3138 10th Street North
Arlington, VA 22201-2149
703.522.4770 | 800.336.4644
f: 703.524.1082
nafcu@nafcu.org | nafcu.org

National Association of Federally-Insured Credit Unions

April 3, 2023

Comment Intake—Nonbank Registration and Collection of Contract Information
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 No. CFPB-2023-0002)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the proposed rule published by the Consumer Financial Protection Bureau (CFPB or Bureau) regarding the creation of a registry of supervised nonbanks that use certain terms and conditions in form contracts. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 135 million consumers with personal and small business financial service products.

While NAFCU supports efforts to detect and prevent abuses of federal consumer financial law among nonbank entities, the proposed rule raises serious concern about the prospect of additional burden for credit unions that use credit union service organizations (CUSOs) or vendor form contracts, and will likely magnify the risk of reputational damage associated with use of contract language that must be registered but is not expressly prohibited by law. To reasonably limit these risks, NAFCU recommends the CFPB take additional time to examine potential burdens on small entities, exclude CUSOs from the definition of a supervised registrant, and limit the registry's scope to contract language that is expressly prohibited by federal consumer financial law.

General Comments

The proposed rule requires supervised nonbanks to register form contract language in a CFPB database if they use specific terms and conditions that attempt to waive consumers' legal protections, limit how consumers enforce their rights, or restrict consumers' ability to file complaints or post reviews. Nonbank registrants would also need to identify whether courts or arbitrators have issued decisions on the enforceability of covered terms or conditions when the registrant is a party to a legal action.

Credit unions are regularly supervised for compliance with federal consumer financial law and exams conducted by both the CFPB and the National Credit Union Administration already involve review of contract language.[1] Unlike credit unions that operate on regular exam cycles, the CFPB notes that the numerous nonbanks subject to the agency's supervisory jurisdiction cannot all be examined in a similarly rigorous manner.[2]

Existing supervisory focus on third party relationships and a credit union's obligation to conduct due diligence when reviewing vendor contracts also mitigates the risks discussed in the proposal with respect to form contracts that may be adopted by credit unions.[3] Furthermore, as cooperatively owned and mission driven financial institutions, credit unions strive to provide their members with access to safe and responsible banking services. A significant part of credit unions' success is fostering a meaningful and trusted relationship with each member and this strategy depends on fair and transparent agreements.

Unlike for profit financial companies that may take advantage of the CFPB's limited supervisory reach, credit unions have a natural incentive to protect their members' finances and promote healthy financial choices. This is because credit unions are accountable and ultimately answerable to their membership. The credit union industry's commitment to member service and relationship banking necessitates offering members the best possible terms and conditions for the financial products or services they use.

Although the proposal does not affect how the CFPB applies its functions for monitoring and evaluating depository institutions and credit unions, the same contracts developed by nonbanks subject to registration under the proposal might potentially be used by credit unions. These contracts could involve aspects of mortgage servicing, marketing, or payment processing—functions that are often provided by service providers but may also involve third parties that would qualify as supervised registrants under the proposal. While NAFCU appreciates exclusions for the use of de minimis covered terms and conditions—such as those required for insurance or guarantee of residential mortgages by a Federal agency or government sponsored enterprise (GSE)—these exclusions do not address other routine aspects of credit union operations, such as

[1] *See e.g.*, NCUA, Federal Consumer Financial Protection Guide, Truth in Lending Act (Regulation Z) (last updated January 1, 2023), *available at* https://ncua.gov/regulation-supervision/manuals-guides/federal-consumer-financial-protection-guide/compliance-management/lending-regulations/truth-lending-act-regulation-z
[2] *See* CFPB, 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, 6958 [hereinafter Proposal] ("[G]iven Bureau resource constraints and the high number of supervised nonbanks, the baseline likelihood of examination in a given year is low for the average supervised nonbank").
[3] NCUA, Supervisory Letter No. 07-01 "Evaluating Third Party Relationships" (October 2007) ("Credit unions should take measures to ensure careful review and understanding of the contract and legal issues relevant to third party arrangements.").

processing of member data, which could be governed by contracts developed by supervised registrants.[4]

