Comments to the

Consumer Financial Protection Bureau

Regarding

Proposed Rule
Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA)

Docket (CFPB-2025-0002)[1]

By
National Consumer Law Center (on behalf of its low-income clients)
Americans for Financial Reform
National Association of Consumer Advocates
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April 1, 2025

The **National Consumer Law Center**,[2] on behalf of its low-income clients, **Americans for Financial Reform Education Fund**,[3] and the **National Association of Consumer Advocates**,[4] **Consumer Federation of America**,[5] and **Public Justice**[6] write to strongly support the above-

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[1] Consumer Financial Protection Bureau. "Prohibited Terms and Conditions in Agreements for Consumer Financial Products or Services (Regulation AA); Proposed Rule." *Federal Register*, vol. 90, no. 8, 14 Jan. 2025, pp. 3566–3596. https://www.regulations.gov/document/CFPB-2025-0002-0001 (CFPB Proposed Reg AA)

[2] The **National Consumer Law Center** (www.nclc.org) is a nonprofit organization specializing in consumer issues affecting low-income and elderly people. NCLC publishes twenty practice treatises, which are updated annually and which describe the law currently applicable to all types of consumer transactions. These comments are filed on behalf of our low-income clients and co-written by NCLC Senior Counsel Margot Saunders.

[3] **National Association of Consumer Advocates** (NACA) is a national nonprofit organization of consumer attorneys and advocates actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. These comments are co-written by Christine Hines, NACA's Senior Policy Director.

[4] **Americans for Financial Reform Education Fund** (AFREF) is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, it works to lay the foundation for a strong, stable, and ethical financial system – one that serves the economy and the nation as a whole. These comments are co-written by Christine Chen Zinner, Senior Policy Counsel at AFREF.

[5] **Consumer Federation of America** is an association of over 200 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

[6] **Public Justice** takes on the biggest systemic threats to justice of our time — unchecked corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's

named proposal to codify the application of the Federal Trade Commission's (FTC) Credit Practices Rule to all covered entities under the Consumer Financial Protection Bureau's (CFPB or Bureau) jurisdiction, including financial institutions that were not covered by the FTC's rule, while adding three critically needed new prohibitions applicable to all covered entities.

I. Introduction.

The Federal Trade Commission (FTC) issued the Credit Practices Rule in 1984 to prohibit the inclusion of several unfair terms in consumer contracts and require certain disclosures.[7] The FTC's rule applied to all creditors within the FTC's jurisdiction. It was based on the recognition that finance companies universally used standard form adhesion contracts that routinely included unconscionable terms.[8] The FTC determined that the Credit Practices Rule was necessary because consumers were rarely able to digest the complex legal terminology included in the adhesion contracts, let alone negotiate to avoid unwanted terms.

The unfairness of adhesion contracts is reflected in the recent Restatement of Consumer Contracts, which noted that "consumer contracts present a fundamental challenge to the law of contracts, arising from the asymmetry in information, sophistication, and stakes between the parties to these contracts—the business and the consumers."[9] As the CFPB stated in its explanation of this proposed regulation, quoting the Restatement of Consumer Contracts:

> On one side of the transaction "stands a well-informed and counseled business party, entering numerous identical transactions, with the tools and sophistication to understand and draft detailed legal terms and design practices that serve its commercial goals," while on the other "stand consumers who are informed only about some core aspects of the transaction, but rarely about the list of standard terms."[10]

The FTC's Credit Practices Rule prohibits confessions of judgment, exemption waivers, irrevocable wage assignments, non-purchase money security interests in household goods, pyramiding late charges, and deceptive cosigner practices.

Soon after the issuance of the FTC's rule, the federal banking regulators issued the Reg AA, a parallel rule applicable to banks, savings associations, and federal credit unions.[11] However, when Congress created the CFPB in 2010 and transferred certain other agencies' rulemaking authority to

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sustainability. We connect high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice.

[7] Credit Practices Rule, 49 Fed. Reg. 7740 (Mar. 1, 1984).

[8] 49 FR 7745

[9] Restatement of the Law, Consumer Contracts, Introduction (Am. L. Inst. 2024).

