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Mind the Fine Print: CFPB Warns Against Use of Unenforceable Terms and Conditions

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In a move that underscores the importance of clarity and accuracy in consumer-facing terms and conditions, the Consumer Financial Protection Bureau recently issued Circular 2024-03, addressing the use of unlawful or unenforceable provisions in consumer terms and conditions for financial products. The CFPB concluded that the inclusion of such provisions in consumer-facing terms and agreements can constitute an unlawful act of deception.

Specifically, the Circular – issued June 4, 2024 – provides that: "'Covered persons' and 'service providers' must comply with the prohibition on deceptive acts or practices in the [Consumer Financial Protection Act ('CFPA')]," and that the "inclusion of certain terms in contracts for consumer financial products or services may violate the prohibition when applicable federal or state law renders such contractual terms, including those that purport to waive consumer rights, unlawful or unenforceable."

Under the CFPA, a representation or omission is "deceptive" if (1) it is likely to mislead a reasonable consumer and (2) is material. A representation is "material" if it "involves information that is important to consumers and, hence, likely to affect their choice of, or *conduct regarding*, a product." The Bureau noted, for example, that a contractual provision stating that a consumer agrees *not* to exercise a legal right is likely to affect a consumer's willingness to *attempt* to exercise that right in the event of a dispute, and is therefore material. Moreover, certain categories of information, including express representations, are presumptively material.

The Bureau reasoned that including an unenforceable material term in a consumer contract is deceptive because it misleads consumers into believing the contract term is enforceable, and that disclaimers in a contract such as "subject to applicable law" do not cure the misrepresentation caused by the inclusion of an unenforceable contract term.

Many federal laws—including statutes enforced by the CFPB—render unlawful or unenforceable various contract terms in certain contexts. The CFPB provided several examples of unlawful or unenforceable terms, such as:

- The Consumer Review Fairness Act of 2016 generally prohibits the use of form contracts that limit how consumers communicate their reviews, assessments, or similar analysis of the sale of goods or services, and invalidates these types of contract terms and conditions.
- Regulation Z, which implements the Truth-in-Lending Act, prohibits the inclusion in a residential mortgage loan or open-ended consumer credit plan secured by the principal dwelling of terms requiring arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling claims arising out of the transaction.

- The Electronic Fund Transfer Act ("EFTA") prohibits contract terms that contain a "waiver of any right conferred" by the EFTA and prohibits waivers of any "cause of action" under the EFTA.

In addition to such contract provisions that are expressly made unenforceable by law, the Circular indicates that certain terms can be deemed unenforceable based on judicial interpretation. For instance, a recent federal district court decision held that the Servicemembers Civil Relief Act (SCRA) renders unenforceable provisions in contracts with servicemembers that purport to waive their right to participate in class actions to enforce the SCRA, since the SCRA grants an "unwaivable right of servicemembers to bring and participate in class actions."
The CFPB emphasized that it had found numerous covered persons in violation of the CFPA's prohibition on deceptive acts or practices by including unlawful or unenforceable provisions in consumer agreements, offering the following examples:

- **Mortgage borrowers**: CFPB examiners have repeatedly found examples of deceptive contract terms purporting to waive mortgage borrowers' rights that cannot be waived.
- **Bank accountholders**: The CFPB found that a bank deceived consumers through contract terms that it claimed waived consumers' right to hold the bank liable for improperly responding to garnishment orders when, in fact, this right could not be waived. Regardless of the language in the account agreement, consumers still had the right to challenge the garnishments.
- **Remittance transfer consumers**: The CFPB found that a non-bank remittance transfer provider violated the CFPA's deception prohibition when it included misleading statements in disclosures purporting to limit consumers' error resolution rights, which would be unenforceable under the EFTA and the Remittance Rule.
- **Student borrowers**: In a September 2023 report, the Bureau noted that certain student tuition payment plan agreements impermissibly "include terms and conditions that purport to waive consumers' legal protections, limit how consumers enforce their rights, or misrepresent the rights or protections available to consumers under existing law."
- **Auto loan borrowers**: The CFPB found an auto loan servicer deceptively included language in contracts that indicated that consumers could not exercise bankruptcy rights, when in fact, waivers of bankruptcy rights generally are void as a matter of public policy.

The CFPB assessed that, because consumers are unlikely to be aware of the existence of laws that render the terms or conditions at issue unlawful or unenforceable, they may believe that they lawfully agreed to waive their legal rights. As a result, the Circular concludes with a determination that such risk of mistaken beliefs undermines consumers' rights, and distorts markets to the disadvantage of covered persons who abide by the law by including only lawful terms and conditions in their consumer contracts.
Conclusion: Based on the guidance provided in the Circular, highlighting the CFPB's renewed focus on contract terms that could be deemed "deceptive," covered persons and service providers should take care to review their consumer-facing agreements and terms & conditions to ensure that no such terms are being included. The omission of any such unlawful or unenforceable terms must also be reflected in

policies and procedures that implement the provision of financial products and services. Kilpatrick's Consumer Financial Services team has extensive experience reviewing such materials for financial institutions, fintechs, and other service providers to ensure compliance with applicable law.