CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1027

[Docket No. CFPB–2025–0002]

RIN 3170–AB23

Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Proposed rule; request for comment.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is proposing to prohibit certain contractual provisions in agreements for consumer financial products or services. The proposal would prohibit covered persons from including in their contracts any provisions purporting to waive substantive consumer legal rights and protections (or their remedies) granted by State or Federal law. The proposal would also prohibit contract terms that limit free expression, including with threats of account closure, fines, or breach of contract claims, as well as other contract terms. The proposal would also codify certain longstanding prohibitions under the Federal Trade Commission's (FTC) Credit Practices Rule.

DATES: Comments must be received on or before April 1, 2025.

ADDRESSES: You may submit comments, identified by Docket No. CFPB–2025–0002 or RIN 3170–AB23, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. A brief summary of this document will be available at *https://www.regulations.gov/docket/CFPB-2025-0002.*
- *Email: 2025-NPRM-REGAA@cfpb.gov.* Include Docket No. CFPB–2025–0002 or RIN 3170–AB23 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA), c/o Legal Division Docket Manager, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. Commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *https://www.regulations.gov.*

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: George Karithanom, Regulatory Implementation and Guidance Program Analyst, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

SUPPLEMENTARY INFORMATION:

I. Summary of the Proposed Rule

Consumer finance companies often limit or restrict individual freedoms and rights by including coercive terms and conditions in contracts of adhesion. These types of contracts—which are ubiquitous in transactions for consumer financial products or services—are drafted by the companies or their lawyers and presented to consumers on a ''take it or leave it'' basis. Form contracts can create operational efficiencies for large businesses, but in recent years they have been used to constrain fundamental freedoms and rights that are recognized and protected under the U.S. Constitution and statutory and common law. While the Bill of Rights, with limited exceptions, only protects people from government actions, jurists have long recognized affirmative obligations regarding certain private actors,[1] and scholars and jurists are increasingly recognizing that corporate intrusion into historically recognized individual rights poses a similar threat as government intrusion.[2] Clauses buried in the fine print of these contracts can have dramatic consequences for consumers—for instance, by waiving statutory protections passed by elected officials in Federal or State government, by surrendering due process rights upon default, by undermining consumers' right to contract and giving companies the power to unilaterally amend material terms of the contract at any time, or by constraining consumers' ability to exercise free speech. These clauses usually provide little or no benefit to consumers, but they can be valuable to companies by insulating them from accountability or advancing managers' political interests.

Federal and State legislatures and regulators have taken action against these kinds of one-sided terms in consumer contracts. For instance, the FTC issued in 1984 a rule commonly known as the ''Credit Practices Rule,'' which prohibited certain creditor remedies in consumer credit contracts.[3] Congress has also enacted numerous statutes limiting companies' ability to use certain one-sided contract terms, such as through inclusion of anti-waiver provisions in several consumer financial laws[4] and passage of the Consumer Review Fairness Act of 2016, which prohibits companies that use form contracts from restricting consumers' right to provide negative reviews.[5] The CFPB has also recently issued guidance warning companies that they could violate the law by using unenforceable terms and conditions in their consumer contracts, including terms and conditions in violation of the Consumer Review Fairness Act.[6]

While defenders of civil liberties rightly focus on the risk of government infringement on constitutional freedoms, the CFPB is also concerned about large consumer financial companies' use of contracts of adhesion to curtail those same rights, especially due process, the freedom to benefit from a contract, the rule of law as established by democratically elected officials, and free expression. The CFPB is also concerned that certain terms used in these contracts deny consumers the benefits of a free market—one that is ''fair, transparent, and competitive.''[7] Under the CFPA, the CFPB may issue rules applicable to providers of consumer financial products or services (known as ''covered persons'' under the statute) to identify and prevent ''unfair,

[1] *See generally Ganesh* Sitaraman, *Deplatforming,* 113 Yale L.J. 497 (2023).

[2] *See* Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship,* Wall St. J. (Jan. 15, 2021), *https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343* (interviewing Richard Epstein); *Biden* v. *Knight First Amend. Inst.,* 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring) (raising concerns about the ability of companies to constrain free speech and recognizing that doctrines involving common carriers or public accommodation may be an appropriate solution).

[3] Credit Practices Rule, 49 FR 7740 (Mar. 1, 1984).

[4] *See, e.g.,* 10 U.S.C. 987(e)(2) (expressly prohibiting waivers of right to recourse under any State or Federal law in contracts with covered servicemembers).

[5] Public Law 114–258, codified at 15 U.S.C. 45b.

[6] Consumer Fin. Prot. Bureau, *CFPB Consumer Financial Protection Circular 2024–03, Unlawful and unenforceable contract terms and conditions,* (June 4, 2024), *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/.*

[7] 12 U.S.C. 5511(a).

deceptive, or abusive acts or practices.'' [8] The CFPB is relying on this authority in this proposed rule to protect consumers from harms that often arise from contracts of adhesion used to constrain fundamental rights and freedoms.

First, the CFPB is proposing to codify the Credit Practices Rule as applied to covered persons subject to the CFPA. As noted above, the FTC first issued the Credit Practices Rule in 1984. Although that rule applied only to creditors within the FTC's jurisdiction, banking regulators subsequently issued their own credit practices rules applicable to banks, Federal credit unions, and savings associations.[9] The rules issued by the banking regulators were repealed upon enactment of the CFPA (which transferred those agencies' consumer financial protection authorities to the CFPB). However, in 2014 the Federal financial regulators—including the CFPB—issued joint interagency guidance clarifying that financial institutions could violate the law by including in consumer credit contracts any provisions prohibited by the Credit Practices Rule.[10] Thus, in this proposed rule, the CFPB is codifying the Credit Practices Rule with regard to all covered persons, and the CFPB does not anticipate that this provision of the rule will have a substantial material effect on the market as covered persons are already likely to be in compliance with these prohibitions.

Second, the CFPB is proposing to forbid covered persons from including in their consumer contracts any terms or conditions that purport to waive substantive legal rights and protections, that reserve to the covered person the right to unilaterally amend a material term of the contract, or that restrain a consumer's lawful free expression. The CFPB has preliminarily concluded that use of these clauses may constitute an unfair or deceptive act or practice.

The CFPB requests comment on all aspects of the proposal.

[8] 12 U.S.C. 5531(b).

[9] These regulations were previously codified at: 12 CFR 227.11 through 227.16 (part of Regulation AA) (banks); 12 CFR 535.1 through 535.5 (savings associations); 12 CFR 706.1 through 706.5 (Federal credit unions).

[10] Board of Governors of the Federal Reserve, et al. *Interagency Guidance Regarding Unfair or Deceptive Credit Practices* (Aug. 22, 2014), *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20140822a2.pdf.* The guidance highlighted that the repeal of the banking regulators' credit practices rules ''should not be construed as a determination by the Agencies that the credit practices described in [the] former regulations are permissible'' and that ''the Agencies may determine that statutory violations exist even in the absence of a specific regulation governing the conduct.'' *Id.* at 2.

II. Background for Proposed Rule

A. Contracts of Adhesion

In today's consumer economy, contracts of adhesion are inescapable. In banking, retail, insurance, health care, travel, or virtually any other sector, they are ubiquitous in everyday transactions. A contract of adhesion is a standard-form contract for a product or service with a fixed set of terms or conditions. The contract—which is often lengthy, complex, and full of boilerplate language or fine print—will have been drafted by the company and is presented to the consumer on a ''take it or leave it'' basis. The consumer usually has little ability to read the contract and no opportunity to negotiate its terms.[11] If the consumer wants the product or service offered by the company, they must accept the contract's terms in totality. The company will use the same standard-form contract for every consumer with respect to the product or service at issue and will typically enter into thousands (or even millions) of versions of the same contract with its consumers. Altogether, the elements of a contract of adhesion create a deep imbalance of power between the contracting parties. ''[O]n the one side there is the ordinary individual and on the other a monopoly or powerful organi[z]ation with desirable goods or services to supply. The choice between not making a contract or making it on the only terms available is no choice at all.'' [12]

In the experience of the CFPB, contracts of adhesion are widely used in the market for consumer financial products and services. When consumers want to take out a mortgage, apply for a new credit card, open a checking account, subscribe to a digital payment app, or engage in any type of routine consumer financial transaction, they are almost always presented with a standard-form contract. The FTC noted four decades ago that consumer finance companies ''[u]niversally make use of standardized forms in extending credit to consumer[s]. These forms are prepared for creditors or obtained by them, and the completed contract is presented to the prospective borrower on a 'take it or leave it basis.' '' [13] More recently, the U.S. Supreme Court observed that ''the times in which consumer contracts were anything other than adhesive are long past.'' [14]

[11] Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction,* 96 Harv. L. Rev. 1173, 1176–77 (1983) (defining a contract of adhesion).

[12] H.B. Sales, *Standard Form Contracts,* 16 Mod. L. Rev. 318 (1953).

[13] 49 FR 7745.

Standard-form contracts have long been used in the consumer marketplace, and standardization does not necessarily undermine consumer welfare. Standard-form contracts can lower transaction costs by making transactions more uniform, efficient, and expedient. Indeed, given the size and transaction volume of the consumer economy, it would be impractical for consumer contracts to be drafted and negotiated on an individual basis. ''The costs of negotiating with each customer would surely outweigh the benefits that would result from individually tailored contracts.'' [15]

But many standard-form contracts are used in consumer transactions today to do more than just establish the terms for the basic structure of a business relationship. They are also used to give large corporations undue economic advantage and constrain the personal autonomy and freedom of individual consumers. Because companies (and their lawyers) draft standard-form contracts, they have broad discretion in what terms and conditions to include. Contracts of adhesion will, of course, contain the ''deal terms'' of the transaction between the consumer and the company, which consumers are typically aware of in contrast to fine print clauses. For example, in a consumer credit transaction, the contract would include the amount borrowed, the repayment amount, the interest rate, and the repayment schedule. But over time, companies have realized that they could also include other ancillary terms and conditions that limit consumer rights and protections and shield the company from legal liability. These types of clauses have little to do with administering the transaction between the company and consumer, and they are almost always one-sided. They benefit or insulate the company but provide little, if any, added value to the consumer.

In particular, with the advent of online contracting, companies are more readily able to use standard-form contracts to protect their own economic interests.[16] Today, many transactions occur electronically, and online contracting with features such as ''click-through'' contracts are the norm, making

[14] *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 346–47 (2011).

[15] 49 FR 7746.

[16] Recent research suggests the problem of one-sided contracts is a growing phenomenon. *See e.g.,* Tim R. Samples et al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use,* 39 Berkeley Tech. L.J. 47, 105 (2024).

it easy for consumers to provide their electronic assent to contracts of adhesion. The electronic medium has encouraged many companies to add even more fine-print terms into those contracts. ''Because it is now trivial to attach a complex, one-sided 'contract' to virtually any consumer transaction, more and more companies do so.'' [17] Electronic contracting also makes it more difficult for consumers to understand these contracts. The terms and conditions in electronic form contracts may not be visible on the page where the consumer is asked to indicate their agreement; consumers may be required to do additional clicking or downloading to view the terms and conditions. Some terms or conditions may be de-emphasized. In some cases, companies may also engage in risky digital design practices—termed ''dark patterns''—that obscure certain terms and conditions in adhesion contracts or the adhesion contract itself.[18]

Given the complexity of fine print terms in contracts of adhesion, it should come as no surprise that consumers do not really provide meaningful assent to these terms. As many academic studies have shown, the vast majority of consumers pay little or no attention to such terms when reviewing or signing a standard-form contract. In one prominent study, the authors examined the extent to which potential buyers of software read End User License Agreements (EULAs), which are contracts that govern the use of software products. The study tracked nearly 50,000 consumers across 90 software companies, and found that 0.2 percent of consumers access the EULA for at least one second.[19] Two recent studies found that online contracts are often unreadable according to scientific readability standards and lack basic organizational features like a table of contents or useful headings to help consumers locate important information in the contract.[20] To the extent consumers read a standard-form contract at all, they are likely to focus on salient terms such as price.[21]

Nor is it feasible for consumers to comparison-shop for fine print terms. As an initial matter, many providers in a market may use similar terms, making comparison-shopping a futile exercise.[22] ''If 80 percent of creditors include a certain clause in their contracts, for example, even the consumer who examines contracts from three different sellers has a less than even chance of finding a contract without the clause.'' [23] And even if consumers were to try to compare such terms, they would often find it difficult to do so because companies draft them using complex language and terminology.[24] Moreover, many fine-print terms relate to consequences that would occur only if the consumer breaches the contract or a problem with the transaction otherwise surfaces. Consumers can find it difficult to predict or envision such scenarios ex ante, meaning that fine-print terms may not resonate with consumers when they initially enter into an agreement with a provider.[25]

For decades, courts, regulators, and scholars have warned about the risks and dangers associated with contracts of adhesion. Perhaps the most famous such pronouncement is the D.C. Circuit's decision in *Williams* v. *Walker-Thomas Furniture Co.*[26] In that case, the consumers had purchased items from a furniture store on a lease-to-own basis, and the agreement—which was a standard-form contract—provided that title to the items would remain with the store until monthly payments equaled the stated value of the items. When the consumers did not make all the payments, the store sued them to take repossession of the property. The consumers claimed the contract was unenforceable because it was unconscionable. Reversing the lower court, the D.C. Circuit explained that contracts of adhesion can be invalidated on grounds of unconscionability when they are ''unfair'':

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party . . . . In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[27]

Unfair boilerplate terms in contracts of adhesion were also the basis for the FTC's Credit Practices Rule. As discussed in additional detail below in section IV, the Credit Practices Rule prohibited lenders from using certain remedial provisions in consumer credit contracts, including confessions of judgment, waivers of exemption, wage assignments, and security interests in household goods. Based on an extensive evidentiary record, the FTC concluded that these clauses were unlawful because lenders' uses of such clauses were unfair acts or practices.

This view is also encapsulated in the recently adopted Restatement of Consumer Contracts, which warns that ''consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts—the business and the consumers.'' [28] On one side of the transaction ''stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals,'' while on the other ''stand consumers who are informed only about some core aspects of the transaction, but rarely about the list of standard terms.'' [29] The Restatement thus notes that ''[b]ecause consumers rarely read or review the non-core standard contract terms, . . . the doctrine of unconscionability is a primary tool against the inclusion of

[17] Mark A. Lemley, *The Benefit of the Bargain,* 2023 Wis. L. Rev. 237, 256 (2023).

[18] *See generally* FTC Staff Report, *Bringing Dark Patterns to Light,* at 7 (Sept. 1, 2022).

[19] Yannis Bakos et al., *Does Anyone Read the Fine Print?, Testing a Law and Economics Approach to Standard Form Contracts,* 43 U. Chicago J. of Legal Studies 1, 3 (2014); *see also, e.g.,* Carl Schneider & Omri Ben-Shahar, *The Failure of Mandated Disclosure,* 159 U. Penn. L. Rev. 647, 671 (2011) (reciting research that ''suggests that almost no consumers read [contract] boilerplate, even when it is fully and conspicuously disclosed'').

[20] Uri Benoliel & Shmuel Becher, *The Duty to Read the Unreadable,* 60 B.C. L. Rev. 2255, 2277–78 (2019); Uri Benoliel & Shmuel Becher, *Messy Contracts,* 2024 U. of Ill. L. Rev. 893, 917–18 (2024).

[21] *See* George L. Priest, *A Theory of the Consumer Product Warranty,* 90 Yale L.J. 1297, 1304–06 (1981).

[22] *See generally* Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or ''The Economics of Boilerplate''),* 83 Va. L. Rev. 713 (1997) (discussing network effects which promote use of inefficient boilerplate); *see also* Benoliel and Becher, *The Duty to Read the Unreadable, supra* note 20, at 2291–94.

[23] 49 FR 7746.

[24] *Id.* at 7746–47.

[25] *Id.* at 7747.

[26] 350 F.2d 445 (D.C. Cir. 1965).

[27] *Id.* at 449–50.

[28] Restatement of the Law, Consumer Contracts, Introduction (Am. L. Inst. 2024).

[29] *Id.*

intolerable terms in a consumer contract.'' [30]

B. The Proposed Rule

There are many types of fine print terms and conditions in contracts of adhesion. The CFPB's proposal does not seek to prescribe all of these terms. Rather, the CFPB is proposing to re-codify the Credit Practices Rule under Regulation AA to reinforce the prohibition of certain contract clauses that, for example, impede on consumers' right to due process, and is adding to Regulation AA additional prohibited clauses that implicate other fundamental or constitutional rights. This includes:

• Clauses that waive provisions of law designed by democratically elected officials to benefit or protect consumers.

• Clauses that reserve a company's discretion to amend a material term of the contract unilaterally.

• Clauses that restrain a consumer's free expression by, for example, limiting a consumer's right to provide a negative review or even engage in certain disfavored political speech.

While companies may view these clauses as a way to save money or limit liability, for consumers these clauses have significant impacts—they implicate fundamental principles of personal freedom and democratic governance. For example, clauses limiting free expression restrict citizens' ability to exercise free speech that government agencies could not prohibit under the First Amendment. Clauses that permit lenders to take citizens' unsecured property without any due process or just compensation amounts to a private taking—were the company a Federal government actor, it would potentially violate the Due Process and Takings Clauses of the Fifth Amendment. Citizens' freedom to benefit from a contract is undermined when a counterparty can unilaterally change the core terms of a contract at any time without notice and consent. And the rule of law, as established by democratically elected State and Federal legislatures, is undermined if large companies can nullify those laws in consumer contracts.

The CFPB has authority to issue rules to prevent unfair or deceptive acts or practices by providers of consumer financial products or services (known as ''covered persons'').[31] Under that authority, the CFPB proposes to prohibit covered persons from including, using, enforcing, or otherwise relying on these types of clauses in a contract for a consumer financial product or service.

Lastly, one of the reasons for proposing this rule is to grant State law enforcement new authority to enforce the existing Credit Practices Rule and the additional prohibitions against national banks.[32] State attorneys general cannot yet use the CFPA's substantial remedies, including Civil Money Penalties,[33] to stop some of the largest banks in the country (which are national banks) from, for example, using confessions of judgment or debanking a consumer for inappropriate reasons. This rule, if finalized, would grant State attorneys general that authority pursuant to section 1042(a) of the CFPA.

III. Consultation With Other Agencies

In developing this proposed rule, the CFPB has consulted with the Federal Trade Commission (FTC), as well as with the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Office of the Comptroller of the Currency (OCC) on, among other things, consistency with any prudential, market, or systemic objectives administered by such agencies.

IV. Scope of Proposed Rule

The proposed rule would generally apply to ''covered persons'' under the CFPA (subject to certain exceptions discussed below). A covered person is ''(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.'' [34] The CFPA covers a broad array of financial products or services offered or provided to consumers, including (but not limited to) credit, real or personal property leases, real estate settlement services, deposits, payment processing, and credit reporting.[35] Subject to certain exceptions discussed below, any person offering or providing such a consumer financial product or service—or an affiliate of such a person acting as a service provider to the person—would thus be covered by the proposed rule. Such a person would be subject to the prohibition on certain credit practices discussed in section V and the prohibition on certain other terms and conditions in contracts for consumer financial services discussed in section VI. Notably, the practices re-codified from the existing Credit Practices Rule in subpart B only apply with regard to credit transactions, while the additional terms in subpart C apply to all consumer financial products or services including deposit accounts, payments, and other services.

Section 1027.102 of the proposed rule would exempt two categories of covered persons from the rule:

First, under § 1027.102(a) the rule would 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.'' Under those sections, the CFPB may not exercise its CFPA rulemaking authority over certain persons or activities (which includes rules issued under 12 U.S.C. 5531). The CFPB preliminary concludes that this approach is appropriate because the CFPB lacks authority to apply this rulemaking to such persons or activities. However, this applies only ''to the extent'' that a person is beyond the CFPB's rulemaking authority. For example, if a covered person offers a consumer financial product or service that is excluded from the CFPB's rulemaking authority under 12 U.S.C. 5517 and another consumer financial product or service that is not excluded, the proposed rule would apply to the covered person's offering or provision of the latter product or service (even though it would not apply to the former).

Second, under § 1027.102(b), subpart C of the rulemaking (*i.e.,* the prohibitions on clauses related to waivers of law, unilateral amendments, and free expression) would not apply to a ''small business,'' ''small organization,'' or ''small governmental jurisdiction'' as those terms are defined in 5 U.S.C. 601. A ''small business'' has ''the same meaning as the term 'small business concern' under section 3 of the Small Business Act.'' [36] A ''small business concern'' is ''one which is independently owned and operated and

[30] *Id.* section 6 cmt.1.

