

## CFPB Proposes a New Rule Prohibiting Certain Contractual Terms for Consumer Financial Products

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On January 13, the Consumer Finance Protection Bureau (CFPB) published a new proposed rule attempting to ban certain contractual provisions in “take it or leave it” consumer contracts that purport to “waive substantive consumer legal rights and protections (or other remedies) granted by State or Federal law.” This proposed rule comes less than a year after the CFPB issued a similar warning in June 2024 (Circular 2024-03), stating it may treat the inclusion of unlawful and unenforceable terms in consumer financial services agreements as an Unfair, Deceptive, or Abusive Acts or Practices (UDAAP) violation.<sup>1</sup>

### Who Does This Proposed Rule Apply To?

The proposed rule generally applies to “covered persons” as defined by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, also known as the Consumer Financial Protection Act (CFPA). Covered persons include “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.”<sup>2</sup>

### Prohibition of Contractual Provisions in Consumer Contracts

The most noteworthy parts of the proposed rule are found in Subpart C, which prohibits various contractual terms and conditions that the CFPB characterizes as limiting the “fundamental freedoms” of consumers.<sup>3</sup> Specifically, the proposed rule would ban the following:

#### 1. *Clauses waiving consumer remedies or causes of action under state or federal law*

The proposed rule seeks to prohibit any contract provision “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.**” The CFPB lists examples of consumer protection laws that would be protected by the rule, including the CFPA, the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Electronic Fund Transfer Act (EFTA), the Bankruptcy Code, antitrust laws, and laws protecting service members, in addition to many other state consumer protection laws.

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<sup>1</sup> As Katten attorneys have noted previously, the CFPB and FTC’s activities over the past several years provide good reason for consumer product providers to regularly review and update their form consumer contracts and practices. See Expert Analysis: CFPB, FTC Actions Show Consumer Terms Need Fresh Eyes, *Law360*, <https://www.law360.com/articles/1721630/cfpb-ftc-actions-show-consumer-terms-need-fresh-eyes> (authored by Katten Consumer Finance Partners Christina Grigorian and Eric Hail).

<sup>2</sup> See 12 U.S.C. § 5481(6). The proposed rule states it “shall not apply to any person to the extent that it is providing a product or service in circumstances excluded from the CFPB’s rulemaking authority pursuant to 12 U.S.C. 5517 or 5519.”

<sup>3</sup> Subpart C of the proposed rule is not intended to apply to any “small business,” “small organization,” or “small governmental jurisdiction” as defined under 5 U.S.C. § 601.

## **2. *Clauses allowing covered persons to unilaterally amend material contract terms***

The proposed rule would prohibit “[a]ny term or condition that expressly reserves the covered person’s right to unilaterally change, modify, revise, or add a material term of a contract for a consumer financial product or service.” While the CFPB acknowledges that such clauses may already face challenges for lack of “mutual assent” or under other existing statutes – such as the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) – the CFPB claims that formal rulemaking is necessary to address persisting concerns with these types of clauses.

## **3. *Clauses restraining free and lawful consumer expression***

The proposed rule further seeks to prohibit any contractual term that “limits or restrains, or purports to limit or restrain, the free and lawful expression of a consumer.” In explaining the rule, the CFPB specifically takes issue with non-disparagement clauses that may prevent consumers from posting negative reviews about a financial institution’s products or services and clauses that interfere with a consumer’s ability to engage in political or religious expression.

## **Codification of the FTC’s Credit Practices Rule Under CFPB Rulemaking**

Subpart B of the proposed rule separately looks to “re-codify” the Federal Trade Commission’s (FTC) Credit Practices Rule under the CFPA to apply to banks and other covered persons.<sup>4</sup>

As background, the FTC initially published its Credit Practices Rule in 1984, with the banking regulators at the time issuing their own companion rules applicable to banks. Those rules generally prohibited lenders from including terms in consumer contracts providing for confessions of judgment, waivers of exemption, wage assignments, or security interests in household goods, in addition to other lender prohibitions. However, the enactment of the CFPA in 2010 repealed the rulemaking authority of the banking regulators under the FTC Act, causing those regulators to repeal their existing credit practice rules applicable to banks. The CFPB has nonetheless maintained since at least 2014 that the same credit practices may still violate Section 5 of the FTC Act and Sections 1031 and 1036 of the CFPA. The CFPB now claims, with the publication of its new proposed rule, that formal rulemaking is necessary to codify and more effectively enforce the Credit Practices Rule against all banks and other covered persons.

Subpart B to the proposed rule is noteworthy to the extent it would extend the Credit Practices Rule to banks and other financial services institutions that are not subject to the jurisdiction of the FTC. Among other effects of implementing this rule, if finalized, is that it would grant authority to state attorney generals, under Section 1042(a) of the CFPA, to enforce the Credit Practices Rule prohibitions against banks.

## **Predispute Arbitration Clauses Not Prohibited Under the Proposed Rule**

The CFPB’s proposed rule notably does not attempt to prohibit predispute arbitration clauses. While an important point, this is not particularly surprising. Congress previously took action in 2017 under the Congressional Review Act (CRA) to override a prior CFPB rule that would have prohibited class action waivers in consumer arbitration agreements. That congressional mandate substantially restrains the CFPB in attempted rulemaking governing arbitration clauses going forward.<sup>5</sup>

To avoid congressional oversight under the CRA, the CFPB is taking a different approach this time. Specifically, on January 14 – just one day after issuing its current proposed rule – the CFPB published a separate report recommending that each state strengthen its consumer protection laws against the use of arbitration clauses in

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<sup>4</sup> The FTC’s Credit Practices Rule does not itself apply to banks, savings associations, or federal credit unions. See 15 U.S.C. § 45(a)(2).

<sup>5</sup> In December 2024, the CFPB denied a Petition for Rulemaking, filed by a group of consumer advocate organizations, seeking to prohibit predispute arbitration clauses in consumer contracts, with the CFPB making note that Congress had previously overturned the agency’s prior arbitration rule in 2017.

consumer contracts.<sup>6</sup> This effort to attack consumer arbitration clauses at the state level will likely be less effective than federal rulemaking. Nonetheless, which states will pursue the CFPB's recommended course of action remains to be seen.

## What's Next?

The proposed rule is open for public comment until April 1. The CFPB will then review any submitted comments and decide whether to promulgate the rule as proposed, issue a new or revised rule, or withdraw the proposed rule in its entirety.

If the rule is finalized as proposed, covered persons must quickly conform to their applicable consumer contracts. Any agreements executed less than 30 days after the final rule's publication will need to be amended or otherwise brought into compliance no later than 180 days after final publication.

<sup>6</sup> *Strengthening State-Level Consumer Protections*, Consumer Fin. Prot. Bureau (Jan. 14, 2025), <https://www.consumerfinance.gov/about-us/blog/strengthening-state-level-consumer-protections/>.

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