April 3, 2023

Comment Intake—Nonbank Registration and Collection of Contract Information
Consumer Financial Protection Bureau
c/o Legal Division Docket Manager
1700 G Street NW
Washington, DC 20552

Comments of Ten Consumer Organizations on Docket No. CFPB-2023-0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections

The undersigned organizations, representing millions of consumers, support the rule proposed by the Consumer Financial Protection Bureau ("CFPB") to increase transparency and bring consumer awareness to the rights nonbank financial firms require Americans to surrender just to use their products and services. The proposed rule would create a publicly accessible registry system for these nonbank entities, requiring them to report commonly used terms and conditions that have been weaponized by businesses to limit consumer rights. These provisions disproportionately harm low-income communities and people of color, who are more likely to use nonbank financial services because they are more often unserved or underserved by traditional credit opportunities.[1]

Transparency is critical to the health and success of a robust free market economy. Businesses that choose to strip consumers of their choices, and the rights associated with these choices, should be transparent about their actions. It should not be difficult to tell consumers the truth, and while consumers often have no real choice when it comes to accepting contractual clauses limiting their rights, the proposed registry would at

[1] For example, a 2021 FDIC survey found that Black and Latinx households earning between $30,000 to $50,000 annually were nearly 5 times more likely to be unbanked than white households in the same income level. FEDERAL DEPOSIT INSURANCE CORPORATION, 2021 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS (2022) at 2, https://www.fdic.gov/analysis/household-survey/2021report.pdf.

least provide a baseline awareness of any rights being given up, and which businesses are engaging in these practices. Making this information easily accessible in a single, publicly accessible registry will generate the transparency necessary to ensure a more stable and fairer marketplace for industry stakeholders as well as consumers.

Nonbank firms have a history of capitalizing on a captive consumer market to impose predatory conditions, such as charging exorbitant interest rates on payday loans;[2] attaching junk fees to prepaid cards;[3] or disabling an automobile for missed loan payments.[4] While many of these practices may violate state and federal laws, these pernicious terms and conditions tucked away in the fine print of take-it-or-leave-it contracts force consumers into unknowingly giving up their fundamental rights, such as accessing the courts, or limiting their ability to seek full and meaningful accountability when they've been cheated or defrauded by financial institutions. Obtaining credit reports, taking out private student loans, or taking out a car loan should not suddenly strip individuals of local, state, and federal consumer protections. Yet rights-stripping contract provisions continue to harm consumers, sometimes severely, by allowing repeat offenders to avoid legal accountability.

The registry will help the Bureau, federal and state regulators, and the American public, understand the prevalence of these terms and conditions. Fostering such understanding will level the playing field for businesses that do not rely upon contracting away consumer rights to stay profitable, while simultaneously enhancing Bureau oversight of the unnecessary risk generated in the marketplace when businesses use consumer contracts to eliminate consumer rights and protections.

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[2] *What Is a Payday Loan?*, CFPB, https://www.consumerfinance.gov/ask-cfpb/what-is-a-payday-loan-en-1567/ (last visited March 14, 2023).

[3] *The Hidden Cost of Junk Fees*, CFPB, https://www.consumerfinance.gov/about-us/blog/hidden-cost-junk-fees/ (last visited March 14, 2023).

[4] Andy Grimm, *Car Dealer, Lender Use 'Kill Switch to Deactivate Cars, Borrowers Say, After They Fall Behind on Loan Payments,* CHI. SUN TIMES, July 13, 2022, https://chicago.suntimes.com/2022/7/13/23206224/car-lot-lender-deactivated-cars-with-kill-switch-after-borrowers-fell-behind-on-payments-lawsuit.

Specifically, the registry highlights commonly used terms and conditions that:

- Cap the amount consumers are allowed to recover when they have been defrauded or harmed by a corporation.
- Make it harder for consumers to file cases seeking remedies for wrongdoing, by limiting where and when they can file cases.
- Prohibit consumers from joining together to hold businesses accountable for breaking the law.
- Force consumers to completely absolve businesses of wrongdoing.
- Waive consumer rights and limit consumers' ability to seek justice and accountability when they have been harmed by corporations, by requiring them to resolve disputes in forced arbitration, a secret proceeding with unappealable outcomes that is often biased against consumers.

While the proposed registry would be a helpful first step towards a strong and fair marketplace, the Bureau must also continue working towards curtailing the use of the highlighted terms and conditions, especially in the area of forced arbitration. This process remains one of the most comprehensive ways businesses avoid accountability for wrongdoing, deceit, and fraud. Consumers should not be swindled into giving up their fundamental rights to access the courts simply because they've used or purchased a financial product or service.

The proposed registry exposes terms and conditions that strip consumers of important protections, especially the practice of forced arbitration.

We strongly support the Bureau's choice of terms and conditions selected for inclusion in the proposed registry. Of these clauses, forced arbitration clauses have emerged as one of the most prevalent, overarching tools used to deprive consumers of their rights. The proliferation of forced arbitration clauses imposed in contracts for prepaid cards, payday loans, private student loans, auto lending, and other forms of nonbank credit hurts all consumers, but especially affects people of color, who are even more likely to be subject to such restrictions than white consumers.[5]

The forced arbitration process is inherently unequal, and individual consumers rarely prevail over financial services providers. Indeed, data from the American Arbitration Association, the world's largest private forced arbitration provider[6] reveal that over a five-year period, from 2017-2021, only 237 out of 13,179 individuals won monetary awards against banks and other financial services providers, with a win rate of just 1.8%.[7] In 104 cases, it was the *consumer* who ended up being ordered to pay the bank,[8] and in these instances, consumers ended up paying an average of $24,000 each to the banks they had filed cases against.

There are several reasons for why the forced arbitration playing field is tilted against consumers. First, there is the structural relationship between arbitrators and corporations that doesn't exist for consumers. Corporations choose the forced arbitration provider, who then oversees selections of individual arbitrators, and it is only corporations that have enough familiarity with arbitrators' records and as a result of their repeat use of the system to participate effectively in the selection

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[5] SYDNEY A. SHAPIRO ET AL., CENTER FOR PROGRESSIVE REFORM, PRIVATE COURTS, BIASED OUTCOMES: THE ADVERSE IMPACT OF FORCED ARBITRATION ON PEOPLE OF COLOR, WOMEN, LOW-INCOME AMERICANS, AND NURSING HOME RESIDENTS, CENTER FOR PROGRESSIVE REFORM 13 (2022),*https://progressivereform.org/publications/private-courts-biased-outcomes-forced-arbitration-rpt/*.

[6] The American Arbitration Association ("AAA") is the world's largest private global provider of arbitration, mediation and other ADR services, as reported on the organization's webpage at https://www.adr.org/.

[7] The forced arbitration win rate for consumers against banks and financial services providers was even lower than the already low 4.8% win rate in forced arbitrations against all corporations. *See* AM. ASS'N. FOR JUST., FORCED ARBITRATION AND BIG BANKS: WHEN CONSUMERS PAY TO BE RIPPED OFF (2022), https://www.justice.org/resources/research/forced-arbitration-big-banks.

[8] *Id.* at 2. These dire consumer outcomes also stop future complaints against businesses, as consumers see how unlikely and even risky it may be to initiate an arbitration against a financial services provider.

process.[9] Once selected, arbitrators often see the corporation as their client, even if they are supposed to be neutral.[10] And if arbitrators refuse to "play ball" with large corporations or corporate defense firms by changing their rules to suit the preferences of the companies midstream, companies sue the forced arbitration provider. This ensures that any administrator that tries to operate fairly and impartially will find themselves dragged into litigation with far better resourced opponents and encourages the emergence of administrators and arbitrators who will bow to any pressure companies impose on them simply to be able to operate their businesses without fear of litigation.[11] Needless to say, any corporate defendant (and their counsel) who attempted to sue the court system after receiving a ruling they didn't like would be subject to swift and severe sanctions.

Second, unequal access to resources gives corporations a significant advantage in this arena. The process itself can be very costly for consumers, since parties are generally expected to split the costs, which can amount to several thousands of dollars. Filing fees can total up to $1,500 and arbitrators can charge from $1,000 to $2,000 per day. While JAMS and AAA, the largest two arbitration administrators, require the companies to bear most of the costs of forced arbitration above what it would cost to file a claim in court, several large companies have engaged

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[9] Edmund Andrews, *Why the Binding Arbitration Game Is Rigged Against Customers,* STAN. GRAD. SCHOOL OF BUS., March 8, 2019, *https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers*.

[10] Jessica Silver-Greenberg and Michael Corkery. *In Arbitration, a 'Privatization of the Justice System*, N.Y. TIMES, Nov. 1, 2015, *https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html*.

