ATTEMPTS TO REGULATE PRIVATE ARBITRATION IN CONSUMER FINANCIAL PRODUCTS: THE CONSUMER FINANCIAL PROTECTION BUREAU APPROACH

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INTRODUCTION

The purpose of the present essay is to analyse recent developments concerning the Consumer Financial Protection Bureau's (CFPB) attempts to regulate private arbitration in consumer financial products. Meanwhile, contrasting them to other recent and parallel administrative endeavors aimed at curving, what some deem, an overextended and abusive system. Particularly, this

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paper summarizes the CFPB's Rule regarding Arbitration Agreements[1], along with the agency's rulemaking process, and contrasts it with rules approved by other governmental institutions, including: (1) the Financial Industry Regulatory Authority (FINRA); (2) the Commodities and Futures Exchange Commission (CFTC); (3) the Federal Trade Commission (FTC); and (4) the Department of Labor (DOL). We will examine the possible consequences the CFPB's cases pose to future administrative efforts intended in regulating an area where deference has become the norm, by Congress and the Courts.

I. THE CFPB AND RULE 1041

The CFPB was created in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act, commonly referred to as the Dodd-Frank Act[2], as a response to the financial crisis that occurred from 2007 to 2009. § 5491 of said Act formally established the CFPB,[3] while § 5511(a) defined its purpose as "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive".[4] Additionally, § 5511(b) lists the CFPB's primary objectives, including that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."[5]

Additionally, Congress went further and explicitly granted the CFPB the power to regulate mandatory pre-dispute arbitration agreements.[6] Particularly, Congress gave the CFPB the authority to "prohibit or impose conditions or limitations" on such agreements, if it finds such actions are in the public interest, for the protection of consumers, and consistent with its findings in a Congressionally-mandated study (hereinafter, "Study") regarding such agreements.[7]

On March 2015, the CFPB published and delivered to Congress its report on the use of arbitration agreements in consumer financial products.[8] Later, on May 24, 2016, it published its proposed rule to address these agreements.[9] Afterwards, it released its revised Rule 1041 on July 19, 2017, which consists of two

[1] *See* Arbitration Agreements, 12 C.F.R. 4010 [Repealed]. *See also* 82 Fed. Reg. 137, 33210–33434 (July 19, 2017) (to be codified 12 C.F.R. pt. 1040).
[2] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2012).
[3] *Id.* § 5491.
[4] *Id.* § 5511(a).
[5] *Id.* § 5511(b)(2).
[6] *See id* § 5518(b).
[7] *Id.* § 5518(a). (The Study, required under 12 U.S.C. §5518(a), concerns "the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering of consumer financial products or services". It must be carried out by the Bureau and presented to Congress.)
[8] *See* Bureau of Consumer Fin. Prot., Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf
[9] *See* Bureau of Consumer Financial Protection, 81 Fed. Reg. 137, 32617–33122 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

parts: (1) it "prohibits providers from using a pre-dispute arbitration agreement to block consumer class actions in court and requires most providers to insert language into their arbitration agreements reflecting this limitation"[10]; and (2) "requires providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral and court proceedings to the [CFPB]."[11] The Rule was set to take effect on September 18, 2017, with mandatory compliance commencing on March 19, 2018;[12] but on November 1, 2017 Congress passed Pub. Law 115–74, which repealed the CFPB's rule, leaving it without "force or effect."[13]

Congress relied on the Congressional Review Act to overrule the CFPB. This statute permits Congress to overrule an agency's proposed or finalized rule within a 60-day period of being published. [14] Additionally, the law further states that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[15] Thus, there is no reasoning or justification given for Congress' presently given action, nor can one be implied from congressional debate, given there was none. The only official expressions regarding the CFPB's rule were from the Executive branch. These were in the form of two separate reports provided by the U.S. Department of the Treasury[16] (Treasury) and the Office of the Comptroller of the Currency[17] (OCC), both of which were critical of the Rule for several reasons.

