

April 3, 2023

Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G St. N.W.
Washington, D.C. 20552

RE: Proposed Rule for a Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections (Docket No. CFPB-2023-0002)

Dear Director Chopra,

The Student Borrower Protection Center (SBPC) appreciates the opportunity to comment on the Consumer Financial Protection Bureau’s (CFPB) proposal for a registry of supervised nonbanks that use language in form contracts to limit consumers’ rights and safeguards under the law. This proposal will help promote consumer protection, facilitate the CFPB and its partners’ work to hold bad actors accountable, and further the efficient functioning of vital retail financial markets.

Over the past several decades, financial services companies have learned that the inclusion of certain magic-seeming words and phrases in their consumer-facing contracts can shield them from consequences for predatory conduct. Exploiting an “asymmetry in information, sophistication, and stakes between the parties to the contracts—the business and consumers,”¹ harmful firms have used carefully designed agreement provisions to prevent members of the public from seeking justice in the courts for predatory conduct,² accessing key protections,³ speaking out about bad products and experiences,⁴ and more. Sometimes, the contract terms in question have been unenforceable or outright illegal for as long as companies have deployed them.⁵

Provisions curbing consumers’ rights have been cemented in widespread take-it-or-leave-it form contracts that, in the CFPB’s words, “are the dominant means of setting terms and conditions for

¹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=8 citing Restatement (Third) of Consumer Contracts (Tentative Draft No. 2, approved at ALI 2022 Annual Meeting) at 1

² <https://protectborrowers.org/one-more-way-states-can-step-up-as-betsy-devos-rolls-back-legal-protections/>

³ https://protectborrowers.org/wp-content/uploads/2021/05/SBPC_Holder_Rule_Final.pdf

⁴ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=15 note 42

⁵ See, e.g., <https://www.congress.gov/bill/114th-congress/house-bill/5111>

consumer financial products and services in today’s marketplace.”⁶ These agreements’ generic nature and general lack of negotiability diminish both the incentives for consumers to engage critically with them and the success they are likely to have if they do.⁷ Accordingly, these contracts are both an expression of and a key tool for cementing incumbents’ market power.⁸

Rights-reducing contract terms have proven to be a powerful shield for corporate interests and a lucrative field of work for the attorneys that design them.⁹ But neither the CFPB nor the public should ever lose sight of how drastic and serious it is for powerful, often monopolistic private firms to separate consumers from the full protection of the law. The CFPB appears to understand the gravity of the situation, noting in the proposal considered here that risk arises “any time a consumer legal protection is being relinquished or constrained pursuant to a term or condition contained in a form contract. . . .” However, to restore the public’s understanding that the diminishment of their rights should be seen as *unusual*, instances of it happening will have to once again become uncommon.

The CFPB’s registry proposal will help make that vision for improved consumer protection a reality. SBPC supports the proposal and looks forward to its full implementation. In addition, SBPC offers the following comments regarding the plan and how the CFPB should strengthen it.

Even With Recent Improvements, Students Remain the Frequent Subjects of Opaque Contract Terms that Deny Them Their Rights

Students have unique financial needs, each of which serves as an entrypoint for restrictive contract terms such as those that firms would have to disclose under the CFPB’s proposed registry.

Of course, the most obvious example of a financial product that people rely on when pursuing higher education is student loans. The vast majority of these loans are made by the U.S.

⁶ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=5

⁷ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=8 (“Consumers also lack an incentive to review fully the terms and conditions in form contracts that they cannot negotiate.”)

⁸ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=5 (“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.”)

⁹ One proponent of class action waivers was quoted saying that after the Supreme Court ruled in *AT&T Mobility v. Concepcion* that the Federal Arbitration Act preempted a California law prohibiting contracts from disallowing class-wide arbitration, “We did, I must admit, pull out the champagne and pop the cork and we celebrated.”

