# CFPB Bulletin: New Proposal Bans Class Action Waivers

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Financial services companies need to rethink and retool their arbitration and litigation strategies based on the recent action taken by the Consumer Financial Protection Bureau (CFPB). The CFPB has proposed issuing a rule that would prohibit class action waivers in mandatory pre-dispute arbitration agreements. The proposal was announced at a field hearing on October 7, and can be found on the CFPB's website here (PDF).

**What Will the Rule Do?**

Under the proposed rule, any mandatory pre-dispute arbitration agreement contained in a consumer contract must state that it does not apply to class action litigation, unless and until class certification is denied or the class claims are dismissed in court. The proposed rule will not prohibit class arbitration, so long as consumers are also given the option of filing class claims in court.

**What About Individual Arbitration?**

For now, the CFPB does not plan to restrict arbitration of individual claims. However, the proposed rule could effectively eliminate a valued feature of arbitration–confidentiality. The CFPB is considering a requirement that reports of individual arbitration claims and awards be submitted to the CFPB, and is also considering publishing them on its website.

**Who Will the Rule Affect?**

According to the proposal, the list of entities who may be affected includes, but is not limited to, banks, credit unions, credit card issuers, certain auto lenders, small-dollar or payday lenders, auto title lenders, installment and open-end lenders, private student lenders, providers of certain auto leases for at least 90 days, servicers of covered credit and auto leases, credit service/repair organizations, debt settlement firms, providers of credit monitoring services, and debt buyers. This list is not limited to entities over whom the CFPB has supervisory authority, but includes all entities who extend credit subject to the Truth in Lending Act, among others.

**When Will it Happen?**

A final rule could be issued in late 2017 or 2018 — after the CFPB first gets feedback on its proposal from a Small Business Review Panel, then drafts and publishes a formal rule for notice and comment. The final rule would likely go into effect 210 days after issuance, applicable to new contracts only.

**How Did We Get Here?**

Under the Dodd-Frank Act, the CFPB was given authority to study the use of mandatory pre-dispute arbitration in connection with the offering of financial services and products, and to regulate the use of arbitration agreements if it found that regulation would be in the public interest and for the protection of consumers. The CFPB began its study in 2012 and submitted a 700-page report to Congress in March of this year.

According to the CFPB's proposal, its study proves that very few consumers seek relief through individual litigation or arbitration (either because the individual harm is not worth the cost of bringing suit or the consumer is simply unaware of the harm), and that the public interest is best served by the availability of class litigation as a means of private enforcement: "Through such proceedings, the Bureau expects that consumers will receive monetary relief when companies violate the law and that companies will change their practices to comply with the law, which will benefit consumers." Although the industry has long argued that a ban on class action waivers would result in frivolous class action lawsuits and increased costs that would be passed on to consumers, the CFPB has disagreed. At the October 7 field hearing where the proposal was announced, Director Richard Cordray denied finding any evidence in the study that large credit card companies would increase their prices or reduce access to credit if they eliminated their arbitration clauses.

Although the CFPB's study did not analyze whether individual arbitration is more or less favorable to consumers than single-plaintiff litigation, the CFPB's proposal reflects a general distrust of the closed-door arbitration process. The requirement to report all individual claims and awards to the CFPB, and potentially publish them, is based on the "potential for consumer harm" if arbitration agreements are administered by biased administrators or handled in an unfair manner.

**Can the Rule Be Challenged?**

Once the CFPB issues a rule, it could be subject to legal challenge. Under Dodd-Frank, any rule restricting arbitration must be consistent with the findings from the CFPB's arbitration study. Many in the industry have argued that the study findings do not support the CFPB's conclusions about class actions or arbitration, and that the proposed rule is inconsistent with the study findings. The CFPB's position on class actions is also in direct conflict with the decisions of the Supreme Court in *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013), where the Court upheld class waivers as consistent with the liberal federal policy favoring arbitration, and held they should be enforced even if they make it economically inefficient to bring a certain type of claim. However, there is nothing on the horizon that would derail the CFPB's rulemaking process. In light of these looming changes, financial services companies must reevaluate their arbitration and litigation strategies for the near future.

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If you have any questions on this issue, please contact the authors or a member of our Consumer Financial Services Litigation or Compliance teams.

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