Senate Passes Resolution to Repeal CFPB Arbitration Rule, Signaling Rule’s Likely Demise

Overview: On October 24, the Senate voted 51-50 to repeal the CFPB’s rule to ban class action waivers in consumer arbitration agreements (the “Arbitration Rule” or the “Rule”). This marks the first major policy blow for the CFPB – an agency still controlled by an Obama-era holdover – since President Trump entered office.

By way of background, this past summer, the CFPB released a final rule prohibiting a wide range of consumer financial services companies from blocking consumer class actions by way of binding arbitration agreements. Although the Rule would not have prohibited arbitration agreements altogether, many companies felt that the increased exposure to class action litigation would make arbitration programs economically untenable. The Rule would have also required covered companies to provide information on individual arbitration awards to the CFPB for publication in a public database (redacting consumers’ private financial information).

The Rule faced immediate criticism from industry participants and Republicans in Washington, who claimed that the Rule was predicated upon faulty research by the CFPB, and that it would present much more of a boon to the plaintiff’s bar than ordinary consumers. For example, the American Bankers Association, Consumer Bankers Association, and Financial Services Roundtable, in their joint comments to the rule, cited that in “87% of class action settlements consumers receive no compensation, and in the rare cases where they do receive a cash payment from a class action settlement, it will be a pittance, inasmuch as the Bureau Study found that the average participant in the class actions who were granted reward received $32.35.” Criticism against the Rule was particularly intense in this instance, likely because the Rule would have affected a very large swath of the consumer financial services sector (unlike many other CFPB rules, which target a particular product type).

Congress relied upon a measure known as the Congressional Review Act to repeal the Rule. This law allows Congress to overturn a major regulatory action within 60 legislative days of the measure being published in the Federal Register. This course of action has limited historical precedent, as it is typically only used in the rare set of circumstances when there is a carry-over regulator from a prior administration whose position on a regulation is at odds with both a President and Congress controlled by the opposition party. (That is the current case with the CFPB, whose current director, Richard Cordray, is a holdover from the Obama administration).

The Congressional Review Act only requires a simple majority in the Senate to pass, rather than the 60-vote super-majority required for most other legislation. That threshold certainly came in handy for Arbitration Rule opponents in this instance, because the resolution passed by a razor-thin margin of 51-50, with Vice President Pence casting the tie-breaking vote. All Democratic Senators (and two Republicans, Senators Lindsey Graham and John Kennedy of South Carolina and Louisiana, respectively) voted against the measure. The House of
Representatives previously voted to approve the measure back in July.

The resolution has now been sent to the President’s for his expected signature into law. Notwithstanding the recent Senate vote, Director Cordray wrote a surprising, personal appeal to the President on October 30, asking him to veto the measure. Among other things, Director Cordray points to the support for the Rule from veterans groups and President Trump’s own use of the court system in resolving business disputes. We expect this “Hail Mary” appeal to fall on deaf ears, however, as both the President and his advisors have taken a public stance against the Arbitration Rule (and the CFPB, generally). Indeed, just prior to the Senate’s passage of the resolution to repeal the Rule, the U.S. Treasury Department released a report criticizing the CFPB for its analysis of data underlying the rule and its alleged failure to “consider less onerous alternatives to its ban on mandatory arbitration clauses across market sectors.” This report follows several high-profile statements and letters issued by Acting Comptroller of the Currency Keith Noreika castigating the CFPB for the Rule.

**Outlook:** Assuming President Trump signs the resolution into law, the Rule will become a dead letter and the CFPB will be barred from re-issuing a similar rule unless Congress expressly authorizes it do so. (The Congressional Review Act not only kills the particular regulatory measure at issue; it also prevents the regulatory agency from issuing a substantively similar regulation without express Congressional approval). This development represents the most significant policy setback for the CFPB, which has spent the past 10 months in fierce existential tension with a Republican-controlled White House and Congress.

Notwithstanding this development, the CFPB still maintains other tools in its tool shed to police the marketplace for consumer arbitration agreements. Most notably, the CFPB maintains broad authority to prohibit unfair, deceptive, and abusive acts and practices through supervisory and enforcement actions. Through these mechanisms, the CFPB can still scrutinize and penalize companies, on a case-by-case basis, that it believes are harming consumers through overly aggressive arbitration practices. Although such supervisory and enforcement actions are case-specific, their outcomes essentially become *de facto* rules for the rest of the industry to follow.

In addition, as Senate Republicans barely managed to repeal the Rule, relying upon the Vice President’s tie-breaking vote, it is not impossible to imagine a future Congress, controlled by Democrats, passing a law to restore the CFPB’s arbitration authority. Senator Al Franken (D-MN), for example, has introduced legislation that would prohibit pre-dispute arbitration clauses in consumer contracts altogether. This type of measure could serve as a blueprint for policy discussions in a future Congress. Until that point, though, upon the President’s signature, the repeal of the CFPB Rule means that consumer class action waivers will live to see another day.

---

Craig Saperstein, a member of NACHA’s Government Relations Advisory Group, is an attorney in the Public Policy practice of Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. In this capacity, he provides legal analysis for clients on legislative and regulatory developments and lobbies congressional and Executive Branch officials on behalf of companies in the payments industry. Deborah Thoren-Peden is a partner and member of the Financial Institutions Team at Pillsbury Winthrop Shaw Pittman LLP. She provides advice to financial institutions, bank and non-bank, and financial services companies. Andrew Caplan is an associate and member of the Financial Institutions Group and the Privacy, Data Security, and Information Use Focus Team at Pillsbury Winthrop Shaw Pittman LLP. He counsels and defends financial institutions, technology companies, and other clients that offer consumer products or services on a range of issues related to credit, payments, data privacy, cybersecurity, and e-commerce. The information contained in this update does not constitute legal advice and no attorney-client relationship is formed based upon the provision thereof.