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CFPB ISSUES FINAL ARBITRATION RULE BANNING WAIVER OF CLASS ACTION IN PRE-DISPUTE ARBITRATION CLAUSES

Yesterday the CFPB issued a final rule on arbitration ("Rule"). The Rule is similar to the proposed rule released in May of 2016 in that the Rule does not prohibit all pre-dispute arbitration clauses, but does prohibit pre-dispute arbitration clauses that waive participation in a class action. The Rule applies generally to any person offering or providing consumer financial products or services as defined by the Dodd-Frank Act, including extensions of credit. "Pre-dispute arbitration agreement" means an agreement between a provider and a consumer providing for arbitration of any future dispute between the parties.

Under the Rule, a pre-dispute arbitration agreement for a product or service covered by the Rule must state:

"We agree that neither we nor anyone else will rely on 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 filed by someone else."

When the pre-dispute arbitration agreement is for multiple products or services, only some of which are covered by the Rule, the following alternative statement may be used:

We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. The following provision applies only to class action claims concerning the products or services covered by that Rule: We agree that neither we nor anyone else will rely on 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 filed by someone else."

Although the Rule does not impact existing pre-dispute arbitration clauses, the Rule attempts to apply the new restrictions to existing contracts if the contract changes hands. The Rule provides that when a pre-dispute arbitration agreement exists in a contract that is acquired by a new company, the company that acquires the contract must amend the contract to contain the relevant language (see agreement language above) or provide the consumer a notice that includes the following language within 60 days of entering into

the pre-dispute arbitration agreement:

"We agree not to rely on any pre-dispute arbitration 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 filed by someone else."

When the pre-dispute arbitration agreement is for multiple products or services, only some of which are covered by the Rule, the notice may include the following optional additional language:

"This notice applies only to class action claims concerning the products or services covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau."

The rule requires companies that utilize arbitration clauses to submit to the CFPB information on claims, awards and other information related to arbitration cases. These records will be published on a publically available website that the CFPB will establish by July 1, 2019. The CFPB will publish details of how providers should comply with these reporting requirements.

The CFPB issued the rule under its Dodd Frank authority. Per Dodd Frank, the CFPB was directed to conduct a study of, and provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services. 12 U.S.C. § 5518(a). In order to meet the rulemaking standard in the Dodd Frank Act, the resulting CFPB Rule must be in the public interest and for the protection of customers. The findings in the Rule must be consistent with the CFPB study. 12 U.S.C. § 5518(c).

The CFPB's own study does not support the Rule. The study revealed that arbitration is faster, averaging 2 to 7 months, versus class action lawsuits which average two or more years. The study also found that consumers do not understand arbitration, but failed to ask if consumers understand litigation. This lack of correlation between the study and the resulting rule is likely to be the basis for lawsuits challenging the Rule's validity.

Additionally, Congress may overturn the rule via the Congressional Review Act, which allows legislators to reverse finalized rules within a specific timeframe with a simple majority vote.

While the rule is effective on the 60th day after its publication in the Federal Register, it only applies to pre-dispute arbitration

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agreements for covered products or services entered into on or after the 241st date after publication in the Federal Register (the compliance date).

Please contact us to address how the Rule impacts your business and what steps you can take prior to its effective date. We will continue to monitor further developments and legal/legislative challenges to the Rule. □

✧ *Elizabeth Anstaett and Emily Cellier*