

# Likely Doomed CFPB Contract Rule Still Has Industry Pointers

By **Jason McElroy and Ryan Gallagher** (February 5, 2025)

As the Biden administration came to an end, the Consumer Financial Protection Bureau issued a proposed rule that prohibits "covered persons"[1] from including in consumer financial contracts provisions that waive or limit a consumer's fundamental or constitutional rights,[2] and a report offering guidance on how state-level enforcement officials can implement CFPB interpretations of its covered laws.[3]



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While the proposed rule on contractual provisions, issued on Jan. 13, is unlikely to be finalized under the new Trump administration, its provisions are important for industry to recognize.

This is particularly true in light of the CFPB's report for state officials, a clear attempt by the CFPB to signal to its ideological contemporaries to continue to assert the Biden administration's interpretations of the law.



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Specifically, the CFPB seeks to prohibit several clauses, including but not limited to clauses that waive rights under laws passed by elected officials; permit covered persons to unilaterally amend material terms in a contract; and waive certain freedoms of speech.

The CFPB even goes one step further to provide, essentially, a registry of contractual terms that are permitted in such agreements.

To accomplish this, the CFPB seeks to codify provisions of the Credit Practices Rule as applicable to all covered persons under the Consumer Financial Protection Act. The Credit Practices Rule was issued in 1984 by the Federal Trade Commission, was intended for creditors subject to the FTC's jurisdiction, and may apply to certain companies within the CFPB's jurisdiction.[4]

The Credit Practices Rule prohibits, among other things, the use of certain contractual provisions that the FTC finds to be unfair to consumers, such as confessions of judgment, waivers of exemption, wage assignments and security interests in household goods.[5]

This proposal runs contrary to the 2014 interagency guidance issued jointly by the Federal Reserve Board of Governors, the CFPB, the Federal Deposit Insurance Corp., the National Credit Union Association and the Office of the Comptroller of the Currency, which provided that the Credit Practices Rules did not apply to banks, federal credit unions and savings associations.[6]

The Credit Practices Rule, however, is not one of the enumerated consumer laws over which the CFPB was authorized by Congress to exercise regulatory authority.[7]

The CFPB preemptively counters this by stating that it is authorized to make such rule changes and codification for all covered persons pursuant to the Consumer Financial Protection Act, which permits the CFPB to issue rules to covered persons that prevent "unfair, deceptive or abusive acts or practices." [8]

The crux of the CFPB's proposal is to simply prohibit covered persons from presenting take-it-or-leave-it contracts to consumers such that consumers previously had little to no bargaining power and accepted all contract terms to be entitled to the company's products or services.

The CFPB submits that covered persons often use contracts of adhesion, or boilerplate contracts with standard terms, for millions of consumers that, while efficient and uniform, give covered persons undue economic advantages that encroach on the autonomy and liberties of consumers.

Specifically, the CFPB argues that consumer financial contracts of adhesion place the consumer at a disadvantage because they are typically lengthy and dense, and most consumers do not afford much, if any, attention to noncore standard contract terms.[9] This, the CFPB asserts, often results in an unconscionable contract.

To avoid such practices and results, the CFPB's proposal essentially strips consumers and covered persons of their right to negotiate the terms of their contracts as they deem appropriate, including waivers of certain rights, which is a basic principle of contract law.

Seemingly recognizing that the Trump administration may be inhospitable to its proposal — and perhaps revisit other recent issuance — the CFPB also issued a January report intended to assist state legislators with strengthening consumer protections by encouraging states to enforce the Consumer Financial Protection Act.[10]

In fact, the CFPB's report includes suggested legislative text to help states implement and expand the CFPB's directives.

This report lays bare the CFPB's agenda in the opening paragraphs, claiming with no attribution that "[l]arge companies and their lawyers have developed more advanced tricks, using fine print and product complexity to increase profits at the expense of American families," and that "[c]ompanies can use forced arbitration to select their own private judge, prevent injunctive relief, impose secrecy, and make it virtually impossible for consumers to defend themselves against law-breaking companies." [11]

But the CFPB's ideological prerogative is not final, nor has it been afforded any form of congressional review. Instead, while presumably understanding that the new administration may not agree with the last iteration of CFPB leadership's aggressive testing of its statutory boundaries, the CFPB lays forth a road map to state attorneys general and administrative enforcement agencies with certain considerations, including:

- Incorporating the so-called abusive standard into state law; [12]
- Creating stronger remedies and tools for investigation and enforcement; [13]
- Eliminating the requirement to prove monetary injuries, effectively removing standing as a requirement for statutory violations; [14]
- Applying consumer protection laws to protect businesses as well as consumers; [15] and
- Increasing private attorney general rights so that consumers can more easily avoid arbitration. [16]

While the CFPB's proposals contain many issues that consumer financial services companies should be aware of, should the Trump administration decide to finalize the contract proposal in its current form, the CFPB's attempt to circumvent Congress to obtain its interpretations is likely to gain particular attention.

The CFPB emphasized that Congress and state legislatures are well-versed in regulations concerning nonwaivable rights, but prohibiting covered persons from asking consumers to waive certain rights in a contract undoubtedly frustrates the very foundation of many states' contract laws, and likely runs headlong into other obstacles, such as the Federal Arbitration Act.

The CFPB's stated authority for issuing the rule is likely to also come under attack if the rule is finalized, as Congress did not clearly grant the bureau authority under the Credit Practices Rule.

The CFPB previously sought to prohibit arbitration clauses in consumer financial contracts under its proposed arbitration agreements rule,[17] but that was disapproved by Congress and President Donald Trump in 2017 under the Congressional Review Act.[18]

While the CFPB's new proposal is unlikely to be finalized, it is an important look into what former CFPB Director Rohit Chopra believes consumer financial services contracts should look like.

Given the CFPB's near contemporaneous report to state-level enforcement authorities on ways to implement CFPB interpretations and authorities, it should not be surprising to see state authorities sympathetic to these views take up the mantle after the CFPB's leadership changes under the Trump administration.

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[1] Defined as providers of consumer financial products or services.

[2] Docket No. CFPB-2025-0002.

[3] [https://files.consumerfinance.gov/f/documents/cfpb\\_strengthening-state-level-consumer-protections\\_2025-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_strengthening-state-level-consumer-protections_2025-01.pdf).

[4] 49 Fed. Reg. 7740 (Mar. 1, 1984).

[5] 16 C.F.R. Part 444.

[6] Board of Governors of the Federal Reserve, et al. Interagency Guidance Regarding Unfair or Deceptive Credit Practices (Aug. 22, 2014).

[7] See 12 U.S.C. § 5481(12).

[8] 12 U.S.C. § 5531(b).

[9] Docket No. CFPB-2025-0002.

[10] [https://files.consumerfinance.gov/f/documents/cfpb\\_strengthening-state-level-consumer-protections\\_2025-01.pdf](https://files.consumerfinance.gov/f/documents/cfpb_strengthening-state-level-consumer-protections_2025-01.pdf).

[11] Id. at 2.

[12] Id. at 21-23.

[13] Id. at 23-24.

[14] Id. at 25-26.

[15] Id. at 26-27

[16] Id. at 28-30.

[17] 82 Fed. Reg. 33210 (July 19, 2017).

[18] Public Law 115-74 (Nov. 1, 2017); 82 Fed. Reg. 55500 (Nov. 21, 2017).