Berkeley Law | Center for Consumer Law & Economic Justice

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Consumer Financial Protection Bureau
c/o Legal Division Docket Manager
1700 G Street NW, Washington DC 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 No. CFPB-2023-0002, RIN 3170-AB14

Comments of the National Association of Consumer Advocates and the UC Berkeley Center for Consumer Law and Economic Justice

To Whom It May Concern:

The National Association of Consumer Advocates and the Center for Consumer Law and Economic Justice at the UC Berkeley School of Law submit these comments in response to the Bureau's request for comment on its proposed Rule creating a registry of specific form terms and conditions that limit legal protections in supervised nonbank consumer financial products, to be enacted at 12 C.F.R. pt. 1092.[1] In the comments below, we explain our support for the Bureau's initiative with examples from particular nonbank consumer financial products that would fall within the registry's coverage. We emphasize specific terms and conditions that the Bureau has identified that, based on our experience and research, are especially harmful to consumers and that merit the Bureau's attention. We also suggest additional terms and conditions that the Bureau should consider in its final Rule. Finally, we explain our reasoning in support of creating the registry and making it available to the public.

I. Introduction and Background: Form Terms and Conditions Severely Restrict Consumer Rights.

As the Bureau correctly observes, boilerplate terms and conditions in contracts, including those used by nonbank financial entities, present significant risks to consumers' ability to enforce their rights to participate in a fair and equitable marketplace. Restrictive terms and conditions in consumer financial products and services particularly hamstring private parties' efforts to enforce our most critical consumer protection laws. Government agencies like the Bureau do not have the resources to police the entire financial services marketplace. Further, many federal and state consumer protection laws were intended to rely primarily on private enforcement, including through class actions and other collective action vehicles.

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[1] Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, 88 Fed. Reg. 6906 (CFPB Feb. 1, 2023).

Public agencies cannot do the task themselves. As Iowa Attorney General Thomas J. Miller noted in a 2016 letter to the Bureau, "Though state attorneys general and federal agencies such as the Bureau and the Federal Trade Commission contribute mightily to ensuring consumers are protected through our legal actions, everyone knows that our resources are limited and that we must be good stewards of the public resources we receive to do our work."[2]

Nevertheless, onerous terms and conditions limiting private enforcement continue to proliferate. As the Bureau notes in its proposed Rule, these clauses are particularly prevalent within the nonbank financial sector, including the prepaid credit card, private student loan servicing, and payday loan industries.[3] These types of provisions impose significant hurdles to justice by hampering private enforcement of public interest laws and deterrence of unlawful conduct.

The Bureau also clearly recognizes the gross imbalance between consumers and financial institutions "in terms of understanding [products and services] and access to information" about them.[4] The proposed Rule requires nonbank institutions to take more responsibility to disclose some of that information, including reporting the terms and conditions where entities tend to take advantage of this imbalance.[5] Standard form contracts accompany most consumer financial products and services. They have long been a subject of debate and concern over the risks of harm to consumers when the surrender of consumer rights, protections, and withdrawal of consent are hidden in the fine print.[6] One-sided contracts of adhesion take unreasonable advantage of consumers' lack of understanding of the material risks, costs, or conditions of certain products or services, as well as consumers' inability to protect their interests in selecting or using those products or services.[7]

Over the past several decades, federal regulators and courts have permitted adhesive contracts to become part of the normalized process of engaging in consumer financial products and services, even when the (often harmful) terms and conditions are presented to borrowers on a take-it-or-leave-it basis.[8] This process has continued despite continued warnings from consumer advocates and other government agencies. For example, a 1972 report of the National Commission on Consumer Finance, established by the Consumer Credit Protection Act of 1968, specifically recommended restrictions on "a variety of boilerplate provisions commonly found in consumer credit contracts"[9] because they violated "accepted principles of fair play and equity."[10] Almost half a century later, the Bureau itself examined the use of arbitration clauses and class action waivers and determined that it was in the public interest to prohibit the use of these provisions in the terms and conditions of financial services and products. Although Congress subsequently dissolved that rule, the Bureau's exhaustive study of arbitration clauses presented

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[2] Ltr. from Iowa Attorney General Thomas J. Miller to the CFPB, Docket No. CFPB-2016-0020, at 2 (Aug. 22, 2016).
[3] 88 Fed. Reg. at 6921.
[4] Rebecca Schonberg, *Comment: Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 Calif. L. Rev. 1401, 1405 (2012).
[5] *Id.*
[6] *See* Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 976-77 (D.C. Cir. 1985).
[7] *See* Dodd-Frank Act, Section 1031(d).
[8] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d at 976.
[9] *Id.* at 962.
[10] *Id.* at 982.

ample—even incontrovertible—evidence of harm to consumers stemming from these non-negotiable terms in contracts.

In the current proposed Rule, the Bureau demonstrates the degree to which other types of unfair, deceptive, and abusive terms have come to proliferate in consumer financial contracts. The proposed Rule also illustrates how establishing a public registry would facilitate the Bureau's work, including its efforts to monitor risks to customers in the consumer finance market. Mandatory public registries documenting risks of harm to the public are well established in federal and state government practices to inform and protect the public. In the financial sector specifically, mandatory reporting requirements are relied upon to track risky practices and unsafe products and services.[11] A public registry of potentially harmful terms and conditions that systemically constrain or remove consumers' rights and protections will bring more awareness to unfair, deceptive, and abusive terms and should be welcomed by all stakeholders.

