Senate Votes to Overturn CFPB Arbitration Rule

By Joseph Neuhaus and Thomas Walsh

The Senate voted on October 24 to block the Consumer Financial Protection Bureau's rule prohibiting financial institutions from requiring consumers to waive class actions in pre-dispute arbitration agreements. As expected, President Trump signed the resolution of disapproval on November 1.

The Senate vote, 51-50, was largely along party lines. The House of Representatives had voted to block the rule in July. The rule was the product of a three-year study by the CFPB and would have prohibited companies from the use of mandatory pre-dispute arbitration agreements that prevented consumer finance class actions in court. The rule would not have affected the use of mandatory pre-dispute arbitration clauses for individual consumer finance disputes. Prior to the Senate vote, the Treasury released a 17-page analysis opposing the rule. The CFPB issued a response shortly thereafter.

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The underlying statutory command in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") remains in effect. That law called for the CFPB to study pre-dispute arbitration agreements and issue regulations restricting their use if such rules would be in the "public interest" and for the "protection of consumers." Thus, the CFPB must presumably make a new determination on that question. Under the Congressional Review Act, however, now that the President has signed the resolution, the CFPB is barred from issuing a new rule that is "substantially the same" as the overturned rule.

Background

Pursuant to the Dodd-Frank Act, the CFPB conducted a three-year study and released its results in March 2015.[1] The CFPB found that precluding certain financial providers from blocking consumer class actions in litigation and arbitration through arbitration agreements would better enable consumers to enforce their rights and obtain redress when their rights are violated.[2] Further, the CFPB found that prohibiting class action waivers would strengthen incentives for companies to avoid potentially risky activities.[3]

After its release, the CFPB invited stakeholders to provide feedback on the study, and after reviewing the feedback, the CFPB issued a proposed rule on May 24, 2016. Following a public comment period on the proposed rule and review of the comments received, the CFPB issued its final rule governing class action waivers in pre-dispute arbitration agreements between consumers and providers of certain financial products and services ("Covered Providers") on July 19, 2017. The final rule became effective on September 18, 60 days after its publication in the *Federal Register*.[4] The compliance date was 180 days after the final rule became effective, so Covered Providers would have had until March 19, 2018 ("Compliance Date") to comply with the regulation.[5]

Under the Congressional Review Act (CRA),[6] Congress had 60 legislative days after the final rule was published to overturn the rule by adopting a "joint resolution of disapproval," passage of which requires a simple majority in both chambers (i.e., it is not subject to filibuster in the Senate). On July 25, the House of Representatives voted almost exclusively along party lines (231-190 vote) to strike down the final rule. The Senate in October took up the House-passed joint resolution of disapproval, consideration of which occurred under the expedited parliamentary procedures provided for in the CRA.[7]

Summary of CFPB Rule

The final rule would have imposed two sets of limitations on the use of pre-dispute arbitration agreements by Covered Providers. First, Covered Providers would have been prohibited from using new pre-dispute arbitration agreements entered into after March 19, 2018 to block consumer class actions in court, and Covered Providers, with a limited exception,[8] would have been required to insert language into their arbitration agreements that reflected this limitation: "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."[9] When a pre-dispute arbitration agreement applied to multiple products or services, only some of which were covered by the rule, Covered Providers would have been allowed to insert a modified version that specified that the ban on class action waivers applied only to the covered products or services.[10] In addition, the rule provided that Covered Providers could include a sentence at the end of the required disclosures that indicated that the provision did not apply to parties

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that entered into the agreement before March 19, 2018, or to products or services that were first provided before March 19, 2018, and were subject to an arbitration agreement entered before that date.[11]

Second, the final rule would have required Covered Providers to submit to the CFPB, within 60 days of filing or receipt, certain records relating to arbitral and court proceedings concerning consumer financial products or services covered by the rule.[12] Specifically, Covered Providers would have been required to submit to the CFPB: (i) the pre-dispute arbitration agreement filed with the arbitrator; (ii) the initial claim and any counterclaim; (iii) the answer to any initial claim and/or counterclaim; (iv) any judgment or award; (v) any communication from the arbitrator or administrator regarding dismissal of arbitration because of failure to pay fees; (vi) any communication from an arbitrator or administrator related to a determination that the arbitration agreement did not comply with fairness principles, rules, or similar requirements of the arbitral forum; and (vii) any submission to a court that relied on the pre-dispute arbitration agreement to seek dismissal, deferral, or stay of a case.[13] The requirement would have applied to any arbitration and related court proceedings regardless of whether there were any class action proceedings involved. When it released the Rule, the CFPB stated that it intended to publish collected materials with redactions on its website in order to "provide greater transparency into the arbitration of consumer disputes," and it planned to use the collected information to monitor "arbitral and court proceedings to determine whether there [were] developments that raise[d] consumer protection concerns that [might] warrant further Bureau action."[14]

