

# Client Alert

National Class Action Practice Group  
Data Privacy & Security Practice Group

May 11, 2016

## CFPB Proposes Rule Prohibiting Class Action Waivers And Requiring Reporting Of Arbitration Information

On May 5, 2016, the Consumer Financial Protection Bureau (“CFPB”) announced a proposed rule that would ban the use of class action waivers in agreements between consumers and certain providers of consumer financial products or services.<sup>1</sup> The CFPB’s proposal also would mandate new disclosures in agreements with consumers that include arbitration provisions and would require the covered providers to submit documentation to the CFPB for arbitrations taking place pursuant to agreements entered into with consumers after the compliance date.

The proposed rule, which was expected in light of the CFPB’s prior announcement that it intended to implement such a regulation, is likely to increase the risk of class action litigation and future regulatory actions for companies providing consumer financial products or services. The CFPB’s proposal further could impose added costs on these companies by requiring them to revise language in consumer agreements and ensure compliance with the mandate to disclose arbitration documentation to the CFPB.

### Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) directed the CFPB to study the effect of pre-dispute arbitration agreements relating to consumer financial products or services.<sup>2</sup> In March 2015, the CFPB completed a study on these agreements and presented the results to Congress, which authorized the CFPB to issue regulations restricting or prohibiting the use of pre-dispute arbitration agreements if the CFPB found such regulations to be in the public interest, for the protection of consumers, and consistent with the study’s findings.<sup>3</sup>

Late last year, the CFPB issued an “outline of proposals” that it intended to implement regarding pre-dispute arbitration agreements, which contemplated a proposal to ban class action waivers.<sup>4</sup> The recent proposed rule is the CFPB’s next step in implementing its contemplated regulation.

### The CFPB’s Proposal

The current proposal essentially consists of three parts. First, the rule would ban the use of class action waivers in certain pre-dispute arbitration

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agreements for consumer financial products or services.<sup>5</sup> Such waivers previously have proven effective in avoiding or halting consumer class action litigation for claims that arise out of written agreements. Typically, these consumer agreements would include a requirement for all disputes between the parties to be submitted to arbitration and an express ban on claims proceeding on a class basis. The proposed rule would strip the effect of these provisions in preventing disputes with consumers from proceeding as part of class action litigation.

Second, the rule would require that any covered pre-dispute arbitration agreement include language disclosing to the consumer that it does not prohibit the consumer's ability to initiate or participate in class action litigation. Specifically, the required disclosure would state: "We agree that neither we nor anyone else that later becomes a party to this pre-dispute arbitration agreement will use it 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 even if you do not file it."<sup>6</sup>

Finally, the rule would require certain providers of consumer financial products or services to submit to the CFPB documentation regarding arbitration proceedings taking place pursuant to agreements with consumers entered into following the compliance date.<sup>7</sup> The documentation required to be provided to the CFPB would include (1) the initial claim and any counterclaim in the arbitration; (2) the pre-dispute arbitration agreement; (3) the award issued, if any; (4) "any communications from the arbitrator . . . relating to a refusal to administer or dismissal of a claim due to the provider's failure to pay required fees"; and (5) "any communications related to a determination that an arbitration agreement does not comply with the administrator's fairness principles."<sup>8</sup> The CFPB intends to publish this information on its website (in redacted form), as well as to monitor the information for purposes of potentially taking further action against covered providers of consumer financial products or services.<sup>9</sup>

## What type of agreements are covered by the proposed rule?

The proposed rule would apply to agreements with consumers for a broad range of financial products or services.<sup>10</sup> The CFPB's announcement states that the rule is intended to apply to consumer agreements "in the core consumer financial markets of lending money, storing money, and moving or exchanging money."<sup>11</sup> This would include consumer agreements for checking or savings accounts, credit cards, certain non-mortgage consumer loans,<sup>12</sup> and money transfer services. The rule also would cover consumer agreements with entities engaged in consumer debt management, collection, and settlement, as well as to consumer agreements with entities providing directly to consumers any consumer reports, credit scores, or other information from a consumer report (with certain exceptions).<sup>13</sup>

These listed categories, of course, are just examples of the agreements covered by the broad definition in the proposed rule. The full scope of the covered agreements is described in the CFPB's 377-page proposal.

## When would the rule apply?

The proposed rule would not apply retroactively to pre-existing consumer agreements or to those consumer agreements entered into prior to a grace period following the effective date of the final rule. Under the Dodd-Frank Act, the CFPB's regulations apply to "any agreement between a consumer and a covered person entered into after the end of the 180-day period beginning on the effective date of the regulation."<sup>14</sup> The current proposed effective date is 30 days following publication of the final rule. Thus, the proposed rule would apply to any agreements within its scope that are entered into after 210 days following publication of the final rule in the Federal Register.<sup>15</sup>

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The proposed rule, however, is not yet in final form and would not be published in such form until after the notice and comment period for the current proposal. Accordingly, the proposed rule would not take effect until sometime in 2017.

## What is the next step?

The CFPB is requesting public comment on various aspects of its proposed rule. Per the recent announcement, the comment period will be open for 90 days following publication of the proposal in the Federal Register. Those interested in commenting on the proposal should immediately take steps to do so. King & Spalding's National Class Action and Data Privacy & Security Practice Groups have deep experience litigating class action waivers, extensive experience representing CFPB-regulated clients, and are prepared to advise and consult with clients regarding the potential impact of the CFPB's proposal and strategic options relating to it.

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*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.*

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<sup>1</sup> See Bureau of Consumer Financial Protection, CFPB-2016-0020, Proposed Rule 12 C.F.R. Part 1040 – Arbitration Agreements (May 5, 2016) (“Proposal”), available at [http://files.consumerfinance.gov/f/documents/CFPB\\_Arbitration\\_Agreements\\_Notice\\_of\\_Proposed\\_Rulemaking.pdf](http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf)

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 3, 7.

<sup>4</sup> *Id.* at 81.

<sup>5</sup> *Id.* at 201.

<sup>6</sup> *Id.* at 201, 223, 361.

<sup>7</sup> *Id.* at 201.

<sup>8</sup> *Id.* at 140-41.

<sup>9</sup> *Id.* at 140-47.

<sup>10</sup> *Id.* at 357-60.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> Pre-dispute arbitration agreements already are prohibited by the Dodd-Frank Act. *See* 15 U.S.C. § 1639c(e).

<sup>13</sup> *See* Proposal at 163, 165.

<sup>14</sup> *Id.* at 245.

<sup>15</sup> *Id.* at 364.