[10] *Id.*

[11] These regulations were previously codified at: 12 CFR 227.11 through 227.16 (part of Regulation AA) (banks); 12 CFR 535.1 through 535.5 (savings associations); 12 CFR 706.1 through 706.5 (Federal credit unions).

it, it repealed the provision of the FTC Act that authorized these federal banking regulators to adopt rules paralleling FTC rules.[12] In response, the federal financial regulators—including the CFPB—issued an Interagency Guidance clarifying that financial institutions may commit unfair and deceptive practices, in violation of the FTC Act and the Consumer Financial Protection Act, by including in their consumer credit contracts any provisions prohibited by the Credit Practices Rule.[13]

As a result, all finance companies and financial institutions in the United States have been operating under the restrictions of the Credit Practices Rule continuously since 1984. These practices are now considered to be "baseline."[14] We agree with the CFPB's assessment that the codification of Reg AA will not have a "substantial material effect on the market as covered persons are already likely to be in compliance with these prohibitions."[15]

The CFPB now proposes to codify into its own regulations the provisions of the Credit Practices Rule, making it applicable to all "covered persons" [16] (with certain exceptions such as for "small businesses"[17]). "Covered persons" include the non-bank finance companies and other lenders covered by the FTC's Credit Practices Rule, plus the financial institutions that have been historically covered by the first Reg AA, and then by the Interagency Guidance. Additionally, the new regulation would add three new, much-needed, protections: forbidding covered entities from including in their contracts 1) any clause that waives legal rights designed to protect consumers, 2) any clause that reserves to the covered person the right to unilaterally amend a material term of the contract, and 3) any clause that restrains the consumer's free expression.

The proposed regulation is particularly important because it would allow state attorneys general to employ the CFPA's substantial remedies, including civil money penalties, against national banks and federal savings associations for violations of these proscriptions.[18]

II. Codifying the Application of the Credit Practices Rule is Necessary to Protect Individuals and Families from Unfair and Deceptive Practices.

A. The Rationale for the FTC's Credit Practices Rule is Entirely Applicable to Covered Persons.

12 Pub.L. 111-203 , § 1092(2) (striking former 15 U.S.C. § 58a(f)(1)).

13 Board of Governors of the Federal Reserve, et al. *Interagency Guidance Regarding Unfair or Deceptive Credit Practices* (Aug. 22, 2014), *https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20140822a2.pdf.*

14 CFPB Proposed Reg AA at 24.

15 CFPB Reg AA at 3.

16 Covered persons

17 Small businesses are those which are "independently owned and operate and which is not dominant in its field of operation." 15 U.S.C. 632(a).

18 State officials may not bring a civil action against a national bank or Federal savings association for violations of the CFPA unless it is under a regulation prescribed by the CFPB. 12 U.S.C. 5552(a)(2)(A) and (B).

The CFPB is basing this new Reg AA on its authority under the CFPA to issue rules to prevent "unfair, deceptive, or abusive acts or practices."[19] Likewise, the FTC used its "mandate to proscribe unfair or deceptive acts or practices" as the basis for the Credit Practices Rule.[20] Thus, the process and the analysis used by the FTC is relevant to the analysis of whether the CFPA supports the CFPB's issuance of the new Reg AA.

When issuing the Credit Practices Rule, the FTC declared that consumer injury was "the focus of any inquiry regarding unfairness." [21] The FTC confined its definition of consumer injury to those injuries "found to be substantial, not reasonably avoidable by the consumer, and not outweighed by countervailing benefits to consumers or competition."[22] Employing this three-part definitional and analytical rubric, the FTC based its prohibitions upon a finding that its substantial rulemaking record established "by a preponderance of the evidence that consumers suffer substantial economic or monetary injury from creditors' use"[23] of the practices proscribed by the Rule. Additionally, the record established that because of the identified practices, "consumers often suffer substantial emotional or subjective harm as well."[24]

After finding substantial harm to consumers in six areas of consumer credit, without countervailing benefits, the FTC's Credit Practices Rule specifically prohibits six practices in 16 C.F.R. § 444:

1. <u>Confessions of judgment, cognovits, and other waivers of the right to notice and opportunity to be heard in the event of suit</u>. (16 CFR § 444.2(a)(1).) Confessions of judgments were standard form contract clauses in which the debtor agreed in advance to a judgment in the amount of any debt unpaid. The result was that consumers were denied any opportunity to present meritorious defenses in lawsuits. The judgment typically led to wage garnishment, execution on the consumer's household goods, and a lien on the consumer's real property.[25] Recognizing these abuses, the Credit Practices Rule prohibits confessions of judgments.

