April 3, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Re: Proposed Rule, Consumer Financial Protection Bureau; Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections (88 Fed. Reg. 6,906-6,969, February 1, 2022) (Docket No. CFPB-2023-0002)

Dear Director Chopra:

Our groups oppose the recent proposal by the Consumer Financial Protection Bureau to create a public registry of companies that use certain terms and conditions—including, most significantly, arbitration agreements—in their contracts with consumers. The core of this Proposed Rule is a wholly impermissible and unjustified attack on arbitration agreements that violates the Dodd-Frank Act and the Congressional Review Act (CRA), as well as the protections for arbitration agreements that Congress put in place when it enacted the Federal Arbitration Act (FAA).

In reliance on the FAA's protections, companies, including in the context of financial products or services, have for many years resolved consumer disputes by arbitration rather than by costly and burdensome litigation in our overcrowded court system. These arbitration provisions reduce transaction costs and enable fair, speedy, and efficient dispute resolution, thereby providing significant advantages to consumers, businesses, and the public at large. Yet the Proposed Rule would brand companies as "risky" to consumers merely for exercising their federally protected right to use arbitration, or otherwise engaging in fully lawful and appropriate conduct—making those companies a special focus of the Bureau's supervisory and enforcement activities just because they use arbitration to resolve consumer disputes. The Bureau's proposal offers no basis for that conclusion, and there is none.

We write to highlight six overarching reasons why the Bureau should not promulgate the Proposed Rule.

First, the Bureau lacks the legal authority to impose these burdens on the use of arbitration agreements.

The proposal is an unlawful attempt to circumvent the limits on the Bureau's authority with respect to arbitration agreements—limits imposed by Section 1028 of the Dodd-Frank Act, 12 U.S.C. § 5518, and Congress's 2017 Congressional Review Act ("CRA") resolution disapproving the Bureau's prior attempt to limit the use of arbitration. In particular, by specifically addressing in Section 1028 the Bureau's authority to regulate arbitration, and imposing express limits on that authority, Congress made clear that the Bureau's only means of addressing arbitration is a regulation issued pursuant to that provision. The Proposed Rule—without following the process Section 1028 requires or invoking Section 1028 at all—would impose significant burdens on the use of arbitration through its disclosure requirements, its identification of arbitration as a means of dispute resolution that carries heightened risks for consumers, and its targeting of companies that use arbitration with heightened supervisory and enforcement activity.

The Proposed Rule also runs afoul of the further limits imposed on its authority as a result of Congress's action under the Congressional Review Act, which bars an agency from promulgating a rule that is "substantially the same" as a rule invalidated under the Act.[1] The 2017 rule that Congress invalidated would have required supervised entities to disclose their arbitration agreements to the Bureau; the Proposed Rule is substantially similar because it requires the same thing. In addition, the Federal Arbitration Act itself forecloses the Bureau's impermissibly hostile view of arbitration that animates the Proposed Rule, because it bars a federal agency from treating arbitration agreements differently from the way the agency treats contract provisions generally.

Second, the Proposed Rule's targeting of arbitration is arbitrary, capricious, and irrational, because it is based on the false premises that arbitration is risky for consumers and the use of arbitration to resolve disputes makes companies more likely to violate federal consumer protection laws.

In fact, the best empirical evidence shows that consumer claimants in arbitration fare better than or at least as well as consumer claimants in court.[2] In addition, most claims asserted by consumers are small and individualized; the Bureau ignores that for those consumers, arbitration provides the only feasible mechanism for redressing their claims.

Moreover, a new study evaluating the Bureau's own data and assumptions shows that there is *no connection* between the use of arbitration and risk to consumers: use of arbitration is not correlated with either increased consumer complaints or heightened enforcement activity by the Bureau.[3]

Third, the Bureau has offered no justification for regulating the non-arbitration contractual terms that it is targeting.

The Bureau acknowledges that its only data supporting the Proposed Rule concerns arbitration agreements. It accordingly has failed to provide any justification for imposing regulatory burdens on businesses that include other terms and conditions in their consumer

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1 *See* 5 U.S.C. § 801(b)(2).

