

ALERT

CFPB Launches Assault on Consumer Arbitration Clauses

May 5, 2016

Today, the Consumer Financial Protection Bureau (CFPB) released a Notice of Proposed Rulemaking (NPRM) to ban consumer arbitration clauses in many consumer contracts, effectively seeking to undo decisions of the Supreme Court of the United States upholding such clauses under the Federal Arbitration Act (FAA). If adopted, the proposed ban could affect numerous companies that are otherwise not subject to CFPB oversight or have only a tenuous connection to financial services. For example, by targeting mobile billing and payment practices and technology, the CFPB aims broadly to discourage the use of arbitration, seemingly beyond its core mandate.

Background

Section 1028(a) of Dodd-Frank requires the CFPB to study and report to Congress on the use of certain pre-dispute arbitration agreements. Section 1028(b) of the Act grants the CFPB “further authority” to restrict or prohibit arbitration agreements if doing so “is in the public interest and for the protection of consumers.” In 2015, the CFPB issued its report, which was critical of the efficacy and fairness of consumer arbitration clauses.

Proposed Rule

The NPRM proposes a rule to prohibit covered providers of certain consumer financial products and services from using consumer arbitration agreements that limit the consumer from filing or participating in a class action with respect to the covered product or service.

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Practice Areas

Enforcement of Arbitration Clauses
Telecom, Media & Technology

According to the CFPB, arbitration clauses are “contract gotchas” that harm consumers and allow companies to “sidestep the legal system, avoid accountability, and continue to pursue profitable practices that may violate the law and harm countless consumers. The CFPB’s proposal is designed to protect consumers’ right to pursue justice and relief.”[1]

The most notable provisions in the NPRM include:

- Prohibiting providers from using a pre-dispute arbitration agreement to block consumer class actions in court;
- Requiring companies including arbitration clauses in their consumer contracts to use specific language to make clear that the contract does not prevent class action participation;
- Reserving to the CFPB an ongoing role in dispute management, by requiring companies with arbitration clauses to submit to the CFPB claims, awards, and certain related materials filed in arbitration cases;
- Considering the publication of collected information so the public can monitor the arbitration process.

Under the NPRM, a wide array of businesses would be banned from employing arbitration as an alternative to expensive and burdensome class-action litigation. These include, for example, companies that (1) engage in most types of consumer lending, such as making secured or unsecured loans or issuing credit cards, and the extension and brokerage of certain automobile leases; (2) store funds or other monetary value for customers; and (3) provide consumer services related to the movement or conversion of money.

The NPRM also addresses wireless service contracts and third party billing arrangements employed by telecommunications providers. Other language would seem to impact emerging mobile payment technology and applications. Given the breadth and complexity of the definitional issues, the proposed rules could impact numerous entities as well as their partners, vendors, and service providers.

The CFPB is not the only federal agency that has launched an assault on arbitration. The Federal Communications Commission, for its part, has sought comment in a pending NPRM on Internet privacy whether it should ban the use of arbitration clauses by Internet service providers.[2]

Next Steps

Comments must be received within 90 days after publication in the Federal Register.

Wiley Rein’s team has been involved in all aspects of ongoing battles over arbitration, litigating major cases and positioning arguments at the Supreme Court, as well as helping companies develop arbitration clauses that have been upheld in state and federal courts across the country.

[1] May 5, 2016 Press Release, CFPB, <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>.

[2] See NPRM at ¶ 274.