(7)(A) excludes related persons from the type of covered persons covered by Bureau rules regarding registration issued under CFPA section 1022(c)(7) authority. As discussed in part II.C and part IV above, the Bureau is proposing this rule in part under separate authorities under CFPA sections 1022 and 1024. However, for clarity, the Bureau is not proposing to cover persons who are not subject to its CFPA section 1022(c)(7)(A) authority. Therefore, it is proposing to exclude related persons in this rule, to the extent that they are not covered persons for any other reason than being deemed covered persons pursuant to CFPA section 1002(25). Similar to the operation of the exclusion for related persons in the Bureau's recent proposal for registration of certain nonbank orders,[298] this exclusion generally would not apply to a supervised nonbank who offers or provides consumer financial products or services described in CFPA section 1024(a)(1) (as recited in proposed § 1092.301(g)), even if it also happens to be a related person for other reasons.

301(i) Use of a covered term or condition

The proposal would collect information about supervised registrants' use of covered terms and conditions in covered form contracts. Supervised registrants may use terms and conditions in different ways. Supervised registrants may typically use covered terms and conditions by placing them in contracts between the consumer and the supervised registrant. In other circumstances, supervised registrants may seek to enforce covered terms and conditions in a covered form contract that they did not enter into as a party. For example, as discussed in part II, under some legal precedents, a larger participant debt collector or student loan servicer may seek to enforce a covered term or condition in a loan agreement between the consumer and the creditor.

The enforcement of covered terms and conditions may signal risk to consumers that is different than the risks presented by placing the covered terms or conditions in the covered form

[298] *See* Nonbank Registration – Orders Proposal, proposed § 1092.201(d)(1).

contract. Namely, the degree to which a covered term or condition dissuades or chills private enforcement of an applicable legal protection depends on whether there are in fact instances of non-compliance with the applicable legal protection that could lead to private enforcement. If a consumer files a legal action, then that may indicate that a consumer is claiming there are such instances. If a court or arbitrator then enforces the covered term or condition, then that decision on its face restricts the ability of the consumer to enforce an applicable legal protection when they have determined they would do so. In addition, as discussed in the section-by-section analysis of proposed § 1092.301(d)(6) above, a non-disparagement clause covered by proposed § 1092.301(d)(6) may similarly chill public comment or complaint about a supervised registrant's practices, which in turn may make potential violations or risks of violations of applicable legal protections more difficult to uncover. Accordingly, proposed § 1092.301(i) would define the term "use" in this context to include both entering into a contract that contains the covered terms or conditions and obtaining decisions about the enforceability of covered terms and conditions.

First, as described in proposed § 1092.301(i)(1), a supervised registrant would use a covered term or condition for purposes of subpart C if it "enters into" a covered form contract containing the covered term or condition. Proposed § 1092.301(i)(1) would list the covered examples of this type of use. The examples in proposed § 1092.301(i)(1) include providing a new consumer financial product or service, acquiring or purchasing a consumer financial product or service, or adding a covered term or condition to a consumer financial product or service, as described in more detail in proposed § 1092.301(i)(1).[299]

Proposed § 1092.301(i)(1)(iii) would clarify that one way a supervised nonbank would enter into a covered form contract is to acquire a consumer financial product or service that is

[299] This proposed definition and related examples would not reach terms or conditions affecting all goods and services. The definition of covered term and condition in proposed § 1092.301(c) reaches only limitations applicable to those consumer financial products and services subject to the Bureau's supervisory authority listed in proposed § 1092.301(g).

subject to a covered form contract. That would be the case even if the seller is not subject to the Bureau's supervisory authority. For example, a larger participant automobile finance lender would enter into a covered form contract for purposes of proposed § 1092.301(i)(1)(iii) when it acquires a covered retail installment sales form contract from an automobile dealer excluded from supervisory authority of the Bureau under CFPA section 1029(a).

In addition, proposed § 1092.301(i)(1)(v) would clarify that another way a supervised registrant may enter into a covered form contract is to add a covered form contract to a pre-existing consumer financial product or service. For example, a loan servicer or debt collector may engage in servicing or collection of a debt originated under a consumer contract that the servicer or debt collector had not entered into at the time of origination of the loan. But as part of its servicing or debt collection activities, the servicer or debt collector may enter into an agreement with the consumer such as for a payment plan, a payment authorization, a debt modification or settlement, or some other type of agreement. If the agreement is a covered form contract, then the servicer or debt collector has entered into that covered form contract for purposes of proposed § 1092.301(i)(1).

Second, as described in proposed § 1092.301(i)(2), subpart C would cover an additional type of use of covered terms or conditions – obtaining decisions by a court or arbitrator on the enforceability of a covered term or condition. This type of "use" could affect a supervised registrant's obligations under the proposal in two ways. First, this type of use would affect a supervised registrant's eligibility for the *de minimis* exclusion from subpart C, as discussed in the section-by-section analysis of proposed § 1092.301(h)(6) above. In addition, when the supervised registrant is not eligible for the *de minimis* exclusion, the Bureau would collect certain limited information about this type of use as described in proposed § 1092.302(a)(4).

Proposed § 1092.301(i)(2) would define the type of event that would be the subject of information collection under proposed § 1092.302(a)(4). The Bureau seeks to define an event or events that would be a meaningful indicator of potentially significant risk to a consumer who has

asserted a claim in a legal action (or in the case of non-disparagement clauses, faces a claim against them), while also defining an event or events that supervised registrants could ascertain without incurring significant burdens. Court or arbitrator decisions to enforce or not enforce a covered term or condition would be both a notable event in the supervised registrant's administration of covered terms or conditions, and a relatively definitive indicator of risk posed by those terms or conditions. The section-by-section analysis of proposed § 1092.302(a)(4) below explains the value of this information from a risk monitoring and assessment perspective.

Many decisions covered by proposed § 1092.301(i)(2) are not readily available to the public, such as through electronic legal research. Decisions in individual arbitrations generally are confidential, and decisions in lawsuits filed in court are not always searchable. Some court decisions may be publicly available such that the Bureau and the public could conduct legal research to determine when covered terms and conditions were enforced. However, the supervised registrant is in the best position to know and to readily access decisions in the legal actions brought against or by them.

The Bureau is not proposing to define "use" more broadly. For example, proposed § 1092.301(i)(2) would not cover steps taken by the supervised registrant to enforce covered terms or conditions, such as through filing a pleading that a court or arbitrator either has not decided or has rejected. Based on the narrower definition in proposed § 1092.301(i)(2), which would cover only decisions on such requests, proposed § 1092.302(a)(4) would pose a lower information collection burden than if it were collecting information about the broader range of attempts at enforcement (such as motions practice) regardless of whether the motion resulted in a decision. Supervised registrants would not need to review all pleadings in a legal action to identify responsive information. Instead, supervised registrants would need to be aware of the decisions of the court or arbitrator.

In addition, proposed § 1092.301(i)(2) would not cover administrative decisions. While courts and arbitrators may generally apply State common law of contracts to rule on

enforceability of terms, administrative agencies may be less likely to serve that general role of applying State common law of contracts to rule on enforceability of covered terms and conditions. The Bureau seeks comment on this approach, including on the likelihood that administrative decisions may have a bearing on the enforceability of covered terms and conditions.

Section 1092.302 Registration and submission of information regarding use of covered terms and conditions

302(a) Requirements to register and annually submit information to the nonbank registration system

Proposed § 1092.302(a) would establish requirements for supervised registrants to annually register in the nonbank registration system and provide information about their use of covered terms and conditions in covered form contracts. Proposed § 1092.302(a) would require that, each calendar year by the annual registration dates, supervised registrants must identify themselves or update their identifying information and administrative information in the nonbank registration system. Proposed § 1092.302(a)(1) and (2) would require the supervised registrant to specify the supervised products as relevant to proposed § 1092.301(g) for which the supervised registrant used covered terms or conditions in the previous calendar year and the States or other jurisdictions where it offered those products or services.

Proposed § 1092.302(a)(3) and (4), would further require that supervised registrants provide information to the nonbank registration system about their use of those covered terms and conditions by providing standardized data.

The Bureau requests comment on the general requirements of proposed § 1092.302(a), including the requirement to register and update registration information annually. The Bureau requests comment on whether registration and registration updates should be required or permitted more or less often, and if so, why and in what circumstances. For example, the Bureau requests comment on whether, and if so, why and when supervised registrants should be required

or allowed to update the registry upon a change in their identifying information, such as a result of a merger or acquisition, or a change in their use of a previously-registered covered term or condition or a change in use of a form contract containing covered terms or conditions. To the extent such updates are permitted or required, the Bureau also requests comment on how and when the updates should be published pursuant to proposed section § 1092.303 below.

The Bureau also requests comment on whether the nonbank registration system should include pre-completed selections for standard form contracts that have widespread market usage. For example, as discussed in the section-by-section analysis of proposed § 1092.301(h)(7), some mortgage lenders using certain form contracts for federally-related mortgages may be required to register in circumstances where exclusions in proposed § 1092.301(h) do not apply. Because the form contracts are widely accessible on Federal agency and government-sponsored enterprise websites, the Bureau may be able to pre-populate answers to the questions posed by the nonbank registration system for these contracts. That would reduce the incremental burden of registering any covered terms or conditions in these contracts. The Bureau requests comment on what other covered form contracts may be in such widespread usages that would be amenable to similar burden-reducing information collection methods. The Bureau requests commenters provide examples of these covered form contracts.

In addition, the Bureau requests comment on the benefits and burdens involved in identifying the States or other jurisdictions where the supervised registrant offered the consumer financial products or services identified pursuant to proposed § 1092.302(a)(1). In addition, the Bureau requests comment on whether the final rule should clarify what qualifies as a State where the consumer financial product or service is offered. The Bureau does not believe significant uncertainty on this issue is likely. If, for example, an online lender in one State offers loans to consumers in the State where it is located as well as to consumers in other States, for purposes of subpart C, the lender presumably would be offering or providing loans in all of these States where the loans would be available.

Proposed § 1092.302(a)(3) would collect additional types of data more specifically related to each of the covered terms and conditions contained in covered form contracts entered into by the supervised registrant. Proposed § 1092.302(a)(3) would require the supervised registrant to identify which consumer financial products and services identified pursuant to proposed § 1092.302(a)(1) are affected by each covered term or condition, and in which States listed pursuant to proposed § 1092.302(a)(2). Proposed § 1092.302(a)(3) also would require the supervised registrant to provide six additional types of data on its use of the covered term or condition.

First, proposed § 1092.302(a)(3)(i) would collect brand name and trade names the supervised registrant used to provide the supervised consumer financial product or service. Second, proposed § 1092.302(a)(3)(ii) would collect the legal names of any persons, other than a consumer and the supervised registrant, that typically entered into the applicable covered form contract such as other named parties. The information described in proposed § 1092.302(a)(3)(i) and (ii) would help the Bureau to more clearly identify the products and services and other covered persons to which the information collected relates.

Absent the data collected by proposed § 1092.302(a)(3)(i), the remaining data collected under proposed § 1092.302(a) may be associated only with corporate entity names that may be difficult to match to other information related to a brand name or trade name. Thus, the data collected by proposed § 1092.302(a)(3)(i) would facilitate use of the data for the Bureau's market monitoring and supervisory purposes as described in part II.C.

Absent the data collected by proposed § 1092.302(a)(3)(ii), the Bureau may have greater difficulty identifying when the remaining data collected under proposed § 1092.302(a) is partially duplicative of information provided by other supervised registrants. For example, if a nonbank lender covered by subpart C registers terms and conditions in a covered form contract to which an unaffiliated loan broker or loan servicer covered by subpart C is also a party, then

without the information collected by proposed § 1092.302(a)(3)(ii), the Bureau may be unable to identify that the terms and conditions registered relate to the same agreement.

Furthermore, the Bureau anticipates that publication of this information under proposed § 1092.303 would similarly help other regulators and the public to more clearly identify the products and services to which the information collected relates.

Third, proposed § 1092.302(a)(3)(iii) would collect information on each category of covered limitation on consumer legal protections that is included in the covered form contract. Because each of the types of covered limitations listed in proposed § 1092.301(d) may pose different risks, it would be useful to collect information about which types of covered terms or conditions the supervised registrant used. This information also would identify situations where a supervised registrant is using multiple types of covered terms or conditions for a given consumer financial product or service, which may shed light on distinct risks or magnify risks.

Fourth, for each type of covered limitation on consumer legal protections described in proposed § 1092.301(d)(1) through (7) contained in the covered form contract, proposed § 1092.302(a)(3)(iv) would collect certain information about the limitation. For limitations described in proposed § 1092.301(d)(1) (precluding the consumer from bringing a legal action after a certain period of time), proposed § 1092.301(d)(2) (specifying a forum or venue where a consumer must bring a legal action in court), and proposed § 1092.301(d)(3) (limiting the ability of the consumer to file a legal action seeking relief for other consumers or to seek to participate in a legal action filed by others), supervised registrants may be able to provide specific information about the limitations' content in a more standardized form, without incurring significant burdens. By collecting the standardized information described below, the Bureau also would be able to monitor and assess risks posed by these limitations and compare limitations across consumer financial products and services in a more efficient manner. Because the risks posed by these terms or conditions vary not just by their type or combination, but also

by their content, collecting information about their content would facilitate closer monitoring and more careful risk assessment.

Accordingly, for limitations described in proposed § 1092.301(d)(1) (precluding the consumer from bringing a legal action after a certain period of time), proposed § 1092.302(a)(3)(iv)(A) would collect the specified time period, within ranges specified by the Bureau, for the consumer to bring a legal action. For limitations described in proposed § 1092.301(d)(2) (specifying a forum or venue where a consumer must bring a legal action in court), proposed § 1092.302(a)(3)(iv)(B) would collect the name and, as applicable, place, of the forum or venue for the consumer to bring a legal action. For limitations described in proposed § 1092.301(d)(3) (limiting the ability of the consumer to file a legal action seeking relief for other consumers or to seek to participate in a legal action filed by others), proposed § 1092.302(a)(3)(iv)(C) would collect information about what type of legal action the consumer is prohibited from filing and, as applicable, what type of participation the consumer is prohibited from engaging in vis-à-vis legal action filed by others. This could include specifying, for example, whether the consumer is prohibited from engaging or participating in joinder, intervention, representative action, a class action, or some combination of these or others.

For limitations described in proposed § 1092.301(d)(4) (limiting liability to the consumer in a legal action, including by capping the amount of recovery or type of remedy), proposed § 1092.301(d)(5) (waiving a cause of legal action by the consumer, including by stating a person is not responsible to the consumer for a harm or violation of law), proposed § 1092.301(d)(6) (limiting the ability of the consumer to make any written, oral, or pictorial review, assessment, complaint, or other similar analysis or statement concerning the offering or provision of consumer financial products or services by the supervised registrant), and proposed § 1092.301(d)(7) (waiving any other identified consumer legal protection, including any specified right, defense, or protection afforded to the consumer under Constitutional law, a statute or regulation, or common law), an efficient, low-burden way to

collect relevant information to monitor and assess the risk posed by the term or condition would be for the supervised registrant to submit the text of the relevant contract term or condition. For contracts stored electronically, the supervised registrant could type or electronically paste the text quickly into the nonbank registration system. For contracts not stored electronically, the supervised registrant could type the text in their nonbank registration system submission or potentially submit an image that contains or can be converted to readable text. For these types of covered limitations on consumer legal protections, collection of the covered term or condition itself would pose a lower burden on supervised registrants than requiring the supervised registrant to describe or otherwise characterize the limitation. The latter approach could call upon the supervised registrant to make burdensome legal judgments about the scope of what may be a complex legal provision, for example. By contrast, the Bureau would be better able to monitor and assess risks posed by these limitations when it can review their text.

Proposed § 1092.302(a)(3)(iv) would not propose to collect information about the contents of an arbitration agreement covered by proposed § 1092.301(d)(8). There is substantial information available about the generalized risks posed by arbitration agreements, including those discussed in part II and the section-by-section analysis of proposed § 1092.301(d)(8) above. These risks include that class actions are not available and decisions in individual arbitration generally are not public. These risks remain in particular after the Bureau's 2017 rulemaking to address them was voided by a joint resolution of Congress signed by the President.[300] The Bureau therefore believes at this time that it would be unnecessary to impose additional information collection burdens because the baseline risks posed by arbitration agreements described above (as distinct from any other covered terms or conditions that they may contain) are unlikely to vary. And to the extent an arbitration agreement contains one of the

[300] *See* 82 FR 55500 (Nov. 22, 2017) (discussing Congressional Review Act revocation of Bureau's 2017 Arbitration Agreements rule), https://www.federalregister.gov/documents/2017/11/22/2017-25324/arbitration-agreements.

limitations described in proposed § 1092.301(d)(1)-(7), supervised registrants already would provide information about that limitation separately.

The Bureau requests comment on this approach. For example, the Bureau notes that some arbitration agreements may allow consumers to obtain judicial review of the validity of the arbitration agreement itself, while others may contain a delegation provision requiring that only the arbitrator may decide the validity of the arbitration agreement. In addition, some arbitration agreements could specify unusual administrators. The Bureau requests comment on whether it should collect information about whether reported arbitration agreements contain such delegation clauses, and about the identity of the arbitration administrator, including information about the potential value and burdens of such information collection.

