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## CFPB Proposes Rule Banning Class Action Prohibitions

On May 5, 2016, the Consumer Financial Protection Bureau (CFPB) issued a proposed rule that drastically limits the effectiveness of arbitration clauses in consumer financial product agreements. Specifically, the proposed rule bans providers of “consumer financial products” from including arbitration clauses in their contracts that prohibit consumers from filing or participating in class actions. The proposed rule also sets out specific language regarding the right to file a class action lawsuit that must be included in any arbitration clause for contracts covered by the rule. In addition, it requires covered providers to report certain information about arbitral proceedings to the CFPB. The reporting requirement would allow the CFPB to continue studying if arbitration agreements raise any additional consumer protection concerns warranting additional rules or restrictions.

The proposed rule will apply only to the providers of certain types of consumer financial products and services. While an individual analysis for each entity and type of consumer transaction is prudent, the rule generally covers providers engaged in, among other things:

- consumer lending (secured loans, unsecured loans, credit cards) and related activities (debt servicing, credit monitoring, debt relief, debt collection);
- extending automobile leases;

- credit score reporting;
- providing accounts covered by the Truth in Savings Act; and
- providing transfers covered by the Electronic Funds Transfer Act and Regulation E.

In short, anyone whose business touches upon these kinds of products and services needs to analyze the proposed rule very carefully to determine if it applies to some or all of its activities.

The proposed rule has not yet been published in the Federal Register, though that is expected to occur shortly. After the proposed rule is published, it will be subject to a 90-day notice and comment period. During that period, all providers of consumer financial products should decide whether to comment on the proposed rule before its adoption, especially if they disagree with the CFPB’s justifications for the rule. The CFPB justified the rule based on a 2015 study which determined, among other things, that eliminating arbitration provisions would not raise consumer prices and that class action waivers contained in many arbitration agreements unfairly restrict average consumers from pursuing smaller claims relating to transactions like bank fees and overdraft charges. Providers should also consider commenting on some of the proposed rule’s unanswered questions, such as whether a covered provider can enforce an arbitration

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agreement once a court denies class certification, or whether a consumer, merely by bringing a class action lawsuit, can avoid arbitration all together. Comments on the proposed rule may be posted here once it is published in the Federal Register. Financial product providers can expect a final rule to be announced this Fall with the proposed rule's requirements becoming effective sometime in mid-2017.

Potentially covered businesses should take this time to start preparing for the proposed rule to become law. Now is the time for providers to review their consumer practices to ensure that they comply with all relevant consumer protection laws. In our experience, conducting periodic reviews of consumer-facing practices is the most cost-effective way to prevent class action litigation. Next, covered providers, who are likely accustomed to arbitrating

instead of litigating, should begin preparing themselves for class action litigation and the demands that come with it. Prudent preparations include having experienced class litigation counsel at the ready and ensuring that the business can effectively implement orders for the preservation of broad categories of data, including internal electronic data. Finally, covered providers will need to have compliant versions of their standard contracts ready for implementation within the timelines included in the proposed rule.

The foregoing is only a brief summary of the proposed rule. If you have any questions or need assistance reviewing your consumer practices, please do not hesitate to contact members of Wigginn and Dana's Class Action Group or its Consumer Protection Practice Group.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*