[11] *See Uber Techs., Inc. v. Am. Arb. Ass'n, Inc.*, 204 A.D.3d 506, 510, 167 N.Y.S.3d 66 (2022) (court found in favor of AAA, when AAA issued an invoice asking Uber for $10.879 million in case management fees, noting, "[W]hile Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision").

in a strategy of refusing to pay their share of the forced arbitration fees, ensuring that the arbitrations cannot move forward.[12] Still, other forced arbitration administrators may require the consumers to share portions of the fees.

One CFPB review of a sample of forced arbitrations found that only half of consumers had a lawyer at any point, while corporations almost always had representation.[13] Low-income consumers and consumers of color are much less likely to be represented by counsel in forced arbitration proceedings than their corporate adversaries, because of the prohibitive cost of legal services and consumers' lack of access to legal service providers.[14] For Black and Latino workers, who earn a median of $896 and $837 per week, respectively, such costs can be entirely out of reach.[15]

Since the Bureau's 2017 rulemaking, more data continue to emerge about inherent biases disproportionately impacting consumers who are Black, indigenous, people of color (BIPOC), low-income, or female.[16] The closed and secretive system of forced arbitration may perpetuate and hide very real biases that negatively impact these consumers.

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[12] Allison Grande, *Samsung Users Press 50K Arbitration Face Scan Claims*, LAW 360, Oct. 11, 2022, https://www.law360.com/articles/1538947/samsung-users-press-50k-arbitration-face-scan-claims. ("Although Samsung "claimed to be 'committed to its consumer arbitration program' and to 'value ... the role that the AAA plays in ensuring the fair adjudication of legitimate disputes between parties,'" the company said it had identified some deficiencies in the filings and conveyed that "the only way it would participate in the arbitrations is if the individual consumers paid Samsung's share of the filing fees," the petitioners assert.")

[13] CFPB, ARBITRATION STUDY PRELIMINARY RESULTS: SECTION 1028(A) STUDY RESULTS TO DATE 14 (2013), *https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf*.

[14] Shapiro et al., supra note 5, at 6.

[15] U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS FOURTH QUARTER 2022 (2023), *https://www.bls.gov/news.release/pdf/wkyeng.pdf*.

[16] Shapiro et al., supra note 5, at 16.

For example, the self-disclosed data of the two largest forced arbitration providers, the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS),[17] reveal that 88% of their arbitrators are white and 77% of them are male, vastly different than the 40% of individuals who identify as BIPOC and 51% of the U.S. population who are women. Compounding this, women and BIPOC individuals are more likely than white men to be forced into arbitration.[18] This means that women and individuals who identify as BIPOC are not only being deprived of their Constitutional right to trial before a jury of their peers, but their forced arbitration decisions are also very likely to be decided by a white male. A consumer is already going to be very unlikely to win any kind of monetary award against a financial services company in forced arbitration[19] N being BIPOC or female reduces these prospects even further.

Biases against consumers are also likely with certain arbitrators who oversee forced arbitrations involving certain repeat-player companies. For example, between 2014 and 2018, of the 1,064 cases handled by the ten most frequently appearing JAMS arbitrators, only 51 (4.8%) resulted in a documented consumer victory. Thirty-two of these consumer wins were handled by one arbitrator, and all but two of them involved payday lender CashCall, Inc. The other nine arbitrators handled around 102 cases each, ruling for consumers in less than three cases over five years. The ten most frequently used AAA arbitrators handled 712 cases, with consumers winning only 34 times in five years. And most of these consumer wins – 28 out of 34 – were handled by three AAA arbitrators. The most frequently used AAA arbitrator, a former insurance agent

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[17] Founded in Founded in 1979, JAMS is the world's largest private alternative dispute resolution (ADR) provider.

[18] AM. ASS'N. FOR JUST., WHERE WHITE MEN RULE: HOW THE SECRETIVE SYSTEM OF FORCED ARBITRATION HURTS WOMEN AND MINORITIES (2021), https://www.justice.org/resources/research/forced-arbitration-hurts-women-and-minorities.

[19] During the five years from 2017 to 2021, for example, AAA's self-reported data revealed a 1.8% win rate for consumers against banks and financial service providers. Only 237 consumers over five years managed to win against a bank or financial service provider out of 13,179 claims filed.

turned corporate defense attorney, handled 84 consumer forced arbitrations, claiming a total of $6.8 million in damages. He ordered a consumer monetary award just once, for $1,682.[20]

Class action lawsuits and collective actions are generally banned by forced arbitration clauses. Collective proceedings would otherwise allow consumers to pool resources and create financial incentives to encourage legal representation, even when individual claims are for small amounts. Banning class actions and collective actions makes consumers of color and low-income consumers less likely to initiate an arbitration proceeding, let alone win—even as they are more likely to be hurt by corporate wrongdoing and least able to bear the costs of corporate predation in the first place.[21]

Finally, a veil of secrecy surrounds forced arbitration clauses, placed innocuously in the fine print of terms and conditions with little or no notice to consumers, meaning that few even know they are subject to such restrictions. But even once a consumer has gone through the process of forced arbitration, the proceedings and the findings are also secret: proceedings are not open to the public, and private arbitrators often do not issue written explanations for their decisions.[22] Because of this secrecy, companies that are repeat users of the forced arbitration system, have an informational advantage; over time, they build up knowledge of the process and its outcomes, including decisional tendencies of particular arbitrators, that they can use to their strategic benefit.

Forced arbitration's lack of transparency also prevents consumers from being able to learn from the experiences of other consumers and make

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[20] The arbitrator awarded the consumer $7,960, but offset that with a $6,278 award to the defendant corporation.

[21] Shapiro et al., supra note 5, at 6.

[22] *Examining Mandatory Arbitration in Financial Service Products: Hearing Before the Senate Committee on Banking, House and Urban Affairs* 117th Cong. 8 (2022) (statement of Myriam Gilles, Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University), *https://www.banking.senate.gov/imo/media/doc/Gilles%20Testimony%203-8-22.pdf*.

informed choices about which financial products and services to select in the future. This informational gap fundamentally distorts the markets for financial products and hurts not only current but future consumers as well.

In fact, companies often retain the right or ability to change forced arbitration clauses with little or no notice to consumers and have changed clauses to be even less favorable to consumers in anticipation of events they know will likely result in litigation.

Companies have also replaced more established forced arbitration providers such as AAA and JAMS with newly formed forced arbitration providers, even mid-dispute, seemingly for the sole purpose of serving corporate interests. Some of these newly formed providers may be non-neutral, making their designation in forced arbitration provisions a form of "gerrymandering" aimed at making it even more difficult for consumers to have their claims fairly arbitrated.

Recently, while a judge was considering whether to compel arbitration in the middle of a separate antitrust lawsuit,[23] Ticketmaster changed their forced arbitration agreement with customers, switching from JAMS arbitrators to a new start-up forum, New Era ADR.

New Era relies on Ticketmaster for a large percentage of its revenue, and its provisions are incredibly one-sided, allowing retailers such as Live Nation and Ticketmaster to pay a single subscription fee, while consumers must each pay a $300 fee per filing. The forced arbitration agreement also bars class or representative proceedings for consumers, while New Era is allowed to unilaterally group cases for any reason it deems appropriate. New Era can then decide which arbitrator presides over these groups, including for bellwether cases that determine the outcome for all consumers. These terms make it exceptionally difficult for consumers to prevail against a financial institution.

[23] *Skot Heckman et al. v. Live Nation Entertainment, Inc. et al.*, No. 2:22-cv-00047 (C.D. Cal. Jan. 4, 2022).

New Era's procedures are designed to create as many inefficiencies for consumers as possible. Consumers pay 100% of the marginal cost and must prove their case in the face of absurd limitations on documents that can be submitted (10 total), briefing page lengths (5), witnesses (2-3), and discovery (none). All cases are consolidated before one arbitrator who can reject all cases based on dispositive issues at once (with no discovery, 10 documents, and one 5-page brief). If the consumers survive on dispositive issues, then Ticketmaster can litigate individual issues seriatim, virtually indefinitely, producing a controlled drip of final decisions to reduce the pressure on Ticketmaster.[24]

If a consumer successfully wins injunctive relief, Ticketmaster still retains a one-sided right to appeal to a different forced arbitration forum, (while denials of a consumer's request for injunctive relief is unreviewable). In short, Ticketmaster can win efficiently, but can only lose after consumers incur massive inefficiencies. The notion that a company facing litigation can not only change the rules of the game midstream, but also pick the umpire, is inimical to a fair dispute resolution system.

