

# CFPB issues proposed rule to require nonbank registration and public registry of terms and conditions in form contracts

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FEBRUARY 7, 2023

The Consumer Financial Protection Bureau (“CFPB”) recently issued a proposed rule<sup>1</sup> (the “Proposed Rule”) that would impose significant data collection and reporting obligations on nonbanks subject to the CFPB’s supervisory authority (with limited exceptions).

*The CFPB’s proposed rule will create significant regulatory requirements for nonbanks offering consumer financial products and services.*

The proposed rule would require annual registration of supervised nonbanks and reporting on their use of form contracts containing terms and conditions waiving or restricting consumer legal protections applicable to the offering or provision of consumer financial products. The CFPB indicated the rule was necessary to facilitate its role in monitoring for consumer risks and to inform its risk-based nonbank supervision program.

## Key takeaways

The CFPB’s proposed rule will create significant regulatory requirements for nonbanks offering consumer financial products and services by way of registration and data production concerning contract terms.

The scope of nonbank entities subject to the proposed rule is vast, including residential mortgage lenders and servicers, student loan lenders, and consumer payday lenders.

Although directed at nonbank lenders, following the proposed rule is helpful for anyone interested in understanding the CFPB’s regulatory priorities and its approaches for carrying out its supervisory objectives.

Comments on the proposed rule are due April 3, 2023.

## Registration and reporting

The Proposed Rule does not include the form of, or detail on the means of, registration (other than noting that registration would be

completed electronically). Instead, the CFPB stated that it would provide this information through future guidance.

In addition to registration, registrants would be required annually to submit information regarding their use of form contracts containing “covered terms or conditions”, which include those that:

- (1) restrict a consumer from bringing a legal action;
- (2) specify a forum or venue where a consumer must bring a legal action;
- (3) limit the ability of the consumer to file a legal action seeking relief for others or to participate in a legal action filed by others;
- (4) limit the registrant’s liability to consumers, including capping recovery amounts or the types of remedies available;
- (5) waive a consumer’s cause of legal action;
- (6) limit the ability of the consumer to review or assess, or to make a complaint concerning, the consumer financial products or services offered or provided by the registrant;
- (7) waive a consumer legal protection afforded by law; and
- (8) require arbitration.

In addition, registrants must submit information identifying what products and services the form contract terms or conditions cover, the jurisdictions where the products and services are offered and provided, and details on the type and scope of limitation imposed.

The Proposed Rule also requires registrants to report to the CFPB whether the registrant has received a decision regarding the enforceability of any covered term or condition by a court or arbitrator and the details related to such decision.

The Proposed Rule provides enumerated exceptions to registration. Some exceptions include nonbanks that have less than \$1 million in annual receipts from offering or providing consumer financial products or services or the de minimis use of form contracts containing covered terms and conditions (defined as entering into form contracts less than 1,000 times during the previous calendar year or obtaining a court decision on its enforceability within the prior calendar year).

There is also an exception where the use of covered terms or conditions in the previous calendar year was limited to entering into contracts for residential mortgages using a form made publicly available on the Internet required for insurance or guarantee by a Federal agency or purchase by the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation (or its successors), or the Government National Mortgage Association.

*The CFPB uses significant portions of its commentary on the proposed rule to set out both the need for the data collection.*

This exclusion would not apply, however, if the nonbank obtained a court or arbitrator decision regarding the enforceability of a covered term or condition during the previous calendar year.

The Proposed Rule allows affiliates to make their submissions either jointly or in combination with a larger participant that controls the affiliate. If a registrant identifies any information in its submission that is inaccurate, it has 30 calendar days from the date of discovery of the inaccuracy to correct the errors.

**CFPB's publication of covered terms and conditions**

The CFPB plans to publish the information collected from supervised registrants in a publicly available database on a "periodic basis within a timeframe it determines in its discretion". The Proposed Rule is unclear on the content of the information that will be published. Interestingly, the proposed rule also provides that if any published information is later corrected by the registrant that the CFPB reserves the right not to publish the corrected information.

**About the authors**



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**This article was first published on Westlaw Today on February 7, 2023.**

**Questions for comment**

Comments on the Proposed Rule are due by the later of March 13, 2023 or the 30-days after publication of the Proposed Rule in the Federal Register.

The CFPB requested public comment on various specific aspects of the Proposed Rule and in four more general areas, including:

- (1) Whether the data collected by the rule is necessary for CFPB's performance of its oversight function;
- (2) Whether the CFPB accurately estimated the compliance burden and costs;
- (3) Whether there are ways to enhance the quality and clarity and the usefulness of the information collected; and
- (4) Whether there are ways to minimize the information collection burden.

The CFPB uses significant portions of its commentary on the proposed rule to set out both the need for the data collection and the inadequacy of alternative approaches. With respect to the latter, the CFPB noted its resource limitations if it were to attempt to conduct its own efforts to gather, review, identify, and assess relevant contractual restrictions used by registrants.

The cost-benefit analysis, including indications that the rule should not have a meaningful impact on small businesses and the CFPB's general estimates of the time and costs for compliance, are areas impacted businesses should carefully review and consider providing any relevant comments.

**Notes**

<sup>1</sup> <https://bit.ly/3XbiZbx>