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CFPB Proposes to Bar Arbitration Clauses That Preclude Consumer Class Actions

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The federal Consumer Financial Protection Bureau (“CFPB”) announced a proposal this week² that would effectively prohibit certain banks, credit card issuers, lenders and other entities from using arbitration clauses to preclude consumers from bringing class actions in court. Specifically, the CFPB’s proposal would require such entities to state that the arbitration clause does not apply to cases filed in court as class actions, unless and until class certification is denied or the class claims are dismissed. According to the announcement, this proposal, if adopted, “would apply to arbitration agreements entered into at least 180 days from the effective date of any regulation.”

The CFPB’s proposal follows its study of the use of arbitration agreements in connection with offering or providing consumer financial products or services, which we discussed in our March 19, 2015 memorandum. The CFPB acknowledged that “class lawsuits have been subject to significant criticism that regards them as an imperfect tool that can be expensive and cumbersome for all parties.” However, relying upon its study to justify its proposal, the CFPB concluded that “consumers are significantly better protected from harm by consumer financial service providers when they are able to aggregate claims,” and that permitting consumers to aggregate claims “also strengthens incentives for consumer financial service providers to engage in robust compliance and customer service on an ongoing basis.”

The proposal comes just days after the Supreme Court heard oral argument in *DIRECTV, Inc. v. Imburgia*, No. 14-462, the latest Supreme Court case involving a challenge to the enforceability of an arbitration clause that includes a waiver of class arbitration. Although a line of recent Supreme Court rulings—including *Stolt-Nielsen* (2010), *AT&T Mobility* (2011), and *American Express* (2013), among others—has emphasized the contractual nature of arbitration and repeatedly upheld contracting parties’ ability to preclude class arbitrations in consumer, financial and other agreements, the CFPB’s proposal opens a new regulatory front.

Participants in the markets for consumer financial products or services should be mindful of the CFPB’s attitude favoring class actions and its proposed rulemaking as well as the forthcoming decision in the *DIRECTV* case.

²This memo was originally released October 9, 2015)