[31] 12 U.S.C. 5531(b).

[32] State attorneys general and regulators usually have authority to enforce the prohibition against unfair, deceptive, or abusive acts or practices in the CFPA. 12 U.S.C. 5552(a). However, State officials *may not* bring a civil action against a national bank or Federal savings association for violations of the CFPA, *unless* it is under a regulation prescribed by the CFPB. 12 U.S.C. 5552(a)(2)(A) and (B). Thus, while many of the practices in this rulemaking are already enforceable by the CFPB against national banks and other covered persons, State officials cannot bring an action under the CFPA to prevent these practices if used by national banks until the CFPB codifies the prohibitions by rule.

[33] 12 U.S.C. 5565(c) (creating penalty authority of up to $5,000 per violation per day, $25,000 per violation per day if the violations are ''recklessly'' committed, and $1,000,000 per violation per day if the violations are ''knowingly'' committed).

[34] 12 U.S.C. 5481(6).

[35] *See* 12 U.S.C. 5481(15).

[36] 5 U.S.C. 601(3).

which is not dominant in its field of operation,'' [37] or which (along with its affiliates) is at or below the Small Business Administration (SBA) standard listed in 13 CFR part 121 for its primary industry as described in 13 CFR 121.107. A ''small organization'' is ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [38] A ''small governmental jurisdiction'' means ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [39]

The CFPB preliminary concludes that applying subpart C of the proposed rule to large entities would be appropriate because they are capable of imposing their terms on consumers and have more resources to enforce them. Studies have shown that large companies routinely use such terms,[40] often applying to thousands or millions of consumers. Furthermore, the threat of the use of private contracting to oppress by constraining fundamental freedoms is greater when a consumer is dealing with a company with more market power and more resources. Large companies are more likely than small companies to have superior bargaining power over consumers, giving them more opportunity to impose one-sided terms in contracts of adhesion. The CFPB intends to monitor the market and determine whether an expansion of coverage to smaller entities may be necessary and appropriate at a later time.

The CFPB also considered—but is not proposing—an exception for State or Federal entities. The CFPB is unaware of any government entities that provide consumer financial products or services with contracts that include the terms at issue in this proposal. That is likely the case because doing so could violate various constitutional constraints on government actors, including the First Amendment right to free speech, the right to Due Process, the Takings Clause, and the substantive rights being waived in legal waivers.

The CFPB generally seeks comment on the coverage of the proposed rule, including whether the scope should be narrowed or expanded and whether additional exclusions would be appropriate.

V. Prohibited Credit Practices

Overview

Subpart B of the proposed rule would codify for covered persons the already existing FTC Credit Practices Rule, which renders unlawful certain remedial provisions in consumer credit contracts.

The FTC first issued the Credit Practices Rule in 1984 pursuant to its authority to prohibit unfair or deceptive acts or practices.[41] The banking regulators subsequently issued their own companion credit practices rules applicable to banks, Federal credit unions, and savings associations.[42] The CFPA repealed the rulemaking authority of the banking regulators under the FTC Act, and the regulators consequently repealed their rules. However, the banking regulators and the CFPB issued a joint interagency guidance in 2014 clarifying their understanding that those credit practices may continue to violate the prohibition against unfair or deceptive practices in section 5 of the FTC Act and sections 1031 and 1036 of the CFPA.[43]

The CFPB now proposes to re-codify the Credit Practices Rule for all covered persons, including those currently subject to the FTC's Credit Practices Rule and other entities formerly subject to the companion rules issued by the banking regulators. This proposal is not expected to change existing business conduct in light of the existing FTC rule and the fact that financial institutions generally continue to treat these contract terms as unlawful.

Discussion

The FTC's Credit Practices Rule was based on an extensive evidentiary record. Over a two-year period, the FTC took testimony from more than 300 witnesses and subpoenaed the credit files of 12 large finance companies.[44] The FTC explained that ''consumers' ability to avoid certain remedies depends on their ability to shop and compare the language of different credit contracts.'' However, the FTC also found that—given the prevalence of standard-form contracts in the consumer credit industry—''although consumers may be able to bargain over terms such as the price of credit and the number or size of payments, there is no bargaining over the boilerplate contract terms that define creditor remedies.'' [45] The FTC concluded that these remedies and practices were unfair because they caused substantial injuries to consumers that were not reasonably avoidable, and offered no countervailing benefits to consumers or competition.

Specifically (and as discussed in more detail below), the FTC's Credit Practices Rule prohibits lenders from using any of the following provisions: a confession of judgment, a waiver of exemption, an assignment of wages, or a security interest in household goods. The rule also prohibits lenders from misrepresenting the nature or extent of cosigner liability to any person or obligating a cosigner unless the cosigner is informed prior to becoming obligated of the nature of the cosigner's liability. Finally, the rule prohibits lenders from levying or collecting any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period.

The Credit Practices Rule does not apply to banks, savings associations, or Federal credit unions.[46] However, the FTC Act (at the time) also required the Federal Reserve Board, the National Credit Union Administration, and the Federal Home Loan Bank Board (FHLBB) (later superseded by the Office of Thrift Supervision (OTS)) to issue, within 60 days after the FTC issued a rule under its authority to prohibit unfair or deceptive acts or practices, ''substantially similar regulations prohibiting acts or practices of banks or savings and loan institutions . . . or Federal credit unions . . ., which are substantially similar to those prohibited by rules of the [FTC].'' [47] The Board, NCUA, and FHLBB adopted such regulations in 1985,[48] and those rules were codified at 12 CFR parts 227, 706, and 535. In issuing those rules, the agencies did not make new findings, evidence, or conclusions. They relied on the extensive findings by the FTC.

In 2010, the CFPA transferred Federal consumer protection functions from the Board, OTS, NCUA, and other Federal agencies to the CFPB.[49] The CFPA also repealed the requirement in the FTC Act

[37] 15 U.S.C. 632(a).

[38] 5 U.S.C. 601(4).

[39] *Id.* sec. 601(5).

[40] *See e.g.,* Samples et. al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use, supra* note 16, at 105; Andrea J. Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights* at 51, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4756735* (Mar. 12, 2024) (forthcoming in the. Iowa L. Rev.).

[41] 49 FR 7740.

[42] *See* 50 FR 16695 (Apr. 29, 1985) (Federal Reserve Board); 50 FR 19325 (May 8, 1985) (FHLBB); 52 FR 35060 (Sept. 17, 1987) (NCUA).

[43] *Interagency Guidance Regarding Unfair or Deceptive Credit Practices, supra* note 10.

[44] 49 FR 7741.

[45] *Id.* at 7745.

[46] 15 U.S.C. 45(a)(2).

[47] *See* formerly 15 U.S.C. 57a(f)(1).

[48] *See* 50 FR 16696 (Apr. 29, 1985) (Federal Reserve Board); 50 FR 19325 (May 8, 1985) (FHLBB); 52 FR 35060 (Sept. 17, 1987) (NCUA).

[49] 12 U.S.C. 5581.

for those agencies to issue companion rules applicable to banks, Federal credit unions, and thrifts. Those agencies duly repealed their versions of the Credit Practices Rule.[50]

However, the Federal financial regulators—including the CFPB—also issued a joint interagency guidance in 2014 clarifying that the repeal of the credit practices rule for banking institutions did not condone those credit practices, and that the agencies would remain vigilant about policing banks for use of the credit practices under their general authority to prohibit unfair or deceptive acts or practices:

> The Agencies are issuing this statement to clarify that the repeal of credit practices rules applicable to banks, savings associations, and Federal credit unions should not be construed as a determination by the Agencies that the credit practices described in these former regulations are permissible. The regulations were issued on the basis of extensive findings that identified the unfair or deceptive practices prohibited in the rules. The Agencies believe that, depending on the facts and circumstances, if banks, savings associations, and Federal credit unions engage in the unfair or deceptive practices described in these former credit practices rules, such conduct may violate the prohibition against unfair or deceptive practices in Section 5 of the FTC Act and Sections 1031 and 1036 of the Dodd-Frank Act. The Agencies may determine that statutory violations exist even in the absence of a specific regulation governing the conduct.[51]

The CFPB has preliminarily concluded that it would be appropriate to codify the Credit Practices Rule with respect to covered persons within its jurisdiction. Many nonbank covered persons are already subject to the FTC's Credit Practices Rule, and the CFPB has authority to enforce the Credit Practices Rule against them. Although banks, Federal credit unions, and savings associations within the CFPB's jurisdiction are technically not subject to the Credit Practices Rule, they have been on notice under the 2014 interagency guidance that they could violate the CFPA's prohibition on unfair or deceptive practices if they engaged in the practices prohibited by the Credit Practices Rule, and any private or public enforcer enforcing a State or Federal law that parallels the FTC Act may have a cause of action under the same logic as the Credit Practices Rule. Thus, in order to avoid any confusion or uncertainty about whether covered persons within the CFPB's jurisdiction may use these credit practices, this proposed rule would clarify that these credit practices are unlawful for all covered persons.

The CFPB notes that codifying the Credit Practices Rules for all covered persons would be consistent with one of the CFPB's primary objectives under the CFPA—to ensure that ''Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition.'' [52] Presently, nonbank entities remain subject to the Credit Practices Rule while banks, Federal credit unions, and savings associations are technically not (although they are of course subject to the 2014 interagency statement). The CFPB preliminarily concludes that any differential treatment for banks and nonbanks regarding the practices covered by the rule would serve no regulatory objective and provide no added benefit for consumers. Since engaging in these practices may nonetheless violate Federal law (and harm consumers) regardless of the type of entity, and the banking regulators have made entities under their supervision aware of that possibility for more than a decade, the CFPB does not expect that codification of the proposed rule will place significant additional burdens on entities based on their type of business. Moreover, the CFPB anticipates that the proposal will clarify regulatory requirements for all market participants and ensure that compliance burdens do not vary arbitrarily, which will promote fair competition.

Description of Prohibited Credit Practices

The credit practices that would be prohibited under this proposed rule are the same as those described in the FTC's Credit Practices Rule.[53]

Confessions of judgment. Proposed § 1027.202(a) would prohibit a ''cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right of notice and the opportunity to be heard in the event of suit or process thereon.'' The cognovit is a legal device whereby the consumer, as part of the credit contract, consents in advance to the creditor obtaining a judgment without prior notice or hearing. The consumer either confesses judgment in advance of default or authorizes the creditor or an attorney designated by the creditor to appear and confess judgment against the consumer.[54]

Waivers of exemption. Proposed § 1027.202(b) would prohibit an ''executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.'' Many State laws provide exemptions for certain property of a debtor from being seized or sold to satisfy the debt. A waiver of exemption in a credit contract requires a consumer to forfeit or limit such an exemption and allows such property to be seized and sold to satisfy the debt.[55]

Wage assignments. Proposed § 1027.202(c) would prohibit an ''assignment of wages or other earnings unless: (1) The assignment by its terms is revocable at the will of the debtor; (2) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (3) The assignment applies only to wages or other earnings already earned at the time of the assignment.'' [56] A wage assignment is a contractual transfer by a debtor to a creditor of the

[50] *See* 81 FR 8133 (Feb. 18, 2016) (Board's repeal of Reg AA); 79 FR 59627 (Oct. 3, 2014) (NCUA's repeal of credit practices rule). Under the Dodd-Frank Act, the rulemaking authority of the OTS relating to all Federal savings associations was transferred to the OCC on July 21, 2011. The OCC did not have authority at any time to promulgate regulations under section 5 of the FTC Act, either before or after enactment of the Dodd-Frank Act. For that reason, the OCC omitted the OTS version of the credit practices rule when it republished the regulations applicable to Federal savings associations. 76 FR 48950. (Aug. 9, 2011). Thus, the OTS's credit practices rule was effectively repealed as of July 21, 2011.

[51] *Interagency Guidance Regarding Unfair or Deceptive Credit Practices, supra* note 10.

[52] 12 U.S.C. 5511(b)(4).

[53] Section 1027.201 of the proposed rule includes certain definitions applicable to subpart B, including cosigner, earnings, household goods, and obligation. Additionally, under proposed § 1027.205, ''[a]n appropriate State agency may apply to the CFPB for a determination that (i) There is a State requirement or prohibition in effect that applies to any transaction to which a provision of this subpart applies; and (ii) The State requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by this subpart.'' If the CFPB ''makes such a determination, the provision of this subpart will not be in effect in that State to the extent specified by the CFPB in its determination, for as long as the State administers and enforces the State requirement or prohibition effectively.'' A State agency may apply for an exemption under the same procedures as those set forth in appendix B to Regulation Z (12 CFR part 1026).

[54] 49 FR 7748–49.

[55] *Id.* at 7768–7769.

[56] Proposed § 1027.201(b) would define ''earnings'' as ''compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.''

right to receive wages directly from the debtor's employer. To activate the assignment, the creditor simply submits it to the debtor's employer, who then pays all or a percentage of the debtor's wages to the creditor. The debtor releases the employer from any liability arising out of the employer's compliance with the wage assignment, and may waive any requirement that the creditor first establish or allege a default.[57]

Security interests in household goods. Proposed § 1027.202(d) would prohibit a ''nonpossessory security interest in household goods other than a purchase money security interest.'' A security interest in household goods grants a creditor the right to seize personal items from a consumer. The rule (proposed § 1027.201(c)) would define ''household goods'' as ''clothing, furniture, appliances, one television and one radio, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of a consumer and a consumer's dependents.'' [58]

Cosigners. Consumers who do not meet a creditor's standards for creditworthiness may be required to obtain one or more ''cosigners'' who agree to be liable for the debt. A cosigner is required to pay if the debtor defaults, but the cosigner receives no monetary consideration for undertaking the obligation.[59] Proposed § 1027.203(a) would make it unlawful for a covered person ''directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person,'' or ''directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of the cosigner's liability.'' Proposed § 1027.203(b) would further require a covered person to provide a cosigner with a disclosure, consisting of a separate document that shall contain the following statement and no other prior to the cosigner being obligated (which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed):[60]

NOTICE TO COSIGNER

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of *your* credit record.

This notice is not the contract that makes you liable for the debt.

Pyramiding late charges. Proposed § 1027.204(a) would make it unlawful, ''[i]n connection with collecting a debt arising out of an extension of credit to a consumer,'' for a covered person ''directly or indirectly, to levy or collect any delinquency charge on a payment, which payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments.'' [61] This practice is called ''pyramiding'' late charges and occurs when a creditor assesses multiple delinquency charges due to a single late payment because any subsequent payments are first applied to the outstanding late charge and only then to interest and principal. ''In 'pyramiding' the accounting method works in this fashion: If a consumer's payment is due on the first day of January, for example, and the payment is not made until the 20th day of that month, the creditor assesses a late charge, for example, $5. The February payment and all subsequent payments are made on time. However, by allocating $5 of the February payment to the January late charge and only the remainder to the February payment, the creditor causes the February payment to be $5 'short', hence delinquent. Timely payments in succeeding months are given the same treatment, so that there is a delinquency or late charge for each month.'' [62]

D. Legal Authority

Section 1031(b) of the CFPA provides the CFPB with authority to prescribe rules to identify and prevent unfair, deceptive, or abusive acts or practices (UDAAPs). Specifically, section 1031(b) authorizes the CFPB to prescribe rules ''applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.'' [63] Section 1031(b) of the Act further provides that ''[r]ules under this section may include requirements for the purpose of preventing such acts or practices.'' [64] The CFPB may declare an act or practice to be unfair if it ''causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and such substantial injury is not outweighed by countervailing benefits to consumers or to competition.'' The CFPB preliminary concludes that the credit practices it proposes to prohibit are unfair for the same reasons as the FTC in the Credit Practices Rule.

First, the FTC found ''substantial consumer economic or monetary injuries from the use of these creditor remedies'' [65]:

- Confessions of judgment deprive consumers of a notice of suit or hearing and opportunity to present claims and defenses. And once obtained, the confessed judgment can be turned into a lien on the consumer's property.[66]
- A waiver of exemption clause or a security interest in household goods can lead to the consumer losing the basic necessities of life and requiring the consumer to replace these items or face destitution.[67]
- Wage assignment can occur without the due process safeguards of a hearing

[57] *Id.* at 7755.

[58] The term would not include: (1) Works of art; (2) Electronic entertainment equipment (except one television and one radio); (3) Items acquired as antiques; that is, items over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character; and (4) Jewelry (other than wedding rings).

[59] 49 FR at 7773. The proposed rule (section 1027.201(a)) would define a ''cosigner'' as ''a natural person who renders themself liable for the obligation of another person without compensation,'' including ''any person whose signature is requested as a condition to granting credit to another person, or as a condition for forbearance on collection of another person's obligation that is in default.'' But the term ''shall not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to State law.'' Furthermore, ''[a] person who does not receive goods, services, or money in return for a credit obligation does not receive compensation within the meaning of this definition.'' The rulemaking would also state that a person is a cosigner ''whether or not they are designated as such on a credit obligation.''

[60] Under proposed § 1027.203(c), a covered person that provides the disclosure required by proposed § 1027.203(b) ''may not be held in violation of paragraph (a) of this section.''

[61] For purposes of this section, proposed § 1027.204(b) states that ''collecting a debt means any activity, other than the use of judicial process, that is intended to bring about or does bring about repayment of all or part of money due (or alleged to be due) from a consumer.''

[62] 49 FR 7771.

[63] 12 U.S.C. 5531(b).

[64] *Id.*

[65] 49 FR 7743.

[66] *Id.* at 7753–54.

[67] *Id.* at 7743–44, *see also id.* at 7769–70.

and an opportunity to present defenses and counterclaims. This can lead to job loss or severely reduced income, either one of which could prevent the consumer from providing for his or her family or cause default on other obligations.[68]

- When a creditor seizes household goods pursuant to a non-purchase money security interest in such goods, debtors lose property which is of great value to them and little value to the creditor. A non-purchase money security interest in household goods also enables a creditor to threaten the loss of all personal property located in the home, which may lead a debtor to make repayment arrangements that they would not willingly take but for the security interest.[69]
- Pyramiding of late charges results in the consumer being unknowingly assessed multiple late charges for a single late payment, even though subsequent payments are timely made.[70]
- When creditors fail to inform potential cosigners of their obligations and liability, the cosigners may unexpectedly be subject to collection tactics when the principal debtor defaults (including the remedies described above). The sudden liability that can result from cosigner status can cause over-extension when a consumer is confronted with a debt, the timing of which cannot be controlled by the cosigner because it is due to nonpayment by the principal debtor. Because of the range of potential liabilities, many consumers might not have become cosigners had they known the likely costs of doing so. Cosigners thus undertake obligations which they might not have undertaken had they understood them and suffer economic and other hardship as a result when called upon to repay.[71]

Second, the FTC concluded that these injuries were not reasonably avoidable, principally because these credit practices were typically incorporated into standard form contracts ''over most of which there is no bargaining.'' [72] The FTC noted that consumers have ''limited incentives to search out better remedial provisions in credit contracts.'' [73] For one thing, the ''substantive similarities of contracts from different creditors mean that search is less likely to reveal a different alternative.'' [74] The FTC also noted that because these credit remedies are relevant only once a consumer defaults, and default is relatively infrequent, ''consumers reasonably concentrate their search on such factors as interest rates and payment terms.'' [75] The FTC also explained that comparison-shopping for credit contracts is difficult ''because contracts are written in obscure technical language, do not use standardized terminology, and may not be provided before the transaction is consummated.'' [76] Nor could consumers avoid these credit remedies by avoiding default. ''When default occurs, it is most often a response to events such as unemployment or illness that are not within the borrower's control. Thus, consumers cannot reasonably avoid the substantial injury these creditor remedies may inflict.'' [77]

Third, the FTC concluded that any countervailing benefits from these practices did not outweigh the substantial injuries. The FTC explained that even if restrictions on these contract clauses would result in costs to creditors—for example, increased collection costs, increased screening costs, larger legal costs, or increases in bad debt losses—the ''possible magnitude of these costs is diminished by the fact that the rule leaves untouched a wide variety of more valuable creditor remedies,'' such as repossession, suit, garnishment, or acceleration.[78]

The D.C. Circuit subsequently upheld the Credit Practices Rule against legal challenge, noting that the rule ''was painstakingly considered and significantly modified in response to the extensive comments and recommendations received during this long rulemaking proceeding.'' [79]

Like the prudential regulators in their rules implementing the Credit Practices Rule, the CFPB preliminarily concludes that these credit practices are unfair for the same reasons as provided by the FTC. The FTC relied on an extensive evidentiary basis for its conclusions, and there is no reason to believe the core findings have changed since the FTC issued the original rule. Similarly, the findings were not specific to any given creditor type, and therefore, the CFPB preliminarily concludes that the FTC's findings apply equally to entities under the CFPB's jurisdiction carved out of the FTC rule. Indeed, as described above, many of the principal conclusions by the FTC—for example, the prevalence of standard-form contracts and the lack of comparison-shopping—remain true today. At any rate, in the CFPB's experience, these practices are uncommon (thanks in large part to the Credit Practices Rule and the interagency guidance). However, when the CFPB has encountered these practices during exams of supervised entities, it has cited them as violations of the CFPA. For example, the CFPB cited as unfair a servicer's practice of applying borrowers' post-maturity auto-loan payments in a manner that resulted in the principal balance not being paid off and triggered late fees.[80]

The CFPB seeks comment on all aspects of the proposed codification of the Credit Practices Rule applicable to covered persons within the CFPB's jurisdiction.