II. The Bureau Has Correctly Identified Many Onerous Form Terms and Conditions that Limit Consumer Protections.

The proposed registry would collect valuable information—including the text of the provisions themselves—about limitations in nonbanks' use of terms and conditions that restrict consumers' legal claims; limit corporate liability for claims; limit consumers' ability to file in particular timeframes, forums, or venues; prohibit consumers from participating in class and other group actions; limit consumers' ability to post reviews or complaints about a given service; waive other protections or rights; and force consumers to bring their claims in private arbitration. We applaud the Bureau's proposed rule defining these terms and conditions as "covered limitation[s] on consumer legal protections" and obligating an annual collection of those terms in the Bureau's proposed registration system.[12] In particular, we strongly endorse the Bureau's collection of measures purporting to shorten statutes of limitations, change venue, deny access to the courts, or otherwise prevent vindication of consumers' statutory rights. Our own research demonstrates—and the communities that we represent have identified—that these terms and conditions present some of the most egregious restrictions on legal protections in consumer financial products.

A. Waivers of Substantive Rights and Damages Caps.

We endorse the Bureau's proposal to collect all-encompassing provisions that purport to waive liability and legal claims.[13] The Bureau correctly observes that removal of legal protections can operate in "different ways" against consumers.[14] In general, however, these provisions, perniciously presented in a take-it-or-leave contract, coerce consumers into giving up their rights to challenge unfair practices and essentially render recourse for legal violations impossible to obtain. The standard definition of a waiver term is "the intentional relinquishment

[11] *See, e.g.*, SEC, *SEC Proposes Rules on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure by Public Companies* (Mar. 9, 2022), https://www.sec.gov/news/press-release/2022-39.
[12] *See* 12 C.F.R. §§ 1092.301(d), 1092.302(a)(3)(iv) (proposed).
[13] *See* 12 C.F.R. §§ 1092.301(d)(4)-(5), 1092.302(a)(3)(iv) (proposed).
[14] 88 Fed. Reg. at 6935.

or abandonment of a known right."[15] Courts generally conclude that the intent requirement for establishing waiver is met because a consumer's acceptance of fine print terms and conditions, even in a "clickwrap" or "browsewrap" contract, is generally deemed an affirmative act of assent.[16] Nevertheless, as the Bureau notes, most consumers do not "review fully the terms and conditions in form contracts that they cannot negotiate" and "rarely read adhesion contracts."[17] As such, the reality is that consumers do not truly express a clear intent to give up their rights to pursue legal claims.[18] Companies therefore routinely insert broad "waivers" in their terms of service, knowing that consumers will be forced to accept them.

Our research indicates that various nonbank entities insert broad language restricting their liability in their consumer contracts. For instance, remittance provider Wise's terms and conditions "release Wise from any and all claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, arising out of or in any way connected with" disputes with other Wise account holders and third-parties.[19] Western Union has an even broader limitation of liability, as do fintech companies Chime and Zelle, whose form terms and conditions purport to waive corporate liability and damages for any and all claims "whatsoever."[20] Given the high risk of money laundering and consumer scams connected with remittance and fintech products, broad waivers of liability can leave consumers with no civil recourse against even a financial institution that has behaved sloppily, rashly and irresponsibly.[21]

Relatedly, as the Bureau notes, some nonbank terms and conditions severely cap the amount that consumers can recover as damages.[22] The terms and conditions of a product offered by the fintech company Chime, for example, exempt it from liability for "any direct damages in excess of (or in the aggregate) of $500.00."[23] The online payment platform Zelle sets the bar

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[15] *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022); *see, e.g., Util. Audit Co. v. City of Los Angeles*, 112 Cal. App. 4th 950, 959 (2003) ("Waiver requires an existing right, benefit, or advantage, actual or constructive knowledge of the right's existence, and either an actual intention to relinquish it or conduct so inconsistent with any intent to enforce the right as to induce a reasonable belief that it has been relinquished."); *Van Der Velde v. New York Prop. Underwriting Ass'n*, 169 N.Y.S.3d 114, 116 (2022) ("[W]aiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable"), *leave to appeal denied*, 39 N.Y.3d 902 (2022).
[16] *See, e.g.*, *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) ("Courts have consistently enforced browsewrap agreements where the user had actual notice of the agreement . . . [or] where the browsewrap agreement resembles a clickwrap agreement—that is, where the user is required to affirmatively acknowledge the agreement before proceeding with use of the website" (citing cases)); *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1256 (10th Cir. 2012) (applying Florida and Oklahoma law and explaining that "if a clickwrap agreement gives a consumer reasonable notice of its terms and the consumer affirmatively manifests assent to the terms, the consumer is bound by the terms"); *see also Anderson v. Amazon.com, Inc.*, 490 F. Supp. 3d 1265, 1274-76 (M.D. Tenn. 2020) (summarizing cases).
[17] 88 Fed. Reg. at 6908.
[18] *See e.g.*, *Util. Audit Co.*, 112 Cal. App. 4th at 959 ("The waiver of a legal right cannot be established without a clear showing of intent to give up such right.").
[19] Wise, *Customer Agreement* (effective July 13, 2022), https://wise.com/us/terms-of-use-tw-inc ("Release").
[20] Western Union, *Online Money Transfer Terms & Conditions*, https://www.westernunion.com/us/en/legal/terms-conditions.html ("5. Limitations of Liability"); Chime, *SpotMe Terms and Conditions* (Feb. 2022) ("XVII. General Provisions"); Zelle, *Zelle Network User Service Agreement* (Aug. 25, 2022), https://www.zellepay.com/legal/user-service-agreement ("11. Liability for Sending and Receiving Money").
[21] *See, e.g.*, U.S. Dep't of Justice, *Justice Department Announces Phase Two of Compensation Process for Western Union Fraud Victims* (July 6, 2022), https://www.justice.gov/opa/pr/justice-department-announces-phase-two-compensation-process-western-union-fraud-victims (describing criminal and civil fraud investigation by FTC and USPS against Western Union related to victims of wire fraud facilitated through the remittance provider).
[22] *See* 12 C.F.R. § 1092.301(d)(4) (proposed).
[23] Chime, *SpotMe Terms and Conditions* § XV.2 (revised Feb. 2022), https://www.chime.com/policies/bancorp/spotme_terms/#general-provisions ("Indemnification, Limitation of Liability, Termination").

even lower at $100.00 total.[24] Chime and Zelle have recently come under congressional scrutiny for the high volume of customer complaints and purported "rampant fraud and theft," respectively.[25] Nevertheless, both companies enjoy the shield of take-it-or-leave-it terms that block or hinder their customers' ability to seek relief.