Fifth, proposed § 1092.302(a)(3)(v) would collect information about the State or other jurisdiction identified in any choice of law provisions in the covered form contract, as applicable. The applicable law specified in the covered form contract may be important contextual information for assessing the risk posed by the covered form contract and the covered terms or conditions in the covered form contract. For example, as discussed in part II above, some laws prohibit or void certain contract terms, while others do not. By collecting information about the chosen law, the Bureau can assess whether a contract term or condition may be prohibited by that law, or if the supervised registrant may have selected a law that has the effect of avoiding a prohibition or limitation on the term or condition that exists under a different law.

Sixth, proposed § 1092.302(a)(3)(vi) would collect information necessary for the Bureau identify and obtain form contracts provided by form providers to supervised registrants. Proposed § 1092.302(a)(3)(vi) would collect the name of the form contract provider and other information necessary to identify the form contract, such as the complete copyrighted name including any form number and date of the contract. The information collected pursuant to proposed § 1092.302(a)(3)(vi) would help the Bureau to identify and obtain these agreements. The Bureau could use these agreements to simplify registration of terms and conditions

contained in those contracts. As discussed above, the Bureau may be able to prepopulate the nonbank registration system with information about certain form contracts used by multiple market participants. To the extent the Bureau is able to obtain a specific form contract and prepopulate the nonbank registration system with information about that contract, and the supervised registrant uses that contract without modification, the Bureau requests comment on whether the final rule should permit supervised registrants to simply identify their use of that contract pursuant to proposed § 1092.302(a)(3)(vi), as an alternative to providing the specific information about that contract required by proposed § 1092.302(a)(3)(iii)-(v).

In addition, by identifying those terms and conditions that are contained in form provider contracts, the Bureau could more efficiently identify supervised registrants that use potentially unique or outlier terms and conditions. Accordingly, the information collected pursuant to proposed § 1092.302(a)(3)(vi) also would facilitate the Bureau's monitoring of risks to consumers and assessment of risks for prioritization of its risk-based supervision program.

Finally, the Bureau requests comment on whether it should publish the name of the form provider and the citation to the specific form contract, pursuant to proposed § 1092.303.

Proposed § 1092.302(a)(4) would obtain information about the degree to which supervised registrants obtained court or arbitration rulings during the previous year regarding the enforceability of covered terms or conditions. In particular, pursuant to proposed § 1092.302(a)(4), the nonbank registration system would ask basic questions, such as binary questions about whether courts or arbitrators issued decisions ruling on the enforceability of a covered term in legal actions by consumers, as defined in proposed § 1092.301(i)(2). The information collected would further assist the Bureau in monitoring and assessing risks, by informing judgments about whether the terms or conditions are lawful and hence enforceable.

If a supervised registrant received one or more such decisions, proposed § 1092.302(a)(4) also would require the supervised registrant to identify which type of covered term or condition was at issue in the decision, and whether the ruling enforced or declined to enforce the covered

term or condition. This information would clarify the type of risk posed by the decision. In the case of a ruling declining to enforce the covered term or condition, this could indicate that the term was unenforceable in that case, posing a risk that consumers may have been misled to believe otherwise. By contrast, a ruling enforcing a covered term or condition could be a concrete indication that claims a consumer affirmatively asserted in court or arbitration were being limited by a term or condition found to be lawful in that case.

In many cases, information about decisions collected under proposed § 1092.302(a)(4) would relate to claims filed by the consumer as described in proposed § 1092.301(i)(2). However, proposed § 1092.302(a)(4) also would apply to certain actions the supervised registrant brought against the consumer. In particular, if a supervised registrant used a non-disparagement term or condition described in proposed § 1092.302(d)(6) to obtain a decision on its enforceability from a court or arbitrator, then that decision also would be subject to proposed § 1092.302(a)(4).

The Bureau requests comment on how the legal departments or legal function of supervised registrants track the legal actions filed against or by supervised registrants and the decisions courts or arbitrators issue in those legal actions. The Bureau considered proposing to require supervised registrants to quantify the number of times they attempted to enforce covered terms or conditions. However, the Bureau is concerned that to identify such a number, legal staff at supervised registrants may need to review the pleadings in all legal actions filed against or by them in a calendar year. Proposed § 1092.302(a)(4) therefore takes a more limited approach to avoid this higher burden on supervised registrants.

The Bureau requests comment on whether proposed § 1092.302(a)(4) also should require the supervised registrant to identify the citation for or court issuing each decision ruling on the enforceability of a covered term or condition. For example, this could help the Bureau to locate the relevant decisions as well as to identify multiple decisions in the same case, such as different decisions on appeal over time. The Bureau also requests comment on whether similar

information should be collected related to arbitration decisions and, in the case of any confidential arbitration decisions, whether such information should be excluded from information the Bureau would publish under proposed § 1092.303. Finally, the Bureau requests comment on whether proposed § 1092.302(a)(4) should be expanded to require or allow supervised registrants to report when decisions are pending appeal or the like.

The Bureau also requests comment on whether proposed § 1092.302(a)(4) should be expanded to require a supervised registrant to identify any orders registered under rules for subpart B that the Bureau is separately proposing[301] when the order refers to the use of a covered term or condition in a covered form contract as a basis for a finding of a violation of law covered by subpart B. For example, if an order is not issued by a court or arbitrator, then it would not already be covered by the information collection in proposed § 1092.302(a)(4). Thus, the Bureau seeks comment on whether proposed § 1092.302(a)(4) should be expanded to cover agency orders, and if so, whether exclusions in proposed § 1092.301(h) should be similarly adjusted to account for agency orders.

Finally, the Bureau requests comment on whether proposed § 1092.302(a) more broadly should identify additional or different categories of information to be collected by the nonbank registration system, including but not limited to the text of the standard covered terms or conditions used by the supervised registrant beyond those described in proposed § 1092.301(c)(4) through (7), the text of the covered form contract in which covered terms or conditions appear, or both. Such additional or different categories also could relate to the contracting process, such as whether the supervised registrant uses an electronic contracting process pursuant to the E-Sign Act requirements, including those discussed in the section-by-section analysis of proposed § 1092.301(d)(7) above.

302(b) Supervised registrant's collection and reporting of information; scope of initial

[301] *See* Nonbank Registration – Orders Proposal.

registration; corrections to registration information

Proposed § 1092.302(b) would set forth certain standards related to the information supervised registrants must collect and report pursuant to this subpart.

Proposed § 1092.302(b)(1) would clarify that for the period while a supervised registrant qualifies as a supervised registrant, it must collect the information necessary to comply with the reporting requirements in proposed § 1092.302(a). For periods when persons are not supervised registrants, the rule would not place requirements on those persons. For example, a debt collector that is not a larger participant would not be required to collect information about its use of covered form contracts. If that debt collector later becomes a larger participant in the market for consumer debt collection and also is not eligible for an exclusion from the definition of supervised registrant in proposed § 1092.301(h), then the debt collector would be subject to proposed § 1092.302(b)(1) at the time it becomes a supervised registrant. Similarly, under proposed § 1092.302(b)(1), upon exit from the Bureau's supervisory authority, a person would no longer be required to collect the information covered by proposed subpart C. The Bureau requests comment on proposed § 1092.302(b)(1) including on whether it should include a similar requirement to retain records used to submit registration information under subpart C, and if so, for how long.[302]

Proposed § 1092.302(b)(2) would clarify that supervised registrants do not need to collect or report information related to periods that predate when they become subject to subpart C, as

[302] *See* 12 U.S.C. 5514(b)(7)(A)-(C) (provisions, discussed in part IV above, authorizing the Bureau to prescribe rules to facilitate supervision and assessing and detecting risks to consumers, as well as to ensure that supervised nonbanks "are legitimate entities and are able to perform their obligations to consumers). *See also* 12 U.S.C. 5512(b)(1) (provision, discussed in part IV above, authorizing Bureau to prescribe rules as necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof). *See e.g.,* Nonbank Registration—Orders Proposal (proposed § 1092.203(e) (relying on these authorities to propose a record retention requirement in connection with registration of certain orders in Bureau's nonbank registration system); CFPB Final Rule, Debt Collection Practices (Regulation F), 85 FR 76734, 76859 (Nov. 30, 2020) (relying on these authorities to impose a record retention requirement in connection with debt collection rule).

determined by the effective date of the rule.[303] Proposed § 1092.302(b)(2) would provide examples. For example, proposed § 1092.302(b)(i) would clarify that, for registrations providing information about activities in the calendar year that includes the effective date, supervised registrants would satisfy the requirements of proposed § 1092.302(a) by submitting information that relates to the portion of that calendar year after the effective date. Therefore, the Bureau anticipates that, in the first year when it accepts registrations (assuming that is in the calendar year after the effective date), the information provided may relate to only a portion of the previous calendar year. This approach would afford supervised registrants advance time to prepare to collect the information they will need to report. In addition, to the extent that supervised registrants do not want to report certain contract terms or conditions, they would have the option of updating their contracts before the effective date of the subpart. For example, if a supervised registrant had a covered form contract that included a waiver of rights that is prohibited by an anti-waiver provision of a statute, the supervised registrant could fix that non-compliant contract provision before it becomes subject to mandatory reporting under proposed subpart C. As discussed in the analysis of impacts of the proposal in part VII, some supervised registrants would have an incentive to make such corrections before the effective date.

Proposed § 1092.302(b)(2)(ii) would provide another example, where a nonbank became a larger participant in the middle of the calendar year before the annual registration date. This could happen, for example, for participants in debt collection or consumer reporting markets where the larger participant test is based on receipts during the fiscal year, if the supervised registrant's fiscal year is not the calendar year. In that case, as described in proposed § 1092.302(b)(2)(ii), its submission of data required by proposed § 1092.302(a) would only need to cover the period between the date it became a larger participant under the applicable test in part 1090 and the end of the calendar year.

[303] The nonbank registration system implementation date defined in proposed § 1092.101(e) is a separate date that serves a different function. The nonbank registration system implementation date would define when the filing process begins, and not necessarily the time period to which those filings relate.

Proposed § 1092.302(b)(3) would provide that supervised registrants that are affiliates of one another will make their submissions either jointly or in combination, as set forth in filing instructions the Bureau issues under proposed § 1092.102(a). As noted in proposed § 1092.101(a), the term "affiliate" has the meaning in CFPA section 1002(1): "any person that controls, is controlled by, or is under common control with another person."[304] Proposed § 1092.302(b)(3) would further clarify that for subpart C, the term "control," for purposes of determining who is an affiliate, would have the meaning set forth in part 1090 of the Bureau's regulations.[305] The Bureau believes those definitions may facilitate compliance by establishing a standard for what constitutes "control" – one that has been in place for several years in the Bureau's larger participant rules.

The Bureau anticipates the possibility of joint or combined submissions because that may be the most efficient manner to register supervised registrants that have affiliates. It is necessary for the Bureau's monitoring and supervision risk assessment to understand the scope of an enterprise involved in supervised markets. That information affects, among other things, the entity or entities the Bureau may choose to examine. Rather than requiring each affiliate to make a separate registration, proposed § 1092.302(b)(3) envisions registering a group of affiliated entities at once or at least in combination. The alternative could be more burdensome. Not only would each affiliate have to register separately, but each affiliate would have to submit duplicative information – namely, the identity all its affiliates.

Proposed § 1092.302(b)(4) would clarify that a supervised registrant must correct an information submission within 30 days of when it becomes aware of or has reason to believe that the submitted information was and remains inaccurate. Proposed § 1092.302(b)(4) would clarify that the process for making corrections will be described in the filing instructions the Bureau issues pursuant to proposed § 1092.102(a). Proposed § 1092.302(b)(4) also would clarify that

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[304] 12 U.S.C. 5481(1).

[305] *See* 12 CFR 1090.101 (paragraph (2) of the definition of "affiliated company" defining three types of control).

the Bureau may direct a supervised registrant to correct errors or other non-compliant submissions to the nonbank registration system. Under proposed § 1092.302(b)(4), the Bureau could direct corrections at any time and in its sole discretion.

With respect to the potential for errors in submissions to the nonbank registration system, the Bureau also requests comment on whether subpart C should provide that a supervised registrant would not violate the requirements of proposed subpart C as a result of an error in collecting or reporting information, if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. For example, there is a *bona fide* error provision in another information reporting system the Bureau administers under Regulation C.[306] The Bureau also proposed a similar provision in its small business lending data reporting proposal.[307] The Bureau is not proposing a similar exception here because, unlike data collected under Regulation C and the Bureau's small business lending data reporting proposal, the data collected under § 1092.302 of this proposal generally would not be as complex, extensive, or statistical, and thus less prone to error. In addition, even in the absence of such a provision, supervised registrants may still have sufficient incentives to establish compliance systems both to avoid violations and to mitigate risks associated with any inadvertent violations that do occur.[308] However, the Bureau requests comment on whether this type of provision would provide incentives for supervised registrants to establish procedures to comply with the requirements of proposed subpart C, and/or would reduce burden on supervised registrants by reducing the risk of penalties in the event of inadvertent errors. The Bureau also requests comment on what types of *bona fide* errors, if any, might be likely to occur often.

302(c) Notification by a previously-supervised registrant that it is no longer covered by this

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[306] 12 CFR 1003.6(b).

[307] 86 FR 56356, 56503-04 (Oct. 8, 2021) (section-by-section analysis of proposed 12 CFR 1002.112(b)).

[308] *See, e.g.,* CFPB Bulletin 2020-01, Responsible Conduct: Self-Assessing, Self-Reporting, Remediating, and Cooperating (Mar. 6, 2020) (identifying self-assessment factors that Bureau considers when determining how to resolve violations of law via supervisory and enforcement tools).

subpart

Under proposed § 1092.302(c), the nonbank registration system would accept notification from previously-registered supervised registrants that they are no longer covered by proposed subpart C. The notifications would be voluntary since the Bureau is not seeking, through proposed subpart C, to impose information reporting requirements on entities who are no longer supervised by the Bureau.

Some supervised nonbanks may exit supervised markets, ceasing to be supervised nonbanks. If a person is no longer a supervised nonbank, then under the proposed rule it would not be required to register or update its registration when it is not a supervised nonbank. For example, an entity that is not a supervised registrant as of the annual registration date would not be required to report information concerning the previous calendar year, even if it was a supervised registrant for some or all of that time period. However, some supervised nonbanks that registered previously may wish to update the nonbank registration system so that it is clear that they are no longer offering the consumer financial product or service that led them to register or that they are no longer a larger participant in the relevant market. Proposed § 1092.302(c) would provide a means of doing so. Such notices also would facilitate the Bureau's administration of the nonbank registration system by clarifying the reasons why an entity is no longer registering under proposed subpart C. Absent the notification described in proposed § 1092.302(c), there may be uncertainty over whether a previously-registered supervised registrant failed to comply with the annual update requirements in proposed § 1092.302(a).

The Bureau seeks comment on whether to require the notice described in proposed § 1092.302(c), and if so, why, in what circumstances.

302(d) Notification by certain persons of non-registration under this subpart

Under proposed § 1092.302(d), the nonbank registration system would accept voluntary notifications of non-registration from persons who have a good-faith basis to believe that they

are not a supervised registrant, or that certain contracts or terms or conditions are not covered by subpart C. Notices filed under proposed § 1092.302(d) also would be defined as administrative information under proposed § 1092.301(a) and therefore not subject to publication under proposed § 1092.303(b). Proposed § 1092.302(d) would clarify that the person would be required to comply with the registration requirements of proposed § 1092.302 promptly if the person becomes aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a supervised registrant or that the contract or terms or conditions in question are covered by this subpart.

The Bureau is proposing § 1092.302(d) for several reasons. First, while determining whether a company qualifies as a "supervised registrant" should be straightforward in most cases, some persons may be uncertain about whether they are a supervised registrant. Similarly, when supervised registrants offer multiple products or services with multiple contracts, it should be straightforward in most cases to determine which products or services are for consumer financial product or service as relevant under § 1092.301(g). However, some supervised registrants may be uncertain about whether some of their products or services are consumer financial products or services described in proposed § 1092.301(g). Finally, it should be straightforward in most cases to determine which terms or conditions are covered terms or conditions as defined in proposed § 1092.301(c), including whether they impose limitations described in proposed § 1092.301(d). However, some supervised registrants may be uncertain about whether some of their terms or conditions are covered terms or conditions.

Even when persons in these circumstances have a good faith basis to believe they are not a supervised registrant, or that certain products and services they offer or provide are not consumer financial products or services described in proposed § 1092.301(g), or that certain terms or conditions in their form contracts are not required to be registered, the Bureau considered whether to propose that they annually register if they did not want to incur the risk of violating the requirements of subpart C. But that approach could impose burden on persons who

ultimately are not supervised registrants or who ultimately are not using covered terms or conditions contained in covered form contracts. The Bureau therefore proposes an alternative option for these persons. Rather than facing the burden of registration, such an entity could elect to file a notice under proposed § 1092.302(d).

When a person makes a non-frivolous filing under proposed § 1092.302(d) stating that it has a good faith basis to believe that it is not a supervised registrant or that it uses a contract or terms or conditions that are not covered by subpart C, the Bureau would not bring an enforcement action against that person based on the person's failure to comply with proposed § 1092.302 unless the Bureau has first notified the person that the Bureau believes the person does in fact qualify as a supervised registrant or that its contract or terms or conditions are covered by subpart C and has subsequently provided the person with a reasonable opportunity to comply with proposed § 1092.302.