<https://www.ballardspahr.com/-/jssmedia/Main/Podcast-Transcripts/334-Transcript.pdf?rev=cdc329a4635d4ef082ce76e990efba25&hash=C2F909809E3F9D91C45C290DCE979682#page=2>

Department of Education (ED) and do not themselves contain terms such as class-action waivers, mandatory arbitration agreements, or restrictions on consumer reviews (putting aside the issue of whether ED would be covered by the registry in any case).¹⁰ But that does not mean that federally funded students are safe. As members of Congress have noted, predatory for-profit colleges that participate in the Title IV program have a long track record of “denying students their day in court by requiring them to give up that right—both individually and as part of a class—as a condition of enrollment.”¹¹ That particular statement is a reference to class-action waivers and mandatory arbitration agreements that, according to one study, are present in 98 percent of enrollment agreements at for-profit institutions compared to just seven percent of those at private nonprofits and *no* public institutions.¹² The members of Congress cited above explained that these contract terms mean “many defrauded students are forced to resolve their disputes behind closed doors where outcomes are often required to be kept secret—effectively hiding predatory practices from the public and regulators, including the Department. In addition, these practices mean that defrauded borrowers often are unable to receive restitution directly from their school—especially if it closes suddenly—and have no other option than to turn to taxpayers for relief in the form of borrower defense discharges.”¹³ These members are likely drawing on harsh lessons from the recent past, where notorious for-profit school chains such as Corinthian Colleges used arbitration agreements to keep predatory practices out of public view and help them continue taking advantage of students before abruptly closing.¹⁴

The Biden administration has made progress on the issue of restrictive enrollment agreements at Title IV-eligible schools, including having proposed to ban colleges from “requiring borrowers to sign mandatory pre-dispute arbitration agreements or class-action waivers” and to require

¹⁰ Compare https://www.federalreserve.gov/releases/g19/HIST/cc_hist_memo_levels.html to <https://studentaid.gov/sites/default/files/fsawg/datacenter/library/PortfolioSummary.xls>

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<https://www.durbin.senate.gov/imo/media/doc/Consumer%20Protections%20and%20Program%20Integrity%20Dem%20Caucus%20Letter%207.1.21.pdf>

¹² <https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/>

¹³

<https://www.durbin.senate.gov/imo/media/doc/Consumer%20Protections%20and%20Program%20Integrity%20Dem%20Caucus%20Letter%207.1.21.pdf>. See also

<https://www.jconline.com/story/news/2018/08/29/purdue-global-students-must-waive-right-sue-documents-show/1134526002/>,

<https://consumerist.com/2016/04/29/screwed-over-by-a-for-profit-college-you-probably-signed-away-your-right-to-sue/>,

<https://www.washingtonpost.com/news/grade-point/wp/2016/04/28/its-almost-impossible-for-students-to-sue-a-for-profit-college-heres-why/>, <https://www.thenation.com/article/archive/for-profit-colleges-have-found-a-new-way-to-hoodwink-their-students/>

¹⁴

<https://www.help.senate.gov/release/congressional-democrats-urge-secretary-of-education-john-king-to-provide-full-relief-to-defrauded-student-borrowers-and-protect-against-future-abuses-with-a-complete-ban-on-mandatory-arbitration>

additional transparency for arbitration proceedings that do still occur.¹⁵ This change comes after then-Secretary of Education Betsy DeVos rolled back in 2019 limits on arbitration agreements and class-action waivers instituted under the Obama administration.¹⁶ But future administrations may think differently, and in the meantime students deserve to know which schools have required restrictive agreements in the past.

The situation for private student loan borrowers is even more precarious. CFPB research cited in the present proposal indicates that over 85 percent of private student loan contracts include arbitration clauses, “with all of these limiting availability of class proceedings.”¹⁷ SBPC regularly finds areas of emerging risk where the presence of these restrictive contract terms leave students at the mercy of creditors.¹⁸

The registry proposal contemplated here additionally notes that students who take on private loans have been subject to efforts by lenders and servicers to apply certain deceptive and unenforceable waivers that incorrectly bar borrowers from pursuing their right to loan discharge through bankruptcy.¹⁹ SBPC has previously identified that a decades-long industry scheme aimed to rob more than 2 million people of their bankruptcy rights in relation to more than \$50 billion in consumer debt.²⁰ The CFPB recently announced additional efforts to quash this specific plot,²¹ but key questions remain around how widespread these misrepresentations were and whether they will end. The registry considered here will help answer them.