2. <u>Waiver of exemptions from execution on personal or real property, such as waiver of a homestead exemption, unless the waiver applies only to property that is the subject of a security interest granted in that credit transaction</u>. (16 CFR § 444.2(a)(2).) Both state and federal law provide exemptions to protect the property of judgment debtors from seizure by judgment creditors. For example, all states' laws provide some level of protections for household goods, some cash, and property used as a home, as well as other protections. Prior to the CPR, creditors commonly required consumers to waive all of those exemptions, thus making consumers vulnerable to loss of their most basic property: all of their household goods, their homes, all savings.[26] To address this abuse, the CPR prohibits contract clauses that waive or limit

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[19] 12 U.S.C. 5531(b).

[20] 49 Fed. Reg. 7740, 7741 (Mar. 1, 1984).

[21] *Id.* at 7742.

[22] *Id.*

[23] *Id.* at 7744.

[24] *Id.*

[25] *Id.* at 7744.

[26] *Id.* at 7744.

exemptions from attachment, execution, or other process on the debtor's real or personal property.[27]

3. Most irrevocable wage assignments. (16 CFR § 444.2(a)(3).) Wage assignments (in which the consumer agrees in the initial credit contract that her wages will be paid directly to the creditor) occur without the procedural safeguards of a hearing and an opportunity to assert defenses or counterclaims. The FTC found that wage assignments were particularly harmful because the pressure from the threat of wage assignments caused consumers to abandon legitimate defenses to prevent the creditors from contacting the employers and exercising the wage assignment. Consumers feared that the wage assignment would result in job loss.[28] To address this, the CPR prohibits wage assignments except those that are revocable at the will of the debtor.[29] The rule makes exceptions for payroll deduction plans and preauthorized payment plans in which the consumer authorizes a series of wage deductions as a method of making each payment,[30] as long as only part of the debtor's paycheck is taken.[31]

4. Non-purchase money security interests in certain household goods. (16 CFR § 444.2(a)(4).) The FTC found that both banks and small loan finance companies routinely took blanket security interests in household goods for their *in terroram* impact, rather than to provide any economic security to the creditor:

> In this proceeding, a large majority of industry witnesses confirmed that household goods have little, if any, economic value to creditors. Their value to creditors is psychological, ... [32]
>
> The imminence of seizure of all of their personal property – including beds, tables and chairs, linen, kitchen plates and pots and pans, even the family bible – placed considerable pressure on consumers to make disadvantageous repayment arrangements. Not only would debtors forego the assertion of valid or meritorious defenses in their rush to complete repayment agreements acceptable to the financial service providers, but "such consumers are likely willing to take other steps they would not willingly take but for the security interest. Accordingly, such creditors are in a prime position to urge debtors to take steps which may worsen their financial circumstances."[33]

Based on these findings, the CPR prohibited virtually all non-purchase money, nonpossessory security interests in household goods.[34] It defines household goods to include clothing, furniture,

[27] 16 C.F.R. § 444.2(a)(2).

[28] 49 Fed. Reg. 7740, 7758 (Mar. 1, 1984).

[29] 16 C.F.R. § 444.2(a)(3)(i).

[30] 16 C.F.R. § 444.2(a)(3)(ii).

[31] Kelley, FTC Informal Staff Opinion Letter (June 17, 1987).

[32] 49 Fed. Reg. 7740, 7764 (Mar. 1, 1984).

[33] *Id.*

[34] 16 C.F.R. § 444.2(a)(4).

appliances, one radio, one television, linens, china, crockery, kitchenware, and personal effects, including wedding rings. Just the *listing* of a security interest in these protected household goods violates the rule.

5. Pyramiding late charges by assessing more than one delinquency charge for one late payment (pyramiding late charges for a missed payment is not prohibited). (16 CFR § 444.4.) The FTC found that creditors routinely charged late charges on timely payments because a late charge due for a previous late payment was not included. Often, the only delinquency in the account was attributable to the prior late charge. Moreover, the assessment of these fees was far in excess of the amounts, if any, actually expended by creditors to collect on the account. The problem of this late charge pyramiding was compounded by the fact that consumers are usually unaware that the late charges are "pyramiding" until the final payment is made. Consumers could not avoid the practice, because it was not something that was disclosed in credit contracts.[35]

   Addressing this abuse, the CPR prohibits late charge pyramiding by assessing more than one delinquency charge for one late payment.[36] The rule does not prevent a creditor from assessing a late charge for each month that an installment remains unpaid.[37] Nor does it dictate which month a late payment is applied to – the month when it was due or the month in which it was actually paid.[38]

