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Related Practices

Litigation

CFPB Takes Aim at Class Action Waivers

The Consumer Financial Protection Bureau (CFPB) has announced that it is considering rulemaking that would prohibit class action waivers in arbitration agreements.

Background

Arbitration agreements frequently govern the resolution of consumers' disputes with providers of consumer financial products and services. The CFPB studied these agreements and submitted a report to Congress. The CFPB's Final Report, released on March 10, 2015, concluded that consumers are better served by litigation – particularly class action litigation – than by arbitration agreements in disputes regarding consumer financial contracts.

The CFPB is authorized under the Dodd-Frank Act to prohibit or impose conditions on the use of arbitration clauses by regulation in accordance with these findings if doing so would protect consumers and serve the public interest.

Proposals Currently Under Consideration by The CFPB

On October 7, 2015, the CFPB announced that it is considering rulemaking to implement a possible ban on class action waivers in arbitration agreements in consumer financial services contracts. The CFPB published an outline of its proposal and is currently gathering feedback from a panel of small industry stakeholders.

The proposed rule would prohibit contracts in which consumers forfeit their right to join a class action. For companies still willing to offer individual arbitration, the agreements would have to explicitly state that they do not apply to class actions.

Further, the proposed rule would require that companies choosing to use individual arbitration clauses submit arbitration claims and awards to the CFPB in an effort to increase transparency and deter what it may deem as “unfair” arbitrations. Additionally, the CFPB is considering publishing those claims and awards on its website, making them available to the public.

Impact of the Proposed Changes

The proposed changes would affect most consumer financial products and services that the CFPB oversees, including but not limited to credit cards, prepaid cards, checking and deposit accounts, money transfer services, certain auto loans, private student loans, small-dollar or payday lenders and installment loans.

Any proposed changes likely will not take effect until late 2016 or early 2017, and compliance with any new rules will not be required until 180 days post-issuance. In the interim, companies that do not currently use arbitration agreements in their financial services contracts should consider adding them, since agreements entered into before the new rules become effective will survive enactment of the new rules. In addition, financial service companies that employ arbitration provisions in their customer agreements should consider participating in the rulemaking process and making their views part of the administrative record.

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