Notices filed under proposed § 1092.302(d) also may reduce uncertainty by the Bureau about why certain entities are not registering or are not registering certain terms or conditions under subpart C. These notices also may provide the Bureau with information about how market participants are interpreting the scope of subpart C, about the potential need for the Bureau to instruct certain unregistered entities to register or to instruct certain registered entities to register additional terms or conditions, and about the potential need for guidance or rulemaking clarifying the scope of subpart C.

The Bureau requests comment on proposed § 1092.302(d) including on whether the final rule for the nonbank registration system should specify information that a filer must provide to describe its good faith basis to believe subpart C does not apply. For example, the Bureau requests comment on whether the filer should provide information that supports its determination, such as any court decisions or an affidavit, as well as any information that may contradict its position, such as a court decision holding that the entity is not outside the scope of subpart C.

The Bureau has considered an alternative to proposed § 1092.302(d) under which entities that do *not* file such a notice with the Bureau still could avoid penalties for non-compliance with proposed § 1092.302 if in fact they could establish a good faith belief that they did not qualify as supervised registrants subject to proposed § 1092.302. Under this alternative, entities would maintain such good faith belief so long as the Bureau had not made clear that proposed § 1092.302 would apply to them. The Bureau seeks comment on whether it should finalize this alternative instead. It also seeks comment on whether, if it finalized this alternative, entities would require additional guidance on the circumstances pursuant to which an entity could no longer legitimately assert a good faith belief that proposed § 1092.302 would not apply to its conduct. While the Bureau anticipates that such circumstances would certainly include entity-specific notice from the Bureau that proposed § 1092.302 applies, the Bureau does not believe such notice should be required to terminate a good faith defense to registration. Among other circumstances, the Bureau anticipates that at least formal Bureau interpretations of (for example) subpart C or the provisions of CFPA section 1024(a)(1) would generally suffice to terminate such belief.[309]

The Bureau also seeks comment on whether it should decline to finalize proposed § 1092.302(d) and on whether it should not adopt the potential alternative to that provision.

Section 1092.303 Publication of information regarding supervised registrants' use of covered terms and conditions

303(a) Publication of information collected under this subpart

In proposed § 1092.303(a), the Bureau proposes to publish and maintain a publicly-available source of identifying information about supervised registrants and information about covered terms and conditions that supervised registrants use. This could occur, for example, on

[309] 12 U.S.C. 5514(a)(1).

the Bureau's publicly-available Internet website. Under proposed § 1092.303(a), the Bureau would make this information available to the public on a periodic basis within a timeframe it determines in its discretion.

The Bureau has preliminarily determined that publication of supervised registrants' identifying information would facilitate the ability of consumers to identify covered persons that are registered with the Bureau.[310]

In addition, the Bureau preliminarily believes that publication of additional information about supervised registrants and their use of covered terms and conditions would be in the public interest.[311] Proposed § 1092.303(a) would formally align the proposed nonbank registration system with the Federal government's emphasis on making government data available to and usable by the public, by default, to the greatest extent possible.[312] It also would provide supervised registrants, other regulators, and the general public with clarity as to the public availability of data collected under proposed subpart C.

Further, the Bureau has preliminarily determined that making the data collected publicly available would further the rationale of the proposal – namely, enhancing oversight of and awareness of supervised registrants' use of covered terms and conditions in covered form contracts, as discussed in part II.C.3 above. Regulators at all levels of government (not just the Bureau) could use the information the Bureau makes publicly available to set priorities. Researchers could analyze the information the Bureau makes publicly available to gain valuable insight into the issues addressed in the nonbank registration system. For example, they could produce reports that may inform consumers and the public more broadly of potential risks posed by covered terms and conditions, or otherwise use the public data to promote private innovation.

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[310] 12 U.S.C. 5512(c)(7)(B).

[311] 12 U.S.C. 5512(c)(3)(B).

[312] *See, e.g.,* Open, Public, Electronic and Necessary Government Data Act, in title II of Pub. L. 115-435 (Jan. 14, 2019); Office of Management & Budget, M-19-18, Federal Data Strategy – A Framework for Consistency (June 4, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-18.pdf (last visited Dec. 7, 2022).

The public registry could broadly inform public debate about use of contracts of adhesion in consumer finance markets and beyond and help ground that debate in data. The public registry also could enable education of consumers about which consumer financial products and services contain covered terms or conditions that the consumers may or may not want. The Bureau requests comment on how industry may use the published information, such as by better understanding the terms or conditions used by other firms.

Finally, publication may help to promote government accountability by making public certain information that the Bureau can use to prioritize its resources. Publication also would help the public to understand the impact of the Bureau's nonbank registry initiative more broadly.

The Bureau seeks comment on potential costs and benefits of making data from the nonbank registry system publicly available on a periodic basis. In particular, the Bureau seeks comment on whether it should not finalize the provisions in proposed § 1092.303, whether it should not publicize some of the information collected pursuant to proposed § 1092.302 (beyond administrative information or information not permitted to be disclosed by law), or whether there may be approaches to publishing the information that would mitigate confusion about the registry. CFPA section 1022(c)(7) recognizes that it may be in the public interest for consumers to know who is registered with the Bureau. However, there may be some uncertainty over the degree to which consumers would use the publicized information and, when they do, over how consumers could interpret such information. For example, consumers might view a supervised nonbank's registration in the Bureau's nonbank registration system as an indicator that their covered terms and conditions pose a substantial risk. (On that note, the Bureau requests comment about whether to not publish information on certain terms or conditions to the extent the risk they may pose to consumers is negligible or *de minimis*, and if so, which covered terms may meet that standard in which circumstances and how the Bureau would assess whether the risk is at such a level.) Or consumers may misunderstand registration to mean that registered

entities are "legitimate," that registration itself serves as an endorsement by the Bureau, or that all registered entities are regularly examined by the Bureau. While registration might indicate that the entity is complying with subpart C, it would not in and of itself establish the entity's legitimacy or serve as a Bureau endorsement in any way. And, as discussed in part II.C.2, there are many more nonbanks subject to the Bureau's supervisory authority than are regularly examined by the Bureau – a fact that consumers may not appreciate. Moreover, proposed subpart C would not constitute a licensing system or an authorization by the Bureau for the supervised registrant to engage in offering of supervised consumer financial products or services. For these reasons, the Bureau continues to evaluate the possibility that publishing information collected under proposed subpart C has the potential to create confusion, which, to the extent it occurs, is unlikely to serve the public interest. If the Bureau finalizes proposed § 1092.303, it would consider options for publishing the information in a manner that mitigates this risk.

303(b) Scope of information released publicly by the Bureau

Proposed § 1092.303(b) would require the Bureau to publish information collected by proposed subpart C by default.

However, proposed § 1092.303(b) would clarify that, consistent with CFPA section 1022(c)(8), the Bureau would not publish information protected from public disclosure under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). CFPA section 1022(c)(8) states that "[i]n … publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under [the FOIA, 5 U.S.C. 552(b)] or [the Privacy Act of 1974, 5 U.S.C. 552a], or any other provision of law, is not made public under [the CFPA]." While much of the information submitted to the nonbank registry under proposed subpart C would not be legally protected from

public disclosure, some of the information may be confidential commercial information subject to Exemption 4 of the FOIA.[313]

Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and [that is] privileged or confidential."[314] Courts construe data to be "commercial information" where the submitter has a "commercial interest" in them.[315] The Bureau therefore believes that information submitted to the nonbank registry system that describes supervised registrants' ongoing business operations is likely to qualify as "commercial information." Furthermore, courts have interpreted information to be "confidential" under Exemption 4 if it is customarily and actually kept private by the submitter.[316] Some of the information submitted to the nonbank registry may meet this standard and therefore be protected by Exemption 4.

The Bureau requests comment on whether institutions customarily and actually keep private information collected under proposed § 1092.302, including any information collected under proposed § 1092.302(a) such as information about arbitrator decisions described by proposed § 1092.302(a)(4), and information about certain affiliate relationships that may be collected pursuant to proposed § 1092.302(b)(3). Where applicable, the Bureau asks that such comments address each category of information listed in proposed § 1092.302 with specificity, including descriptions of practices related to how each category is (or is not) maintained and/or protected from disclosure.

If the Bureau determines that information submitted to the nonbank registry may be protected from disclosure by FOIA Exemption 4, the Bureau instead would publish the data in an

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[313] Information subject to publication under proposed § 1092.303 appears unlikely to be subject to legal protections from public disclosure, other than perhaps the information protected by FOIA Exemption 4. The Bureau requests comment on whether additional legal protections may apply to information the Bureau proposes to be included in the public registry.

[314] 5 U.S.C. 552(b)(4).

[315] *See Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

[316] *See Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

aggregated format that does not directly or indirectly identify the source of the information.[317] The Bureau believes that publication of this data is in the public interest, for the same reasons as described above, even if the data is published in aggregated form to protect confidentiality.

Because the Bureau is relying in part on its supervisory authority in CFPA section 1024 to require submission of information to the nonbank registration system, information collected under the proposed rule could be construed to be "confidential supervisory information" as defined in the Bureau's confidentiality rules at 12 CFR 1070.2(i). The public release of information required by proposed § 1092.303(b) would be authorized by the Bureau's confidentiality rules at 12 CFR 1070.45(a)(7). That provision permits the Bureau to disclose confidential information "[a]s required under any other applicable law." The Bureau does not believe that the information proposed to be published under § 1092.303(b) would raise the concerns generally addressed by the Bureau's general restrictions on disclosure of confidential supervisory information. For example, after accounting for any confidential business information protected by FOIA Exemption 4 and excluding administrative information as defined in proposed § 1092.301(a), disclosure of the remaining information would not reveal institutions' proprietary or privileged information; would not impede the confidential supervisory process; and would not present risks to the financial system writ large. The Bureau's alternative for information subject to FOIA Exemption 4 – to publish it in a format that does not directly or indirectly identify the source of the information – is consistent with how the Bureau treats confidential information generally, including confidential supervisory information.[318]

Proposed § 1092.303(b) also would clarify that the Bureau would not publish administrative information, as defined in proposed § 1092.301(a). The proposal defines that term to include contact information and other information submitted or collected in the nonbank

[317] *See* 12 CFR 1070.41(c) ("The CFPB may, in its discretion, disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains.").

[318] *See id.*

registration system to facilitate administration of the nonbank registration system, including nonregistration statements filed under proposed § 1092.302(d). The purposes for this information are limited—for example, so the Bureau can contact the supervised registrant with questions about the registration. As also discussed in the section-by-section analysis of proposed § 1092.301(a), the proposal would not publicize this information because the Bureau does not believe publication would be of use to the general public. Therefore, the Bureau preliminarily concludes that release of administrative information would not be in the public interest. The Bureau seeks comment on its proposal not to publish administrative information, including whether the release of administrative information would be in the public interest.

Finally, proposed § 1092.303(b) would clarify that the Bureau retains discretion not to publish information that has been corrected or is subject to correction, as well as information that is not required to be submitted under subpart C or is otherwise not in compliance with part 1092. For example, the Bureau does not believe it would be in the public interest to publish or continue to publish previously published inaccurate information for which it has received or issued a correction notice as described in proposed § 1092.302(b)(4). In addition, persons could submit unauthorized or inadvertent filings, or filings regarding terms and conditions that would not require registration under the proposal, or other inaccurate or inappropriate filings. The Bureau believes it would require flexibility not to publish such information to maintain the accuracy and integrity of the nonbank registration system and the data that would be published by the Bureau.

VI. Proposed Effective Date of Final Rule

The Administrative Procedure Act generally requires that rules be published not less than 30 days before their effective date.[319] The Bureau proposes that, once issued, the final rule for this proposal would be effective 30 days after it is published in the *Federal Register*. However, as described in the proposal, registration would be required by an annual registration date that

[319] 5 U.S.C. 553(d).

comes at a later time, after the nonbank registration system implementation date, which is likely to be no earlier than January 2024. The Bureau seeks comment on the proposed effective date including whether it should be at a different time, and if so, when and why.

VII. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Overview

In developing the proposed rule, the Bureau has considered the potential benefits, costs, and impacts of the proposed rule as required by section 1022(b)(2) of the Consumer Financial Protection Act (CFPA).[320] The Bureau requests comment on the preliminary analysis presented below as well as submissions of additional data and analysis that could help refine the Bureau's analysis of the benefits, costs, and impacts. In developing the proposed rule, the Bureau has consulted, or offered to consult with, the appropriate prudential regulators and other Federal agencies, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies as required by CFPA section 1022(b)(2)(B). The Bureau also has consulted with State agencies and Tribal governments[321] as required by CFPA sections 1022(c)(7)(C) and 1024(b)(7)(D).

The Bureau is proposing this rule to establish a registration system for supervised nonbanks that use form contracts to impose covered terms and conditions. The purposes of this nonbank registration system would be to support monitoring of risks to consumers in the offering or provision of consumer financial products and services, to facilitate supervision of nonbanks and assess and detect risks to consumers as authorized by CFPA section 1024(b), and to publicly release the information collected in the public interest, as authorized by CFPA section 1022(c). The registration system for nonbanks that use certain standard terms and conditions in consumer

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[320] Specifically, CFPA section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in CFPA section 1026; and the impact on consumers in rural areas.

[321] CFPA section 1002(27) defines "State" to include "any federally recognized Indian Tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1(a))."

contracts would increase transparency and oversight in areas where certain standard terms and conditions limit private enforcement and increase transparency for the public when consumers are waiving rights.

The policy embodied in the proposed rule can be broken into three parts.

First, under the proposed rule, subject to certain exclusions, supervised nonbanks that use covered terms and conditions would be required to register annually using a nonbank registration system established by the Bureau. As part of the registration process, these supervised registrants would be required to submit three separate types of information: identifying information, administrative information, and information related to their use of covered contract terms and conditions.

Second, the Bureau would use information acquired through the nonbank registration system to facilitate the Bureau's monitoring functions and supervisory processes.

Third, the Bureau would publish each of the types of nonbank registration information, except for administrative information, on its website and potentially in other forms, to the maximum extent permitted by applicable law.

We analyze these three parts separately below.

B. Data Limitations and the Quantification of Benefits, Costs, and Impacts

The discussion below relies on information that the Bureau has obtained from other regulatory agencies and publicly available sources, as well as Bureau expertise. These sources form the basis for the Bureau's consideration of the likely impacts of the proposed rule. The Bureau provides its best estimates of the potential benefits and costs to consumers and covered persons of this proposal, given available data. However, as discussed further below, the data with which to quantify the potential costs, benefits, and impacts of the proposed rule generally are limited.

In light of these data limitations, the analysis below generally provides a qualitative discussion of the benefits, costs, and impacts of the proposed rule. General economic principles

and the Bureau's expertise in markets for consumer financial products and services, together with the limited data that are available, provide insight into these benefits, costs, and impacts. The Bureau requests additional data or studies that could help quantify the benefits and costs to consumers and covered persons of the proposed rule.

C. Baseline for Analysis

In evaluating the potential benefits, costs, and impacts of the proposed rule, the Bureau takes as a baseline the current legal framework regarding the use of covered terms and conditions. Under the baseline legal framework, supervised nonbanks are subject to certain prohibitions and restrictions on the use of covered terms and conditions, including explicit statutory and regulatory restrictions, as well as a prohibition on UDAAPs, as discussed in part II above. Supervised nonbanks also are not obliged to annually register with the Bureau. Nor are they required by rule to provide information to the Bureau concerning their use of covered terms and conditions.[322] Much of the information that would be acquired by the Bureau as a result of the proposed rule is not in the Bureau's possession or available from any other source. As a result, it is not used currently by the Bureau to monitor, assess, or address the risks to consumers presented by covered terms and conditions. Furthermore, much of this information is not currently published by the Bureau and therefore is not available to other regulators or the general public.[323]

A few nonbanks currently are required to report their entire contract, including any covered terms and conditions, under State laws which govern one supervised market – private

[322] Some nonbanks may be required to provide sample contracts as a part of examination by the Bureau. The Bureau's examination procedures generally describe how contracts are sampled. For individual exams, information requests vary and may not include all contracts covered by this rule. Furthermore, in contrast to the proposed rule, any information on contracts obtained through examinations is confidential and generally is not made publicly available in non-aggregated form.

[323] Part II.C above discusses examples of Bureau supervisory or enforcement matters that identified risks from the use of covered terms and conditions at certain supervised nonbanks. These are made public through *Supervisory Highlights* or the public enforcement actions the Bureau brings.

student loan origination – in a few states.[324] In addition, in the mortgage lending market, most residential mortgages for site-built homes are either eligible for purchase by government-sponsored enterprises or for insurance by Federal agencies[325] that generally require the use of standard-form promissory notes that are published on websites for a commercial audience.[326] For these firms, the costs, benefits, and impacts of the proposed rule will generally be smaller than described below.