VI. Other Prohibited Provisions

Subpart C of the proposed rule would prohibit covered persons from including three other types of terms and conditions in contracts for consumer financial products or services: clauses requiring the consumer to waive substantive consumer legal rights or protections that were designed to benefit consumers, and their remedies; clauses allowing a covered person to unilaterally amend a material term of the contract; and clauses restraining a consumer's lawful free expression.[81] The CFPB is proposing to ban these

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[68] *Id.* at 7757–59.

[69] *Id.* at 7762–7765.

[70] *Id.* at 7772.

[71] *Id.* at 7774. The FTC also noted that where a creditor affirmatively misrepresents a cosigner's obligations—for example, by telling the cosigner that they are merely a reference for the primary debtor—such a statement would be a deceptive act or practice because it would be misleading and material to a reasonable consumer. *Id.* at 7776. The FTC also has taken action against a for-profit medical school for failing to provide the cosigner notice as required by the Credit Practices Rule. *See FTC* v. *Human Res. Dev. Servs. Inc. dba Saint James School of Medicine* (*St. James Medical School*), No. 22–cv–1919 (N.D. Ill. filed Apr. 14, 2022), *https://www.ftc.gov/legal-library/browse/cases-proceedings/2123034-human-resource-development-services-inc-dba-saint-james-school-medicine-ftc-v.* Instead, defendants included a notice that failed to include the specific language required by the Credit Practices Rule and that appeared in the middle of the contract. *See id.*

[72] 49 FR 7744.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Am. Fin. Servs. Ass'n* v. *FTC.,* 767 F.2d 957, 963 (D.C. Cir. 1985).

[80] CFPB, *Supervisory Highlights: Special Edition Auto Finance,* Fall Issue 35, 7–8 (Oct. 2024) *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-special-ed-auto-finance_2024-10.pdf.*

[81] Under proposed § 1027.301(b), a covered person would not be permitted to ''use, enforce, or otherwise rely on'' these terms or conditions ''in an agreement between a consumer and any person for a consumer financial product or service.'' This provision would ensure, for example, that a covered person could not rely on a prohibited term or condition in an agreement they purchased from another person.

clauses under its authority to prohibit unfair or deceptive acts or practices.

A. Clauses Waiving Consumers' Substantive Legal Rights or Protections

Proposed § 1027.301(a)(1) would prohibit covered persons from including in agreements for consumer financial products or services ''[a]ny 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.'' The waivers of law covered by the proposed rule ''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.'' The proposed rule would not, however, prohibit clauses with regard to procedural rights, like venue clauses, arbitration clauses prohibiting court adjudication, or class action waivers.

There is a large body of substantive Federal and State law—including statutes designed by legislators and the common law process developed by courts—to protect or benefit consumers. Congress has enacted numerous consumer protection laws, including the Federal consumer financial laws administered by the CFPB (such as the CFPA, the Truth in Lending Act (TILA), the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), and the Electronic Fund Transfers Act (EFTA)), the Bankruptcy Code, antitrust laws, and laws protecting servicemembers (such as the Military Lending Act and the Servicemembers Civil Relief Act). Many States have also passed analogous consumer protection or antitrust laws, and in some cases the protections afforded by State laws exceed those of Federal law. Consumers also have common law rights to bring claims, including, for example, for a breach of contract or a tort.

These laws provide substantive protections for consumers. For instance, the CFPA (among other things) generally prohibits covered persons from engaging in unfair, deceptive, or abusive acts or practices in connection with transactions for consumer financial products or services,[82] while the enumerated consumer laws codify specific consumer protections. Many of these laws also expressly grant consumers the right to privately enforce violations and to seek remedies, including monetary or injunctive relief. For instance, TILA provides consumers with a cause of action against ''any creditor who fails to comply with any requirement imposed under [TILA],'' and makes such a creditor liable to the consumer for actual damages and certain statutory damages.[83]

Many Federal laws—including statutes enforced by the CFPB—also render consumer-protection provisions unwaivable. For instance, EFTA prohibits contract terms that contain a ''waiver of any right conferred'' by EFTA and prohibits waivers of any ''cause of action'' under EFTA.[84] The Military Lending Act and its implementing regulations generally prohibit terms in certain consumer credit contracts that require servicemembers and their dependents to ''waive the borrower's right to legal recourse under any otherwise applicable provision of State or Federal law.''[85] The FTC also administers laws that forbid certain contractual waivers.[86] And certain State laws similarly prohibit or restrict the use of waivers in consumer contracts.[87]

In the CFPB's experience, however, covered persons sometimes include waivers of consumer protection laws in contracts for consumer financial products or services (including when those laws forbid such waivers). The CFPB has taken both supervisory and enforcement action against such practices as both unfair and deceptive. For example, in 2013, the CFPB cited two mortgage servicers for the unfair practice of requiring all borrowers, regardless of their individual circumstances, to enter into across-the-board waivers of existing claims in order to obtain a forbearance or loan modification agreement.[88] In 2021, the CFPB cited entities for the deceptive practice of requiring borrowers to agree to a waiver of any equity or right of redemption in the loan security agreement for cooperative units. Specifically, the waiver stated that in the event of default, lenders may sell the security at public or private sale and thereafter hold the security free from any claim or right whatsoever of the borrower, who waives all rights of redemption, stay or appraisal which the borrower has or may have under any rule or statute.[89] In 2022, the CFPB entered into a consent order with Bank of America for, among other practices, unfairly requiring consumers to waive its liability as to consumers' garnishment-related protections in its deposit agreement and misrepresented to consumers that they could not go to court to attempt to prevent wrongful garnishments.[90] The FTC has also taken action against a for-profit medical school that attempted to waive consumers' rights under Federal law.[91]

These waiver clauses in contracts of adhesion undermine our system of constitutional democracy. Our

[82] 12 U.S.C. 5531.

[83] 15 U.S.C. 1640(a).

[84] 15 U.S.C. 16931.

[85] 10 U.S.C. 987(e)(2).

[86] See 16 CFR 444.2(a)(2) (FTC's 1984 Credit Practices Rule, prohibiting the use of contract terms purporting to waive a consumer's State law right to block creditors from seizing personal or real property of the consumer in which they do not hold security interests). The FTC also has interpreted section 604(b)(2)(A) of the Fair Credit Reporting Act (FCRA) to prohibit the inclusion of a waiver of consumer rights in a disclosure form required under that section, observing that ''it is a general principle of law that benefits provided to citizens by federal statute generally may not be waived by private agreement unless Congress intended such a result.'' FTC, Division of Credit Practices, Staff Opinion Letter (June 12, 1998), 1998 WL 34323756, at *1 (citing *Brooklyn Savings Bank* v. *O'Neill,* 324 U.S. 697 (1945)). In addition, while not an express prohibition on waivers, the FTC's Preservation of Consumers' Claims and Defenses rule, commonly known as the ''Holder Rule'' and also enforced by the CFPB, requires sellers of goods or services to consumers to include a provision in their finance contracts that ensures that if another person holds the loan or lease a consumer uses to finance acquisition of a good or service from a seller or lessor, then the holder is subject to the same consumer rights and defenses that the consumer had with respect to the seller or lessor, thereby emphasizing the importance of preserving consumer rights. 16 CFR part 433.

[87] For instance, the California Consumer Privacy Act affords consumers certain rights to know how their information will be used, instructs businesses not to sell consumers' personal information, and deems ''void and unenforceable'' any contractual provision ''that purports to waive or limit in any way rights under this title, including, but not limited to, any right to a remedy or means of enforcement.'' *See generally* Cal. Civ. Code sec. 1798.100 *et seq.* described at *https://oag.ca.gov/privacy/ccpa* ; Cal. Civ. Code sec. 1798.192. Further, certain State laws, including those of California, Illinois, Kansas, and Tennessee, contain outright prohibitions of waivers of legal protections in general consumer protection laws. See Cal. Civ. Code. sec. 1751 (barring waivers of protections under California Consumers Legal Remedies Act); Ill. St. Ch. 815 sec. 505(10c), Waiver or modification (barring waiver or modification of protections under consumer fraud and deceptive practices statute); Kan. Stat. 50–625(a), Waiver (generally prohibiting waivers of rights or benefits under the Kansas Consumer Protection Act, unless otherwise specified in the statute); Tenn. Stat. 47–18–113(a) (generally prohibiting waivers ''by contract, agreement, or otherwise'' of provisions of the Tennessee Consumer Protection Act of 1977).

[88] CFPB, *Supervisory Highlights: Winter 2013,* at 6–7 (Jan. 2014), *https://files.consumerfinance.gov/f/201401_cfpb_supervisory-highlights-winter-2013.pdf.*

[89] CFPB, *Supervisory Highlights: Issue 24, Summer 2021,* at 28 (June 2021), *https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-24_2021-06.pdf.*

[90] See Consent Order, In re Bank of America, N.A., No. 2022–CFPB–0002 (May 4, 2022).

[91] *See St. James Medical School, supra* note 71. According to the FTC's complaint, among numerous other things, defendants failed to include the notice required by the FTC's Holder Rule in their credit agreements, and also included language attempting to waive those rights.

government is—as President Abraham Lincoln said—a ''government of the people, by the people, for the people.'' The United States Constitution implements that principle by vesting Federal lawmaking powers in the United States Congress [92] and reserving other lawmaking powers (unless prohibited by the Constitution) ''to the States respectively, or to the people.'' [93] At both the Federal and State levels, legislatures are elected by citizens and are empowered to pass laws that benefit their wellbeing. In enacting such laws, legislatures necessarily balance competing interests among citizens, and their legislative judgments and policy choices must be respected unless constitutionally invalid. Against this system of democratic governance, waiver-of-law clauses in form contracts of adhesion are distinctly anti-democratic. They allow companies to use contracts of adhesion to override laws that have been designed to protect consumers without meaningful consent by the consumer.

This proposed rule would forbid a covered person from using any clause in a contract for a consumer financial product or service that requires a consumer to waive substantive consumer rights and legal protections conferred by State or Federal laws designed to protect or benefit consumers (unless the law is expressly waivable), or their remedies. This prohibition would cover waivers of substantive legal rights as well as waivers of a consumer's right to enforce those laws (such as a waiver of a cause of action, a cap on statutory damages, or a time limitation on consumer enforcement of the law). For example, a contractual clause requiring a consumer to waive certain provisions of TILA (or to waive the consumer's right to enforce TILA) would be prohibited under the proposed rule. However, the prohibition would not apply to waivers of procedural rights (*e.g.,* venue clauses, arbitration clauses prohibiting court adjudication, or class action waivers). Although the CFPB also has concerns about such waivers, the CFPB is focusing on waivers of substantive rights in this proposed rule because contractual waivers of substantive rights allow companies to invalidate legislative judgments that certain business practices are unlawful.

The CFPB seeks comment on this proposed prohibition of waiver clauses.

[92] U.S. Const. art. 1, section 1.

[93] U.S. Const. amend. X.

B. Unilateral Amendment Clauses

Proposed § 1027.301(a)(2) would prohibit covered persons from including in agreements for consumer financial products or services ''[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.'' Companies often include contractual clauses that grant them unfettered discretion to change or add to the terms of their agreement with the consumer without adequate notice to or assent from the consumer before the change becomes effective. Unilateral contract amendments can harm consumers since any modifications are likely to mainly benefit the company and the consumer has no option to reject the change. The CFPB proposes to ban these clauses because they allow covered persons to circumvent consumers' freedom to benefit from a contract by changing material terms of an agreement.

The proposal would prohibit any amendment clause in a contract between a covered person and a consumer for a consumer financial product or service that grants the covered person the exclusive right to modify a material term of the contract in the future. By definition, these unilateral amendment clauses provide no meaningful opportunity for the consumer to affirmatively accept, negotiate, or reject any modifications by the company.

Unilateral amendment clauses are typically drafted to provide a company with discretion to change a term of the contract or to add terms to the contract. Companies can thus use these clauses to change fees, dispute resolution procedures, terms of service, or privacy policies.[94] ''In fact, unilateral modifications can change any aspect of a contract.'' [95] For instance, in recent years, unilateral amendment clauses have become a popular way for companies to add arbitration clauses to consumer contracts or to change the rules of the arbitration process.[96] And unilateral amendment clauses typically do not impose limits on when these changes can be made, meaning that a company may rely on such a clause to modify a contract months or even years after the agreement was consummated. In short, when a contract includes a unilateral amendment clause, ''[f]irms can virtually make any change they wish to their contracts, for whatever reason and at any time, without properly communicating this change.'' [97] And changes implemented unilaterally will typically benefit the company, not the consumer. ''There is a concern . . . that businesses will initiate self-serving, opportunistic modifications in standard contract terms once consumers are already locked into the service.'' [98]

Unilateral amendment clauses are commonly included by companies in consumer contracts or terms of use. For example, a recent study examined 100 companies' online terms and conditions for contracts and relationships with consumers.[99] The sample set included companies in retail, computer and browsing services, streaming and entertainment, financial services, social media, and transportation.[100] The study considered both private and public companies.[101] The study found that all of the companies' terms and conditions included a unilateral modification clause.[102] Only 15 of the companies' terms and conditions provided for notice to the consumer when the company made a unilateral change to a material term.[103] The study also found that under these clauses, the consumer had no real opportunity to reject the modifications, short of terminating the transactional relationship with the company.[104] Other studies have reached similar conclusions.[105]

In the CFPB's experience, unilateral amendment clauses are used by companies in the consumer finance market, and companies rely on such clauses to modify agreements in ways that are harmful to consumers. Unilateral amendments can be especially prejudicial when they thwart a consumer's expectations about the terms of or performance under a

[94] See, *e.g.,* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments,* 57 UCLA L. Rev. 605, 630–636 (2010); Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts,* 55 Ga. L. Rev. 657, 660 (2020).

[95] Becher & Benoliel, supra n. 94 at 661.

[96] Adam Levitin, *Venmo's Unfair and Abusive Arbitration Opt-Out Provision,* Credit Slips (Apr. 26, 2022), *https://www.creditslips.org/creditslips/2022/04/-venmos-unfair-and-abusive-arbitration-opt-out-provision.html.*

[97] Shmuel I. Becher & Uri Benoliel, *Dark Contracts,* 64 B.C. L. Rev. 55, 68 (2023).

[98] Restatement of the Law, Consumer Contracts, *supra* note 28, at section 3 cmt. 1.

[99] Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights, supra* note 40, at 6.

[100] *Id.* at 7

[101] *Id.*

[102] *Id.* at 18.

[103] *Id.* at 19.

[104] *Id.* at 20.

[105] Becher & Benoliel, *Sneak In Contracts, supra* note 94, at 681–682 (finding that more than 95 percent of companies with the 500 top websites used unilateral amendment clauses); Samples et al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-use, supra* note 16 at 103.

contract (including when such a change conflicts with advertising or marketing about the contract on which the consumer relied in the first place).

For instance, such clauses are commonly included in credit card agreements, and the harm arising from unilateral amendments to credit card agreements was one of the main reasons for congressional enactment of the Credit Card Accountability, Responsibility, and Disclosure Act (CARD Act) of 2009.[106] Prior to the CARD Act's passage, credit card issuers routinely relied on unilateral amendment clauses to change fees, interest rates, and payment amounts after a consumer had taken out a credit card.[107] The CARD Act was intended to curb the abuses wrought by these ''[a]ny time any reason'' changes to credit card agreements.[108] As implemented by Regulation Z, the CARD Act requires that when a credit card issuer seeks to make ''a significant change in account terms,'' it must provide 45 days advance notice of the change and include in the notice a statement that the consumer ''has the right to reject the change or changes prior to the effective date of the changes'' and ''[i]nstructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection.'' [109]

However, abuses arising from unilateral amendments remain a problem in consumer financial services. For example, the CARD Act does not require a change-in-terms notice for all modifications to a credit card agreement, and the CFPB recently warned that ''many of the largest credit card issuers reserved the right to change their rewards program at any time, for any reason, and in many cases without notice in terms and conditions typically separate from the cardholder agreements, in which changes to some terms are restricted and/or require prior communication.'' [110] The CFPB noted that such clauses can allow issuers ''to alter rewards programs or devalue rewards as a safety valve [for the company], putting consumers at a fundamental disadvantage.'' [111]

The CFPB is concerned about unilateral amendment clauses because they undermine the consumer's freedom to benefit from the contract. A contract is based on the voluntary exchange of promises between the contracting parties that establish a ''meeting of the minds.'' Thus, as the Restatement (Second) of Contracts notes, ''the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.'' [112] These same principles apply not only for the initial contract but any subsequent modifications.[113]

For that reason, courts have generally refused to enforce unilateral amendment clauses that do not allow for mutual assent. ''Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so. This is because a revised contract is merely an offer and does not bind the parties until it is accepted. And generally an offeree cannot actually assent to an offer unless he knows of its existence.'' [114] Thus, as noted by the Restatement of Consumer Contracts, if a company ''can derogate, without any limitation, from rights and obligations that were stated when the original assent was manifested, or if the business awards itself unfettered discretion to specify its obligations under the original contract, such that the promise the business made to consumers is lacking sufficient meaningful commitment, the business's promise is illusory and the contract fails for lack of consideration.'' [115]

As the Restatement of Consumer Contracts further explains, ''courts have developed a fairly consistent approach to determining the enforceability of modifications. In particular, the requirements of notice and opportunity to reject or terminate figure prominently in courts' reasoning. In almost all cases in which modifications were enforced and that involve the questions of notice as well as opportunity to reject or terminate, courts made explicit determinations that both the requirements of sufficient notice and opportunity to reject or terminate were satisfied.'' [116] Thus, under the Restatement of Consumer Contracts, a modification of a standard-contract term is binding on a consumer only if the consumer received notice of the proposed modification and was provided a reasonable opportunity to reject the change.[117] For example, the Restatement provides an example of a ''contract between an airline and a consumer allow[ing] the airline to modify the frequent-flyer program at its discretion,'' explaining that such a provision would be unenforceable ''if the airline does not afford the consumer a meaningful opportunity to reject it.'' [118]

Consistent with these principles, the proposed rule would prohibit any clause in a contract for a consumer financial product or service that provides the company the sole right to modify the contract. The CFPB recognizes that consumer contracts may need to be modified to account for changed circumstances after the contract is signed, and this proposed rule would not prohibit all such modifications. Nothing in the proposed rule would prohibit companies from implementing modifications that are consistent with applicable State or Federal law.[119] Whether a particular

[106] Public Law 111–24, 123 Stat. 1734 (2009).

[107] *See, e.g.,* Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. 199 (2009) (statement of Travis B. Plunkett).

[108] See 155 Cong. Rec. S2150 (daily ed. Feb. 11, 2009) (statement of Sen. Dodd); see also 15 U.S.C. 1637(i).

[109] 12 CFR 1026.9(c)(2)(iv).

[110] Consumer Fin. Prot. Bureau, *Issue Spotlight: Credit Card Rewards,* 11 (May 9, 2024) (citing agreements from American Express, Citi, Chase, and Wells Fargo).

[111] *Id.*

[112] Restatement (Second) of Contracts section 17(1) (1981); *see also, e.g., Specht* v. *Netscape Commc'ns Corp.,* 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001), aff'd, 306 F.3d 17 (2d Cir. 2002) (''Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King's Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today.)

[113] See, *e.g., Dallas Aerospace, Inc.* v. *CIS Air Corp.,* 352 F.3d 775, 783 (2d Cir. 2003) (''[f]undamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms'').

[114] *Douglas* v. *U.S. Dist. Ct. for Cent. Dist. of California,* 495 F.3d 1062, 1066 (9th Cir. 2007); *see also, e.g., In re Zappos.com, Inc., Customer Data Sec. Breach Litig.,* 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012); *Lovinfosse* v. *Lowe's Home Centers, LLP,* 2024 WL 3732436 (E.D. Va. Aug. 8, 2024).