Worse, borrowers who venture out of the mainstream, generally bank-based private student loan market and into the world of “shadow” student debt face even greater contractual risks.²² For example, the CFPB’s proposal notes an instance of an “Institutional private student lender [that] violated the Holder Rule. . . [because] 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.”²³ But violations of the Holder Rule (a key anti-fraud protection) are

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<https://www.ed.gov/news/press-releases/education-department-releases-proposed-regulations-expand-and-improve-targeted-relief-programs>

¹⁶ <https://www.politico.com/story/2019/08/30/devos-forgiving-student-loans-1697959>

¹⁷ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=49 citing <https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/>

¹⁸ See, e.g., <https://protectborrowers.org/are-millions-of-student-loan-borrowers-about-to-pay-for-banks-libor-fraud/>

¹⁹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=47

²⁰ <https://protectborrowers.org/morally-bankrupt-how-the-student-loan-industry-stole-a-generations-right-to-debt-relief/>

²¹ <https://protectborrowers.org/cfpb-moves-to-protect-borrower-bankruptcy-rights/>

²² <https://protectborrowers.org/shadow-student-debt-report/>

²³ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=47

common across fringe areas of the student financing landscape, including in the market for income share agreements (a risky form of income-contingent private student debt) and among the for-profit coding bootcamps that drive students to take them on.²⁴ These violations have contributed to situations where borrowers face severe restrictions on recourse after they are scammed by a fly-by-night operator that lures them into unaffordable loans with lofty, false promises of quick placement in a lucrative tech-based career.²⁵ These are the same bootcamps that have also benefited mightily from their ability to evade accountability through lopsided arbitration mandates and class-action waivers.²⁶

Yet it is not just via student loans that people pursuing higher education face restrictive contract terms when managing their financial lives. For example, when students have surplus Title IV funds available after covering tuition and other expenses, they are able to have their money be returned to them via prepaid cards and bank accounts with associated debit cards.²⁷ The CFPB and advocates have repeatedly noted over the years that these cards come with a wide range of hidden and inflated junk fees,²⁸ that firms in the space engage in a wide range of unfair and deceptive behavior,²⁹ and that the fallout for students involves extensive personal and financial precarity.³⁰ But these cards, too, come with arbitration agreements, class action waivers, and other terms that restrict borrowers' rights, contributing to the lack of accountability for harmful market-wide practices.³¹

This backdrop illustrates why the CFPB's registry proposal is so important. In general, under the proposal, covered companies would have to disclose any "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;

²⁴ https://protectborrowers.org/wp-content/uploads/2021/05/SBPC_Holder_Rule_Final.pdf

²⁵ <https://www.arnoldventures.org/stories/for-misled-students-a-legal-shield-becomes-a-weapon>

²⁶ See, e.g.,

<https://protectborrowers.org/students-and-advocates-take-action-against-sham-for-profit-school-and-student-loan-company/>,

<https://protectborrowers.org/make-school-vemo-lawsuit/>,

https://protectborrowers.org/wp-content/uploads/2021/05/SBPC_Holder_Rule_Final.pdf

²⁷ <https://protectborrowers.org/wp-content/uploads/2021/05/SBPC-UNC-Legal-Memo.pdf>

²⁸ https://pirg.org/wp-content/uploads/2022/07/thecampusdebitcardtrap_may2012_uspef-1.pdf,

https://pirg.org/wp-content/uploads/2022/08/USP_Debit-Cards-On-Campus_040419-v2.pdf,

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_foia_letter-to-department-education_record_2018-02.pdf

²⁹ https://files.consumerfinance.gov/f/documents/cfpb_college-banking-report_2022.pdf

³⁰ https://protectborrowers.org/wp-content/uploads/2022/04/SBPC_US-PIRG-EF_Junk-Fees.pdf#page=9

³¹ See, e.g., <https://www.vibeaccount.com/info/accountagreementsonboarding.do?affiliateid=174>,

