

INSIGHTS

CFPB Rules Permitting Consumer Class Actions Against Financial Institutions Set to Take Effect Absent Action by Congress

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In 2016, the Consumer Financial Protection Bureau (CFPB) announced that it was seeking public comment on proposed rules that would limit the effect of mandatory arbitration clauses for consumer finance transactions and allow consumers to initiate or participate in class action litigation against financial institutions. On July 10, 2017, the CFPB announced that the proposed rules had been finalized. Should the new rules take effect—more on that in a moment—they will apply to agreements between financial institutions and consumers entered into 180 days after the rules' effective date of August 10, 2017.

According to the proposed rules, financial institutions can continue to offer arbitration as a means for dispute resolution, but can no longer use arbitration clauses to waive a consumer's right to participate in class action litigation. This means that consumers will have the option to either arbitrate their disputes or participate as a class representative or class member in class action litigation against financial institutions even if there is an arbitration provision in their agreement.

Consumer advocacy groups, citing the need for more protection for consumers and greater accountability for financial institutions, have for years sought to place restrictions on the enforceability of mandatory arbitration provisions in consumer contracts with financial institutions. Financial institutions and industry groups have countered that mandatory arbitration clauses promote an efficient and cost effective way to resolve what are typically small-dollar disputes with consumers.

In an interesting development, acting Comptroller of the Currency, Keith A. Norieka, submitted a letter to the CFPB expressing concerns that the rule may expose financial institutions to "potentially ruinous liability" and [force them] to settle unmeritorious claims to mitigate the significant costs and risks associated with class action law suits." In a letter to Norieka, the director of the CFPB, Richard Cordray, rejected Norieka's assertions and dismissed his concerns, setting up a potential public conflict between the two agencies.

As referenced above, it is possible that the impact of the rules will be short-lived. The Republican-controlled Congress has recently made use of the Congressional Review Act (CRA), which by a simple majority allows Congress to override a government agency's newly issued regulations if done so within 60 days of the regulations being finalized. Early reports indicate

that Congress is already taking steps to invoke the CRA. Whether Congress successfully invokes the CRA to prevent the CFPB's new rules from being implemented remains to be seen. In the meantime, both financial institutions and consumers will anxiously await a final resolution.

Bracewell's initial analysis of the proposed changes of the rules, including a list of the types of financial companies the new rules will effect, can be found [here](#).