D. Coverage of the Proposed Rule

This proposed rule would affect nonbank covered persons subject to the supervisory authority of the Bureau under 12 U.S.C. 5514(a), and not excluded from the supervisory authority of the Bureau pursuant to 12 U.S.C. 5517 or 12 U.S.C. 5519 (defined in proposed § 1092.301(g) as supervised nonbanks). Supervised nonbanks that may be covered by the rule may offer or provide several types of consumer financial products and services. Subject to the foregoing statutory exclusions, supervised nonbanks include any nonbank covered person that:

(1) Offers or provides a residential mortgage-related product or service as described in 12 U.S.C. 5514(a)(1)(A);

(2) Offers or provides any private educational consumer loan as described in 12 U.S.C. 5514(a)(1)(D);

(3) Offers or provides any consumer payday loan as described in 12 U.S.C. 5514(a)(1)(E);

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[324] There are general requirements in Colorado, Maine, and Louisiana for private student lenders to provide model loan agreements that regulators make or will make publicly-accessible. In addition, Illinois has adopted legislation to collect these agreements.

[325] CFPB 2021 Mortgage Market Trends Report at Table 1 (reporting fewer than 10% of total 2021 originations for 1-4 family residential mortgages were not conventional conforming or FHA/VA/FSA/RHS-insured), https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2022-09.pdf.

[326] *See, e.g.,* Fannie Mae Selling Guide B8-3-01, Notes for Conventional Mortgages (09/02/2020) & Fannie Mae Legal Documents (July 2021), https://singlefamily.fanniemae.com/fannie-mae-legal-documents (last visited Dec. 7, 2022).; HUD Single Family Mortgage Promissory Notes, https://www.hud.gov/program_offices/housing/sfh/model_documents (last visited Dec. 7, 2022).

(4) Is a larger participant in any market as defined by rule in part 1090 pursuant to 12 U.S.C. 5514(a)(1)(B)[327]; or

(5) Is subject to an order issued by the Bureau pursuant to 12 U.S.C. 5514(a)(1)(C).

The Bureau seeks comment on any other entities that may be affected by the proposed rule.

All Bureau-supervised nonbanks in the markets described above that use covered terms and conditions potentially would be affected by the proposed rule, except for persons excluded by proposed § 1092.301(h). Among other exclusions, proposed § 1092.301(h) would exclude natural persons, persons (together with affiliates) with less than $1 million in annual receipts from the offering or provisions of the consumer financial products or services described above, persons (together with affiliates) using covered terms in no more than a *de minimis* manner, and persons whose sole use of covered terms and conditions is in publicly-available residential mortgage contracts required for insurance, guarantee, or purchase by Federal agencies or Federal government-sponsored enterprises.[328] Many of the costs, benefits, and impacts of the proposed rule will not be applicable to entities that both do not enter into contracts containing covered terms or conditions, and do not enforce these terms or conditions appearing in contracts of others.[329]

The Bureau seeks comment on any other entities that may be affected by the proposed rule.

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[327] Under current Bureau regulations, larger participant markets include: consumer reporting, consumer debt collection, student loan servicing, international money transfers, and automobile financing.

[328] The proposed *de minimis* exemption has two components: entering into covered form contracts containing covered terms and conditions less than 1,000 times in the previous calendar year *and* not obtaining a court or arbitrator decision on the enforceability of covered of terms and conditions (whether enforcing or rejecting enforcement). Proposed § 301(h) also includes exemptions for a Federal agency, a State (including a Tribe), persons supervised solely as service providers under Bureau supervisory authorities, and persons to the extent they meet the definition of "related person" in 12 U.S.C. 5481(25).

[329] In general, supervised nonbanks not using covered terms or conditions will need to understand the rule and verify that they are exempt. This will generally be a one-time cost, as nonbanks are able to verify that future contracts do not include covered terms or conditions in the normal course of business.

Under existing law, there is no system or central registry that comprehensively identifies nonbanks that are subject to the Bureau's supervisory authority. Furthermore, as discussed above, supervised nonbanks currently are not required to register with the Bureau regarding their use of covered terms or conditions. Without comprehensive information on the number of supervised nonbanks, including the number of supervised nonbanks using covered terms or conditions in covered form contracts, the Bureau cannot precisely estimate the number of entities that will be affected by the proposed rule. Moreover, the Bureau cannot precisely estimate the number of consumers or accounts that will be affected by the proposed rule.

Table 1: Potential Scope of Proposed Rule

Market	**NAICS Code(s)**	**NAICS Name(s)**	**NAICS Entities**	**NAICS Entities > $1MM Revenue**
Statutory Markets				
Residential Mortgages	522292, 522310, 522390	Real Estate Credit, Mortgage and Nonmortgage Loan Brokers, Other Activities Related to Credit Intermediation	11,430	3,275
Private Educational Loans	522291	Consumer Lending	2,642	789
Payday Loans	522390	Other Activities Related to Credit Intermediation	3,304	688
Larger Participant Markets				
Consumer Reporting	561450	Credit Bureaus	284	131
Consumer Debt Collection	561440	Collection Agencies	2,570	1,254
Student Loan Servicing	522390	Other Activities Related to Credit Intermediation	3,304	688
International Money Transfers	522320	Financial Transactions Processing, Reserve, and Clearinghouse Activities	2,550	874
Automobile Financing	522220	Sales Financing	2,033	997

Other Nonbanks Subject to Bureau Orders	N/A	25	25
Total		**21,714**	**7,345**

Table 1 presents the best estimate available to the Bureau of the number of affected entities under the proposed rule.[330] The estimate is based on the most recent Economic Census data.[331] Table 1 presents entity counts for the 6-digit North American Industry Classification System (NAICS) codes that generally include the markets supervised by the Bureau, including counts for entities with more than $1 million in revenue reported in the 2017 Economic Census. The markets defined by NAICS codes are broader than the markets supervised by the Bureau.[332] Moreover, Table 1 counts an unknown number of entities active in markets over which the Bureau exercises larger participant supervisory authority, but which are not supervised because they are not larger participants under existing Bureau rules in part 1090, generally because they fall below a size threshold. Although some supervised nonbanks may fall outside the NAICS codes listed in Table 1, the Bureau believes their number to be small. In particular, the Bureau believes that the number of these supervised nonbanks is smaller than the number of entities counted in Table 1 that are not subject to the Bureau's supervisory authority. As such, the Bureau considers the estimates in Table 1 to be an upper bound on the number of currently-supervised nonbanks potentially covered by the proposed rule.[333] The Bureau seeks comment on

[330] The number of entities in the "total" row in Table 1 is less than the sum of the rows above it because some NAICS codes appear in multiple markets, for example, "Other Activities Related to Credit Intermediation" appears three times.

[331] These entity counts include only firms operating for the entire year, for which there are reliable estimates of annual receipts. *See* U.S. Census Bureau, ECN Core Statistics Economic Census: Establishment and Firm Size Statistics for the U.S., Selected Sectors: Sales, Value of Shipments, or Revenue Size of Firms for the U.S. (2017), https://data.census.gov/table?d=ECN+Core+Statistics+Economic+Census:+Establishment+and+Firm+Size+Statistics+for+the+U.S.&tid=ECNSIZE2017.EC1700SIZEREVFIRM.

[332] The full definitions of each of the 2017 NAICS codes in Table 1 can be identified at https://www.census.gov/naics/.

[333] That is, any undercounting of impacted entities outside the NAICS codes listed in Table 1 is likely to be more than offset by an overcounting due to the broader delineation of markets defined by NAICS codes relative to the larger participant markets.

NAICS codes not included in Table 1 that include a significant number of entities affected by the proposed rule.

In addition, the penultimate row of Table 1 presents an estimate of the number of nonbanks that would be subject to the Bureau's supervisory authority pursuant to orders the Bureau may issue in the future.[334]

As noted above, Table 1 likely over-estimates the number of current larger participants subject to the Bureau's supervisory authority. In any event, any nonbank covered persons not currently subject to the Bureau's supervisory authority that become subject to its authority pursuant to a future larger participant rule generally would incur the same costs the Bureau describes and estimates below on a per-entity basis. Similarly, the benefits described below generally would increase as more entities become subject to the registration requirement and provide information about the covered terms and conditions in their specific form contracts.

Given that some supervised nonbanks may not use covered terms and conditions, Table 1 is likely to overestimate the number of entities subject to the registration requirements of the proposed rule. The Bureau does not have sufficient data to precisely estimate the number of supervised nonbanks that use covered terms and conditions, which is one problem the proposed rule seeks to remedy. However, based on available information, the Bureau believes that the use of covered terms and conditions is widespread, although prevalence of specific terms may vary widely by market.[335] The Bureau seeks any additional input or data on this issue.

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[334] Currently, the Bureau estimates that very few entities are subject to supervision solely due to a pre-existing consent order. However, the Bureau has recently announced plans to use this authority and anticipates that the number of entities in this category will increase. Given that orders generally remain in force for two to five years, and the proposal includes an exemption for such orders with a duration of two years or less, it is unlikely that more than 25 entities would be covered in any given year. *See* Consumer Financial Protection Bureau, CFPB Invokes Dormant Authority to Examine Nonbank Companies Posing Risks to Consumers (Apr. 25, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/.

[335] There has been some variance in the use of arbitration agreements across markets. *See* Consumer Financial Protection Bureau, Arbitration Study (Mar. 2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Some nonbanks that the Bureau has not previously examined may not know if they are subject to the Bureau's supervisory jurisdiction. The Bureau anticipates that nonbanks facing legitimate uncertainty about their status as supervised nonbanks under the proposed rule will choose to notify the Bureau on a confidential basis that they are not registering, due to the low burden of providing that basic information and the specific option to do so described in proposed § 1092.302(d). Unfortunately, no information exists on the number of unsupervised nonbanks facing legitimate uncertainty over whether they are subject to Bureau supervision. However, such nonbanks still are most likely to be in the Economic Census industries defined by the NAICS codes listed in Table 1, and therefore accounted for in the analysis. The Bureau seeks comment or data on the extent and impact of potential uncertainty regarding a nonbank's status (such as whether it is a larger participant) and registration requirements, and on alternatives which might reduce the impact of this uncertainty.

E. Potential Benefits and Costs to Consumers and Covered Persons

This section describes the benefits and costs to consumers and covered persons that the Bureau expects to occur if the proposed rule is adopted. Each of the three components of the rule, described above, is analyzed in detail separately.

The Bureau anticipates that the primary benefit of the proposed rule is increased compliance by those entities using covered terms and conditions to avoid complying with underlying law including Federal consumer financial laws regulating the supervised registrant's business practices (apart from the use of covered terms and conditions, discussed separately below). The proposed rule would incentivize firms to comply through at least two mechanisms. First, the proposed registry would enable the Bureau to better target its limited monitoring, supervision, and enforcement resources to entities posing a risk of violation of Federal consumer financial law. Upon publication of the information collected in the registry, other public regulators, including those who have a shared role in enforcing Federal consumer financial law, also could use the information to calibrate the prioritization of their resources. Consumers would

benefit from increased compliance as a result of this public scrutiny in circumstances where consumers' ability to protect themselves through private enforcement is impeded.

Second, a public registry of covered terms and conditions contained in covered form contracts will increase compliance by helping public regulators to detect terms or conditions prohibited by law. As discussed in part II.B above, some provisions of law expressly prohibit certain covered terms and conditions, expressly render certain covered terms and conditions void and unenforceable, or both. As also illustrated by some of the examples discussed in part II.C above, other provisions of law, such as the CFPA's prohibition against UDAAPs, also may prohibit or limit the use of certain covered terms and conditions. Although such illegal terms generally are unenforceable, they still sometimes may be used. The Bureau does not possess data on the frequency of use of such terms, but as discussed in part II above, these terms and conditions are in fact used today. And when used in prohibited circumstances such as those generally described in part II above, these terms and conditions likely still have a chilling effect on consumers' ability to enforce or exercise their rights or otherwise protect their interests. As discussed in more detail below including in part VII.E.2, the Bureau believes that supervised nonbanks currently using prohibited covered terms and conditions often would remove them from their contracts, thus benefitting consumers.

The primary costs of the proposed rule would affect supervised nonbanks that use covered terms or conditions. These entities would incur the cost of time spent by employees to read and understand the requirements of the proposed rule, and then gather and submit the required registration information. This would include locating and identifying information sought by the proposed rule about the supervised nonbanks' use of covered terms and conditions in covered form contracts regarding the offering or provision of consumer financial products or services in markets the Bureau supervises. This information would include standardized data regarding certain covered terms and conditions (i.e., limitations on time, place, forum, or venue for filing legal action, on filing actions seeking relief for other consumers, on participation in

legal action filed by others, and arbitration agreements) and the text of other covered terms and conditions (liability limits, waivers of causes of action, non-disparagement clauses, and other waivers). This information also would include a limited amount of additional information about each form contract – the States in which the contract is used, the legal names of any persons other than a consumer and the supervised registrant that typically entered into the covered form contract, and any governing law specified in the contract. If the terms or conditions are contained in a form contract from a form provider, the name of the provider and citation to the contract also would be collected. Finally, the supervised nonbank would need to locate any court and arbitrator decisions on enforcement of these terms and conditions and report about the frequency and results of these decisions. As discussed below, covered supervised nonbanks may also bear some indirect costs related to increased incentives to comply with laws specifically governing the use of covered terms and conditions.

If finalized as proposed, the rule would affect supervised nonbanks as long as it is in effect. However, the costs, benefits, and impacts of any rule are difficult to predict far into the future. Therefore, the analysis below of the benefits, costs, and impacts of the proposed rule is most likely to be accurate for the first several years following implementation of the proposed rule.

1. *Registration and submission of information regarding covered terms and conditions contained in covered form contracts*

This section VII.E.1 discusses the costs and benefits to consumers and covered persons of the first part of the rule outlined in part VII.A above: registration and submission of information regarding covered terms and conditions contained in covered form contracts.

Costs

To precisely quantify the costs to covered persons, the Bureau would need representative data on the operational costs that supervised nonbanks incur to locate, identify, gather, and submit registration information regarding their use of covered terms and conditions in covered

form contracts. Given that no such registry currently exists, the Bureau does not believe that data on this specific type of reporting cost are likely to be available from any source. The Bureau has made reasonable effort to gather data on reporting costs, generally, and the discussion below uses this information to quantify certain likely costs of the proposed rule. The Bureau believes that the following discussion of the costs of registration and submission of information regarding covered terms or conditions in covered form contracts accounts for most elements of cost, given the extent of available data. However, these calculations may not fully quantify the costs to covered persons, especially given the potential for wide variation in use of covered terms or conditions in covered form contracts by supervised nonbanks across a diverse set of industries. The Bureau requests comment on any additional impacts as well as information that would inform its cost estimates.

In general, the costs would fall into four subcategories: the cost of understanding the proposed rule, the cost of identifying covered terms and conditions in covered form contracts that the nonbanks enter into, the cost of identifying and reporting on the nature of court and arbitrator decisions on the enforceability of covered terms and conditions, and the cost of entering all the related information, as well as the nonbank's identifying information and administrative information,[336] into the registration system. If a supervised nonbank does not directly enter into agreements with consumers and did not obtain arbitrator or court decisions on the enforceability of a covered term or condition–which may be the case for some servicers or debt collectors–then its costs in the second and subsequent categories would be limited to the time needed to confirm that fact.

The first step to register as required by the proposed rule is to read the filing instructions and understand the requirements of the proposed rule as reflected in the filing instructions. The Bureau anticipates issuing guidance in the filing instructions to assist with this step, and that

[336] The cost of entering required administrative information, such as contact information, would be minimal and generally is accounted for below as part of the cost of entering related identifying information.

supervised nonbanks will generally not read the final rule in its entirety. Based on the Bureau's experience, this will generally take roughly 60 minutes for a typical firm. Some firms may have higher costs. For example, as part of the time to understand the registration requirements, some nonbanks may take time to analyze whether they are supervised by the Bureau or otherwise exempt from the proposed rule. Some of these nonbanks may be permitted to notify the Bureau that they believe in good faith they are not supervised or eligible for an exclusion from the definition of supervised registrant. These nonbanks, to the extent they may use covered terms or conditions, may consult an in-house attorney on whether they have a good faith basis to file a notice of non-registration.[337] The Bureau requests comment on which types of consumer financial products and services over which there would be such uncertainty as to coverage by the proposed rule, as well as the costs of determining whether to file such a notice and of filing the notice.

The second step requires supervised registrants to identify certain information regarding covered terms and conditions in each of their covered form contracts for the offering or provision of consumer financial products or services in Bureau-supervised markets. These covered terms and conditions appear in contracts in standardized language, and therefore often can be identified relatively quickly by skimming or searching, without reading the contract in its entirety. Based on comments it receives on the proposal or other feedback, the Bureau also may issue guidance documents to assist with this step. The time involved in identifying required information is likely to depend on how firms maintain information regarding their use of consumer contracts, and the Bureau therefore expects the burden to decline as firms gain experience with the registration process and adapt their record-keeping practices to more efficiently track the information required by the proposed rule. The Bureau also is proposing to collect information on firms' use of covered terms and conditions in contracts purchased from third-party providers.

[337] And if they file such a notice, the cost of that would be less than the cost of full registration in steps 4 and 5 of Table 2 discussed below.