NAFCU is concerned that the CFPB may use the contract registry as a tool to signal supervisory interest in contractual provisions—such as arbitration—even if such language is not expressly prohibited by law. As a result, the proposal could magnify risks linked to the use of covered terms and conditions for all financial institutions—not just supervised nonbanks subject to the proposed registration requirements. The proposed registry might also invite spurious litigation based on the false premise that contract language submitted to the Bureau is inherently unlawful when that may not be the case.[5]

While the use of contractual language that is in direct conflict with existing federal consumer financial law administered by the CFPB presents a legitimate supervisory concern, the scope of the proposal exceeds the limited goal of detecting prima facia abuses of consumer rights. The proposal cites to court opinions (e.g., bankruptcy courts), state laws (e.g., the California Consumer Privacy Act), and the Uniform Commercial Code (e.g., Article 9's restrictions on waivers of consumer legal protections) as additional sources of authority prohibiting certain contractual terms and conditions. The CFPB also draws upon legal treatises (i.e., the Restatement of Contracts) and its own authority to prohibit unfair, deceptive, and abusive acts and practices to fill gaps "[e]ven when State statutory law may not expressly prohibit or restrict waivers or limitations on how consumers may enforce or exercise their rights."

As a federal agency, the CFPB's jurisdiction is limited to the federal laws it administers, as enumerated by Congress. The CFPB was neither designed nor authorized to operate as an arbiter of state or common law beyond its express statutory jurisdiction. Accordingly, reliance on nonbinding statements of legal principle to declare that certain contractual provisions embedded in arbitration clauses may "unreasonably limit" a consumer's ability to enforce their rights amounts to an over extension of the Bureau's authority.

Furthermore, with respect to arbitration, it is questionable whether the proposed requirement to disclose use of arbitration agreements is consistent with Congress' decision to nullify the CFPB's 2017 Arbitration Rule.[6] The CFPB's authority to restrict arbitration is governed by Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) which provides in relevant part that the Bureau's authority impose conditions or limitations on the use

[4] The CFPB has asserted that the risk of unfair, deceptive or abusive acts and practices may extend to certain data security practices. *See* CFPB, Consumer Financial Protection Circular 2022-04 (August 11, 2022), *available at* https://www.consumerfinance.gov/compliance/circulars/circular-2022-04-insufficient-data-protection-or-security-for-sensitive-consumer-information/

[5] *See e.g.*, Proposal at 88 Fed. Reg. 6918 ("In addition, certain covered terms and conditions, such as non-disparagement clauses, also *could* be an important companion to the Bureau's existing *prioritization process* that is based in significant part on consumer complaints") (emphasis added).

[6] *See* 5 U.S.C. § 801(b) ("A rule [disapproved by a joint resolution of Congress] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued.")

of arbitration agreement requires the agency to issue a regulation.[7] The CFPB attempted to do so but that rulemaking was disapproved under the Congressional Review Act.[8] The effect of the 2017 joint resolution by Congress blocks the agency from undertaking a substantially similar rulemaking, a limitation the CFPB should not attempt to circumvent with the proposed contract registry.[9]

The proposal also devotes considerable attention to the enforceability of arbitration agreements while citing law that could be preempted by the Federal Arbitration Act. For example, the CFPB cites to a case involving Tribal Law and the use of an arbitration agreement associated with a mobile home loan to state that "the Restatement of the law of consumer contracts further articulates how the State common law of contracts scrutinizes certain standard terms and conditions for unconscionability."[10] At the same time, the CFPB acknowledges that "the Restatement expressly does not address 'possible preemption under the Federal Arbitration Act.'"[11]

Separate from the issue of preemption, the CFPB's reliance on statements of legal principle is itself problematic. Agency interpretations of common law doctrines are generally not owed great deference.[12] In general, state law governs the enforceability of contracts under common law principles. While federal consumer financial law (*i.e*, the Fair Debt Collection Practices Act) may recognize certain theories of contract enforceability (e.g., unconscionability) and require agency expertise in applying legal theories to specific regulations, there is no general authority in the Dodd-Frank Act permitting the CFPB to establish its own common-law interpretations for reviewing contracts not otherwise in violation of federal consumer financial law.[13]

