

## The New Arbitration Rule

August 28, 2017 | Nora Udell

The Consumer Financial Protection Bureau ("Bureau") published its new Arbitration Rule ("Rule"), 12 C.F.R. part 1040 and its Official Interpretation of the Rule, Supplement I to Part 1040, in the *Federal Register* on July 19, 2017. The Supplementary Information to the Rule includes a summary of the Bureau's Arbitration Study, comments received by the Bureau on the proposed rule, and a section-by-section analysis of the Rule.

This article explains when you must comply with the Rule and introduces you to the basic requirements of the Rule.

Compliance Date and Possibility of Congressional Override.

The Rule has an "Effective Date" and a "Compliance Date." The Effective Date is September 18, 2017 - 60 days after the day the Rule appeared in the *Federal Register*. The Compliance Date is March 19, 2018, the 181st day after the Effective Date.

Congress can kill the Rule. Under the Congressional Review Act ("CRA"), if the House of Representatives and the Senate each pass a Joint Resolution of Disapproval and the President signs a veto, the Rule dies. 5 U.S.C. § 802. The House of Representatives adopted its Joint Resolution of Disapproval on July 25, 2017. The Senate has not yet acted on its Joint Resolution. If the Joint Resolution is adopted, the Bureau may not reissue the rule or a substantially similar rule unless Congress enacts new law. 5 U.S.C. § 801(b)(2). We cannot predict with any certainty whether the Senate will act on its Joint Resolution, and if it acts, whether there will be enough votes for adoption.

Basic Requirements.

The Rule:

- Prohibits a consumer financial products and services provider ("Provider") from using a pre-dispute arbitration agreement to compel arbitration to avoid a class action lawsuit unless a court determines that the controversy cannot proceed as a class action;
- Requires a Provider to modify the form of any new pre-dispute arbitration agreement to remove the class action waiver or to explain that the arbitration agreement does not prevent the consumer from filing a class action lawsuit or participating in a class action as a class member;
- Requires a Provider to review each arbitration agreement it acquires by assignment or by entering into a new relationship with the consumer. If the arbitration agreement does not contain

the new language restricting the use of an arbitration agreement to avoid a class action lawsuit, the Provider must modify the arbitration agreement or send a separate notice to the consumer. The notice explains that the arbitration agreement does not prevent the consumer from filing a class action lawsuit or participating in a class action as a class member; and

- Requires a Provider to deliver redacted records from any arbitration proceedings to the Bureau. The Bureau must make the records available to the public on its website by the summer of 2019.

Providers must comply with these requirements on and after the compliance date, March 19, 2018.

Assuming Congress does not override the Rule, we will discuss a number of other topics over the coming months, including:

- How the Rule will apply to arbitration agreements entered into before the Compliance Date;
- How the Rule will apply to Providers who do not enter into an arbitration agreement;
- The types of products, services, and entities that are not subject to the Rule;
- More detail on the Rule's content and timing requirements.

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