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CFPB Field Hearing May Unveil New Rule on Arbitration Agreements

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The CFPB is continuing its march towards a new rule governing the use of arbitration clauses in consumer lending contracts. On April 20, the Bureau announced its next step will be to conduct a field hearing in Albuquerque, New Mexico on Thursday, May 5, at 1:00 p.m. EST. The CFPB will stream the field hearing live, and it is likely that the Bureau will announce its new rule then. The rule would apply to multiple products and services throughout the consumer lending industry 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. Given the broad scope of the anticipated new rule, lenders should be watching the CFPB closely to see what exactly will be permissible in arbitration clauses.

The regulatory focus on the use of arbitration clauses has been in place from the very beginning of the CFPB. Dodd Frank required the CFPB to "conduct a study of, and provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services." The results of the study can be found here. After completing the study, the CFPB provided an outline of proposals. The proposals included (1) prohibiting the application of arbitration agreements as to class actions, and (2) requiring submission to the Bureau of arbitral disputes (i.e., claims in arbitration) and awards. The CFPB also announced that it is considering publishing those disputes and awards on its website. Since the CFPB already publishes the data collected on customer complaints and HMDA reporting in a searchable and sortable format on its website, this part of the proposal comes with its own increased legal and reputational risks for lenders.

According to the CFPB's proposal, its study "shows that . . . aggregated actions – typically class action litigation – have provided significant benefits to consumers, through cash settlements and other benefits made available to them and from agreements by companies to stop harmful behavior. Class litigation may also benefit consumers through the deterrent impact of those settlement agreements on other companies' conduct." This last sentence is particularly bothersome as it signals that the CFPB is going to subject the entire industry to the increased cost of defending class actions partially to deter bad actors who make up a tiny fraction of the industry.

The new rule will likely have a dramatic impact on lenders. Institutions will have to "price in" the added costs associated with the increased risk of class action lawsuits across most of their consumer product lines. Lenders would also have to overhaul their contracts to comply with any new rule. Most importantly, consumers will likely face higher transactional costs and interest rates. It is very possible that the precise group the CFPB is aiming to protect – consumers – will end up worse off. As with any new rule promulgated by the CFPB, the key to successful implementation is early planning. If you have any questions regarding the effects of this coming regulation or arbitration clauses in your existing consumer contracts, please contact a member of Baker Donelson's Financial Services Litigation practice group.