CFPB Releases Proposed Rule Restricting Arbitration Clauses

As expected, the Consumer Financial Protection Bureau (CFPB) used today's field hearing in Albuquerque, N.M. to roll out a **Notice of Proposed Rulemaking** (NPRM) that would significantly limit companies' ability to use mandatory arbitration clauses to block class action proceedings. While arbitration clauses would still be permissible in consumer financial product contracts, they would "have to say explicitly that they cannot be used to stop consumers from being part of a class action in court," according to a press release accompanying the NPRM. "The proposal would provide the specific language that companies must use."

The proposal mirrors an outline of arbitration-related options the CFPB published last October when it began the process of convening a small business review panel on the rulemaking. That outline, like the proposed rule, would make it so that arbitration clauses only apply if a class certification is first denied or dismissed in court. The rule has a broad scope in covering "providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money." This includes credit cards, checking accounts, prepaid cards, and consumer loans, as well as credit monitoring and debt collection services, among others. Even mobile phone apps that accept financial data from a consumer for initiating a transaction would be covered.

After the proposed rule is published in the Federal Register, companies and other interested parties will have 90 days to submit comments to the docket. Issuance of a final rule will likely take several months. According to the NPRM, the final rule will go into effect 30 days after it is published, but companies will have an additional 180 days to comply with any changes to arbitration agreements.

This rulemaking is the latest result of nearly six years of activity. It began with the enactment of the Dodd-Frank Act, which established the CFPB and also eliminated pre-dispute arbitration clauses in residential mortgage contracts and home-equity line-of-credit agreements. In addition, Section 1028(a) of Dodd-Frank required the CFPB to study the use of arbitration "in connection with the offering or providing of consumer financial products or services" and to provide a report to Congress on its findings. The CFPB completed its **report** in March 2015, focusing on the use of arbitration clauses across various consumer financial product markets. While the CFPB's findings were heavily criticized by many industry trade groups, it seems to have done little to detour the CFPB.

In the months ahead, the debate over the rulemaking will not be confined to traditional notice and comment. The topic is already making waves amongst Washington lawmakers as well as those in many states. Republicans have long argued that arbitration benefits both consumers and businesses, while lawyers will be the only ones to gain from limiting such clauses. Many Democrats have countered that disputes often involve small dollar amounts that no single person will take the time to pursue, and argue that class action litigation is in many instances the only logical recourse.

While the debate will intensify this year, any federal legislative response to curtail the CFPB's efforts will face an uphill battle in the near-term. Regardless of whether or not Congress intervenes, or the next

410 17th Street, Suite 2200
Denver, Colorado 80202

administration changes the rules trajectory, there are already predictions that a challenge to the issue could rise to the U.S. Supreme Court. In both 2011 and 2013, the Supreme Court handed down significant wins for industry in upholding their ability to use arbitration agreements. In the meantime, the CFPB will attempt to implement its rules and proceed with enforcement actions.

Brownstein's CFPB task force will continue to monitor this rulemaking as it progresses and provide clients with strategic insight and counsel on how to navigate the CFPB's activities. Through our federal **government relations** and **litigation** practices, we have the know-how, experience and expertise to position our clients for success. Whether it be direct engagement with policymakers, participation in the comment process, or complying with new regulations, Brownstein has you covered.

Richard B. Benenson
Shareholder
rbenenson@bhfs.com
303.223.1203
Denver

Jonathan C. Sandler
Shareholder
jsandler@bhfs.com
310.564.8672
Los Angeles

Thomas J. Bunting
Associate
tbunting@bhfs.com
505.724.9573
Albuquerque

John Sonsalla
Policy Advisor
jsonsalla@bhfs.com
202.652.2357
Washington, D.C.