Submitted Via Regulations.gov

March 29, 2023

Rulemaking Petitions Docket
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: 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:

On behalf of the Association of Credit and Collection Professionals ("ACA International" or "Association"), I am writing in response to the Consumer Financial Protection Bureau's ("Bureau" or "CFPB") Notice of Proposed Rulemaking ("NPRM") to require certain supervised nonbank covered entities that use form contract provisions that effect a waiver or limitation of certain consumer rights with respect to the offering or provision of consumer financial products and services to report information about their use of such contract terms and conditions to a publicly available Bureau registry.[1]

ACA International represents approximately 1,800 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 125,000 people worldwide. Most ACA International member debt collection companies, however, are small businesses. Women make up 70% of the total diverse debt collection workforce.

## I. Background about ACA International:

ACA International members play a critical role in protecting both consumers while providing liquidity to lenders. Association members work with consumers to resolve their debts, which in turn saves every

[1] 12 CFR Part 1092 (the "NPRM")

American household, on average, more than $700, year after year.[2] The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost. For example, in 2018 the ARM industry returned over $90 billion to creditors for goods and services they had provided to their customers. And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA International members follow comprehensive compliance policies and have high ethical standards to ensure consumers are treated fairly. The Association contributes to this goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA International members are committed to assisting consumers as they work to resolve their financial obligations, all in accord with the Collector's Pledge that all consumers be treated with dignity and respect.

## II. The NPRM Seeks to Circumvent Established Jurisprudence and Congressional Intent Regarding the Constitutionality of Arbitration Clauses, Among Other Similar Contract Provisions, and Implicates Significant Due Process Concerns:

The NPRM requires certain nonbanks subject to the CFPB's supervisory authority to annually record certain terms and conditions in form contracts for consumer financial products and services in a nonbank registry created by the bureau .[3] Specifically, the NPRM would require such nonbank entities to register with the Bureau if they use specific terms and conditions in form contracts that purportedly attempt to waive a consumer's legal protections, limit how consumers enforce their rights, or restrict abilities to file complaints or post reviews, including, most notably, by requiring that a consumer bring any type of legal action in arbitration.[4]

The primary impact of the NPRM will be imposinga chilling effect on private sector utilization of arbitration agreements, despite the fact that (i) the U.S Supreme Court (the "Supreme Court") has established a clear precedent permitting arbitration between individuals and/or entities, and in doing so, favoring an individual or entity's autonomy to enter into such agreements over state laws that restrict the use of arbitration,[5] and (ii) Congress has repeatedly indicated through bipartisan actions its intention of supporting an individual and/or entity's autonomy to enter into arbitration agreements, including, most notably, when Congress disapproved of the CFPB's 2017 arbitration rule in accordance with the Administrative Procedure Act. By requiring a registry of terms and conditions used in form contracts by certain nonbank entities, the CFPB is seeking to use the glare of public pressure and the threat of public enforcement measures and private litigation to pressure individuals and entities to no longer include arbitration clauses, among other provisions, in routine contracts used in the ordinary course of business. Accordingly, the CFPB's actions in the NPRM appear to be designed to circumvent established Supreme Court precedent as well as congressional intent, and in doing so, violate the separation of powers, among other constitutional concerns.

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[2] 2020 State of The Industry Report, available at https://www.acainternational.org/kaulkin-ginsberg/ (2020).
[3] *Id.*
[4] *Id.*
[5] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

The Supreme Court has long recognized the value of arbitration as a medium for dispute resolution, and through its jurisprudence, has held that states and localities must treat arbitration agreements or clauses no different than other contracts.[6] In fact, Section 2 of the Federal Arbitration Act (the "FAA") provides that arbitration agreements are "valid, irrevocable, and enforceable."[7] Specifically, Section 2 of the FAA sets forth (i) an enforcement mandate whereby "agreements to arbitrate [between two or more parties are deemed] enforceable as a matter of federal law," and (ii) a savings clause that allows for the "invalidation of arbitration clauses on grounds applicable to any contract."[8] Taken together, the Supreme Court has interpreted this framework to prohibit the invalidation of arbitration agreements pursuant to "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[9] In applying this principle toward instances where state laws have sought to limit the use or constitutionality of arbitration clauses in valid contracts, the Supreme Court has affirmed the validity of arbitration agreements in accordance with the terms and conditions contained therein, and in doing so, prohibited or otherwise restricted state laws that seek to infringe on private parties' use of arbitration agreements.[10]

