

CFPB Rule Bars the Use of Mandatory Arbitration Clauses to Prohibit Class Actions; Some Members of Congress Vow to Take Action to Reverse

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This week, the Consumer Financial Protection Bureau (CFPB) adopted a final rule prohibiting a broad range of financial firms from using mandatory arbitration clauses to bar class action suits and received wide press coverage. The CFPB announced that this final rule would “restore the ability of groups of people to file or join group lawsuits.” Some in the financial services industry potentially subject to the rule have already issued statements opposing and attacking it and asking that Congress use its statutory authority to reverse the CFPB’s action.

Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) authorized the CFPB to study pre-dispute arbitration provisions. That study was published and submitted to Congress in 2015. Dodd-Frank also authorized the CFPB to issue rules restricting or regulating the use of such arbitration clauses the CFPB determined to be in the public interest and in the interests of consumers. (After the passage of Dodd-Frank, of course, the Supreme Court issued its decision in [AT&T v. Concepcion](#), which held that the Federal Arbitration Act of 1925 preempted state laws prohibiting class-wide arbitration, a decision which some viewed as increasing the use of such provisions in financial services contracts.)

What’s The New Rule

The rule has two main substantive provisions. First, the rule prohibits covered entities from using pre-dispute arbitration provisions to block consumer class actions in court and requires most covered entities to insert language into their agreements reflecting this. The rule requires that the arbitration clause state that “[w]e 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 further states that covered entities using arbitration clauses cannot “seek a stay or dismissal” of particular claims or the entire class action unless, generally, the court has ruled that the action may not proceed as a class

action (seemingly that a court has found that a case should not be certified as a class under Federal Rule of Civil Procedure 23). Second, the rule would require that entities using arbitration clauses in their agreements submit certain information to the CFPB, which the CFPB would use to determine if “further” action will be necessary in the future.

Who is Subject to the New Rule

According to the CFPB, the rule applies to “providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money...”

Effective Date

The rule is not retroactive and applies only to products or services provided to consumers at least 60 days after publication in the Federal Register.

Reaction

Reaction to the rule, as one might imagine, has been swift and heated. Some have argued that Congress should use the Congressional Review Act which, they argue, allows Congress to reverse the CFPB’s rule – but doing so would require swift action, as the act requires reversal within 60 days of a rule’s publication. According to press reports, House Financial Services Chairman Representative Jeb Hensarling (R-Texas) stated that he would work to do just that, calling the new rule “anti-consumer” and stating that “Congress must work with President Trump to make good on this mandate by fundamentally reforming the CFPB and dismantling the Administrative State.” Senator Elizabeth Warren (D-Mass.), press reports indicated, said that the rule presents Republicans with a choice as to whether to protect the interests of their constituents. The American Bankers Association and the United States Chamber of Commerce have also weighed in. Given the short turnaround time for Congress act and a lack of early partisan dispute, we anticipate a heated battle in Congress. (There is, of course, also, [continued litigation](#) over whether the structural set-up of the CFPB itself is constitutional, a question which had been working its way through the courts already.)

The lengthy statement issued with the final rule can be found at

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf, with the final rule itself reproduced at pages 747 to 775, where those interested in the final rule can read all the details, as the summary above is necessarily general.

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Topics

Dodd-Frank, Mandatory Arbitration, Dodd-Frank Wall Street Reform And Consumer Protection Act, Federal Arbitration Act, Trump, CFPB