CFPB Eyes Arbitration Agreements

Law360, New York (November 13, 2015, 11:48 AM ET) -- On Oct. 7, 2015, the Consumer Financial Protection Bureau published a potential rulemaking on predispute arbitration agreements that would effectively ban consumer financial companies from using arbitration clauses to prevent class action cases and would require records of all other arbitrations to be provided to the CFPB for potential publication. The potential rulemaking is the latest and most substantive step in a multiyear review that the CFPB has undertaken with respect to arbitration agreements.

On Oct. 22, 2015 the CFPB convened a Consumer Advisory Board meeting to discuss the proposed arbitration ban, as well as the emerging compliance risk issue of "Reaching Limited English Speaking Consumers." The CFPB's inclusion of treatment of limited English proficiency (LEP) consumers on the agenda reflects its focus on the issue of how financial institutions accommodate LEP consumers. We expect that the agency will prioritize the issue in coming months.

This article summarizes these developments and offers suggestions for mitigating risk in these areas.

Predispute Mandatory Arbitration Provisions

The CFPB's announcement of potential rulemaking relating to arbitration agreements is not unexpected in light of public scrutiny over the past several years of such agreements. The Consumer Financial Protection Act of 2010 effectively banned predispute mandatory arbitration provisions in mortgage loan agreements. While the ban did not apply to non-mortgage consumer financial services, Section 1028 of the statute directed the CFPB to conduct a study of use of arbitration provisions in consumer financial products and services, and to provide a report to Congress on the results of that study. Section 1028 also provides that the CFPB may promulgate a regulation that would "prohibit or impose conditions or limitations on the use of" arbitration provisions if the CFPB determines such action is "in the public interest and for the protection of consumers." Section 1028 also provides that the "findings in any such regulation shall be consistent with" the results of the CFPB's study. The CFPB began its arbitration study in 2013 and presented its report to Congress in April of this year. The report concluded that arbitration agreements provide a substantial barrier to pursuing claims on a class action basis and that consumers benefit more from class actions than from arbitrations.

The CFPB's potential rulemaking seeks to address these findings, and while it stops short of banning arbitration agreements altogether, it proposes restrictions that would, if promulgated as proposed, have essentially the same effect.

1. Prohibit Arbitration Agreements That Do Not Allow Class Actions

The potential rulemaking would prohibit arbitration agreements that preclude consumers from participating in class action litigation. In explaining its reasoning, the CFPB notes 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." Given that arbitration class actions are all but nonexistent and that a primary reason to include an arbitration provision is to limit class actions, this proposal would significantly reduce the value of such provisions to consumer finance providers.

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

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

Next Steps

The CFPB has convened a small business review panel to gather feedback on the economic impact of complying with the proposed rulemaking. The panel will issue a report based on the input it receives from small businesses, after which the CFPB will issue proposed regulations, subject to notice and comment.

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 any CFPB rulemaking will be subject to significant judicial and congressional scrutiny in coming years. Challenges likely will focus on whether the findings supporting a proposed rule are consistent with the findings in the report to Congress, whether the CFPB's study in support of its findings was flawed, and whether Section 1028 actually authorizes the CFPB to prohibit arbitration agreements or if such a prohibition can be effected only by amendment of the Federal Arbitration Act. Other challenges may focus on the privacy concerns associated with requiring parties to submit arbitration claims and awards (which are often confidential) to the CFPB for publication on the CFPB's website.

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 a wide range of financial products, 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.

Suggestions for Mitigating Risk

While the CFPB has not yet issued formal rules, this is nonetheless a good time for companies to proactively assess the potential implications of rulemaking, on the assumption that such rules may mirror the proposed rulemaking.

In particular, consumer finance companies would be well advised to review their current consumer contracts to determine which products contain arbitration provisions and to analyze how those arbitration provisions would be affected by the CFPB's proposal. Moreover, regardless of whether the final rules bar certain arbitration clauses, it would be useful to review arbitration agreements to ensure that they are prominently disclosed to the consumer and ensure fair procedures with respect to costs and location of the arbitration.

Finally, while arbitration may be preferable to litigation, companies should also take steps to minimize the possibility of either litigation or arbitration by reviewing their processes for handling customer complaints. Such review may include periodic assessment of complaint trends and the procedures for addressing those complaints, as well as an assessment of whether changes to policies and procedures, enhanced training, or other steps can prevent the recurrence of similar issues.