For example, in *Concepcion,* customers brought a class action lawsuit against AT&T Mobility LLC in federal district court, following which AT&T Mobility LLC moved to compel arbitration based on the arbitration clause contained within the applicable provider-customer contract.[11] The lower court held that (i) the arbitration clause was unconscionable, and therefore, unenforceable under California law, and (ii) the FAA did not preempt California law governing unconscionability.[12] On appeal, the Supreme Court reversed this order by holding that the FAA preempts "State-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[13] Time and time again, the Supreme Court has found that in enacting the FAA, Congress expressly enacted a framework designed to permit parties to enter into arbitrations as an alternative to litigation, and therefore, courts were bound by "the FAA's command to place [arbitration] agreements on an equal footing with all other contracts."[14]

Further, Congress has taken several legislative actions favoring the use of arbitration agreements in the ordinary course of business, or in certain situations, have enacted specific carve-outs where use thereof would be prohibited. The FAA, as originally enacted by Congress, included specific carve-outs for contracts of the employment of seamen, railroad employees, or other classes of workers engaged in foreign or interstate commerce.[15] Most notably, in 2017, Congress invoked its statutory authority under the Congressional Review Act to disapprove of the CFPB's rule that prohibited arbitration clauses in consumer finance contracts that barred class actions, among other things.[16] In addition, in 2022,

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[6] *Concepcion*, 563 U.S. at 344; *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)

[7] 9 U.S.C. § 2

[8] *See Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906, 1917 (2022) (citing 9 U.S.C. § 2).

[9] *Kindred Nursing Ctrs. Ltd. v. Clark,* 137 S. Ct. 1421, 1426 (2017)

[10] *Concepcion,* 563 U.S. at 344*; Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

[11] *See id.* at 344-345.

[12] *See Id.*

[13] *See Id.*

[14] *Kindred Nursing Ctrs*., 137 S. Ct. at 1429.

[15] 9 U.S.C. § 2.

[16] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''

Congress passed and President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which rendered invalid and unenforceable, at the claimant's option, arbitration agreements with respect to a case related to a sexual assault or sexual harassment dispute, among other things.[17] This legislative history indicates that Congress, over decades, has consistently favored the use of arbitration agreements in various contracts, and in the event certain situation arise in which Congress has found that exceptions should be made to the FAA, it has passed legislation doing so in accordance with the legislative process. Importantly, when given the opportunity to do so by the CFPB, it declined.

Despite clear Supreme Court jurisprudence and congressional intent that has favored the use of arbitration agreements and expressly found that arbitration agreements should be treated by courts and legislatures on equal footing as other valid contract provision, the CFPB's NPRM seeks to circumvent both judicial scrutiny and legislative procedure by requiring a registry of terms and conditions, that will have the effect of inviting significant scrutiny to the entities using such terms and conditions, and therefore, disincentive them from continuing to use such provisions in form contracts utilized in the ordinary course of business. In fact, the CFPB admits that forcing entities to engage in policy shifts with respect to the use of arbitration agreements and other covered terms and conditions is a key rationale behind issuance of the NPRM.

The NPRM notes, "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."[18] Because Congress and the Supreme Court have uniformly found in favor of the use of arbitration agreements, and expressly found that state laws restricting the use of arbitration agreements are preempted by the FAA, the CFPB does not have the statutory authority to use its regulatory power to force entities to engage in significant policy shifts. That power lies with Congress and the evidence provided in this comment letter indicates that Congress' legislative intent stands in contravention to the CFPB's goals set forth in the NPRM. Unfortunately, from the text of the NPRM, it is not clear whether the CFPB has substantively considered whether the NPRM would be in contravention of established Supreme Court precedent or express congressional intent. Other than one immaterial reference in a footnote, the NPRM does not address *Concepcion* despite referencing various state laws addressing arbitration or other covered contract terms and conditions, many of which are and likely would be seen by a court as preempted by the FAA.[19]

