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Financial Services Alert: Attacks Begin on the CFPB's Recently Proposed Regulations

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The first wave of attacks on the Consumer Financial Protection Bureau's (CFPB) recently proposed rules^[1] prohibiting class action waivers in pre-dispute arbitration agreements occurred during the House Financial Institutions and Consumer Credit Subcommittee hearing entitled "Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?" The hearing was held Wednesday, May 18.

The hearing included prepared remarks from members of the Subcommittee and written and verbal testimony of four expert witnesses who were also questioned by the Subcommittee:

1. Professor Jason S. Johnston - Henry L. and Grace Doherty Charitable Foundation Professor of Law, University of Virginia School of Law
2. Mr. Dong Hong - VP and Regulatory Counsel, Consumer Bankers Association
3. Mr. Andrew Pincus - Partner, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce
4. Mr. F. Paul Bland Jr. - Executive Director, Public Justice

Professor Johnston's testimony critiqued the CFPB's study as relying too heavily on a single class action case, and criticized the proposed rules as ignoring the study's findings that arbitration often resulted in larger rewards for consumers than class actions.

Mr. Hong's testimony focused on the incompleteness of the study (including the absence of consumer satisfaction studies on those who have received payment from arbitration and/or class action suits) as well as the study's failure to collect data on arbitration settlements. Mr. Hong reiterated that the CFPB's own study found arbitration often resulted in larger and faster rewards for consumers than class actions.

Mr. Pincus' testified that the CFPB had lost sight of the goal of determining whether arbitration was beneficial for consumers. He concluded that the practical effect of the proposed regulations would

be to eliminate arbitration in its entirety as lenders devote resources to defending class actions instead of engaging in the arbitration process. Mr. Pincus argued the proposed rules would limit access to justice, specifically for individual consumers alleging individual harms, and would limit offerings from lenders as they increase capital reserves to account for an increased number of class action cases.

Mr. Bland championed class actions as delivering recovery to many more individuals than arbitration and forcing changes in lending behavior for the benefit of consumers generally through litigation.

Like three of the experts at the hearing, our analysis of the CFPB's 728 page study also raises questions about whether the CFPB's proposed rules will benefit consumers, and whether the proposed rules are consistent with the study as required by Dodd-Frank.

The CFPB admits to the shortcomings of its March 10, 2015 study. With respect to the CFPB's findings on arbitration: "outcome metrics are imperfect," "only in very rare circumstances are the terms of settlement available," and "these considerations make it quite challenging to attempt to answer even the simple question of how well do consumers (or companies) fare in arbitration."^[2] With respect to class action litigation: "many of these [challenges] parallel the challenges in reviewing arbitration data," "lack of specific information about claim amounts in court filings meant that the Study was unable to offer a meaningful analysis of recovery rates," and "comparing frequency, processes, or outcomes across litigation and arbitration is especially treacherous."^[3]

The CFPB ignored its study's shortcomings and findings to propose rules that would eliminate the benefits of arbitration revealed in the study. Such benefits include:

1. **Higher awards in arbitration:** An average award of roughly \$5,400 to consumers in arbitrations on successful affirmative claims (and an average award to consumers in arbitration seeking some form of debt forbearance of \$4,100) versus an average award to consumers in class action litigation of \$32 per class member.
2. **Higher likelihood of award:** Consumers were awarded relief in roughly 20.3% of arbitrations where they filed an affirmative claim (19.2% of arbitrations in which they sought debt relief) versus 12.3% when they were part of a class.
3. **Quicker time to payment:** A time to settlement payment of 155 days in arbitration versus 690 days for class action.

The CFPB's proposed rules have not yet been published in the Federal Register. The Office of Information and Regulatory Affairs reviews all proposed rules, and they have up to 90 days to do so before publishing. Once the proposed rules are published, interested parties will have 90 days to comment.

If you have questions about this case or related financial institution or lender/servicer issues, please contact: Lisa Forbes (Cleveland; 216.479.6105), Rodney Holaday (Columbus; 614.464.8356), Chris Santagate (Columbus; 614.464.5477), or your Vorys lawyer.

^[1] On May 5, 2016 the CFPB released a widely anticipated proposed rule that would: (1) prohibit class action waivers in pre-dispute arbitration agreements, and (2) require a provider to submit records from individual arbitrations to the CFPB. Read more at: [publications-1717.html](#)

^[2] Study section 5 at 7. Report page 57.

^[3] Study section 6 at 2-5. Report page 62-63.