CFPB’s Arbitration Proposal Would Ban Class Action Waivers

The Consumer Financial Protection Bureau (CFPB) issued a proposal that would ban the use of arbitration clauses that prohibit class actions and require companies to report to the CFPB on arbitrations that do occur. The proposal has been anticipated for several years, as the 2010 Dodd-Frank Act (Dodd-Frank) required the CFPB to study consumer arbitrations and provided authority for the CFPB to issue a rule to address its findings.

Under Dodd-Frank, the CFPB may impose prohibitions, conditions or limitations on the use of arbitration agreements that the CFPB finds are in the public interest and for the protection of consumers, and consistent with its study. Much of the recent proposal discusses this standard and explains why the CFPB believes it has been met. The proposal even cites law firm “alerts” about how arbitration clauses can reduce class action risk, arguing that increased exposure to class actions will provide incentives for companies to comply with the law and protect consumers from harm.

In the end, the CFPB concluded that pre-dispute arbitration agreements have been widely used to prevent consumers from seeking relief from legal violations on a classwide basis and that banning class waivers in those agreements would (1) be in the public interest because it would level the playing field and enhance the rule of law and (2) protect consumers by creating incentives for increased legal compliance. These findings are at odds with the significant body of case law recognizing that arbitration agreements with class waivers are consistent with consumer protection statutes under which class actions are often brought.

**Scope.** The CFPB defines the types of covered entities broadly. Although in theory it does not extend to the full breadth of the CFPB’s jurisdiction over “consumer financial products and services,” it includes all of the major categories of those products and services. A few types of entities are exempted, including many merchants.

**Timing.** Under the proposal, the rule will apply to all arbitration agreements that covered entities enter into, starting roughly seven months after the publication of the final rule. This is to comply with the specific Dodd-Frank mandate requiring prospective-only application of the rule. The proposal would not apply to accounts — such as credit card accounts — that are opened before the effective date but remain in use after the effective date. However, if a new entity becomes a party to an existing agreement — such as by acquiring a credit card portfolio or through a bank acquisition — that would trigger the application of the rule.

**Limitation on Use of Arbitration Agreements.** The core of the CFPB’s proposal is a prohibition on covered entities relying in any way on a pre-dispute arbitration agreement for any aspect of a class action, and it prohibits including arbitration provisions in agreements unless the provision includes specified language that does not forbid class actions. Many financial institutions have been concerned about having class arbitrations...
because such matters may involve significant potential liability, and arbitrations typically do not provide the procedural protections involved with judicial class actions.

**Submission of Arbitration Information.** The proposal also requires covered entities to submit information about their pre-dispute arbitration agreements to the CFPB, including claims filed in arbitration, the arbitration agreement and the arbitrator award.

**Next Steps.** Comments are due 90 days after the proposal is published in the *Federal Register*, which is expected shortly. The CFPB proposed that the effective date be 30 days after the final rule, with the final rule applying to agreements entered into at least 180 days after the effective date. Thus far, the CFPB has moved relatively quickly to advance this rule, so a final rule is anticipated soon after the comment period closes.

Strenuous opposition to CFPB efforts to ban arbitration clauses with class limitations has already surfaced. A legal challenge to the final rule is widely anticipated, if such a ban is adopted, likely arguing that the CFPB has failed to satisfy the statutory standard. Some members of Congress have also signaled a willingness to oppose the CFPB’s efforts to limit the use of arbitration clauses. As a result, the final resolution of the rule and its impact may take time to unfold.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work, or

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