

April 1, 2025

The Honorable Russell Vought
Acting Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Comment on Proposed Rule on Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA) (Docket No. CFPB–2025–0002)

Dear Acting Director Vought,

The American Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the Consumer Financial Protection Bureau’s (Bureau) proposed rule to create Regulation AA (the Rule). While AFSA understands the Rule may have been motivated by a desire to enhance consumer protection under the former administration, the Bureau lacks the authority to implement the Rule and should rescind it as set forth below.

The Rule proposes a limitation on waivers of substantive federal or state law. The Rule states:

§1027.301 Prohibition.

(a) It shall be unlawful for a covered person to include in an agreement with a consumer for a consumer financial product or service any of the following terms or conditions:

(1) Waivers of law. Any term or condition that disclaims or waives, or purports to disclaim or waive, any substantive State or Federal law designed to protect or benefit consumers, or their remedies, unless an applicable statute explicitly deems it waivable. Waivers of law include, but are not limited to:

- (i) Waivers of remedies to consumers for violations of State or Federal laws; and
- (ii) Waivers of a cause of action to enforce State or Federal laws.²

This provision is problematic in a few areas. First, this applies to waivers “include[d] in an agreement with a consumer for a consumer financial product or service.” It is unclear whether this refers to originating agreements for consumer financial products or services only, or whether this

¹ Founded in 1916, the American Financial Services Association (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 90 Fed. Reg. 3596.

is intended to prohibit waivers of law for the entire lifecycle of the consumer financial product or service. Over the course of a contract, parties may have strong incentive to modify their contract in a manner that suits their circumstances. For example, a state law may offer borrowers the right to redeem property in connection with foreclosure. Where such a right is offered, this could be the sort of law that is intended to benefit consumers addressed in the Rule, and the Rule would prohibit waiver of the redemption right. Waiver of this right can be beneficial to both consumers and mortgage lenders, as it accelerates and simplifies the foreclosure process for all stakeholders. Losing the right to waive such a provision can harm consumers.

Secondly, the Rule as drafted would create an impermissible prohibition on voluntary arbitration agreements. An arbitration agreement operates to waive a party's substantive right to judicial resolution of disputes and replace it with an alternative dispute resolution mechanism like arbitration. As drafted, the Rule would prohibit parties from waiving the right to certain remedies and the right to sue, which would render arbitration agreements invalid.³

On July 19, 2017, the CFPB issued a final rule regarding arbitration agreements in consumer finance contracts.⁴ This rule was disapproved by operation of the Congressional Review Act on November 1, 2017.⁵ This action had the immediate effect of invalidating the 2017 arbitration rule and prohibiting the CFPB from reissuing a rule "in substantially the same form" or that is "substantially the same" unless new authorizing legislation is adopted by Congress.⁶

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."⁷ 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."⁸ 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.

The provisions of the Rule that would prohibit arbitration agreements cannot be implemented, as the Bureau's authority to write rules on arbitration was removed in 2017. Furthermore, a rule prohibiting arbitration is contrary to a century of federal law and policy favoring arbitration. Such a rule is invalid on its face and unenforceable.

³ This proposal's Supplementary Information states that the proposed rule would prohibit waivers of substantive legal rights but leave arbitration clauses intact. However, the proposed rule's language prohibiting waivers of causes of action does not support this interpretation. To the extent that a given cause of action provides for a forum in a court, an arbitration clause prohibiting court adjudication effectively waives that cause of action.

⁴ 82 Fed. Reg. 333210.

⁵ Public Law 115-74, 131 Stat. 1243.

⁶ 5 U.S.C. § 801(b)(2).

⁷ AT& T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

⁸ Id. at 346.

In addition to the substantive problems with the Rule, it affords insufficient notice to industry and should therefore be rescinded. Despite the Rule's flaws, AFSA would be pleased to coordinate with the Bureau to explore future alternatives that provide consumer protection within the limited scope of the Bureau's authority.

Thank you for the opportunity to provide comments on this proposal. If you have any questions or would like to discuss this further, please do not hesitate to contact me.

Sincerely,



Celia Winslow
President-Elect
American Financial Services Association