Although the Bureau believes the burden of identifying and submitting information on covered terms and conditions already would be small, if the Bureau allowed simplified reporting of common purchased contracts,[338] some firms may choose to minimize their burden by purchasing their contracts instead of writing them in house. In addition, in the years following the first year of registration, supervised registrants will need to identify only information needed to update their existing registration – i.e., any new covered form contracts that contain covered terms or conditions, any new or amended covered terms or conditions in previously-registered covered form contracts, or removals or modifications of previously-registered covered terms or conditions. The time needed to do that will be shorter than in the first year of registration. Therefore, the Bureau assesses that, on average, this step will take less than 45 minutes per contract each year for supervised registrants using ten or fewer contracts, and less than 30 minutes per contract each year for supervised registrants using more than ten contracts. Some firms may use uncommon covered terms and conditions that cannot be readily identified or determined to be covered for purposes of registration. For such firms, this step may take additional time, including in circumstances where the firm ultimately decides it has a good faith basis to determine the term or condition is not covered and thus may instead file a voluntary notice of non-registration of that term or condition under proposed § 1092.302(d). The Bureau requests comment on the types and specific examples of covered terms and conditions that might be difficult to detect or determine coverage and on steps the Bureau could take to reduce this burden.

The third step requires supervised registrants to identify whether courts or arbitrators have issued decisions on the enforceability of covered terms or conditions, such as by ruling on requests to enforce these covered terms and conditions. If, during the previous calendar year, supervised registrants know they did not receive a court decision of this type, such as a decision

[338] As discussed in the section-by-section analysis of proposed § 1092.302(a)(3)(vi), the Bureau requests comment on this option.

dismissing, staying, or capping liability for a claim filed by the consumer on the basis of a covered term or condition, or ruling on a request to enforce a non-disparagement clause, they can answer no. If supervised registrants are aware of any covered court or arbitrator decisions, then they can answer yes. The Bureau believes that most supervised registrants retain records of legal action and can readily ascertain whether or not they had any covered court or arbitrator decisions. Furthermore, the Bureau believes that the majority of registrants will not have any covered court or arbitration decisions and will be able to complete this step in under 20 minutes. Registrants with covered decisions will be required to compile those decisions and identify the presence or absence of language related to covered terms or conditions contained in covered form contracts. For decisions that would be covered, supervised registrants must note what product or service and term or condition was at issue in the decision, and how the court or arbitrator ruled (i.e., to enforce the term or condition or not). The Bureau assesses that this is likely to take less than 120 minutes. Therefore, the Bureau assesses that, on average, supervised registrants will require less than 70 minutes to find and consult the relevant records to complete this step.[339] Large entities may have more complex legal activities and may be more likely to have qualifying court or arbitrator decisions and the Bureau therefore assesses that this step will take 140 minutes for firms with 250 or more separate contracts.

Finally, supervised registrants must submit the information they have gathered to the online registration system. There would be a one-time cost of creating an account to register in the nonbank registration system, which would involve, among other steps, verifying the identity of the individual performing the registration for the supervised registrant as well as their authority to act on behalf of the supervised registrant for purposes of the nonbank registration. For supervised registrants already registered with the Bureau, for example through the Consumer Response Company Portal, the time involved should be minimal. For entities that have not

[339] Under the conservative assumption that at least 50% of registrants do not have covered court or arbitration decisions in a given calendar year, we compute this as: 0.5*20 + 0.5*120 = 70 minutes, or twice that amount for large, complex firms.

already been verified, this process may take significantly more time. The burden of verification will depend on the exact policies and procedures laid out in the filing instructions and cannot be precisely estimated at this time. However, the Bureau expects that, on average, this step will take under five hours of employee time to complete. Registrants may occasionally need to reverify, for example due to reorganization or employee turnover. The Bureau expects that, on average, registrants will not need to go through the verification process more than once every five years. Therefore, the amortized annual burden of verification is likely to be less than 60 minutes on average.

Each year during periodic registrations, there would be a cost for providing or updating basic identifying information for the supervised registrant, including information about any affiliate relationships with other supervised registrants, and for providing or updating information regarding the covered terms and conditions. Submitting this information is likely to take less than 60 minutes for most firms, and up to 90 minutes for large, complex firms. In addition, the Bureau estimates that once the relevant information on each covered form contract is gathered, inputting this information into the registration system is likely to take less than roughly 20 minutes per contract. These estimates include time supervised registrants likely would spend to verify that the registration is complete and accurate. Proposed § 1092.302(b)(4) would require correction of incorrect registration information, but it is uncertain how often errors would occur. The Bureau requests comment on that issue, and also seeks comment and data on how a possible *bona fide* error provision discussed in the section-by-section analysis of proposed § 1092.302(b)(4) may affect the procedures established to ensure the accuracy of information submitted, and the related expected costs.

The Bureau requests comment, data, or other information that would help inform its estimates of the time required to complete the tasks described above.

The Bureau assesses the average hourly base wage rate for each reporting requirement at $43.60 per hour. This is the mean hourly wage for employees in four major occupational groups

assessed to be most likely responsible for the registration process: Management ($59.31/hr); Legal Occupations ($54.38/hr); Business and Financial Operations ($39.82/hr); and Office and Administrative Support ($20.88/hr).[340] The average hourly wage of $43.60 is multiplied by the private industry benefits factor of 1.42 to get a fully loaded wage rate of $61.90/hr.[341] The Bureau includes these four occupational groups in order to account for the mix of specialized employees that may assist in the registration process. The Bureau assesses that the registration process will generally be completed by office and administrative support employees that are generally responsible for the registrant's paperwork and other administrative tasks. Employees specialized in business and financial operations or in legal occupations are likely to provide information and assistance with the registration process. Senior officers and other managers are likely to review the registration information before it is submitted and may provide additional information. The Bureau requests any information that would inform its estimate of the average hourly compensation of employees required to register under the proposed rule.

[340] *See* U.S. Bureau of Labor Statistics, National Occupational Employment and Wage Estimates United States (May 2021), https://www.bls.gov/oes/current/oes_nat.htm.

[341] As of March 2022, the ratio between total compensation and wages for private industry workers is 1.42. *See* U.S. Bureau of Labor Statistics, Employer Costs for Employee Compensation: Private industry dataset, (March 2022), https://www.bls.gov/web/ecec/ecec-private-dataset.xlsx.

Table 2: Burden and Cost of Registration and Submission

Description of Task	Simple (10 contracts)	Intermediate (25 contracts)	Complex (250 contracts)
1. Read proposed rule, understand requirement, and analyze definitions	60 minutes	60 minutes	60 minutes
2. Identify covered terms and conditions	450 minutes	750 minutes	7,500 minutes
3. Identify decisions on enforcement of covered terms and conditions	70 minutes	70 minutes	140 minutes
4. Fill out and file identifying information	120 minutes	120 minutes	150 minutes
5. Fill out and file contract registration	200 minutes	500 minutes	5,000 minutes
Total time burden:	900 minutes	1500 minutes	12,850 minutes
Avg. wage rate	$61.90	$61.90	$61.90
Total Cost	**$929**	**$1,548**	**$13,257**

The direct registration cost for a given supervised nonbank will depend on its complexity in general and, most importantly, on the number of different covered form contracts it uses. Table 2 presents the estimated direct registration cost for supervised nonbanks at three different levels of complexity, based on the assumptions described above. For supervised nonbanks covered by exclusions to the rule in proposed § 1092.301(h), they would only need to complete step 1 in Table 2 to ascertain that fact. For other supervised nonbanks that complete steps 2 and 3 without identifying covered terms and conditions in covered form contracts they enter into or decisions on enforcement of covered terms, they would not need to complete steps 4 or 5.

The total direct cost of registration depends on how many supervised nonbanks fall into each of the three representative categories of contract complexity. For illustrative purposes, Table 3 reports estimates of how many of the estimated number of supervised nonbanks reported in Table 1 may fall into each category, based on their total revenue as reported in the Economic Census. The Bureau believes that revenue is a reasonable and transparent indicator of the number of contracts used by supervised nonbanks, and therefore appropriate for estimating the average time burden and cost of registration. However, some supervised nonbanks with

relatively low revenue may use many covered form contracts, or vice versa. The Bureau requests any information that could inform its estimates of the distribution of registration costs across supervised nonbanks.

The Bureau has considered the possibility that covered nonbanks pass on some or all of the costs described above to consumers. As described below, the nature of these costs makes it unlikely that consumers will bear a significant portion of the direct costs of registration under the proposed rule. According to standard theory of the firm, profit-maximizing firms will fully absorb any one-time costs or fixed costs, unless these costs are sufficiently large that it is no longer profitable to offer a given product or service. Firms may pass on, fully or in part, an increase in their variable cost to consumers through higher prices.[342] Therefore, consumers could experience modestly higher prices if registration costs depend on the number of times a given contract is used. However, because the registration costs very likely do not depend on the number of times a given covered form contract is used, the Bureau considers these costs to be fixed costs at the product or service level. Therefore, the Bureau believes that the provisions of the proposed rule requiring registration and submission of information regarding covered terms and conditions will not lead to increased prices for consumers.

The Bureau also has considered the degree to which the proposed rule may induce supervised nonbanks to discontinue certain products or services due to the cost of registering and submitting information regarding covered terms and conditions contained in covered form contracts. That outcome is not the rationale or stated goal of the rule, but the Bureau is considering the extent of its likelihood here. Given the small fixed costs associated with these provisions, as described above, a firm or product line would need to be on the threshold of unprofitability for the proposed rule to induce exit. The Bureau believes there are very few, if any, firms with over $1 million in revenues for which the proposed rule would be a decisive

[342] Fixed costs are defined as costs required to provide a product or service and which do not depend on the number of consumers or accounts, or on the size or volume of transactions. Variable costs are defined as costs which change as the quantity of the good or service provided by the firm changes.

factor in their exit decision. Therefore, the proposed rule is unlikely to lead to a significant reduction in the offering of specific products and services. However, the Bureau does not have adequate information with which to quantify the identity or number of products or services that could or might be discontinued as a result of this proposed rule, and therefore cannot quantify the resulting impact, if any, on consumers.

If it is cheaper to remove a given covered term or condition than to maintain it, then profit maximization implies that the firm will remove that covered term or condition from its contracts. As a result, under the proposed rule, if the cost of registering a given covered term or condition minus the benefits of maintaining it in a covered form contract for a particular product or service exceeds a firm's costs of removing the term from supervised nonbanks' contracts, profit maximization implies that the firm will remove that term from its contracts.[343] To the extent that any covered terms or conditions removed by supervised registrants were disadvantageous to consumers, consumers will benefit and some supervised registrants may be impacted. To quantify these impacts, the Bureau would need information regarding the costs and benefits to supervised nonbanks of including covered terms and conditions in their contracts. In its 2017 arbitration agreement rule, which did not take effect, the Bureau found that many firms often view the benefits of arbitration agreements to significantly exceed their costs.[344] Similar data on the costs and benefits to firms from other covered terms and conditions is not available. The costs of removing covered terms and conditions are discussed in part VII.E.2 below and should be considered an upper bound on the costs described here, because supervised nonbanks always have the option to register contracts instead of removing covered terms and conditions.

Table 3: Estimates of Total Direct Cost of Registration

[343] That is, if (cost of registration) – (benefits of contract term) > (cost of removing term).

[344] 82 FR at 33397.

Entity Type	Entity Count[345]	Total Burden (Hours)	Total Burden ($1000s)
Simple	5,566	83,490	5,168
Intermediate	1,383	34,575	2,140
Complex	396	84,810	5,250
Total	**7,345**	**202,875**	**12,558**

Benefits

When separated out from the monitoring and supervisory uses (analyzed separately in part VII.E.2 below) and the publication provision (analyzed separately in part VII.E.3 below), the registration and information submission provision alone is unlikely to provide any benefits for affected firms.

For consumer financial services and products offered by supervised nonbanks, the main benefit derived from registration under the proposed rule is the Bureau's enhanced monitoring and supervision based on the information collection regarding covered terms and conditions contained in covered form contracts. This consumer protection activity by the Bureau via this proposed rule and its beneficial effects for consumers are described in detail in the following part VII.E.2.

2. Use of information for Bureau's market monitoring and supervision processes

The Bureau can use the information collected under the proposal for monitoring and supervisory processes. The publication component, while a monitoring process, is discussed separately in part VII.E.3 below.

Costs

[345] The Economic Census provides firms counts for revenue ranges. Here, firms with $1-10MM in revenue are assumed to be "simple," with 10 different contracts on average. Firms with $10-100MM in revenue are assumed to be "intermediate," with 25 different contracts on average. Firms with over $100MM in revenue are assumed to be "complex," with 250 different contracts on average. In addition to the Economic Census data, the Bureau assumes that the estimated 25 nonbanks subject to supervision due to orders are large and therefore complex. For details on burden and cost estimates, see Table 2.

The costs to covered persons of the Bureau's use of information collected under the proposal through its monitoring and supervisory processes may differ depending on the degree to which any covered terms and conditions that supervised nonbanks use are prohibited by law, including Federal consumer financial law (whether enumerated consumer laws and implementing regulations discussed in part II.B or the prohibition against UDAAPs such as in the examples discussed in part II.C). Most of these costs can be grouped into two categories, each of which relates to changes in the probability of supervision by the Bureau. First, as discussed below, some firms may face incentives to modify the covered terms and conditions in their covered form contracts in response to the proposed rule. Firms choosing to modify their covered terms and conditions in their covered form contracts face a direct paperwork cost of modifying their form contracts, as well as potential impacts from changes to their form contracts. For example, to the extent supervised nonbanks use prohibited covered terms and conditions, there may be specific impacts from these firms' discontinuing use of prohibited covered terms and conditions in covered form contracts they enter into with consumers in the future. Second, some nonbanks may experience costs from an increased likelihood of examination by the Bureau due to the Bureau's use of the information collected under the proposed rule. As discussed below, this increase likely would be at least partially offset by forgone examinations of other supervised nonbanks.

With respect to the first category of cost – of removing prohibited covered terms and conditions, in addition to the prohibition against UDAAPs, Federal, State, and Tribal laws include a number of express prohibitions of the use of a number of covered terms and conditions.[346] Despite these express prohibitions and the prohibition against UDAAPs, the Bureau and other regulators have identified violations of some of these prohibitions linked to contract terms and conditions purporting to waive consumer protections and limit their exercise

[346] For examples, see the discussion in parts II.A and II.C of the preamble.

or enforcement by consumers. Although these types of prohibited contract terms and conditions generally are unenforceable, the fact that some supervised nonbanks include them in their contracts strongly suggests that these entities obtain some economic benefit from them. For example, such terms may deter consumers from pursuing remedies by deceiving them into believing that they no longer have the right purported to be waived or limited.

Under the proposed rule, supervised nonbanks would be required to register covered terms and conditions, including any covered terms or conditions that are expressly prohibited or whose use may constitute UDAAPs. The Bureau believes that supervised nonbanks currently using prohibited covered terms or conditions in their form contracts generally would choose to remove them (from the form contracts for future use) prior to registration. Under the proposal (*see* proposed § 1092.302(b)(2)(i)), if a supervised registrant removes a covered term or condition before the effective date of the final rule, a supervised registrant would not be required to register that term or condition. This impact may impose two types of costs on supervised nonbanks. First, supervised nonbanks will lose any benefits they were obtaining from the use of prohibited covered terms or conditions. Second, supervised nonbanks may incur administrative costs to identify and remove any prohibited covered terms or conditions from their form contracts slated for future use. Supervised nonbanks may accomplish the removal directly to form contracts they draft and periodically update, or through implementing updated form contracts they purchase from form providers who periodically update their form contracts based on changes in law.[347] The Bureau does not have any systematic data with which to estimate the prevalence of prohibited covered terms and conditions, and therefore cannot fully quantify either of these costs. At baseline, these terms and conditions already are prohibited, whether explicitly or under UDAAP. Thus, firms already have an incentive not to use them. Regardless of their prevalence, prohibited covered terms and conditions generally are unenforceable, and only of

[347] As noted in the discussion of benefits of this second component of impact, the Bureau believes that existing widely-used form provider contracts, in general, are unlikely to contain expressly prohibited covered terms or conditions.

value to the firms using them to the extent they mislead consumers into believing otherwise and thus chill consumers' enforcement or exercise of rights. Therefore, the Bureau believes the impact of no longer using prohibited covered terms and conditions on supervised nonbanks is likely to be small.

Covered terms and conditions that are not expressly prohibited by law, or that are not *per se* prohibited (such as where the presence of a UDAAP may depend on facts and circumstances beyond the text of the term or condition), also may be indicators of risk to consumers and use of these covered terms and conditions also may inform the Bureau's supervision priorities. The Bureau therefore also considers the impact of nonbanks' incentives to modify the covered terms or conditions contained in their covered form contracts in response to changes in the probability of examination by the Bureau. The impact of changes to Bureau supervision, and examination prioritization in particular, is discussed below. As discussed below, given Bureau resource constraints and the high number of supervised nonbanks, the baseline likelihood of examination in a given year is low for the average supervised nonbank. Examination priorities depend on many factors other than use of covered terms and conditions and it is unlikely that a supervised nonbank could significantly decrease their likelihood of examination, in absolute terms, by modifying their covered terms or conditions in their covered form contracts.[348] For most supervised nonbanks, the cost of the examination process is primarily the employee time necessary to respond to the Bureau's information requests and is unlikely to exceed roughly $35,000.[349] Therefore, the incentive for a typical supervised nonbank to modify their contracts in order to manipulate their probability of examination is relatively weak.

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[348] The Bureau does not currently have access to the information that would be collected by the proposed rule, and therefore has not developed policies or procedures for incorporating this information into its examination priorities. To the extent that the relationship between use of covered terms and conditions and the Bureau's examination priorities is not public, supervised nonbanks' incentives to influence the Bureau's priorities by modifying their contracts will be further weakened.

