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Locke Lord QuickStudy: CFPB's Proposed Rule Would Register ?and Publish Waiver Provisions Used by Nonbanks in ?Consumer ?Contracts

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On January 11, 2023, the Consumer Financial Protection Bureau proposed a rule that would require certain nonbanks to disclose provisions in form contracts that waive consumer rights. The CFPB would then make those terms publicly available. This will require many nonbanks to register terms that are widely used in consumer financial contracts, including jury waivers and pre-suit notice provisions.

What entities are covered?

The rule imposes registration requirements on a “supervised registrant,” which is defined as nonbanks that are subject to CFPB supervision, including the following: (i) mortgage lenders and servicers; (ii) private educational lenders; and, (iii) consumer payday lenders.^[1] The rule excludes entities that: (i) entered into fewer than 1,000 contracts with covered waiver provisions in the prior year; and, (ii) entities that only used contracts with covered waiver provisions because the contracts are GSE-approved form contracts.^[2] Neither exception applies to an entity that obtained an order enforcing a covered waiver provision.^[3]

What contracts are covered?

The rule applies to terms in covered form contracts, which the CFPB defines as a written agreement between a covered entity and a consumer that: (i) was drafted before the transaction for use in multiple transactions between the entity and different consumers; and, (ii) contains a covered provision.^[4]

This rule would certainly cover form loan documents. The CFPB states that it intends to exclude settlement agreements, though it isn't clear if that exclusion would apply to form settlement agreements with covered provisions. The CFPB states that “many settlement agreements are drafted for the particular claims involved and may be unique to that case”.^[5] While all settlement agreements include provisions unique to each case, many also include standard provisions, including standard waiver provisions. It is unclear if the final rule will cover such form settlement agreements.

The rule also seems to apply to standard loss-mitigation agreements, such as loan modifications. The rule not only applies to an initial contract with a consumer,^[6] but also applies when a covered entity adds a covered term to a form contract (e.g., a loan modification that contains a covered term).^[7] The CFPB specifically contemplates that this could include “a payment plan, a payment authorization, a debt modification or settlement, or some other type

of agreement.”

The rule applies when a supervised registrant “uses” a covered contract, which includes: (i) entering into a contract; (ii) acquiring or purchasing a consumer financial product that is subject to a ^[8]form contract; or, (iii) obtaining an order enforcing a covered waiver provision.^[9] Thus, a loan servicer that is otherwise a supervised registrant would “use” a covered contract if it modified a loan and included a covered provision, or if it sought to enforce a covered provision.

What contract terms trigger registration?

The proposed rule lists eight contract terms that would require registration:

- Contractual limitations periods;^[9]
- Venue- or forum-selection provisions,^[10] but not choice-of-law provisions.
- Class-waiver provisions;^[11]
- Damage caps or waivers of liability;^[12]
- Waiving certain types of claims,^[13] though this presumably only applies to a prospective waiver since settlement agreements, by their nature, contain waivers of existing claims;
- Limiting the consumer’s ability to complain about the covered entity (*i.e.*, non-disparagement terms);^[14]
- Arbitration provisions;^[15] and,
- A catch-all description for provisions “waiving … any other identified consumer legal protection.”^[16]

As currently written, the proposed rule is broad enough to include provisions in many existing consumer contracts. Most common are jury-waiver provisions, which the CFPB has explicitly stated are covered by the rule. The rule could also potentially apply to notice-and-cure provisions, which are included in many loan contracts.^[17]

What is required?

Supervised registrants must register with the CFPB and annually report: (i) the financial products or services that use form contracts with covered terms; (ii) each State where the entity offered those services; and, (iii) a description of the terms as used by the entity.^[18] The CFPB would then make information about the registrants and the terms and conditions they use publicly available.^[19]

Entities subject to this rule should review the terms in their standard contracts and determine if the use of those terms justifies the need to register and have the terms published by the CFPB. Covered entities that move to enforce covered provisions in the course of litigation should also be aware that doing so could trigger future registration requirements.

[1] 12 C.F.R. § 1092.301(g), (h). All CFR citations are to the provisions of the proposed rule.

[2] 12 C.F.R. § 1092.301(h)(6), (7).

[3] *Id.*

[4] *Id.* § 301(b).

[5] *Id.*

[6] 12 C.F.R. § 1092.301(i)(1)(i)-(ii).

[7] *Id.* § 301(i)(1)(v).

[8] 12 C.F.R. § 1092.301(i).

[9] *Id.* § 301(d)(1).

[10] *Id.* § 301(d)(2).

[11] 12 C.F.R. § 1092.301(d)(3).

[12] *Id.* § 301(d)(4).

[13] *Id.* § 301(d)(5).

[14] *Id.* § 301(d)(6).

[15] *Id.* § 301(d)(8).

[16] *Id.* § 301(d)(7).

[17] See *Giotta v. Ocwen Loan Services, LLC*, 706 Fed. App'x 421 (9th Cir. Dec. 15, 2017) (affirming dismissal of complaint based on consumer's failure to comply with contractual notice-and-cure provision).

[18] 12 C.F.R. § 1092.302(a).

[19] *Id.* § 303(a).

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