In addition, the NPRM's requirement that covered nonbank entities register with a public registry run by the Bureau implicates significant due process concerns from a constitutional perspective. The NPRM notes, "other regulators would be able to quickly access the centralized, publicly accessible database, facilitating their efficient prioritization of oversight of supervised nonbanks" and "this information may spur action by those regulators to enjoin or otherwise stop further use of those covered terms and conditions."[20] The underlying point of each of these statements is that the CFPB expressly expects that the establishment of a registry and publishing of the collected information will enable other government agencies as well as private individuals with private rights of action, to engage in

[17] 9 U.S.C. § 402.
[18] NPRM at 6962.
[19] *Id.* at 6921.
[20] *Id.* at 6923.

additional enforcement and litigation efforts against covered nonbank entities. Despite the CFPB's explanation of the desired impacts of the publication requirements set forth in the NPRM, the primary impact of such publication will be rewarding the trial bar by incentivizing further litigation that will have an incalculable cost from a financial and administrative perspective on covered entities. Enabling further enforcement actions and private litigation will only increase the significant administrative, compliance, and financial costs to which covered entities are subject. These additional costs will serve to reduce the amount of economic output and investment that covered entities can devote toward the ordinary course of business and their day-to-day activities.

**III. The Congressional Review Act Prohibits the CFPB from Issuing a Substantially Similar Rule:**

As noted above, Congress expressly spoke on this issue in 2017 when it passed a joint resolution under the Congressional Review Act disapproving of the CFPB's rule that placed restrictions on the use of arbitration agreements.[21] Under the Congressional Review Act, a federal agency is prohibited from issuing a new rule that is substantially the same as the disapproved rule unless Congress thereafter specifically authorizes the new rule.[22] There is significant evidence indicating that the provisions of the NPRM are substantially similar to that of the CFPB's 2017 rule regarding arbitration such that the NPRM would be in violation of the Congressional Review Act.

For example, despite the preamble of the NPRM only mentioning Congress' disapproval of the 2017 arbitration rule once, there is little to no additional mention of the 2017 disapproval that goes to the heart of the NPRM. In fact, to the contrary, despite Congress' disapproval of the 2017 arbitration rule and the Congressional Review Act's express prohibition on a federal agency issuing a substantially similar rule to the disapproved rule, the NPRM cites the CFPB's 2015 arbitration study and discusses the agency's position on consumer risks related to mandatory arbitration clauses, all of which was included in the 2017 proposed arbitration rule. In addition to the foregoing similarities between the 2017 rule and the current NPRM, the key overlap between both rules is the concept of a Bureau-required registry. The 2017 arbitration rule required the reporting of arbitration awards and court orders corresponding to an applicable arbitration clause or agreement as well as claims and counterclaims and related responses from parties to the arbitration, among other required information.[23] In publicly reporting this information, the CFPB provided a similar rationale as that provided with respect to the current NPRM, including that the gathering of such materials would enable the CFPB to better understand and monitor arbitration as well as the inherent fairness or unfairness of the process.[24]

The inherent similarities in rationale underlying the 2017 rule and that of the current NPRM, as well as similar information collected under both rules, indicate that the NPRM is the CFPB's way of indirectly attempting to do what Congress prevented it from doing in 2017. Given the NPRM's substantial similarity to the 2017 arbitration rule, we strongly urge the CFPB to limit the scope of the NPRM so that it does not thwart the express will of Congress and established jurisprudence established by the Supreme Court. To do so would be a material violation of the separation of powers, particularly

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[21] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''
[22] 5 USC § 801(b).
[23] 12 CFR Part 1040.
[24] *See Id.*

when, as noted below, the Supreme Court will be ruling on the constitutionality of the CFPB's own structure in the near future.

## IV. **Response to Debt Collection Section**

In the NPRM the CFPB claims:

> 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. 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.