[115] Restatement of the Law, Consumer Contracts, *supra* note 28, section 5, reporters' notes a.

[116] *Id.* section 3, reporters' notes f.

[117] *Id.* section 3(a). Under the Restatement, ''[a] consumer contract governing an ongoing relationship may provide for a reasonable procedure for adoption of modified terms under which the business may propose a modification of the standard contract terms but may not, to the detriment of the consumer, exclude the application of subsection (a), except that the established procedure may replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden.'' *Id.* section 3(b).

[118] *Id.* section 5 illus. 5.

[119] The CFPB recognizes that there are State or Federal statutes or regulations setting forth processes for companies to implement modifications for certain contract terms. For example and as noted above, the CARD Act and its implementing regulations create procedures for credit card issuers to implement modifications to a consumer's account agreement. For certain changes, the CARD Act and its implementing regulations require a company to provide consumers with notice and an opportunity to reject a modification. For other changes, the CARD Act and its implementing regulations affirmatively state that no advance notice of a modification is required. And

modification is consistent with applicable law will depend on the facts and circumstances and the applicable jurisdiction's common law, and is beyond the scope of this rulemaking. But the proposed rule would prohibit companies from relying on a unilateral amendment clause to make modifications.

The CFPB seeks comment on this proposed prohibition of unilateral amendment clauses.

C. Clauses Restraining Consumers' Free Expression

Proposed § 1027.301(a)(3) would prohibit covered persons from including in contracts for consumer financial products or services ''[a]ny term or condition that limits or restrains, or purports to limit or restrain, the free and lawful expression of a consumer,'' except that this prohibition would not ''affect[] a covered person's ability to close an account that is being used to commit fraud or other illegal activity.'' This prohibition would apply to, for example, contractual clauses that limit a consumer's ability to make negative comments about a company or to freely express their political and religious views. And it would include any contractual mechanism for enforcing those limits, including fees, reserving rights to close accounts on that basis (*e.g.,* ''debanking''), or terms that do not describe a particular remedial consequence but could give rise to a breach of contract claim. The proposed rule would not, however, prohibit contract clauses giving covered persons a right to close accounts based on the use of an account to commit fraud or illegal activity, because that would not constitute ''lawful expression.''

The First Amendment of the Constitution protects people from, among other things, laws abridging free speech or prohibiting the free exercise of religion. The First Amendment ''reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'' because ''speech concerning public affairs is more than self-expression; it is the essence of self-government.'' [120] Free expression ''is powerful medicine'' because it ''put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'' [121] The First Amendment applies even when speech is disagreeable or offensive. ''In an open, pluralistic, self-governing society, the expression of an idea cannot be suppressed simply because some find it offensive, insulting, or even wounding.'' [122]

While government restraints on speech carry obvious risks due to the coercive power of government, infringement of speech by large private corporations can be similarly harmful, with the added concern that these entities are not subject to democratic accountability or transparency obligations. And in recent decades, many companies have begun to use contractual terms to prevent individuals from expressing themselves freely.[123] In the market for consumer financial products and services, two such types of clauses are of particular concern to the CFPB, both of which would be prohibited under the proposed rule.

First, some companies have begun including non-disparagement clauses—also colloquially known as ''gag'' clauses—that restrict consumers from providing negative reviews of the company's product or service. Originating in the health care sector, these types of clauses have migrated to many parts of the economy.[124] The CFPB is aware of such abuses in the consumer finance market. For instance, the FTC has taken action against a credit repair firm for its use of non-disparagement clauses in violation of the Consumer Review Fairness Act.[125] The CFPB is also aware of reports that a nonbank mortgage lender had imposed certain non-disparagement provisions in certain loan modification agreements associated with settlement of pending legal claims, until committing to the New York State financial regulator to stop doing so.[126]

Numerous studies and surveys have confirmed the importance of online reviews across the economy. For example, one prominent study estimated that a one-star rating increase on *Yelp.com* translated to an increase of five to nine percent in revenues for a restaurant.[127] Another study found that a one-point boost in a hotel's online ratings on travel sites is tied to an 11 percent jump in room rates, on average.[128] To date, academic research has not focused specifically on markets for consumer financial products and services. But the CFPB expects consumer reviews to play an increasing role in helping consumers choose between financial providers given that many consumers now seek financial products online, including on shopping platforms that can simultaneously provide reviews. This can create an incentive for dishonest market participants to attempt to manipulate the review process, rather than compete based on the value of their services, which can frustrate a competitive marketplace.

In 2016, Congress unanimously enacted the Consumer Review Fairness Act,[129] in response to abuses by companies that restricted consumer reviews. The Consumer Review Fairness Act generally prohibits non-disparagement clauses in standard-form consumer contracts. Specifically (and with certain exceptions), it voids from inception any such contractual provision that prohibits, restricts, or penalizes ''an individual who is a party to the form contract'' to engage in a ''written, oral, or pictorial review, performance assessment of, or other similar analysis of . . . the goods, services, or conduct of a person.'' [130] As the legislative history of the statute explains, the ''wide availability'' of consumer reviews ''has caused consumers to rely on them more heavily as credible indicators of product or service quality. In turn, businesses have sought to avoid negative reviews . . . through provisions of form contracts with consumers restricting such

the CARD Act and its implementing regulations are silent on changes for other terms. Nothing in this proposed rule would displace or affect those procedures for amending a contract. This rulemaking only prohibits the use of a contract term to reserve a unilateral right to amend that the company would not otherwise have by virtue of State or Federal law or regulation.

[120] *Snyder* v. *Phelps,* 562 U.S. 443, 452 (2011).

[121] *Cohen* v. *California,* 403 U.S. 15, 24 (1971).

[122] *Fulton* v. *City of Philadelphia,* 593 U.S. 522, 615 (2021).

[123] Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech,* 83 Cornell L. Rev. 261, 268 (1998).

[124] Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016,* 24 Mich. Telecomm. & Tech. L. Rev. 1, 2 (2017).

[125] *FTC* v. *Grand Teton Professionals*, LLC, et al., Case No. 19–cv–933 (D. Conn) (Complaint filed June 17, 2019).

[126] Peter Rudegeair, Michelle Conlin, *Exclusive: Ocwen Financial to stop gagging homeowners in mortgage deals, Reuters.com* (June 3, 2014), *https://www.reuters.com/article/us-banks-mortgages/exclusive-ocwen-financial-to-stop-gagging-homeowners-in-mortgage-deals-idUSKBN0EE1XG 20140603* (last visited Dec. 2, 2022); Brena Swanson, *Ocwen will stop using mortgage gag orders, Housingwire.com* (June 3, 2014), *https://www.housingwire.com/articles/30196-ocwen-will-stop-using-mortgage-gag-orders/.*

[127] Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com,* Harv. Bus. Sch. Working Paper No. 12–016, 14 (2016).

[128] Chris Anderson, *The Impact of Social Media on Lodging Performance,* 12(15) Cornell Hospitality Report 6, 11 (2012).

[129] 15 U.S.C. 45b.

[130] *Id.*

reviews.'' [131] Some States have also enacted prohibitions against non-disparagement or ''gag'' clauses.[132]

Second, some companies have also used contractual terms to prevent consumers from engaging in political or religious expression or to penalize them for doing so. For example, in 2022 PayPal amended its user agreement to levy a fine or close accounts based on consumers' exercise of free expression, even if it was unrelated to fraud or other illegal activity.[133] In a similar vein, some consumer financial companies have been accused of ''de-banking'' persons or organizations based on their political or religious beliefs. For example, several State regulators recently accused a major bank of ''discriminating against religious ministries,'' including the bank's closure of the accounts of a Christian ministry because the bank did not want to serve the organization's ''business type.'' [134] State attorneys general also sent a letter to the same bank about the bank's practice of ''conditioning access to its services on customers having the bank's preferred religious or political views.'' [135] Some State legislatures have also introduced or enacted laws that would prohibit such ''de-banking.'' [136]

The CFPB seeks comment on this proposed prohibition of clauses restraining consumers' lawful free expression.

Legal Authority

The CFPB proposes to prohibit these three types of terms and conditions in consumer financial products or services because their use constitutes unfair or deceptive acts or practices.

i. Deceptive Acts or Practices

Under the CFPA, a representation or omission is deceptive if it is likely to mislead a reasonable consumer and is material.[137] A representation is ''material'' if it ''involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'' [138] It is well-established that material misrepresentations to consumers that are unsupported under applicable law can be deceptive.[139] In particular, including an unenforceable material term in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable.

As the CFPB recently explained, waiver-of-law provisions in contracts for consumer financial products or services are often deceptive when the waivers are unlawful or unenforceable under Federal or State law.[140] The inclusion of unlawful or unenforceable terms and conditions in consumer contracts is likely to mislead a reasonable consumer into believing that the terms are lawful and/or enforceable, when in fact they are not. Further, the representations made by the presence of such terms are often material, presumptively so when they are made expressly. In particular, consumers are unlikely to be aware of the existence of laws that render the terms or conditions at issue unlawful or unenforceable, so in the event of a dispute, they are likely to conclude they lawfully agreed to waive their legal rights or protections after reviewing the contract on their own or when covered persons point out the existence of these contractual terms and conditions. Research indicates providers are incentivized to include unenforceable terms because consumers tend to assume the terms in their contracts are enforceable (even if they harm the consumer's interests or deprive them of legal rights).[141] A contractual provision stating that a consumer agrees not to exercise a legal right is likely to affect a consumer's willingness to attempt to exercise that right in the event of a dispute. Deceptive acts and practices such as these pose risks to consumers, whose rights are undermined as a result, and distort markets to the disadvantage of covered persons who abide by the law by including only lawful terms and conditions in their consumer contracts.

For similar reasons, a contractual provision that restrains a consumer's free expression in violation of the Consumer Review Fairness Act would be deceptive. As the CFPB noted in a recent compliance bulletin, it would generally be deceptive to include a restriction on consumer reviews in a form contract, given that the restriction would be void from the inception under the Consumer Review Fairness Act.[142] Consumers can be expected to read such language to mean what it says: that they are restricted in their ability to provide consumer reviews. But that is not the case, since the provision is void under applicable law. And the option to post candid reviews about products or services would be material to the many American consumers who do so. Moreover, enforcing the deception prohibition is particularly important in this context, given that consumer reviews are a significant driver of competition in the modern economy.

ii. Unfair Acts or Practices

The CFPB may declare an act or practice to be ''unlawful on the grounds that [it] is unfair'' if the CFPB ''has a reasonable basis to conclude that (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.'' [143] The use of each of the clauses that would be prohibited

[131] H. Rept. 114–731, at 5 (2016). The legislative history also indicates that Congress was concerned that these clauses would diminish the overall value of consumer reviews, including by chilling ''negative yet truthful'' reviews. ''Non-disparagement clauses interfere with the benefits consumers derive from ready access to 'crowd-sourced' reviews of products and services. If such clauses become widely adopted, negative yet ruthful reviews may be chilled, undermining the overall credibility of consumer reviews. The newfound utility of consumer reviews would then be reduced as trust in their veracity diminishes. H.R. 5111 seeks to curtail non-disparagement clauses in order to preserve the credibility and value of online consumer reviews.'' *Id.* at 5–6.

[132] Cal. Civil Code sec. 1670.8 (''A contract or proposed contract for the sale or lease of consumer goods or services may not include a provision waiving the consumer's right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.''); 815 Ill. Comp. Stat. Ann. 505/2UUU (West) (same); Md. Code, Com. L. sec. 14–1325 (making it an unfair and deceptive trade practice to include a provision ''waiving the consumer's right to make any statement concerning [ ] The seller or lessor; [ ] Employees or agents of the seller or lessor; or [ ] The consumer goods or services.'').

[133] See Emily Manson, *After PayPal Revokes Controversial Misinformation Policy, Major Concerns Remain Over $2,500* Fine (Oct. 27, 2022), *https://www.forbes.com/sites/emilymason/2022/10/27/after-paypal-revokes-controversial-misinformation-policy-major-concerns-remain-over-2500-fine/.*

[134] Letter from Andre Sorrell et al. to Brian Moynihan, *https://treasurer.utah.gov/wp-content/uploads/04-18-2024-Letter-to-BoA-Regarding-Debanking.pdf* (Apr. 18, 2024).

[135] Letter from Kris W. Kobach et al. to Brian T. Moynihan, (Apr. 15, 2024) *https://dojmt.gov/attorney-general-knudsen-demands-action-from-bank-of-america-to-correct-debanking-practices/.*

[136] See, *e.g.,* Tenn. Code Ann. sec. 45–1–128.

[137] Although the CFPA does not define ''deceptive,'' the CFPB has adopted the definition set forth by the FTC in its 1983 Policy Statement on Deception. *See* FTC Policy Statement on Deception (Oct. 14, 1983), *https://www.ftc.gov/bcp/policystmt/ad-decept.htm.*

[138] *Novartis Corp.* v. *FTC,* 223 F.3d 783, 786 (D.C. Cir. 2000) (quoting *In re Cliffdale Assocs., Inc.,* 103 F.T.C. 110, 165 (1984)).

[139] *See, e.g., FTC* v. *World Media Brokers,* 415 F.3d 758, 763 (7th Cir. 2005).

[140] *Consumer Financial Protection Circular 2024–03, supra* note 6.

[141] *See, e.g.,* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud,* 72 Stan. L. Rev. 503, 508–09 (2020).

[142] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2022–05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews,* (Mar. 22, 2022), *https://www.consumerfinance.gov/compliance/supervisory-guidance/cfpb-bulletin-2022-05-unfair-deceptive-acts-or-practices-that-impede-consumer-reviews/.*

[143] 12 U.S.C. 5531(c).

under the proposed rule in contracts for consumer financial products or services would be an unfair act or practice.

Substantial injury. Each of the three types of clauses causes or would likely cause substantial injury to consumers.

A contractual clause requiring a consumer to waive the protections of Federal or State law causes the consumer to forfeit legal rights designed for their benefit. These laws reflect a legislative judgment that it is in the public interest for consumers to be protected from certain business practices. Eliminating these protections through a consumer contract deprives the consumer of those legal rights. Consumers can also suffer concrete monetary injury from the inclusion of waiver-of-law clauses when, as a result of the waiver, they are exposed to business practices that would have been otherwise illegal, or, when the waiver reduces the monetary remedy that consumers can seek. These waivers shift the risk of such business practices from the company to the consumer. ''Consumers are clearly injured by a system which forces them to bear the full risk and burden of sales related abuses.'' [144] This is particularly the case when a consumer cannot fully enforce a law because of a waiver-of-law provision. As noted above, many consumer protection laws grant consumers a statutory cause of action to enforce the law, enjoin the unlawful practice, and recover actual and/or statutory damages. When a consumer is contractually restricted from relying on such a cause of action—or when a waiver provision limits a company's legal liability or limits the time in which a consumer can bring a legal action against the company—consumers are unable to stop the illegal practice and recover damages from the company. For example, in a 2022 case the CFPB alleged that Bank of America engaged in unfair acts and practices by using a deposit agreement that required consumers not to contest legal process and waive the bank's liability for unlawfully garnishing funds from a consumer's deposit account. According to the consent decree, in at least 3,700 instances, the bank's conduct resulted in substantial injury to affected consumers in the form of garnishment-related fees, frozen or held funds, and funds turned over to judgment creditors.[145]

Unilateral amendment clauses injure consumers by facilitating involuntary changes that are a detriment to the consumer (including monetary detriment), and depriving consumers of the opportunity to provide meaningful consent to amended terms that may adversely affect them. As noted above, when a company can derogate from the material terms of an agreement with a consumer at its own discretion, a contract becomes illusory and the consumer does not obtain the benefit of the bargain in the contract they signed initially. They also deprive consumers of the ability to make a free and informed choice of whether to contract in the first place because the material terms of the agreement might change later in unpredictable ways. Furthermore, the changes effected through such clauses (*e.g.,* diminution of credit-card rewards) typically inure to the detriment of consumers. In particular, when a modification undermines a consumer's expectations about the scope of contract, it resembles a traditional ''bait-and-switch'' scheme that has long been found to be unfair by the FTC.[146]

In particular, in the credit card market, consumers experience substantial injury when credit card companies use unilateral amendment clauses to amend the terms of a reward program without adequate notice or opportunity to provide meaningful consent. Consumers make decisions based on expectations about the value of credit card reward programs,[147] and so they incur concrete and monetary harm associated with the use of unilateral amendment clauses to unilaterally decrease the accrual rates or otherwise downgrade those programs.

Contractual restraints on free expression deprive consumers of their ability to express themselves freely. This can cause harm when, for example, a consumer is prohibited from providing a negative review on or complaining about a faulty product or service. In such cases, the consumer is deprived of the ability to freely voice themselves about the quality of a product or service, which in turn deprives other consumers of the benefit of the negative review or complaint.[148] When a contract limits the consumer's ability to speak or act freely on political or religious matters, it deprives consumers of a fundamental right to express themselves. It also leaves consumers with the untenable choice between maintaining access to the financial service in question or maintaining the right to free speech. While most unfairness matters involve ''monetary harm,'' the substantial injury prong is met for any form of injury that is not ''trivial or merely speculative.'' [149] The CFPB preliminarily concludes that, based on the historical importance of free speech in the United States, limiting religious, political, or other forms of free speech is not a trivial consumer harm.

Not reasonably avoidable. The injuries caused by these terms and conditions in form contracts are not reasonably avoidable by consumers because consumers are typically unaware they are agreeing to these terms and conditions, and even if they were, are unable to negotiate the terms out of the agreement. These clauses are almost always presented to consumers as ''boilerplate'' or ''fine print'' language in contracts of adhesion on a ''take it or leave it'' basis. These terms are drafted by companies (or their lawyers), and consumers are allowed no opportunity to negotiate or reject them. Nor can consumers realistically comparison shop for any of these clauses among different providers, since these contracts typically ''are written in obscure technical language, do not use standardized terminology, and may not be provided before the transaction is consummated.'' [150] Indeed, with the increasing popularity of digital transactions, standard contract terms have become more and more complex.[151] ''The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent.'' [152] There are also limited incentives for consumers to seek out better terms because these terms relate to future events that a consumer may not be able to properly assess at the time they are initially shopping for the product or service. For example, a

[144] FTC, *Preservation of Consumers' Claims and Defenses,* 40 FR 53506, 53523 (Nov. 18, 1975).

[145] *See* Consent Order, *In re Bank of America, N.A.,* No. 2022–CFPB–0002 (May 4, 2022).

[146] *See* FTC Guides Against Bait Advertising, 16 CFR part 238 *et seq.; cf. Rossman* v. *Fleet Bank (R.I.) Nat. Ass'n,* 280 F.3d 384, 396–400 (3d Cir. 2002) (credit card issuer soliciting business with no-annual-fee offer while intending to later impose fee constitutes a bait-and-switch scheme).

[147] *See* Consumer Fin. Prot. Bureau, *Consumer Financial Protection Circular 2024–07: Design, Marketing, and Administration of Credit Card Rewards Programs,* (Dec. 18, 2024), *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-07-design-marketing-and-administration-of-credit-card-rewards-programs/.*

[148] *See, e.g., FTC* v. *Roca Labs, Inc.,* 345 F. Supp. 3d 1375, 1393 (M.D. Fla. 2018) (agreeing with the FTC that ''restricting the flow of information to consumers and the marketplace causes or is likely to cause substantial injury'').

[149] FTC Policy Statement on Unfairness (December 17, 1980), *https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness.*

[150] 49 FR 7744.

[151] See *e.g.,* Samples et al., *supra* note 16 at 105.

[152] Restatement of the law, Consumer Contracts, *supra* note 28, at introduction.

consumer reviewing a unilateral amendment clause would be unlikely to predict what kinds of modifications a company might implement under such a clause. Under these circumstances, it should be unsurprising that many research studies have confirmed that consumers almost never read non-core terms in standard-form contracts. As noted above, for example, one prominent study found that far less than one percent of consumers can be expected to read such terms.[153] At any rate, even if consumers were to review these terms before signing the agreement, their only opportunity to avoid the terms would be to decline the agreement in totality. And once the agreement is entered into, these clauses are implemented by the companies without any involvement by the consumer.