Limited English Proficiency Consumers

The topic of "Reaching Limited English Speaking Consumers" is a more recent focal point for the CFPB, and although it is too early to tell where that focus will lead, treatment of LEP consumers is clearly a concern for the agency.

Prior to announcing the agenda for the Oct. 22, 2015, Consumer Advisory Board meeting, the CFPB had publicly addressed LEP accommodations only in limited contexts. The CFPB had entered into two consent orders with institutions stemming from LEP issues, including a June 2014 settlement based on allegations that a bank excluded Spanish-speaking customers from debt repayment and settlement offers, and a December 2013 settlement based on alleged deceptive practices in connection with scripts and documents used in the offering of ancillary products to Spanish-speaking customers.

In addition, the CFPB's March 2015 potential rulemaking on payday, vehicle title and similar loans had 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 indicated that it was "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 April report 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."

Existing federal consumer financial regulations address LEP issues to a limited degree. For example, the CFPB's remittance transfer rule, issued in 2012, requires foreign language disclosures, and Truth in Lending Act regulations explicitly permit use of foreign language disclosures (provided that English-language disclosures are available upon request) and prohibit misleading foreign language disclosures. Finally, recipients of federal funds have been obligated for some years to provide LEP services, and the U.S. Department of Justice issued guidance for such recipients to follow. Outside of the federal context, a number of states have enacted laws that require foreign language documentation or disclosures when institutions "negotiate" transactions or otherwise communicate with loan applicants in a foreign language.

The CFPB's Consumer Advisory Board meeting addressing LEP consumers is a new and potentially significant step forward on this issue. The board, which was created under the Dodd-Frank Act, exists 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 board's role and the prominence of LEP issues on its agenda, we expect that it will continue to address issues relating to accommodation of LEP consumers for some time.

Compliance Risks Arising From LEP and Foreign Language Use

Compliance risks relating to LEP include both fair lending risk where consumers may be treated differently based on their language abilities or preferences (which are likely to be

considered proxies for ethnicity or national origin); and unfair, deceptive and abusive acts or practices (UDAAP) risk, particularly where there is a disconnect between the language used in marketing or oral customer communications and product fulfillment documentation.

Examples of the situations in which these risks can arise include the following:

- Providing marketing and solicitation materials in both English and other languages but not making other product documents, such as disclosures, available in any language other than English.

- Providing inaccurate or incomplete translation and interpretation services to LEP customers, or relying on inaccurate or incomplete scripts for interactions with LEP customers. For example, a customer service representative may paraphrase English language documents in a foreign language, but not accurately translate the entire document.

- Substantive differences in English versus foreign language marketing materials, or marketing a different mix of products in one language compared with another.

- Providing different levels of service or availability of products or offers to the customer based on that preference.

Suggestions for Assessing and Managing the Risk

Given the limited regulatory guidance, institutions have taken varied approaches to mitigating their risk in this area. For example, some institutions have adopted an "English only" policy, which mitigates potential UDAAP risk insofar as it prevents conflicts between language usage in oral communications versus product disclosures and fulfillment documentation. However, such policies may limit an institution's business expansion opportunities, reduce access to credit for certain populations, and be difficult to effectively implement and monitor in a large institution. Institutions that do provide services in foreign languages have undertaken audits of their foreign language capabilities as well as assessments of the number of LEP consumers in different areas that they serve.

Although the guidance in this area is limited, institutions may wish to consider the following actions to mitigate risk:

- promulgating clear language policies governing consumer interactions across all lines of business, including oral interactions with customers during origination and servicing, disclosures, other product fulfillment documentation, and third-party service providers;

- ensuring consistency of LEP assistance throughout the product life cycle, including application procedures, fulfillment and servicing/collections;

- avoiding exclusion of certain customers from offers based on their language preferences;

- providing training to employees and third-party service providers on LEP policies and procedures;

- taking steps to ensure that any foreign language translation or interpretation services are accurate; and

- monitoring effectiveness of LEP risk controls and policies and procedures.

It should be noted, however, that the risk associated with LEP policies and procedures can vary significantly depending on the product, market area, complexity of the institution, reliance on third parties, and other fact-specific considerations. Consequently, there is no one-size-fits-all approach for effectively mitigating LEP risk.

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