As the California Court of Appeal recently explained, "[R]estrictive damages limitations are 'yet another version of a "heads I win, tails you lose" clause that has met with uniform judicial opprobrium.'"[26] Collecting these provisions and evaluating the different damages caps—especially if there are distinctions across consumer financial products—will further aid the Bureau in monitoring for consumer risk and will help reveal which firms actually look out for consumers' interests rather than just claiming to do so.

B. Forced Arbitration Provisions and Class Action Bans.

We also support the Bureau's proposed inclusion in the registry of terms and conditions that require consumers to bring legal action in private arbitration and that limit consumers' ability to bring or participate in class or other group actions.[27] The prevalence of forced arbitration clauses in consumer finance contracts is the most significant obstacle blocking consumers from obtaining relief for violations of their rights. A line of U.S. Supreme Court decisions over the past several decades interpreting the Federal Arbitration Act (FAA)—most notably *AT&T Mobility v. Concepcion*[28]— has permitted the proliferation of forced arbitration clauses that also prohibit participation in class actions. Now, these clauses are ubiquitous in contract terms and conditions that touch every aspect of a consumer's life and interaction with the U.S. economy. Despite the Supreme Court's recent pronouncement that "[t]he federal policy [under the FAA] is about treating arbitration contracts like all others, not about fostering arbitration,"[29] in reality, forced arbitration provisions have developed an unparalleled and privileged status in corporate contracts that largely bar regular consumers from vindicating their rights.[30]

Arbitration was originally designed as an effective and efficient means of dispute resolution voluntarily entered into by parties of equal bargaining power. However, in recent years, corporations have weaponized it to keep important consumer (and employment) disputes out of court. Forced arbitration clauses are buried in the fine print of take-it-or-leave-it consumer

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[24] Zelle, *Zelle Network User Service Agreement* § 23 (revised Aug. 25, 2022), https://www.zellepay.com/legal/user-service-agreement ("Limitation of Liability").

[25] Sen. Sherrod Brown, *Brown Presses CFPB to Address Risks to Consumers from Fintechs like Chime* (July 27, 2021), https://www.brown.senate.gov/newsroom/press/release/presses-cfpb-address-risks-fintechs-chime; Sen. Elizabeth Warren, *New Report by Senator Warren: Zelle Facilitating Fraud, Based on Internal Data from Big Banks* (October 03, 2022), https://www.warren.senate.gov/oversight/reports/new-report-by-senator-warren-zelle-facilitating-fraud-based-on-internal-data-from-big-banks.

[26] *Nelson v. Dual Diagnosis Treatment Ctr., Inc.*, 77 Cal. App. 5th 643, 663 (2022) (quoting *Lhotka v. Geo. Expeditions, Inc.*, 181 Cal. App. 4th 816, 824-26 (2010)) (finding that a contract with a "a damages cap" and "a unilateral release of almost any conceivable claim" was substantively unconscionable).

[27] 12 C.F.R. § 1092.301(d)(3), (8).

[28] 563 U.S. 333 (2011).

[29] *Morgan*, 142 S. Ct. at 1713. In other words, "[t]he policy is to make arbitration agreements as enforceable as other contracts, *but not more so*." *Id.* (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)) (emphasis added).

[30] *See also* David L. Noll, *Regulating Arbitration*, 105 Calif. L. Rev. 985, 986 (2017) (stating that mandatory arbitration clauses have effectively "undermin[ed] . . . private enforcement of federal law").

contracts, and they strip consumers of their right to have their claims heard by a judge and jury when they are harmed. Instead, consumers must take their claims to private closed-door arbitration, where they have far fewer procedural rights than they do in court. Arbitrators have a financial incentive and institutional bias to favor the more powerful corporate party, typically a repeat player in arbitration proceedings. Moreover, arbitration proceedings generally take place without public oversight or effective review.

Consumers fare significantly worse in arbitration than they would in court.[31] Only 9 percent of consumers who bring claims in arbitration obtain relief and, worse still, consumers are often ordered to pay the companies they are accusing of misconduct.[32] Even when a consumer believes their case has been wrongly decided, it is almost impossible to successfully appeal an arbitrator's ruling once it has been made.

It is no wonder, then, that—according to the Bureau's own data—consumers very rarely file claims in arbitration on an individual basis.[33] The low number of cases does not indicate that few consumer harms are taking place, but rather that going to arbitration is not worth it for consumers even when they have valid cases. In most cases it is economically infeasible and impractical to bring cases individually; consumers are unable to find attorneys to help them seek remedies in private, individual arbitration.[34] If forced to resolve their claims in private arbitration, consumers generally find that the deck is stacked against them.

These issues are particularly harmful to the public interest when systemic misconduct affects thousands, or even millions, of consumers. Class actions are the most effective way to obtain consumer remedies in cases involving large-scale but relatively small-value harms and to hold corporations accountable for systemic wrongdoing. The drafters of Federal Rule of Civil Procedure 23(b), which authorizes certification of damages classes in federal court, intended to "cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[35] As the Supreme Court explained, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[36] Class actions also perform an important deterrence function by preventing corporate fraud and abuse.[37] They perform critical signaling effects by publicizing misconduct and alerting class members and other individuals of violations of their rights, as well as prompting public

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[31] Heidi Shierholz, *Correcting the Record: Consumers Fare Better under Class Actions Than Arbitration*, Economic Policy Institute (August 1, 2017), https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/.
[32] *Id.*
[33] *See* CFPB, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a)*, at 11-12 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (hereafter, *Arbitration Study*).
[34] Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 Fordham L. Rev. 2223, 2225 (2018).
[35] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C. App. at 697).
[36] *Id.* at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).
[37] Gilles, *supra* note 34, at 2227.

enforcement activity by alerting government actors to misconduct in the marketplace.

