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CFPB Rule Prohibits Financial Services Providers from Blocking Consumer Class Actions in Arbitration Agreements

The Consumer Financial Protection Bureau's rule, which went into effect today, (i) prohibits providers of certain consumer financial products and services from requiring consumers to waive class actions in pre-dispute arbitration agreements, and (ii) requires these providers to submit certain records relating to arbitral and court proceedings to the Bureau. The Senate may still act to block it.

BACKGROUND

In the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Congress directed the Consumer Financial Protection Bureau (the "CFPB") to study pre-dispute arbitration agreements and issue regulations restricting the use of arbitration agreements if such rules would be in the "public interest" and for the "protection of consumers."[1] Congress required that the findings in any such rule be consistent with the study. The CFPB conducted a three-year study and released its results in March 2015. The CFPB found that precluding certain financial providers from blocking consumer class actions in litigation and arbitration through arbitration agreements would better enable consumers to enforce their rights and obtain redress when their rights are violated.[2] Further, the CFPB found that prohibiting class action waivers would strengthen incentives for companies to avoid potentially risky activities.[3]

After its release, the CFPB invited stakeholders to provide feedback on the study, and after reviewing the feedback, the CFPB issued a proposed rule on May 24, 2016. Following a public comment period on the proposed rule and review of the comments received, the CFPB issued its final rule governing class action waivers in pre-dispute arbitration agreements between consumers and providers of certain financial

products and services (herein, "Covered Providers") on July 19, 2017. The final rule became effective today, which is 60 days after its publication in the *Federal Register*.[4] The compliance date is 180 days after the final rule became effective, so Covered Providers have until March 19, 2018 ("Compliance Date") to comply with the regulation.[5]

Under the Congressional Review Act ("the CRA"),[6] Congress has 60 legislative days after the final rule was published to overturn the rule by adopting a "joint resolution of disapproval," passage of which requires a simple majority in both chambers (i.e., it is not subject to filibuster in the Senate). On July 25, 2017, the House of Representatives voted almost exclusively along party lines (231-190 vote) to strike down the final rule. The Senate is expected to have until late October or early November to take up the House-passed joint resolution of disapproval, consideration of which would occur under the expedited parliamentary procedures provided for in the CRA.[7] Importantly, if Congress were to overturn the final rule, the CFPB would be prohibited in the future from issuing any new rule that is "substantially the same" as the overturned rule.

SUMMARY OF CFPB RULE

The final rule imposes two sets of limitations on the use of pre-dispute arbitration agreements by Covered Providers. First, Covered Providers are prohibited from using new pre-dispute arbitration agreements entered into after March 19, 2018 to block consumer class actions in court, and Covered Providers, with a limited exception,[8] are required to insert language into their arbitration agreements that reflects this limitation. The Covered Providers are required to include in pre-dispute arbitration agreements the following provision: "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."[9] When a pre-dispute arbitration agreement applies to multiple products or services, only some of which are covered by the rule, Covered Providers are allowed to insert a modified version that specifies that the ban on class action waivers applies only to the covered products or services.[10] In addition, the rule provides that Covered Providers may include a sentence at the end of the required disclosures that indicates that the provision does not apply to parties that entered into the agreement before March 19, 2018, or to products or services that were first provided before March 19, 2018, and are subject to an arbitration agreement entered before that date.[11]

Second, the final rule requires Covered Providers to submit to the CFPB, within 60 days of filing or receipt, certain records relating to arbitral and court proceedings concerning consumer financial products or services covered by the rule.[12] Specifically, Covered Providers are required to submit to the CFPB: (i) the pre-dispute arbitration agreement filed with the arbitrator; (ii) the initial claim and any counterclaim; (iii) the answer to any initial claim and/or counterclaim; (iv) any judgment or award; (v) any communication from the arbitrator or administrator regarding dismissal of arbitration because of failure to pay fees; (vi)

any communication from an arbitrator or administrator related to a determination that the arbitration agreement does not comply with fairness principles, rules, or similar requirements of the arbitral forum; and (vii) any submission to a court that relies on the pre-dispute arbitration agreement to seek dismissal, deferral, or stay of a case.[13] The requirement applies to any arbitration and related court proceedings regardless of whether there are any class action proceedings involved. The CFPB intends to publish collected materials with redactions on its website in order to "provide greater transparency into the arbitration of consumer disputes," and it plans to use the collected information to monitor "arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action."[14]

