COMMENTARY

JULY 2017


# Controversial Rule by CFPB Limits Class Action Waivers in Arbitration Agreements

## IN SHORT

**The Situation**: A final rule recently issued by the Consumer Financial Protection Bureau bars banks and other covered companies from attempting to avoid consumer class actions by using arbitration clauses in covered consumer financial agreements.

**The Result**: The rule applies to providers of certain consumer financial products and services and their affiliates, but it excludes companies that are regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

**The Outlook**: The rule is effective September 18, 2017. However, Congress has 60 legislative days, pursuant to the Congressional Review Act, to overturn the rule. Litigation challenges from some affected companies are also possible.

The Consumer Financial Protection Bureau ("CFPB") has issued a final rule that limits the use of pre-dispute arbitration agreements for many consumer financial products and services ("Rule"). Although the controversial Rule is final, significant congressional and litigation challenges are likely.

The Rule prohibits banks and covered companies from relying on arbitration clauses in covered consumer financial agreements to avoid consumer class actions. The Rule follows a March 2015 study of consumer arbitration agreements mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and a May 2016 proposed rule that generated more than 110,000 public comments. (Please see Jones Day's *Commentary*, "CFPB Proposes New Rule on Mandatory Consumer Arbitration Clauses," for our analysis of the proposed rule.)

The Congressional Review Act grants Congress 60 legislative days to pass a joint resolution disapproving the Rule. If such a joint resolution passes and is signed by the president, the Rule would be overturned and the CFPB would be prohibited from reissuing a new, substantially similar rule without specific Congressional authorization. On July 20, 2017, resolutions were introduced in the Senate and the House of Representatives to disapprove of the Rule pursuant to the Congressional Review Act.

Congress recently has focused attention on consumer arbitration agreements. While the Rule is based upon the authority in Sections 1022 and 1028 of the Dodd-Frank Act, the Financial CHOICE Act of 2017 (H.R. 10), which passed the House of Representatives in June 2017, would revoke the CFPB's authority to restrict such arbitration agreements by repealing Section 1028 of the Dodd-Frank Act.

Separately, companies may seek to challenge the validity of the Rule on several grounds. For example, pursuant to the Dodd-Frank Act, the findings in the Rule must be consistent with the CFPB's study of consumer arbitration agreements, and the substance and process of the 2015 study have been heavily criticized.

The Rule applies to providers of covered consumer financial products and services and their affiliates; however, the Rule excludes certain companies such as those that are regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission. The Rule covers pre-dispute arbitration agreements (including both stand-alone agreements and provisions incorporated in broader contracts with customers) entered into on or after March 19, 2018.

The Rule becomes effective September 18, 2017, and applies to agreements entered into on or after March 19, 2018. In a letter to the CFPB Director on July 10, 2017, the Acting Comptroller of the Currency requested that the CFPB share with the Office of the Comptroller of the Currency ("OCC") the data used to develop and support the Rule and that the agencies work together to resolve potential OCC safety and soundness concerns. In a subsequent letter on July 17, 2017, the Acting Comptroller noted that the CFPB is not a safety and soundness prudential regulator and asked the CFPB to delay publication of the Rule in the *Federal Register* until OCC staff has conducted an analysis of the CFPB data. The Rule was published in the *Federal Register* on July 19, 2017.

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Once the Rule applies, covered companies' consumer financial contracts must include a specific provision explaining that the company may not rely on the arbitration agreement to stop the consumer from being part of a class action lawsuit. The Rule will also require covered companies that use pre-dispute arbitration agreements to submit arbitral and court proceeding records to the CFPB, which the CFPB will then publish on its website, accessible by the public. Records required to be submitted include the initial claim and any counterclaim, answer, and judgment or award. These records initially will be made available to the public on the CFPB's website by July 1, 2019, and new submitted records will be made available annually thereafter.

## TWO KEY TAKEAWAYS

1. A controversial final rule recently issued by the Consumer Financial Protection Bureau prohibits covered financial companies from including bans on class actions in their arbitration agreements.
2. The new provisions would become effective September 18, 2017, but legislative and court challenges are likely.

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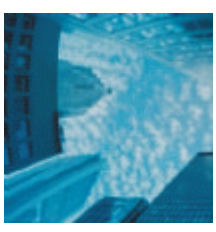
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