

## NAIC Draws Line in CFPB Sandbox

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The National Association of Insurance Commissioners has taken a firm stance on the Consumer Financial Protection Bureau's proposed ban on "mandatory arbitration" clauses that make financial product consumers waive their right to join class actions.

Because consumer loans are generally financial products within the CFPB's purview, the CFPB stated that the proposed ban would extend to any such arbitration clauses used for whole life insurance policy loans if: (a) the insurance company is a "creditor" under the Equal Credit Opportunity Act (ECOA) and (b) the activity is not the "business of insurance" under the Dodd-Frank Act. In a comment letter, however, the NAIC urged the agency to remove altogether such policy loan features from the scope of the rule.

In drawing a line between insurance policy loans and consumer finance, the NAIC argued that whole life policy loans do not make insurance companies ECOA "creditors." The insurance companies do not extend, renew, or continue credit; nor do they arrange for such transactions. Rather, despite the use of the word "loan," a policy loan is in substance an advance payment of the policy's cash surrender value. It more closely resembles a structured temporary conversion from one type of asset into cash, particularly because if a policyholder does not repay the loan, the insurance company's recourse is simply to reduce the policy benefits by the outstanding balance of the loan.

Finally, the NAIC pointed to Dodd-Frank Act language that states the bureau lacks authority to alter, amend, or affect the authority of any state insurance regulator. Because states regulate the issuance of insurance policy loans, and none of the CFPB's enumerated statutes—like the Truth in Lending Act or Real Estate Settlement Procedures Act—expressly incorporates policy loans into their purview, the NAIC concluded that the CFPB's purported encroachment into this territory is "beyond the appropriate jurisdiction of the bureau."

For more analysis of this CFPB rule proposal, and the additional regulatory areas where it is prompting line-drawing controversies, see "CFPB Grabs for SEC/CFTC Turf," *Expect Focus* Vol. III 2016.