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Aggressive CFPB Rulemaking Attempts to Create Registry of Nonbank Contract Provisions

On February 1, 2023, the Consumer Financial Protection Bureau (CFPB) published a proposed rule that, if implemented, would require most nonbanks subject to the CFPB's supervisory authority, with limited exceptions, to submit annually to the CFPB information on certain terms and conditions in form contracts. As noted in our earlier post, rumors abound that this is an attempt by the CFPB to put a kibosh—or at least impose a chilling effect—on arbitration agreements (which contain class action waivers) and to skirt precedent by the U.S. Supreme Court's (SCOTUS) policy favoring arbitration and action by Congress in November 2017 overturning the CFPB's arbitration rule from earlier that year. The proposed registry would have further follow-on consequences, including giving plaintiffs' counsel wide access to previously unpublished information, which could drum up claims with thin-or-no merit.

More than a decade ago, SCOTUS concluded in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act (FAA) preempts, that is, “displaces”, state law that puts arbitration on unequal footing. Nevertheless, the CFPB spends at least six pages of the proposed rule addressing various state laws that on their face would appear to prohibit or at least limit the effectiveness of arbitration agreements and class action waivers contained therein. However, these state laws were displaced by *Concepcion* and the FAA to the extent the transaction involves interstate commerce—which nearly all, if not all, credit transactions do.

Collection of the required terms and conditions may also be a boon to plaintiffs' counsel. As also noted in our earlier post on this topic, the CFPB currently collects prepaid account agreements and credit card agreements and publishes them on its website. This is pursuant to specific authority found in

the Electronic Funds Transfer Act and the Truth-in-Lending Act, respectively. Late last year, a court denied a motion for summary judgment in a case in which a consumer alleged that a debt collector violated the Fair Debt Collection Practices Act for trying to collect on time-barred debt. In that case, the parties disagreed as to when the statute of limitations to sue on the defaulted debt commenced and, therefore, whether the debt was time barred at the time of the debt collector's suit. The consumer pointed to the CFPB's credit card agreement repository to oppose summary judgment, arguing that a shorter statute of limitations applied based on the agreements, and specifically their choice-of-law provisions, contained in the credit card agreement repository—even though the facts of the case did not identify which version of the agreements contained in the repository applied to her account. In part on this basis, the court sided with the consumer, finding a dispute of fact, and denied the motion for summary judgment.

Nuts and bolts of the proposed rule

The basics

The proposed rule would create a registry maintained by the CFPB that will publish information collected, which is discussed in more detail below, on the CFPB's website. Notably, this published information would include “covered terms and conditions,” as defined by the proposed rule, which generally includes those terms and conditions that waive or impose limitations on consumer rights or legal protections and are applicable to consumer financial products or services. The anticipated effective date would be January 2024 at the earliest.

The purpose of the rule

In Director Chopra's statement on the proposed rule, he noted three purported key goals in proposing the registry. First, the CFPB intends for the registry to assist regulators in detecting when companies are offering products and services that violate consumer protection laws. Second, the registry would help the CFPB understand the types of contract provisions that are being used and their impact on consumers. Lastly, the registry will inform how the CFPB conducts its supervision of nonbank financial companies.

In addition to the purported goals outlined by Director Chopra, the summary of the proposed rule specifically provides that collection of the requested contract terms and conditions will allow the CFPB to identify supervised nonbank entities for the CFPB to consider examining and prioritization of those examinations. The summary also describes that the CFPB has a “particular interest in exercising its market monitoring authorities to address questions or concerns regarding the ‘legal protections applicable’ to consumer financial products and services...” and that collection of these proposed “covered terms and conditions” would assist in identifying instances where consumers are not protected due to waiver of the protections offered by the required terms.

Scope of entities subject to proposed rule

The proposed rule would be issued pursuant to the CFPB's authority under the Consumer Financial Protection Act of 2010, which allows the CFPB to monitor markets for risks to consumers as it relates to consumer financial products or services. "Supervised nonbanks" would be required to collect and submit to the CFPB information, including the "covered terms and conditions," for inclusion in the registry. Supervised nonbank entities include, generally, nonbank covered persons subject to supervision and examination by the CFPB. Specifically, such entities include persons conducting mortgage lending or servicing, payday lending, and private student lending. Additionally, the definition of supervised nonbanks would include larger participants of certain consumer financial products and services, as defined by 12 C.F.R. § 1090.

