INFiN℠ A Financial Services Alliance

April 3, 2023

SUBMITTED via Federal E-rulemaking Portal (www.regulations.gov)

Comment Intake– Nonbank Registration and Collection of Contract Information
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 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 Number CFPB–2023-0002

Dear Director Chopra:

This comment letter is submitted on behalf of INFiN, A Financial Services Alliance ("INFiN"), in response to the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") proposed rule for a "Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Protections" with request for public comment, published in the Federal Register on February 1, 2023 (the "NPRM" or "Rule Proposal").[1] INFiN appreciates the opportunity to provide comments on this NPRM and respectfully requests that the CFPB withdraw its proposal to establish this new and unnecessary federal registry.

INFiN, A Financial Services Alliance

INFiN is the leading national trade association representing the diverse and innovative consumer financial services industry. INFiN's membership includes more than 350 companies operating approximately 8,000 locations throughout the United States and online.[2] Headquartered in Washington, DC, INFiN serves as the voice of the vital and rapidly evolving consumer financial services industry to advocate on behalf of its customers. INFiN's membership consists of a range of large companies operating in multiple states, mid-size companies, and small "mom and pop" operators.

INFiN members offer critical access to financial services to millions of Americans, particularly middle-income working families, who are often underserved by banks and credit unions and who value the wide range of services provided by community-based financial service providers. Consumers choose these providers because they are affordable, offer integrated services through multiple convenient channels, and deliver services in a transparent and regulated environment.

[1] *Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections*, 88 Fed. Reg. 6906 (February 1, 2023) (12 C.F.R. Part 1092).
[2] For more information, visit www.infinalliance.org.

The consumer financial services offered by INFiN members include check cashing, money orders, pre-paid cards, electronic bill payments, and small-dollar loans, among others. These simple, popular financial solutions play an integral role in the financial lives of millions of American households, helping them to manage their financial obligations and challenges and providing essential financial inclusion and stability. The consumer financial services offered by INFiN members are available across a range of platforms and channels – from community-based storefronts to online tools powered by the latest technology.

The most fundamental aspect of INFiN members is that they are licensed and regulated in the jurisdiction in which their customers reside and, as such, are subject to state and local consumer protection laws throughout the U.S. INFiN members also comply with a myriad of applicable federal consumer financial protection laws. As licensed and regulated financial service providers, INFiN members are accessible to regulators and law enforcement for supervision, examination, and enforcement. INFiN members also comply with INFiN Best Practices[3], which impose other requirements related to the provision of consumer financial services.

INFiN offers the following comments about the Rule Proposal for consideration:

The CFPB Has Failed to Establish Consumer Risk Justifying a Nonbank Registry Regarding Covered Terms and Conditions

Despite the Bureau's asserted justification for this rule proposal, this federal registry is unnecessary and would provide no real benefit to consumers. Without adequate justification for the Rule Proposal, the clear intent of the Bureau is to regulate legal and appropriate contractual provisions. Moreover, it is a clear attempt to circumvent the prohibition imposed on the Bureau's rulemaking authority as expressed by the 2017 Congressional Review Act Resolution.

The Bureau proposes to establish a requirement that nonbanks subject to its supervisory authority register each year in a registration system and submit information about their use of "certain terms and conditions in form contracts for consumer financial products and services that pose risks to consumers." The "specific terms and conditions" are provisions in form contracts 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." The Bureau proposes to publish information it collects identifying registrants and their use of these terms and conditions to facilitate public awareness and oversight by the CFPB and other regulators of the use of covered terms and conditions.

The Bureau justifies the Rule Proposal by asserting that it will facilitate its market monitoring functions and its risk-based supervisory processes. It is founded on the supposition that "form contracts" pose risks to consumers when they impose terms and conditions that seek to waive consumer legal protections or limit how consumers enforce their rights or post complaints or reviews. (88 Fed. Reg. at 6907). The NPRM also states that the CFPB has "preliminarily" determined that a nonbank registration system to continuously and systematically monitor the use of covered terms and conditions is necessary to promoting a fair, transparent, and competitive

[3] INFiN's Best Practices are available at https://infinalliance.org/Dev/Resources/Best-Practices/Dev/Content/Best-Practices.aspx?hkey=be92a443-4f3f-4b9e-8f14-a487d956346c.

consumer financial marketplace, including its risk-based nonbank supervision program.