[349] *See, e.g.,* CFPB, Final Rule Defining Larger Participants of the Automobile Financing Market and Definition Certain Automobile Leasing Activity as a Financial Product or Service, 80 FR 37496, 37520 (June 30, 2015) (estimating cost of examination for larger participant automobile finance company would be $27,611, or $33,834 when adjusted for inflation using the 2022Q3 GDP Implicit Price Deflator).

Some subset of supervised nonbanks engaged in activities that, if supervised, likely would lead to enforcement may have stronger incentives to modify their contracts. These incentives may be particularly high if such supervised nonbanks are unknown to the Bureau at baseline, as they may face a relatively larger increase in the probability of examination upon registration. In theory, such firms could choose to avoid this increase, and the prospect of increased public oversight generally, by removing all covered terms and conditions from their contracts. However, it is uncertain whether these firms would act on the incentive, for example, by removing their arbitration agreements. Such a move essentially would trade an increased risk of public oversight for an increased risk of private enforcement including class actions. And firms engaged in activities likely to lead to enforcement may be equally concerned about creating new exposure to class actions. The Bureau requests comment on supervised nonbanks' incentives to modify the covered terms or conditions in their covered form contracts in response to the proposed rule including, where relevant, specific examples of covered terms and conditions that firms may modify and a description of what modifications may occur and why.

For the unknown share of supervised nonbanks that may choose to review and modify the covered terms or conditions contained in their covered form contracts for future use, the Bureau assesses the cost to be less than 5 hours per contract. This process would involve a mix of managerial, legal, business, and administrative employees, with an average fully loaded hourly wage of $61.90, calculated as described above. Therefore, the cost for supervised nonbanks using expressly prohibited covered terms and conditions could range from $3,095 for a firm using 10 contracts containing such terms to $77,375 for a firm using 250 contracts. The Bureau believes this would be a one-time cost because, after the effective date of the final rule, supervised nonbanks may simply choose to refrain from including expressly prohibited covered terms and conditions in their new contracts. Amortized over the first five years of the rule, the cost of changing a form contract would range from approximately $620.00 to $15,500 annually. To quantify the total impact, the Bureau would need information on how many supervised

nonbanks would have a strong incentive to modify their form contracts, generally because they contain prohibited covered terms and conditions.[350] The Bureau also would need to know how many supervised nonbanks draft their own form contracts, as opposed to purchasing them from third parties. Form contract providers appear less likely to use prohibited terms and conditions, and, if that is so, would be less likely to have an incentive to modify their contracts as a result of the proposed rule. Furthermore, the form contract providers would bear the cost of these modifications. To the extent that these costs are passed through to supervised nonbanks as higher prices, the impact on any individual business that is a customer of the form contract provider is likely to be negligible. The Bureau seeks comment or data on the use of form contracts purchased from third parties. In particular, the Bureau seeks information on the prevalence of third-party form contracts in different markets and for supervised nonbanks of different sizes.

With respect to the second category of cost – the direct costs of monitoring and examination by the Bureau that may specifically result from the proposed rule, pursuant to its authorities under CFPA section 1022, as discussed in part II.C.1 above, the Bureau may consider both risks and costs to consumers, and consumer understanding of risks, as factors in allocating its monitoring resources. A major purpose of the proposed rule is to use the nonbank registration system to facilitate the Bureau's monitoring and supervisory processes. The information collected under the proposed rule will have at least two distinct effects on supervised nonbanks' costs related to Bureau supervision and enforcement. First, the Bureau would use the registration information to prioritize markets or entities where applicable legal protections are often waived, or where private enforcement or exercise of consumer rights is weakened, by the use of covered terms and conditions. Second, the registry of supervised nonbanks independently would improve the Bureau's ability to determine which nonbanks are subject to its supervisory authority. To the

[350] As discussed above, some supervised nonbanks also may have an incentive to modify or remove covered terms and conditions that are not expressly prohibited. For example, a supervised nonbank may believe that modifying or removing a specific term or condition would lead to decreased likelihood of Bureau supervision.

extent a nonbank would not have been examined but for the adoption of the proposed rule, the costs of an examination of that nonbank could be similar to the costs estimated in the Bureau's larger participant rules, adjusted for inflation.[351] However, most supervised nonbanks would not go from no likelihood of examination to definitely being examined as a result of the proposed rule. Rather, for a given supervised nonbank, the examination cost resulting from the proposed rule generally would be the cost of an examination multiplied by the marginal change in probability of an examination. The Bureau cannot quantify the change in likelihood of such an examination without the information collected by the proposed rule and the opportunity to develop and test methods for incorporating this information into Bureau decision making. However, the Bureau conducts a limited number of supervisory actions per year. A modest increase in the number of actions due to increased efficiency will not noticeably change the probability that any given entity is supervised. Individual supervised nonbanks may experience larger changes in the probability of supervisory action due to improvements in how the Bureau prioritizes supervision. Therefore, the cost of any exam conducted due to the rule generally would be offset by other, lower-priority exam work not conducted. That is, to the extent that the costs of supervisory action are similar across entities, the proposed rule would reallocate the costs of being examined across supervised nonbanks but is unlikely to increase significantly the overall costs to all supervised nonbanks of being examined.

The Bureau has considered the possibility that supervised nonbanks would pass through some of the costs described above to consumers, generally by raising prices. Although the Bureau lacks sufficient data to quantify the extent to which consumers may ultimately bear some of the impacts on firms discussed above, economic theory and available evidence suggest that the impact on consumers is likely to be small. As discussed in part VII.E.1. above, firms generally are only able to pass increased costs through to consumers if those costs vary

[351] *See, e.g.,* CFPB, Final Rule Defining Larger Participants of the Automobile Financing Market and Definition Certain Automobile Leasing Activity as a Financial Product or Service, 80 FR 37496, 37520 (June 30, 2015) (estimating cost of examination for larger participant automobile finance company would be $27,611).

depending on the number of units sold. Although the incentive to modify a contract may depend on the number of times it is used, many of the costs described above are paid for each covered form contract, regardless of the number of times the covered form contract is used, and therefore are unlikely to be passed through to consumers. Because firm size is taken into account in the Bureau's examination prioritization, costs associated with the probability of supervision arguably are variable costs that could be passed through to consumers. However, as discussed above, the proposed rule does not increase the total resources available to the Bureau for supervision and will generally reallocate the costs of examination across supervised nonbanks. Because firms pass through decreases as well as increases in marginal cost to consumers, this implies that prices for consumers are unlikely to increase on net. Consumers' ability to substitute towards firms offering lower prices will further mitigate any increase in consumer prices related to the costs described in this section.

Benefits

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. As against that baseline, which the Bureau lacks data to quantify, the Bureau believes that the proposed rule will significantly reduce the use of prohibited covered terms and conditions. Even when they are generally unenforceable, covered terms and conditions still harm consumers by chilling private action because many consumers are unaware that such covered terms and conditions are prohibited. For example, when a consumer complains about a particular practice or harm, a firm using a prohibited covered waiver may incorrectly claim that the consumer waived their rights and thus has no rights to enforce. In light of what the covered waiver states and the likelihood of

the firm standing behind it if a consumer complains, a reasonable consumer may believe that they have waived their rights, and not pursue further action.

As discussed above, the Bureau believes that the obligation to register covered terms and conditions will significantly reduce the use of prohibited covered terms and conditions. Although the Bureau has documented examples of the use of prohibited covered waivers and other covered terms and conditions, the Bureau is unaware of any systematic data that would enable it to estimate the prevalence of prohibited covered terms or conditions or their harm to consumers. Therefore, the Bureau cannot quantify the benefit from incentivizing firms to remove prohibited covered terms and conditions from their contracts. The Bureau requests any additional information that would improve its understanding of this benefit.

Some firms may be using prohibited covered terms or conditions unintentionally, for example because they have purchased a contract from a vendor. Because such firms did not choose to include expressly prohibited covered terms or conditions in their contracts, the legal risks associated with using them may exceed the benefits. Such firms may therefore benefit from the proposed rule, as any advantages lost by removing prohibited covered terms and conditions (which the form provider may do, or the supervised registrant may do by modifying the form contract or using a different contract) are outweighed by the benefit of reduced legal risk. The Bureau does not have systematic data on the unintentional use of prohibited covered terms and conditions, or on the expected benefits or costs of using prohibited covered terms and conditions. Therefore, the Bureau cannot quantify this benefit. Because form providers typically review developments in the law and update their form contracts accordingly, and market the form contracts as legally tested and updated, the likelihood of a prohibited covered term or condition in a form contract furnished by a form contract provider may be relatively low.

Covered terms and conditions that are not prohibited also may deprive consumers of legal rights or other legal protections or undermine those legal rights or other legal protections by placing limits on how consumers enforce them (*e.g.*, by limiting the timing, venue, forum, or

recovery for legal actions, or ability to file complaints) or complain about matters related to potential noncompliance with them.[352] By extinguishing or diminishing the adequacy of applicable consumer legal protections, these covered terms and conditions weaken firms' incentives to comply with applicable legal protections including Federal consumer financial law. Therefore, the Bureau believes that markets or firms where these covered terms and conditions are more prevalent likely are relatively riskier for consumers. The proposed rule will allow the Bureau to target its monitoring, supervision, enforcement, and other resources to riskier markets and firms. The possibility of such increased supervision as well as its reality will increase firms' incentives to comply with applicable legal protections including Federal consumer financial law and reduce harm to consumers.

Because their use is not generally prohibited in supervised markets outside of certain mortgage agreements and lending to servicemembers as discussed in part II above, arbitration agreements may be a common example of covered terms or conditions generally not prohibited by law. As discussed in the Bureau's section 1022(b) analysis of the provisions of its 2017 final rule (which did not take effect) that would have prohibited use of arbitration agreements from blocking class actions, arbitration agreements (which often may be enforceable under the Federal Arbitration Act) pose a risk of reducing deterrence for violation of, and thereby increasing noncompliance with, Federal consumer financial law and other applicable legal protections.[353]

Apart from data about the prevalence of arbitration agreements discussed in part II.C.2 above, the Bureau does not have systematic data on the use of covered terms and conditions that are not expressly prohibited by law, the relationship between these covered terms and conditions and risky or potentially illegal activity, the resulting harm to consumers, or the extent to which

[352] There may be relatively few situations where contractual limitations on complaints are not prohibited by law. *See* CFPB Bulletin 2022-05 (describing likelihood that contractual limits on complaints will constitute UDAAPs).

[353] 82 FR at 33410.

risky or potentially illegal activity would be deterred by changes to Bureau prioritization. Therefore, the Bureau is unable to quantify this benefit.

In addition to enhancing the Bureau's process for prioritizing supervision of individual entities, the information collected by the proposed rule will improve the Bureau's general understanding of the role of covered terms and conditions in supervised markets and their effects on consumers. The proposed rule would give the Bureau high-quality information on the use of covered terms and conditions in several significant markets in which the Bureau monitors for risks to consumers. The proposed registry would improve the Bureau's monitoring for potential risks to consumers arising from the use of specific covered terms and conditions, their use at specific types of firms, and broader patterns in the use of covered terms and conditions. Such monitoring, in turn, would help inform the Bureau's other functions, including not only its supervisory function, but also its consumer education, market research, and enforcement functions. Through exercise of those functions, the Bureau may identify and publicize linkages from the use of particular covered terms and conditions, or patterns of use of covered terms and conditions, and specific benefits or harms to consumers (whether through the use of covered terms and conditions that are prohibited by applicable legal protections, or through the undermining of applicable legal protections by the use of covered terms and conditions generally). Those activities likely would improve the functioning of the broader market for consumer financial products and services. Because market participants typically benefit from well-functioning markets, the proposed rule is likely to have positive effects on both consumers and supervised nonbanks. The Bureau does not have data to quantify these benefits.

Because the proposed rule would not require entities to register if they do not use covered terms and conditions, and the proposal would not require entities to submit information about their revenues or volume of activity in the supervised markets, the Bureau would need additional data on non-users to precisely estimate the prevalence of covered terms and conditions overall or within a given market. However, the proposed rule still would provide a valuable source of

information on questions of interest to the Bureau and the general public. For example, in part due to lack of comprehensive data, the Bureau does not have good estimates of how consumers value covered terms and conditions. Similarly, precisely how market concentration and competition between firms impacts use of covered terms and conditions offered to consumers is generally poorly understood. The proposed rule will provide evidence that will shed light on these and other questions, which may inform or precipitate future Bureau publications or policy initiatives. For example, as the Bureau learns more about the effects of certain covered terms and conditions, it may issue guidance to improve consumers' understanding of their rights and ability to make informed decisions about the contracts they enter into or about their rights under contracts they already entered into. Firms using covered terms and conditions in covered form contracts also may benefit from a better understanding of how these terms and conditions are used and how they are perceived by consumers. Without the data to be collected by the proposed registry, the Bureau cannot anticipate, or quantify, these benefits.

Firms that are complying with the law (by both not using covered terms and conditions that are prohibited, and by adhering to underlying applicable legal protections despite any use of covered terms and conditions), are often at a competitive disadvantage relative to firms that do not comply with the law. As discussed above, the information collected by the proposed rule is likely to improve the Bureau's ability to target supervisory action towards those firms that may be using covered terms and conditions in a manner that facilitates violating Federal consumer financial law. To the extent that this improvement induces more firms to comply with Federal consumer financial law, firms which were previously compliant will benefit. As noted above, the Bureau does not have systematic data on the use of all covered terms and conditions, the number of firms currently not complying with consumer protection law, or the harm to compliant firms from their competitors' noncompliance. The Bureau is therefore unable to quantify this benefit to firms. Improved targeting of the Bureau's monitoring and supervision processes also may benefit firms that do not use covered terms and conditions or use them in a manner that does

not facilitate violation of Federal consumer financial law, as they would be, on the margin, less likely to bear the costs of supervision or enforcement actions, as discussed above. Without the data proposed to be collected by the registry or the opportunity to develop, test, and implement procedures for using this data to inform Bureau prioritization, the Bureau is unable to quantify this benefit.

3. Publication of registration information pursuant the Bureau's market monitoring authority

Costs

The publication requirement in proposed § 1092.303 would allow information about covered terms and conditions that are already available to existing customers of supervised registrants to be centralized on the Bureau's public website. This could make the information more accessible than it might otherwise be. However, in the section 1022(b) analysis impacts of the Bureau's recent proposal to register certain public orders against covered persons, the Bureau observed that publication of certain public orders in a centralized fashion would be unlikely to change the behavior of most consumers.[354] Similarly, as explained at the end of this part VII.E.3 below, the publication of information that would be required by this proposal is likely to have a minimal impact on consumer behavior, so the impact of this proposed provision on most affected entities likely would not be significant.

For the reasons discussed in part VII.E.2 above, firms are likely to remove covered terms or conditions that are prohibited by law, before being required to register them under the proposed rule. Some firms' use of covered terms and conditions that are not prohibited by law still may be so controversial among consumers or the general public that their publication on the Bureau's public website could impose a significant impact on these firms. However, even under the baseline with no rule, covered terms and conditions generally are available and can become the subject of scrutiny by public regulators and the public at large. Publication may increase the

[354] Nonbank Registration – Orders Proposal, at 169 (citing research on impacts of consumer disclosures).

incentive at the margin to remove covered terms and conditions, to the extent the Bureau, through its supervisory work, would not have found a given covered term or condition to violate or risk violating Federal consumer financial law.

With respect to the covered terms and conditions that are registered (which likely would be largely terms and conditions that are not prohibited), even if controversial, their publication is unlikely to result in a significant increase in private class actions. As discussed in part II, these remaining covered terms and conditions reflect risks to consumers due to their potential to undermine applicable legal protections magnified by their creation through form contracts often entered into with limited consumer understanding. It is possible some of these remaining terms and conditions may, in conjunction with other facts or circumstances, also violate the prohibition against UDAAP or other protections enforced by other regulators or privately. However, with respect to the potential for significant increased private enforcement, through class actions in particular, that appears unlikely. Consumers' ability to participate in class actions is limited by several of the covered terms and conditions, and especially in light of the prevalence of arbitration agreements discussed in part II above. As a result, in the context of current law governing the covered terms and conditions, the Bureau's publication of information collected by the proposal is unlikely to result in a significant increase in class action litigation across markets supervised by the Bureau.

The Bureau requests comments and information that would inform the Bureau's estimates of the impacts of publication on covered entities.

Although the Bureau is not proposing the registry to signal an endorsement of supervised registrants or their safety, some consumers may interpret registration as a signal of legitimacy or safety.[355] Unregistered firms may experience costs if consumers interpret their absence from the

[355] All else equal, use of covered terms and conditions in covered form contracts is an indicator that a firm is potentially risky, rather than safe. It is also only one among many indicators of risk to consumers, and should not be relied on exclusively to determine a firm's riskiness to consumers.

registry as a signal that they are relatively more likely to be illegitimate or risky.[356] There is also some potential for harm to consumers who do not understand the information conveyed by registration and, for example, pay less attention to other indicators of a firm's business practices. The Bureau is in a position to minimize these costs by designing a public-facing registration system that can educate those consumers who might access it on the significance of the published information.