<https://www.pnc.com/content/dam/pnc-com/pdf/personal/Checking/Virtual%20Wallet%20Fine%20Print.pdf#page=15>

certain other waivers of consumer rights or other legal protections; and arbitration agreements” in their form contracts.³² Registrants would also have to disclose “court and arbitrator decisions on the enforceability of covered terms and conditions,” particularly ones indicating that the provisions in question are not enforceable. These proposed changes would help shed sunlight on techniques that companies use to set their own rules and avoid accountability, help inform the public and advocates about market activity, assist the CFPB across its various functions and with supervisory prioritization, and boost state and private litigation that—as CFPB notes—“plays an additive, not duplicative, role in supporting the rule of law.”³³

The CFPB Should Expand its Registry to Include the Full Sweep of Relevant Companies

As drafted, the CFPB’s registry generally pertains to most companies already under its supervisory purview, including larger participants in financial markets.³⁴ This level of breadth is noteworthy, as it would importantly capture key student loan companies including servicers and firms that acquire covered form contracts.³⁵ However, the proposal would exclude states, service providers and related persons to financial services companies, companies with less than \$1 million in annual receipts, companies that have entered into a covered form contract fewer than 1,000 times during the past year, and more.³⁶ Accordingly, in finalizing its registry proposal, the CFPB should make the following changes:

- ***The registry should more clearly cover for-profit colleges both inside and outside the Title IV program.*** As discussed above and in the proposal, schools ranging from Title IV participants to fly-by-night coding bootcamps use a range of restrictive contract terms to silence students, avoid accountability, and further their predatory practices. In doing so, these institutions drive students to take on debts ranging from federal student loans to institutional credit and a wide range of other expensive, opaque private debt products. These schools and their contracts deserve scrutiny. In response, building on its recent announcement that it would supervise for-profit colleges that extend institutional loans to students,³⁷ the CFPB should clarify that the contract terms registry will encompass the full range of schools that drive students into all forms of debt. In support of this goal, the

³² https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=3

³³ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=11

³⁴ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=192

³⁵ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=55,
https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=115

³⁶ Id.

³⁷

<https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-examine-colleges-in-house-lending-practices/>



CFPB should eliminate the provisions of its registry proposal that would limit its reach to firms with over \$1 million in receipts and/or 1,000 uses of covered form contracts.³⁸ SBPC’s work shows that companies are more than capable of harming consumers while falling below those arbitrary hurdles.³⁹ In fact, certain markets—such as the market for coding bootcamps—are so replete with predatory but small companies that the effect of these exclusions would be to hide most of the market from scrutiny, even when it is clear that harmful conduct and restrictive contract terms are present.⁴⁰ The CFPB should not build in an unnecessary blindspot for markets that consist of numerous but individually small-scale actors.

- ***The registry should cover the full range of state and quasi-state entities.*** As drafted, the registry would exclude any “State as defined in 12 U.S.C. 5481, including a federally recognized Indian Tribe.”⁴¹ Beyond advantaging so-called “rent-a-tribe” agreements, which unscrupulous companies use to circumvent state-level consumer protections,⁴² this exclusion would likely shield many state-associated and quasi-state loan authorities that are involved in education financing. For example, Connecticut’s loan authority, CHESLA, offers student loans and student loan refinancing products while describing itself as a “quasi-public state authority.”⁴³ Similar organizations exist across the country, and recent research shows that they disburse as much as \$8 billion in student loans per year.⁴⁴ The public clearly deserves to know whether these agencies are driving borrowers into the restrictive contract language considered here. Along the same lines, several student loan servicers that might enforce these rights-reducing loan terms either falsely claim to be appendages of certain state governments,⁴⁵ or are headquartered in states whose governments incorrectly claim that these companies are agents of the state.⁴⁶ These servicers would likely be captured by the registry as larger participants in the

³⁸ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=110, https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=108

³⁹ See, e.g., <https://protectborrowers.org/students-and-advocates-take-action-against-sham-for-profit-school-and-student-loan-company/>, <https://protectborrowers.org/make-school-vemo-lawsuit/>. Note that SBPC has no information to indicate that either of these examples actually have revenues below \$1 million, but rather that it is possible given their startup status that they did in the time period covered by these lawsuits, and in any case that their past misconduct is reflective of the type of behavior seen across the bootcamp and private student lending spaces, particularly among smaller firms.