In the nonbank space, as soon as large cryptocurrency exchange and lender Gemini learned that it had entrusted $900 million worth of customer funds to an investment fund that was likely to lose nearly all of the customer funds, Gemini began to repeatedly update its dispute resolution provisions, adding nearly 2,000 words, changing arbitration administrators and imposing extensive administrative exhaustion requirements and complex consolidation procedures as conditions to initiate a forced arbitration.[25] Even consumers who take the time to understand their rights under the original forced arbitration clause are

[24] New Era ADR Rules and Procedures are available at https://www.neweraadr.com/rules-and-procedures/.

[25] *See* Complaint, *Picha et al. v. Gemini Trust Company, LLC et al.*, No. 1:22-cv-10922-NRB (S.D.N.Y. Mar. 17, 2023). *See also Nguyen v. OKCoin USA Inc.*, No. 22-cv-06022-KAW, 2023 WL 2095926 (N.D. Cal. Feb 17, 2023) (granting the cryptocurrency company's motion to compel arbitration although it adopted revised forced arbitration clause two months after collapse of a company in which customers were invested).

likely to be dissuaded from exercising their rights when they see that companies like Gemini can simply rewrite the rules at any time.

With few laws curbing forced arbitration abuses and a legal ecosystem that almost always defers in favor of forced arbitration, the deck is stacked against consumers *forced* into arbitration. As a result, with little to no accountability for repeat offenders, some of the top corporate enforcers of forced arbitration in the financial services industry were also later found to have committed egregious consumer harms, both by the CFPB and in private actions.

Very limited publicly available data[26] published quarterly by the one of the largest forced arbitration providers, the American Arbitration Association ("AAA"), reveal that from 2017-2021, the top 10 corporate arbitration defendants in the financial services sector are as follows, in order: Intuit (1,575 cases), American Express (1,126 cases), H&R Block (1,061 cases), Santander (882 cases), Paypal (744 cases), Citibank (712 cases), Credit One (561 cases), Wells Fargo (432 cases), Chime (337 cases), and Navient (323 cases).[27] Notably, Intuit, maker of Turbo Tax (the no. 1 corporate participant in forced arbitration), American Express (no. 2), Santander (no. 4), Wells Fargo (no. 8), and Navient (no. 10) have all been found to have engaged in egregious and illegal misconduct repeatedly, using forced arbitration to avoid and delay accountability.

Intuit faced such a high volume of complaints by consumers, that the company subsequently attempted to push *all* of its consumer cases into small claims court to avoid paying for its share of the forced arbitration fees for the very arbitrations *that Intuit had initially forced them into*. Last May, after numerous state and federal investigations for illegal marketing practices, Intuit finally reached a settlement with all 50 state

[26] California and Maryland state disclosure laws require arbitration providers who oversee 50 or more forced arbitrations to disclose arbitration data. Despite these requirements, it appears that only AAA and JAMS, the two biggest providers, comply with this rule, which has no real enforcement mechanism. *See* Md. Code Ann., Com. Law § 14-3903 (West) and Cal. Civ. Proc. Code § 1281.96 (West).

[27] *See* FORCED ARBITRATION AND BIG BANKS, supra note 7.

attorney generals and the DC attorney general.[28] Santander (the no. 4 corporate participant in forced arbitration), was found by the Bureau to have knowingly provided inaccurate loan information to credit reporting agencies, culminating in a consent order.[29] Litigation between the CFPB and Navient (no. 10) for widespread student loan servicing violations is still ongoing.

The CFPB has ordered Wells Fargo (no. 8) to pay more than $3 billion in redress and civil penalties for blatantly illegal conduct costing billions of dollars in financial harm to consumers,[30] yet Wells Fargo has continued trying to avoid accountability through procedural tactics within the forced arbitration system. It has convinced arbitrators to adopt a corporate wish list of procedural requirements frequently requested in court such as heightened pleading requirements, multiple dispositive motions, or drawn out discovery disputes, without any of the benefits that consumers get in the court system, such as the ability to group cases together, or seek discovery into widespread corporate policies and practices.

Initially, Wells Fargo's forced arbitration clause included a class action waiver and also required consumers to file forced arbitrations only on an individual basis. Wells Fargo promised to pay forced arbitration fees so long as consumers paid their initial filing fees. However, when 3,000 consumers who had been illegally charged surprise overdraft fees tried to proceed in arbitration, and paid those initial filing fees to begin the process, Wells Fargo *then* demanded that their preferred forced

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[28] *San Diego TurboTax Maker to Pay $141M over 'Free' Tax Filing Deception*, TIMES OF SAN DIEGO, May 4, 2022, https://timesofsandiego.com/business/2022/05/04/san-diego-turbotax-maker-to-pay-141m-over-free-tax-filing-deception/.

[29] Womble Bond Dickinson, *CFPB Assesses $4.75 Million Civil Penalty Against Santander For Systemic Errors Leading to Inaccurate Credit Reporting Of Millions of Accounts,* JD SUPRA (Jan. 14, 2021), https://www.jdsupra.com/legalnews/cfpb-assesses-4-75-million-civil-2680960/.

[30] *CFPB Orders Wells Fargo to Pay $3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts,* CFPB (Dec. 20, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-wells-fargo-to-pay-37-billion-for-widespread-mismanagement-of-auto-loans-mortgages-and-deposit-accounts/.

arbitration provider, AAA, adopt de facto class procedures to handle consumer cases. With no legal basis, Wells Fargo proceeded to create new heightened pleading standards on all current and future cases, effectively halting them. Consumers would now have to provide evidentiary proof before being allowed to proceed, while at the same time, Wells Fargo was allowed to withhold the information consumers needed to satisfy the new heightened pleading standard.[31] This "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[32]

Years after the Wells Fargo scandal involving fraudulently opened bank accounts, employees are still coming forward with stories about how management, and not just lower-level employees, were fully aware of ongoing misconduct.[33]

With no legal consequences and the ability to hide patterns of fraud and wrongdoing, forced arbitration clauses enable corporations like American Express (no. 2) to continue ignoring systemic and known reporting errors, including for mistaken "deceased" statuses that ruined credit reputations for consumers such Matthew Bommarito[34] who repeatedly and diligently notified American Express of his incorrect "deceased" status, but was

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[31] See Memorandum of Points and Authorities In Support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration, *Mosley et al. v. Wells Fargo & Co. et al.*, No. 3:22-cv-01976-DMS-AGS (S.D.Cal. March 3, 2023).

[32] *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018).

[33] *Hear and Now: Former Wells Fargo Executive Opens Up About Leadership Failures During Account Scandal,* NPR, (Feb. 17, 2023), https://www.nprillinois.org/2023-02-17/former-wells-fargo-executive-opens-up-about-leadership-failures-during-account-scandal.

[34] *See* Complaint, *Bommarito v. Equifax Information Services, LLC, Experian Information Solutions, Inc., Transunion LLC, and American Express Co.*, No. 2:21-cv-12423-DPH-APP (E.D. Mich. Oct. 13, 2021), ECF No. 27 (alleging that Matthew Bommarito's father received two separate collection letters in June 2020 for Amex accounts following Matthew's alleged death, even though Matthew had not died. Amex had listed him as deceased to all three credit reporting agencies and failed to conduct a reasonable investigation to correct the mistake, harming Matthew's credit reputation, which resulted in missed credit opportunities).

forced into arbitration instead of American Express simply correcting their error.[35] In the past three years, the CFPB has received at least 9,712 other consumer complaints against American Express.

As these examples illustrate, forced arbitration provisions enable corporations to flout the law with little to no consequences, and with no deterrent effect to curb misconduct. The secrecy around forced arbitration also delays regulators and the public from finding out the extent of wrongdoing and misconduct. Forced arbitration also pushes consumers who cannot bring claims in court to rely on already overburdened agencies to handle problematic repeat offenders. For these reasons, we wholeheartedly support the Bureau's inclusion of forced arbitration clauses in the registry, as well as the other terms and conditions highlighted by the Bureau as problematic.

The Bureau's proposed definition of "covered form contracts" in proposed §1092.301(b) helpfully captures potentially problematic contracts.

We agree with the CFPB's preferred definition of "covered form contracts" in proposed §1092.301(b). Using the more expansive Restatement definition of "standard contract term"[36] will be more effective than the Consumer Review Fairness Act (CRFA) definition of "form contract" to define what the registry covers.[37] No matter which

[35] Mr. Bommarito spent significant time and resources fighting his forced arbitration clause, simply because he wanted to hold American Express accountable for the company's many alleged FCRA violations, including for Amex's failure to establish reasonable procedures to ensure accurate reporting.

[36] Restatement of Consumer Contracts (2022). The Restatement defines a "standard contract term" as a contract term "that has been drafted prior to the transaction for use in multiple consumer contracts." Its focus, unlike that of the CRFA's "form contract" definition, is not on whether the consumer could in theory have negotiated for something different, but just on whether the contract that was entered into used the terms drafted by the company for use in multiple consumer contracts.

