

CFPB Issues Final Rule Limiting Use of Arbitration Clauses in Consumer Financial Contracts

July 11, 2017 | Client Update | 2-minute read

Yesterday afternoon, the CFPB issued a [final rule](#) that, once it becomes effective, is designed to prohibit providers of certain consumer financial products or services from using pre-dispute arbitration clauses to bar consumers from participating in class action lawsuits. Although covered providers will still be permitted to include mandatory arbitration clauses in agreements with consumers, covered providers will no longer be permitted to use such clauses to bar class actions. The rule becomes effective 60 days after publication in the Federal Register, and covered parties must comply with the rule's requirements within 181 days of the effective date. For a rule this size, we estimate that publication in the Federal Register will be delayed by a few weeks, meaning that covered providers would need to be in compliance with the new rule by approximately late March or early April 2018.

The CFPB's final rule is 775 pages long and addresses many comments made in response to the CFPB's [May 2016 proposed rule](#). The final rule is broadly consistent with the proposed rule in scope and effect, but will take time to fully digest. Look for our deeper dive soon.

It is possible that the final rule could still be invalidated by Congress pursuant to the Congressional Review Act (the "CRA"), a statute that authorizes Congress to repeal recently adopted agency rules. Provided that certain conditions are met, joint resolutions considered under the CRA are not subject to filibuster. The current Congress has enacted 14 joint resolutions under the CRA to repeal Obama-era rules. Congress did not, however, repeal the CFPB's recent rules on prepaid cards within the limited timeframe permitted by the CRA. In addition to possible congressional action, legal challenges to the new regulation under the Administrative Procedure Act are likely.

While these challenges play out in Congress and the courts, covered institutions now need to plan for compliance should the final rule become effective. If the rule becomes effective, it will be difficult to change without a new notice and comment procedure. The attorneys general of 18 states and the District of Columbia recently filed a lawsuit against the U.S. Department of Education and its Secretary, Betsy DeVos, for delaying a final rule's effective date, and the D.C. Circuit recently rebuked the EPA and its Administrator, Scott Pruitt, for staying the effective date of a final rule. See [Clean Air Council v. Pruitt](#) (D.C. Cir. July 3, 2017). So even after Director Cordray's departure—whenever that happens—it would likely take considerable time and effort for a new CFPB chair to unwind today's rule, should it survive the anticipated Congressional and legal challenges.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Edmund Polubinski

+1 212 450 4695

edmund.polubinski@davispolk.com

Margaret E. Tahyar

+1 212 450 4379

margaret.tahyar@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.