CFPB Pursues Aggressive Enforcement Agenda and Arbitration Restrictions

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In 2015, the Consumer Financial Protection Bureau (CFPB) continued to aggressively enforce federal consumer protection laws across a broad spectrum of consumer financial products and services. Additionally, the CFPB took a significant step toward proposing a ban on arbitration clauses that would preclude consumers from being able to file class action lawsuits. Together, these actions demonstrate the increased scrutiny of consumer compliance for providers of consumer financial products and services.

CFPB Enforcement Actions

Last year, the CFPB initiated more than 50 enforcement actions, reaching settlements in most of those cases for a total of over $1.6 billion in compensation to consumers (more than $30 million per settlement, on average) as well as approximately $190 million in civil penalties.

The CFPB's enforcement program has relied most heavily on its authority to enforce the Dodd-Frank Act prohibition on unfair, deceptive, or abusive acts or practices. The CFPB has used this authority to bring actions relating to credit reporting and consumer information, debt collection, ancillary products, payday lending, student lending, mortgage marketing and other areas.

Fair lending is another enforcement hot spot, with the CFPB bringing enforcement actions relating to indirect auto finance and mortgage redlining. In June 2015, the U.S. Supreme Court upheld the disputed "disparate impact" theory of liability under the Fair Housing Act in the case of *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* while also articulating limits on application of the disparate impact theory. The *Inclusive Communities* decision has no doubt emboldened the CFPB and other regulators to aggressively pursue disparate impact cases under the federal fair lending laws, including the Equal Credit Opportunity Act. Accordingly, we expect to see increased fair lending enforcement in 2016.

CFPB Enforcement in 2015

More than	Over	Approximately
50	**$1.6**	**$190**
enforcement actions	billion in compensation to consumers*	million in civil penalties

*More than $30 million per settlement, on average

Arbitration Restrictions Proposed

On October 7, 2015, the CFPB published a long-awaited "potential rulemaking" on predispute arbitration agreements that would effectively ban arbitration clauses in any consumer financial products or services if those clauses would prevent class action cases. 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.

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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 few years. In March 2015, the CFPB published a study, required by the Dodd-Frank Act, concluding that arbitration agreements are 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 stopped short of banning arbitration agreements altogether. In particular, the potential rulemaking proposes to accomplish the following:

1. Arbitration agreements that preclude consumers from participating in a class action lawsuit would be prohibited, reflecting the CFPB's view that consumers may benefit from class actions; and
2. Consumer financial companies that use arbitration agreements with consumers would be required 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 will gather feedback on its proposal from a small-business review panel process and likely will issue a formal proposed rule in 2016. If the regulations are finalized as expected, many companies will need to make significant changes to their business practices and will encounter increased compliance burdens and costs. 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 a number of industry and consumer groups will file comments once the rule is formally proposed, and any final CFPB rule restricting arbitration provisions may lead to a showdown at the Supreme Court. In recent years, the Court has issued a number of decisions upholding arbitration provisions, quashing attempts by numerous states and lower courts to limit or prohibit consumer contract arbitration agreements. The Court's most recent decision upholding such arbitration provisions, *DIRECTV, Inc. v. Imburgia* on December 14, 2015, elicited a strong dissent by Justice Ruth Bader Ginsburg, who relied on the CFPB's arbitration study in arguing that "take-it-or-leave-it arbitration agreements mandating arbitration and banning class procedures" have harmed consumers.

Conclusion

In light of the CFPB's recent enforcement activity and anticipated rulemaking restricting arbitration agreements, consumer financial services companies would be well-advised to review consumer complaints as well as their policies and procedures to proactively address practices that may present enhanced risk of enforcement or consumer litigation.