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Insights

CFPB Moves to Significantly Restrict the Use of Arbitration Clauses they Consider a "Free Pass"

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The Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) took another step today towards effectively banning the use of arbitration clauses in financial services contracts with the release of their Proposal on Pre-Dispute Arbitration Agreements and its accompanying Discussion Issues for Small Entity Representatives (collectively, the “Proposal”), available by clicking **here**.

The Proposal will impact all covered “consumer financial products and services[1] ” by:

- Prohibiting the use of pre-dispute arbitration agreements in class litigation; and
- Imposing conditions on the use of pre-dispute arbitration agreements by requiring submission of arbitral claims and awards to the Bureau, and requiring public disclosure of an award on the CFPB website.

The Proposal would cover the following consumer financial products and services:

- Extensions of credit by a creditor or credit card issuer under the Truth in Lending Act (15 U.S.C. 1601 et seq.) and the Bureau’s Regulation Z (12 CFR Part 1026);
- Extensions of credit by a creditor under the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.) and the Bureau’s Regulation B (12 CFR Part 1002), or the brokering, servicing, acquiring, or purchasing of any such credit;
- Extending or brokering automobile leases as defined in Bureau regulations (to be codified at 12 CFR 1090.108);
- Providing debt relief services for credit or automobile leases under the Telemarketing Sales Rule (16 CFR Part 310);
- Accounts with depository institutions under the Truth in Savings Act (12 U.S.C. 4301), the Bureau’s Regulation DD (12 CFR Part 1030) and the National Credit Union Administration’s implementing regulations (12 CFR Part 707); and
- Products or services subject to the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.) and the Bureau’s Regulation E (12 CFR Part 1005), transmitting or exchanging funds under Dodd-Frank Act section 1002(15)(A)(iv), or check cashing under Dodd-Frank Act section 1002(15)(A)(vi);

- Obtaining information from a credit reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.) for the purposes of monitoring, on behalf of the consumer, the consumer's credit; and
- Collecting debt related to any of the covered consumer financial products or services.

Announcing the Proposal in a press release titled, "CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers," Director Cordray commented,

> *Consumers should not be asked to sign away their legal rights when they open a bank account or credit card. Companies are using the arbitration clause as a free pass to sidestep the courts and avoid accountability for wrongdoing. The proposals under consideration would ban arbitration clauses that block group lawsuits so that consumers can take companies to court to seek the relief they deserve.*

Cordray's comments leave little doubt as to the CFPB's perspective on the use of arbitration clauses by financial services providers especially when viewed with language from the Proposal itself that provides,

> *In accordance with its authority under section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the Bureau has preliminary determined that a regulation that would prohibit the application of pre-dispute arbitration agreements to class litigation in court would protect consumers, serve the public interest, and be consistent with the Study. This proposal would not prevent consumers and providers of covered consumer financial products and services from agreeing to arbitrate disputes on a class basis, as long as class litigation remains an option. The Bureau believes that consumers and the broader consumer finance market will benefit by allowing consumers to pursue relief for violations of law through class proceedings against providers of covered consumer financial products or services without the impediment of arbitration agreements.*

While this is only the first step[2] before the CFPB would formally propose a regulation for official notice and comment, based on past rulemaking practices and public statements to date on this issue, we expect the Bureau to work towards a final regulation sometime in the next twelve to eighteen months that will significantly impede the ability of financial institutions to use arbitration clauses in many of their current consumer agreements.

Krieg DeVault **Financial Institutions attorneys** are closely monitoring developments associated with both this Proposal and the wide range of other federal regulatory changes currently underway, and are able to answer any questions you may have to ensure your financial institution can manage any associated risk with the rapidly changing regulatory environment.

[1] Covered consumer financial products and services are defined in Dodd-Frank Act section 1002(15)(A), subject to limitations and exceptions set forth in sections 1002(15)(B)-(C), 1027, and 1029 of the Act.

[2] The Small Business Review Panel Process is required pursuant to the Small Business Regulatory Enforcement Fairness Act before the CFPB can move forward with an official proposed rule that would then be open for comment and eventually adoption. A description of the Small Business Review Panel Process was provided by the CFPB with their announcement of the Proposal, and is available at: **http://files.consumerfinance.gov/f/201510_cfpb_fact-sheet-small-business-review-panel-process.pdf**

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