[37] The Consumer Review Fairness Act (CRFA) defines a form contract as one that is "imposed on an individual without a meaningful opportunity to negotiate the standardized terms." 15 U.S.C. 45b(3)(A)(i). Even if a contract entered into by the parties uses a company's standard form without any modification at all, it doesn't meet this definition if the individual had a meaningful opportunity to negotiate it.

definition is ultimately adopted, the registry must capture any terms and conditions that ask consumers to "agree to" waive rights *before* a dispute arises. Consumers typically do not realize the extent of the fundamental rights they are giving up *before* they've been harmed by a corporation, or *before* a dispute with that corporation arises.

Using the Restatement definition of "standard contract term" will help address a potential loophole that would allow a covered nonbank to avoid registering harmful terms and conditions simply because the nonbank entity indicates they are open to negotiating any terms. Most transactions using form contracts don't involve negotiations, even when consumers are theoretically allowed to modify contract terms as consumers typically do not perceive they can negotiate these contracts. As a result, consumers really have no choice but to accept the terms as offered.

<u>§1092.301(b) of the proposed registry must cover all pre-dispute arbitration provisions, including arbitration provisions with opt-out clauses.</u>

Importantly, both the CRFA definition of "form contract" as well as the CFPB-preferred Restatement definition of "standard contract term" cover forced arbitration agreements with opt-out provisions. The availability of an opt-out right under a company's form contract does not involve negotiable contract terms, so an opt-out arbitration clause falls under the CRFA definition of "form contract." Nor does exercise of an opt-out right cause the contract itself to deviate from the company's pre-drafted terms for use in multiple transactions, so the arbitration clause remains the Restatement definition of "standard contract term." Put another way, when a consumer exercises an opt-out right under the contract, the consumer does not modify the contract terms; she just exercises an option that the standard form contract terms give her.

That is, if the company establishes that it would have considered changing the terms for an individual consumer if the consumer had asked, the contract is not considered a "form contract" within the meaning of that definition, for purposes of the CRFA.

All forced arbitration provisions, including provisions with pre- and post-dispute opt-out provisions, should be included in the proposed CFPB registry of terms and conditions. As alluded to in the rulemaking,[38] opt-out provisions in consumer contracts are generally drafted to benefit businesses, to the detriment of consumers. They are largely ineffective at helping consumers actually opt out of forced arbitration because of consumers' lack of awareness of the existence or significance of the clauses until faced with an actual dispute, at which point it is too late to opt out.

Corporations should not be opposed to reporting their use of forced arbitration agreements that include the right to opt-out of forced arbitrations, *unless they never actually expect or want consumers to exercise these rights*. Technology giants like PayPal widely market apps such as Venmo as allowing consumers to quickly and easily move money digitally, but force consumers to waive their rights unless they physically print out and mail in a hard copy of the opt-out form within 30 days of signing up for the service. Clearly, the intent is to discourage consumers from opting out of forced arbitration.[39]

Specialty consumer reporting agency Checkr technically allows individuals to opt out of arbitration within 30 days, but the language is buried deep in the terms of service and mostly unknown and unexercised. So, while Checkr is federally mandated to provide one free background report each year, individuals are forced to agree to arbitration when they use Checkr's online portal to access the free report. Without meaningful legal accountability, individuals with egregious background check errors have had to wait for months before their records were corrected, with devastating outcomes as they became unemployed.[40] Checkr's opt-out

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[38] 88 Fed. Reg. 6908 (Feb. 1, 2023).

[39] Barbara Krasnoff, *How to Opt Out of Venmo's New Arbitration Clause*, THE VERGE, (April 25, 2022) *https://www.theverge.com/23040916/venmo-arbitration-class-action-sue-how-to*.

[40] *See* Issie Lapowsky, *Locked Out of the Gig Economy: When Background Checks Get It Wrong,* PROTOCOL (Feb. 7, 2020), https://www.protocol.com/checkr-gig-economy-lawsuits (detailing how, in violation of the Fair Credit Reporting Act's 30 day time limit to correct background report errors, major uncorrected reporting errors kept individuals such as single parent Amy Rae and senior citizen and Army veteran

provision did not provide any meaningful opportunity to opt-out of arbitration.

Similarly, Klarna's 30 day opt-out provision did not benefit California and Connecticut consumers who *still* faced additional delays and expensive legal hurdles fighting forced arbitration clauses in their claims against the small-dollar lender for unethical and illegal marketing practices.[41] Serving 90 million shoppers in over 17 countries, Klarna is America's largest "buy now pay later" ("BNPL") service, deceptively marketing itself as a fee-free and interest-free solution to its core constituency of poor, cash-strapped consumers struggling to make ends meet on a weekly basis. Klarna loans are deceptively conveyed as convenient, simple, automatic, and free. In reality, these loans expose consumers to large and risky overdraft and non-sufficient funds ("NSF") fees. Klarna exacerbates fee risks by using undisclosed processing choices, including reprocessing debits on the same or next day, when it knows users' checking accounts are already negative.

As seen on its website, Klarna's 30 day opt-out provision is buried in the fine print of its consumer contract, and requires consumers to physically print out, complete, and mail in the arbitration opt-out form within 30 days of first using the Klarna service.[42] The Connecticut consumers who eventually won the right to hold Klarna accountable in court are continuing to defend against Klarna's appeal of that decision.[43]

Jerome Miller from being employed for months. Checkr incorrectly reported that Amy drove without a license when she was merely double parked while waiting to pick up her 10-year-old. It took two years and counting to resolve the mistake, which kept her from being able to earn extra income as an Uber drive. It took three months for Checkr to correct Jerome Miller's report, which mistakenly claimed his license expired, causing him to fall behind on his car payments which eventually led to the car's repossession).

[41] *See Hale v. Klarna, Inc.*, No. 3:22-CV-00598 (S.D. Cal. Apr. 28, 2022); *Edmundson v. Klarna*, 3:21-CV-00758 SVN (D. Conn. Feb. 15, 2022).

[42] As of February 14, 2023, Klarna's contract language and opt-out provision (Provision 10, titled 30-day Opt-out Right) may be accessed at https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/user#26 .

[43] *Edmundson v. Klarna*, 3:21-CV-00758 SVN (D. Conn. Feb. 15, 2022).

§1092.301(d)(1) should be expanded to cover pre-filing requirements and PDDR clauses.

Proposed §1092.301(d)(1) should be expanded to cover standard terms and conditions imposing pre-filing requirements and pre-dispute dispute resolution processes ("PDDR clauses") not required by law. Pre-filing requirements and PDDR clauses create additional procedural and substantive hurdles for consumers, above and beyond regular notice clauses, by requiring them to provide company-mandated claim information or undergo a company-mandated process before they are even allowed to initiate a forced arbitration.

These additional barriers to the vindication of consumers' rights are another step in the downward trajectory and continued loss of consumer rights: first, corporations pushed individuals into forced arbitration, next, they successfully eliminated a consumer's right to group cases together. And now, like a mutating corporate virus, forced arbitration 2.0 involves corporations relying upon pre-filing requirements and PDDR clauses to avoid the possibility of being held accountable for repeat and ongoing misconduct, even in their already rigged forced arbitration proceeding. These clauses use lopsided language to give businesses certain procedural rights if their unilaterally imposed requirements aren't met. They also unfairly allow companies to retain the advantage of limiting group actions by sending group actions that could otherwise be filed as class action suits into forced arbitration. Simultaneously, it is almost impossible for consumers to bring arbitrations at any meaningful scale to deter widespread repeat misconduct.

Consumers sometimes risk having their claims inappropriately pushed into small claims court or, worse, may lose access to *any* pathway to recourse—even forced arbitrations—if they are deemed not to have followed company-mandated pre-filing requirements.[44] These types of

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[44] *In re Centurylink Sales Practices & Sec. Litig.*, MDL No. 17-2795 (MJD/KMM) (D. Minn. Dec. 4, 2020) (telecommunications company Centurylink refused to move forward with an arbitration where 1,000 out of 9,000 jointly represented consumers notified the cable company of their intent to begin individual arbitrations. CenturyLink claimed the consumers failed to give sufficiently detailed notice, and

intentionally burdensome provisions should be tracked in the proposed registry because they leave consumers in procedural limbo, bringing businesses one step closer to being completely insulated from all liability for consumer claims.