⁴⁰ <https://careerkarma.com/blog/bootcamp-market-report-2021/> (estimating that the largest bootcamps have only a few thousand graduates per year)

⁴¹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=192

⁴² See <https://www.nclc.org/topic/rent-a-bank-loans/>

⁴³ <https://www.chesla.org/>

⁴⁴ https://cdn.ymaws.com/www.efc.org/resource/resmgr/efc_members/2019-2020_nfp_loan_handbook.pdf

⁴⁵ <https://www.scotusblog.com/wp-content/uploads/2016/02/Oberg-cert-petition-FILED.pdf>

⁴⁶ <https://www.scotusblog.com/case-files/cases/biden-v-nebraska-2/>



student loan servicing market,⁴⁷ but it is nevertheless worthwhile for the CFPB to revise its proposal in the direction of eliminating ambiguity. Accordingly, in finalizing its registry proposal, the CFPB should clarify that state and quasi-state agencies that engage in lending and/or servicing will be held to the same standards as purely private companies that perform similar work.

- ***The registry should cover banks.*** Banks, including those that the CFPB supervises, are among the most prolific users of restrictive form contract terms.⁴⁸ Yet even while noting that it has the authority to include supervised depositories in the registry proposed here,⁴⁹ the CFPB has opted not to do so. The agency attempts to explain this away as a matter of prioritization,⁵⁰ stating that while “there is no comprehensive registry of identifying information for nonbanks subject to the Bureau’s supervisory authority across supervised markets,” “Federal prudential regulators track and already publicize information about the identity and size of depository institutions.”⁵¹ This explanation is hardly compelling. Indeed, even if other regulators already have lists that reveal banks’ identities, they certainly do not currently have any registries of restrictive contract terms along the lines of what the CFPB has proposed. Moreover, the CFPB paradoxically complains of resource constraints as a reason for excluding banks while also dismissing banks’ inclusion as unnecessary given that the agency has found “fewer than 200 large depository institutions subject to its supervisory authority . . . and it has procedures for regularly supervising them.”⁵² The CFPB should abandon its effort to protect large banks from scrutiny over their use of restrictive contract language to rob borrowers of their rights. In finalizing its registry proposal, the CFPB should expand its definition of covered persons to include supervised depository institutions.
- ***The registry should cover service providers and related persons.*** As drafted, the CFPB’s registry proposal would exclude firms that are subject to agency supervision solely in their capacity as service providers or related persons to otherwise covered entities.⁵³ This

⁴⁷ The CFPB has supervised various federal student loan servicers since 2014 as larger participants in the student loan servicing market. See

<https://www.consumerfinance.gov/rules-policy/final-rules/defining-larger-participants-student-loan-servicing-market/>

⁴⁸ See, e.g.,

<https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court>, <https://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/banking-on-arbitration>

⁴⁹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=30

⁵⁰ Id (“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.”)

⁵¹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=29

⁵² https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=63

⁵³ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=192



exclusion is puzzling. The CFPB appears to understand in its registry proposal that third parties to a form contract, such as student loan servicers,⁵⁴ can play an integral role in enforcing contract terms and waivers that restrict borrowers' rights. But while the agency proposes to include certain servicers as larger participants in financial markets, it would generally exclude service providers and other related persons. This move will only create back-doors that unscrupulous firms could use to engineer end-runs around scrutiny, including but not limited to as it pertains to the present registry. The CFPB should abandon this exclusion, and it should instead require that the full range of third parties are held accountable for potentially restricting borrowers' rights, regardless of whether they happen to already be supervised.

The CFPB Should Modify its Registry to Include the Full Sweep of Relevant Contract Terms, and to Hold Firms Accountable as Forcefully as Possible for their Use

The CFPB proposes to require the disclosure of covered firms' use of the following types of contract terms in its registry, whether they are enforceable or not: "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."⁵⁵ As discussed above, this broad list captures many of the most grave, widespread, and harmful varieties of restrictive contract provisions.

