

April 3, 2023

The Hon. Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

RE: Proposed Rule on Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, Docket No. CFPB-2023-0002

Dear Director Chopra:

The American Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the proposed rule to establish a registry of certain contract terms (including arbitration provisions) in contracts for consumer products and services offered by supervised nonbank entities (the 2023 Rule).²

By proposing a rule relating to arbitration and similar provisions in consumer finance contracts, the Consumer Financial Protection Bureau (CFPB or Bureau) has unfortunately overlooked several impediments to this rulemaking.

The 2023 Rule is fatally flawed for the following reasons:

- The 2023 Rule is an unlawful attempt to issue a rule on arbitration following Congress' revocation of the CFPB's 2017 Arbitration Rule;
- The 2023 Rule is based on an incorrect understanding of Federal law favoring arbitration agreements;
- The 2023 Rule is an obvious precursor to attempts by the CFPB to regulate arbitration agreements, which is contrary to Federal law and policy and beyond the CFPB's authority; and
- The 2023 Rule overlooks that a registry of contract terms relating to arbitration already exists.

1. The CFPB Lacks Authority to Promulgate a Rule on Arbitration After the Congressional Disapproval of the 2017 Arbitration Rule

On July 19, 2017, the CFPB issued a final rule regarding arbitration agreements in consumer finance contracts.³ This rule was disapproved by operation of the Congressional Review Act on November 1, 2017.⁴ This action had the immediate effect of invalidating the 2017 arbitration rule and prohibiting the

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² 88 Fed. Reg. 6906.

³ 82 Fed. Reg. 333210.

⁴ Public Law 115-74, 131 Stat. 1243.

CFPB from reissuing a rule “in substantially the same form” or that is “substantially the same” unless new authorizing legislation is adopted by Congress.⁵

On February 1, 2023, the CFPB issued a new arbitration rule.⁶ The 2023 Rule is clearly an arbitration rule. In defining the coverage of the contract terms sought under the proposal, the 2023 Rule provides:

(d) Covered limitation on consumer legal protections means any covered term or condition in a covered form contract:

...

(8) Requiring that a consumer bring any type of legal action in arbitration.⁷

While the drafters took care to avoid issuing a rule facially identical to the disapproved 2017 rule, the 2023 effort cannot proceed in the absence of new legislation by Congress. Since such legislation does not exist, the CFPB must withdraw this rule.

The purposes of the 2017 rule were:

the furtherance of the public interest and the protection of consumers regarding the use of agreements for consumer financial products and services providing for arbitration of any future dispute, and also to monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.⁸

In the 2023 Rule, the CFPB took pains to avoid stating a substantive purpose for the rule. Rather it supplied something of a tautology. The 2023 Rule provides:

The purpose of this part is to prescribe rules governing the registration of nonbanks, and the collection and submission of registration information by such persons, and for public release of the collected information as appropriate.

(1) Subpart A contains general provisions and definitions used in this part.

(2) Subpart B is reserved.

(3) Subpart C sets forth requirements regarding the registration of supervised nonbanks and collection of information regarding their use of form contracts to impose certain terms and conditions that seek to waive or limit consumer rights or other applicable legal protections.⁹

In other words, the Bureau has declined to articulate the purpose for the 2023 rule in terms of policy or desired outcome, and instead is stating that the purpose of the 2023 rule is to make a rule that does the things the rule proposes. Fortunately, the rulemaking provides a more thorough account of the Bureau’s purposes in crafting this rule. The Bureau states that this rule is needed:

⁵ 5 U.S.C. § 801(b)(2).

⁶ 88 Fed. Reg. 6906.

⁷ 88 Fed. Reg. 6966.

⁸ 82 Fed. Reg. 33428.

⁹ 88 Fed. Reg. 6965.

to monitor risks to consumers from the use of covered terms or conditions in form contracts in today's marketplace and to inform its various functions, including supervision, enforcement, consumer education, and rulemaking. Most immediately, the information collected by the registry would facilitate the Bureau's prioritization and implementation of examination work in its statutorily-mandated risk-based nonbank supervision program.¹⁰

The 2017 rule was clearly created to monitor for risks to consumers relating to arbitration provisions, and the 2023 rule is created to monitor risks to consumers relating to contract clauses including arbitration provisions. Due to the substantial similarity of the two rules and the operation of the Congressional Review Act, the 2023 rule is invalid.

2. The 2023 Rule is Based on Flawed Interpretations of State and Tribal Laws

The 2023 rulemaking recounts a litany of state and tribal laws that “prohibit or restrict contractual waivers of or certain limits on enforcement and exercise of important consumer legal protections.”¹¹ The rulemaking further addresses how the doctrine of unconscionability operates to limit arbitration and similar provisions in consumer contracts.¹² Presumably, the purpose of this recitation is to justify the Bureau's involvement in regulating arbitration provisions and similar contractual terms.

In addressing the relationship between state law and arbitration provisions, the Bureau overlooks a ruling by the U.S. Supreme Court. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court ruled that the Federal Arbitration Act (FAA) preempts a state law declaring collective arbitration waivers as unconscionable.¹³ *Concepcion* clarified that a state law standing “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” is pre-empted by the FAA.

The various state and tribal laws that purport to disfavor arbitration provisions in contracts are preempted by the FAA as articulated in *Concepcion*. For this reason, the CFPB's reliance on these is improper and ineffective.