6. Failure to give cosigners a specified warning indicating the potential obligations of a cosigner. (16 CFR § 444.3.) The FTC found that many creditors routinely required consumers to obtain cosigners for their debts. A cosigner is required to pay if the debtor defaults, but the cosigner receives no benefit for agreeing to this obligation. The cosigner agreement was a standard form contract drafted by the creditor which waived all defenses a cosigner might otherwise have. Often multiple cosigners were required (one finance company stated it required six cosigners on some loans). Cosigners were not provided any notice of their obligations and liability.[39]

   To address this abuse, the CPR requires a form notice to cosigners, as prescribed by the FTC, warning them of their potential obligations.[40]

All of the provisions included in the original Consumer Practice Rule are also included in the new Reg AA. The justifications used for the original rule are still entirely applicable to all covered providers for whom the new rule would be applicable.

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[35] 49 Fed. Reg. 7740, 7772 (Mar. 1, 1984).

[36] 16 C.F.R. § 444.4.

[37] Bucchi, FTC Informal Staff Opinion Letter (June 21, 1985); Caspo, FTC Informal Staff Opinion Letter (Dec.

21, 1984).

[38] Caspo, FTC Informal Staff Opinion Letter (Dec. 21, 1984).

[39] 49 Fed. Reg. 7740, 7774 (Mar. 1, 1984).

[40] 16 C.F.R. § 444.3.

B. The Credit Practices Rule has been widely accepted by the financial services industry.

The credit industry challenged the Credit Practices Rule. But, after the Rule was affirmed by the appellate court,[41] and an appeal was rejected by the U.S. Supreme Court,[42] the credit industry complied with the rule. All of these offensive and damaging terms and practices were stopped. Within a few years of the passage of the CPR, consumer advocates rarely saw the problems identified in the FTC's rule in consumer credit contracts. And, despite the predications by the industry at the time that if this rule were passed the sky would fall, nothing terrible happened to the credit industry or small businesses. The sky did not fall. Credit continued to be widely available, only with less abusive terms.

But over time, some in the consumer credit industry developed new terms and practices, just as dangerous, just as outrageous, and just as unavoidable, that harm consumers. Some of these abusive practices are targeted in the CFPB's proposed Reg AA. These are addressed in Section III.

III. Prohibiting contract terms that waive substantive legal rights, limit free expression, and unilaterally amend material contract terms that protect individual rights is necessary to protect consumers.

Since the Credit Practices Rule was issued in 1984, several additional problems have arisen that unfairly advantage financial service providers in their transactions with individuals. As adhesion contracts remain standard, borrowers are unable to protect themselves from these provisions. Relying on its UDAAP authority, the new Reg AA proposes to prohibit three types of clauses in contracts offered to consumers by covered persons:

- Clauses that waive consumers' substantive legal rights or protections.
- Clauses that allow the financial service providers to unilaterally amend contracts.
- Clauses that restrain consumers' free expression.

All of these proposed prohibitions address unfair, deceptive, and abusive behavior that causes substantial injury to consumers. The CFPB properly relies on its authority under the CFPA to prohibit unfair, deceptive and abusive activities.[43]

A. Terms that waive substantive legal rights restrict freedoms are fundamentally unfair.

Increasingly, companies' standard-form terms and conditions incorporate clauses that restrain the personal autonomy of individuals by removing substantive and procedural protections that lawmakers have required to be applicable. The waivers of law covered by the proposed rule "include,

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41 American Financial Services Association v. Federal Trade Commission, 767 F.2d 957 (D.C. Cir. 1985).

42 American Financial Services Association v. Federal Trade Commission, 475 U.S. 1011, 106 S.Ct. 1185, 89 L.Ed.2d 301 (1986).

43 12 U.S.C. 5531(c).

but are not limited to: (i) waivers of remedies to consumers for violations of State or Federal laws; and (ii) waivers of a cause of action to enforce State or Federal laws."[44]

Waivers of important rights are ubiquitous in the terms and conditions for bank accounts, loans, digital payment applications and many other financial products and services under the CFPB's jurisdiction.[45] As the transactions are all memorialized by adhesion contracts, individuals rarely understand these waivers, and even when they understand them, they have no bargaining power or influence over the fine print.[46] The proposed rule rightly observes that companies in the consumer finance sector have an undue economic advantage with fine print because they can write these take-it-or-leave-it terms for their own financial interests and purposes.