However, additional modifications are necessary for the CFPB to more fully capture the entire set of relevant contract terms and optimally hold firms accountable for using them. SBPC proposes the following changes that would help the CFPB meet those goals:

- ***The registry should include terms that create de facto limitations on or waivers of consumers' rights and protections, not just explicit ones.*** As proposed, a contract term can be covered by the registry only if it "*expressly* seeks to establish a covered limitation on consumer legal protections" (emphasis added).⁵⁶ The registry's reach therefore "would not extend to implied waivers, which might arise from a term or condition that violates a

⁵⁴ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=47

⁵⁵ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=4

⁵⁶ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=84



consumer legal protection but does not expressly purport to accomplish a waiver of that legal protection.”⁵⁷

This limitation is extremely harmful. Consider Training Repayment Agreement Provisions (TRAPs), the increasingly common employment contract terms that impose thousands of dollars in fees on working people for dubious on-the-job “training” if they try to leave before an arbitrarily determined date set by the employer.⁵⁸ The scale of these charges can quite literally be made up by the employer, with sky-high interest rates, attorney fees, and collection fees added in.⁵⁹ Industry has been caught explicitly discussing TRAPs as a means to achieve a de facto non-compete agreement,⁶⁰ thereby restricting the fundamental right of workers to exit at-will employment.⁶¹ Moreover (and as makes them relevant for the present rulemaking), to the extent that TRAPs use contingent debt as their mechanism to restrict worker rights, they blur the line between workers and consumers.⁶² But despite this, and despite being quintessential take-it-or-leave-it contract terms, the CFPB’s registry would overlook TRAPs simply because they (intentionally) achieve their aims implicitly rather than explicitly.

Leaving out contract terms that create implied waivers of consumer rights would leave a gaping hole in the CFPB’s registry proposal that unscrupulous firms could exploit to predatory ends. The consumer finance industry has already hinted that it is aware of this; in describing the CFPB’s proposal, for example, one law firm winkingly noted that “The Proposed Rule currently proposes to limit the collection of terms and conditions that *expressly* attempt to establish the covered limitation” (emphasis in original).⁶³ The CFPB should refrain from offering up such a tool for evasion. Instead, the CFPB should clarify not just that TRAPs are a covered contract term for the purposes of the present registry

⁵⁷ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=97

⁵⁸ <https://protectborrowers.org/training-repayment-agreement-provisions/>

⁵⁹

<https://protectborrowers.org/sbpc-uncovers-pervasive-use-of-training-repayment-agreement-provisions-to-trap-workers-in-low-paying-jobs-through-student-debt-launches-campaign-to-collect-worker-stories/>

⁶⁰ https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf#page=4

⁶¹ <https://www.law.ua.edu/lawreview/files/2021/05/2-Harris-723-783.pdf#page=43>

⁶² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172535. See also

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/>

⁶³

<https://www.alstonconsumerfinance.com/cfpb-issues-proposed-rule-to-establish-public-registry-of-supervised-nonbank-form-contract-provisions-that-waive-or-limit-consumers-legal-protections/>



proposal, but that *all* implied waivers of consumer rights are included in the set of “Covered limitation on consumer legal protections” defined in proposed § 1092.301 (d).⁶⁴

- ***Registrants should be required to disclose entire contracts that contain covered terms.*** The CFPB notes that it “considered proposing that supervised nonbanks submit their covered form contracts, instead of providing information about them.”⁶⁵ However, the agency ultimately judged that “that type of registry would result in a much greater volume of information collected and published,” which could “reduce the attention to those type of terms in the registry” that the CFPB is most concerned with.⁶⁶ In addition, the CFPB notes that it “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” to identify provisions of concern, making it more “effective” to simply have companies report on aspects of their form contracts.⁶⁷

These arguments are not compelling. There is little risk that disclosing entire contracts would leave consumers too distracted to focus on the provisions that the CFPB finds particularly troubling, as those contracts would simply sit alongside the disclosures surrounding restrictive terms that the registry will already require companies to make. Those disclosures exist precisely to draw attention to restrictive contract terms, and there is no reason to think that they would fail to do so simply because more context might be present if entire contracts were available. In addition, while the CFPB may lack the resources to review each form contract, the publication of those contracts would require minimal effort from covered firms themselves, as these companies would have to have these agreements at hand in the first place to report on them. The CFPB makes no effort to weigh the low costs of contract publication against the huge benefits of unparalleled transparency that such a requirement would provide. These benefits are already visible at the state level, where laws requiring the publication of certain form contracts have helped advocates unearth aggressive contract terms, junk fees, misrepresentations, and more.⁶⁸ The CFPB should not preclude the public, researchers, and other third parties from sifting through or referring to critical form contracts on their own time and with their own resources. Instead, the agency should revise its registry proposal to require companies not

⁶⁴ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=191

⁶⁵ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=60

⁶⁶ Id.

