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The Consumer Financial Protection Bureau's Summer Gift to Plaintiff's Counsel

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***Seyfarth Synopsis**: The Consumer Financial Protection Bureau issued a final rule that exposes financial services companies to increased litigation by banning the use of arbitration agreements to block consumer class actions. Companies must revise their consumer contracts to include language informing consumers of their right to bring or participate in class actions. The rule becomes effective August 10, 2017, unless rescinded by Congress.*

The Consumer Financial Protection Bureau ("CFPB") is ordering financial services companies to pull out a red pen and redraft all mandatory arbitration clauses in agreements for consumer financial products and services. As expected, the CFPB published its much-anticipated rule prohibiting the use of pre-dispute arbitration agreements to block consumer class actions. The rule, which could be overruled before it takes effect, will likely increase compliance costs and litigation risks for businesses.

The final arbitration rule is the result of section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), wherein Congress directed the CFPB to study pre-dispute arbitration agreements and afterward authorized the CFPB to issue regulations restricting the use of arbitration agreements. The CFPB concluded that consumers rarely pursue claims on an individual basis because the individual amounts in dispute are low and that arbitration clauses typically waive the consumers' right to seek relief on a class basis. According to the CFPB, these factors in combination effectively prevent consumers from obtaining any relief for valid claims. The CFPB drafted the rule to address these perceived concerns.

According to CFPB Director Richard Cordray, "Our new rule will stop companies from sidestepping the courts and ensure that people who are harmed together can take action together," but Senator Tom Cotton (R-AR), a member of the Senate Banking Committee, called the rule an "anti-business regulation that will prompt frivolous lawsuits while hurting consumers."

Key Provisions In The Rule

The rule prohibits the inclusion of class-action waivers in pre-dispute arbitration agreements (cue plaintiff's counsel applauding the potential of new class action work). The rule requires covered providers to include the following notification in pre-dispute arbitration agreements:

> "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."

The rule provides for a variation of this language where a customer may purchase more than one product or service or the customer has an existing pre-dispute agreement with the provider. Accordingly, this new requirement does not apply to pre-dispute agreements that already exist or products and services that were first provided before implementation of the rule.

In addition to modifying pre-dispute arbitration agreements, the new rule mandates that covered providers submit filings attributable to a consumer arbitration claim or court proceeding involving consumer financial products or services covered by the rule, including but not limited to, the claim and any counterclaim, answer, and the pre-dispute arbitration agreement, and judgment or award. Such documents must be provided to the CFPB within 60 days of the provider filing the record with the arbitrator or court. In turn, the CFPB will be establishing and maintaining a repository of the records provided, which is expected to be made publically available by July 1, 2019.

The final rule applies to providers--individuals, partnerships, companies, or other entities as defined in 12 U.S.C. 5481(19)--of certain consumer financial products and services in in the "core consumer financial markets of lending money, storing money, and moving or exchanging money." Excluded providers generally include persons or entities governed by the Securities and Exchange Commission or Commodity Futures Trading Commission, such as registered brokers or investment advisers.

Implementation Timing

Unless rescinded, the final rule will become effective 60 days after the rule is published in the Federal Register and will apply to agreements entered into after the end of the 180-day period measured from the effective date. Thus, if the rule is published in the Federal Register this month, it will likely begin applying to new agreements sometime in March 2018.

Because there is strong opposition to the rule, however, the rule could be rescinded before it becomes effective. Under the Congressional Review Act ("CRA"), Congress can override the rule by a simple majority vote and the President's signature within 60 legislative days of the rule's publication in the Federal Register. Republicans in the House and Senate, including Senate Banking Committee Chairman Mike Crapo (R-ID) and House Financial Services Committee Chairman Jeb Hensarling (R-TX) , have indicated that they will use the CRA to rescind the rule. If that effort is successful, the rule will not become effective. The CFPB will be prevented from imposing the rule and further barred from revisiting the subject regulation until permitted by Congress to do so. We are following this effort and will provide a future update.

Preparation & Compliance

Despite uncertainty as to whether the rule will go into play, covered providers should be proactive and prepare for compliance under the new rule. Noncompliance could subject covered providers to litigation and regulatory investigations. Covered providers should redraft their pre-dispute agreements to comport with the new rule, revise record-keeping policies to ensure maintenance of the records required for submission to the CFPB, and conduct training to apprise representatives of the new rule.

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