One example referenced in the notice of proposed rulemaking is cryptocurrency exchange Coinbase's onerous PDDR provisions (rolled into their arbitration provision).[45] This example highlights some key reasons why these terms are so problematic and should be included in the proposed registry. Even *before* any arbitration is allowed to proceed, customers have to follow a 2-step PDDR process: first, they must contact Coinbase's support page to "resolve any such dispute amicably" (a highly subjective standard) and secondly, they must complete a complaint form that will be evaluated by a Coinbase employee. If these steps aren't fulfilled to *Coinbase's* satisfaction, the consumer's "claim or action must be dismissed from arbitration or small claims court."[46] This extreme language appears to allow a company, on its own, and with no oversight, to throw out any and all consumer claims.

In 2021, as a result of unauthorized transactions on the Coinbase platform, consumers such as Mr. Abraham Bielski had $31,000 stolen from his Coinbase account. Coinbase first relied on the PDDR provision, and then on its forced arbitration clause, to avoid accountability for failing to follow federal banking laws by taking the appropriate precautionary protections for customers. In a "fox guarding the hen house" dynamic, it seems counterintuitive to force consumers to submit disputes related to a company's systemic noncompliance with federal laws to the company itself, before the dispute is forced into arbitration. Coinbase customers, such as Mr. Bielski, have had to spend additional time and resources fighting the forced arbitration provision just to have

therefore materially breached the arbitration agreement. The court disagreed with CenturyLink, finding failure to provide adequate notice was not a material breach.)

45 88 Fed. Reg. 6909, 6933 (Feb. 1, 2023).

46 *See* Coinbase user agreement, Provision 7, "Customer Feedback, Queries, Complaints, and Dispute Resolution," *available at* https://www.coinbase.com/legal/user_agreement/united_states#appendix-5-arbitration-agreement (last accessed on February 15, 2023).

a judge, and not an arbitrator, decide on the unconscionability of the PDDR clause. Even after a federal court agreed that the PDDR clause was both substantively and procedurally unconscionable, over a year and half later, Coinbase continues litigating the enforceability of its contract provisions while both parties wait for the district court to make a decision.[47]

In the supervised nonbank space, Klarna's consumer contract includes an Initial Dispute Resolution provision that requires customers to "try, for 60 days, to resolve any Dispute informally." This is a "material term" of the Agreement, and "a requirement that must be fulfilled before commencing any arbitration." Klarna customers are required to provide a notice of dispute that includes "facts giving rise to the Dispute and the relief requested."[48] This type of vague language may fuel additional litigation and delay resolution by leaving room for companies to argue that the facts and relief stated weren't sufficient, subjective standards that would be decided by potentially biased arbitrators in secret proceedings. Klarna and other corporate defendants who use these types of provisions also get an unfair extra opportunity, a "free peek," to see what they anticipate is going to be filed against them. This "informal" and yet "material" dispute process does not come with the protections and oversight of a neutral third party.

For consumers, who have no legal training and no understanding of the legal process, the pre-filing, PDDR process may appear informal, and companies promote it as an easy, cost-saving way to resolve conflicts. In reality, PDDR is a complex legal process with real and permanent consequences impacting consumer settlements or arbitrations. Some of the clauses even have corporate counsel engaging with consumers

[47] *Bielski v. Coinbase, Inc.*, No. C 21-07478 WHA, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022), *stay denied*, No. 22-15566 (9th Cir. July 11, 2022), *cert. granted*, No. 22-105 (U.S. argued Mar. 21, 2023). *See also* Brief for American Association for Justice as Amicus Curiae in Support of Respondents, *Coinbase Inc., v. Bielski*, No. 22-105 (U.S. Feb. 28, 2023), https://www.justice.org/resources/research/coinbase-v-bielski.

[48] *See* Terms for Klarna Shopping Service, Initial Dispute Resolution, Provision 6, published February 13, 2023, https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/user#mandatory-disputes).

directly, without any consumer representative present.[49] Many PDDR clauses are also inconsistent with state and federal consumer protection laws, which provide substantive rights for consumers or spell out procedures that consumers may use to dispute transactions.[50]

To help more fully capture this latest evolution in forced arbitration and how companies are now even trying to avoid forced arbitrations, which *they* chose to begin with, pre-filing requirements and PDDR provisions should be included in the proposed registry of covered terms and conditions.

Proposed §1092.301(d)(2) should require the registry to include provisions that compel consumers to choose between forced arbitration or a limited category of forums and venues to resolve their claims.

Provisions allowing either party, including nonconsumer parties, to choose between forced arbitration or small claims court should be included in the proposed CFPB registry. While these clauses were originally designed to empower consumers by giving them a choice of where they would like to file a case, companies have misused them to inappropriately push cases into small claims court, even where the court does not have jurisdiction. Compounding the problem, unwary consumers

49 *See, e.g.*, AT&T Consumer Service Agreement, https://www.att.com/consumerserviceagreement ("During that period [after receipt of a Notice of Dispute], either you or AT&T may request an individualized discussion (by phone call or videoconference regarding settlement …. [A]n AT&T representative must personally participate …. Your and AT&T's lawyers (if any) also can participate."); Intuit Terms of Service, https://www.mint.intuit.com/terms ("[B]efore either you or Intuit commence arbitration …, we will personally meet, via telephone or videoconference, in a good-faith effort to confer with each other and try to resolve informally any Claim ….").

50 While some state unfair and deceptive practice statutes require consumers to provide notice before filing suits to enforce statutes, these requirements are not as burdensome as those typically imposed in PDDR clauses, and would also have reciprocal obligations for companies. For example, California's Consumer Legal Remedies Act requires companies to offer consumers an opportunity to make reasonable corrections within 30 days of receiving the consumer's statutory notice letter. *See* Cal. Civ. Code § 1782 (West).

likely may not understand the nuances of small claims court versus arbitration. Disclosing such provisions in a public database would more clearly inform the Bureau and the public how often covered nonbank entities are resorting to this type of legal language to push complaints into small claims court as a way to delay claim resolutions and avoid legal accountability.

In 2021, 40,000 customers who were wrongfully charged for tax software found themselves forced into arbitration by Intuit.[51] But when these customers proceeded with arbitrations, Intuit realized they owed $3,200 in arbitration fees for each customer and filed for a preliminary injunction in state court to halt these arbitrations and push them into small claims court. While the state lawsuit was pending, the customers filed a federal lawsuit seeking to compel arbitration of claims including federal Sherman Act claims. The federal court declined to intervene, leaving the matter in state court. The state trial and appeals courts denied Intuit's motion for an injunction of the arbitration claims.

When reading the small claims provision, the appeals court found the terms only empowered *consumers* and not Intuit to elect whether to move arbitration to small claims court. The court noted that "Intuit is now seeking to push the claims out of arbitration and into oblivion."[52] That the FAA prohibits arbitration agreements that "effectively eliminate a party's substantive statutory rights." The court further observed that parties like Intuit "have not just been forum shopping; they have been on a veritable shopping spree."[53]

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[51] Mentioned earlier in this comment, AAA's self-reported data reveal that Intuit was a defendant in the greatest number of arbitrations against financial services companies over a five-year period from 2017-2021. *See* FORCED ARBITRATION AND BIG BANKS: WHEN CONSUMERS PAY TO BE RIPPED OFF, AM. ASS'N. FOR JUST. (2022), accessible at https://www.justice.org/resources/research/forced-arbitration-big-banks.

[52] *Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at *8 (Cal. Ct. App. July 29, 2021).

[53] *Id.* at 1.

Although the court ultimately sided with consumers, Intuit's inappropriate attempt to push forced arbitration claims into small claims court further delayed claim resolutions and required additional time and expense to fight Intuit's stratagem. The registry should track which consumer contracts contain language that allow companies to engage in these types of procedural gymnastics.

Proposed §1092.301(d)(3) should comprehensively cover provisions limiting collective actions, class actions, or class arbitrations or mass proceedings.

Collecting data on provisions that limit collective actions, class actions, and class arbitrations would be very helpful in capturing the extent to which consumers are harmed when they are prohibited from banding together to address recurring problems that wreak havoc but sometimes have too small a dollar value to pursue individually and must be pursued as large, group claims. In addition to provisions that waive outright a consumer's ability to participate in collective proceedings, the registry should also cover provisions that limit any aspect of these group claims, including "batch arbitration" provisions that limit the number of cases that may be filed at a time, or any restrictions around who may represent consumers in these claims.

Including all such limits on claims seeking relief for multiple consumers will bring much needed transparency to an increasing tendency of companies to include in their contracts provisions seemingly aimed at halting *any* type of resolution of claims involving large numbers of consumers. These provisions typically either limit the number of forced arbitrations that may proceed at once or cap the number of consumers who may be represented in forced arbitration by the same attorneys at any given time.

