



March 30, 2023

The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, D.C. 20552

Re: Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections (Docket Number CFPB-2023-0002)

Dear Director Chopra:

This letter is in reference to the Consumer Financial Protection Bureau's (CFPB) notice of proposed rulemaking (NPRM) on the Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections.<sup>1</sup> Advocacy is concerned about the Regulatory Flexibility Act (RFA) section of the NPRM. Advocacy encourages the CFPB to perform a more thorough analysis of the impact that the proposed rulemaking may have on small entities.

### **Advocacy Background**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration, so the views expressed by Advocacy do not necessarily reflect the views of the Small Business Administration or the Administration. The RFA,<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act,<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include a response to these written

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<sup>1</sup> 88 Federal Register 6906, February 1, 2023.

<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

comments in any explanation or discussion accompanying the final rule’s publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup> Advocacy’s comments are consistent with Congressional intent underlying the RFA, that “[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public.”<sup>6</sup>

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. The Office of Advocacy held a roundtable with small entities on February 6, 2023, to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy also held a conference call on this issue on March 17, 2023. Advocacy’s comments reflect the feedback that it received from the organizations about the potential impact of the proposal on their small members.

### **The Proposed Rule**

On February 1, 2023, the CFPB published a notice of proposed rulemaking in the Federal Register on the Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections. The proposed rule would establish a CFPB system for registration of nonbanks that use covered terms or conditions that seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce or exercise their rights. With limited exceptions, including an exception for certain small entities, supervised registrants would be required to register annually in the system by submitting or updating their identifying information as well as information about their use of covered terms or conditions. In the NPRM, the CFPB states that it will provide filing instructions with details on how to register, the implementation date for the registration system, and the annual registration date. Under the proposal, the CFPB would publish the information on its website and potentially in other forms.<sup>7</sup>

The CFPB is proposing to collect information about supervised nonbanks' use of terms and conditions in form contracts that expressly seek to impose limitations on consumer rights and other legal protections, including:

- Waivers of claims a consumer can bring in a legal action.
- Limits on the company's liability to a consumer.
- Limits on the consumer's ability to bring a legal action by dictating the time frame, forum, or venue for a consumer to bring a legal action.
- Limits on the ability of a consumer to bring or participate in collective legal actions such as class actions.
- Limits on the ability of the consumer to complain or post reviews.
- Certain other waivers of consumer rights or other legal protections.
- Arbitration agreements.

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<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> 88 FR 6906.

The proposal defines these terms and conditions as covered terms and conditions. Covered terms and conditions would be covered by the proposal regardless of whether they are legally enforceable or not.<sup>8</sup>

The CFPB will publish the information it collects. The CFPB contends that publishing this information would facilitate public awareness and oversight by other regulators of the use of covered terms and conditions, including those that waive or limit consumer protections under state law and tribal law.<sup>9</sup>

The CFPB proposes to establish the registry to monitor risks to consumers from the use of covered terms or conditions in form contracts in today's marketplace and to inform its various functions, including supervision, enforcement, consumer education, and rulemaking. The agency asserts that the information collected by the registry would facilitate the CFPB's prioritization and implementation of examination work in its statutorily mandated risk-based nonbank supervision program.<sup>10</sup>

### **The CFPB's Certification Lacks a Sufficient Factual Basis**

Pursuant to Section 605 of the RFA, the CFPB certified that the rule will not have a significant economic impact on a substantial number of small entities. Such a certification must be supported by a factual basis.<sup>11</sup> Advocacy asserts that the CFPB's certification lacks a sufficient factual basis.

### **The CFPB Fails to Provide Information About the Number of Small Entities that Will Be Impacted**

As noted in Advocacy's RFA guide, the Office of Advocacy believes that an adequate certification statement requires an agency to perform a threshold analysis. The threshold analysis should include a description of small entities affected. It should be a brief economic and technical statement on the regulated community, describing some of the following types of information:

- a) The diversity in size of regulated entities.
- b) Revenues in each size grouping.
- c) Profitability in each size grouping.<sup>12</sup>

The CFPB's certification<sup>13</sup> lacks information about the number of small entities that may be impacted by this rulemaking. Although the certification relies on the CFPB's analysis under Section 1022 (b)(4) of the Dodd-Frank Act<sup>14</sup>, that analysis also lacks the necessary information

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<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> 5 USC 605(b).