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[7] 12 U.S.C. § 5518(b).
[8] H.J.Res.111, 115th Cong. (2017)
[9] 5 U.S.C. § 801(b)
[10] *See* CFPB, 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, 6913, FN 101 (February 1, 2023) [*hereinafter* Proposal].
[11] Proposal 88 Fed. Reg. 6914
[12] *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) ("the basis for deference ebbs when "[t]he subject matter of the [dispute is] distan[t] from the agency's ordinary" duties or "fall[s] within the scope of another agency's authority." ") (quoting *City of Arlington v. FCC*, 569 U.S. at 309 (2013)); *Jicarilla Apache Tribe v. Fed. Energy Regulatory Comm'n*, 578 F.2d 289, 293 (10th Cir. 1978) ("When the administrative interpretation is not based on expertise in the particular field, however, but is based on general common law principles, great deference is not required"); *Texas Gas Corp. v. Shell Oil Co*., 363 U.S. 263, 270 (1960); *Federal Communications Comm'n v. RCA Communications, Inc*., 346 U.S. 86, 91 (1953); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 129 (2015) (Thomas, J., concurring) ("Fundamentally, the argument about agency expertise is less about the expertise of agencies in interpreting language than it is about the wisdom of according agencies broad flexibility to administer statutory schemes.").
[13] *See* FDCPA § 808, 15 U.S.C. § 1692f; *see also* https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf

Instead, the Dodd-Frank Act grants the CFPB wide latitude to identify unfair, deceptive and abusive acts and practices to prevent violations of consumers' financial rights under *federal* law.[14] While the CFPB's authority in this domain presents its own hazards—not the least of which is interpretive ambiguity—unfair, deceptive and abusive practices are nonetheless governed by distinct legal standards articulated in agency guidance.[15] The same cannot be said for the numerous standards, court opinions, and legal theories mentioned in the proposal that the CFPB may rely upon for the purpose of determining registration compliance and whether additional supervisory scrutiny of contract language is warranted.

NAFCU recommends the CFPB modify the scope of its proposal to focus only on registration of contractual terms that may be in violation of federal consumer financial law. Consideration of state law, tribal law, or even legal treatises will create confusion and demand significant legal resources to review, particularly in cases where terms and conditions may not be expressly prohibited.

If the CFPB does not limit the scope of the proposal, NAFCU would ask—in the alternative—that the CFPB publish prior to the effective date of any final rule a list of all contract language it deems problematic, including citations to the relevant law(s), court opinions or agency interpretations that may cast doubt upon enforceability. To the extent that certain covered terms and conditions are subject to conflicting interpretations regarding their enforceability, the CFPB should not require registration of those terms and conditions if the source of conflict does not involve a question of federal consumer financial law.

Estimated Burden and Need for Small Business Review Panel

The CFPB underestimates the burden of compliance for small entities—asserting that tasks such as identifying covered terms and conditions and monitoring court or administrative decisions will "generally take on average 15 to 25 hours of employee time per small entity annually."[16] The CFPB further states that it believes the process of identifying covered terms and conditions "will take less than 45 minutes per contract each year for supervised registrants using ten or fewer contracts, and less than 30 minutes per contract each year for supervised registrants using more than ten contracts."[17] With respect to depository institutions that may be indirectly affected by the proposal, the CFPB merely speculates that there may be indirect costs in situations where a

[14] 12 U.S.C. § 5531(a) ("The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice ***under Federal law*** in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.")(emphasis added).
[15] *See* CFPB, Unfair, Deceptive, or Abusive Acts or Practices (March 16, 2022), available at https://www.consumerfinance.gov/compliance/supervision-examinations/unfair-deceptive-or-abusive-acts-or-practices-udaaps-examination-procedures/.
[16] *See* Proposal, 88 Fed. Reg. 6964.
[17] *Id*. at 6955.

depository institution is affiliated with a supervised registrant and concludes, without further evidence, that these indirect impacts will not be significant.[18]

Before proceeding with a final rule, NAFCU requests that CFPB issue a supplementary request for information to gather more detailed information about the legal resources available to small entities subject to the proposal along with information about the extent to which small depository institutions may be affected indirectly through affiliate relationships with supervised registrants. The supplementary information would better inform the CFPB about whether it has an obligation to convene a small business review panel.

Under the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the Regulatory Flexibility Act (RFA), the CFPB must convene a small business review panel to determine whether a rule will have a significant economic impact on a substantial number of small entities.[19] In the context of satisfying the initial regulatory flexibility analysis under the RFA, it is doubtful Congress intended for agencies to forge ahead with proposed rules using rough guesses of potential burden to avoid a more deliberative rulemaking process that starts with a request for information.