Just last year, these types of limiting provisions jeopardized the claims of Verizon customers,[54] individually and as private Attorneys general,

[54] *MacClelland et al. v. Cellco P'ship et al.*, No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), *appeal filed*, No. 22-16020 (9th Cir. July 13, 2022). See also Brief for American Association for Justice as Amicus Curiae in Support of Plaintiffs-

when they were forced to choose between denial of their counsel of choice or delay of their ability to file forced arbitration proceedings, with no tolling of the statute of limitations. Verizon had falsely advertised its "Administrative Charge" for wireless services, misrepresenting it as a tax or government regulation, when it was simply another Verizon fee. The court denied Verizon's motion to compel arbitration, citing in part that limiting arbitrations to 10 at a time is substantively unconscionable, as it would have forced consumers to wait for months before being able to proceed with their counsel of choice, and could even have the effect of barring the claims based on statutes of limitations.

That such provisions may be subject to successful court challenge does not make it unnecessary to include them in the registry. Consumer advocates report that these types of "batch" or "mass" arbitration provisions are proliferating, and while the full extent of their adoption is unknown, the number of challenges may be far fewer than the number of instances in which the provisions have been used and have deterred or prevented the assertion of claims.

It is therefore critical that the CFPB registry shed light on the use of such provisions by including not only terms in consumer contracts that waive the right to participate in a class or collective action waiver, but also those that limit any aspect of a group claim, including limitations on who may serve as counsel, and on the order or timing of claims filed on behalf of large numbers of consumers.

Proposed § 1092.301(d)(4) should not exclude "loser pay" provisions.

"Loser pay" provisions mandate that the losing side in any case must pay the legal costs of the prevailing side. These provisions seriously undermine a consumer's access to justice, chilling even the strongest consumer complaints and stopping consumers from trying to enforce their rights. Their potential to negatively impact valid consumer complaints for repeat misconduct should be monitored and included in

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Appellees, *MacClelland, et al. v. Cellco P'ship, et al.*, No. 22-16020 (9th Cir. Mar. 24, 2023).

the proposed database. The proposed rule notes that these types of provisions are infrequently used,[55] so including them in a database should not impose much of a reporting burden for nonbank entities.

Regulators and the public would greatly benefit from being able to see when “loser pay” provisions are present and track how they may be misused. Even where a “loser pay” provision may be illegal under state and federal laws, there have been instances where it took additional litigation, time, and money before they were deemed unenforceable. Mr. Benzor Shem Vidal, an immigrant nurse from the Philippines, was hit by such a provision when he had to quit his job under dangerous working conditions that threatened his nursing license. The staffing agency that employed Mr. Vidal characterized the resignation as a “breach of contract,” and sent him a letter threatening legal action, including seeking tens of thousands of dollars in attorney’s fees and forced arbitration costs if he did not return to work. The American Arbitration Association barreled forward with this forced arbitration, despite requests from Mr. Vidal’s attorney, followed by a request from the New York Attorney General’s office. It took a declaratory judgment action and a court order before the forced arbitration requirement, which included the illegal “loser pay” provision, was deemed unenforceable.

While Mr. Vidal’s case arose out of an employment matter, the same unequal power dynamic can be seen in consumer contracts, where harmed consumers must take on businesses with massive legal resources and the ability to drag out a case in order to wear them down into accepting lower settlement offers. With a “loser pay” provision, few consumers have the ability to risk their retirement savings, their children’s college tuition, and even their homes in the event of a loss. “Loser pay” provisions enable experienced corporate litigants with more resources and expert legal talent into bullying harmed consumers into unfair settlements due to the risk that they could lose their cases. And since many if not most consumer financial services contracts include forced arbitration provisions that are already biased against consumers, even meritorious claims can easily result in a consumer loss.

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[55] *See* 88 Fed. Reg. 6906, 6934 (Feb. 1, 2023).

While infrequently used, "loser pay" provisions should be included in the proposed registry as each instance of this provision results in a high risk to consumers, a chilling effect for meritorious claims, and a potential for great consumer harm.

<u>Proposed § 1092.301(h) should eliminate the exception for States (as defined by 12 U.S.C. § 5481) because this definition is overly broad.</u>

The proposed rule will apply to "supervised registrants." But the definition of that term excludes States as defined in 12 U.S.C. § 5481.[56] This exclusion will undermine the purpose of the rule because some of the entities within that definition, persons affiliated in various ways with them (only some of whom may fall within the proposed exception for "state affiliated businesses"), and others claiming to act in their name use the same terms and conditions that the Bureau has identified as limiting consumers' rights.[57]

Title 12, § 5481 defines a "State" to include "any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe . . . ." The Bureau proposes excluding them "[f]or parity, comity, and . . . [because they] generally are immune from private suit already."[58] But this assumption is overly broad and disregards the Bureau's stated goals of promoting "[f]air, transparent, and competitive markets"[59] and "facilitat[ing] public awareness[.]"[60]

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[56] Proposed 12 C.F.R. § 1092.301(h).

[57] *See generally* 88 Fed. Reg. 6906, 6920 (Feb. 1, 2023).

[58] *Id.* at 6937.

[59] *Id.* at 6907.

[60] *Id.* at 6906.

It is overly broad because there are, in fact, situations in which a State[61] may be subject to private suit. States may waive their immunity by contract, consent, or law.[62] So it is incorrect to assume "that the law itself already limits such suits against these persons."[63] In response to the Bureau's query, we are unaware of any data on how often States waive sovereign immunity in the provision of supervised consumer financial products or services.[64] And we believe it would be too burdensome and confusing for the exception to hinge on whether a State has waived its immunity. Such waivers are not always explicit, so making the waiver dependent on a determination of whether the State has waived immunity would be a difficult and unreliable process.

In response to the Bureau's related question, we strongly believe that the exemption in § 1092.301(h)(2) should *not* apply when a State waives sovereign immunity. An official waiver of sovereign immunity indicates that the State wishes to be treated on a level playing field with private entities and respects the rights of private citizens. So, it would be incongruous for the proposed rule to ignore that expression of intent. But

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[61] In this discussion, we use "State" as defined by the proposed rule (i.e., as defined by 12 U.S.C. § 5481), and, like the rule, we do not distinguish between Tribes and States.

[62] *See, e.g.*, GA. CONST. art. I, § 2, ¶ IX(c) ("state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract"). *See also* 27 N.C. Index 4th State § 31 ("Whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the state implicitly consents to be sued for damages on the contract in the event it breaches the contract."); Actions against the State of Arkansas, 1 Arkansas Law Of Damages § 22:1 ("When the state becomes a suitor in its own courts, she is treated like any other claimant. The state cannot then object if a counterclaim is filed against it."). *See generally*, 81A C.J.S. States § 554 (discussing state liability for breach of contract; summarizing as "Generally, when a state makes a contract, it is liable for a breach of its agreement, and the doctrine of sovereign immunity does not apply or is waived."); Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. Rev. 273 (2002). Immunity may also be abrogated by a clear federal law. *See* 88 Fed. Reg. 6906, 6938 n.293 (Feb. 1, 2023) (citing *Michigan* v. *Bay Mills Indian Cmty.,* 572 U.S. 782, 790 (2014).

[63] 88 Fed. Reg. 6906, 6938 (Feb. 1, 2023).

[64] *Id.*

limiting the exception to areas where there is a waiver would be impractical.

In addition, even if a State is immune from private suit, consumers may effectively be able to sue the State by invoking the *Ex parte Young*[65] doctrine or its equivalent, which permits suit against an officer of the State for prospective injunctive relief. It is important to remember that sovereign immunity is immunity from suit, not an exemption from the law. Thus, the *Ex parte Young* doctrine provides an important mechanism to ensure enforcement of the law without subjecting States to damages or direct suit.

Including State contracts that force consumers to waive legal rights in the registry will facilitate transparency and public awareness—two goals that become even more important when public pressure and private competition are the only effective avenues left for encouraging States to eliminate harmful contract clauses.[66] Like the federal Freedom of Information Act and many state equivalents, the proposed registry will give consumers access to information that they would otherwise be unlikely to discover. Shining daylight on the fine print in all contracts—whether offered by a State with immunity or a private entity—will benefit the public by making markets more transparent and facilitating public debate. Parity and comity do not justify a pass when States delve into consumer financial services normally provided by non-state actors.

It is important to recognize that States do offer financial products and services within the scope of the proposed rule. These include student loans, money transfers, and small-dollar lending.

- ***Student Loans:*** According to the National Conference of State Legislatures, as of 2017, 12 States operated student loan

[65] 209 U.S. 123 (1908). *See also Bay Mills Indian Cmty.*, 572 U.S. at 796; *Gingras v. Think Fin., Inc.*, 922 F.3d 112 (2d Cir. 2019).

