National Association of Consumer Advocates

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CFPB walks back protections on terms and conditions in financial services

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The Consumer Financial Protection Bureau has long kept a watchful eye on terms and conditions that accompany financial products and services it oversees. But like most other consumer protections under the CFPB's umbrella of late, and with leadership focused on dismantling the bureau and discarding its mission, it is retreating from the progress it has made in tackling the unfair fine print.

The bureau was keenly aware that when consumers sign up for a loan or credit card, open a bank account or payment app account, or engage with other everyday financial products or services, by and large they must accept financial providers' standard-form contracts on a take-it-or-leave-it basis. It also knows that financial services terms and conditions include boilerplate language that both limit consumer rights and insulate companies from liability. So as part of its scrutiny of corporate-written contracts, the bureau issued a handful of public notices warning financial companies about using certain provisions that may be unfair, illegal, or deceptive.

Then in May, the agency issued a notice revoking 67 guidance documents that advised the public on how it interprets the law for a plethora of issues in financial services and products. The list included a handful of advisories explaining its findings and views on terms and conditions it determined are unfair, deceptive, abusive, or in violation of state and federal laws.

Specifically, the now-withdrawn guidance documents addressing the fine print, helpfully:

- Warned financial services providers that the inclusion of unlawful or unenforceable terms and conditions in contracts for consumer financial products and services are a deceptive act or practice that violates the Consumer Financial Protection Act (CFPA).

- Explained that abusive acts or practices prohibited under the CFPA may include acts such as using buried disclosures that limit a person's understanding of a term or condition; or using digital tools to trick consumers and keep them from viewing or understanding contract terms; or taking "unreasonable advantage" when a person is unable to protect their interests, particularly when the person is in a weak bargaining position when selecting financial services attached to a standard-form nonnegotiable contract, which deprives them of making choices about the terms.

- Warned debt collectors that they can violate the Fair Debt Collection Practices Act and Fair Credit Reporting Act when they rely on invalid contract terms to collect a nursing facility debt. The Nursing Home Reform Act bars nursing facilities from

requesting or requiring third parties, such as caregivers, to guarantee payment. A provision in a nursing home facility contract that requires third-party payment is illegal. And debt collectors that attempt to collect payment from caregivers based on these illegal contract provisions are also breaking the law.

- Reminded financial services companies that they may violate the CFPA if they included provisions such as non-disparagement clauses in their terms and conditions to restrict or suppress their customers' honest reviews and complaints.

CFPB's withdrawal of the guidance on financial terms and conditions and the other 63 documents may be an act that is more symbolic than about holding meaningful legal weight. First, guidance documents are generally nonbinding. Second, following the U.S. Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which unraveled the discretionary authority of federal agencies, it is up to courts to decide whether the CFPB interpretations of the law in these documents are valid.

While the CFPB will no longer enforce or rely on its withdrawn guidance, the public and other law enforcers can. They can ask a court to decide. Still, the agency's reversal of its own previously thoughtful legal analyses is regrettable.

CFPB used other tools to protect consumer rights from restrictive fine print

In years of oversight and prosecution of law enforcement actions against financial institutions, the CFPB built a record, methodically addressing contract clauses that restrict customers' legal protections. And it determined in numerous instances that provisions in financial provider agreements violated the CFPA's provisions against unfair, deceptive, and abusive practices.

Back in 2017 for example, during the first Trump Administration, the supervisory team examining mortgage servicing practices continued to see "broad waiver of rights clauses" in forbearance and loan modification agreements with customers. The CFPB determined that the waiver clauses were deceptive because reasonable consumers could have believed that the contract banned them from bringing claims against the company in court. These clauses would have been inconsistent with the federal Truth in Lending Act, which prohibited agreements that barred consumers from pursuing legal claims.

Again, in 2021, the bureau's supervision observed "deceptive waivers of borrowers' rights," in home equity installment loan agreements, as well as in a rider to a security deed for a state that waived customers' rights to notice or a judicial hearing.

Financial companies' use of standard form contracts to mislead consumers about their legal rights is an ongoing issue that the CFPB tackled in its law enforcement. In 2020, also during the first Trump Administration, the CFPB settled a case against a remittance transfer provider Trans-Fast Remittance LLC, asserting that the company used misleading language in customer disclosures that implied there were limits on their error resolution rights, and limits on the company's liability. In fact, the Electronic Fund Transfer Act and the Remittance Rule provides customers with more substantive, broader protections to address

and remedy errors than the corporate disclosures had indicated. According to then-CFPB, the company committed deceptive acts or practices with its misleading fine print.

Bank of America's consumer deposit agreement also drew the agency's ire. In a 2022 consent order for wrongfully handling garnishments, the bureau found that the bank "violated the law by inserting unfair and unenforceable language into customer contracts that purported to limit customers' rights to challenge garnishments." The bank's fine print appeared to put off customers from pursuing legal claims against it for unlawful garnishments. Account holders, the CFPB said, have the legal right to challenge garnishments or to seek state and federal exemptions despite any such waivers in take-it-or-leave-it contracts.

The bureau continued to scrutinize and document consumer contract terms used in certain markets. In a 2023 paper on tuition payment plans, the bureau found that many contracts for these plans offered by schools included waivers of borrowers' legal rights. The fine print connected to these tuition payment programs in which nearly 4 million students participate, forced borrowers to get their legal claims heard in private arbitration instead of in court, waived their rights to seek a bankruptcy discharge or to retain their own attorneys, and misrepresented protections available to them under existing law that would survive any contractual waivers.

There's more work to do to quell unfair, abusive fine print

The bureau's work demonstrated a commitment over the years to tackle systemic anti-consumer clauses in financial services terms of use. And right up until January 2025 when it issued a proposed rule to prohibit certain terms, including banning clauses that waive substantive legal rights and protections, the bureau knew there was more to accomplish to protect consumers from the harsh fine print.

The most challenging to overcome is the ubiquitous arbitration clause, which diverts consumer claims out of the public court system and into private forums to be heard by a privately paid arbitrator. Arguably, forced arbitration is the bane of consumer financial protection's existence, because it is the most successful at insulating companies from liability. The CFPB over the years has studied and documented its impact. The bureau has also on different occasions proposed avenues to limit, or at the very least, bring some transparency to, the restrictive terms. But none of its proposals have come to fruition. It's reasonable to presume that no further actions to address this barrier to justice will occur at the CFPB for a long while.

Yet, the overall challenge of unfair and abusive contract provisions in consumer financial services persists. In one of the CFPB's last reports for the previous administration, the CFPB emphasized that financial institutions continue to find ways to use their boilerplate to evade or undermine consumer law. State and federal lawmakers should persist in finding solutions to check them.