Consideration of countervailing benefits. The CFPB is not aware of any meaningful countervailing benefits to consumers or competition created by these clauses that would outweigh the associated harms, and invites commenters to raise any countervailing benefits that the agency will consider before finalizing any rule. These clauses will typically not be essential to the transaction and will serve no purpose in the deal between the company and the consumer. To the contrary, these types of clauses strip important rights or protections from consumers, including the right to be aware of and provide meaningful consent to contract amendments, the right to benefit from legal protections, and the right to free expression. The CFPB is also not aware of any research or findings demonstrating that consumers enjoy lower costs or prices in exchange for these clauses. Nor is the CFPB aware of any benefits these clauses provide to competition. Indeed, the CFPB preliminary concludes that these clauses dilute competition by insulating companies from the rule of law, legal liability, and negative feedback (or even being compared unfavorably to one's competitors), and also by allowing companies broad discretion to fashion rules and procedures to their own liking. And once one firm adds one of these non-salient fine print terms, other firms in the market may be incentivized to match, creating a race to the bottom.[154]

As noted in the section 1022(b) Analysis below, the CFPB acknowledges that companies may incur costs associated with the increased incentive to comply with existing laws if they cannot waive those laws or sidestep public accountability by blocking criticism. For purposes of determining legally recognizable countervailing benefits, it would generally be inappropriate to consider companies' lawbreaking to be a benefit to consumers or competition. However, even were the CFPB to consider that foregone cost to companies a countervailing benefit, those costs are likely to be low, and the CFPB would only credit those costs to the extent they pass through to consumer prices. That is because the CFPB considers countervailing benefits to ''consumers or competition,'' not companies, and the analysis is used to determine whether a practice is ''injurious in its net effects.'' [155] As noted in the section 1022(b) Analysis, the CFPB does not anticipate a 100 percent pass-through rate.

Taking each of these clauses in turn, with respect to waiver of law clauses, the CFPB preliminarily concludes that that the harms are not outweighed by countervailing benefits associated with allowing companies to include clauses that nullify State and Federal legislatures' judgment on addressing a consumer harm and tools they have chosen to enable consumers to vindicate their legal rights. A consumer protection enacted by a legislature pursuant to a constitutionally valid process will generally have a legitimate purpose and a rational basis,[156] and legislatures generally balance the benefits and costs and conclude that the legislation is net beneficial when a law is passed. It would be inappropriate for the CFPB to second-guess that legislative judgment and conclude that a democratically passed consumer protection's benefits are outweighed by its costs.

Regarding unilateral amendment clauses, the CFPB preliminarily concludes that the countervailing benefits do not outweigh the harms. To be sure, companies may need to implement modifications during the course of an agreement, but consumers do not benefit from having such changes imposed on them without their awareness and consent. Nor do such changes benefit competition, since competition is benefited by consumers being able to consider concrete deals with terms they can rely on. If firms can change contractual terms at their discretion, consumers can have no confidence in the scope of consumer contracts and cannot properly comparison-shop among various providers.

As noted below in the section 1022(b) Analysis, in theory some firms may be discouraged from offering certain consumer-beneficial terms if they are not free to change them at a later date (without providing appropriate notice and obtaining consent). The CFPB generally does not grant this theoretical countervailing benefit much weight because the likelihood that unilateral amendment clauses impact the terms a firm offers is quite small. Firms will still be able to amend contracts—the only change is they will need to go through an appropriate process under common law to do so. Moreover, to consider such a benefit would be to argue that the CFPB should not prohibit a bait-and-switch scheme because it would deter companies from offering the ''bait.'' If firms are unwilling to offer terms unless they have full flexibility to change them, these terms are likely ephemeral promises anyway.

With respect to restraints on free expression, the CFPB is unaware of any countervailing benefit to allowing companies to include clauses that restrict consumers' ability to provide negative feedback or reviews on the companies, since distorting public reviews of a good or service does not help consumers and moreover such restrictions are already illegal in form contracts under the Consumer Review Fairness Act. Nor do there appear to be benefits to restricting a consumer's right to engage in constitutionally protected religious or political activity. While a company's management may disfavor certain speech or activities, it is not their purview to restrict such activities by private citizens and it is unclear what pecuniary gain the company itself would gain by constraining customers' speech involving topics having nothing to do with the company.

Having said that, there are two theoretical countervailing benefits to consumers that the CFPB has considered in issuing this proposal. First, a scammer or fraudster who is a customer of a financial institution may communicate with other consumers in furtherance of an illegal scheme to defraud those consumers and induce payment to their account. In recognition of this potential countervailing benefit, the unfair practice identified by the CFPB only includes contract terms that limit ''lawful expression,'' which would not include contract terms giving covered persons a right to close an account that is being used to commit

[153] *See, e.g.,* Bakos et al., supra note 19 at 1.

[154] Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 108 (2013) (''competition forces firms to offer progressively worse and more onerous terms'').

[155] See FTC Policy Statement on Unfairness, *supra* note 149.

[156] *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U.S. 456, 461–63 (1981).

fraud or other illegal activity. Second, a common argument raised in debates about platforms and free speech is that a company should not have to carry the message of its customers if they disagree with the message.[157] Putting aside the question of whether companies' and natural persons' free speech rights should be given equal weight, or the other merits of such arguments, this rulemaking implicates only agreements for consumer financial products or services, not terms of service for social media services or other businesses that provide a forum for someone else's views.

Public policy. ''In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence.'' [158] Public policy corroborates that the use of these three contractual clauses would be an unfair act or practice. As discussed above, evidence suggests that these clauses undermine principles of democratic governance, freedom of contract, and freedom of expression. In particular, a prohibition on unilateral amendment clauses is consistent with the recent Restatement of Consumer Contracts.[159] A prohibition on waivers of substantive rights is consistent with the public policy as determined by State and Federal legislatures across the country when determining to pass each individual law. And a prohibition on restraints on free expression supports a broad conception of the freedom of speech and recognizes that banking and consumer finance should be treated as public utilities with a duty to serve.[160]

The CFPB seeks comment on all aspects of the proposed prohibition of these clauses.

[157] *Moody* v. *NetChoice, LLC,* 603 U.S. 707, 728 (2024) (''We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. And we have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.'').

[158] 12 U.S.C. 5531(c)(2). ''Such public policy considerations may not serve as a primary basis for such determination.'' *Id.*

[159] Restatement of the Law, Consumer Contracts, *supra* note 28, sections 3, 5.

[160] Lev Menand and Morgan Ricks, Rebuilding Banking Law: Banks as Public Utilities (Sept 2023), *https://cdn.vanderbilt.edu/vu-URL/wp-content/uploads/sites/412/2023/09/14140935/Banking-Full-Report-Final.pdf; cf. Biden* v. *Knight First Amend. Inst.,* 141 S. Ct. 1220, 1222–24 (2021) (Thomas, J., concurring) (raising concerns about the ability of companies to constrain free speech and recognizing that doctrines involving common carriers or public accommodation may be an appropriate solution).

VII. Proposed Effective Date and Compliance Date

If finalized, the proposed rule would go into effect 30 days after publication in the **Federal Register**. Under proposed § 1027.104, covered persons subject to the rule would also be required to comply with the rule by 30 days after publication in the **Federal Register**. However, ''if an agreement for a consumer financial product or service between a covered person and a consumer was executed before [30 days after publication of the final rule in the **Federal Register**],'' compliance with the rule would be required by 180 days after publication of the final rule in the **Federal Register**.'' An extended compliance date for pre-existing agreements would be appropriate because companies may need additional time to review and conform any pre-existing agreements to the proposed rule. The CFPB is not proposing to prescribe any particular manner in which a covered person should conform a pre-existing agreement to this proposed rule. For instance, a covered person may (subject to applicable law) amend such an agreement to remove any terms or conditions prohibited by the proposed rule. Or a covered person may provide adequate notice to a consumer that it will not enforce a term or condition prohibited by the proposed rule.

VIII. Severability

Under proposed § 1027.103, the CFPB preliminarily intends that, if any provision of the proposed rule, if adopted as final, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

IX. Dodd-Frank Act Section 1022(b)(2) Analysis

A. Introduction

Overview

In developing this proposed rule, the CFPB considered the potential benefits, costs, and impacts required by section 1022(b)(2) of the Dodd-Frank Act. Specifically, section 1022(b)(2) calls for the CFPB to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services, the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act, and the impact on consumers in rural areas.[161]

The CFPB requests comment on the preliminary analysis presented below, as well as submissions of additional data that could inform the CFPB's analysis of the benefits, costs, and impacts of the proposed rule.

The CFPB considers the benefits, costs, and impacts of the proposed provisions as compared to the status quo that existed prior to the issuance of this proposed rule. In formulating this baseline, the CFPB considers economic attributes of the relevant markets and the existing legal and regulatory structures applicable to covered persons. In subpart B, the proposed rule would codify the prohibition of certain credit practices. Bank and nonbank covered persons have generally been aware that these credit practices are or are likely unlawful in light of the FTC Credit Practices Rule and joint guidance from the CFPB and the prudential regulators warning that such practices may violate the CFPA and FTC Act even in the absence of an express regulatory prohibition if engaged in by banks, savings associations, and Federal credit unions. The CFPB therefore anticipates few impacts resulting from this provision, relative to the baseline for these types of covered persons and seeks comment regarding the impacts on covered persons who were not already subject to these laws. subpart C of the proposed rule would create new restrictions on the terms of covered persons' contracts for a consumer financial product or service, though in many cases these terms are also already prohibited, such as non-disparagement clauses that violate the Consumer Review Fairness Act or waivers that violate the Military Lending Act. Therefore, subpart C may result in some substantive changes relative to the baseline. The estimated costs and benefits of both subparts are considered below. The CFPB seeks comment on this baseline.

Data

The CFPB notes that in some instances, the data needed to analyze the potential benefits, costs, and impacts of the proposed rule are not available or are limited. In particular, data with which to quantify impacts of the proposed rule are especially limited; for example, data with which to quantify the incidence of prohibited clauses, incidence of the use of

[161] 12 U.S.C. 5512(b)(2)(A).

prohibited clauses under baseline,[162] estimates of investments into compliance with consumer protection laws that will be induced by the rulemaking, and estimates of the effect on consumer behavior induced by the inclusion of prohibited clauses in contract language under baseline. As a result, portions of this analysis rely in part on general economic principles and the CFPB's expertise in consumer financial markets to provide a qualitative discussion of the benefits, costs, and impacts of the proposed rule. The CFPB seeks comment, data, or analysis that would improve this analysis.

Statement of Need

Before considering the benefits, costs, and impacts of the proposed provisions on consumers and covered persons, as required by section 1022(b)(2), the CFPB believes it may be useful to provide the economic framework through which it is considering those factors in order to more fully inform the rulemaking, and in particular to describe the market failures that are the basis for the proposed rule.[163]

In a perfectly competitive market, where consumers were able to fully understand and appropriately value each term or condition of their contracts, firms would have strong incentives to offer contracts that include only terms and conditions that, in expectation, generate net value that is shared between the firm and their customers. However, there is strong evidence that consumers rarely read the terms and conditions and are often unaware of the full implications of the contracts they sign. Form contracts are often long and complex, and require sophisticated legal knowledge to understand. Further, consumers have no meaningful opportunity to negotiate the contracts' terms and conditions, and therefore have little incentive to spend their limited time on understanding and valuing the contracts' terms and conditions. Even if consumers do fully understand the terms and conditions, the risks and benefits of each clause are often distant in time and probability and therefore extremely difficult for consumers to accurately assess. Finally, although the competitiveness of markets for consumer financial products and services varies from product to product, the search costs involved in reading, understanding, and valuing the terms and conditions offered for each product or service a consumer is considering likely creates sufficient market power for firms to impose contract terms and conditions that are less favorable to consumers than would be efficient. That is, the terms and conditions are likely to, on average, impose costs on consumers that exceed the benefits to the firms that impose them.

Certain types of terms and conditions also impose negative externalities on the market as a whole by weakening incentives to comply with applicable consumer protection laws. For example, firms sometimes include clauses in their terms and conditions that purport to waive protections passed by elected officials in Federal or State government, surrender due process rights upon default, or allow firms to unilaterally amend the contract at any time. Some firms also seek to weaken reputational incentives by including clauses that restrict consumers' free speech.

The proposed rule has two parts. First, it codifies practices on the use of certain remedies in credit contracts that have long been understood to be prohibited. Second, it forbids covered persons from including in their contracts any clause that waives legal rights designed to protect consumers, any clause that reserves to the covered person the right to unilaterally amend a material term of the contract, and any clause that restrains the consumer's free expression.

The first part of the proposed rule–subpart B–would codify the already existing FTC Credit Practices Rule and is unlikely to have significant costs for covered persons because the credit practices it prohibits are generally understood to be prohibited at baseline. Under this baseline, many covered persons are already subject to the FTC Credit Practices Rule, and the prohibitions in subpart B would not result in any change for them, while banks and other prudentially supervised institutions that have not been covered by the Credit Practices Rule or its prudential regulator equivalents, repealed following the enactment of the CFPA, generally understand from the 2014 guidance that the practices that subpart B would codify are likely to be prohibited. At baseline, some covered persons may face costs related to residual uncertainty about whether covered persons within the CFPB's jurisdiction may engage in the prohibited credit practices. For example, some covered persons may choose to consult legal counsel to determine whether a certain business practice is permissible. By reducing confusion or uncertainty about what is prohibited, the proposed rule may reduce these costs for covered persons.

The second part of the proposed rule—subpart C—addresses the incentives for covered persons to comply with applicable consumer financial protection laws. Some consumer finance companies may alter private enforcement through the terms and conditions included in contracts of adhesion. The CFPB's economic framework assumes that when Congress and States have promulgated consumer protection laws that are applicable to consumer financial products and services (the underlying laws) they have done so to address a range of market failures. The underlying laws need enforcement mechanisms to ensure that firms providing financial products and services conform to these laws. Along with supervisory or public enforcement by Federal and State regulatory bodies and commercial incentives to maintain a good reputation, private enforcement mechanisms play a critical role in ensuring compliance with the underlying laws. While the CFPB assumes that the underlying laws address a range of market failures, it also recognizes that compliance with these underlying laws requires firms to incur costs. For example, there are costs required to distribute required disclosures, resolve disputes, or train and monitor employees for compliance with underlying laws.

The CFPB has preliminarily determined, based on its experience and expertise in overseeing consumer finance markets, that weakening consumers' rights, as defined by elected legislatures and courts, is likely to lead to weaker compliance incentives. The economic costs of increased compliance would generally be less than the economic benefits of increased compliance. Thus, the terms and conditions that would be prohibited by subpart C of the proposed rule are likely to lower economic welfare by undermining compliance incentives.

The provisions that would be prohibited by subpart C of the proposed rule generally undermine compliance incentives without offering any rights or benefits to consumers. Indeed, they generally constitute unfair or deceptive acts or practices. Many of the provisions prohibited by subpart C persist in the marketplace due to the market failures described above. Consumers are generally unaware of these provisions, cannot understand them, and have no meaningful opportunity to avoid them. However, even in an idealized marketplace where consumers were fully informed and firms did not have

[162] That is, how often covered persons rely on a prohibited term in consumer relations under the baseline.

[163] Although section 1022(b)(2) does not require the CFPB to provide this background, the CFPB does so as a matter of discretion to more fully inform the rulemaking.

market power, terms and conditions that weaken incentives to comply with the underlying laws would likely be economically inefficient because they impose costs on other consumers and firms that are not parties to the transaction. For example, consumers might sign a contract of adhesion agreeing to forfeit their right to provide negative reviews of a firm's product or service either because they have no meaningful choice or because the product is priced lower than competing products (and at the time of contracting, the consumer might focus only on the price, not the right they are giving up), and the firm might be willing to provide a discount in return for this agreement to ensure that any deficiencies in their product or service would not affect their reputation or ability to attract future customers. However, this restraint on free expression deprives the rest of the market of valuable information regarding the conduct of the firm or the quality of its product. This type of clause creates an additional market failure—insufficient provision of public information—that cannot be resolved through informed consent or negotiation.

B. Overview of Economic Effects

This section provides an overview of the economic effects of subparts B and C of the proposed rule.

Overview of Economic Effects of Subpart B

This subpart would codify the already existing FTC Credit Practices Rule, which was first issued in 1984 and applies to entities in the FTC's jurisdiction, and apply it additionally to banks, savings associations, Federal credit unions, and other covered persons under the CFPB's jurisdiction. Following the issuance of the FTC's rule, other prudential regulators issued companion credit practices rules applicable to banks, savings associations, and Federal credit unions; the Federal Reserve Board's rule applicable to banks was codified in Regulation AA. The Dodd-Frank Act repealed the rulemaking authority of the prudential regulators under the FTC Act and transferred that authority to the CFPB. The CFPB did not re-codify these rules when it was created, but issued joint guidance with the prudential regulators to make clear that the conduct that these rules covered still could violate the prohibitions against unfair and deceptive acts and practices under the FTC Act and the Dodd-Frank Act. This subpart explicitly re-codifies these credit practices rules. Because the conduct covered under this subpart is already generally understood by market participants to be unfair and deceptive, the CFPB does not anticipate that there will be any meaningful economic effects in response to the re-codification of these rules.

Insofar as there are covered persons who are not currently subject to the FTC's Credit Practices Rule or within the scope of the interagency guidance on prohibited credit practices for banks, savings associations, and Federal credit unions, and therefore do not understand that the practices are currently prohibited, the implementation of this proposed rule would standardize credit practices across lenders of different types. This would require covered persons not currently in compliance with the requirements of the FTC's Credit Practices Rule and the former rules promulgated by the prudential regulators to invest in compliance with the proposed rule, for example, by removing any clauses with prohibited terms in existing contracts and including cosigner disclosure forms. For covered persons currently subject to the FTC's Credit Practices Rule or within the scope of the interagency guidance—that is, banks, savings associations, Federal credit unions, and any covered person under FTC jurisdiction—this would require potential competitors to also comply with the requirements of the existing and former rules, eliminating any undue competitive advantage those potential competitors currently hold and benefiting the covered persons currently refraining from the practices covered by those rules. From the perspective of the consumer, the standardization of credit practices across lenders of different types would reduce search costs. Moreover, as noted in the interagency guidance, the basis of the prohibited credit practices was their unfair or deceptive nature;[164] hence their prohibition across a broader group of covered persons would benefit consumers by further shielding them from these practices. On the other hand, it is theoretically possible that some covered persons would reduce the provision of certain credit products due to the expanded scope of the proposed rule. However, even if there are entities that are not covered by the FTC's rule or the interagency guidance and use these prohibited terms, the rule is unlikely to affect credit access from those entities given the FTC's original conclusion that the Credit Practices Rule would ''not have a major impact on either the price or availability of credit.''[165] The magnitude of these effects depends on how many covered persons would be newly subjected to these requirements. The CFPB requests any data or comments that would help quantify how many covered entities would be newly subjected to the requirements of the credit practices rules as a result of this proposed rule and how many use any prohibited credit practices under the baseline.[166]

Additionally, it is possible that certain providers would attempt to engage in prohibited credit practices or may be uncertain as to whether certain business practices are permissible, despite current guidance from the CFPB and other prudential regulators. This subpart would reduce any residual confusion or uncertainty about what is prohibited, which may benefit covered persons. In the event that covered persons may incorrectly attempt to use these prohibited practices against consumers, it is possible that this re-codification incentivizes providers to reduce their use of these prohibited credit practices and thus reduces any costs incurred by consumers in defending themselves from these prohibited credit practices.

Overview of Economic Effects of Subpart C

This subpart would prohibit covered persons from including in their contracts with consumers for consumer financial products or services (1) clauses that require consumers to waive legal rights designed to protect consumers, other than rights explicitly made waivable by relevant consumer laws; (2) clauses that allow a covered person to unilaterally amend a material term of the contract; and (3) clauses that restrict consumers' free expression. Collectively, these are referred to as prohibited terms and conditions. The CFPB considers these terms and conditions to be (1) deceptive insofar as clauses that purport to waive legal rights expressly granted by relevant consumer financial laws, or restrain speech protected by the Consumer Review Fairness Act are unenforceable but may be presented as if they are binding; and (2) unfair, as these terms and conditions cause injury that is not reasonably avoidable by consumers and not

[164] *See* 49 FR 7740 (Mar. 1, 1984); 50 FR 16696 (Apr. 29, 1985); 50 FR 19325 (May 8, 1985); and 52 FR 35060 (Sept. 17, 1987).

[165] 49 FR 7779. The FTC's post-hoc review on access to credit came to the same conclusion. 60 FR 24805, 24808 (May 10, 1995).