[66] We also question the Bureau's premise that it and other federal regulators will be adequately informed of State activities through other avenues of collaboration. 88 Fed. Reg. 6906, 6937 (Feb. 1, 2023).

refinancing programs.[67] According to the Education Data Initiative, that number increased to 15 in 2022.[68] In addition, there are quasi-governmental or government-created entities, such as the Connecticut Higher Education Supplemental Loan Authority[69] and the Massachusetts Educational Financing Authority,[70] that offer financial services that are no different from those offered by private lenders.

- ***Money Transfers*:** According to a 2021 study by the Prison Policy Initiative, at least four States operate their own electronic money transfer systems for people to send money to prisoners.[71] At least two of these States charge fees for the service.[72]

- ***Small-dollar Lending:*** States have also been active in small-dollar lending. According to research by Public Justice, in 2017 there were at least 100 websites claiming affiliation with Native American nations.[73] This area of State-affiliated financial services

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67 Dustin Weeden, *Refinancing Student Loans*, 25(8) NCSL Legis Brief (Feb. 2017), https://web.archive.org/web/20220420134052/https://www.ncsl.org/research/education/refinancing-student-loans.aspx.

68 MELANIE HANSON, EDUC. DATA INITIATIVE, STATE-AFFILIATED STUDENT LOAN REFINANCING (Aug. 8, 2022), https://educationdata.org/state-student-loan-refinancing.

69 THE CONNECTICUT HIGHER EDUCATION SUPPLEMENTAL LOAN AUTHORITY, https://www.chesla.org/ (last visited Mar. 31, 2023) (stating "The Connecticut Higher Education Supplemental Loan Authority (CHESLA) is a quasi-public state authority created to help students and their families finance the cost of higher education.").

70 Massachusetts Educational Financing Authority, https://www.mefa.org/about (last visited Mar. 31, 2023) (stating "The Massachusetts state legislature created MEFA in 1982 . . . . from the start, our mandate has been to offer low-cost college financing to families of aspiring college students.").

71 Stephen Raher and Tiana Herring, Prison Policy Initiative, Show me the money: Tracking the companies that have a lock on sending funds to incarcerated (Nov. 9, 2021), *available at* https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/.

72 One state (Montana) does not charge, and no data was available for the other state, Texas.

73 KYRA TAYLOR, LESLIE BAILEY, & VICTORIA W. NI, PUB. JUST. FOUND. STRETCHING THE ENVELOPE OF TRIBAL SOVEREIGN IMMUNITY? , (2017),

is particularly important to cover for two reasons. One is that so many of the affected consumers are not citizens of the jurisdiction claiming oversight over the lender and, for that reason, have no recourse to the ballot box or other source of democratic reform. The other is that there is such strong evidence of consumer harm and false claims of immunity. The CFPB recently recovered significant damages in one such case.[74] The Public Justice report documents strong evidence suggesting that many of the lenders involved were not as closely connected to a Native nation as they claimed. And the Bureau acknowledges "courts have found that immunities are not available to some providers of consumer financial products or services subject to the Bureau's supervisory authority, notwithstanding their claims to have a nexus with a State or a Tribe."[75]

Determining whether a lender is in fact a State and is entitled to immunity is a complex task, and allowing lenders to inappropriately avoid the registry by falsely claiming they are the equivalent of a State would facilitate evasions.[76] The Bureau suggests that entities could voluntarily register when there is uncertainty over whether it is a State.[77] But that would not serve the purpose of the registry because entities with anti-consumer contract terms are unlikely to voluntarily do something that could bring them to a regulator's attention, particularly entities that falsely assert sovereign immunity.

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https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

[74] *See* Minute Order, *CFPB v. CashCall, Inc.*, No. CV 15-7522-JFW-RAO (C.D. Cal. Feb. 10, 2023).

[75] 88 Fed. Reg. 6906, 6938 (Feb. 1, 2023) (footnote omitted), https://www.federalregister.gov/d/2023-00704/p-511.

[76] *See* Brief for Public Citizen and National Consumer Law Center as Amicus Curiae Supporting Respondent, *Lac du Flambeau Band of Lake Superior Chippewa Indians, et. al. v. Coughlin*, No. 22-227 (1st Cir. March 30, 2023), https://www.nclc.org/resources/amicus-brief-from-public-citizen-nclc-and-naca-in-support-of-respondent-in-lac-du-flambeau-v-coughlin-supreme-court-case/.

[77] 88 Fed. Reg. 6906, 6938. (footnote omitted).

As the Bureau notes in footnote 290, entities that are not themselves Tribes are eligible for sovereign immunity conferred upon a Native nation under the "arm-of-the-Tribe" doctrine. An entity that is an arm-of-the-Tribe is legally treated as the Tribe for purposes of sovereign immunity. As explained in the Public Justice report, there is widespread evidence[78] that payday lenders are falsely claiming to be an arm of a Native nation. As a result, the State exemption is likely to be widely abused. While the Bureau has not proposed to exempt all State or Native nation-affiliated businesses,[79] assessing which affiliated businesses are exempt and which are not would be far too complex and unenforceable.

The Bureau states that entities that inappropriately claimed an exemption could face private enforcement.[80] But the very provisions that this registry seeks to address, such as forced arbitration clauses, would prevent such enforcement.

In response to the Bureau's question about whether States "should be required to register covered terms or conditions that are not expressly framed as limitations on private suit[,]"[81] we firmly believe they should. As the Bureau recognizes, consumers can be harmed in more ways than just losing their right to sue a bad actor. Legal protections have value even when they are not privately enforceable, because they act as a restraint on government misconduct. Non-disparagement clauses, for example, interfere with competition because they make it harder for consumers to seek out the best service provider. But when imposed by a State actor, they are particularly dangerous because they interfere with the democratic process (and may even be unconstitutional).

The Bureau also asks whether the proposed State exemption should be limited in some way. We believe that any such limitations would be hard to define without inviting evasions from affected actors or additional

[78] *See* Brief for Public Citizen and National Consumer Law Center as Amicus Curiae, supra note 76.

[79] 88 Fed. Reg. 6906, 6938 (Feb. 1, 2023) (footnote omitted).

[80] *Id.*

[81] *Id.* at 6938.

vagueness that may be easily exploited. For example, the exemption could be limited to products or services for which the State holds the predominant economic interest, including both risk and reward. But such an exemption would not draw a bright line and would be open to case-by-case debate.

Eliminating the exemption is far preferable. We expect that it would be exceedingly rare for States to have to register. Very few States offer financial services and even fewer do so through contracts that waive consumers' rights. But where they do employ such waivers, "comity" is not a sufficient reason for hiding them. And including States is important to prevent evasions and promote transparency.

Proposed §1092.301(i)(2) and §1092.302(a)(4) should be expanded to include the initiation, and not just the final ruling, of judicial or arbitral proceedings in which a party is challenging the enforceability of covered terms and conditions.

Just as the public and regulators can glean helpful insights and possible patterns of wrongdoing through complaints and pleadings visible in public court dockets, being able to see when judicial and arbitral proceedings involving the enforcement of covered terms and conditions are initiated could reveal helpful patterns and practices, as well as lessen the likelihood of data being manipulated when only decisions are reported. This additional data point should not be burdensome, and, in fact, may be helpful administratively for covered registrants as a tool for tracking cases for which they will ultimately be providing the final decisions. It is also the type of information that is available to the public in court case filings.

For example, what if a covered nonbank entity has many ongoing, unresolved cases pending in forced arbitration? If no decisions have been issued, they would be missed by a CFPB registry that only reports decisions about the enforceability of contract terms. Yet having numerous pending open cases filed by consumers against nonbank entities could mean that entity is doing something that is generating unnecessary risk – the very conduct that should be highlighted and made transparent to the Bureau and the public.

Similarly, many arbitrations, like many lawsuits, are settled without a decision. Indeed, companies are especially likely to settle when the evidence against them is strong.

Capturing only decisions, rather than when a proceeding has been initiated, further allows a possible time lag between harmful conduct and when that pattern of wrongdoing is noticed.

Being able to publicly and openly hold a company accountable in court for fraudulent and illegal activity that harms consumers is one of the quickest and easiest ways to incentivize companies to address corporate misconduct. This is particularly true for lower-income populations, who are more vulnerable to being exploited by financial institutions when their cases are pushed into forced arbitration with misconduct being conveniently hidden from the public eye. And while enforcement actions by agencies can helpfully alert the public, and thus incentivize companies to fix their behavior, unfortunately it often takes years for an agency to build a case. Government agencies must use protocols that require secrecy until an enforcement action is ready to be made public.