NAFCU is concerned the Bureau has underestimated the time needed to review form contracts and small entities will face greater burdens than anticipated given their limited in-house legal resources. These burdens may also have a greater than expected indirect impact on small credit unions who might also face added litigation risk—a concern the CFPB briefly dismisses but does not attempt to quantify.[20] Accordingly, NAFCU recommends the CFPB pause its current rulemaking to collect additional data specific to small entities.

Application to Credit Union Service Organizations

The proposal generally would apply to nonbank covered persons that are subject to supervision by the Bureau under its statutory authorities in section 1024(a) (12 U.S.C. § 5514) of the Consumer Financial Protection Act (CFPA). A supervised nonbank would qualify as a supervised registrant if the Bureau could require reports from, or conduct examinations of, that entity because it is a covered person described in CFPA section 1024(a)(1); however, some exclusions apply. One of those exclusions applies to service providers.

Service providers subject to the CFPB's supervisory authority under 12 U.S.C. § 5514(e), 12 U.S.C. § 5515(d), or 12 U.S.C. § 5516(e) may include credit union service organizations (CUSOs);

[18] *See id*. at 6963.
[19] *See* 5 U.S.C. § 607 ("In complying with the provisions of sections 603 and 604 of this title, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not *practicable* or *reliable*.") (emphasis added).
[20] *See* Proposal FN 215.

however, references to the CFPB possessing authority equivalent to a federal bank regulator under the Bank Service Company Act (BSCA) may also create confusion about whether the service provider exemption exists for CUSOs. NAFCU recommends that the CFPB clarify in the proposal that CUSOs are excluded from the definition of a supervised registrant. As the CFPB acknowledges, "[r]egistering entities solely supervised as service providers may introduce complexity and would add burden and broaden the scope of the nonbank registration system."[21]

The NCUA already has access to the books and records of CUSOs, including contracts that may govern the provision of financial services to credit union members.[22] Accordingly, introducing an additional and duplicative layer of reporting would merely complicate credit union efforts to work with CUSOs to achieve economies of scale that are necessary to serve their communities and remain competitive with larger banks and financial technology companies. Furthermore, a definition of service provider that excludes bank service providers but does not exclude CUSOs would create a competitive disparity by subjecting credit union owner(s) to more onerous requirements.

Absent an appropriate exclusion, credit union owner(s) would bear significant costs to ensure that a CUSO is compliant with any of the proposed registration requirements. These costs would involve the time required to periodically review contract language, court decisions, and CFPB statements or actions that would have interpretative significance. Given that these functions would both involve the use of legal experts, the costs to smaller CUSOs (or to smaller credit union owners) would be significant and ongoing.

Credit unions might also bear reputational costs and higher litigation risk. Proposed § 1092.302(a)(3)(ii) would require certain supervised registrants to identify the legal names of parties to their covered agreements, which could include credit unions. While this information may be useful for the Bureau to determine the prevalence of certain form contracts while avoiding duplication of effort, publication of such information would not offer similar value to consumers. NAFCU recommends the CFPB refrain from publishing any information that would identify a credit union or other entity that is not a supervised registrant as a party to a contract containing covered terms and conditions.

Conclusion

NAFCU appreciates the opportunity to provide comments on this proposed rule. NAFCU supports efforts to identify the use of unlawful contract language by certain supervised nonbanks; however, the scope of the proposal should be narrowed to focus on federal consumer financial law administered by the CFPB. The mere existence of the registry may fuel spurious litigation based on the false assumption that language included in the proposed registry is unlawful.

[21] Proposal at 88 Fed. Reg. 6938.
[22] See 12 CFR § 712.3(d).

Accordingly, the CFPB must seek to limit its focus to questions of federal law for which there is clear precedent or a regulatory basis for questioning the legality of particular contract language. The CFPB should set aside its ambition of analyzing contracts based on their conformity with common law, statements of legal principle, or other sources of authority outside of the federal laws the agency administers under the Dodd-Frank Act.

NAFCU also requests clarification that CUSOs acting as service providers will be exempt from the definition of a supervised registrant. If we can answer any questions or provide you with additional information, please do not hesitate to contact me at 703-842-2266 or amorris@nafcu.org.

Sincerely,

Andrew Morris
Senior Counsel for Research and Policy