

Significant CFPB Developments Relating to Arbitration Agreements and Limited English Proficiency Consumers

Skadden

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On October 7, 2015, the Consumer Financial Protection Bureau (CFPB) published a long-awaited “potential rulemaking” on predispute arbitration agreements that would (i) effectively ban consumer financial companies from using arbitration clauses to prevent class action cases, and (ii) require records of all other arbitrations to be provided to the CFPB for potential publication on its website. The potential rulemaking is the latest and most substantive step in a three-year review that the CFPB has undertaken with respect to arbitration agreements.

On the same day, the CFPB announced the agenda for its next Consumer Advisory Board meeting scheduled for October 22, 2015. In addition to covering the proposed arbitration ban, the meeting will address “Reaching Limited English Speaking Consumers.” The CFPB’s inclusion of treatment of limited English proficiency (LEP) consumers on the agenda sends a strong signal that the CFPB is focused on how financial institutions accommodate LEP individuals, and that the agency will prioritize the issue in coming months, possibly through rulemaking.

Potential Arbitration Rulemaking

The CFPB’s announcement of potential rulemaking relating to arbitration agreements is not unexpected in light of its public scrutiny of arbitration agreements over the past three years. In March 2015, the CFPB published a study, required by the Dodd-Frank Act, which concluded that arbitration agreements provide a substantial barrier to pursuing claims on a class action basis and that consumers benefit far more from class actions than from arbitrations.

The CFPB’s potential rulemaking clearly seeks to address these findings but stops short of banning arbitration agreements altogether. In particular, the potential rulemaking proposes to accomplish the following:

1. Prohibit Arbitration Agreements That Do Not Allow Class Actions

The potential rulemaking would prohibit arbitration agreements that preclude consumers from participating in a class action litigation, reflecting the CFPB’s view that consumers may benefit from class actions. The potential rulemaking asserts that allowing class action litigation against consumer finance providers is important not only to provide greater relief to consumers but also for its deterrent value, given that “government resources to pursue such lawsuits are limited.”

2. Require Submission of Arbitral Claims and Awards to the CFPB

The potential rulemaking also would require consumer financial companies that use arbitration agreements with consumers to give the CFPB copies of claims filed and awards issued in any arbitration. The CFPB may publish the claims and awards on its website. The CFPB believes that the collection of claims would allow it to monitor arbitrations and identify trends in arbitration proceedings, as well as promote transparency and ensure fairness in the proceedings.

Next Steps

The CFPB will convene a small business review panel to gather feedback on the potential economic impact of complying with the potential rulemaking. The panel will issue a report based on the input it receives from small businesses during the panel process, and the CFPB will later issue formal proposed regulations that are subject to notice and comment. Based on prior CFPB rulemakings, it is likely that any such regulations would, at the earliest, go into effect in 2017.

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If the regulations are finalized as expected, many companies will face significant changes to their business practices as well as increased burden and cost of compliance. The impact of a ban on arbitration would be widespread: The prohibition would apply to many products that the CFPB regulates, including credit cards, checking and deposit accounts, prepaid cards, money transfer services, certain auto loans, auto title loans, small dollar or payday loans, private student loans and installment loans.

We expect that publication of a proposed rule on arbitration agreements will lead to critical comments being filed by both industry and consumer groups, and that the CFPB's final rulemaking will be subject to significant judicial and congressional scrutiny in coming years. Challenges likely will focus on whether the Dodd-Frank Act actually authorizes the CFPB to prohibit arbitration agreements as it contemplates here, or whether this can be done only by amendment of the Federal Arbitration Act. Other challenges may center on the privacy concerns associated with requiring parties to submit claims and awards from typically confidential arbitration proceedings to the CFPB and the possible publication of such information on the CFPB's website.

Limited English Proficiency Consumers

Based on recent developments, we believe that the CFPB may be heading down the path of issuing broadly applicable guidance, or even regulations, relating to accommodation of LEP consumers. Prior to announcing the agenda for the October 22, 2015, Consumer Advisory Board meeting, the CFPB had publicly addressed LEP accommodations only in limited contexts. For example, the CFPB issued a final remittance transfer rule in 2012 that required certain foreign language disclosures. Also, in December 2013, the CFPB entered into a consent order with an institution based on alleged deceptive practices in connection with the disclosure of products and services to Spanish-speaking customers.

In addition, the CFPB's March 2015 potential rulemaking on payday, vehicle title and similar loans noted that the CFPB was considering whether to require lenders to make disclosures in non-English languages if a lender marketed or serviced loans in those languages. (The CFPB has not yet issued a proposed rule.) Finally, in its April 2015 Fair Lending Report, the CFPB noted that it is "exploring the obstacles" that LEP consumers "face when attempting to access credit, as well as the challenges that creditors face when interacting with LEP consumers and complying with their various legal and regulatory obligations." The CFPB encouraged lenders to "provide assistance to LEP individuals in order to increase access to credit and to reach out to the Bureau with ideas of how to promote access."

The CFPB's notice of a Consumer Advisory Board meeting addressing LEP consumers is a new and potentially significant step forward on this issue. Pursuant to the Dodd-Frank Act, the purpose of the board is to "advise and consult with the Bureau in the exercise of its functions under the Federal consumer financial laws" and "provide information on emerging practices in the consumer financial products or services industry, including regional trends, concerns, and other relevant information." Given the Consumer Advisory Board's role and the prominence of LEP issues on its agenda, we expect that ideas on how to accommodate LEP consumers will continue to develop over the next several months and could eventually lead to rulemaking setting forth restrictions and requirements relating to how financial institutions interact with consumers with limited English proficiency.