To maximize transparency and deter misconduct, the proposed CFPB registry should report not just decisions about the enforceability of covered terms and conditions, but when cases challenging covered terms and conditions have been initiated as well.

Perhaps Wells Fargo would not have been able to continue its fraudulent cross-selling practices for as long as it did had the extent of cases filed against the bank in arbitration been made public. Unfortunately, when consumers discovered fake bank accounts were being opened in their name, they had no meaningful legal recourse and were forced into secret arbitrations. That secrecy allowed the wrongdoing to continue unreported until a *Los Angeles Times* investigation finally flagged the significance of the misconduct, enough to garner the interest of the Los Angeles City Attorney's office.[82] A CFPB registry that captures not just

[82] Helaine Olen, *Wells Fargo Must Pay $185 Million After Opening Customer Accounts Without Asking. That's Not Enough*, SLATE (Sept. 8, 2016),

decisions regarding the enforceability of a covered term, but also open cases in forced arbitration, would help the public see when there are lots of complaints against a repeat offender, closer in time to when the misconduct occurs, rather than months or years *after* a case is resolved.

Finally, §1092.302(a)(4) should require covered registrants to cite decisions on covered terms and conditions. If no citation is available, a copy of that decision should be provided and accessible through the registry. These citations are likely already tracked by legal departments, in house counsel, and law firms handling legal matters for covered entities, and would save the Bureau and other regulators time from having to hunt down decisions. As currently proposed, covered entities are only required to report which financial product or service is related to a decision on the enforceability of a term or condition, and whether that term or condition was enforceable. It is entirely plausible that without a citation to that decision, there will not be enough information to actually find the correct citation related to a decision.

Archival Data Must Stay Accessible Pursuant to the Federal Records Act.

Archival data must remain available and accessible in a CFPB registry, as the lack of archival data can hinder the public, including policymakers and researchers, from being able to fully understand the problems (or benefits) of forced arbitration. For example, even though AAA and JAMS have consistently released their data, as required by Maryland and California state statutes, only the most recent 20 quarters of data are reported. Once a quarter disappears, it is gone from the public view forever.

Lack of publicly available archival data was problematic for AAA's pre-2019 data, when AAA had incorrectly reported only cases in forced arbitration that were filed *and* closed within the most recent 20 quarters, completely missing cases in forced arbitration which had taken longer

https://slate.com/business/2016/09/wells-fargo-to-pay-185-million-for-account-opening-scandal-that-s-not-enough.html.

than 20 quarters to resolve.[83] AAA's incomplete reporting, coupled with the lack of archival data to validate its incomplete reporting, resulted in skewed forced arbitration resolution times, shortening them artificially. The CFPB later relied on this inaccurate data to determine resolution times in forced arbitration.

The discrepancies were only noticed after a select group of researchers happened to download each quarter's data as it was released and kept back up files of these data even when AAA had stopped reporting the older data on its website.[84] Instead of resorting to such elaborate measures, making sure the proposed registry includes archival data will help ensure the data's accuracy and completeness, which will in turn help the public and regulators observe long term patterns and trends in forced arbitration proceedings. This is also more in line with the court system, which maintains public dockets for an unlimited amount of time.

Proposed §§1092.301(i)(2) and 1092.302(a)(4) should cover administrative agency decisions.

The potentially wide impact of agency decisions, coupled with the relatively low frequency and low reporting burden of these decisions, makes it important and necessary for any proposed CFPB database to include agency decisions on the enforceability of any provisions, along with court and arbitration decisions. Administrative agencies are sometimes the *only* path forward for legal remedies when consumers unknowingly agree to the very provisions the CFPB registry would highlight. Where consumers might be forced into arbitration, or

[83] Due to the way AAA reported only the latest 20 quarters, cases that happened to be filed and resolved in just the wrong time could have been missed as well. For example, a case filed in the last week of December 2013 and closed on the first day of 2014 would have taken one week, but would have been completely excluded from the database.

[84] The phenomena of the disappearing claims from the AAA database was first observed by researchers at the American Association for Justice in 2019. Shortly after they released their report, AAA appears to have corrected their claims data. *See* AM. ASS'N. FOR JUST., THE TRUTH ABOUT FORCED ARBITRATION: AMERICANS ARE MORE LIKELY TO BE STRUCK BY LIGHTNING THAN WIN IN FORCED ARBITRATION, 20-21 (2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration.

prohibited from grouping smaller dollar claims together, agencies are not subject to these same restrictions and are uniquely situated to address misconduct. The public, as well as regulators, would benefit from being able to see the critical role agencies play as they fill in regulatory and enforcement gaps sometimes not available through private actions.

Agencies have also issued decisions on the enforceability of certain terms and conditions. Since the 1975 passage of the Magnusson-Moss Warranty Act, the FTC has regulated the enforceability of arbitration provisions in consumer warranty agreements.[85] The SEC has also used its authority approving initial-public-offerings filings to regulate aspects of forced arbitration provisions in the securities field. Similarly, the FCC may condition future mergers on whether forced arbitration provisions are imposed upon consumers, given the frequency of these provisions in consumer mobile and internet contracts.[86]

Being able to see agency decisions and statements may help regulators and the public pick up patterns of misconduct, furthering the CFPB's goal to accurately assess risk levels when consumer rights are limited for certain products and services. We urge the CFPB to adopt a forward-looking rule, anticipating possibly growing agency action on the enforceability of these clauses, especially in the current ecosystem of court deference towards enforcing arbitration clauses and the resulting eagerness of companies to use these terms and conditions in consumer contracts to skirt accountability.

<u>The proposed registry is a helpful first step, but ultimately the CFPB must use its statutory authority to curb these harmful terms and conditions.</u>

We commend the CFPB for the Bureau's continued and diligent efforts to ensure transparency and accountability, and for working towards a stronger and fairer marketplace, benefiting both consumers and businesses. Creating a registry that allows regulators, consumers, and

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[85] 15 U.S.C. §§ 2301–2312 (2012).

[86] Daniel Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 1015 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837535.

consumer advocacy organizations to quickly and easily see when harmful terms and conditions are used will go far in shining a light on harmful patterns and practices that generate unnecessary risk for products and services offered by nonbank financial firms.

Over the last two decades, corporations have increasingly used forced arbitration, additional pre-suit requirements, class waivers, and other restrictions on settlement, venue, forum, and liability to avoid accountability for wrongdoing. Consumer contracts are peppered with these terms and conditions, even if there is a possibility that they would not be upheld in court. In the nonbank financial world, disputes are kept out of court through forced arbitration clauses, and consumers who eventually overcome the forced arbitration hurdle may run out of time and money to keep fighting unfair terms and conditions. Because of these slick contract clauses, whether to follow the law is now just another business decision for companies. These terms and conditions result in lower compensation when consumers are harmed, lessen deterrence to misconduct, and ultimately threaten to render underlying consumer protections and laws meaningless.

Clearly, there is evidence that the terms and conditions highlighted by the registry harms consumers. The examples in this comment alone represent tens of thousands of consumers who have lost millions of dollars when they were hurt by various nonbank and financial institutions regulated by the CFPB. While we applaud this important first step in setting up a registry for nonbank entities, the CFPB must continue to use its statutory authority not just to highlight terms and conditions that limit consumer rights, but also to protect consumers from these terms and conditions through continued rulemaking, particularly in the area of forced arbitration.[87] Just as over 100 consumer, civil rights,

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[87] The previous 2017 forced arbitration rule was overturned under the Congressional Review Act ("CRA") by the very narrowest of margins, but a CRA repeal resolution does not prevent the CFPB from issuing another rule concerning the same subject matter, as the sole limitation it imposes on subsequent agency action is simply not to issue another rule that is "substantially the same" as the one Congress disapproved. Here, the proposed registry rule is far from being substantially the same as the previous rule limiting class action waivers, and a forced arbitration rulemaking

and labor groups emphasized last year in a letter to the CFPB,[88] we urge the Bureau to act now to rein in forced arbitration in financial services.

We look forward to supporting the Bureau's efforts. Please do not hesitate to reach out to Christine Zinner at christine.zinner@justice.org, with any additional questions or concerns.

Sincerely,

American Association for Justice
Americans for Financial Reform Education Fund
Better Markets
Consumer Action
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center
Public Citizen
Public Justice
US PIRG

would not be barred so long as it is not "to a great or significant extent" "identical" in substance as the prior 2017 rule.

[88] Press Release, National Consumer Law Center, More than 100 Consumer, Labor and Civil Rights Groups Call on CFPB to Take Action on Banking Fraud and Forced Arbitration (Sept. 14, 2022), https://www.nclc.org/more-than-100-consumer-labor-and-civil-rights-groups-call-on-cfpb-to-take-action-on-banking-fraud-and-forced-arbitration/.