# Banking and Finance Law Daily Wrap Up, TOP STORY—Final rule banning arbitration clauses that block class actions adopted, (Jul. 10, 2017)

Banking and Finance Law Daily Wrap Up

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The Consumer Financial Protection Bureau has adopted a rule banning mandatory predispute arbitration clauses in consumer financial product contracts if those clauses prevent class actions. Arbitration clauses will be allowed only if their application is restricted to individual claims. The rule (which runs 775 pages in draft form) also imposes information reporting duties and disclosure obligations on financial services companies that choose to use permissible arbitration clauses.

The CFPB's rule will apply to those who:

- make consumer loans, participate in lending decisions, or make credit referrals;
- lease automobiles or broker such leases;
- provide debt management or settlement services, credit repair services, or foreclosure relief services;
- accept deposits covered by the Truth in Savings Act;
- provide consumers with copies of their consumer reports;
- transmit funds, process payments, or cash, guarantee, or collect checks; or
- collect debts.

An arbitration rule was proposed in May 2016 (see *Banking and Finance Law Daily*, May 5, 2016). The bureau says it received more than 110,000 responsive comments.

**Reason for rule.** The bureau says that consumers are nearly completely deterred from pursuing claims against financial service providers by the small size of the potential recoveries. According to CFPB Director Richard Cordray, "These clauses allow companies to avoid accountability by blocking group lawsuits and forcing people to go it alone or give up. Our new rule will stop companies from sidestepping the courts and ensure that people who are harmed together can take action together." "Hundreds of millions" of consumer financial product or services contracts have included arbitration clauses, the bureau asserts.

The CFPB claims that allowing companies to block class actions does more than effectively fend off consumers' attempts at securing remedies. It also reduces the amounts that companies have to pay out. Moreover, class actions are much more effective than arbitration in deterring continuing illegal practices.

**Rule effects.** The bureau is creating a new 12 CFR Part 1040—Arbitration Agreements that generally will ban predispute arbitration clauses that would interfere with consumers' rights to participate in class actions. Arbitration clauses that apply only to individual actions must disclose that class actions are not covered. If a judge rules that a suit is not appropriate for class action treatment, an otherwise valid arbitration clause can be invoked.

Financial services providers that use arbitration clauses must collect and submit several types of records to the CFPB. These include arbitration records of the initial claim; any counterclaims; the answers to the claim and any counterclaims; the arbitration agreement; the arbitrator's decision or award; and any communication from the arbitrator if the matter is rejected because the company has not paid a fee or because the agreement does not comply with the arbitrator's fairness rules.

In the case of litigation, the company must submit a copy of any filing that invokes an arbitration clause and a copy of the relevant clause.

The CFPB will post all of these submissions on its website.

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**Exemptions.** The rule provides a limited number of exemptions. These include exemptions for class action bans in arbitration clauses related to:

- contracts for consumer financial products or services that are an employee benefit;
- contracts with persons who are regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission;
- contracts with state-regulated broker-dealers and investment advisors; and
- contracts with state and tribal governments that enjoy sovereign immunity.

**Compliance deadlines.** The rule will apply to all contracts signed 241 days after it is published in the *Federal Register*. There is a separate mandatory compliance date for contracts related to prepackaged general purpose reloadable prepaid cards.

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