CFPB Issues Final Rule Prohibiting Class Action Waivers in Arbitration Clauses

On July 19, 2017 the Consumer Financial Protection Bureau (CFPB) published its long delayed final rule that prohibits class action waivers in pre-dispute arbitration clauses contained in covered consumer financial services agreements. 82 FR 33210. While the final rule becomes effective on September 18, 2017, compliance will be mandatory only for pre-dispute arbitration agreements entered into on or after March 19, 2018.

Note that on July 26, 2017, the House of Representatives exercised its power under the Congressional Review Act (CRA), voting to overturn the rule. Under the CRA both the House and Senate must pass a resolution of disapproval within 60 legislative days. While the Senate also is considering action to oppose the rule, it is not expected to vote on a resolution until September. If a vote on a joint resolution passes the Senate and the president signs it, the final rule will not become effective. Thus, at this point institutions may want to delay implementing any changes to documents or agreements until after the Senate has voted on its resolution.

In the meantime, this article highlights the primary provisions of the CFPB's final rule.

Prohibition on class action waivers. The final rule **prohibits** covered consumer financial service providers from **including class action waivers in pre-dispute arbitration agreements** contained in consumer financial services agreements.

The final rule does not ban arbitration clauses entirely. Rather, it bans arbitration agreements that include provisions that block consumer class actions. In addition, there is specified language that must be included in arbitration clauses that apply to individual cases, discussed later in this article.

Under the final rule, a "pre-dispute arbitration agreement" is defined as "an agreement between a covered person . . . and a consumer providing for arbitration of any future dispute concerning a consumer financial product or service covered by [the final rule]." Section 1040.2(c). The prohibition on class action waivers applies to pre-dispute arbitration agreements entered into between "providers" and consumers. In general, a "provider" is any person or affiliate of an individual that offers a financial product or service primarily for personal, family or household purposes unless the person or affiliate is specifically excluded from coverage. In practice the rule will apply to most consumer financial service contracts entered into between financial institutions and consumers other than mortgage loans. Mortgage loans are already subject to a ban on mandatory arbitration provisions of any type under Regulation Z.

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In particular, the final rule applies to:

- Most types of consumer credit transactions, including consumer credit cards, lines of credit, small-dollar or payday loans, private student loans and certain auto loans;
- Checking and other deposit and share accounts subject to the Truth in Savings Act;
- Auto leases;
- Consumer debt relief services;
- Services providing consumers with consumer reports, credit scores and credit monitoring;
- Remittance transfers subject to the Electronic Funds Transfer Act (EFTA);
- Funds transmittal or exchange;
- Payment processing activities that involve accepting financial or banking data directly from the consumer for initiating a payment, credit card, or charge card transaction;
- Consumer check cashing, check guaranty, and check collection services; and
- Debt collection activities related to the types of consumer financial transactions listed above. See Section 1040.3(a).

Specified language for arbitration clauses. The final rule **requires** covered providers to include a **specified plain-language provision in their arbitration agreements** disclaiming the agreement's applicability to class actions. The following specific language must be used for this purpose:

> *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.*

The rule permits an alternative procedure for complying with this provision where a covered provider is deemed to have "entered into" an arbitration agreement by acquiring or purchasing a covered product. Specifically, within 60 days of "entering into" the arbitration agreement—that is, by acquiring or purchasing a covered product and becoming a party to the product's agreement which contains the arbitration provision—the provider has the option to provide the consumer with a separate written notice rather than amending the existing agreement itself. In that case the notice must state as follows: *"We agree not to rely on any pre-dispute arbitration 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."* Section 1040.4(a)(2)(iii).

The final rule provides limited flexibility and model language that can be included in arbitration agreements under additional circumstances, such as where the agreement covers different products and services some of which are not subject to the prohibition on class action waivers, or where the provider wants to use the agreement both before and after the March 19, 2018 compliance date.

Submission of arbitral records to CFPB. The final rule also imposes a reporting requirement on providers that rely on arbitration agreements. The rule requires covered consumer financial service providers that use arbitration clauses to submit to the CFPB copies of all claims, answers, counterclaims, awards, and certain related materials that are filed in arbitrations. The provider must submit these records to the CFPB within 60 days of the filing with the arbitrator or court. For privacy purposes, the final rule requires providers to redact consumers' personal information prior to submitting the records to the CFPB. The CFPB will post the records on a publicly available website that is to be established by July 1, 2019. As a result, some of the confidentiality financial institutions have hoped for from arbitration will be lost.

We will `update BCG members regarding the status of the CFPB's final rule once the congressional dust has settled. In the meantime, BCG members are encouraged to contact Robert Olsen at **ROlsen@ablawyers.com** or Keith Forrester at **KForrester@ablawyers.com** with questions regarding the final rule.