Terms prohibiting class actions and forcing individual arbitration are particularly damaging in the financial services context, where illegal junk fees and small-dollar charges abound. As one consumer advocate in Tampa Bay, Florida, informed NACA in a survey: "In order to impose fees on consumers without causing too strong of an objection or catching the eye of watch dogs, the fees are always too small to be economically viable absent a class action. Where there is an arbitration clause there is also a class action ban. Thus, consumers are left without a remedy."

Class action bans can act perniciously to limit consumers' legal rights even after consumers have joined together to challenge unfair practices. For example, in *Story v. Heartland Payments*, a class of parents of public school children in Florida challenged transaction fees assessed to process routine payments for items like school lunches, after-school programs, bus passes, and athletic fees.[38] After the lawsuit was filed, Heartland updated its online terms of service specifically to *retroactively* require resolution of any disputes through forced arbitration and waiver of rights to proceed as a class action.[39] The terms expressly provided that if "you accept these terms of service and a class is certified in the *Story* matter, you will not [be] permitted to participate in the *Story* case as a class member." The district court permitted Heartland to continue using these new terms and conditions, thereby effectively barring class members from joining the class *even after the putative class action was filed*. The court upheld the arbitration provisions as a matter of contract, even while recognizing that the consumers did not have any real control: "[w]hile the users have no real bargaining power with Heartland, each of them must affirmatively agree to the terms, which are boldly stated on the first page of the website."[40]

Consumer perception and general lack of awareness of the impact of covered provisions, particularly arbitration clauses and class action bans, are another aspect of adhesion contracts that a public registry could improve. In its 2015 study on arbitration, the Bureau found that consumers generally were not aware of the existence, meaning, and effects of forced arbitration clauses.[41] Consumers' lack of knowledge and understanding of harmful provisions heightens the problems when their rights and protections are contractually removed. A public registry will bring much needed attention to the terms and conditions that the Bureau has deemed risky.

Unscrupulous financial institutions are keenly aware that forced arbitration can act as a get-out-of-jail-free card that handcuffs private enforcement, essentially leaving public enforcement as the sole, under-resourced potential avenue of relief. This has led to businesses becoming increasingly emboldened. If bad actors believe they are unlikely to face consequences, they are more likely to engage in riskier and more harmful conduct. As a Scottsdale, Arizona, consumer attorney commented to NACA, "[A]rbitration also strips away a consumer's right to

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[38] *Story v. Heartland Payment Sys., LLC*, 461 F. Supp. 3d 1216, 1219 (M.D. Fla. 2020). Heartland Payment Systems has been subject to a civil investigative demand by the CPFB and therefore could fall under the definition of a supervised nonbank or registrant for the purposes of this proposed rule. *See* 12 C.F.R. § 1092.301(g)-(h); CFPB, *In re Heartland Campus Sols., ECSI*, 2017-MISC-Heartland Campus Solutions, ECS1-20001 (Sept. 8, 2021).

[39] *Story*, 461 F. Supp. 3d at 1221-22.

[40] *Id.* at 1224.

[41] CFPB, *Arbitration Study*, *supra* note 33, at 11.

have his/her claims heard by a jury and virtually eliminates the risk of a substantial award in favor of a consumer, making the bad actors more bold and less willing to settle cases where they have committed violations of law."

The proposed registry would also help promote public enforcement by giving the Bureau more information about harmful forced arbitration clauses in covered nonbanks' terms and conditions and what risks those provisions pose to consumers.[42] Indeed, effective public enforcement hinges upon whether regulators have a "broad-based understanding of their financial practices vis-à-vis a number of consumers, not just one isolated consumer."[43] The information collected will help the Bureau identify repeat-offender businesses and craft more targeted regulations to deter harmful behavior.

C. Terms That Remove Other Legal Protections.

We also support the Bureau's registration of terms and conditions that remove other consumer legal rights, defenses, or protections under other laws.[44] Many contracts impose limitations that have been found to be judicially unenforceable.[45] Nevertheless, financial services providers continue to mislead and deceive consumers by using these burdensome terms. For example, in some consumer financial products, such as student and auto loan agreements, companies often require consumers to waive their rights to discharge the loans in bankruptcy proceedings. As the Bureau notes, these non-dischargeability clauses are particularly common in student loan servicing contracts.[46] Although the clauses are unenforceable, they can still detrimentally affect student borrowers who are likely to be unfamiliar with their rights and thus can be misled into believing that their student loans cannot be extinguished in bankruptcy proceedings, even in cases of undue hardship. The Bureau also recently issued a consent order against an auto lender whose loan agreements "created the net impression that consumers could not file for bankruptcy," even though a term purporting to eliminate an individual's right to file for bankruptcy is *per se* void and unenforceable. The Bureau found that the lender relied on these terms to deceive borrowers in ways that ultimately led to wrongful repossessions of their vehicles, causing them to miss work, bear increased travel costs, and pay repossession-related fees.[47]

Similarly, many consumer financial contracts purport to remove a consumer's right to seek public injunctive relief, despite courts having ruled that such waivers are unenforceable. Public injunctive relief is a statutory remedy embedded in, for example, California's consumer protection laws that "has the primary purpose and effect of prohibiting unlawful acts that

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[42] 88 Fed. Reg. at 6907

[43] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, William & Mary L. Rev. 1137, 1182 (2012).

[44] 12 C.F.R. § 1092.301(d)(7).

