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Bureau of Consumer Financial Protection Issues New Arbitration Rule; U.S. House of Representatives Rejects It

General Commercial Litigation Alert **| August 28, 2017**

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On July 19, 2017, the Bureau of Consumer Financial Protection (CFPB) issued its final rule to regulate arbitration agreements for certain consumer financial products and services pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. The regulation becomes effective September 18, 2017 and will apply to pre-dispute arbitration agreements entered on or after March 19, 2018.

The CFPB 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." More specifically, the rule applies to providers:

1. engaging in extending consumer credit,
2. extending or brokering automobile leases,
3. providing services to assist with debt management,
4. providing a consumer report directly to a consumer,
5. providing accounts under the Truth in Savings Act,
6. transmitting or exchanging funds, and
7. collecting debt arising from the covered products or services.

Excluded from the rule are:

1. entities regulated by the Securities and Exchange Commission or a state securities commission as either a broker dealer or an investment advisor,
2. entities regulated by the Commodity Futures Trading Commission,
3. federal agencies,
4. any state, tribe or other person that qualifies as an "arm" of a state or tribe under federal sovereign immunity laws,
5. entities that provide services to no more than 25 consumers in the current and preceding calendar years,
6. merchant retailers or other sellers of non-financial goods or services,
7. employers providing an otherwise covered service as an employee benefit, and
8. entities excluded from the CFPB's rulemaking authority.

The rule has two components to it. First, the provider cannot, through a pre-dispute arbitration agreement, prohibit the consumer from participating in class actions filed in court. In fact, pre-dispute arbitration clauses must contain an explicit statement to that effect. Second, with respect to disputes that are subject to arbitration, the providers must submit certain arbitral records to the CFPB so that the bureau can monitor the proceedings in an effort to prevent unfairness to consumers. The complete text of the rule can be found at 82 Fed. Reg. 33,210 (to be codified at 12 C.F.R. § 1040).

A few days after the CFPB announced its final rule regarding pre-dispute arbitration clauses the United States House of Representatives used the Congressional Review Act to reject the rule through a legislative veto by a 231-190 vote along party lines. A similar measure was introduced in the Senate but a vote has not taken place. If the Senate also vetoes the rule – and the President agrees with Congress – the Congressional Review Act will bar the CFPB from issuing a substantially similar rule again. If, however, there is no Senate veto before September 18, 2017, the CFPB rule will go into effect.

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