Here the CFPB is relying on data from 2010 to 2012, that is more than a decade old (and in part before the CFPB even opened its doors as an agency), to concoct a tortured point about the debt collection industry. If the CFPB had looked at recent data, after its own Regulation F[25] went into effect, it would likely find that class-action litigation resulting from the FDCPA has decreased since 2010.[26] Regulation F included an expansive new list of consumer protections and safe harbors to address a balance between consumer protection and an industry need for clarity and certainty. The CFPB also ignores the plethora of data that proves that the main beneficiaries of FDCPA class-action litigation are plaintiffs lawyers, not consumers. As ACA has outlined to the CFPB on multiple occasions,[27] the

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[25] ACA International Comments in Response to Prposed Regulation F, available at https://policymakers.acainternational.org/wp-content/uploads/2021/10/assets_comments_aca-comment-cfpb-reg-f-9.17.19.pdf (Sep. 17, 2019). See, e.g., Anenkova, 201 F.Supp.3d at 636-39 (granting summary judgment against plaintiff who sued a debt collector because a barcode was visible on the envelope); McShann v. v. Northland Grp., Inc., Case No. 15-00314-CV-W-GAF, 2015 WL 8097650 (W.D. Mo. Dec. 1, 2015) (granting a motion to dismiss where a plaintiff sued because a demand letter with a "window" displayed the plaintiff's name, address, and account number); Simmons v. Med-I-Claims, No. 06-1155, 2007 WL 486879, at *9 (C.D. Ill. Feb. 9, 2007) (granting summary judgment where plaintiff sued because the return address listed in the envelope was listed for "Med-I-Claims" instead of "Med-I-Claims Services Inc."); Masuda v. Thomas Richards & Co., 759 F.Supp. 1456, 1466 (C.D. Ca. 1991) (rejecting plaintiff's argument that debt collector violated FDCPA by including in an envelope language like "PERSONAL & CONFIDENTIAL" and "Forwarding and Address Correction Requested.").

[26] WebRecon Stats Dec '22 & Year in Review, available at https://webrecon.com/webrecon-stats-dec-22-year-in-review/?utm_source=ActiveCampaign&utm_medium=email&utm_content=WebRecon+Stats+Dec++22+%26+Year+in+Review&utm_campaign=Dec+2022+Newsletter&vgo_ee=AqSuxCM3%2B72kAO9%2FZXuiVzpLB9tk6tN1Fm%2BmFY3WWOeL8u0%2BWBCfKIYwvb2riYN9. (noting that For the full year 2022, FDCPA (-31.3%) and TCPA (-10.8%) were both down significantly over 2021).

[27] *Id*. ("Notably, the FDCPA does not require consumers to show that a debt collector's misconduct was intentional. See, e.g, Russell v. Equifax A.R.S., 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct to be entitled to damages."); Beuter v. Canyon State Prof 'l Servs., Inc., 261 F. App'x 14, 15 (9th Cir. 2007) (holding that the FDCPA imposes strict liability on debt collectors and that they "are liable for even unintentional violations of the FDCPA"). Likewise, the FDCPA incentivizes consumers and their attorneys to diligently

vast majority of FDCPA litigation is based on a highly technical violation that causes no actual harm to consumers. Consumers have many protections under the FDCPA, including the ability to ask to cease communications.

When the CFPB has been asked to weigh in on litigation stemming from technical violations where there is no consumer harm, such as the recent line of *Hunstein* v. *Preferred Collection and Management Services, Inc*., No. 19-14434 cases, it has refused to do so. ACA supported the passage of the FDCPA to protect consumers, but the CFPB appears to be more focused on protecting the trial bar's ability to become enriched when it refuses to provide the clarity needed to stop frivolous litigation. Instead, the CFPB chooses to focus on eliminating efforts to more quickly and efficiently resolve such disputes, so that the exorbitant costs of nuisance FDCPA litigation is not passed on, raising the costs of credit for all consumers.

The NPRM also claims:

> 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 ("TCPA) and its implementing regulations. 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.

Again, here, the CFPB contorts various issues related to the TCPA. It also overlooks the FDCPA, which expressly prohibits debt collectors from "harassing" consumers. In addition to its own rules in Regulation F capping the number of calls to consumers, the CFPB should be aware that the Supreme Court recently found that to qualify as an ATDS under the TCPA, a device must have the capacity to either: Store a telephone number using a random or sequential number generator, or produce a telephone number using a random or sequential number generator. In other words, equipment that can store or dial telephone numbers without using a random or sequential number generator does not qualify as an ATDS under the TCPA.[28] While the plaintiffs' bar surely regrets the clarity that the 9-0 decision from the Supreme Court provided on this issue, it is an important development for a host of businesses making informational calls with much needed information for consumers. It has also decreased class action litigation under the TCPA.[29] Fraudulent calls aimed to harm consumers should

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monitor the accounts receivable management industry's behavior by allowing the recovery of "any actual damage," statutory damages up to $1,000, as well as the consumers' attorney's fees and costs. 15 U.S.C. § 1692k")

[28] In April 2021, the U.S. Supreme Court issued a 9-0 decision in *e your browser tools to copy the text, then click Close. Facebook, Inc. v. Duguid,* 141 S. Ct. 1163, finding that many lower courts were improperly interpreting what types of technology were considered an ATDS. The Supreme Court justices were clear that Congress drafted the TCPA to address abusive telemarketing, not to punish legitimate business callers.