[45] California's ethics commission is currently considering a rule prohibiting attorneys from counseling their clients to include these provisions in their contracts. *See* National Consumer Law Center et al., Coalition Letter to COPRAC (Mar. 3, 2023), https://www.nclc.org/wp-content/uploads/2023/03/COPRAC-letter-final.3.3.23.pdf.

[46] 88 Fed. Reg. at 6920; *see In re Homaidan*, 640 B.R. 810, 848 (E.D.N.Y. Bktcy. 2022); *see also In re Nichols*, 2010 WL 5128627, at *2 (E.D.N.Y. Bktcy. 2010).

[47] *See* CFPB, *In re Nissan Motor Acceptance Corp.*, Consent Order, Admin. Proc. 2020–BCFP–0017 ¶¶ 46-52 (Oct. 13, 2020), https://files.consumerfinance.gov/f/documents/cfpb_nissan-motor-acceptance-corporation_consent-order_2020-10.pdf.

threaten future injury to the general public."[48] In *McGill v. Citibank*, the California Supreme Court ruled that contractual waivers of the right to public injunctive relief in a pre-dispute arbitration clause are invalid and unenforceable because they "seriously compromise the public purposes the statutes were intended to serve" and are not preempted by the Federal Arbitration Act.[49] The Ninth Circuit has recently upheld the core of the rule.[50] Nevertheless, terms professing to remove rights to pursue public injunctive relief are still found in contracts for consumer financial products, such as payday loans.[51] Including this type of misleading and unenforceable term in the registry would allow the Bureau to identify repeat offenders and take proactive enforcement measures, which will ultimately reap significant benefits for consumers.

Other nonbank terms and conditions also severely restrict the timeframe in which a consumer can bring a claim against the business. Statutes of limitations are democratically agreed-on, legislative terms that reflect a public decision as to the time that a consumer has to bring a claim. To arbitrarily alter them in a one-sided, non-negotiated contract is to place democracy in private hands. The terms and conditions of CFPB-designated "repeat offender" MoneyGram,[52] for example, require disputes to be "initiated" within one year only.[53] The remittance provider purports to shield itself not only from private consumer claims under any federal or state law with a longer statute of limitations, but also from private contract claims in every state in the Union with a longer limitations period for written contracts—effectively *all* of them. In recent years, state and federal enforcement offices have alleged that MoneyGram failed to stop scammers from using its payment system to trick consumers into wiring them money and that it repeatedly failed to deliver funds promptly to recipients abroad—and that the company then failed to comply with public orders that aimed to change its behavior.[54] In such circumstances, private remedies are also clearly necessary to deter repeated and flagrant violations of the law.

III. The Bureau Should Explicitly Collect Additional Terms and Conditions That Present Major Risks to Consumer Legal Protections.

In addition to the eight proposed categories of terms and conditions specified in proposed 12 C.F.R. § 1092.301(d), we recommend that the Bureau explicitly define "covered limitation on consumer legal protections" to include additional terms and conditions that are harmful to consumers. While the Bureau has considered many of these terms in its analysis of the proposed regulation, covered nonbank entities are not expressly required to submit them to the registry. Absent such regulatory obligations, it is unlikely that corporations will do so voluntarily. That

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[48] *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 951 (2017); *see* Cal. Civ. Code § 1750 *et seq.*; Cal. Bus. & Prof. Code §§ 17203, 17535.
[49] *McGill*, 2 Cal. 5th at 961.
[50] *Blair v. Rent-a-Ctr., Inc.*, 928 F.3d 819 (9th Cir. 2019).
[51] *See, e.g.*, *Delisle v. Speedy Cash*, 818 F. App'x 608, 611 (9th Cir. 2020) (finding such a waiver in a payday lender contract unenforceable); *Maldonado v. Fast Auto Loans, Inc.*, 60 Cal. App. 5th 710, 725 (2021) (same).
[52] CFPB, *CFPB and NY Attorney General Sue Repeat Offender MoneyGram For Leaving Families High and Dry* (April 21, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-ny-attorney-general-sue-repeat-offender-moneygram-for-leaving-families-high-and-dry/.
[53] Moneygram, *Terms and Conditions for Moneygram's Online Services*, https://www.moneygram.com/mgo/us/en/m/terms-and-conditions/.
[54] *See supra* note 52; FTC, *MoneyGram International, Inc.*, https://www.ftc.gov/legal-library/browse/cases-proceedings/062-3187-moneygram-international-inc

omission would frustrate the central purpose of the Rule: to help the Bureau better monitor all emerging risks to consumers and engage in adequate supervision of nonbank entities.

A. Specific Language and Procedures in Arbitration Clauses: Arbitrability and Mass Arbitration Prohibitions.

As part of the Bureau's concerted effort to tackle forced arbitration, we recommend that the Bureau revise proposed 12 C.F.R. § 1092.301(d)(8) to elaborate on particular provisions of forced arbitration provisions, and to add a provision to 12 C.F.R. § 1092.302(a)(3)(iv) that requires registration of those specific arbitration provisions.[55] The explosion of forced arbitration provisions and class action bans in consumer financial contracts has also led to the development of complicated and onerous procedural rules in arbitration that further raise the barriers to justice for consumers. Essentially, once a consumer is forced to individually arbitrate their claims, they face a complicated web of rules, often having to contend with both rules from the specific arbitral forums (AAA or JAMS, for instance) and provisions in the disputed contract that may override those rules. Simply requiring covered nonbanks to register whether they "requir[e] that a consumer bring any type of legal action in arbitration" fails to capture these procedural hurdles that consumers face once they enter arbitration—since, in all likelihood, they *are* subject to a forced arbitration clause in their financial providers' terms and conditions. Inclusion of additional specific terms that fall within the general arbitration provision will help the Bureau better monitor the different ways that business wield procedural levers of arbitration against consumers.

