

CFPB's Proposed Rule Would Ban Class Action Waivers in New Contracts, Would Require New Language and Reporting

McGlinchey Consumer Financial Services Alert

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Today, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") published a **Proposed Rule** that would prohibit providers of consumer financial products or services, and their affiliates, from using mandatory arbitration clauses that prevent class action lawsuits.

Although this Proposal is not an outright ban on arbitration agreements, it would impose both substantive restrictions and reporting requirements on these providers (broadly defined to include almost all entities within the Bureau's jurisdiction).

For providers who choose to continue using arbitration clauses in their agreements, the Proposal would require specific language to be included in these provisions and would further oblige providers to submit their arbitration records to the CFPB, including all claims filed and awards issued in arbitration cases.

Prohibition of Class Action Waivers in Arbitration Agreements

First and most significantly, the CFPB's Proposed Rule would ban providers of consumer financial products and services from putting mandatory pre-dispute arbitration clauses that prohibit class action lawsuits in new contracts. In its 377 page Proposal, the CFPB cites extensively its **March 2015 Arbitration Study** in defense of its decision to prohibit class action waivers. However, under the Proposal, companies would still be allowed to include arbitration clauses in their contracts, provided these clauses do not bar consumers from bringing group claims through the arbitration process.

Specifically, the Proposal provides that:

A provider shall not seek to rely in any way on a pre-dispute arbitration agreement entered into after [211 days publication of the Final Rule in the Federal Register] with respect to any aspect of a class action that is related to any of the [covered] consumer financial products or services . . . including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action

This Proposal would be prospective in nature and would apply only to agreements entered into after the end of the 180-day period beginning on the regulation's effective date. We predict the Final Rule to be published this fall at the earliest, which would mean that this Proposal would only affect contracts entered approximately seven months after the date of publication.

Newly Required Provisions in Arbitration Agreements

The Proposal also imposes affirmative requirements on providers who choose to continue including arbitration provisions in their agreements. In all arbitration agreements covered by the Proposal, providers would be required to insert language that explicitly states that the arbitration agreement does not stop the consumer from being part of a class action in court. In fact, the Proposal provides the following specific language to be used:

We agree that neither we nor anyone else will use this agreement 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.

Going forward, this revision would require companies to both re-draft their own arbitration agreements and also to review the arbitration provisions in contracts they purchase for compliance with the Proposed Rule.

Mandatory Reporting Requirements

Additionally, the Proposal would require providers who rely on arbitration clauses to compel arbitrations to submit to the CFPB certain arbitral records. These records would include specific materials that are filed in arbitration cases, including:

1. The initial arbitration claim filed and any counterclaim
2. The pre-dispute arbitration agreement
3. The judgment or award issued in arbitration

The Proposal indicates that the CFPB would also collect correspondence from arbitration administrators regarding a company's non-payment of arbitration fees and its failure to adhere to the arbitration forum's standards of conduct.

It appears that the CFPB plans to use this information to monitor arbitrations, and it is also considering publishing these materials on its website so that the public has the ability to monitor the arbitration process as well.

The CFPB has invited the public to comment on the Proposal for 90 days, and we encourage comments from all affected companies and providers. Please contact us if you need more information on the comment process.

We will continue studying the Proposed Rule, along with the **CFPB's Small Business Review Panel Report** to Director Cordray on the SBREFA Panel regarding arbitration, also released today, and will keep you informed regarding any new developments.

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