Who Was to Be Covered by the Rule

The CFPB rule was intended to apply to "providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money."[15] In particular, the rule would have applied to the following: (i) consumer credit services; (ii) automobile leasing; (iii) debt management or settlement services; (iv) providing directly to a consumer a consumer report, a credit score, or other consumer-specific information derived from a consumer file; (v) providing accounts subject to the Truth in Savings Act; (vi) providing accounts or remittance transfers subject to the Electronic Fund Transfer Act; (vii) transmitting or exchanging funds; (viii) accepting, or providing a product or service to accept, financial or banking data directly from a consumer to initiate a consumer payment or credit card or charge card transaction for a consumer; (ix) providing check cashing, check collection, or check guaranty services; and (x) debt collection.[16]

The rule would not have covered persons regulated by the Securities and Exchange Commission, persons regulated by a State securities commission as either a broker dealer or investment advisor, or persons regulated by the Commodity Futures Trading Commission, among others.[17] The rule also would not have applied to employers who offered covered financial products or services to their employees as an employee benefit,[18] persons excluded from the CFPB's rulemaking authority,[19] federal agencies, and any state or tribe under federal sovereign immunity law whose immunities had not been abrogated by the U.S. Congress.[20] Further, the CFPB rule would have excluded any Covered Providers that had provided products or services to no more than 25 consumers in the current and preceding calendar years.[21]

Implications

The CFPB rule was controversial; even if the Senate had not voted to overturn it before the CRA deadline, threatened court challenges might have derailed it.

The rule also presented some interpretive difficulties. For example, the rule applied only to arbitration agreements entered into on or after March 19, 2018. The official comments to the rule specified that if a Covered Provider "[m]odifie[d], amend[ed], or implement[ed]" the terms of a product or service that was subject to a pre-dispute arbitration agreement that pre-dated the Compliance Date, the product or service would not have been covered by the CFPB rule.[22] However, if a Covered Provider offered "a *new* product or service," the product or service would have been subject to the CFPB rule.[23] The line delineating a *modified* product or service from a *new* product or service might well have been difficult to draw in some cases. There might also thus have been an incentive for Covered Providers to characterize changes to products and services as "modifications," rather than "new" products or services.

As noted, under the CRA, now that the final rule has been overturned, the CFPB is prohibited in the future from issuing any new rule that is "substantially the same" as the overturned rule.

Endnotes

1. *See* Bureau of Consumer Financial Protection; Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (12 CFR Pt. 1040) ("FR Release").
2. *Id*. at 33280.
3. *Id*.
4. *Id*. at 33211.
5. FR Release, 82 Fed. Reg. at 33120.
6. 5 U.S.C. §§ 801-08.
7. Any day that the Senate gavels into session is a legislative day. Fridays, weekends and recess days do not count as legislative days.
8. The CFPB rule would have provided a limited exception for prepackaged general-purpose reloadable prepaid cards, that were on store shelves as of March 19, 2018, when the providers were unable to contact consumers in writing. These providers would still have been bound by the class action waiver ban but would not

have needed to include the required language in the arbitration agreements with the customers.

9. 12 C.F.R. § 1040.4(a)(2)(i).
10. 12 C.F.R. § 1040.4(a)(2)(ii).
11. 12 C.F.R. § 1040.4(a)(2)(iv).
12. 12 C.F.R. § 1040.4(b)(2).
13. 12 C.F.R. § 1040.4(b)(1).
14. FR Release, 82 Fed. Reg. at 33210.
15. *Id*.
16. 12 C.F.R. § 1040.3(a).
17. 12 C.F.R. § 1040.3(b)(1)(i)-(iii).
18. 12 C.F.R. § 1040.3(b)(5).
19. 12 C.F.R. § 1040.3(b)(6).
20. 12 C.F.R. § 1040.3(b)(2)(i)-(ii).
21. 12 C.F.R. § 1040.3(b)(3).
22. 12 C.F.R. § 1040.4, cmt. 4-1(ii)(A).
23. *Id.*, cmt. 4-1(i)(A) (emphasis added). If a Covered Provider acquired or purchased a product or service that was subject to a pre-dispute arbitration agreement that pre-dated the Compliance Date, and the Covered Provider became a party to the agreement, the product or service would also have been covered by the CFPB rule. *Id.*, cmt. 4-1(i)(B).