WHO IS COVERED BY RULE

The CFPB rule is intended to apply to "providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money."[15] In particular, the rule applies to the following: (i) consumer credit services; (ii) automobile leasing; (iii) debt management or settlement services; (iv) providing directly to a consumer a consumer report, a credit score, or other consumer-specific information derived from a consumer file; (v) providing accounts subject to the Truth in Savings Act; (vi) providing accounts or remittance transfers subject to the Electronic Fund Transfer Act; (vii) transmitting or exchanging funds; (viii) accepting, or providing a product or service to accept, financial or banking data directly from a consumer to initiate a consumer payment or credit card or charge card transaction for a consumer; (ix) providing check cashing, check collection, or check guaranty services; and (x) debt collection.[16]

The rule does not cover persons regulated by the Securities and Exchange Commission, persons regulated by a State securities commission as either a broker dealer or investment advisor, or persons regulated by the Commodity Futures Trading Commission, among others.[17] The rule also does not apply to employers who are offering covered financial products or services to their employees as an employee benefit,[18] persons who are excluded from the CFPB's rulemaking authority,[19] federal agencies, and any state or tribe under federal sovereign immunity law whose immunities have not been abrogated by the U.S. Congress.[20] Further, the CFPB rule excludes any Covered Providers that have provided products or services to no more than 25 consumers in the current and preceding calendar years.[21]

IMPLICATIONS

The CFPB rule is controversial and it remains possible that the Senate could overturn it before the Congressional Review Act deadline or that threatened court challenges may derail it. The rule also presents some interpretive difficulties. For example, the rule applies only to arbitration agreements entered into on or after March 19, 2018. The official comments to the rule specify that if a Covered Provider "[m]odifies, amends, or implements" the terms of a product or service that is subject to a pre-

dispute arbitration agreement that pre-dates the Compliance Date, the product or service will not be covered by the CFPB rule.[22] However, if a Covered Provider offers "a *new* product or service," the product or service will be subject to the CFPB rule.[23] The line delineating a *modified* product or service from a *new* product or service may well be difficult to draw in some cases. There may also thus be an incentive for Covered Providers to characterize changes to products and services as "modifications," rather than "new" products or services.

According to the CFPB's response to comments on the proposed rule, if a Covered Provider fails to include the required notice, the arbitration agreement will still be unenforceable with respect to class actions, but the remainder of the agreement requiring arbitration of an individual dispute will be effective.[24] The release also states that the CFPB and State attorneys general may seek penalties under Title X of the Dodd-Frank Act for failure to include the required provision.[25] For Covered Providers who are subject to the enforcement authority of the federal banking agencies, the rule also may be enforced through Section 8 of the Federal Deposit Insurance Act.[26]

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ENDNOTES

[1] *See* Bureau of Consumer Financial Protection; Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (12 CFR Pt. 1040) ("FR Release").

[2] *Id.* at 33280.

[3] *Id.*

[4] *Id.* at 33211.

[5] FR Release, 82 Fed. Reg. at 33120.

[6] 5 U.S.C. §§ 801-08.

[7] Any day that the Senate gavels into session is a legislative day. Fridays, weekends and recess days do not count as legislative days.

[8] The CFPB rule provides a limited exception for pre-packaged general-purpose reloadable prepaid cards, that are on store shelves as of March 19, 2018, when the providers are unable to contact consumers in writing. These providers are still bound by the class action waiver ban but do not need to include the required language in the arbitration agreements with the customers.

[9] 12 C.F.R. § 1040.4(a)(2)(i).

[10] 12 C.F.R. § 1040.4(a)(2)(ii).

[11] 12 C.F.R. § 1040.4(a)(2)(iv).

[12] 12 C.F.R. § 1040.4(b)(2).

[13] 12 C.F.R. § 1040.4(b)(1).

[14] FR Release, 82 Fed. Reg. at 33210.

[15] *Id.*

[16] 12 C.F.R. § 1040.3(a).

[17] 12 C.F.R. § 1040.3(b)(1)(i)-(iii).

[18] 12 C.F.R. § 1040.3(b)(5).

[19] 12 C.F.R. § 1040.3(b)(6).

[20] 12 C.F.R. § 1040.3(b)(2)(i)-(ii).

[21] 12 C.F.R. § 1040.3(b)(3).

[22] 12 C.F.R. § 1040.4, cmt. 4-1(ii)(A).

[23] *Id.*, cmt. 4-1(i)(A)(emphasis added). If a Covered Provider acquires or purchases a product or service that is subject to a pre-dispute arbitration agreement that pre-dates the Compliance Date, and the Covered Provider becomes a party to the agreement, the product or service will also be covered by the CFPB rule. *Id.*, cmt. 4-1(i)(B).

[24] FR Release, 82 Fed. Reg. at 33371.

[25] *Id.* The relief available includes civil money penalties. *See* 12 U.S.C. § 5565 ("[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection").

[26] 12 U.S.C. § 1818.

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