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CFPB Moves to Eliminate Class Action Waivers in Arbitration Clauses, but Congress Looks to Keep the Rule Off the Books

On July 10, 2017, the Consumer Financial Protection Bureau (CFPB) unveiled a long-awaited and highly contentious final rule to severely curtail the scope of arbitration clauses in consumer financial contracts. While the rule is relatively straightforward and does not constitute an outright ban on arbitration clauses, the impact of the two major changes included and breadth of products and services that would need to comply cannot be understated.

First, the final rule prohibits providers of consumer financial products and services from including class action waivers in pre-dispute arbitration agreements moving forward. In fact, the rule requires most providers to insert specific language into their agreements explicitly acknowledging that limitation. Second, the rule requires providers using pre-dispute arbitration agreements to provide certain records to the CFPB, which it intends to make public. Providers offering consumer loans, card products, automobile leases, money transfers, credit monitoring, and third-party billing services, among many other products and services, would be subject to these new requirements.

The final rule will take effect 60 days after it is published in the *Federal Register* and it will cover agreements that are entered into beginning 180 days after the rule is published (essentially a 240-day grandfather period.)

The final rule will come as little surprise to many given that pre-dispute arbitration clauses have been a target of the CFPB since its inception. In fact, the CFPB was required as part of the Dodd-Frank Act to examine such clauses and further authorized under the law to limit or prohibit their use for consumer financial products and services. The CFPB began its march toward curtailing arbitration clauses with a public inquiry in April 2012, which was followed by field hearings, studies, and a proposed rule in the years that followed. While the CFPB's announcement this week culminates a lengthy rulemaking process, its timing may prove to be strategic. There had been a train of thought that the CFPB would avoid issuing an arbitration rule out of concern the Republican-controlled Congress would move to strike it down. However, there are many that believe the CFPB acted with the belief Republicans are too distracted and disjointed to successfully mount such a legislative effort.

While only time will tell, Republicans in Congress are quickly mobilizing around an effort to use the Congressional Review Act (CRA) to block the CFPB's final rule. The CRA is a powerful oversight tool that provides Congress expedited procedures to consider so-called "resolutions of disapproval" to block major regulations issued by federal agencies, including independent agencies like the CFPB. Republicans successfully employed the CRA over the first five months of this year to block 14 different regulations issued toward the end of President Obama's tenure. Previously, the CRA had been utilized successfully just once in its more than 20 years of existence.

The CRA is advantageous in that it prohibits filibusters and amendments on resolutions of disapproval when considered in the Senate, therefore allowing regulations to be overturned with a simple majority in both chambers. Given Republican control of Congress, a resolution of disapproval blocking the CFPB's arbitration rule could be enacted without any Democratic support. Moreover, once Congress passes a resolution disapproving of a regulation, the authoring agency is barred from promulgating a substantially similar regulation ever again in the future unless expressly given the authority to do so again by Congress.

However, the CRA is limited in that Congress has only 60 legislative days (after a final regulation is published in the *Federal Register*) to move a resolution of disapproval before the expedited procedures expire. While that window could stretch through the end of the year given the current congressional calendar, there are many other high-profile issues on Congress' plate and proponents of the final rule are already mobilizing in defense of the rule. That being said, opponents of the rule have been charging hard out of the gate.

On the same day as the final rule was announced, House Financial Services Committee Chairman Jeb Hensarling (R-TX) said it "should be thoroughly rejected by Congress under the Congressional Review Act." Hensarling's House Republican colleagues have largely piled on and his counterpart on the other side of the Capitol, Banking Committee Chairman Mike Crapo (R-ID), indicated on Tuesday intent to lead the effort to block the rule in the Senate. Even CFPB Director Richard Cordray acknowledged the likelihood of such an effort in remarks accompanying the announcement of the rule: "I am, of course, aware of those parties who have indicated they will seek to have the Congress nullify this new rule. That is a process that I expect will be considered and determined on the merits."

While the CRA is a powerful option in the toolkit of Congress, it should be noted that there are other avenues that could potentially prevent the final rule from becoming enforceable. For example, the Financial CHOICE Act, which would have prohibited the CFPB from issuing such a rule, has already passed the House of Representatives—though its progress has come to a halt in the Senate. Additionally, numerous legal challenges, such as those challenging whether the independent structure of the CFPB is constitutional, have created uncertainty about the agency's future and Director Cordray is rumored to be eyeing an exit from the CFPB to run for governor in his home state of Ohio. A Republican-appointed head of the CFPB would almost certainly bring a much different lens to regulation arbitration clauses.

This rule has the potential to dramatically impact numerous industries, including some that may not view themselves as being in the financial services sector. Companies should evaluate how they will be impacted and consider whether this rule should be supported or overturned. Either way, it is sure to garner attention. In the meantime, companies should note that they have the grandfather period, which would allow companies to maintain the arbitration provisions in their agreements so long as the agreements are in place prior to the expiration of the period.

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