On the other hand, consumers might interpret published information on a supervised registrant's use of covered terms and conditions in covered form contracts as a signal that their products or services are risky. As discussed below, consumers are unlikely to directly-access the registry, but its information could be used to heighten public awareness. This signal potentially generated by publication in the registry generally is unlikely to impose costs such as by altering the ability of firms to attract or retain customers, except potentially in limited circumstances. In general, the use of many types of covered terms and conditions is widespread and that the presence of many well-known firms on the registry would not negatively affect their ability to attract or retain customers. In addition, the registry may identify certain other covered terms and conditions that are not prohibited but which are outliers and are unusually risky. Depending on the competitive environment that firms face, they may choose to adjust their use of such terms and conditions, weighing the cost associated with a risk of losing trust with their customers or potential customers against the value they believe those terms and conditions to provide. Finally, as discussed above, to the extent that supervised nonbanks are using prohibited covered terms and conditions, they are likely to remove those before registration. However, if a supervised registrant does continue to use prohibited covered terms and conditions, then, as discussed above, Bureau supervisory or enforcement action already may become more likely; otherwise, to the extent the term is prohibited by State or Tribal law, then the publication of this type of

[356] For example, enough firms purport to be supervised by the Securities and Exchange Commission (SEC) that the SEC maintains a public list of *unregistered* entities known as the PAUSE program.

registration information under the proposed rule could increase the visibility of that practice; the resulting increased public scrutiny of such a prohibited practice might reduce that firm's ability to attract or retain customers.

In a baseline with no rule, consumers have the opportunity to review the terms and conditions of contracts for products or services they are considering at point of sale, but may rarely do so, as discussed in part II above. The publication of information collected under the proposal on the Bureau website would offer consumers an alternative, centralized way to access this information and facilitate comparisons across competing firms. While the Bureau does not have sufficient data to quantify this impact, a large body of research has shown that consumers often pay little attention even to important product attributes.[357] For that reason, the Bureau does not anticipate making the centralized registry directly accessible to consumers would have significant impact on supervised registrants. Unlike core financial deal terms like price or payment terms, covered terms and conditions often are distant in time and probability, and often may directly affect only a minority of consumers of a given product or service. In addition, consumers may not appreciate how covered terms and conditions may weaken compliance incentives generally, which can have broader impacts on product and service delivery overall. Therefore, covered terms and conditions are unlikely to be decisive factors in consumers' choices at the point of sale. Because consumers already have access to the contract at point of sale, the public registry centralizing this information on the Bureau's website would have limited additional impact. Well-designed information disclosures can be effective at directing consumer attention; for example, one study found that providing payday loan borrowers with information about the costs of payday loans reduced payday loan borrowing.[358] However, effective information disclosures are typically more direct (e.g. disclosing the costs of payday loans to

[357] For one review of this research, see Benjamin Handel and Joshua Schwartzstein, *Frictions or Mental Gaps: What's Behind the Information We (Don't) Use and When Do We Care?,* Journal of Economic Perspectives (2018), vol. 32(1), at 155-178.

[358] See Marianne Bertrand and Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, The Journal of Finance (2011), vol. 66(6), at 1865-1893.

payday loan borrowers) and more timely (e.g. disclosed to payday loan borrowers at the time they are obtaining a payday loan) than the information that would be published under the proposed rule. Therefore, the Bureau believes that the proposed publication of registration information is likely to have a minimal impact on consumer behavior, and so the associated impact on supervised nonbanks also will be minimal.

The Bureau has considered the possibility that supervised nonbanks would pass through some of the costs described above to consumers, generally by raising prices. As discussed in the previous sections, firms' ability to shift the burden on increased costs to consumers depends on the nature of those costs, especially whether they vary depending on the number of customers or units sold. Some of the effects described above could potentially make it more or less difficult for some registrants to attract new customers. In the long-run, customer acquisition costs are arguably a component of variable cost, and potentially could lead to higher prices. However, for the reasons discussed above, the impact of the proposed publication of registration information is likely to have a minimal impact on consumer behavior, so even if these costs were fully passed through the impact on consumers would be minimal.

Benefits

Under the proposed rule, the registration information (except for administrative information) would be published on the Bureau's public website to the extent permitted by applicable laws. This would benefit the public by facilitating the use of registration information by other public regulators. Recognizing the value of contract registration, some individual States have established registration systems for one market.[359] The proposed registration system would provide nationwide, standardized information on covered terms and conditions in covered form contracts across a broader set of supervised markets. Other Federal agencies and public regulators in States without preexisting contract registration systems would be able to use the

[359] For example, Colorado, Louisiana, Maine, and Illinois require private student lenders to register their standard terms and conditions.

Bureau's registry to inform and improve their supervision and enforcement activities. Public regulators in States with preexisting contract registration systems would benefit from the additional context provided by national data, as well as data focused specifically on the use of covered terms and conditions.

The benefits of making the Bureau registry available to other public regulators are analogous to the benefits of the Bureau's own use of the registry discussed above. The two primary benefits are incentivizing firms to ensure that their contracts do not use prohibited covered terms or conditions and facilitating risk-based monitoring, supervision, and enforcement of applicable law. Many of the laws prohibiting waivers discussed in parts II.B and II.C are enforced by other Federal and State agencies. Because the Bureau cannot enforce many of these laws, the proposed rule would not incentivize firms to remove covered terms and conditions prohibited by those laws unless they were used in circumstances that constituted a UDAAP or registration information were shared with the other agencies responsible for enforcement. For the reasons discussed above, quantifying these benefits is not possible without data on the prevalence of prohibited clauses and the harm they do to consumers.

To the extent that consumers are more willing to trust firms subject to Bureau supervision, the public registry identifying nonbanks in part on the basis that they are subject to the Bureau's supervisory authority may provide a benefit to firms that may partially offset costs associated with publication of their risky covered terms and conditions. The Bureau does not have sufficient data, for example, on how Bureau supervision affects consumers' attitudes towards firms or consumers' choices, for it to quantify this benefit. Some supervised nonbanks covered by the proposed rule already would have a license at the State level. Many State licensing regimes also provide an online search function, and firms may advertise their license number either because it is required or because it is beneficial. In addition, firms would need to take care to avoid deceptive practices and other problematic statements in conveying the

significance of their registration to consumers.[360] For these reasons, any benefits from publicizing their registration with the Bureau are likely to be incremental at best.

One alternative to publication is the establishment of confidential data-sharing agreements with individual public regulators. This would permit use of the Bureau registry by other regulators without making it available to the public or to other firms, including potential competitors. However, the process of establishing memoranda of understanding with other regulators at the Federal, State, Tribal, and local levels specifically covering the proposed registry would require public resources and impose costs for public regulators, and therefore may lead to incomplete sharing of information and significant reductions in the benefit to consumers. Furthermore, as described above, the Bureau believes that publication of registration information will not impose significant costs on firms that would justify these reductions.

Furthermore, publication of registration information is likely to provide benefits to the public beyond improved compliance with applicable law and strengthened public enforcement of consumers' rights. For example, academics, journalists, and consumer advocacy groups may use registry information to produce articles or reports which increase consumers' understanding of their rights. The Bureau does not have sufficient information to quantify the value of additional consumer education resulting from the publication of registration information.

In addition, the Bureau is proposing to collect information on firms' use of covered form contracts containing covered terms and conditions purchased from third-party providers. If this type of information is published by the Bureau, firms using these contracts may benefit if consumers and public regulators perceive them as following an industry standard. Publication of this type of information may also have an impact on the contract provider industry by providing additional information on the market for contracts. This may improve contract providers'

[360] *Cf.* Consumer Financial Protection Circular 2022-02, "Deceptive representations involving the name or logo of deposit insurance" (May 17, 2022) (discussing risks of deception in falsely characterizing the status of deposit products as insured by a Federal regulator); CFPB Order to Terminate Sandbox Approval Order, *In re Payactiv, Inc.* (June 30, 2022) (rescinding regulatory approval under TILA due to statements by regulated entity "wrongly suggesting the CFPB had endorsed [the entity] or its products").

understanding of the market for contracts, including new market opportunities. The Bureau seeks comment on the potential impacts of collecting and publishing information on covered terms and conditions in covered form contracts sold by third-party form contract providers.

F. Potential Specific Impacts of the Proposed Rule

1. *Insured depository institutions and credit unions with $10 billion or less in total assets, as described in Section 1026*

There will be no direct effect on insured depository institutions or credit unions with $10 billion or less in total assets, as the rule applies only to supervised nonbanks. There may be certain indirect impacts, as described below.

Some smaller depository institutions may partner with nonbanks to offer loans, such as payday loans, in supervised markets. Proposed § 1092.302(a)(2)(iii)(B) would require supervised payday lenders to identify the legal names of parties to their covered agreements. The Bureau requests data on how often payday lenders' agreements identify smaller depository institutions as parties in the payday lenders' agreements with consumers. If the payday lender's agreement identifies the smaller depository institution as a party, then that information would be reported under the proposal to the Bureau and potentially the public under the publication provisions of the proposal. It is uncertain whether such reporting and publication would have even an indirect effect on the smaller depository institution, however.

An additional indirect impact on some insured depository institutions or insured credit unions with $10 billion or less in total assets may be possible in two separate contexts. First, to the extent that they are affiliated with a supervised registrant, a cost to the affiliate – such as the cost of registration and submission of information – may be an indirect cost to the insured depository institution or insured credit union. Second, to the extent they compete with a supervised registrant, a cost to the competitor – such as the cost of registration and submission of information – may be an indirect benefit to them because they do not incur that cost under the proposal. But as noted above, even for supervised registrants, the Bureau does not anticipate that

the cost of the proposed rule will be significant in most cases. Therefore, the Bureau anticipates that these types of indirect impacts on any such insured depository institutions or insured credit unions with $10 billion or less in total assets would be even less significant.

2. *Impact of the proposed provisions on consumer access to credit*

The proposed rule could potentially reduce consumer access to credit if costs associated with the proposed rule were passed through to consumers as higher prices or led covered persons to discontinue certain products or services. As discussed above, the available data, combined with economic theory, suggests that such effects will be negligible. Moreover, bank and nonbank entities that would not be directly affected by the proposed rule could provide financial products and services to consumers who would otherwise obtain these financial products and services from affected nonbank covered persons. Therefore, the Bureau believes that the proposed rule will not have a significant negative impact on consumer access to credit.

By improving the Bureau's ability to conduct its consumer education, regulation, market monitoring, and supervision activities, the proposed rule would likely improve the functioning on the broader market for consumer financial products and services. Therefore, the proposed rule may have positive effects on consumer access to consumer financial products and services provided in conformity with applicable legal obligations designed to protect consumers.

3. *Impact of the proposed provisions on consumers in rural areas*

Broadly, the Bureau believes that the analysis above of the impact of the proposed rule on consumers in general provides an accurate analysis of the impact of the proposed rule on consumers in rural areas. If consumers in rural areas are relatively less reliant on affected nonbanks, the impact of the rule on consumers in rural areas would be smaller than the impact on those in non-rural areas. Because the Bureau lacks high-quality data on the rural market share of supervised nonbanks that would be affected by the proposed rule, the Bureau cannot judge with certainty the relative impact of the rule on rural areas. However, for certain large and well-studied industries, including mortgage and auto lending, the Bureau has evidence of the lesser

rural impact.[361] Based on this evidence, the Bureau believes that the impact of the proposed rule would likely be relatively smaller in rural areas.

VIII. Regulatory Flexibility Act Analysis

A. Overview

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, the Dodd-Frank Act Wall Street Reform and Consumer Protection Act of 2010, as well as the Small Business Jobs Act of 2010, requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations.[362] The RFA defines a "small business" as a business that meets the size standard developed by the Small Business Administration pursuant to the Small Business Act.[363] Potentially affected small entities include those in the markets described in Table 1 above.

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.

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[361] For evidence on the mortgage market, see Julapa Jagtiana, Lauren Lambie-Hanson, and Timothy Lambie-Hanson, *Fintech Lending and Mortgage Credit Access*, The Journal of FinTech (2021), vol. 1(1). For evidence on the auto loan market, see Donghoon Lee, Michael Lee, and Reed Orchinik, *Market Structure and the Availability of Credit: Evidence from Auto Credit*, MIT Sloan Research Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966710.

[362] 5 U.S.C. 601-12. The Bureau is not aware of any small governmental units or not-for-profit organizations to which the proposal would apply. Proposed § 1092.301(h) would exclude governmental units, unless, in the case of a State, Tribe, or arm of a State or Tribe, the U.S. Congress has abrogated their immunities.

[363] 5 U.S.C. 601(3) (the Bureau may establish an alternative definition after consultation with the Small Business Administration and an opportunity for public comment).

For the reasons discussed below, the Bureau has determined, and the undersigned has certified, that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, and that an IRFA is, therefore, not required.

B. Impacts of the Proposed Rule on Small Entities

As discussed in the 1022(b)(4) analysis above, the costs to supervised nonbanks associated with registration under the proposed rule are small. The direct cost to supervised nonbanks is the employee time spent by to gather and submit registration information. Required information includes identifying and administrative information, as well as information regarding the covered terms and conditions in registrants' covered form contracts. This information should be readily accessible to all entities affected and providing it through the nonbank registration system should be straightforward. While the Bureau cannot precisely quantify this cost, it believes this will generally take on average 15 to 25 hours of employee time per small entity annually, as reflected in Table 2 above, based on the Bureau's estimate that small entities generally have a consumer contracting system of simple or intermediate complexity.[364] Firms would not need to purchase new hardware or software and would not need to employ or train specialized personnel to comply with the proposed rule.

The Bureau believes that indirect costs, primarily related to increased incentives for compliance with applicable consumer protection law including Federal consumer financial law, are also likely to be small. For example, some supervised nonbanks may choose to conduct a compliance audit of their covered terms and conditions in their covered form contracts, to ensure there are no waivers or other covered terms or conditions subject to the various express legal prohibitions mentioned in part II.B above and there are no covered terms or conditions that constitute UDAAPs under Bureau decisions and guidance such as those discussed in part II.C above. As discussed in the 1022(b)(4) analysis, this often would involve review of only

[364] See the 1022(b)(4) analysis above for a detailed description of this burden. Table 2 reports the estimated burden for each task involved in the proposed registration, for firms at varying levels of complexity.

relatively easily-identified terms and conditions and would not require an audit of the whole contract. Small entities in some supervised markets, such as mortgage and automobile finance, typically purchase their contracts from vendors, who may bear the cost of conducting such audits. These are fixed costs and therefore unlikely to be passed on to small entities. Regardless of the method of ascertaining information contained in contracts and to determine compliance with the law and this proposed regulation, the business cost to review contracts and remove prohibited terms would be a one-time cost and is unlikely to be significant when amortized over five years and, in any event, is an existing requirement under existing consumer protection law, separate and apart from the requirements that would be imposed by this proposed rule. Moreover, to the extent that the Bureau prioritizes supervision of entities which pose risks to a larger number of consumers, these indirect costs are likely to be even smaller for small entities.

The 1022(b)(4) analysis above finds that, even for complex entities using many different contracts, it is unlikely that the direct costs of registration under the proposed rule exceed approximately $13,250 annually. Because entities with under $1 million in receipts are exempt from registration, the impact of the rule would be less than 1.3% of receipts for all affected registrants, and therefore not significant. The Bureau believes that this estimate is likely to overstate the cost to most small entities. The estimated direct costs of registration for a supervised registrant using 10-25 different contracts range from more than $900 to less than $1,600 annually, or 0.09-0.16% of annual receipts. The Bureau believes that this lower estimate is most likely to be appropriate for small entities.

For some small entities, the impact may be larger than average and in extreme cases may rise to the level of a significant economic impact. However, the Bureau believes that such cases would be rare, and that the number of small entities experiencing a significant economic impact under the proposed rule would not be substantial.

IX. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq*., Federal agencies generally are required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may neither conduct nor sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

The information collection requirements in this proposed rule would be mandatory. Certain information collected under this proposed rule would not be made available to the public, in accordance with applicable law.

The collections of information contained in this proposed rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements (including the burden estimate methods) is provided in the information collection request (ICR) that the Bureau is submitting to OMB under the requirements of the PRA. Please send your comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Bureau of Consumer Financial Protection. Send these comments by email to *oira_submission@omb.eop.gov* or by fax to 202-395-6974. If you wish to share your comments with the Bureau, please send a copy of these comments as described in the **ADDRESSES** section above. The ICR submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at *www.reginfo.gov*.

Title of Collection: Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections.

OMB Control Number: 3170-00XX.

Type of Review: Request for approval of a new information collection.

Affected Public: Private sector.

Estimated Number of Respondents: 7,345.

Estimated Total Annual Burden Hours: approximately 15-210 depending on complexity of entity's contracting with consumers.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this proposal will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

If applicable, the notice of final rule will display the control number assigned by OMB to any information collection requirements proposed herein and adopted in the final rule.

List of Subjects in 12 CFR Part 1092

Administrative practice and procedure, Consumer protection, Credit, Intergovernmental relations, Law enforcement, Nonbank registration, Registration, Reporting and recordkeeping requirements, Trade practices.

Authority and Issuance

For the reasons set forth above, the Bureau proposes to add part 1092 to chapter X in title 12 of the Code of Federal Regulations, to read as follows:

PART 1092 – NONBANK REGISTRATION

Subpart A–General.
Sec.
1092.100 Authority and purpose.
1092.101 General definitions.
1092.102 Submission and use of registration information.
1092.103 Severability.
Subpart B–[Reserved]

Subpart C–Use of Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections.