[166] Note that these covered persons would be limited to those that are not subject to the current interagency guidance—which covers banks, savings associations, and Federal credit unions—as well as those not subject to FTC jurisdiction.

outweighed by countervailing benefits to consumers or competition.[167]

There are four main effects the adoption of subpart C of this proposed rule would cause. First, the inclusion of prohibited terms and conditions at baseline may have an effect on consumer behavior, even when such terms are unenforceable.[168] Hence, the implementation of this rulemaking would likely ease this effect, which in turn would likely increase the incidence of consumer disputes. This would apply to formal disputes, where consumers exercise legal rights afforded to them under consumer financial laws, or to informal disputes, for example, in situations where a consumer exercises their free expression to lodge complaints against the covered person in public forums. In either case, the covered person would generally incur additional costs in countering such disputes through customer service, in formal legal or arbitration settings, or in informal settings such as response to consumer complaints in public forums. Consumers who may have been discouraged from pursuing valid disputes by the inclusion of prohibited terms in contracts would benefit from the increased incidence of disputes and associated relief. Second, insofar as covered persons may rely on prohibited terms in the event that a dispute arises—including reliance on unenforceable terms due to any residual uncertainty about the applicability of such terms—the prohibition of these terms and conditions in contracts incentivizes covered persons to comply with existing consumer financial laws. Covered persons would respond to this incentive by increasing investments in compliance, which in turn benefits consumers due to the lower likelihood that consumers would experience a violation of their rights under applicable consumer financial laws.[169] Third, the prohibition of unilateral changes in contract terms would increase the costs of contract changes, which in turn may change the terms that the covered person would initially offer beyond the elimination of any prohibited terms. That is, a covered person who relies on a contract term allowing for unilateral changes under the baseline would be required to remove this term and instead comply with applicable Federal or State law in order to implement modifications.[170] Insofar as this process is more costly than the process to change terms under the baseline, the covered person may opt to change the terms—beyond any prohibited terms—in the initially offered contract in anticipation of these increased costs.[171] However, as noted above, unilateral changes may be found to be unenforceable by courts, absent evidence of sufficient notice and consumer consent. Hence, this effect will be limited by the enforceability of such terms under baseline. Finally, there would be administrative costs associated with identifying and removing any prohibited terms and conditions from contracts, though this cost is expected to be a fixed, one-time cost, in general.[172] The CFPB does not have systematic data that would allow for the quantification of the incidence of these terms in consumer contracts nor their actual use in financial relationships. The CFPB requests any commentary or data that would help quantify the baseline as well as any costs or benefits associated with the aforementioned economic effects of the rulemaking.

Insofar as some of these effects increase the marginal costs to covered persons—*e.g.,* increased costs of compliance with consumer finance laws or increased costs associated with dispute resolution which would be ongoing costs, in general, as opposed to being incurred one-time only—the CFPB believes that most providers would pass through some portion of these marginal cost increases to consumers.[173] The rate at which firms pass through changes in their marginal costs to consumers through prices charged is called the pass-through rate—*e.g.,* a pass-through rate of 100 percent means that the increase in marginal costs would not be absorbed by providers but rather fully passed through to consumers through increased prices, while a pass-through rate of 0 percent means that consumers would not see a price increase. The pass-through rate depends on many factors, including the elasticities of demand and supply, the market structure, and the model of competition. Existing estimates of pass-through rates in the credit card market are close to zero.[174] Similarly, research on the effects of regulation on late payment

[167] The CFPB has explained that the use of contract terms that are unenforceable often amounts to a deceptive act or practice, *see* CFPB Circular 2024–03, *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/.* In that sense, portions of this subpart codify existing interpretation of the CFPA. Under the Restatement (Second) of Contracts, revised contract terms are adopted only insofar as consumers receive notice of material changes, have opportunity to consider changes, and assent to changes. Unilateral changes to contract terms that lack notice and meaningful consent by the consumer violate this principle and are generally found to be unenforceable by courts, as noted above. Similarly, form contract prohibitions on consumers' free expression run afoul of the Consumer Review Fairness Act and are thus unenforceable. Finally, as noted above, the CFPB has taken enforcement action against covered persons who include in contract language waivers of consumer rights that are expressly waivable by statute.

[168] *See, e.g.,* Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms,* 103 *Cornell L. Rev.,* 117–175 (2017).

[169] For example, any covered persons that rely on waivers of consumer protection law, including both cause of action and remedies, under the baseline would be incentivized to increase their compliance with these laws given the prohibition of these waivers of law. Note that this incentive effect is not independent of the incidence of disputes effect described above. Specifically, covered persons are likely to recognize that the removal of any chilling effect the prohibited terms may have on consumer behavior would likely increase dispute incidence, all else equal. To lessen the probability of a dispute arising, covered persons would be incentivized to increase compliance with consumer protection laws. Even with this increased compliance, it is likely that the removal of the chilling effect would still lead to increased incidence of disputes.

[170] The specific process the covered person would have to follow depends on prevailing State and common law.

[171] This would have an ambiguous effect on consumers. On one hand, if as a result of increased costs of changing contracts, covered persons decide to change or remove terms that consumers value, this is costly to consumers. On the other hand, consumers being made aware of changes in contract terms and being offered the opportunity to consider these changes allows them to better respond to changes, which benefits them. For example, a covered person that rewards points on a credit card may lower the value of these points in the initially offered contract in anticipation of higher costs of changing the terms at a later date, which is costly for consumers. However, if the covered person decides to lower the value of these points after the contract is in force, they would not be able to do so unilaterally and must notify the consumer in advance, at a minimum giving the consumer opportunity to consider and respond to these changes. In response, the consumer may decide to redeem the points in advance of any devaluation or end the financial relationship and move to a different provider that offers more favorable terms. This would benefit the consumer insofar as they would not necessarily have this opportunity under the baseline.

[172] Given that the rule prohibits waivers of consumer rights under Federal or State consumer financial protection laws, it is possible that future changes in consumer financial protection laws may require review and editing of contracts. In that sense, this final effect may also lead to some variable costs for covered persons in the form of monitoring relevant consumer protection laws and ensuring that terms and conditions of relevant contracts comply with these laws. However, it should also be noted that, at baseline, covered persons must monitor and comply with relevant consumer protection laws, including any potential changes to relevant laws. In that sense, the additional cost here would be limited to reviewing and editing contracts to ensure compliance.

[173] Some of these increased costs—*e.g.,* the cost of changing contract language to remove prohibited terms—can be considered fixed costs of business. Economic theory suggests that the profit-maximizing response of an increase in fixed costs is not to pass that increase through to consumers.

[174] *See* Lawrence Ausubel, *The Failure of Competition in the Credit Card Market,* 81 a.m. Econ. Rev. 50 (1991); *but see* Todd Zywicki, *The Economics of Credit Cards,* 3 Chap. L. Rev. 79 (2000); Daniel Grodzicki, *Competition and Customer Acquisition in the U.S. Credit Card Market* (Working Paper, 2015): *https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2015&paper_id=308.*

fees and overlimit fees on credit card and interchange fees on debit cards generally found low to non-existent pass-through rates.[175] Beyond credit cards and debit cards, there is relatively limited evidence estimating the pass-through rate on all the relevant consumer finance markets covered by this rulemaking. The CFPB requests any comments or data that may aid the evaluation of relevant pass-through rates.

C. Potential Costs and Benefits to Covered Persons

This section describes the benefits and costs to covered persons that the CFPB expects to occur under the proposed rule. Each of the two subparts of the proposed rule is analyzed in detail separately. The proposed rule would generally apply to ''covered persons'' under the CFPA, subject to certain exceptions. A covered person is ''(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.'' [176] Section 1027.102 of the proposed rule would exempt two categories of covered persons from the rule. First, the rule would not apply to any person that is a 'small entity' as that term is defined in 5 U.S.C. 601, including any firm that is at or below the SBA standard for its primary industry. Second, the rule would 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.''

To derive an estimate of the number of affected entities under the proposed rule using publicly available data, the CFPB used data from the December 2023 NCUA and FFIEC Call Report Data and the 2017 Economic Census from the U.S. Census Bureau. Table 1 below presents entity counts for the North American Industry Classification System (NAICS) codes that generally align with consumer financial products or services. The markets defined by NAICS codes may include some entities that would not qualify as covered persons under the CFPA. It is also likely that some covered persons may not be counted in table 1. For example, the financial services they provide may not be their primary line of business. The CFPB seeks comment on the NAICS codes included in table 1, and, in particular, on whether there are any industries not included that contain a significant number of entities that will be affected by the final rule.

TABLE 1—ENTITY COUNTS FOR NAICS CODES

NAICS name(s)	NAICS code(s)	Number of entities operating all year	Estimated number of non-SBA entities [177]
Credit Unions	522110, 522120, 522210	4702	500
Commercial Banking, Savings Institutions, and Credit Card Issuing	522130	4587	1165
Nondepository Credit Intermediation	522220, 522291, 522292, 522299	7403	438
Activities Related to Credit Intermediation	522310, 522320, 522390	11252	212
Activities Related to Real Estate	531311, 531312, 531320, 531390	63564	709
Portfolio Management & Investment Advice	523920, 523930	34695	542
Passenger Car Leasing	532112	199	0
Truck, Utility Trailer, and Recreational Vehicle Rental and Leasing	532120	920	0
Consumer Reporting	561450	284	17
Debt Collection	561440	2750	116
Total		130,356	3,699

Subpart B of the proposed rule would codify the already existing FTC Credit Practices Rule, which was first issued in 1984,[178] and apply it additionally to banks, savings associations, Federal credit unions, and other covered persons under the CFPB's jurisdiction. Because the conduct covered under this subpart is already generally understood to be unfair and deceptive, the CFPB does not anticipate that there would be

[175] *See* Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards,* 130 Q. J. of Econ. 1 (2015); Benjamin Kay, Mark Manuszak & Cindy Vojtech, *Bank Profitability and Debit Card Interchange Regulation: Bank Responses to the Durbin Amendment* (Fed. Reserve Board, Working Paper No. 2014–77, 2014), *https://www.federalreserve.gov/econresdata/feds/2014/files/201477pap.pdf. But see* Todd Zywicki, Geoffrey Manne & Julian Morris, *Price Controls on Payment Card Interchange Fees: The U.S. Experience,* (Geo. Mason L. & Econ., Research Paper No. 14–18, 2014), *http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2446080.*

[176] 12 U.S.C. 5481.

[177] The Economic Census provides entity counts by revenue bins that generally do not correspond to the SBA revenue thresholds. Therefore, the CFPB estimates the number of entities that are above the small entity thresholds. In particular, for each NAICS code, the CFPB fits a generalized Pareto distribution to the share of firms in four revenue bins, as reported in the Economic Census: Under $1MM, $1–10MM, $10–25MM, and $25MM+. SBA regularly updates its size thresholds to account for inflation and other factors. The SBA Size Standards described here reflect the thresholds in effect at the publication date of this proposed rule. The 2017 Economic Census data are the most recently available data with entity counts by annual revenue. See Small Bus. Admin., SBA Size Standards (effective Mar. 17, 2023), *https://www.sba.gov/document/support-table-size-standards.*

[178] 49 FR 7740 (Mar. 1, 1984).

any significant economic effects in response to the proposed codification. However, it is possible that, at baseline, some covered persons attempt to engage in prohibited credit practices or incur costs related to determining whether a practice is prohibited. The proposed rule may therefore modestly benefit covered persons by emphasizing that these credit practices are prohibited.

Subpart C of the proposed rule would prohibit covered persons from including in their contracts with consumers for consumer financial products or services (i) clauses that require consumers to waive legal rights designed to protect consumers; (ii) clauses that allow the covered person to unilaterally amend the contract; and (iii) clauses that restrict consumers' free expression. This provision would impose one-time administrative costs associated with reviewing and revising contracts to identify and remove any prohibited terms and conditions. Covered persons currently using prohibited terms and conditions would likely face increased exposure to consumer disputes, including litigation. In response, covered persons currently using prohibited terms and conditions would incur costs related to lowering their exposure to disputes, for example by allocating more resources to training staff to comply with underlying laws, as well as increased costs related to countering disputes, either in formal litigation or arbitration or in informal settings.

Subpart C likely would benefit some covered persons by reducing uncertainty about the legality of prohibited terms and conditions, as well as unintentional exposure to enforcement action by the CFPB or other State and Federal regulators. Covered persons not currently using terms and conditions that would be prohibited under subpart C may also benefit from this provision of the proposed rule. In general, firms that intentionally violate consumer protection laws or under-invest in compliance obtain a competitive advantage over their more compliant competitors. For example, firms that successfully deceive consumers about the true cost or quality of the products or services they offer by restricting the right of consumers to freely express their experiences with the provider may gain market share at the expense of firms that more accurately disclose costs or quality. In some cases, firms that unlawfully use terms and conditions to limit consumers' ability to resolve disputes may be able to offer lower prices to consumers up front, even if the prohibited terms and conditions leave consumers worse off on average. To the extent that the proposed rule incentivizes firms using prohibited terms and conditions to increase their compliance, firms which were previously compliant will benefit. Clauses that restrict free expression prevent consumers from obtaining information that would be relevant to their adoption or purchasing decisions and make it more difficult for high-quality firms to gain market share. Therefore, the prohibition on clauses restricting free expression will benefit firms that would gain market share if more information about consumers' experiences with their competitors was publicly available.

Potential Costs and Benefits to Covered Persons of Subpart B

Subpart B of the proposed rule would codify the already existing FTC Credit Practices Rule, which was first issued in 1984, and apply it additionally to banks, savings associations, Federal credit unions, and other covered persons under the CFPB's jurisdiction. Because the conduct covered under this subpart is already generally understood to be unfair and deceptive and is, in the CFPB's experience, exceedingly uncommon, the CFPB does not anticipate that there will be any significant economic effects in response to the proposed codification. The CFPB seeks comment on whether any covered persons are not prohibited or discouraged from using these practices at baseline, for example because they are exempt from FTC authority and outside the scope of applicable interagency guidance. The CFPB also seeks comment on the incidence of these practices at baseline, including for any covered persons not currently prohibited or discouraged from using them.

Despite the longstanding prohibition on and discouragement of these practices, it is possible that some covered persons attempt to engage in such practices or incur costs related to determining whether a practice is prohibited. The proposed rule may therefore modestly benefit covered persons by clarifying that these credit practices are prohibited. For example, it is possible that some covered persons that would consult outside legal counsel to assess the risks of engaging in a prohibited credit practice at baseline would no longer do so under the proposed rule.

The CFPB does not have any data with which to quantify the extent of uncertainty regarding the credit practices subpart B would prohibit or the costs, if any, that firms bear as a result of such uncertainty. Therefore, the CFPB cannot quantify the benefits associated with reducing uncertainty about the legality of these practices. The CFPB requests comment or data on cases where covered persons may lack clarity about the applicability of current rules and guidance on credit practices, or where such lack of clarity may be resolved by the proposed rule's codification.

Potential Costs and Benefits to Covered Persons of Subpart C

Subpart C of the proposed rule prohibits covered persons from including in their contracts with consumers for consumer financial products or services (i) clauses that require consumers to waive legal rights designed to protect consumers; (ii) clauses that allow the covered person to unilaterally amend the contract; and (iii) clauses that restrict consumers' free expression. The CFPB has preliminarily determined that these prohibited terms and conditions constitute unfair or deceptive acts or practices. Based on previous guidance [179] and enforcement actions by the CFPB and other State and Federal regulators, the CFPB believes that some covered persons may already not use the terms and conditions covered by subpart C because their use may constitute prohibited UDAAPs or otherwise be unenforceable under common law or other statutory law.

Costs of Reviewing and Revising Contracts

This provision would impose one-time administrative costs associated with reviewing and revising contracts to identify and remove any prohibited terms and conditions. To precisely quantify the costs to covered persons, the CFPB would need representative data on the operational costs that covered persons would incur to read and understand the rule, identify any prohibited terms and conditions in their contracts, revise any non-compliant contracts, and fully implement use of the revised contracts. Given that the CFPB is unaware of the existence of representative data of this kind, the CFPB has made reasonable efforts to gather information on the one-time costs of reviewing contracts for compliance with the proposed rule and revising them if necessary. The following discussion combines available data with assumptions informed by the CFPB's experience to produce estimated costs for covered persons of three

[179] See CFPB Consumer Financial Protection Circular 2024–03 ''Unlawful and unenforceable contract terms and conditions'' at *https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/.*

representative sizes. Given the potential for wide variation in use of terms and conditions covered by proposed subpart C at baseline and the limited data available, these calculations may not fully quantify the costs to an individual covered person. That is, the CFPB expects that some firms would have higher or lower costs than the average costs described here. The CFPB requests comment on this approach, as well as any data or analysis that would inform its cost estimates.

In general, the one-time costs of bringing contracts into compliance with the proposed rule would require four distinct tasks: (1) understanding the rule; (2) reviewing all contract types to identify any prohibited terms and conditions; (3) revising any contract containing a prohibited term and condition; and (4) implementing use of the revised contracts. As discussed above, the CFPB does not have representative data on the prevalence of terms and conditions that would be prohibited under the proposed rule. In order to avoid underestimating the costs of the proposed rule, the CFPB assumes that nearly all covered persons not exempt from the proposed rule would need to review every contract type they use for compliance with the proposed rule. Further, the CFPB assumes that nearly all contract types would need to be revised to comply with the proposed rule.[180] The CFPB seeks comment or data on the accuracy of these assumptions.

The first task would require firms to read the proposed rule and understand its definitions and requirements. Based on the CFPB's experience, this would take roughly two hours for the typical firm. Some firms may have higher costs. For example, some firms may need to take time to analyze whether they are covered persons subject to the proposed rule. The CFPB seeks information or analysis on the typical time burden that would be required to read and understand the proposed rule.

The second task would require firms to review their contracts for the presence of terms and conditions that would be prohibited by the proposed rule. The CFPB understands that the types of terms and conditions prohibited by the proposed rule are not uncommon and expects that many covered persons would review their existing contracts for compliance with the proposed rule. The CFPB expects that firms would generally be able to complete this task by searching the text of the contract for a limited set of key words that signify waivers, amendments to the contract, or restrictions on expression and then evaluating the relevant clause for compliance. The CFPB expects that this would take between 60 and 90 minutes per contract, depending on the number of contracts to review and the sophistication of the firm. The CFPB seeks comment on the typical time burden that would be involved in reviewing existing contracts for compliance with the proposed rule. The CFPB also requests comment on whether any common terms or conditions that would be prohibited by the proposed rule would be difficult to identify.

The third task would require firms to revise any existing contracts containing terms or conditions that would be prohibited by the proposed rule. Based on academic research and its experience, the CFPB expects that most contracts contain at least one term or condition that would need to be revised. The CFPB also expects that many prohibited terms and conditions would need relatively minor revisions that would not significantly change the legal risks or business practices of the firm.[181] In other cases, firms may need to make complex decisions about how to revise their contracts. However, the CFPB also expects that many firms use similar terms and conditions across their contracts, and that even firms using relatively few contracts would not need to consider each term in each contract individually. Considering these factors, the CFPB expects that, on average, revising contracts for compliance would take between six and eight hours per type of contract. The CFPB requests comment on the appropriateness of this estimated burden, especially any data or analysis that would inform an alternative estimate.

The final task involves implementing the revised consumer contracts. This is likely to involve updating consumer-facing websites, notifying existing customers of the changes, collecting and destroying outdated contracts, and printing out new paper copies of the revised contract for use in offices. Given the diverse set of industries and business models covered by the proposed rule, implementation costs are likely to vary significantly between firms. In addition, these kinds of printing and updating tasks will likely be incorporated into ongoing processes and reviews. However, based on its experience the CFPB expects this task to take approximately two to four hours per contract on average, depending on the number of contracts and the sophistication of the firm. The CFPB requests comment on the appropriateness of this estimated burden, as well as any data or analysis that would inform an alternative estimate.

The CFPB assesses the average hourly base wage rate for each of these tasks at $51.21 per hour. This is the mean hourly wage for employees in four major occupational groups assessed to be most likely responsible for the compliance process: Management ($59.31/hr); Lawyers ($84.84/hr); Business and Financial Operations ($39.82/hr); and Office and Administrative Support ($20.88/hr). The average hourly wage of $51.21 is multiplied by the private industry benefits factor of 1.42 to get a fully loaded wage rate of $72.72/hr. The CFPB includes these four occupational groups in order to account for the mix of specialized employees that are likely to participate in the identification, revision, and implementation of terms and conditions due to requirements imposed by the proposed rule. The CFPB assesses that Office and Administrative Support staff are likely to be responsible for gathering existing contracts and implementing use of any revised contracts, potentially including destruction of existing noncompliant contracts. Employees specialized in business and financial operations or in legal occupations are likely to be responsible for making decisions about how noncompliant contracts should be revised. Senior officers and other managers are likely to review the revised contracts and may provide additional information. The CFPB seeks comment on the occupations of staff that would be required to ensure compliance with proposed subpart C as well as any other information that would inform its estimate of the average hourly compensation of the necessary employees.

