

Client Alert

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CFPB Issues Final Rule Banning Class Action Waivers in Consumer Finance Contracts

On July 10, 2017, the Consumer Financial Protection Bureau (CFPB) announced a final Rule banning the use of class action waivers in a broad range of consumer finance agreements.¹ The Rule, which was expected in light of prior CFPB announcements, is likely to increase the risk of class action litigation for companies selling consumer finance products and services.

Background & Proposed Rule

The Rule is the result of direction the CFPB received in the Dodd-Frank Wall Street Reform and Consumer Protection Act to study the effect of pre-dispute arbitration provisions in consumer finance agreements.² In March 2015, the CFPB completed a study on these provisions and presented the results to Congress, which authorized the CFPB to issue regulations restricting the use of arbitration agreements if the CFPB found such regulations to be in the public interest.³ Late in 2015, the CFPB issued an “outline of proposals” that it intended to implement regarding pre-dispute arbitration agreements, including a proposal to ban class action waivers.⁴

In May 2016, the CFPB issued a proposed Rule that (among other things) sought to ban class action waivers in certain consumer finance agreements.⁵ In response to that proposal, the CFPB received a flood of comments—over 110,000 in all—from consumers, consumer groups, industry groups, and other interested parties.⁶

The Final Rule

Despite significant negative feedback and criticism that some commentators expressed following the initial proposal, the CFPB’s final Rule largely tracks the proposed Rule. Like the CFPB’s May 2016 proposal, the final Rule “prohibits covered providers of certain consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action.”⁷ While the Rule does not prohibit covered entities from including arbitration provisions in their consumer contracts, it is designed to bar them “from using a pre-dispute arbitration agreement to block consumer class actions in court.”⁸ To effect that purpose, the Rule bars covered entities from including class action waivers in arbitration clauses.

The CFPB's Rule will increase the risk of class action litigation for companies subject to it. Class action waivers have helped businesses avoid class action litigation for claims arising out of written consumer agreements. These agreements typically include (1) a requirement that all disputes between the parties be submitted to arbitration and (2) an express ban on claims proceeding on a class basis. The Rule generally will permit consumers purchasing financial products and services to participate in class action lawsuits and bar covered businesses from enforcing class action waivers.

In addition to prohibiting class action waivers, the Rule requires covered businesses to insert language in their agreements notifying consumers that an arbitration provision does not prohibit consumers from participating in class action lawsuits.⁹ Finally, the Rule requires covered businesses to submit certain arbitral records and court records to the CFPB, which will use them to compile and monitor data about consumer dispute resolution procedures. The CFPB plans to publish this information on its website (in redacted form) to promote "transparency."¹⁰

The Rule's Scope

The Rule does not apply to all businesses that include arbitration clauses in their consumer agreements. Specifically, the Rule applies to providers of consumer finance products and services "in the core consumer financial markets of lending money, storing money, and moving or exchanging money," including, *e.g.*, providers engaged in consumer credit transactions, automobile leases, providers of debt management/settlement services, and providers of checking services.¹¹

What Happens Next?

The Rule does not take effect immediately and will not apply retroactively to preexisting consumer agreements. The Rule's effective date will be 60 days after it is published in the *Federal Register*, and it will apply "only to agreements entered into after the end of the 180-day period beginning on the regulation's effective date."¹²

In the interim, Congress will have the opportunity to block the Rule. The Congressional Review Act establishes a fast-track process for Congress to block regulations with which it disagrees.¹³ Under the Act, lawmakers are empowered to overturn a rule within roughly 60 legislative days of its publication in the *Federal Register*.¹⁴

Commentators think Congress might block the Rule.¹⁵ Indeed, in a statement released Monday, CFPB director Richard Cordray acknowledged that numerous "parties . . . have indicated that they will seek to have Congress nullify this new rule," noting "[t]his is a process that I expect will be considered and determined on the merits."¹⁶ As of Tuesday, July 11, "[i]ndustry groups including the Chamber and the American Bankers Association have already called on Congress to use the [Congressional Review Act] to eliminate the rule."¹⁷

From a broader perspective, the CFPB's decision to issue the Rule could lead to political changes in the agency that has often been accused of regulatory overreach by Republican lawmakers. Although the Dodd-Frank Act established the CFPB as an independent agency—providing that its director can be removed only "for cause"—a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit recently ruled that the CFPB's independent structure is unconstitutional, and that the President has the power to remove the CFPB's director at will.¹⁸ Assuming that ruling is upheld after consideration by the full D.C. Circuit, the CFPB director's decision to issue the arbitration Rule could have significant political ramifications.

We will continue to monitor developments in this area and are prepared to advise and consult with clients regarding the potential impact of the CFPB's Rule.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ Final Rule, 12 C.F.R. Part 1040 (July 10, 2017) ("Final Rule"), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf.

² See Proposed Rule, 12 C.F.R. Part 1040 (May 5, 2016) ("Proposed Rule"), available at http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

³ *Id.* at 3,7.

⁴ *Id.* at 81.

⁵ See generally Proposed Rule; see also King & Spalding Client Alert, "CFPB Proposes Rule Prohibiting Class Action Waivers And Requiring Reporting Of Arbitration Information," May 11, 2016, available at <https://s3.amazonaws.com/kslaw-staging/attachments/000/003/857/original/ca051116a.pdf>

⁶ Prepared Remarks of CFPB Director Richard Cordray on the Arbitration Rule Announcement, July 10, 2017, available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-arbitration-rule-announcement/>.

⁷ Final Rule at 1.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3-5.

¹² *Id.* at 1-2.

¹³ 5 U.S.C. § 801.

¹⁴ *Id.*

¹⁵ See, e.g., Evan Weinberger, "CFPB Bets Congress Will Let Arbitration Rule Slip By," available at https://www.law360.com/classaction/articles/942869/cfpb-bets-congress-will-let-arbitration-rule-slip-by?nl_pk=26704412-b70e-4723-b1d3-f7c1c65d9441&utm_source=newsletter&utm_medium=email&utm_campaign=classaction

¹⁶ Prepared Remarks of CFPB Director Richard Cordray on the Arbitration Rule Announcement, July 10, 2017, available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-arbitration-rule-announcement/>.

¹⁷ See Evan Weinberger, "CFPB Bets Congress Will Let Arbitration Rule Slip By," available at https://www.law360.com/classaction/articles/942869/cfpb-bets-congress-will-let-arbitration-rule-slip-by?nl_pk=26704412-b70e-4723-b1d3-f7c1c65d9441&utm_source=newsletter&utm_medium=email&utm_campaign=classaction

¹⁸ *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, Slip Op. (D.C. Cir. Oct. 11, 2016), vacated by order granting *en banc* rehearing.