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CFPB Allies and Opponents Clash Over Arbitration Proposal

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The CFPB's recently-announced proposal to limit arbitration clauses in consumer finance contracts has drawn thousands of comments from groups and individuals on both sides of this issue. The deadline for submitting comments was August 22, 2016. To date, the Bureau is reporting more than 13,000 comments.

The CFPB's proposed rule, announced in May, has two main features: (1) it would prohibit financial companies from using pre-dispute arbitration agreements to block consumer class actions in court and would require them to insert language into their arbitration agreements reflecting this limitation, and (2) it would require companies that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the Bureau.

The scale of public comments is not surprising given the potential reach of the proposed rule. The CFPB has stated that the rule would apply to "most consumer financial products and services that the CFPB oversees, including those related to the core consumer financial markets that involve lending money, storing money and moving or exchanging money." Among the products at issue are credit cards, automobile leases, debt management services, consumer reporting, checking and savings accounts, check cashing, payment processing, payday lending and debt collection services.

Financial industry groups strongly oppose the proposed rule, as do those who contend it will benefit trial lawyers at consumers' expense. The American Bankers Association, Consumer Bankers Association and Financial Services Roundtable submitted a joint comment sharply critical of the rule, arguing it is "not in the public interest or for the protection of consumers" and "not consistent with the Bureau's March 2015 empirical Study of consumer arbitration." Citing the Bureau's own estimate that providers who currently use arbitration agreements will "incur between $2.62 billion and $5.23 billion on a continuing five year basis in defending against an additional 6,042 class actions that will be brought," the joint comment concludes that its "consumers…will truly suffer" as they will be "saddled with higher prices and/or reduced services."

The U.S. Chamber of Commerce is similarly urging the CFPB to abandon its current proposal, claiming that "rather than protecting consumers, the rule will harm them—and the public interest—by elevating the interests of the lawyers who benefit from class actions above those of consumers." The Chamber's letter argues that the proposed rule exceeds the Bureau's authority: "If promulgated, it would violate the procedural and substantive limits on the Bureau's authority imposed by both the Dodd-Frank Act and Administrative Procedure Act."

Advocates for industry reform, including Americans for Financial Reform (AFR), a coalition of consumer, civil rights, labor, faith-based and other groups, favor the proposed rule. According to the AFR, mandatory arbitration "effectively eradicates relief" for consumers. The CFPB's proposal would "limit forced arbitration by restoring consumers' right to join together in a class action and add much-needed transparency to individual proceedings by establishing a public record of claims." The AFR urges the CFPB to go even further by prohibiting arbitration in individual cases, as well as in class actions.

Lawmakers have come out on both sides of the issue, as have academics. A group of 19 state attorneys general submitted a letter claiming that the proposed rules "will restore significant and much-needed consumer

protections that have been eroded through the inclusion by financial services companies of mandatory arbitration clauses in their contracts with consumers."

Opponents of the proposed rule will likely challenge the rule and/or the Bureau's authority to promulgate the rule. Given the CFPB's own estimate of the financial impact of the proposal, and given the broad scope of the rule, industry groups may not see much choice. The U.S. Supreme Court has recently upheld class action waivers in agreements to arbitrate in such cases as *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Yet it could take years before any challenge reaches the Supreme Court. In the meantime, providers of consumer financial products need to prepare to revise their contracts and to comply with the proposed rule's reporting requirements about arbitration claims. Providers must also plan for the possibility of additional class action lawsuits and increased legal and compliance costs.