3. The CFPB Plans to Collect Arbitration and Similar Contract Terms in an Impermissible Attempt to Regulate Consumer Contract Provisions

The CFPB obviously seeks to collect contract terms on arbitration and similar provisions as the first part of a plan to pressure covered institutions to stop offering such contract terms to consumers. Despite that these terms are lawful contractual terms that are beneficial for most consumers and consumers should have the right to determine their own contract provisions, for the following reasons, the CFPB lacks the authority to regulate such contract terms.

- a. Under the 10th Amendment, the CFPB Lacks Authority to Interfere with Lawful Contracts

¹⁰ 88 Fed. Reg. 6907.

¹¹ Id. at 6912.

¹² Id. at 6913.

¹³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

The 10th Amendment to the U.S. Constitution re-states the principle that the Federal Government only exercises powers that are delegated to it by the States.¹⁴ In proposing the 2023 Rule, the CFPB is taking the initial steps to eventually regulate lawful terms of consumer financial product and service contracts. There is no grant of authority to the Federal Government to invalidate lawful contract terms in contracts that are based on state laws.

b. Arbitration Provisions are Favored Under Federal Law

In 1925, Congress adopted the Federal Arbitration Act (FAA). The principal purpose of this law is “to ensure that private arbitration agreements are enforced according to their terms.”¹⁵ Courts have interpreted the FAA as “embodying a national policy favoring arbitration” and a “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”¹⁶ Moreover, there is a long history of precedent where Federal Courts consistently upheld the validity of arbitration agreements as a means of alternative dispute resolution.

When Congress established the CFPB, it provided limited authority for the Bureau to propose regulations to “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties....”¹⁷ The CFPB acted under this authority when it proposed the 2017 arbitration rule, but that rule was disapproved by operation of the Congressional Review Act. As a result of this disapproval, the previously granted authority to regulate arbitration agreements is dormant unless and until Congress passes legislation to revive it.

Without a specific grant of authority to the CFPB authorizing it to regulate arbitration agreements, the CFPB has set itself on a collision course with the FAA. The CFPB cannot be allowed to pursue a policy hostile toward consumer contract provisions that are favored under longstanding federal law and upheld by the Supreme Court.

c. Certain Vehicle Finance Contracts Between a Dealer and a Consumer are Beyond the Reach of the CFPB

A large proportion of vehicle finance and lease contracts are bilateral contracts between a consumer and a dealer. In a retail installment sales contract, the dealer is the original creditor on the contract, and the contract is subsequently assigned to a finance company after consummation. Similarly in a vehicle lease contract, the dealer is the original lessor, and the contract is assigned to a leasing company after consummation.

¹⁴ See *New York v. U.S.*, 112 S. Ct. 2408, 2418 (1992).

¹⁵ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

¹⁶ *Id.* at 346.

¹⁷ 12 U.S.C. §5518(b).

The statute that established the CFPB provides that the CFPB “may not exercise any rulemaking, supervisory, enforcement or any other authority... over a motor vehicle dealer....”¹⁸ With regard to consumer contracts between a consumer and a dealer, the CFPB is specifically denied authority to issue this rule or take any other steps the Bureau plans to take in the future.

d. Arbitration and Similar Contract Provisions Must be Enforced under the FTC Holder Rule

The FTC Holder Rule provides that a holder of a consumer credit contract is “subject to all claims and defenses which the debtor could assert against the seller” of goods financed by the contract.¹⁹

An arbitration or other similar provision in a consumer credit contract provides the parties with rights regarding the resolution of disputes. To the extent that the CFPB or any other body were to limit the operation of an arbitration provision or similar provision of a contract subject to the Holder Rule, that would impermissibly prevent a party to the contract from exercising the claims allowed under the contract or in the alternative attempt to control an auto dealer’s right to contract with specific terms. For this reason, any steps to limit the operation of arbitration or similar clauses is impermissible in contracts to which the Holder Rule applies. Moreover, such an attempt to limit the exercise of contractual rights impinge on the FTC’s claimed authority to issue the FTC Holder Rule as well as the various states’ authority to issue FTC Holder Rule analogs.

4. A Registry of Arbitration Clauses Exists

The 2023 Rule is designed to collect arbitration and similar consumer finance clauses. AFSA respectfully reminds the CFPB that a registry of consumer arbitration clauses has been created and is maintained by the American Arbitration Association®.

Conclusion

AFSA is eager to assist policymakers to enhance consumer protections in a manner that promotes stability for all participants in consumer finance markets. With that in mind, AFSA also is obliged to point out when a regulatory or other proposal is beyond the authority of the proposing agency, when existing laws are contrary to the goals of a proposal, or the proposal causes other harms. For the reasons cited in this letter, the 2023 Rule cannot proceed as proposed.

¹⁸ 12 U.S.C. §5519.

¹⁹ 16 C.F.R. §433.2.

AFSA appreciates the opportunity to share these considerations with you and looks forward to providing feedback on future efforts undertaken by the CFPB. Please contact Philip Bohi at pbohi@afsamail.org or 202-466-8605 with any questions.

Sincerely,

A handwritten signature in black ink that reads "Philip P. Bohi". The signature is written in a cursive, slightly slanted style.

Philip Bohi
Vice President Compliance Education
American Financial Services Association