The Bureau justifications for the Rule Proposal are speculative, anecdotal, unnecessary based on other tools and processes already available to it and would impose undue burdens on nonbanks subject to its provisions. For example, with respect to arbitration agreements, the Bureau's *2015 Arbitration Study; Report to Congress pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act* ("Arbitration Study") reported that 84% of storefront payday loan agreements representing 99% of storefronts sampled had arbitration clauses in their agreements. (Id. at 6921). Thus, the Bureau already knows that most small-dollar lenders are using these terms and conditions and there is no reason for the Bureau to establish a registry for further discovery. The rationale posited for the Rule Proposal is that the Bureau wants to track the use of these agreements on an ongoing basis to determine when they are used, by whom, and whether they are held to be enforceable. Most of this information can be obtained by a simple search of reported cases throughout the country. The requirement that nonbanks report on litigation and challenges to their agreements is massively burdensome, particularly on small entities.

The definition of covered terms and conditions is also overly broad. A "covered form contract" is defined as "a written agreement between a covered person and a consumer that was drafted before the transaction for use in multiple transactions and contains a covered term or condition." This definition does not limit the scope of the Rule Proposal to "take-it-or-leave-it" contracts. Rather, the breadth of the definition will essentially require that <u>all</u> contracts are subject to its terms. This requirement will result in a huge database consisting of virtually every contract and be meaningless.

The Rule Proposal asserts that the registry would facilitate the Bureau's prioritization and implementation of examination work in its statutorily mandated risk-based nonbank supervision program. During its supervisory examinations, the CFPB already serves extensive document and information requests, including all consumer-facing forms. Accordingly, any issues with contracts can be identified at that time and a registry is not needed to determine if documents unnecessarily waive rights. The Bureau's argument that it has limited resources also fails to justify the registry since – even if this was true – a new registry containing massive amounts of information and documentation, that changes every year, will not reduce the burdens on the Bureau. Without a burdensome, ineffectual new registry, the Bureau can do precisely what it does now—request the information in advance of an examination.

The Bureau further fails to identify what "enforcement" activity it could undertake simply based on covered terms and conditions. Waivers and limitations of the types that would be reported in the registry are not prohibited under federal law. States that prohibit or restrict their use already examine INFiN members and can discover any violations.

The Bureau's contention that the registry is necessary for it to implement a consumer education program is also without merit. Nowhere does the Rule Proposal offer an explanation as to why it cannot engage in consumer education without a registry – when, in fact, it already does.

The Rule Proposal's assertion that consumers face risk in the use of form contracts appears to be based on the conclusion that "consumers generally do not choose most terms and conditions in their agreements for consumer financial products or services." (Id. at 6907). The Bureau recognizes that

these practices are "ubiquitous" and that consumers "lack an incentive to review fully the terms and conditions in form contracts." (Id. at 6908). Several unsubstantiated statements purport to justify the proposed rule, *e.g.*, terms and conditions in electronic form contracts "may not be visible," consumers "may be required to do additional clicking or downloading to view the terms and conditions," "some terms and conditions may be de-emphasized," and some companies may engage in "dark patterns." However, as the NPRM states: "[s]tudies confirm that consumers rarely read adhesion contracts" and that consumers focus on "salient terms such as price and quantity." Nowhere does the NPRM demonstrate how the creation of a nonbank registry will change this consumer behavior.

The NPRM recognizes that some contracts allow consumers to "opt-out of a particular term or condition" but characterizes these choices as "nominal." This is true and, in fact, many consumer contracts allow consumers to opt out of contracts, including contracts that contain provisions at issue here. The NPRM simply ignores the examples of providers that utilize covered terms and conditions offering consumers the right to opt out of arbitration within 30 days, as well as other provisions offered that benefit consumers, including, for example, offering to pay the costs of arbitration, creating a consumer-friendly forum for the resolution of disputes.