1092.300 Scope.
1092.301 Definitions.
1092.302 Registration and submission of information regarding supervised registrants' use of covered terms and conditions.
1092.303 Publication of information regarding supervised registrants' use of covered terms and conditions.

Authority: 12 U.S.C. 5512(b) and (c); 12 U.S.C. 5514(b).

Subpart A–General.

§ 1092.100 Authority and purpose.

(a) *Authority.* The regulation in this part is issued by the Bureau pursuant to section 1022(b) and (c) and section 1024(b) of the Consumer Financial Protection Act of 2010 (CFPA), codified at 12 U.S.C. 5512(b) and (c), and 12 U.S.C. 5514(b).

(b) *Purpose*. The purpose of this part is to prescribe rules governing the registration of nonbanks, and the collection and submission of registration information by such persons, and for public release of the collected information as appropriate.

(1) Subpart A contains general provisions and definitions used in this part.

(2) Subpart B is reserved.

(3) Subpart C sets forth requirements regarding the registration of supervised nonbanks and collection of information regarding their use of form contracts to impose certain terms and conditions that seek to waive or limit consumer rights or other applicable legal protections.

§ 1092.101 General definitions.

For the purposes of this part, unless the context indicates otherwise, the following definitions apply:

(a) *Affiliate, consumer, consumer financial product or service*, *covered person*, *Federal consumer financial law*, *insured credit union, person*, *related person*, *service provider*, and *State* have the same meanings as in CFPA section 1002, codified at 12 U.S.C. 5481.

(b) *Bureau* means the Consumer Financial Protection Bureau.

(c) *Include*, *includes*, and *including* mean that the items named may not encompass all possible items that are covered, whether like or unlike the items named.

(d) *Nonbank registration system* means the Bureau's electronic registration system identified and maintained by the Bureau for the purposes of this part.

(e) *Nonbank registration system implementation date* means, for a given requirement or subpart of this part, the date(s) determined by the Bureau to commence the operations of the nonbank registration system in connection with that requirement or subpart.

§ 1092.102 Submission and use of registration information.

(a) *Filing instructions.* The Bureau shall specify the form and manner for electronic filings and submissions to the nonbank registration system that are required or made voluntarily under this part. The Bureau also may provide for extensions of deadlines or time periods prescribed by this part for persons affected by declared disasters or other emergency situations.

(b) *Coordination or combination of systems.* In administering the nonbank registration system, the Bureau may rely on information a person previously submitted to the nonbank registration system under this part and may coordinate or combine systems in consultation with State agencies as described in 12 U.S.C. 5512(c)(7)(C) and 12 U.S.C. 5514(b)(7)(D).

(c) *Bureau use of registration information.* The Bureau may use the information submitted to the nonbank registration system under this part to support its objectives and functions, including in determining when to exercise its authority under 12 U.S.C. 5514 to conduct examinations and when to exercise its enforcement powers under subtitle E of the CFPA. However, this part does not alter any applicable process whereby a person may dispute that it qualifies as a person subject to Bureau authority.

§ 1092.103 Severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

Subpart B–[Reserved]

Subpart C–Use of Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections.

§ 1092.300 Scope.

This subpart requires supervised nonbanks to collect and submit information to the Bureau's nonbank registration system regarding their use of form contracts to impose certain terms and conditions that seek to waive or limit consumer legal rights and other applicable legal protections. This subpart also describes the information the Bureau will make publicly available, when permitted by law.

§ 1092.301 Definitions.

For the purposes of this subpart, unless the context indicates otherwise, the following definitions apply:

(a) *Administrative information* means contact and other information regarding persons subject to this subpart and other information submitted or collected to facilitate the administration of the nonbank registration system including submissions made pursuant to § 1092.302(d).

(b) *Covered form contract* means any written agreement between a covered person and a consumer that:

(1) Was drafted prior to the transaction for use in multiple transactions between a business and different consumers; and

(2) Contains a covered term or condition.

(c) *Covered term or condition* means any clause, term, or condition that expressly purports to establish a covered limitation on consumer legal protections applicable to the offering or provision of any consumer financial product or service described in paragraph (g) of this section.

(d) *Covered limitation on consumer legal protections* means any covered term or condition in a covered form contract:

(1) Precluding the consumer from bringing a legal action after a certain period of time;

(2) Specifying a forum or venue where a consumer must bring a legal action in court;

(3) Limiting the ability of the consumer to file a legal action seeking relief for other consumers or to seek to participate in a legal action filed by others;

(4) Limiting liability to the consumer in a legal action including by capping the amount of recovery or type of remedy;

(5) Waiving a cause of legal action by the consumer, including by stating a person is not responsible to the consumer for a harm or violation of law;

(6) Limiting the ability of the consumer to make any written, oral, or pictorial review, assessment, complaint, or other similar analysis or statement concerning the offering or provision of consumer financial products or services by the supervised registrant;

(7) Waiving, whether by extinguishing or causing the consumer to relinquish or agree not to assert, any other identified consumer legal protection, including any specified right, defense, or protection afforded to the consumer under Constitutional law, a statute or regulation, or common law; or

(8) Requiring that a consumer bring any type of legal action in arbitration.

(e) *Identifying information* means existing information available to the supervised registrant that uniquely identifies the supervised registrant, which includes legal name(s), State of incorporation or organization, headquarters and principal place of business addresses, and unique identifiers issued by a government agency or standards organization.

(f) *Annual registration date* means, starting after the nonbank registration system implementation date, the day during the calendar year by which a supervised registrant must complete its annual registration required by § 1092.302(a). The annual registration date will be set by filing instructions issued by the Bureau, as described in § 1092.102(a), in which the

Bureau may specify the process for filing for an automatic extension of the annual registration date for up to 30 days.

(g) *Supervised nonbank* means a nonbank covered person that is subject to supervision and examination by the Bureau pursuant to 12 U.S.C. 5514(a), except to the extent that such person engages in conduct or functions that are excluded from the supervisory authority of the Bureau pursuant to 12 U.S.C. 5517 or 12 U.S.C. 5519. Subject to the foregoing statutory exclusions, this term includes any nonbank covered person that:

(1) Offers or provides a residential mortgage-related product or service as described in 12 U.S.C. 5514(a)(1)(A);

(2) Offers or provides any private educational consumer loan as described in 12 U.S.C. 5514(a)(1)(D);

(3) Offers or provides any consumer payday loan as described in 12 U.S.C. 5514(a)(1)(E);

(4) Is a larger participant in any market as defined by rule in part 1090 pursuant to 12 U.S.C. 5514(a)(1)(B); or

(5) Is subject to an order issued by the Bureau pursuant to 12 U.S.C. 5514(a)(1)(C).

(h) *Supervised registrant* means, for purposes of this subpart, any supervised nonbank that is subject to supervision and examination by the Bureau pursuant to 12 U.S.C. 5514(a), except for the following:

(1) A Federal agency as defined in 28 U.S.C. 2671;

(2) A State as defined in 12 U.S.C. 5481 including a federally recognized Indian Tribe;

(3) A person that is subject to Bureau supervision and examination solely in the following capacity:

(i) As a service provider under 12 U.S.C. 5514(e), 12 U.S.C. 5515(d), or 12 U.S.C. 5516(e); or

(ii) As an entity that is subject to the Bureau's supervisory authority for a period of no more than two years pursuant to an order issued by the Bureau pursuant to 12 U.S.C. 5514(a)(1)(C), such as an order issued based on a consent agreement by which an entity may consent to the Bureau's supervisory authority as described in 12 CFR part 1091;

(4) A natural person;

(5) A person with less than $1 million in annual receipts resulting from offering or providing all consumer financial products and services as relevant to paragraphs (g)(1) through (5) of this section. For purposes of this exclusion:

(i) The term "annual receipts" has the same meaning as that term has in 12 CFR 1090.104(a), including 12 CFR 1090.104(a)(i)-(iii); and

(ii) A person's receipts from offering or providing a consumer financial product or service subject to a larger participant rule described in paragraph (g)(4) of this section count as receipts for purposes of the exclusion in this paragraph (h)(5) regardless of whether the person qualifies as a larger participant;

(6) A person that has not, together with its affiliates, engaged in more than *de minimis* use of covered terms and conditions by either:

(i) Entering into covered form contracts containing any covered term or condition as described in paragraph (i)(1) of this section 1,000 or more times during the previous calendar year; or

(ii) Obtaining, as a party to a legal action, a court or arbitrator decision in the previous calendar year on the enforceability of a covered term or condition in a covered form contract as described in paragraph (i)(2) of this section;

(7) A person that used of covered terms or conditions in covered form contracts in the previous calendar year solely by entering into contracts for residential mortgages on a form made publicly available on the Internet required for insurance or guarantee by a Federal agency or purchase by the Federal National Mortgage Association, the Federal Home Loan Mortgage

Corporation (or its successors), or the Government National Mortgage Association. This exclusion does not apply if the person obtained a court or arbitrator decision in the previous calendar year on the enforceability of a covered term or condition in a covered form contract as described in paragraph (i)(2) of this section; or

(8) A person who is a covered person solely due to being a related person as defined in 12 U.S.C. 5481(25).

(i) *Use of a covered term or condition* means entering into a covered form contract containing a covered term or condition as described in paragraph (i)(1) of this section or obtaining a court or arbitrator decision ruling on the enforceability of a covered term or condition in a covered form contract as described in paragraph (i)(2) of this section.

(1) *Entering into a covered form contract containing a covered term or condition.* A supervised nonbank enters into a covered form contract containing a covered term or condition when it takes any of the following actions:

(i) Provides to a consumer a new consumer financial product or service that is governed by a covered form contract that contains a covered term or condition;

(ii) Provides to a consumer a new consumer financial product or service that is subject to a pre-existing covered form contract that contains a covered term or condition, and the provider is a party to that covered form contract;

(iii) Acquires or purchases a consumer financial product or service that is subject to a covered form contract that contains a covered term or condition, even if the seller is not subject to supervision under 12 U.S.C. 5514(a)(1) and regardless of whether the seller is subject to the authorities of the Bureau more broadly;

(iv) Adds a covered term or condition to a covered form contract governing an existing consumer financial product or service provided to a consumer; or

(v) Adds a covered form contract containing a covered term or condition to a consumer financial product or service.

(2) *Obtaining court or arbitrator decisions on enforceability of a covered term or condition in a covered form contract.* A supervised registrant engages in use of a covered term or condition when, as a party to a legal action, it obtains an order, opinion, or any other type of decision from a court or arbitrator ruling on the enforceability of a covered term or condition.

§ 1092.302 Registration and submission of information regarding supervised registrants' use of covered terms and conditions.

(a) *Annual registration of supervised registrants regarding their use of covered terms or conditions*. By the annual registration date in each calendar year, a supervised registrant must submit or update in the Bureau's nonbank registration system its identifying information and administrative information, as well as the following information regarding its use of covered terms or conditions in the previous calendar year:

(1) The applicable consumer financial products or services listed in § 1092.301(g) for which the supervised registrant used covered term(s) or condition(s);

(2) Each State or other jurisdiction where the supervised registrant offered or provided the consumer financial products or services listed in paragraph (a)(1) of this section;

(3) For each covered form contract the supervised registrant entered into containing a covered term or condition, which consumer financial products and services identified pursuant to paragraph (a)(1) of this section are affected by the covered term or condition and in which States identified pursuant to paragraph (a)(2) of this section, as well as following information:

(i) All brand names and trade names the supervised registrant used to offer or provide the consumer financial product or service;

(ii) The legal names of any persons other than a consumer and the supervised registrant that typically entered into the applicable covered form contract;

(iii) Each type of covered limitation on consumer legal protection listed in § 1092.301(d) contained in the covered form contract for the consumer financial product or service;

(iv) For each type of covered limitation on consumer legal protections described in § 1092.301(d)(1) through (7), relevant information about the limitation including:

(A) For any limitation on when a consumer may bring a legal action described in § 1092.301(d)(1), the specified time period, within ranges specified by the Bureau, for the consumer to bring a legal action;

(B) For any limitation on where a consumer may bring a legal action in court described in § 1092.301(d)(2), the name and, as applicable, place, of the forum or venue for the consumer to bring a legal action;

(C) For any limitation on the consumer's filing a legal action seeking relief for other consumers or seeking to participate in a legal action filed by others described in § 1092.301(d)(3), the type of legal action and, as applicable, participation to which the limitation applies;

(D) For any limitation on liability to the consumer described in § 1092.301(d)(4), the text of the covered term or condition imposing the limitation on liability;

(E) For any waiver of a cause of action by the consumer as described in § 1092.301(d)(5), the text of the covered term or condition imposing the waiver;

(F) For any limitation on a consumer review, assessment, complaint, or other similar analysis or statement, as described in § 1092.301(d)(6), the text of the covered term or condition imposing the limitation; and

(G) For any other waiver of an identified consumer legal protection as described in § 1092.301(d)(7), the text of the covered term or condition imposing the waiver;

(v) The State or other jurisdiction identified in any choice of law provisions in the covered form contract, as applicable; and

(vi) If a covered term or condition reported under this paragraph (a)(3) is contained in a standard form contract provided by a third party for use by multiple market participants, the name of the form contract provider and other information, such as the complete copyrighted

name including any form number and date of the contract, as necessary for the Bureau to identify the precise version of the standard form contract;

(4) Whether the supervised registrant, as a party to a legal action, obtained one or more court or arbitrator decisions regarding enforceability of a covered term or condition in any covered form contract as described in § 1092.301(i)(2) and, if so, the following information related to these decisions:

(i) The consumer financial products or services listed in § 1092.301(g) to which the decision(s) relate;

(ii) The type(s) of covered term(s) or condition(s) listed in § 1092.301(d) at issue in the decision(s); and

(iii) Whether the decision(s) enforced or declined to enforce the covered term(s) or condition(s) at issue.

(b) *Supervised registrant's collection and reporting of information; scope of initial registration; corrections to registration information.*

(1) *General rule.* During the period for which a person qualifies as a supervised registrant, it must collect information necessary to comply with the reporting requirements in paragraph (a)(2) of this section.

(2) *Scope of information submitted on the first annual registration date after a supervised registrant becomes subject to this subpart.* As illustrated by the following examples, supervised registrants are not required to collect or report information prior to becoming subject to this subpart:

(i) When a supervised registrant must submit information in the calendar year after the effective date of subpart C of this part, the requirements of paragraph (a)(2) of this section shall be satisfied by submission of information that covers the portion of the previous calendar year beginning with the effective date.

(ii) If a supervised registrant qualifies as a larger participant under a Bureau rule in part 1090 as of the annual registration date, but the entity was not a larger participant for the entire previous calendar year, then the requirements of paragraph (a)(2) of this section shall be satisfied by submission of information that covers the portion of the previous calendar year during which the entity was a larger participant.

(3) *Registration process for affiliated persons.* Supervised registrants that are affiliates will make their submissions either jointly or in combination, as set forth in filing instructions the Bureau issues pursuant to § 1092.102(a). For purposes of this subpart, the definition of "control" for purposes of who is an affiliate shall have the meaning set forth in paragraph (2) of the definition of "affiliated company" in 12 CFR 1090.101.

(4) *Correction of submissions to the nonbank registration system*. If any information submitted to the nonbank registration system was inaccurate when submitted and remains inaccurate, the supervised registrant shall file a corrected report in the form and manner specified by the Bureau within 30 calendar days after the date on which such supervised registrant becomes aware or has reason to know of the inaccuracy. In addition, the Bureau may at any time and in its sole discretion direct a supervised registrant to correct errors or other non-compliant submissions to the nonbank registration system.

(c) *Notification by a previously-supervised registrant that it is no longer covered by this subpart.* Any nonbank person that has registered pursuant to paragraph (a) of this section should notify the Bureau if it determines that it is no longer a supervised nonbank.

(d) *Notification by certain persons of non-registration under this subpart*. A person may submit a notice to the nonbank registration system stating that it is not registering pursuant to this section because it has a good faith basis to believe that it is not a supervised registrant, or that it is not registering terms or conditions contained in a contract it used because it 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 terms or conditions. Such person shall promptly comply with this section upon

becoming aware of facts or circumstances that would not permit it to continue representing that it has a good faith basis to believe that it is not a supervised registrant or that the contract or terms or conditions in question are covered by this subpart.

§ 1092.303 Publication of information regarding supervised registrants' use of covered terms and conditions.

(a) *Publication of information collected under this subpart.* The Bureau shall publish and maintain a publicly-available source of information about supervised registrants and the covered terms and conditions that supervised registrants use. The Bureau will make this information publicly available on a periodic basis within a timeframe it determines in its discretion.

(b) *Scope of information released publicly by the Bureau.* The Bureau shall publish information collected pursuant to this subpart, except for administrative information as defined in § 1092.301(a) and categories of information that are protected from public disclosure under 5 U.S.C. 552(b)(4). The Bureau may choose not to publish information that has been corrected or must be corrected pursuant to § 1092.302(b)(4), or information that is not required to be submitted under this subpart or is otherwise not in compliance with this part. Nothing in this paragraph prohibits publication by the Bureau of aggregated reports that do not identify, either directly or indirectly, the submitter of the information.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.