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Financial Services Alert: CFPB Invites Comment on Newly Proposed Regulations Banning Class Action Waivers

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The Consumer Financial Protection Bureau (CFPB) yesterday 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. The proposed rule would apply to consumer financial products and services in the core markets of lending money, storing money, and moving or exchanging money.^[1] It would not apply to home mortgages.^[2] The rule, if adopted, would no doubt increase the risk of litigation and associated expenses for lenders.

The proposed rule stops short of a complete ban on all pre-dispute arbitration agreements. Depending on what is ultimately implemented, even without a complete ban on mandatory arbitration clauses, legal challenges may follow given the Supreme Court's rulings upholding the use of class action waivers in pre-dispute arbitration agreements under the Federal Arbitration Act. See *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Dodd-Frank authorized the CFPB to study the use of pre-dispute arbitration agreements^[3] and to issue regulations that "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties" if the regulation is "in the public interest and for the protection of consumers."^[4] Any regulations issued by the CFPB must be "consistent with" the CFPB's study into arbitration agreements.^[5]

The CFPB insists its proposed rule prohibiting class action waivers in pre-dispute arbitration agreements satisfies these requirements concluding that (1) individual dispute resolution is insufficient as the sole mechanism for consumers to enforce contracts; (2) class actions are more effective means of securing relief and changing companies' behaviors; (3) arbitration blocks many class actions; and (4) public enforcement does not obviate the need for a private class action mechanism. CFPB Director Richard Cordray, speaking yesterday, noted

that public resources available to bring enforcement actions “cannot hope to cover the waterfront of consumer financial harm,” and that “class actions supplement government enforcement actions and seldom overlap with them.”^[6] The CFPB also contends that requiring submission of arbitration materials to the CFPB will promote greater transparency and allow the CFPB to monitor how arbitration evolves.

Director Cordray specifically requested public comment on three “general benefits” the CFPB claims will be achieved by banning class action waivers. First, according to the CFPB, under the proposed rule consumers will have a more effective means to pursue meaningful relief after they have been hurt by a violation of consumer financial laws. Second, the CFPB asserts that the proposed rule will “deter wrongdoing on a broader scale,” because of the potential for substantial monetary award in a class action. And, third, “by requiring companies to provide the Bureau with arbitration filings and written awards, which [the CFPB] might end up making public... the proposal would enable the Bureau to monitor and assess the pros and cons of how arbitration clauses affect resolutions for individuals who do not pursue group claims.”^[7]

Comments on the proposed rule will be due 90 days after the proposed rule is published in the Federal Register.

If you have questions about this case or related financial institution or lender/servicer issues, please contact: Jeffery Smith (Columbus; 614.464.5436); Lisa Babish Forbes (Cleveland; 216.479.6105); Rodney Holaday (Columbus; 614.464.8356); Lindsay Doss Spillman (Cleveland; 216.479-6199); or your Vorys lawyer.

^[1] These products include but are not limited to credit cards, checking accounts, general purpose reloadable prepaid cards, payday loans, private student loans, automobile leases, and debt collection.

^[2] In the Dodd-Frank Act, Congress banned the use of pre-dispute arbitration clauses in mortgage contracts.

^[3] 12 U.S.C. §5518 (a).

^[4] 12 U.S.C. §5518 (b).

^[5] *Id.*

^[6] Prepared Remarks of Richard Cordray, Director of the Consumer Financial Protection Bureau, Field Hearing on Arbitration Clauses, Albuquerque, NM, May 5, 2016, available at consumerfinance.gov.

^[7] *Id.*