The proposed rule identifies the entities excluded from coverage and, therefore, not required to submit information to the registry.

States, certain Federal agencies, service providers, or natural persons;

A person with less than \$1 million in annual receipts from offering or providing consumer financial products and services in the specific industries of nonbank covered persons called out in the rule, including larger participants;

A person that has not engaged in more than *de minimis* use of "covered terms and conditions" either by entering into covered form contracts, with any covered term or condition, 1,000 or more times in the previous calendar year or obtaining a court or arbitrator decision regarding the enforceability of a covered term or condition; or

A person that solely entered into contracts for residential mortgages using forms from a government sponsored enterprise required for insurance or guarantee by a Federal agency or purchase.

Types of contract terms and conditions collected

Contracts or written agreements, defined as a "covered form contract" in the proposed rule, that would be used to offer or provide consumer financial products or services and include the following specific features would be in scope of the proposed rule: (1) the contract was drafted prior to the transaction and will be used in multiple transactions with different customers; and (2) the contract contains a "covered term or condition." The CFPB specifically identifies that electronic form contracts for consumer financial products or services would be included in the scope and that a transaction may be subject to multiple "covered form contracts," including website terms of use for an online application for a product or service, a transaction agreement, and a separate arbitration agreement, if

used. The CFPB devotes significant discussion to what may be included in the proposed definition of a “covered form contract” and appears to envision an inclusive approach for the types of contracts that may contain applicable terms or provisions.

A “covered term or condition” would include “any clause, term, or condition that expressly purports to establish a covered limitation on consumer legal protections applicable to the offering or provision of any consumer financial product or service.” A “covered limitation on consumer legal protections” would be one that generally seeks to waive consumer legal protections or limit the ability of consumers to enforce or exercise rights. The types of terms and conditions included in the definition of “covered limitation on consumer legal protections” fit in the following categories:

1. Waivers of claims a consumer could file in a legal action;
2. Limits on the consumer’s ability to bring legal action by dictating the time frame, forum, or venue for a legal action;
3. Limits on the ability of a consumer to bring or participate in collective legal actions, including class actions;
4. Limits on the ability of consumer to complain or post reviews; and
5. Arbitration agreements.

The registry

Submissions to the registry would be on an annual basis and include a number of details related to the covered form contracts used by in-scope entities for consumer financial products or services. Details that would be submitted include the state where the products were offered, brand and trade names used to offer the products, the specific types of covered limitations in the covered contracts, and further specific details about the included covered limitations. The proposed rule also contemplates standard form contracts created by a third party and used by multiple market participants, such as retail installment contracts used for automobile financing. For these types of contracts, the registry submission must include the name of the form contract provider and enough information for the CFPB to identify the version used by the submitter.

An interesting piece of information the CFPB proposed to collect are decisions by a court or arbitrator on the enforceability of a covered term or condition in the previous year. The proposed rule requests information related to all such decisions as part of the registry, particularly whether the decision enforced or declined to enforce the covered term or condition.

Regarding the administrative aspects of the proposed rule, the CFPB provides details on the registration process, corrections of submissions, and self-reporting by in-scope entities if such entity

believes it would no longer be required to report to the proposed registry. Further, publication of the registry would not include “administrative information,” as defined in the rule, including contact information of those individuals that submit required information to the registry.

What this means to you

The proposed rule was published in the Federal Register on February 1, 2023. Comments will be accepted until April 3, 2023. Upon review of any and all comments received, the CFPB will make changes, as applicable, and publish the final rule, likely before the end of the year, if not sooner. If you are a supervised nonbank that offers consumer financial products or services, stay tuned for the final rule.

Contact us

If you have any questions about the proposed rule, your status as a supervised nonbank that may be subject to the rule, or anything else consumer finance related, please reach out to Marci Kowski, Maureen Clark, Catherine Albrecht-Wiese, Abby Felter or your Husch Blackwell attorney.