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CFPB Unveils Proposed Rule Limiting Class Action Waivers

On May 5, 2016, the Consumer Financial Protection Bureau (CFPB) unveiled a widely anticipated proposed rule (see October 2015 alert) imposing two sets of limitations on the use of pre-dispute arbitration agreements by providers of consumer financial products and services.

First, the proposed rule would prohibit providers from using pre-dispute arbitration agreements to block consumer class actions and would require providers to insert language into their arbitration agreements reflecting this limitation.

Second, the proposed rule would require providers that use pre-dispute arbitration agreements to submit various arbitration records to the CFPB. The CFPB would then use the records to monitor arbitration and publish records on its website “in some form, with appropriate redactions or aggregation as warranted.”

The proposed rule would apply to most consumer financial products and services that the CFPB oversees, including, but not limited to, extensions of credit under the Equal Credit Opportunity Act, automobile leases, credit reports, account services under the Truth in Savings Act, accounts and remittance transfers subject to the Electronic Fund Transfer Act, debt settlement and debt collection.

The proposed rule raises serious concerns for many banks and other financial service companies that regularly use mandatory arbitration clauses to avoid the unpredictable costs of class action lawsuits. Opponents allege that arbitration is a fast and relatively cheap dispute resolution forum. As president of the Consumer Banker Association Richard Hunt has stated, it appears “the real winners of [this] proposal are trial attorneys, not consumers.” Proponents of the proposed rule argue that class actions of relatively small-dollar disputes force companies to internalize costs.

Comments on the proposal will be due 90 days after it is published in the Federal Register, and the CFPB is proposing an effective date of 30 days after a final rule is published in

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the Federal Register. Consistent with the Dodd-Frank Act, the proposed rule will apply only to agreements entered into 180 days after the effective date. In the interim, companies that do not currently include arbitration agreements in their financial services contracts should consider adding them. Agreements entered into before the new rule becomes effective will survive enactment of the new rule.

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