One type of provision about which we encourage the Bureau to collect information is the so-called "delegation clause."[56] These provisions delegate to the arbitrator, rather than the court, the question whether a legal dispute is subject to the terms of the arbitration provision—i.e., the *arbitrability* of the dispute. The Supreme Court has confirmed that delegation clauses must be enforced according to their terms,[57] and mandatory arbitration provisions now largely contain such clauses. For example, the credit bureau TransUnion's terms and condition dictate that "the issue of arbitrability[] must be resolved exclusively by binding arbitration."[58] Enforcement of a delegation clause means that whether or not a claim belongs in arbitration lies outside of the court's hands—and therefore beyond the ordinary due process protections of a judicial forum. Meanwhile, arbitrators have a financial incentive to find that the delegation clause assigned to them the authority to decide to the dispute, and then proceed to the merits. Their arbitrability decision is generally not up for review on appeal: even provisions that do create appellate procedures authorize only private arbitral appeals board for review, and the arbitrator's decision is not reviewable by courts.

We also encourage the Bureau to include in the registry provisions that seek to curb or undermine so-called "mass arbitrations," in which consumers and their counsel coordinate to file

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[55] *See* 88 Fed. Reg. at 6943-44.

[56] Here we respond specifically to the Bureau's request for comment about whether it should collect information about delegation clauses. 88 Fed. Reg. at 6944.

[57] *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."); *Rent-a-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010).

[58] *See* TransUnion, Membership Terms and Conditions, https://membership.transunion.com/tucm/termsOfUse.page? (at "Where Your Claim May Be Resolved").

many similar individual claims against the same corporation. Mass arbitrations have been described as causing corporations to contend with the consequences of their determination to force consumers out of court and out of class actions—the most effective and fair vehicle to adjudicate multiple similar claims.[59] In one recent example, some 40,000 customers of the tax preparer Intuit, bound by a forced arbitration provision in the company's terms and conditions, filed individual requests for arbitration *en masse* against the company for unlawfully tricking consumers into using TurboTax software.[60] Intuit then tried unsuccessfully to walk back enforcement of its arbitration clause and resolve the claims by seeking judicial approval of a class action settlement. As U.S. District Judge Charles R. Breyer of the Northern District of California remarked, corporations eager to force consumers into arbitration should not be surprised when the tables are turned and mass arbitration has "hoisted [them] by [their] own petard."[61]

Yet corporations are now vigorously trying to stop mass arbitration by revising the arbitration provisions in their terms and conditions. The newfangled proposals include requiring consumers to engage in pre-dispute resolution processes, to file their requests for arbitration individually or in small "batches," to bear costs associated with arbitration, or to shift all mass arbitrations to "friendly" arbitral forums.[62] The U.S. Chamber of Commerce denounced mass arbitrations as "coercive gambits" in a recent publication and recommended that corporate defendants "include in their arbitration agreements a provision specifically designed to tackle mass arbitrations" such as using a "bellwether process" to resolve cases in batches.[63]

Financial institutions subject to Bureau supervision are already adopting these revisions to undercut mass arbitrations. For example, the terms and conditions for the fintech company Square (now Block) expressly require consumers to engage in an informal negotiation process with the company before initiating arbitration.[64] The tenant screening company Rentspree seeks to defeat mass arbitrations through its terms requiring "batch arbitration" of any disputes if 100 or more of a "substantially similar nature" are filed "by or with the assistance of the same law firm, group of law firms or organizations."[65] Stripe, another fintech company, requires a pre-arbitration informal dispute process as well as cash advances by each party of "one-half of the fees and expenses of the arbitrator, the costs of the attendance of the arbitration reporter at the

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[59] J. Maria Glover, *Mass Arbitration*, 74 Stanford L. Rev. 1283, 1378 (2022).

[60] *See* Scott Medintz, *How Consumers are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, Consumer Reports (Aug. 13, 2021), https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827/.

[61] Alison Frankel, *Judge Breyer rejects $40 million Intuit class settlement amid arbitration onslaught*, Reuters (Dec. 22, 2020), https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5.

[62] *See, e.g.*, Cooley, *How Companies Can Hedge Against Mass Arbitrations*; Michael R. Booden, *How to Avoid Mass Arbitration Claims*, Docket (Apr. 20, 2022); *see also* Glover, *supra* note 43, at 1364-73.

[63] U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* 3-4, 50-52 (2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown.pdf.

[64] *See* Square, *General Terms of Service* (last updated Mar. 1, 2023), https://squareup.com/us/en/legal/general/ua (at "22. Binding Individual Arbitration . . . Pre-Filing Requirement to Attempt to Resolve Disputes.")

[65] *See* RentSpree, *Terms of Use*, https://www.rentspree.com/terms-of-use ("Batch Arbitration").

arbitration hearing, and the costs of the arbitration facility."[66] Unsurprisingly, those costs of arbitration far exceed what a private plaintiff would have to pay in filing fees in a public court.[67]

In light of this rapid shift to expand the reach of forced arbitration provisions to block mass arbitrations, we recommend that the Bureau explicitly collect these and similar provisions in its registry. Notably, the Bureau is considering the unconscionability of certain terms and conditions.[68] In light of court rulings that certain provisions like limitations on attorneys' fees awards in arbitration can be substantively unconscionable,[69] the Bureau should evaluate how these and other clauses that nonbanks are using to combat mass arbitrations may be harmful to consumers.