⁶⁷ Id.

⁶⁸

<https://protectborrowers.org/colorados-nation-leading-work-to-shine-a-light-on-shadow-student-debt-exposes-massive-risks-for-borrowers/>



just to report on details of their form contracts, but to include the form contracts in question as an aspect of their reporting.

- ***The CFPB should clarify that attempting to enforce a covered contract term that a firm failed to disclose in the registry proposed here is a violation of the prohibition against unfair, deceptive, and abusive acts and practices.*** The CFPB notes that it would “not bring an enforcement action” against firms that offer a good-faith basis to be excluded from the registry proposal until the agency determines that they are wrong and offers them time to comply.⁶⁹ In turn, this implies that the CFPB *would* bring an enforcement action against covered entities that fail to comply with their registry requirements. However, the agency does not delineate the specific redress it will seek in these cases. In its final registry proposal, the CFPB should enumerate specific monetary penalties for each day that a covered company fails to comply with its registration requirements, and those penalties should be extremely large. The CFPB should also specify that should a firm both fail to disclose a given covered contract term and, subsequent to that failure, violate federal consumer financial law, the failure to disclose will be considered as an aggravating factor when the agency assesses additional civil money penalties in any and every future matter.

But the CFPB should not stop there. The agency notes throughout its proposal that the registry it intends to create would be a vital informational resource for consumers and law enforcement. For a company to attempt to enforce a restrictive contract term after failing to disclose it as required under the present registry proposal would be to do so after denying the public the transparency they would have come to expect, and after evading disclosures that law enforcement would likely rely on to identify risky practices. The CFPB should not allow such indefensible actions to take place. Instead, in revising its proposal, the agency should clarify that attempts to enforce covered contract terms that should have been but were not disclosed as required are presumptively violative of the Consumer Financial Protection Act’s prohibition on unfair, deceptive, and abusive acts and practices.⁷⁰

- ***The CFPB should maintain disclosures related to registrants’ covered contracts for much longer than one year.*** The CFPB proposes that its registry should be annual, such that each supervised registrant would have to report on “its use of covered terms or

⁶⁹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=134

⁷⁰ <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf#page=631>



conditions in the previous calendar year”⁷¹ But the contracts in question remain present in the lives of most borrowers who are counterparties to them for far longer than one year alone, particularly in the context of student debt. Just as consumers are likely to benefit from the information the registry will hold *before* entering into a covered contract, they are also likely to find the registry to be an important informational resource to help them better understand contracts that they might have already signed onto. Accordingly, the CFPB should revise its registry proposal to require that information on a covered company’s relevant form contracts in a given year would remain available for at least the following ten years.

For as long as it has existed, the CFPB has worked to tip the scales back in favor of consumers. The agency has been particularly active in financial marketplaces where industry had learned it could use crafty contracts and fine print to cheat the public.⁷² Now, against a backdrop of endemic take-it-or-leave-it form agreements that massive firms use to unilaterally impose their own vision of the law onto consumers, the CFPB has proposed a vital new tool to promote transparency and hold companies accountable. With the additional changes proposed here, the CFPB’s new registry of restrictive contract terms might finally make predatory companies think twice before robbing consumers of their rights.

Thank you for your time and consideration.

Sincerely,

Student Borrower Protection Center

⁷¹ https://files.consumerfinance.gov/f/documents/cfpb_registry-of-supervised-nonbanks_2023-01.pdf#page=195

⁷² <https://www.consumerfinance.gov/about-us/newsroom/testimony-of-elizabeth-warren-before-the-house-financial-services-committee/> (citing Elizabeth Warren discussing in 2011 how a then-fledgling CFPB had succeeded in “cutting back on the fine print and legalese that can make it impossible for families to compare a mortgage or credit card with two or three others.”)