Additionally, INFiN members provide broad disclosures of the terms and conditions contained in their transaction documents. These terms and conditions are provided in advance of, and throughout, transactions. Accordingly, there should be no requirement for nonbanks to publish and report terms and conditions, such as website terms and conditions, which are already sufficiently disclosed. Website terms and conditions are generally not the type of activities targeted for regulation by CFPB, and their inclusion in a reporting list has no purpose other than to form the basis for a violation that would otherwise be irrelevant to CFPB.

The Bureau points to several states that have passed laws that address the use of covered terms and conditions. These state laws restrict or prohibit arbitration and other terms. Others, including Ohio, focus on arbitration and provide that it is a legally recognized mechanism for the resolution of disputes, even as an alternative to courts. (Ohio Revised Code 2711).

To the Extent the NPRM Seeks to Limit the Use of Arbitration Agreements, it is Barred by the 2017 Congressional Review Act Resolution

To the extent the NPRM seeks to establish a registry related to the use of arbitration agreements, the Bureau is barred from proceeding by the Congressional Review Act Resolution disapproving the CFPB's 2017 Arbitration Rule. In July of 2017, the CFPB issued a final rule addressing pre-dispute arbitration agreements in financial services contracts (the "Arbitration Rule"). The Arbitration Rule had two major provisions: first, the Rule prohibited covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action concerning the covered consumer financial product or service. Second, the Arbitration Rule required covered providers, that are involved in an arbitration pursuant to a pre-dispute arbitration agreement, to submit specified arbitral records to the Bureau and to submit specified court records.

In the Arbitration Rule, the Bureau stated that it would use the information collected to continue monitoring arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action. The Bureau also announced that it was finalizing provisions that would have provided for publication of the materials it collected on its Web site, to "provide greater transparency into the arbitration of consumer disputes."

On November 1, 2017, the President notably signed a joint resolution passed by Congress disapproving the Arbitration Rule under the Congressional Review Act ("CRA"). Pursuant to the joint resolution, the Arbitration Rule was stricken and has no force or effect.

Enactment of a CRA joint resolution disapproving a rule has two primary effects. First, a rule subject to a disapproval resolution will not take effect. Second, the CRA provides that an agency may not reissue that rule in "substantially the same form," or issue a "new rule that is substantially the same" as the disapproved rule "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."

The Rule Proposal will require nonbanks to register if they use specific terms and conditions that "attempt to waive consumers' legal protections, to limit how consumers enforce their rights, or to restrict consumers' ability to file complaints." In identifying the types of terms and conditions it is focused on, the Bureau lists: "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. (Id. at 6908-09). The NPRM also states that the Bureau intends to publish information identifying registrants and their use of these terms and conditions.

There is little distinction between the nonbank registry the CFPB is proposing to create now, and its intention to publish information, and the now-disapproved Arbitration Rule. Moreover, the intent of each CFPB rule is the same – to discourage the use of arbitration agreements. Further, a simple comparison between of the two rules, *i.e.*, the Arbitration Rule and the NPRM, lends to the conclusion that they are substantially the same and that the CFPB is violating the CRA. The NPRM is clearly an attempt to "end run" around the 2017 CRA resolution. Accordingly, the NPRM should be withdrawn.

The Bureau's Ongoing Effort to Eliminate Arbitration Provisions Mistakenly Presumes that Consumers Do Not Benefit from Arbitration of Claims and is, Therefore, Misguided

The entire premise of the NPRM is that there is a negative impact of arbitration proceedings and the other covered terms and conditions. In addition to the fact that arbitration provisions are favored under federal law, as reflected in the Federal Arbitration Act, multiple studies have found that consumers receive an economic benefit from arbitration because the cost of arbitration is far less than the cost of litigation. Arbitration often leads to speedier resolution of disputes compared to typical court proceedings because arbitration requires fewer formalities, and the decision makers are often selected based upon their technical expertise or knowledge. Moreover, the fast-paced

process of arbitration minimizes costs of dispute resolution. In addition, arbitration may provide more privacy for parties than a public hearing since arbitration may be subject to non-disclosure agreements.