The direct compliance costs for a given covered person will depend on its complexity in general, and, most importantly, on the number of different types of contracts it uses. Table 2 presents the estimated direct cost for

[180] For example, the proposed rule would generally require that unilateral amendment clauses explicitly describe the conditions under which contracts can be unilaterally amended, such as notification and options for opting out of the amendment. In the CFPB's experience, these clauses are common but often do not adequately inform consumers of their rights. Under the proposed rule, any contract containing a unilateral amendment clause would need to be revised.

[181] For example, the CFPB is aware that some firms have established policies to notify consumers of changes to their contracts, despite having clauses which reserve the right to unilaterally amend the contract without notification. These firms would generally be able to comply with the proposed rule by describing this existing policy in the contract. Although this would require additional commitment to notify consumers of changes, it would not require the firm to develop or establish a new notification policy.

covered persons at three different levels of complexity, based on the assumptions described above. The total cost depends on the number of covered persons in each of the three representative categories of complexity. Table 2 also reports estimates of how many of the estimated number of non-exempt covered persons reported in table 1 may fall into each category, based on their total revenue as reported in the Economic Census. Specifically, the CFPB assumes that covered persons with under $25 million in annual receipts fall within the ''simple'' tier with ten covered contracts. Covered persons with annual receipts between $25 million and $100 million are assumed to be in the ''intermediate'' complexity tier, with 25 contracts. Covered persons with annual receipts greater than $100 million are assumed to be in the ''complex'' tier, with 250 contracts. The CFPB believes that revenue is a reasonable and transparent indicator of the number of contracts used by covered persons, and is therefore appropriate for estimating the average time burden and cost to covered entities. The CFPB seeks information or analysis that could improve its estimates of the number of contracts used by different types of firms.

The estimates detailed in table 2 are based on the assumption that most covered persons write their contracts in-house. Covered persons are likely to obtain compliant contracts from external contract providers if the benefits of doing so outweigh the costs. External contract providers, such as law firms or contract vendors, would likely be able to reduce duplication of time and effort by reviewing and revising contract terms that are used by many covered persons. If many covered persons rely on external contract providers to bring their contracts into compliance with the proposed rule, the total cost may be significantly lower than the estimate detailed in table 2. The CFPB requests comment on how covered persons may use external contract providers to comply with the proposed rule, as well as any data or analysis that would inform the cost estimates in table 2.

TABLE 2—BURDEN AND COST OF REVIEWING AND REVISING CONTRACTS

Description of task	Simple (10 contracts)	Intermediate (25 contracts)	Complex (250 contracts)
1. Read rule, understand requirement, and analyze definitions.	2 hours	2 hours	2 hours.
2. Identify prohibited terms and conditions	15 hours	25 hours	250 hours.
3. Revise contract to eliminate prohibited terms and conditions.	80 hours	200 hours	1,500 hours.
4. Update contracts usage	40 hours	100 hours	500 hours.
Total time burden per entity:	137 hours	327 hours	2,252 hours.
Avg. wage rate [182]	$72.72	$72.72	$72.72.
Total cost per entity	$10,000	$23,800	$163,800.
Estimated number of entities [183]	391	900	2,408.
Total estimated time burden:	53,567 hours	294,300 hours	5,422,816 hours.
Total Estimated cost:	$3,895,400	$21,401,500	$394,430,400.

Covered persons may also need to periodically review their contracts for compliance with the proposed rule as applicable State and Federal laws change. The CFPB understands that most firms review their contracts periodically at baseline and expects that the proposed rule would only minimally increase the cost of these periodic reviews above baseline levels. The CFPB requests comment on how the proposed rule would change firms' processes for reviewing and updating their form contracts as well as any data or analysis that would inform estimates of the cost of those changes.

The CFPB has considered the possibility that covered persons may pass through some of the costs related to reviewing and revising contracts to consumers as higher prices. In general, standard microeconomic theory suggests that increases in firms' fixed costs (*i.e.* costs that do not vary with sales volume) are unlikely to be passed through to consumers. For a given product or service, firms use the same form contract for every customer. Therefore, the costs of reviewing and revising contracts for compliance with the proposed rule are fixed at the product level and are unlikely to be passed through to consumers. The CFPB requests any comments or data that may aid the evaluation of relevant pass-through rates.

Costs of Increased Exposure to Consumer Disputes

Covered persons currently using terms and conditions that would be prohibited under subpart C would likely face increased exposure to consumer disputes. This increased exposure may occur both through increased incidence of consumer disputes and through increased costs of countering disputes that do occur. Covered persons may also take costly actions to reduce their exposure to consumer disputes, but are likely to do so only when those actions reduce the net costs of the proposed rule. The CFPB is unaware of any comprehensive data quantifying the number of disputes that are deterred by the terms and conditions that would be prohibited at baseline or the extent to which the terms and conditions that would be prohibited reduce dispute resolution costs at baseline. Therefore, the CFPB is unable to quantify these costs and instead provides a qualitative discussion. The CFPB seeks any data or analysis that would aid in quantifying these costs. Similarly, covered persons have a wide variety of means with

[182] This is the mean hourly wage for employees in four major occupational groups assessed to be most likely responsible for the compliance process: Management ($59.31/hr); Lawyer ($84.84/hr); Business and Financial Operations ($39.82/hr); and Office and Administrative Support ($20.88/hr). The average hourly wage of $51.21 is multiplied by the private industry benefits factor of 1.42 to get a fully loaded wage rate of $72.72/hr. [CITE BLS *https://www.bls.gov/oes/current/oes231011.htm*].

[183] The 2017 Economic Census provides firms counts for revenue ranges. Here, firms with $1–25MM in revenue are assumed to be in the ''simple'' tier, with 10 different contracts on average. Firms with $25–100MM in revenue are assumed to be in the ''intermediate'' tier, with 25 different contracts on average. Firms with over $100MM in revenue are assumed to be in the ''complex'' tier, with 250 different contracts on average. The CFPB assumes that Credit Unions, Commercial Banks, Savings Institutions, and Credit Card Issuers are complex. Firms below the SBA threshold for their industry are excluded from these counts.

which to reduce their exposure to consumer disputes and it is therefore difficult to anticipate which actions firms will take in response to increased exposure or the cost of such actions. Therefore, the CFPB provides a qualitative discussion of those costs and seeks comment on the actions covered persons may take to reduce their exposure to consumer disputes as well as the potential costs of such actions.

At baseline, terms and conditions that would be prohibited under subpart C may also have an effect on consumer behavior, even when such terms are unenforceable.[184] The proposed rule would ease this effect, which in turn would likely increase the incidence of consumer disputes. Consumer disputes may be formal, where customers exercise the legal rights afforded them under consumer financial laws, or informal, where consumers interact with firms' customer service or exercise their right to free expression by lodging complaints against the firm in public forums. Covered persons would likely incur increased costs related to responding to additional disputes. For example, some covered persons may hire additional customer service representatives to handle increased call volume or pay additional fees to resolve disputes in arbitration or in court. The CFPB does not have sufficient data to estimate the effect of these terms and conditions on consumer disputes at baseline and therefore cannot quantify this cost. The CFPB seeks comment on the extent to which consumer disputes would become more frequent as a result of the proposed rule. The CFPB also requests any data or analysis that would allow it to quantify marginal cost to covered persons of responding to additional consumer disputes.

To the extent that covered persons use terms and conditions that would be prohibited under subpart C that are enforceable at baseline, the proposed rule may increase the cost of resolving disputes. Waivers of consumer protection law are often intended to reduce consumers' likelihood of prevailing in a formal dispute or to limit the remedies available to consumers who do prevail. By prohibiting these waivers, the proposed rule would increase the likelihood that disputes are resolved in consumers' favor and increase the cost of associated remedies for some disputes. The magnitude of the increases would depend on the specific fact pattern of individual disputes, because not all terms and conditions that would be prohibited would be relevant in all disputes. The CFPB is unaware of any comprehensive data on the number of court and arbitration decisions in which these types of terms and conditions are decisive, or the effect that they have on the final remedy. Further, the CFPB is unaware of any data or analysis sufficient to quantify the effects that terms and conditions that would be prohibited have on settlements of disputes that do not reach a final court or arbitrator decision. Therefore, the CFPB is unable to quantify this effect. The CFPB requests comment on the effects that these terms and conditions have on dispute outcomes. The CFPB seeks any data or analysis that would help quantify these costs.

Covered persons currently using terms and conditions that would be prohibited under subpart C may mitigate the costs described above by taking actions to lower their exposure to disputes, for example by allocating more resources to training staff to comply with underlying laws. Standard microeconomic theory suggests that covered persons will take such costly actions only if the benefits they receive outweigh the costs. Therefore, the CFPB expects that covered persons would incur costs related to voluntary changes in their business practices if and only if those changes reduce the net costs of the proposed rule. Due to the wide variety of potential actions covered persons could take to reduce their exposure to consumer disputes and the lack of comprehensive data on the costs and benefits of those potential actions for individual firms, the CFPB is unable to quantify the impact of voluntary changes in business practices on the cost of the proposed rule.[185]

Costs From Reduced Flexibility in Amending Contracts

As discussed in section VI.B. of the preamble, many covered persons use contracts containing clauses that provide covered persons with discretion to change a term of the contract or add terms to the contract without notification or meaningful consent from consumers. The proposed rule requires covered persons to clarify their notification and consent requirements in their contracts. At baseline, unilateral amendments are generally unenforceable in court unless requirements of sufficient notice and opportunity to reject or terminate are satisfied. The proposed rule would not prescribe new requirements for sufficient notice or opportunity to reject an amendment and would therefore not change the enforceability of unilateral amendments relative to baseline. The CFPB assumes that some covered persons implement contract amendments at baseline. However, the CFPB assumes that, at baseline, these contract amendments are not prevalent and are rarely challenged in court. The CFPB expects that this provision of the proposed rule will not require significant changes to current business practices or impose significant costs on covered persons relative to baseline.

However, by requiring covered persons to commit to notification and consent requirements and describe those requirements in their contracts, the proposed rule would reduce some covered persons' discretion to unilaterally amend their contracts. This may make it more costly for some firms to amend their contracts. The CFPB is aware that discretion to unilaterally amend contracts may be particularly valuable to firms with specific business models or in certain industries. For example, some credit card issuers reserve the right to change their rewards programs at any time, which can potentially provide a valuable option to the company to devalue rewards in response to changing market conditions.[186] The option to alter rewards programs might become less valuable to credit card issuers if they were required to notify consumers sufficiently in advance of any change in the redemption value of rewards points. The CFPB is unaware of any data or analysis sufficient to quantify the cost of marginally reducing discretion to amend contracts, such as by requiring additional time for notification. The CFPB requests any data or analysis that would inform estimates of the costs related to this provision for credit card issuers, as well as comments regarding any other industry or business model that would be affected by this provision.

[184] That is, such terms and conditions may lead consumers to believe that the expected value of pursuing a dispute is negative, and therefore not worth pursuing. In cases where the terms and conditions that would be prohibited are enforceable, this belief may be correct if such a term or condition would reduce the probability that the consumer prevails in the dispute or the compensation the consumer would receive if they prevailed. If the terms or conditions that would be prohibited are not enforceable, they may still chill disputes by deceiving the consumer about their probability of prevailing or their potential compensation.

[185] As discussed in *Part C: Benefits to Consumers,* these voluntary actions to reduce exposure to consumer disputes may have significant benefits to consumers.

[186] CFPB, Issue Spotlight: Credit Card Rewards at 11 (May 2024).

Costs From the Prohibition on Contractual Restraints on Free Expression

Section 1027.301(a)(3) of the proposed rule would prohibit covered persons from including in their contracts with consumers for consumer financial products or services any clause that limits or restrains, or purports to limit or restrain, the lawful free expression of the user of a consumer financial product or service. This prohibition would prohibit contractual clauses that limit a consumer's ability to make negative comments about a company or to freely express their political or religious views.

At baseline, non-disparagement clauses are generally prohibited in standard-form consumer contracts under the Consumer Review Fairness Act of 2016.[187] As noted in section VI.C. of the preamble, some States have also enacted prohibitions against non-disparagement clauses. Although the CFPB is aware of some violations of these prohibitions in the consumer finance market, the CFPB assumes that nearly all covered persons are aware that non-disparagement clauses are prohibited and in compliance with applicable law. Therefore, the CFPB expects that restating the existing prohibition in the proposed rule will not impose any significant costs on covered persons.

The proposed rule also prohibits contractual terms that prevent consumers from engaging in political or religious expression or penalize them for doing so. Such terms purport to limit consumers' free expression on issues disfavored by the company's management, and such limitations generally are not within the purview of companies engaged in consumer finance markets. Furthermore, while a company's management might obtain a benefit in the form of advancing their own political or religious views or restraining views contrary to their own in the marketplace of ideas, consumer financial companies obtain no concrete financial benefit from limiting the free expression of consumers. The CFPB is unaware of any comprehensive data on the prevalence of such contractual terms and therefore cannot quantify the costs to covered persons of prohibiting them. The CFPB seeks comments regarding any covered persons or business models that would be impacted by this provision, as well as any data or analysis that would inform estimates of its cost.

[187] 15 U.S.C. 45b.

Benefits to Covered Persons

Subpart C is likely to benefit some covered persons by reducing uncertainty about the legality of prohibited terms and conditions, as well as unintentional exposure to enforcement action by the CFPB or other State and Federal regulators. Some covered persons currently using terms and conditions that would be prohibited may be doing so unintentionally, for example because they have purchased a contract from a vendor. Because such firms did not choose to include these terms and conditions in their contracts, the legal risks associated with using them may exceed the benefits. The CFPB does not have systematic data on the prevalence of these terms and conditions in contracts used by covered persons, or the extent to which covered persons are unaware of the presence of these terms and conditions in their contracts. Therefore, the CFPB cannot quantify the extent to which clarifying that these terms and conditions constitute unfair and deceptive acts or practices would reduce the costs of future enforcement actions related to use of terms and conditions that would be prohibited. The CFPB requests any additional information that would improve its understanding of this benefit.

The CFPB anticipates that this provision of the proposed rule would cause most covered persons currently using the terms and conditions that it would prohibit to remove them from their contracts. This is likely to incentivize these firms to increase their compliance with underlying consumer protection laws. Firms that are complying with the law or following existing guidance by not using prohibited terms and conditions are often at a competitive disadvantage relative to firms that do not comply with the law. To the extent that this provision would induce more firms to comply with applicable consumer protections, firms that were previously compliant will benefit. As noted above, the CFPB does not have systematic data on the use of terms and conditions that would be prohibited, the number of firms currently not complying with consumer protection law, or the harm to compliant firms from their competitors' noncompliance. The CFPB is therefore unable to quantify this potential benefit to covered persons. The CFPB requests comments or data that would improve its understanding of this potential benefit.

Clauses that restrict free expression prevent consumers from obtaining information that would be relevant to their adoption or purchasing decisions and make it more difficult for high-quality firms to gain market share. Therefore, the prohibition on clauses restricting free expression would benefit firms that would gain market share if more information about consumers' experiences with their competitors was publicly available. The magnitude of this benefit depends on the prevalence of clauses restricting free speech, the extent to which such clauses limit the information available to other consumers regarding disputes or negative experiences, and the impact that information would have on covered persons' market shares or prices if it were publicly available. The CFPB does not have sufficient data to quantify these factors, and therefore is unable to quantify this potential benefit to covered persons. The CFPB requests comments or data that would improve its understanding of this potential benefit.

D. Potential Costs and Benefits to Consumers

This section describes the benefits and costs to consumers that the CFPB expects to occur under the proposed rule. Each of the two subparts of the proposed rule is analyzed in detail separately.

Potential Benefits to Consumers of Subpart B

This subpart would re-codify Regulation AA, the FTC's Credit Practices Rule, and the companion credit practices rules of the prudential regulators, which established that these credit practices are prohibited. While these practices are largely considered unlawful pursuant to existing guidance from the CFPB and prudential regulators, it is possible that there are consumer contracts that currently include language covered in this subpart or that certain providers attempt to enforce these practices. The re-codification of the prohibition on these credit practices would incentivize any providers that currently engage in these practices through their use of terms and conditions in their contracts, or attempt to enforce such terms and conditions, to cease. This would benefit consumers by clarifying that these terms and conditions are unenforceable, reducing uncertainty and costs associated with defending themselves from unlawful practices, and reducing firms' incorrect application of these practices against consumers. However, the CFPB does not have systematic data on the prevalence of these practices in consumer contracts or on the frequency with which firms incorrectly attempt to enforce these

practices against consumers. Insofar as the scope of this proposed rule extends the scope of prohibited credit practices to covered persons not previously subject to the other rules, this would benefit consumers by standardizing the credit practices rule across different types of lenders, reducing search costs, and shielding consumers from unfair or deceptive credit practices. However, the CFPB does not have systematic data on the number of covered persons that would be newly subject to the prohibited credit practices rule nor the number of covered persons that use any such credit practices under the baseline. Against the baseline, the CFPB is unable to quantify the benefit of re-codifying these prohibited credit practices. The CFPB requests any comments or data that would help quantify these benefits.

Potential Benefits to Consumers of Subpart C

The proposed rule would prohibit the use of three categories of terms and conditions, collectively referred to as prohibited terms and conditions. Even when they are generally unenforceable under the baseline, as is the case with clauses that purport to waive legal rights of consumers expressly made unwaivable under the law, these terms and conditions may still harm consumers by hampering private action because many consumers are unaware that such terms and conditions are prohibited or void. For example, when a consumer complains about a particular practice or harm, a firm using a prohibited term or condition may incorrectly claim that the consumer agreed to an enforceable limitation of their rights and thus has no rights to seek their desired remedy or a consumer who first consults the contract terms in the event a particular harm arises may reasonably assume that they have no right to seek remedy due to the presence of prohibited terms. In light of what the term or condition states and the likelihood of the firm standing behind it if a consumer complains, a reasonable consumer may believe that they have agreed to a limitation of their rights, and not pursue further action. The removal of prohibited terms would lessen this effect, increasing dispute incidence when consumers experience a particular harm. This is likely to benefit consumers through the associated dispute resolution and remedy of said harm. In addition, as noted above, covered persons have increased incentive to comply with existing consumer protection laws, which would also benefit consumers.

While consumers would likely benefit from covered persons' increased compliance with consumer protection laws, fully quantifying this benefit requires data on the incidence of violations of consumer protection laws, including violations that are difficult to quantify, such as limitations on types of contacts and calls under the Fair Debt Collection Practices Act (FDCPA) and the Telephone Consumer Protection Act (TCPA) or a creditor taking more time to assure the accuracy of the information furnished to a consumer reporting agency or investigating disputes of this information. Moreover, these benefits would be related to the aforementioned costs of additional investment in compliance taken by covered persons in response to this rulemaking. The CFPB requests any comments or data that would help quantify the incidence of these violations, the monetary benefit of foregone violations, and increased investment in compliance by covered persons. Similarly, the increased incidence of disputes is likely to benefit consumers through remedies to these disputes; however, the CFPB lacks any systematic data that would allow a full quantification of this effect, especially considering that such a quantification requires measurement of the chilling effect on consumer behavior and that a significant share of these disputes would likely be resolved through internal consumer relations.[188] The CFPB requests any comments or data that would help quantify the increased incidence of disputes that would arise due to the rule, the means by which they are resolved, and any monetary benefits associated with resolution.

The magnitude of these benefits depends on the share of consumer contracts that currently contain prohibited terms.[189] Although the CFPB has documented examples of the use of these terms and conditions, the CFPB is unaware of any systematic data that would enable it to estimate the prevalence of (1) terms and conditions that waive legal rights provided by Federal or State laws, (2) clauses that allow for unilateral amendment of terms and conditions, or (3) terms and conditions that restrain a consumer's free expression. Therefore, the CFPB cannot quantify the benefit to consumers of prohibiting firms' use of these terms and conditions from their contracts. The CFPB requests any additional information that would improve its understanding of this benefit. Against that baseline, which the CFPB lacks data to quantify, the CFPB believes that the rulemaking will result in a significant reduction in the incidence of these terms and conditions relative to baseline, and thus, benefit consumers through the channels described above.

Potential Costs to Consumers

The CFPB expects that costs to consumers would be small under the proposed rule. As discussed in part A of this section, *Overview of Economic Effects,* consumers may experience pass-through costs from covered persons if covered persons' marginal costs increase. As stated in that section, the CFPB requests any comments or data that would aid the evaluation of relevant pass-through rates.

