

# CFPB Proposes to Ban Arbitration Clauses; Fines Bank \$20 Million for Deposit Processing Errors

## CFPB Proposes to Ban Arbitration Clauses

A recent proposal by the Consumer Financial Protection Bureau ("CFPB") to prohibit the use of certain arbitration clauses, and a Consent Order issued by the CFPB regarding deposit processing violations by banks, are examples of the continuing costs and regulatory burdens which the CFPB is imposing on the financial services industry in the name of consumer protection. This Alert briefly reviews both subjects.

## Proposal to Ban Arbitration Clauses

In a 375-page rule released last week<sup>[1]</sup>, the CFPB has proposed to eliminate certain types of arbitration clauses currently used in many consumer contracts with banks and other financial services providers. The CFPB's proposal, issued under authority in the Dodd-Frank Act, met with immediate hostility from the financial services industry who argues that it will be a boon and incentive for attorneys to file non-meritorious class action lawsuits in hope of receiving a settlement.

The CFPB arbitration proposal follows a three-year study of arbitration that was required under the Dodd-Frank Act. The CFPB's proposal is open for public comment for ninety (90) days, and will become effective 180 days after it is published as a final rule.

The CFPB's arbitration proposal has been estimated to apply to as many as 50,000 financial services firms, including banks, credit unions, payday lenders, debt collectors, loan servicers, and prepaid card issuers, among others. In its study, the CFPB found that about 45% of the nations' largest 100 banks include arbitration provisions in their rules for consumer checking accounts, while less than 10% of small and mid-sized banks had such provisions.

One key aspect of the CFPB's arbitration proposal would be to ban the use of a dispute resolution provision that prohibits a consumer from participating in a class action lawsuit with respect to the dispute.

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The second component of the CFPB's proposal would require the submission of certain arbitration records and documents to the Bureau, so they may monitor actual arbitrations.

Institutions currently using deposit account rules and other contracts with consumers which include mandatory arbitration clauses will have to consider how to structure these clauses differently if the proposed rules become effective. Note that some financial services trade groups have talked about bringing litigation to forestall or eliminate the arbitration rule from becoming effective.

## **CFPB Fines Bank for Deposit Processing Violations**

In a Consent Order<sup>[2]</sup> issued last summer, the CFPB ordered Citizens Bank N.A. to pay almost \$20 million in fines and penalties for committing violations of the Unfair, Deceptive, and Abusive Acts and Practices provisions ("UDAAP") of the Dodd-Frank Act. The UDAAP violations involved the Bank's deposit processing practices as discussed below, and the CFPB's Order should cause all banks to examine their deposit processing procedures to assure that they are not vulnerable to a similar regulatory finding.

In the Citizens Bank Order, the CFPB concluded that the Bank processed customer deposits in a manner that resulted in certain customers not receiving full credit for the amount of their deposited funds. The CFPB concluded that this processing lapse was a UDAAP violation, as were the Bank's customer account disclosures relating to the deposit process, since they did not accurately describe the actual verification process used by the Bank.

"Deposit discrepancies" happened where the total deposit amount read on the deposit slip differed from the total of the amounts read from the checks, cash deposited or other deposit items. When the deposit discrepancy was more than \$25, the Bank would review the actual deposited documents and make any necessary adjustments to correct the amount the consumer was credited. On amounts less than \$25, however, the Bank did not examine documents but simply credited the account with the amount shown on the deposit slip, even if this amount was incorrect.

Thus, customers received credit for a deposit that was likely inaccurate, and often (the CFPB alleged) less than the amount of the deposited items associated with the deposit. The CFPB found that during the relevant period, Citizens Bank had under-credited consumers for deposited items by more than \$12 million, which



the CFPB concluded was a UDAAP violation.

Additionally, the CFPB found that the language in the Bank's Deposit Account Agreement regarding deposit discrepancies did not in fact reflect the Bank's actual practices. The Bank's advertising, marketing and deposit rules were held by the CFPB to imply that the Bank would take steps to verify and assure that consumers always were credited with the correct deposit amount, yet the Bank failed to do this. This failure to disclose the Bank's actual practices in dealing with deposit discrepancies was also found to constitute a deceptive act or practice.

In conclusion, this recent action by the CFPB should cause banks to re-examine how their institutions handle consumer deposit discrepancies, and the CFPB's arbitration proposal also merits your attention if you currently utilize an arbitration provision. Please call or e-mail Jim Sheriff at 414-298-8413; [jsheriff@reinhartlaw.com](mailto:jsheriff@reinhartlaw.com) if you would like to discuss either of these subjects.

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[1] [http://files.consumerfinance.gov/f/documents/CFPB\\_Arbitration\\_Agreements\\_Notice\\_of\\_Proposed\\_Rulemaking.pdf](http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf)

[2] <http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-citizens-bank-to-pay-18-5-million-for-failing-to-credit-full-deposit-amounts/>

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