<sup>12</sup> U.S. Small Business Administration, Office of Advocacy, "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," p. 12.

<sup>13</sup> 88 FR at 6964

<sup>14</sup> 88 FR at 6949.

to comply with the requirements of the RFA. Table 1 of the 1022(b)(2) analysis provides the types of entities that may be impacted, the NAICS codes, the overall NAICS entities, and the number of NAICS entities under one million dollars.<sup>15</sup>

The RFA requires the CFPB to provide information about the number of small entities that will be impacted using the appropriate SBA size standards. CFPB's 1022(b)(4) analysis proposes an exemption threshold of one million dollars, but that is not the size standard for the relevant industries. For example, the size standard for real estate credit and consumer lending is 47 million dollars in annual receipts,<sup>16</sup> 46 million dollars higher than the standard used by the CFPB. Many more small businesses may be impacted by this rule than CFPB's analysis describes. CFPB's 1022(b) analysis does not fulfill the obligation under the RFA to provide information about the number of small entities that may be impacted by the proposed rule to support its statement that the rule will not impact a substantial number of small entities.

CFPB can either refer to the size standards found at 13 CFR §121.201 in order to provide the appropriate definition of small entity for each industry that this rulemaking may impact, comply with the requirements of 5 USC 601(3) to request a size standard for RFA purposes, or it may request a new size standard under 15 USC §632. Advocacy further suggests that CFPB use the Census Bureau's Statistics of U.S. Businesses,<sup>17</sup> which are detailed by industry and firm size, to inform its estimate of the number of affected small entities that may be impacted by the rulemaking.

### **The CFPB Provides Contradictory Information about the Economic Impact of the Proposal on Small Entities.**

In Table 2, CFPB estimates that the direct costs will not exceed approximately \$13,257 annually per entity, even for the most complex entities.<sup>18</sup> Since entities that are under one million dollars are exempt, the CFPB concluded that the impact on all other small entities would be less than 1.3 percent.<sup>19</sup> The CFPB then asserts that the direct costs for a supervised registrant using 10-25 different contracts would range from more than \$900 to less than \$1,600 annually. The CFPB further states that for some small entities, the impact may be larger than average and in extreme cases may rise to the level of being a significant economic impact but does not "believe" that the number will be substantial.<sup>20</sup>

The requirements of Section 605 of the RFA cannot be met by confusing, bald assertions without any support. If CFPB cannot state with more certainty the basis of the conclusion that the number of small entities that will absorb a significant economic impact will not be substantial, then they may not certify under Section 605.

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<sup>15</sup> 88 FR at 6952.

<sup>16</sup> See, [SBA Table of Size Standards](#), page 26.

<sup>17</sup> [Data \(census.gov\)](https://www.census.gov)

<sup>18</sup> 88 FR at 6956.

<sup>19</sup> 88 FR at 6965.

<sup>20</sup> Id.

CFPB must perform a proper threshold analysis. If the analysis supports the conclusion that the rulemaking will not have a significant economic impact on a substantial number of small entities, Advocacy encourages the CFPB to use the information from the threshold analysis to provide an appropriate factual basis to support its certification. If the threshold analysis indicates that the rulemaking will have a significant economic impact on a substantial number of small entities, then the CFPB will need to convene a small business review panel under Section 609 of the RFA<sup>21</sup> prior to preparing an initial regulatory flexibility analysis.

### **Clear Guidance**

Given the costs of the rule, providing clear guidance for complying with the CFPB's rulemaking will be helpful to small entities. These entities may lack resources such as in-house counsel or other resources to assist them in understanding regulatory requirements and performing the necessary actions to achieve compliance. Advocacy encourages the CFPB to provide guidance to assist small entities in complying with the requirements of the rulemaking.

### **Conclusion**

Thank you for your consideration of Advocacy's comments. If you have any questions regarding this request or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

/s/

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Assistant Chief Counsel  
For Economic Regulation & Banking  
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<sup>21</sup> 5 USC §609.