B. Surrendering the Right to a Jury Trial.

The right to a jury trial is fundamental to our civil justice system. The Supreme Court has warned against limiting this right in the Seventh Amendment context: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[70] Nonetheless, contract terms and conditions routinely forbid consumers from seeking a jury trial. Courts have considered such jury trial waivers as substantively unconscionable in the appropriate circumstances.[71]

These provisions occur in consumer contracts with and without arbitration clauses. For example, the terms of service for the remittance processor BBVA Transfer Service (BTS) includes a separate jury trial "waiver" that applies even if neither party seeks to compel arbitration of disputes or if the arbitration clause is deemed unenforceable.[72] Wells Fargo removed the right by jury trial in its mortgage servicing agreements.[73] In *Gerro v. BlockFi Lending LLC*, the California Supreme Court granted review in a case (since stayed by bankruptcy proceedings) evaluating the enforceability of a forum selection clause and jury trial waiver imposed by the cryptocurrency lender BlockiFi.[74] The borrower asserts that litigating the case in Delaware, as required under the forum selection clause, rather than California where he filed his case, would violate his jury trial rights, which California but not Delaware preserves

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[66] *See* Stripe, *Stripe Service Agreement—United States* § 13.2, https://stripe.com/legal/ssa ("Arbitration Procedure").
[67] Benny L. Kass, *Second Thoughts About Arbitration*, Wash. Post (May 18, 2002) (citing Public Citizen study), https://www.washingtonpost.com/archive/realestate/2002/05/18/second-thoughts-about-arbitration-it-can-be-more-expensive-than-litigation-in-contract-disputes/2fbdf4df-a90a-484a-8ffe-c5bfcd255838/.
[68] *See* 88 Fed. Reg. at 6913.
[69] *See, e.g.*, *Casa Ford, Inc. v. Armendariz*, 656 S.W.3d 823, 827-28 (Tex. Ct. App. 2022); *Mills v. Facility Sols. Grp., Inc.*, 84 Cal. App. 5th 1035 (2022); *Patterson v. Super. Ct.*, 70 Cal. App. 5th 473, 491-92 (2021).
[70] *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 565 (1990).
[71] *See Damico v. Lennar Carolinas*, 437 S.C. 596, 617 (2022) (finding, in dicta, that a contract term that "Buyer acknowledges that justice will best be served if issues regarding this agreement are heard by a judge in a court proceeding, and not a jury" was "absurd, factually incorrect, and grossly oppressive"); *Lange v. Monster Energy Co.*, 46 Cal. App. 5th 436, 451-52 (2020) (finding that a jury trial waiver separate from a forced arbitration clause was "not susceptible to any interpretation other than as an unconscionable predispute jury trial waiver").
[72] BBVA Transfer Services, *BTS Remittance Service Agreement* 7 (revised Mar. 18, 2021), https://pncglobaltransfers.com/assets/files/BTS%20Remittance%20Service%20Agreement%20-%20ENG.pdf.
[73] *Cannon v. Wells Fargo Bank N.A.*, 917 F. Supp. 2d 1025, (N.D. Cal. 2013)
[74] *See Gerro v. BlockFi Lending LLC*, B307156, 2022 WL 2128000 (Cal. Ct. App. June 14, 2022) (unpublished), *review granted*, No. S275530 (Cal. Sep. 14, 2022).

even in the presence of a waiver.[75] Given the increased prevalence of attempts to remove the fundamental right to a jury trial, we recommend that the Bureau explicitly collect information about these provisions outside of the forced arbitration context.

C. Choice of Law Provisions.

We also urge the Bureau to reconsider its decision not to include choice of law provisions in the covered terms and conditions.[76] The Bureau correctly acknowledges these clauses are "nearly universal," just like the arbitration provisions, class action bans and other terms and conditions the Bureau proposes to track. Yet the prevalence of choice of law provisions justifies collecting these terms, not ignoring them.

Choice of law provisions are a particularly popular method of harming consumers by evading state usury caps. For example, in the payday loan context, choice of law provisions that designate tribal law as controlling is one way to circumvent state consumer protections altogether. "Rent-a-tribe" schemes, a business arrangement in which a payday lender disguises itself as a tribal corporation so that it can claim sovereign immunity and exemption from state laws, have proliferated in recent years. In *Hengle v. Treppa*, the Fourth Circuit invalidated a choice of law provision in a payday loan contract from a lender purportedly operated by the Habematolel Pomo of Upper Lake tribe that designated the tribal laws as governing its loans to Virginia residents.[77] Although Virginia prohibits interest rates over 12 percent, the laws of the tribe did not provide a cap, and the lender imposed exorbitant loan rates ranging from 544 percent to 920 percent. *Hengle* followed several decisions from the Fourth Circuit voiding choice of law provisions in payday loans made by tribal businesses.[78] By collecting these kinds of choice of law provisions, the Bureau could deter their inclusion in other consumer contracts.

IV. Public Registries and Contract Monitoring are Established Tools in Safeguarding the Public.

Some of the most important financial information about regulated entities comes from mandated reporting and disclosures by market participants.[79] State and federal regulators can and have required regulated financial entities to report risks that impact their customers and the marketplace generally.[80] Mandatory reporting in this instance—that is, tracking risky contractual provisions—is premised on this information's relevance to the maintenance of consumer financial protection and the operation of fair and orderly consumer finance markets.[81] The covered provisions generally defeat the prospect of accountability for wrongdoing and invite reckless practices in consumer financial services.

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[75] *Id.*
[76] *See* 88 Fed. Reg. at 6936.
[77] *See Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021).
[78] *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 289 (4th Cir. 2020) (interest rates ranging from 219 to 373 percent); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 335 (4th Cir. 2020) (same); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 332 (interest rates of 440 percent); *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 668-69 (4th Cir. 2016) (139 percent to 233 percent).
[79] *See, e.g.*, FDIC, *Required Bank Financial Reports*, https://www.fdic.gov/regulations/required/.
[80] *See, e.g.*, Jeffrey H. Myers, *Maryland's Financial Abuse Reporting Law for Financial Institutions* (undated) https://www.carrollcountymd.gov/media/14345/how-banks-protect-older-adults-from-financial-exploitation-weaad-2021.pdf.
[81] *See generally Am. Fin. Servs. Asso. v. FTC*, 767 F.2d 957 (1985).

