

Guest Commentary

CFPB Proposed Rule Restricts Arbitration Clauses In Consumer Contracts

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The Consumer Financial Protection Bureau released a much anticipated proposed rule regarding mandatory arbitration clauses in consumer financial services agreements on May 5, 2016. While the proposed rule does not wholly ban the use of arbitration clauses, it prohibits financial companies from including class action waivers in arbitration agreements, thereby allowing consumers to collectively sue companies such as banks or credit card issuers. If finalized in its current form, the proposed rule could lead to a dramatic increase in class action litigation against financial services providers.

Under the proposed rule, companies that include arbitration clauses in their contracts must

explicitly state that the clause cannot prevent consumers from being part of a class action lawsuit. The proposed rule provides specific language reflecting this limitation that must be included in arbitration agreements. The proposed rule also requires companies that use arbitration agreements to submit records regarding arbitral proceedings to the CFPB.

The proposed rule would apply broadly to all financial companies that lend, store, move or exchange money; including banks, credit card issuers, payday lenders, automobile lessors, debt collectors, student loan lenders and other types of companies involved in consumer credit. The CFPB already prohibits mandatory arbitration clauses for certain consumer credit products such as mortgage and home equity loans and certain

transactions involving military service members. Financial services companies argue that the proposed rule will be a windfall for plaintiffs' attorneys and lead to a proliferation of frivolous class action lawsuits while not providing much benefit for individual consumers.

The proposed rule could face a possible legal challenge because it contradicts U.S. Supreme Court precedent favoring the use of arbitration clauses. In *AT&T Mobility LLC v. Concepcion*, the Supreme Court upheld the use of arbitration clauses in consumer contracts that preempt class action lawsuits. In that case, the court noted that consumers are often better off with arbitration provisions than as participants in class action lawsuits. In two cases that followed, *American Express Co. v. Italian Colors Restaurant*

and *DIRECTV, Inc. v. Imburgia*, the Supreme Court continued to uphold the use arbitration clauses to prevent class actions. Another potential legal challenge to the proposed rule involves the CFPB's 2015 Arbitration Study, on which the CFPB relied when drafting the proposed rule. The industry claims the study was fundamentally flawed and that conclusions made by CFPB in the proposed rule are not supported by data in the study.

Any final rule likely will not go into effect until at least mid-2017. Although it is not clear that the proposed rule will survive legal challenge, companies should prepare for the likelihood that the ways in which they use arbitration clauses may change. Companies that currently use arbitration clauses should consult with counsel to consider whether they should redraft any portion of their arbitration clauses. Companies also should consider actions they

could take to reduce their class action litigation risk. Consistent with the Dodd-Frank Act, the proposed rule would only apply to agreements entered into after the end of the 180-day period following the effective date of the regulation. Accordingly, financial companies that do not presently use arbitration agreements may consider including such clauses in their current agreements. ■

Editor's Note: This article was submitted by Husch Blackwell, an MBA associate member. Meghan Kloth Rohlf advises clients on federal and state regulatory and compliance issues, with a focus on consumer lending. Jeff Heuer counsels financial services companies in the Code of Federal Regulations' "alphabet soup," new product development and review, and consumer lending programs. For more information, email meghan.rohlf@huschblackwell.com or jeff.heuer@huschblackwell.com.

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Bill Ratliff To Return For 2017 Session

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House bill sponsors include Reps. Tony Dugger, Sandy Crawford, Travis Fitzwater, Lincoln Hough, Joe Don McGaugh, Robert Cornejo, Denny Hoskins, Tom Flanigan, Caleb Jones and Gary Cross.

I'd also like to say a few special words about a representative who is term-limited. Rep. Tony Dugger from Hartville served his final day during the regular session. Tony is a great friend of the banking industry.

He chaired the House Banking Committee for two years and the Select Committee on

Financial Institutions for two years. There's almost no way to put into words how much he accomplished during his eight years in the Missouri House. The wall on his office is full of signed bills he's guided through the process. Thanks, Tony, for your public service. You will be missed.

I'm also pleased to report that long-time MBA lobbyist Bill Ratliff has agreed to return to work for the 2017 legislative session. Believe it or not, we're already preparing for another session. Until then, stay tuned for updates on the governor's actions on our agenda. ■