In addition, as discussed in part F of this section, *Impact on Access to Consumer Financial Products and Services,* at least some covered persons might determine that particular features of their products make the covered persons more susceptible to consumer disputes or litigation and decide to remove those features from their products. A covered person might make this decision even if such a feature is beneficial to consumers, though the fact that these terms would be deemed more susceptible to dispute or litigation may suggest otherwise. In this case, consumers would incur a cost due to the loss of this feature. The CFPB is not aware of any data showing this theoretical phenomenon to be prevalent among covered persons. The CFPB requests comment on the extent of this phenomenon in the context of the proposed rule, and it specifically requests data and suggestions about how to quantify both the prevalence of this phenomenon and the magnitude of consumer harm if the phenomenon exists.

Finally, under the proposed rule, it is possible that some firms would increase the frequency with which they ask consumers for affirmative consent to changes in contract terms. If so, the time and effort it would take consumers to review these changes would be an additional cost to consumers relative to the baseline. The proposed rule would forbid covered persons from including in any contract with a consumer any

[188] See Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms,* 103 Cornell L. Rev. 117–175 (2017). The article provides some evidence of this effect. In an experimental setting, consumers who read about harsh company policies were more likely to believe they were legally enforceable if these policies appeared in the company's terms and conditions, rather than in some more informal setting. Notably, test subjects were asked to read about a particular policy presented as either a part of a contract or as a more informal policy and asked to assess its enforceability.

[189] Specifically, the presence of prohibited terms as well as particular incidence of waivers of law, provisions that allow for unilateral changes to terms, and constraints on consumers' free expression.

clause that would reserve to the covered person the right to unilaterally amend material terms of the contract. Therefore, under the proposed rule, covered persons that wish to amend their contracts would have to comply with the appropriate State or Federal law process for amending material terms. The proposed rule would not prescribe the manner in which assent to changes in contract terms must be attained. Nevertheless, State law or common law may require firms to attain affirmative consent from consumer, as, for example, via written or electronic signature. If so, it is plausible that the proposed rule would result in an additional burden for consumers who would need to review, and consent to, proposed changes to their contracts. The CFPB seeks data or analysis to quantify this potential cost to consumers.

E. Impact on Depository Institutions With No More Than $10 Billion in Assets

Subpart B of the proposed rule would codify a prohibition on credit practices that are generally understood to be prohibited, pursuant to settled industry expectations and guidance from the CFPB and prudential regulators. The CFPB believes that by reducing confusion or uncertainty about what is prohibited, the proposed rule may reduce unnecessary costs for these depository institutions. The CFPB seeks comment or data to quantify the impact this may have on depository institutions with assets below $10 billion.

There will be no direct impact of subpart C on small depository institutions (no more than $850 million in assets) as the rulemaking provides an exemption for small entities. Subpart C of the proposed rule would prohibit depository institutions with assets between $850 million and $10 billion from including in their contracts with consumers for consumer financial products or services (1) clauses that require consumers to waive legal rights designed to protect consumers, other than rights explicitly made waivable by relevant consumer laws; (2) clauses that allow the covered person to unilaterally amend the contract; and (3) clauses that restrict consumers' free expression. Depository institutions with assets between $850 million and $10 billion would incur one-time administrative costs involved in bringing contracts into compliance with this part of the proposed rule. The CFPB believes that all depository institutions subject to the proposed rule would need to review every contract they use and revise to bring into compliance. Furthermore, the costs associated with implementation of subpart C have been outlined earlier in table 2 in the *Potential Costs and Benefits to Covered Persons of Subpart C* section. The CFPB asks for any comment or data on the impact of the proposed rule on depository institutions with assets between $850 million and $10 billion.

F. Impact on Rural Areas

Rural areas might be differently impacted to the extent that rural areas tend to be served by small entities. The proposed rule would not apply to any person that is a 'small entity' as that term is defined in 5 U.S.C. 601, including any firm that is at or below the SBA standard for its primary industry. Therefore, the impact of the rulemaking would likely be lower in rural areas compared to non-rural areas. The CFPB requests any comment or data about the impact of the proposed rule on rural areas.

G. Impact on Access to Consumer Financial Products and Services

Subpart B of the proposed rule is unlikely to have any impact on consumers' access to financial products and services. As discussed earlier in the *Statement of Need* section, the CFPB believes that these credit practices are generally understood to be prohibited at baseline and, by reducing confusion or uncertainty about what is prohibited, the proposal would reduce costs for covered persons.

Subpart C of the proposed rule would prohibit covered persons from including in their contracts with consumers for consumer financial products or services (1) clauses that require consumers to waive legal rights designed to protect consumers, other than rights explicitly made waivable by relevant consumer laws; (2) clauses that allow the covered person to unilaterally amend the contract; and (3) clauses that restrict consumers' free expression. Collectively, these are referred to as prohibited terms and conditions. As discussed in part A of this section, *Overview of Economic Effects,* the adoption of the rule could increase the marginal costs incurred by covered persons because of increased costs of compliance with consumer finance laws or increased costs associated with dispute resolution. The CFPB believes that most providers would pass through some portion of these marginal cost increases to consumers.[190] As a result, it is possible that some consumers might experience price increases for some financial products and services. This may induce them to seek other financial products or services from a different provider, or to forgo using a particular financial product or service. However, the CFPB believes that the marginal cost increases discussed in the foregoing sections would be small, and as a result, under the proposed rule, the likelihood of price increases for certain financial products or services that would render them unaffordable would be very limited.

Providers might determine that offering some features of certain financial products or services may be too costly and, as a result, decide to remove these features from their product offering. For example, a provider might conclude that a particular product feature might increase the incidence of consumer disputes even accounting for increased compliance under financial laws, and therefore decide to remove that feature entirely from the product or restructure the feature by reducing its availability. Similarly, a provider might update its product features based on external information, such as actions against the provider's competitors by either regulators or private actors. The ongoing component could also include changes to the general product design process. Product design could consume more time and expense due to additional rounds of legal and compliance review. The additional exposure to consumer disputes, including litigation, could also result in some products not being developed and marketed primarily due to the risk associated with consumer disputes. The CFPB requests any comments or data on the impact of the proposed rule on access to consumer financial products and services.

X. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities (SISNOSE). The CFPB is also subject to specific additional procedures under the RFA involving convening a panel to consult with small business representatives before proposing a rule for which an IRFA is required. An IRFA is not required for this proposal because the proposal, if adopted, would not have a SISNOSE.

[190] Some of these increased costs—*e.g.,* the cost of changing contract language to remove prohibited terms—can be considered fixed costs of business. Economic theory suggests that the profit-maximizing response of an increase in fixed costs is not to pass that increase through to consumers.

Small institutions, for the purposes of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, are defined by the Small Business Administration. Effective March 17, 2023, depository institutions with less than $850 million in total assets are determined to be small. For non-depository entities covered by the proposed rule, the standard is $47 million in receipts. According to the Q4 2023 Federal Financial Institutions Examination Council Call Report, there are 3,422 banks with $850 million or less in assets. According to the Q4 2023 National Credit Union Administration Call Report, there are 4,201 credit unions with $850 million or less in assets. Nonbank institutions covered under the proposed rule are subject to different size standards defined with respect to their average annual receipts. Table 3 below presents estimated small entity counts for the North American Industry Classification System (NAICS) codes that generally align with consumer financial products or services and the corresponding size standards. Note that the NAICS codes listed below all incorporate covered persons, but several also are likely to include many non-covered persons, and so these estimates are likely higher than the real number of small covered persons.

TABLE 3—ENTITY COUNTS FOR NAICS CODES AND CORRESPONDING SIZE STANDARDS

NAICS name(s)	NAICS code(s)	Estimated number of small entities	Revenue size standard (million/year)	Assets size standard (million)
Credit Unions	522110, 522120, 522210	4,202		$850
Commercial Banking, Savings Institutions, and Credit Card Issuing.	522130	3,422		850
Nondepository Credit Intermediation	522220, 522291, 522292, 522299.	6,965	$47	
Activities Related to Credit Intermediation	522310, 522320, 522390	11,040	28.5	
Activities Related to Real Estate	531311, 531312, 531320, 531390.	62,855	19.5	
Portfolio Management & Investment Advice	523920, 523930	34,153	47	
Passenger Car Leasing	532112	199	47	
Truck, Utility Trailer, and Recreational Vehicle Rental and Leasing.	532120	920	47	
Consumer Reporting	561450	267	41	
Debt Collection	561440	2,634	19.5	
Total		126,657		

The CFPB is proposing an exemption for small entities from the provisions of subpart C, but does not propose to exempt small entities from the provisions of subpart B.

In the practice of the CFPB, evaluating whether a proposed rule has a SISNOSE proceeds in several steps. First, the CFPB estimates the total number of small entities directly affected, and then it estimates the number of small entities significantly affected by the rulemaking. If the latter is substantial relative to the former, a SISNOSE exists. However, since the proposed rule contains an exemption for small entities for the provision of subpart C, no small entities would be directly and significantly affected by its provisions. The remaining question is whether a SISNOSE would result from the provisions of subpart B. The CFPB outlines below the reasoning for establishing that the proposed rule would not have a SISNOSE.

Subpart B of the proposed rule would codify the already existing FTC Credit Practices Rule to apply it to covered persons under the CFPB's jurisdiction. Consistent with the FTC's Credit Practices Rule, subpart B would prohibit covered persons from entering into or enforcing an agreement that contains any of the following provisions: a confession of judgment, a waiver of exemption, an assignment of wages, or a security interest in household goods. The rulemaking would also prohibit covered persons from misrepresenting the nature or extent of cosigner liability to any person or obligating a cosigner unless the cosigner is informed prior to becoming obligated of the nature of the cosigner's liability. The rulemaking would also prohibit covered persons from levying or collecting any delinquency charge on a payment, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments, and the payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period.

The FTC first issued the Credit Practices Rule in 1984. Although that rule generally applied only to nonbank creditors, prudential regulators subsequently issued their own credit practices rules applicable to banks, Federal credit unions, and saving associations. The rules issued by the prudential regulators were repealed upon enactment of the CFPA, which transferred those agencies' consumer financial protection authorities to the CFPB. However, in 2014 the Federal financial regulators—including the CFPB—issued a joint interagency guidance clarifying that financial institutions could violate the law by including in consumer credit contracts any provisions prohibited by the Credit Practices Rule.

When the FTC originally enacted the Credit Practices Rule, it highlighted that the rule's prohibitions, which are mirrored by the prohibitions in subpart B, would have minimal effects on costs and availability of credit.[191] In 1995, the Federal Trade Commission undertook a periodic review of the Credit Practices Rule and solicited data and comments on whether the rule has had a SISNOSE.[192] Based on the comments received, the FTC did not find a sufficient basis to conclude that the Rule has had a SISNOSE. It is noteworthy that the FTC's notice attracted limited public interest and the comments received involved minimal discussion of issues relating to small entities. Further, in the only comment from a creditor that discussed the impact on small entities, the Credit Union National Association indicated that ''[g]enerally, credit unions have not reported any significant economic or

[191] 49 FR 7779.

[192] 60 FR 24805 (May 10, 1995).

regulatory impact on their operations due to this rule.'' [193]

Nonbanks are already subject to the FTC Credit Practices Rule, and the prohibitions in subpart B would not result in any change, and thus would not cause any new costs, for nonbank small entities. As the background section above discusses, the practices in subpart B were prohibited for depository institutions prior to the enactment of the CFPA, and these institutions received interagency guidance that indicated that the practices in subpart B are likely illegal and involve substantial risks. In addition, the CFPB is unaware of small depository institutions that started using contractual terms prohibited in subpart B after the enactment of the CFPA.

In sum, the CFPB concludes there would not be a SISNOSE because subpart C does not apply to small entities, subpart B merely duplicates an existing FTC regulation for small nonbanks, and subpart B is unlikely to have a significant economic impact on entities not covered by the FTC's existing regulation. No small entities would be directly affected by provisions in subpart C of the proposed rule because the proposed rule contains a small entity exemption for these provisions. As noted above, the FTC's original issuance of the Credit Practices Rule concluded there would be minimal effects on costs and availability of credit, and a 1995 periodic review of the Credit Practices Rule indicated that there had been no SISNOSE since the rule's publication in 1984. Until the enactment of the CFPA, the prohibitions in subpart B were expressly prohibited by rule for both banks and nonbanks. The proposal would not cause nonbanks in general, and small nonbanks in particular, to incur any additional costs, since the provisions of the Credit Practices Rule, which would be codified by subpart B, have continued to apply to them. For depository institutions, the prohibitions in subpart B would have a minimal effect on small entities since they had been illegal and remain discouraged as explained in interagency guidance. Even in an unlikely scenario involving limited use of subpart B's prohibited practices by small entities, consistent with earlier FTC analyses discussed above, the CFPB finds it very unlikely that the proposed rule would have more than a negligible impact on small entities. Further, in the CFPB's experience, use of these practices appears rare.

Accordingly, the Director of the CFPB certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities and that an IRFA therefore is not required. The CFPB seeks comment about this determination.

[193] Id. at 24808.

XI. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are generally required to seek the Office of Management and Budget's (OMB's) approval for information collection requirements prior to implementation.

Under the PRA, the CFPB may not conduct or sponsor and, notwithstanding any other provision of law, a person is not required to respond to an information collection unless the information collection displays a valid control number assigned by OMB.

The CFPB has determined that the proposed rule would not impose any new information collections or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.

The CFPB has a continuing interest in the public's opinions regarding this determination. At any time, comments regarding this determination may be sent to: The Consumer Financial Protection Bureau (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552, or by email to *CFPB_Public_PRA@cfpb.gov.*

List of Subjects in 12 CFR Part 1027

Banks, banking, Consumer protection, Contracts, Credit unions, Finance, National banks, Savings associations.

Authority and Issuance

■ For the reasons set forth in the preamble, the CFPB proposes to add part 1027 to chapter X in title 12 of the Code of Federal Regulations, to read as follows:

PART 1027—AGREEMENTS FOR CONSUMER FINANCIAL PRODUCTS OR SERVICES

Subpart A—General

Sec.

1027.100 Authority and purpose.
1027.101 General definitions.
1027.102 Exclusions from coverage.
1027.103 Severability.
1027.104 Compliance date.

Subpart B—Credit practices

1027.201 Definitions.
1027.202 Unfair credit contract provisions.
1027.203 Unfair or deceptive practices involving cosigners.
1027.204 Unfair late charges.
1027.205 State exemption.

Subpart C—Prohibited terms and conditions

1027.301 Prohibition.

Authority: 12 U.S.C. 5512, 12 U.S.C. 5531.

Subpart A—General

§ 1027.100 Authority and purpose.

(a) *Authority.* This part is issued by the Consumer Financial Protection Bureau (CFPB) pursuant to section 1022(b)(1) and (c) and section 1031(b) of the Consumer Financial Protection Act of 2010, codified at 12 U.S.C. 5512(b)(1) and (c) and 12 U.S.C. 5531(b).

(b) *Purpose.* The purpose of this part is to prescribe rules governing agreements for consumer financial products or services.

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

(3) Subpart B prohibits certain credit practices.

(4) Subpart C prohibits certain other terms and conditions.

§ 1027.101 General definitions.

For the purposes of this part the following definitions apply:

(a) *Consumer, consumer financial product or service, covered person, credit, person,* and *State* have the same meanings as in 12 U.S.C. 5481.

(b) *Include, includes,* and *including* mean that the items named may not encompass all possible items that are covered, whether like or unlike the items named.

§ 1027.102 Exclusions from coverage.

(a) This part 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.

(b) Subpart C shall not apply to any ''small business,'' ''small organization,'' or ''small governmental jurisdiction'' as those terms are defined in 5 U.S.C. 601.

§ 1027.103 Severability.

The provisions of this part are separate and severable from one another. If any provision or any application of a provision is stayed or determined to be invalid, the remaining provisions or applications shall continue in effect.

§ 1027.104 Compliance date.

The compliance date for subparts B and C is [30 days after publication of the final rule in the **Federal Register**], except that if an agreement for a consumer financial product or service

between a covered person and a consumer was executed before [30 days after publication of the final rule in the **Federal Register**], compliance with subparts B and C of this part for such an agreement is required by [180 days after publication of the final rule in the **Federal Register**].

Subpart B—Credit practices

§ 1027.201 Definitions.

For the purposes of this subpart, the following definitions apply:

(a) *Cosigner* means a natural person who renders themself liable for the obligation of another person without compensation. The term shall include any person whose signature is requested as a condition to granting credit to another person, or as a condition for forbearance on collection of another person's obligation that is in default. The term shall not include a spouse whose signature is required on a credit obligation to perfect a security interest pursuant to State law. A person who does not receive goods, services, or money in return for a credit obligation does not receive compensation within the meaning of this definition. A person is a cosigner within the meaning of this definition whether or not they are designated as such on a credit obligation.

(b) *Earnings* means compensation paid or payable to an individual or for the individual's account for personal services rendered or to be rendered by the individual, whether denominated as wages, salary, commission, bonus, or otherwise, including periodic payments pursuant to a pension, retirement, or disability program.

(c) *Household goods* means clothing, furniture, appliances, one television and one radio, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of a consumer and a consumer's dependents. The term household goods does not include:

(1) Works of art;

(2) Electronic entertainment equipment (except one television and one radio);

(3) Items acquired as antiques; that is, items over one hundred years of age, including such items that have been repaired or renovated without changing their original form or character; and

(4) Jewelry (other than wedding rings).

(d) *Obligation* means an agreement between a consumer and a creditor.

§ 1027.202 Unfair credit contract provisions.

In connection with the extension of credit to consumers, it is an unfair act or practice for a covered person to enter into or enforce an agreement that contains any of the following provisions:

(a) *Confession of judgment.* A cognovit or confession of judgment (for purposes other than executory process in the State of Louisiana), warrant of attorney, or other waiver of the right of notice and the opportunity to be heard in the event of suit or process thereon.

(b) *Waiver of exemption.* An executory waiver or a limitation of exemption from attachment, execution, or other process on real or personal property held, owned by, or due to the consumer, unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.

(c) *Assignment of wages.* An assignment of wages or other earnings unless:

(1) The assignment by its terms is revocable at the will of the debtor;

(2) The assignment is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or

(3) The assignment applies only to wages or other earnings already earned at the time of the assignment.

(d) *Security interest in household goods.* A nonpossessory security interest in household goods other than a purchase money security interest.

§ 1027.203 Unfair or deceptive practices involving cosigners.

(a) *Prohibited practices.* In connection with the extension of credit to consumers, it is:

(1) A deceptive act or practice for a covered person, directly or indirectly, to misrepresent the nature or extent of cosigner liability to any person; and

(2) An unfair act or practice for a covered person, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to becoming obligated, which in the case of open-end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.

(b) *Disclosure requirement.* To prevent these unfair or deceptive acts or practices, a disclosure, consisting of a separate document that shall contain the following statement and no other, shall be given to the cosigner prior to becoming obligated, which in the case of open-end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed:

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of *your* credit record. This notice is not the contract that makes you liable for the debt.

(c) *Effect of compliance.* A covered person that is in compliance with paragraph (b) of this section may not be held in violation of paragraph (a) of this section.

§ 1027.204 Unfair late charges.

(a) In connection with collecting a debt arising out of an extension of credit to a consumer, it is an unfair act or practice for a covered person directly or indirectly to levy or collect any delinquency charge on a payment, which payment is otherwise a full payment for the applicable period and is paid on its due date or within an applicable grace period, when the only delinquency is attributable to late fees or delinquency charges assessed on earlier installments.

(b) For the purposes of this section, collecting a debt means any activity, other than the use of judicial process, that is intended to bring about or does bring about repayment of all or part of money due (or alleged to be due) from a consumer.

§ 1027.205 State exemption.

(a) *General rule.* (1) An appropriate State agency may apply to the CFPB for a determination that:

(i) There is a State requirement or prohibition in effect that applies to any transaction to which a provision of this subpart applies; and

(ii) The State requirement or prohibition affords a level of protection to consumers that is substantially equivalent to, or greater than, the protection afforded by this subpart.

(2) If the CFPB makes such a determination, the provision of this subpart will not be in effect in that State to the extent specified by the CFPB in its determination, for as long as the State administers and enforces the State requirement or prohibition effectively.

(b) *Applications.* The procedures under which a State agency may apply for an exemption under this section are the same as those set forth in appendix B to Regulation Z (12 CFR part 1026).

Subpart C—Prohibited terms and conditions

§ 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) *Unilateral amendments.* Any 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.

(3) *Restraints on expression.* Any term or condition that limits or restrains, or purports to limit or restrain, the free and lawful expression of a consumer. Nothing in this subpart affects a covered person's ability to close an account that is being used to commit fraud or other illegal activity.

(b) It shall be unlawful for a covered person to use, enforce, or otherwise rely on any term or condition in paragraph (a) of this section in an agreement between a consumer and any person for a consumer financial product or service.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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