Required reporting of these provisions fits into the CFPB's data-driven approach for identifying and monitoring risks and subsequently taking action to eliminate threats to consumers' financial safety, including holding responsible parties accountable and providing consumer relief. The registry would also complement the Bureau's other risk assessment tools, including its complaint database and other data collection mechanisms.

A. The Registry Would Serve Multiple Valuable Purposes for the Bureau and the Public.

The registry would support and help to implement the Bureau's core functions. First, the registry would promote transparency and establish a common structure with requirements for information collection to help ensure the data's accuracy and credibility. It is designed to help the Bureau identify and enroll nonbanks that use certain terms and conditions and to facilitate follow-up monitoring of those entities. The registry will enable users to easily determine the extent of certain terms and conditions within a financial sector (e.g., payday lending or the mortgage market), as well as within specific groups of consumers who are at high risk for underlying predatory practices and certain terms and conditions.

Second, analysis of the data collected in the registry will spur action beyond disclosure and transparency. As part of its mission, the CFPB spends significant time and effort trying to detect market misconduct and identifying market-wide, or "systemic," risks. The registry and the information collected will facilitate more effective CFPB supervision and help the Bureau stay on top of the latest developments in nonbank product markets. The registry will help the CFPB monitor new product launches and spot and assess emerging risks before they become widespread. Ongoing analysis of the covered terms and conditions will help the Bureau gather early insights on consumer experiences based on the practices of the entities that use the contract terms.

Third, the data elicited for the registry will enable more efficient planning and strategizing for necessary rulemaking and successful enforcement actions. As it makes decisions about actions it will take based on the information collected in the public registry, the Bureau can and should consider how standard-form, non-negotiable contracts, by their nature, restrict free and informed consumer choice and enable covered entities' potentially damaging behavior—and what measures might be taken in response. The CFPB will also be able to use its supervisory and enforcement powers to identify those entities that use the covered contract terms but are not in compliance with the requirements to register them. The result will open opportunities for additional analysis that may show the links between the covered terms and the entity's conduct. Findings of systemic, market-wide harm may also require the addition of other types of clauses to the list of covered terms and conditions required to be reported to the registry.

B. Additional Benefits of the Registry.

The inherent spotlight on the covered contractual provisions could encourage industry players to voluntarily remove identified harmful contract provisions, which incidentally may curtail some of the underlying unfair, deceptive, and abusive practices in the sector or industry. The promise of increased government scrutiny through the registry likely will facilitate a better

financial services market for consumers. Regulated nonbank providers seeking to avoid inclusion in the registry will be motivated to remove, or will be deterred from adding, harmful provisions to their consumer contracts.

Meanwhile, public disclosure of covered terms and conditions has the potential to create a new level of awareness for consumers who often lack knowledge and understanding of the fine-print terms and conditions—particularly those provisions that affect their rights and protections. Disclosures would provide the public with potentially new information about nonbank products, allowing consumers more time to make informed decisions. Although consumers may or may not make purchase decisions based on obscure contract provisions, the information will empower them should they need it. Of course, not every consumer need be made aware. It may take only a subset of dedicated consumers or consumer advocates to raise the necessary ruckus.[82]

Additionally, the registry will provide data for significant research and the publication of empirical studies. Regulators and the public can monitor the occurrence of certain terms and conditions for changes in trends and unusual patterns. Ideally, published studies and analyses of the covered provisions could eventually make contracts easier to understand and increase fairness in contract terms for widely used financial products and services. Subsequently, consumer advocates, industry associations, and the media can use published information to push for better practices in the industry.

Finally, the registry also has the potential to enhance competition. First, ratings organizations can use the information collected as a factor in evaluating the quality or consumer-friendliness of given financial products and services. Second, the registry could provide incentive for nonbank financial providers to publicize their products along with their fair terms and conditions as more beneficial to consumers than their competitors.[83]

V. Conclusion.

As a result of the grossly unequal bargaining power between businesses and consumers, companies can—and do—add ever more expansive terms and conditions to their contracts, and consumers must accept them or forgo the desired products and services. Despite the invalidity and unenforceability of many of these clauses, consumers are largely powerless to challenge them as unfair and deceptive practices—a fact due mostly to restrictions contained in the contracts themselves, including forced arbitration provisions. The Bureau's proposed registry will help hold nonbank entities accountable for terms and conditions that restrict consumers' legal protections. It will help identify the most egregious practices, assist in investigations and enforcement, and deter behavior that is harmful to consumers among covered nonbanks.

We welcome the Bureau's initiative and appreciate the opportunity to provide these comments.

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[82] *See* Yonatan Arbel & Roy Shapira, *The Theory of the Nudnik*, 73 Vand. L. Rev. 929 (2020) (spotlighting the disciplinary power of a small subset of consumers who call to complain, complete satisfaction surveys, demand to speak with managers, post detailed online reviews, and file lawsuits).
[83] *See* Nathan Cortez, *Regulation By Database*, 89 U. Colo. L. Rev. 1 (2018).

If you have any questions or if we can provide further information, please contact Christine Hines of the National Association of Consumer Advocates, Christine@consumeradvocates.org, and David Nahmias of the UC Berkeley Center for Consumer Law & Economic Justice, dnahmias@berkeley.edu.

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The National Association of Consumer Advocates is a non-profit association of attorneys and consumer advocates whose primary focus is the protection and representation of consumers. NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

The UC Berkeley Center for Consumer Law & Economic Justice works to establish equity and fairness in the marketplace. We believe that building economic justice means developing and enforcing laws that fight fraud and deception, that protect low-income communities and communities of color, and that promote financial security and empowerment. Through research, advocacy, policy, and teaching, the Center strives to apply robust consumer protection laws in places, and among people, where those laws have not been used before, and to create a society in which economic, racial, and social justice are available to all.