[29] WebRecon Stats Dec '22 & Year in Review, available at https://webrecon.com/webrecon-stats-dec-22-year-in-review/?utm_source=ActiveCampaign&utm_medium=email&utm_content=WebRecon+Stats+Dec++22+%26+Year+in+

be limited. However, the wide variety of financial services calls that consumers need including account updates, information about stolen credit cards, and other must know financial information should be supported by a consumer protection bureau.

The CFPB also states:

> 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 consent freely, without undue influence, fraud, or duress . . . ."

ACA International is unaware of any situation where a debt collector enforced an arbitration agreement with a patient for payment for medical services. ACA asks that the CFPB produce any data it has that shows this a widespread practice, particularly looking at data after the No Surprises Act went into effect. The CFPB notes that the Department of Health and Human Services estimates that hospitals may deploy these contract waivers nearly 2.5 million times each year. ACA, again, asks that the CFPB provide detailed information about these estimates, again particularly after the No Surprises Act[30] went into effect. Like much of the "data" the CFPB relies on, we believe these estimates are likely dated and/or inaccurate.

The CFPB also states, "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." Here the CFPB appears to be saying that asking for payment is a "risk to consumers." Alternatively, we would argue that singling out medical providers as a group that does not need to get paid, and not ensuring there is a funded well-functioning health care system is a risk to all Americans.

Much of the CFPB's analysis in this section is frankly inaccurate and paints the picture of flawed ideological views that disfavor the debt collection industry. Attempting to create new policies by relying on outdated, non-quantifiable, and in some cases just plain made up information is harmful to consumers, providers including those providing medical care to our country, and the larger economy. As a federal agency that is tasked with protecting consumers, the CFPB must do a better job to understand the laws and regulations in place for the debt collection industry, and have a better understanding of its work for creditors throughout the country before making broad assumptions and accusations.

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Review&utm_campaign=Dec+2022+Newsletter&vgo_ee=AqSuxCM3%2B72kAO9%2FZXuiVzpLB9tk6tN1Fm%2BmFY3WWOeL8u0%2BWBCfKIYwvb2riYN9. (noting that For the full year 2022, FDCPA (-31.3%) and TCPA (-10.8%) were both down significantly over 2021).

[30] Pub.L. 116–260, the Consolidated Appropriations Act of 2021.

## V. The Proposal Impacts a Substantial Number of Small Entities; Therefore, the CFPB Must Undertake the Statutorily-Required SBREFA Review Process:

The Regulatory Flexibility Act ("RFA") provides that "[w]henever an agency is required . . . to publish general notice of proposed rulemaking. . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis."[31] Further, the statute notes, "such analysis shall describe the impact of the proposal on small entities."[32] Through this provision of the RFA, Congress purposefully created the mechanism for an agency to conduct the required cost/benefit analysis, as well as other checks, precisely to ensure what an agency is doing is not in fact harming the broader public, small businesses, and the economy. Creating regulations without going through the required notice-and-comment process is not only legally impermissible, it is also bad policy. Uninformed policymaking undertaken in a closed bubble in Washington, D.C., will lead to bad outcomes for all stakeholders, including consumers and medical providers throughout the country.

If the CFPB attempts to move forward in a rulemaking in this area, it must initiate its efforts through the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process.[33] The majority of ACA International members are small businesses and would be impacted by the NPRM. In fact, it would not be surprising if certain small-business members are unaware of the large impact the NPRM would have on them once implemented. Instead of initiating the SBREFA review process and hearing feedback from small entity representatives ("SERs") as required under the Dodd-Frank Act, the CFPB has issued the NPRM and sought comment from the general public. Time and time again, we have seen the CFPB fail to initiate and continue the SBREFA process in a timely manner by citing the importance of receiving feedback from the general public at large.