The proposed regulation will prohibit financial services providers from including terms that would waive causes of action under any substantive state or federal law designed to protect or benefit consumers, including common law rights, and any accompanying remedies to the laws. We agree with the CFPB's finding that the use of such clauses seeking to waive these substantive rights under statute or common law constitutes an unfair or deceptive act or practice.[47] As the Bureau notes, the legal protections addressed in the proposed rule "reflect a legislative judgment that it is in the public interest for consumers to be protected from certain business practices."[48] The rule prohibits financial service providers from unilaterally denying individuals the protections lawmakers determined were necessary for an orderly society. When these waivers are allowed to stand, individuals are deprived of legal rights.

These waivers also cause consumers to experience concrete monetary losses. The waivers allow business practices that lawmakers have determined should be illegal. As the Bureau notes, the waivers shift the risk of loss from the provider to the individuals, and "[c]onsumers are clearly injured by a system which forces them to bear the full risk and burden of sales related abuses."[49]

Given the significant limitations on individuals' ability to influence terms and conditions for financial services, our organizations endorse the Bureau's use of its authority to prohibit clauses that remove legal protections in contracts for financial products and services offered by large financial services providers. This action to identify unfair and deceptive terms and then to prohibit businesses from including them in the terms and conditions of contracts would help to level the playing field between the providers that dictate the contract requirements and individuals who have little or no power over them. The proposed rule--§ 1027.301(a)(1)—tackles the challenges of standard-form

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44 CFPB Reg AA at 13-14.

45 See,Andrea J. Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Right*s, 110 Iowa L. Rev., 497, 2025, available at https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2025-01/ILR-110-Boyack.pdf. *See* also *Fine Print Traps, Terms in Corporate Form Contracts That Cause the Most Harm to Consumer Rights and Protections*, March 2024, https://www.consumeradvocates.org/wp-content/uploads/2024/03/NACA_fineprinttraps_mostharm032024.pdf.

46 *Id.*

47 CFPB Proposed Reg AA at 20.

48 *Id.* at 20.

49 *Id.*

terms and conditions in a way that traditional contract law cannot or will not do.[50] It protects consumers by prohibiting contractual restrictions on their legal rights. We strongly support this proposal.

B. Prohibiting unilateral modifications of terms is essential to protect individuals.

The CFPB proposes § 1027.301(a)(2) to prohibit "Any term or condition that expressly reserves the covered person's right to unilaterally change, modify, revise, or add a material term of a contract for a consumer financial product or service." These clauses are used to increase fees, add (and limit) dispute resolution mechanisms, and reduce promised terms of service.[51] Most unfairly, companies have used unilateral amendment clauses to add arbitration requirements or change the rules for an arbitration process.[52] When these terms are included in contracts with individuals, the results are often quite damaging to the consumer.

One example of an abusive use of a unilateral—and inherently unfair—change in contract terms is well-illustrated in a recent order issued by a federal court requiring the use of an arbitration procedure that was applied through the modification of the original agreement between consumers and the cryptocurrency exchange Gemini.[53] Plaintiffs argued that while they had agreed to arbitrate their claims in the original agreement, they had not agreed—and would not have agreed—to the new procedure unilaterally applied by defendants.[54] As noted in the Complaint, the defendants changed the dispute resolution provisions repeatedly after it realized that $900 million worth of customer funds were tied to a failing investment fund that would lose nearly all of the customer funds. They added nearly 2,000 more words, changed arbitration providers, and added more procedural requirements, before customers were even allowed to initiate a forced arbitration. Customers weren't allowed to access their funds or their accounts until they accepted the new terms.[55]

The Bureau's proposal cites a study of the online terms of 100 public and private companies, including retail, computer and browsing services, entertainment, financial services and more.[56] All of

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[50] *See,* Boyack at 4.

[51] See, *e.g.,* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments,* 57 UCLA L. Rev. 605, 630-636 (2010); Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts,* 55 Ga. L. Rev. 657, 660 (2020).

[52] Adam Levitin, *Venmo's Unfair and Abusive Arbitration Opt-Out Provision,* Credit Slips (Apr. 26, 2022), *https://www.creditslips.org/creditslips/2022/04/-venmos-unfair-and-abusive-arbitration-opt-out-provision.html.*

[53] *See* Memorandum and Order, *Picha et al. v. Gemini Trust Company, LLC et al.*, No. 1:22-cv-10922-NRB (S.D.N.Y. Mar. 5, 2024).