The NPRM also focuses on waivers, including with respect to the right to file class actions. However, even the Bureau's Arbitration Study found that 87% of class actions provide no benefits to class members. The CFPB's own data indicates that, on average, only 4% of class members obtained monetary relief – meaning that 96% received no monetary settlement. Additionally, the data indicates that the average payment to a class member was $32.35, while the average attorneys' fees were $1 million. In contrast, the same study indicated that individual claimants prevailing in arbitration received relief in an average amount of $5,389. Thus, the CFPB's own study indicates that arbitration is more likely to result in positive economic benefits to consumers than class-action litigation.

Many providers of consumer financial services bear virtually all costs of arbitration, with some even covering the prevailing party's attorney's fees and expenses. Arbitration also generally guarantees prevailing consumers a minimum award amount. Arbitration is a faster, more expedient, and more appropriate process for resolving small loan disputes, particularly because the amounts in dispute with respect to such claims are usually small.

Publication of the Information Collected in the Registry Would Not Serve the Public Interest and Is Prejudicial to Covered Entities

In the NPRM, the Bureau asserts that the "public transparency" provisions further the CFPB's mission to monitor markets and that its mission is furthered by making certain information available to a "wider audience" than just the Bureau. It argues that the Congressional mandate that the Bureau publish reports of significant findings justifies making the use of covered terms and conditions public. However, the proposed registry is simply a database and will not include any actual findings of the CFPB. Moreover, there is no evidence that consumers will utilize the Bureau's registry. Rather, it seems much more likely that consumer advocates and the plaintiffs' trial bar will consult the database as a resource of financial service providers to pursue in frivolous actions. Furthermore, creation of a registry applicable only to nonbanks creates an uneven playing field between licensed and regulated financial service providers such as INFiN members, and depositories or otherwise classified providers, and is, therefore not consistent with the intent of the CFPA.

By indicating the registry will be public, and by requiring covered providers to supply documents containing the covered terms and conditions, the Bureau will also be impacting providers whose terms and conditions are confidential and proprietary and may even be considered trade secrets. The Bureau has not made any provision for a trade secret exception that could be asserted in response to this requirement.

Finally, as breaches of databases have become commonplace, even for government entities, data security should be a paramount concern with respect to the information sought to be collected by the CFPB. The Bureau should consider limiting further the "identifying information" it will seek to collect as part of the proposed registry.

The NPRM's Exclusions are Well Below a Reasonable Level

The NPRM provides for certain exclusions from the registration requirements, including 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. This level of receipts is intended to reflect a *de minimis* exception to the requirements of the rule; however, the receipt level is far too low to be a meaningful exclusion. INFiN respectfully submits that the exclusion level should be substantially raised to well above just $1 million.

Failure to Appropriately Follow the Regulatory Flexibility Act

The CFPB is required by law, namely the Regulatory Flexibility Act ("RFA"), to conduct an initial regulatory flexibility analysis ("IRFA") and a final regulatory flexibility analysis of a federal rule subject to notice-and-comment rulemaking unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Bureau is also subject to certain additional steps pursuant to the RFA regarding the convening of a panel of small business representatives before proposing a rule for which an IRFA is required. The SBREFA process is particularly important to the rulemaking process as it provides small businesses the opportunity to help to educate the CFPB and its rule-writers in advance of an actual rule proposal. In fact, determining a reasonable annual receipts exclusion level is the very issue that could, and should, be discussed with a small business panel. Rather than the CFPB arbitrarily determining this amount, as well as making many other assumptions, the Bureau would benefit from hearing from the small businesses who would be affected by the NPRM.

However, for this rule proposal, the Bureau quickly and summarily dismisses the RFA requirements, incorrectly concluding that the creation of a nonbank registry, and new registration requirements, would not have a significant impact on a substantial number of small entities. Unfortunately, this Bureau failed to properly conduct a thorough small-business analysis and thus skip over the important step of hearing from small businesses who would be adversely affected by this rule.

Conclusion

INFiN and our members appreciate the opportunity to provide comments with respect to the CFPB's Rule Proposal. We hope the Bureau will truly consider these concerns and ultimately withdraw this NPRM Rule Proposal for this nonbank registry.

Respectfully submitted,

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Executive Director