We once again urge the CFPB to consider the value and importance of the SBREFA process in ensuring that small-business members can provide their input, and more importantly, that such input will be taken into account during the CFPB's internal rule formulation process. In fact, we note that Congress recently reminded the agency that it must follow established requirements when considering issuing rules impacting small businesses, highlighting that there are several steps the CFPB must take when a substantial number of small entities are impacted.[34] If an agency fails to engage in this required regulatory flexibility analysis direct harm to small businesses follows, and the agency has not complied with its SBREFA requirements.[35] During congressional testimony and public appearances, Director Chopra and senior CFPB leadership have often cited the importance of working with small business, community banks, and other similarly situated entities. The NPRM, once again, indicates a discrepancy between rhetoric of the CFPB's leadership and the actions taken by the agency.

The ultimate impact of the CFPB's failure to comply with its statutory obligations with respect to SBREFA is that the CFPB itself will have a limited understanding of the full impacts of the NPRM on

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[31] *See* 5 U.S.C. §603(a).
[32] *Id.*
[33] *See* 5 U.S.C § 609.
[34] *See* Letter from Blaine Luetkemeyer, House Committee on Small Business Ranking Member, and Roger Williams, House Committee on Small Business Vice Ranking Member, to the Hon. Rohit Chopra, Consumer Financial Protection Bureau Director (Oct. 24, 2022) http://bit.ly/3fRUVek.
[35] *See* 5 U.S.C. § 604(a)(2)–(6).

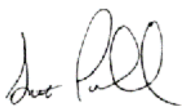
our small business members. Without such comprehensive feedback, there is significant risk that the NPRM will have far-reaching impacts that the CFPB has not considered or been made aware of.

**VI. The CFPB Should Not be Engaging in Any Rulemaking Until the U.S. Supreme Court Has Ruled on Questions Regarding its Constitutional Structure:**

As the CFPB is aware, on February 27, 2023, the Supreme Court of the United States (the "Supreme Court") announced that it granted certiorari to review the Fifth Circuit's decision in *Community Financial Services Association of America Ltd.* v. *CFPB*, which held that the CFPB's independent funding mechanism is unconstitutional under the appropriations clause set forth in Article I, Section 9 of the Constitution.[36] The *CFSA* court held that the CFPB's "double-insulated" funding violates the U.S. Constitution's Appropriations Clause, as well as the separation of powers principles on which it is based. Earlier this month, the CFPB filed its petition for certiorari with the Supreme Court to review this ruling since the *CFSA* decisions held that "without its unconstitutional funding, the Bureau lacked any other means to promulgate the [payday] rule."[37] The CFPB in its brief submitted to the Supreme Court acknowledged that the ambiguity, "threatens to inflict immense legal and practical harms on the CFPB, consumers, and the Nation's financial sector."

Further, the *CFSA* court also held that the plaintiffs, "were thus harmed by the Bureau's improper use of unappropriated funds to engage in the rulemaking," entitling them to "a rewinding of [the Bureau's] action." Given the holdings in *CFSA* that directly and constitutionally undercut the legitimacy of the CFPB, all of which will be decided by the Supreme Court in the near-term, it is imprudent for the CFPB to engage in further rulemaking until the *CFSA* case is finally resolved. If the CFPB were to move forward during this time of great uncertainty, significant judicial, consumer, and financial service market participant resources will be wasted, which is not beneficial to anyone. The CFPB in its petition alludes to the lack of clarity surrounding its authority for rulemaking acknowledging, "the gravity of those consequences and the uncertainty that the court of appeals' decision has already created." We urge the CFPB to follow the warnings it itself described in its petition for certiorari by pausing the issuance and finalization of the NPRM and any further rulemaking until the Supreme Court has ruled on the agency's constitutionality.

Thank you for your attention and due consideration. Please let me know if you have any questions.



Scott Purcell
Chief Executive Officer
On behalf of ACA International

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[36] *See* Community Financial Services Association of America Ltd. v. CFPB, 5th Cir., No. 21-50826, Opinion (Oc. 19, 2022)
[37] *See* Reply Brief for the Petitioners, Community Financial Services Association of America Ltd. v. CFPB, No. 22-448 (Feb. 2023)