[54] *Id.*

[55] *See* Amended Complaint, *Picha et al. v. Gemini Trust Company, LLC et al.*, No. 1:22-cv-10922-NRB, 33-34 (S.D.N.Y. Mar. 17, 2023). *See also Nguyen v. OKCoin USA Inc.*, No. 22-cv-06022-KAW, 2023 WL 2095926 (N.D. Cal. Feb 17, 2023) (granting the cryptocurrency company's motion to compel arbitration although it adopted revised forced arbitration clause two months after collapse of a company in which customers were invested).

[56] Boyack, Andrea J. "Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights." *Iowa Law Review*, vol. 110, no. 2, Jan. 2025, pp. 497–540. (Mar. 12, 2024), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2025-01/ILR-110-Boyack.pdf

the companies evaluated included unilateral modification clauses, while only 15 even provided for notice to the consumer when a modification would be imposed.[57] And none of the companies provided for a way for consumers to reject the modifications, except by ending the relationship with the company.[58]

The changes effectuated with these clauses generally benefit only the company, to the detriment of the consumer. The effect is that the consumer does not receive the full benefit of the bargain that the consumer had agreed to when signing the contract. The consequences to consumers range from inconvenience to monetary loss.

The proposed rule supports the real meaning of a contract, as described by the Restatement of Consumer Contracts. The Restatement provides that modifications are binding only if a consumer receives notice of the modification and was provided a reasonable opportunity to reject the modification.[59] Without proper notification and a meaningful opportunity to consent to any material changes, mutual assent, a necessary ingredient to contract formation, remains lacking. The proposed prohibition of unilateral changes to material terms is necessary to provide some semblance of fairness and equity to individuals.

C. Terms and conditions that limit or restrain a person's free and law expression can be unfair and deceptive.

We also support the proposed provision of § 1027.301(a)(3) to prohibit financial services providers from including terms or conditions that limit or restrain a person's free and lawful expression, while still permitting a provider to close a person's account that is being used to commit fraud or other illegal conduct. Violations of this section may constitute an unfair or deceptive act or practice.

The proposal impacts two types of clauses. First, it would prohibit clauses where financial providers warn of punishment with fees or other actions, or clauses that threaten "debanking" (or abrupt closure of customer accounts) if the financial institution disapproves of the customers' lawful expression, including political and religious speech. The bureau highlighted a 2022 incident when Paypal, the digital wallet platform, revised its terms and conditions and threatened to impose a $2,500 fine on persons who spread "misinformation" on its platform.[60]

Second, the proposed rule would nullify contract clauses that seek to prohibit or punish a person from making negative comments about the company, also known as "gag clauses."

We agree with the Bureau that "[f] Free expression "is powerful medicine" because it "put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon

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[57] *Id.* at 524.

[58] *Id.* at 525.

[59] Restatement of the Law, Consumer Contracts, section 3(a) (Am. L. Inst. 2024).

[60] Xinyi Wan, *PayPal's "Misinformation" Fine Sparks Backlash*, Jolt Digest, Nov. 1, 2022, available at https://jolt.law.harvard.edu/digest/paypals-misinformation-fine-sparks-backlash.

which our political system rests."[61] And, as the Bureau also notes, restraints on speech imposed by large private corporations can be just as harmful as those imposed by the government.[62]

The FTC has determined that the use of non-disparagement clauses to restrict negative review by consumers violates the Consumer Review Fairness Act, which restricts companies from limiting negative reviews.[63] At the same time, the importance of reliable reviews on online has been repeatedly confirmed. [64]

Large financial service providers that use their one-sided terms and conditions to limit individuals' lawful expression and to suppress criticism wield excessive power over their customers and profit from the infringement of individual rights and freedoms. Customers who share their experiences with a product or service on review sites benefit future consumers, who can make buying decisions based on reviews. Online reviews are fully immersed in the marketplace.

We agree with the CFPB that efforts to use the fine print to restrict or manipulate online reviews is an unfair and deceptive practice,[65] and we support this provision of the CFPB's proposed Reg AA.

Conclusion

The proposed Reg AA is a necessary addition to the CFPB's regulations to address unfair and deceptive behavior in consumer financial contracts. We urge the issuance of this regulation.

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61 CFPB Proposed Reg AA at 18 citing Snyder v. Phelps, 562 U.S. 443, 452 (2011).

62 *Id.* at 18.

63 Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016,* 24 Mich. Telecomm. & Tech. L. Rev. 1, 2 (2017).

64 Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com,* Harv. Bus. Sch. Working Paper No. 12-016, 14 (2016); Chris Anderson, *The Impact of Social Media on Lodging Performance,* 12(15) Cornell Hospitality Report 6, 11 (2012).

65 CFPB Proposed Reg AA at 19.