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See You in Court: CFPB Final Arbitration Rule Opens the Door to Class Action Lawsuits

By [Fintech and Payments](#) & [Complex Litigation and Arbitration](#) Practices

Summary of the Final Rule

In the heat of the July summer in D.C., the CFPB has issued its long-awaited Final Rule regulating arbitration agreements in certain consumer financial services contracts. The Final Rule, which is scheduled to become effective on September 17, 2017, applies to companies that offer the core consumer financial products and services, such as lending, storing, and moving or exchanging money.

The Final Rule imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered financial services providers. First, the Final Rule prohibits the use of a pre-dispute arbitration agreement to bar consumers from filing or participating in a class action for anything related to a consumer financial product or service. Second, the Final Rule requires covered providers to submit specified arbitral and court records to the CFPB.

Consistent with the Dodd-Frank Act,¹ the final rule applies only to agreements entered into after the compliance date of March 19, 2018.

The Substance of the Final Rule

The Final Rule is substantially similar to the Proposed Rule issued in May 2016, which we discussed in [our previous Stay Current](#). The Final Rule applies to pre-dispute arbitration agreements, or language in contracts committing (or permitting either party) to resolve future disputes in arbitration rather than in court.

Scope of Coverage

The Final Rule applies to covered “providers,” defined to include persons or entities who engage in covered consumer financial activities, as well as their affiliates when the affiliate is acting as a service provider.² Covered providers include those engaged in the following consumer financial activities:

- **Consumer credit decisions:** Extending consumer credit, participating in consumer credit decisions, or referring or selecting creditors for non-incident consumer credit, each when done by a creditor under Regulation B implementing the Equal Credit Opportunity Act (ECOA), acquiring or selling consumer credit, and servicing an extension of such credit;
- **Auto leasing:** Extending or brokering automobile leases;



- **Debt management or settlement:** Providing services to assist with debt management or debt settlement, modify the terms of any extension of consumer credit, or avoid foreclosure;
- **Credit reporting:** Providing directly to a consumer a consumer report as defined in the Fair Credit Reporting Act, a credit score, or other information specific to a consumer from a consumer report, except for adverse action notices provided by an employer;
- **Consumer accounts and remittance transfers:** Providing accounts under the Truth in Savings Act and accounts and remittance transfers subject to the Electronic Fund Transfer Act;
- **Certain fund transfers and payment processing activity:** Transmitting or exchanging funds (except when integral to another product or service not covered by the proposed rule), certain other payment processing services, check cashing, check collection, or check guaranty services consistent with the Dodd-Frank Act;
- **Debt collection:** Collecting debt arising from any of the above products or services; and
- **PrePaid Cards:** General-purpose reloadable prepaid cards can be sold in pre-rule printed packages, even if non-compliant with the rule, provided consumers are sent a compliant agreement as soon as consumers register their cards and future contracts adhere to the rule.

The rule specifically exempts the following persons and entities from coverage:

- **Securities:**
 - A person regulated by the SEC.
 - A person regulated by a state securities commissioner as a broker dealer or investment adviser.
- **Commodities:**
 - A person regulated by the CFTC.
- **Government Agencies:**
 - A federal agency.
 - A state, federally recognized Indian tribe, or other person with federal sovereign immunity.
- **Auto Dealers, Attorneys, and Real Estate Agents:**
 - A person not subject to the CFPB's rulemaking authority.



- **Merchants:**
 - Merchants, retailers, or other sellers of nonfinancial goods to the extent they (i) offer or provide consumer credit and are not subject to the CFPB’s rulemaking authority, or (ii) purchase or acquire such extension of consumer credit.
- **Employers:**
 - An employer providing the covered product or service to an employee as an employee benefit.
- **Certain Small Businesses:**
 - A person that provides the product or service to 25 or fewer consumers each year.

Arbitration Agreement Restrictions

The Final Rule requires that, upon entering into a pre-dispute arbitration agreement on or after the compliance date, a provider must ensure that certain language set forth in the Rule is included in the agreement. Generally, the required language informs consumers that the agreement may not be used to block class action lawsuits. If such an agreement does not already contain the language required by the Rule, the provider must amend the agreement to include language required by the Rule or provide a written notice to each consumer subject to the agreement within 60 days of entering into the pre-dispute arbitration agreement.

Will the Final Rule Be Thrown Out?

Congressional Review Act

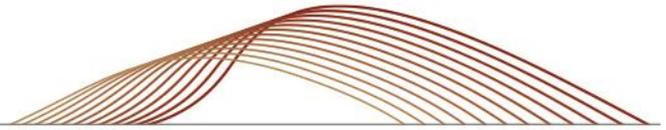
The process of rescinding the rule using the Congressional Review Act (“CRA”) has already begun. Senate Banking Chairman Mike Crapo (R-ID) is planning to introduce a resolution under the CRA to overturn the rule and Senator Bob Corker (R-TN) has publicly stated that he will back the resolution when it is introduced. Moreover, in the House, legislation has already been dropped to use the CRA to repeal the Final Rule.³

The CRA provides Congress with 60 legislative days to review a rule (after it has been received by Congress) and use the Act to rescind the rule by simple majority votes in both the House and Senate.

If effective, this would be the first rule issued under the Trump Administration to be rescinded pursuant to the CRA. The previous uses of the CRA rolled back Obama Administration regulations.

Financial Stability Oversight Council

In addition to Congress, the Financial Stability Oversight Council (“FSOC”) may weigh in on the matter. Treasury Secretary Steven Mnuchin, who chairs the FSOC, has the power to stay the rule unilaterally within 10 days of publication of the Final Rule. The FSOC can veto the rule with a two-thirds vote. So far, Keith Noreika, Acting Comptroller of the Currency—whose office is one of the voting members of FSOC—has publicly raised concerns about the rule and its implications on the safety and soundness of the U.S. banking system as multiple litigations over the same conduct could adversely impact banks. In response, CFPB Director Richard Cordray has pointed out that the Office of the Comptroller of the Currency (“OCC”) did not previously raise concerns about the rule, despite having more than a year to do so. On Tuesday, July 18th, Director Cordray said in a statement that



the CFPB was willing to share the data underlying the Final Rule with the OCC, despite his belief that the Final Rule does not pose a safety and soundness risk to the banking system.

Action Items

Financial institutions (bank and non-bank) subject to the CFPB's jurisdiction should review the requirements of the Final Rule and the [Implementation Guidance](#) to ensure compliance. Action items may include:

- Review existing consumer agreements to determine the presence and volume of mandatory arbitration provisions that are prohibited by the Final Rule;
- Review customer complaint logs to identify those products and services that elicit the most frequent consumer complaints and could potentially serve as the basis for consumer class action lawsuits; and
- Prepare to revise existing arbitration provisions to ensure compliance with the Final Rule, should it take effect.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, 12 U.S.C. § 5518 (2012).

² See 12 U.S.C. § 5481(6)(B).

³ See House Financial Services Committee Press Release dated July 20, 2017, available at <https://financialservices.house.gov/news/email/show.aspx?ID=ECLKUS7ZCIQOPJ6BCSQUSZTY4>

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