2 *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf; *see also*, *e.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

3 *See* Nam D. Pham & Mary Donovan, *A Critique of the CFPB Proposed Rule: Companies That Use Arbitration Agreements Do Not Pose Any Greater Risks To Consumers Than Those That Do Not* (Mar. 2023), https://instituteforlegalreform.com/cfpb-report-final-march-29-2023/.

contracts—particularly the other lawful terms that the Bureau nonetheless seeks to penalize and publicly disapprove of companies for using.

Fourth, the Bureau's cost-benefit analysis is woefully inadequate.

The Bureau simply ignores the most serious costs associated with the Proposed Rule: the potential reputational costs and increased risks of being subject to enforcement action, supervisory burdens, and private litigation after being branded a "risky" company by the Bureau. These are meaningful costs for any business that might find itself on the public registry—potentially just because it uses lawful contract terms approved of by courts and Congress.

On the other side of the ledger, the Bureau has not identified *any* benefits to consumers from the Proposed Rule. The Bureau suggests that companies will cease using contract terms prohibited by law, but companies already have a strong incentive not to incorporate illegal terms into their agreements. In addition, the Bureau's principal focus is a contractual provision that is not prohibited by law: arbitration agreements. Yet arbitration agreements *benefit* consumers and businesses alike. The Bureau further admits it "does not have systematic data" about the use of any non-arbitration terms, "the relationship between these covered terms and conditions and risky or potentially illegal activity," or any "resulting harms to consumers."

The Bureau has also shirked its obligations under the Small Business Regulatory Enforcement Fairness Act. The Bureau's assertion that "this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities" ignores the significant reputational harms and risks of enforcement actions, supervisory burdens, and private litigation just discussed. And the Proposed Rule's *de minimis* exception for businesses that enter into fewer than 1000 contracts per year with covered terms fails to protect small businesses from the burdens that the Proposed Rule will impose, because it is likely that even small businesses who enter into contracts with their consumers will do so at least 1000 times per year—an average of less than three times a day.

Fifth, the Bureau should not promulgate this burdensome Proposed Rule before the Supreme Court decides a serious question about the constitutionality of the Bureau's structure.

The Fifth Circuit's recent *Community Financial* decision[4] holding the Bureau's funding structure unconstitutional will be considered by the Supreme Court in the Court's October 2023 Term. Should the Supreme Court agree with the Fifth Circuit, this constitutional infirmity in the Bureau's structure will provide an additional reason why the Bureau lacks the lawful authority to promulgate the Proposed Rule, even setting aside the Rule's many critical flaws.

Sixth, if the Bureau nonetheless moves forward with the Proposed Rule, it should narrow the Rule significantly. Because Congress did not authorize the Bureau to make new contract law or supplant the judgment of courts and legislatures, any rule should be limited to contract terms on which there is overwhelming consensus of their unlawfulness.

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[4] *Community Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).

Next, any rule should apply only to contracts between supervised nonbanks and their customers—and not to terms and conditions between third parties and their customers that supervised nonbanks happen to invoke. As the Bureau acknowledges, many of these third parties are not "subject to the authority of the Bureau" at all. The Bureau may not exceed the limits on its supervisory authority imposed by Congress by tagging and publicly disapproving of businesses solely for having some association with the supervised nonbanks that the Bureau is purporting to regulate.

Finally, the information collected by the Bureau should not be made public and should not name specific companies. The registry will not be a useful tool for consumers, but will instead mislead consumers based on the Bureau's biased and counterfactual view of the impact on consumers of the use of certain contract terms—most notably, arbitration agreements. And the Bureau's proposal to publicly name individual companies and disapprove of those companies as "risky" has no connection to the market monitoring and supervisory powers that the Bureau has offered to justify the Proposed Rule.

In sum, the Bureau should withdraw the Proposed Rule. It would harm businesses without any benefit to consumers. And, if promulgated, it would violate the procedural and substantive limits on the Bureau's authority imposed by the Dodd-Frank Act, the Congressional Review Act, the Federal Arbitration Act, and the Administrative Procedure Act. If the Bureau nonetheless does go forward with the Proposed Rule, the Rule should be significantly narrowed.

Sincerely,

ACA International
American Financial Services Association
American Transaction Processors Coalition
Credit Union National Association
Electronic Transactions Association
Financial Technology Association
National Association of Federally-Insured Credit Unions
National Association of Mutual Insurance Companies
Real Estate Services Providers Council, Inc.
Small Business & Entrepreneurship Council
U.S. Chamber of Commerce