

CFPB Unleashes Draft Rule On Arbitration Clauses

By **Dani Kass**

Law360, New York (May 5, 2016, 12:02 AM ET) -- The Consumer Financial Protection Bureau released a highly anticipated proposed rule Thursday to ban consumer financial services providers from prohibiting customers, through contracts with mandatory arbitration clauses, from filing or joining class actions.

In advance of a hearing Thursday in New Mexico regarding the proposed rule, the CFPB said in a statement that allowing class actions will stop banks and other firms from “sidestepping the legal system” and create accountability that they used to be able to dodge.

“Signing up for a credit card or opening a bank account can often mean signing away your right to take the company to court if things go wrong,” CFPB Director Richard Cordray said in a statement. “Many banks and financial companies avoid accountability by putting arbitration clauses in their contracts that block groups of their customers from suing them. Our proposal seeks comment on whether to ban this contract gotcha that effectively denies groups of consumers the right to seek justice and relief for wrongdoing.”

The proposed rule does not outright ban arbitration, as many advocacy organizations had hoped for, with the CFPB saying the harm caused by these firms is often too small to deal with at a consumer-by-consumer level and that class actions have more significant effects. The CFPB pointed to its March 2015 study to show that few individuals consider bringing suit against their providers, either through the courts or arbitration.

But experts have told Law360 that even a ban on class actions would have the practical effect of snuffing out arbitration.

In fear of having to pay twice for private arbitration and then class actions, firms would likely curb their use of the former, Mayer Brown LLP partner Andrew Pincus has said. Unlike court, the firms usually end up picking up the bill for arbitration.

In a joint statement Thursday, U.S. Chamber Institute for Legal Reform President Lisa A. Rickard and U.S. Chamber of Commerce Center for Capital Markets Competitiveness President and CEO David Hirschmann said the proposed rule presents the “biggest gift to plaintiffs lawyers in a half-century” while harming consumers by blocking them from arbitration.

“In the 50 years since the advent of modern-day class action lawsuits, plaintiffs lawyers have made millions of dollars in fees from these suits while consumers often receive little benefit. With this rule,

the CFPB doubles down on that trend,” Rickard and Hirschmann said. “The proposed rule is a wolf in sheep’s clothing. The CFPB’s own study concludes that arbitration empowers consumers to resolve disputes easily and quickly on their own without having to hire a lawyer. Nevertheless, the CFPB’s rule will have the practical effect of eliminating arbitration for most consumers.”

Under the proposal, companies would have to report arbitration claims, awards and related materials to the CFPB, which the agency said it may then publish in some form.

The CFPB also said it would provide companies with the specific language they must use to allow class actions.

The financial services industry has long argued that mandatory arbitration lowers the prices consumers have to pay for financial products by limiting the risk of litigation. Arbitration is also faster than going through the courts, according to the industry.

But the agency's study, which analyzed nearly 850 consumer finance agreements and more than 1,800 consumer arbitration disputes filed between 2010 and 2012, found that the consumer price benefits were overstated.

Between 2010 and 2012, consumers filed an average of about 600 arbitrations per year and 1,200 individual federal lawsuits in the markets the CFPB surveyed, but the relative recovery the consumers got was minimal, according to the report. It found that arbitrators awarded a combined total of under \$175,000 in damages and less than \$190,000 in debt forbearance in 1,060 cases filed in 2010 and 2011.

Arbitrators also ordered consumers to pay a total of \$2.8 million in that period, largely over disputed debts, the report said. Companies can also take consumers to arbitration.

Litigation filed by individuals saw similar meager recoveries, the report said. In contrast, around 32 million consumers were able to recover approximately \$2.7 billion in class action settlements over a five-year period, the report said.

--Additional reporting by Evan Weinberger. Editing by Edrienne Su.
