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The CFPB's Arbitration Rule, Its Requirements, Potential Legal Challenges, and What Companies Should Do

by Eric R. Hail

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On July 10, in a 775-page release, the Consumer Financial Protection Bureau (CFPB) issued its long-awaited final arbitration rule pertaining to consumer-finance contracts.

Which Finance Companies Are Within the Rule's Reach?
The rule applies to consumer-credit companies that offer or provide certain types of consumer financial products or services, or "covered transactions," as follows:

- extensions of credit and participating in credit decisions
- providing accounts and remittance transfers subject to the European Free Trade Association
- auto-leasing and brokering of auto leases
- providing accounts subject to the Truth in Savings Act
- debt management, settlement, and repair
- credit-report remediation
- consumer-report providers
- check cashing
- debt collectors, which is defined more broadly than the term is traditionally employed in the Fair Debt Collection Practices Act context

Certain entities and transactions are excluded from the rule, such as broker-dealers and low-volume credit providers.

What Are the Requirements of the Rule?
The rule brings three primary requirements, as follows:

- First, the rule's "General Rule" makes it illegal for covered providers to "rely in any way on a pre-dispute arbitration agreement . . . with respect to any aspect of a class action" that concerns any covered product or service, including to "seek a stay or dismissal of particular claims or the entire action. . . ."

- Second, covered providers must change the language of their arbitration agreements to delete class-action waivers and to include the following notice: "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." And where the agreement existed previously between other parties, the company must amend the arbitration provision to contain the required language or provide written notice that the company waives any right to block a class action.

- Third, the rule requires companies to submit arbitration-related filings from court cases and arbitrations to the CFPB for review. The filings will be monitored by the CFPB and posted on an internet site for public access.

When Will the Rule Come into Effect?
The effective date is 60 days after the rule is published in the Federal Register. The rule would apply only to agreements entered into *after* the end of the 180-day period beginning on the rule's effective date. As such, the rule will apply to arbitration agreements entered into 241 days after publication in the Federal Register.

Will the Rule Be Challenged or Overturned?
The rule may face challenges from a number of different angles. For example, Congress could seek to reverse the rule using the Congressional Review Act (CRA). Under the CRA, agency action can be overridden by a resolution approved by a simple majority vote of both chambers of Congress and signed by President Trump. The rule may also be challenged on grounds that the CFPB erred or overstepped its authority. Specifically, the CFPB's authority underpinning the rule is the Dodd-Frank Wall Street Reform and Consumer Protection Act, which authorized the CFPB to issue regulations regarding arbitration *only* if they (1) are in the public interest; (2) for the protection of consumers; and (3) consistent with findings from a study by the CFPB. A finding that any one of these three prerequisites to action is absent could doom the rule.

What Should Consumer Finance Companies Do?

- First, covered providers should determine whether they and/or the products or services they provide are covered by the rule.

- Second, in the event the rule is not overridden, repealed, or enjoined prior to its effective date, covered providers should consult with counsel on how to comply with the rule, including amending their standard form contracts to include the express terms required by the rule. They may also take the opportunity to reevaluate the entirety of the arbitration agreement, including whether to permit class arbitrations, and whether to continue to require individual arbitrations since those are unaffected by the rule.

- Third, covered providers should consider how to build compliance with the rule into their general compliance-management system, including compliance with the arbitration-filing submission requirement.

Eric R. Hail *is a partner with Hunton & Williams, LLP in Dallas, Texas.He focuses his practice on commercial and securities litigation. He can be reached at ehail@hunton.com or (214) 468-3332.*