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CFPB Publishes Proposed Rule Banning Pre-Dispute Arbitration Agreements in Consumer Class Actions

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This week, the Consumer Financial Protection Bureau (CFPB or Bureau) published a proposed rule which would prohibit application of pre-dispute arbitration agreements to class litigation involving a broad range of consumer financial products and services. Publication of the proposed rule was expected, as the Bureau announced in October its intention to do so based on its study findings that pre-dispute arbitration agreements "effectively prohibit" class litigation and prevent consumers from obtaining remedies for harm caused by providers of certain consumer financial products or services. Dodd-Frank specifically prohibited arbitration agreements in home mortgages. It also authorized the Bureau to regulate the use of arbitration clauses in other consumer financial products if it found, based upon study, that doing so would protect consumers and serve the public interest. The proposed rule will apply to pre-dispute arbitration agreements for all "consumer financial products and services" as defined in the law. The proposed regulation includes two limitations on pre-suit arbitration agreements with respect to such products: **Prohibition on class action waivers**. First, it

will prohibit inclusion of arbitration clauses that block class action claims in contracts with consumers for consumer financial products and services (as defined by Dodd-Frank), including credit cards, checking and deposit accounts, student loans, consumer mortgage and other credit servicing, prepaid cards, consumer debt acquisition, credit reporting, debt relief and debt collection services. Providers of covered products and services will be prohibited from relying on any pre-dispute arbitration agreement entered into after the effective date of the new rule (211 days after publication of the final rule). Additionally, any arbitration agreement in such a contract would be required to contain a provision expressly stating that the provider agrees not to use any arbitration agreement "to stop the consumer from being part of a class action case in court." **Submission of information on all arbitration proceedings**. Second, for any pre-dispute arbitration agreements entered into after the effective date, covered entities will be required to provide the Bureau with certain records of all arbitration claims relating to consumer financial products or services filed by or against them, including initial claim filings, the arbitration agreement, and the judgment or award issued by the arbitrator, with personal consumer information redacted. The Bureau "intends to use the information it collects to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action," and "to publish materials on its website in some form, with appropriate redactions or aggregation as warranted." In March, the Bureau released the results of a three-year study of pre-dispute agreements which focused on credit cards, prepaid cards, and deposit accounts, announcing its findings that such agreements restricted consumer relief in disputes with financial service providers by limiting class actions. The Bureau relies on the study findings as authorization for the new regulation under Dodd-Frank. However, the regulation will cover a far broader scope of consumer financial products and services than those focused on in the study. Excluded from the rule are broker dealers subject to SEC regulation, the insurance industry (persons subject to state insurance regulations), federal and certain state local and tribal governments that provide consumer financial services directly to those within their jurisdictions, and persons who provide 25 or fewer consumer products or services annually. The Bureau claims the new regulation will benefit consumers and the public interest by providing companies with incentive to comply with consumer laws in order to avoid lawsuits, bringing public attention to questionable business practices, and making the individual arbitration process more transparent. However, such benefits could be outweighed by the consequences that will flow from the massive increase in litigation costs to financial service providers it is sure to bring about. Corporate counsel have been anticipating the proposed rule, according to the 2016 Carlton Fields Class Action Survey, with nearly 14 percent expressing concern about an increase in class actions as a result. Comments must be received by the Bureau within 90 days of publication of the proposed rule in the federal register.

Authored By

Julianna Thomas McCabe

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