II. THE CFPB STUDY

Per §1028(a) of the Dodd-Frank Act, the CFPB finalized an extensive and empirical study focused on understanding the resolution mechanisms used in consumer financial products. As explained by the CFPB, the Study included:

> [O]ver 850 agreements for certain consumer financial products and services; 1,800 consumer financial services arbitrations filed over a three-year period; a random sample of the nearly 3,500 individual consumer finance cases identified as having been filed over a period of three

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[10] *See* Bureau of Consumer Financial Protection, 82 Fed. Reg. 137, 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).
[11] *Id.*
[12] *See* 12 C.F.R. 1040.5 [Repealed].
[13] Congressional disapproval procedure, 5 U.S.C. § 802 (2017).
[14] *See* Congressional Review Act, 5 U.S.C. §802–803 1994 Edition Supplement III vol. 1 190 (1995–1998).
[15] *Id* at §805. 1994 Edition Supplement III vol. 1 192 (1995–1998).
[16] *See* U.S. DEP'T OF THE TREASURY, LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE (2017), *https://www.treasury.gov/press-center/press-releases/Documents/10-2317%20Analysis%20of%20CFPB%20arbitration%20rule.pdf.*
[17] *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, PROBABLE COST TO CONSUMERS RESULTING FROM THE CONSUMER FINANCE PROTECTION BUREAU'S FINAL RULE ON ARBITRATION AGREEMENTS (2017), *https://www.occ.gov/publications/publications-by-type/other-publications-reports/occ-arbitration-study.pdf.*

> years in Federal and selected State courts; and all of the 562 consumer finance class actions identified in Federal and selected State courts of the same time period . . . . [O]ver 40,000 filings in State small claims courts over the course of a single year. The Bureau supplemented this research by assembling and analyzing all of the more than 400 consumer financial class action settlements in Federal courts over a five-year period and more than 1,100 State and Federal public enforcement actions in the consumer finance area.[18]

Using these extensive datasets, the CFPB focused its Study on a total of nine (9) factors, which comprehensively illustrated the nature and scope of arbitration agreements in covered consumer financial products. The following sections provide a summary of the CFPB's findings in each of these factors.

A. Arbitration Clause Incidence and Features

In one of the CFPB's most important findings, the study showed that "tens of millions" of consumers with financial product contracts were subjected to arbitration clauses. 16% of issuers of credit cards that aggregate a total of 50% of credit card loan balances outstanding included these clauses in their contracts. In the checking account market, around 8% of banks — covering 44% of insured deposits — included such clauses. Likewise, almost the entirety of prepaid card and payday loans included arbitration clauses. Substantially, all of the large companies offering student debt and mobile wireless billing agreements use these clauses. 85–100% across each of the foregoing markets include a no-class arbitration provision alongside an anti-severability provision.[19] Most contracts studied contained a small claims court "carve-out", while the American Arbitration Association (AAA) is the predominant arbitration administrator in these types of arbitrations.[20]

B. Consumer Understanding and Awareness

The CFPB conducted a survey of consumers of credit card products and found that dispute resolution rarely is taken into account when selecting a credit card provider. Consumers are generally unaware that these contracts include arbitration clauses and thus erroneously believe that they can bring suit in court,

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[18] Bureau of Consumer Financial Protection, 82 Fed. Reg. 137, 33220 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[19] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 10 (2015).

[20] *Id.* at 12–13. As to the credit card market, the Bureau emphasizes that without the several private settlements during 2009 and 2010, in which some issuers agreed to remove these clauses from their credit card contracts, 94% of credit card loan balances would have been subject to an arbitration clause.

participate in class action suits, or opt-out opportunities that were given during the process.[21]

C. Arbitration Incidence and Outcomes

Similarly, the CFPB found a large divergence in participation and outcomes between companies and consumers in arbitration. For example, the consumers were represented by counsel in about 60% of cases; arbitrators adjudicated about 33% of claims; consumers obtained relief to their affirmative claims in 9% of cases, while companies obtained relief in 93%; and a decision was issued within five months of submission.[22]

D. Class Litigation Incidence and Outcomes

For the test period, the CFPB found that, on average, 187 putative class action cases were filed each year. Of those cases, 25% were resolved through individual settlements and 15% reached a final settlement approval.[23] Additionally, the company moved to compel arbitration in 17% of cases, of which the Courts granted the petition, in whole or in part, in 49% of instances.[24]

E. Individual Litigation Incidence and Outcomes

By analyzing individual cases filed by consumers in federal courts, the CFPB found that in about 7% of them consumers could establish some form of corporate liability.[25] Moreover, companies compelled arbitration in only 1% of cases.[26] These federal cases closed in a median of 127 days after filing.[27]

F. Small Claims Court

Under the premise that the small claims court carve-out in most arbitration agreements, the CFPB analyzed 870 credit card claims in these courts of various jurisdictions.[28] It found that credit card providers were more likely to use this alternative than consumers.[29]

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[21] ARBITRATION STUDY, *supra* note 19, at 14.
[22] *Id.* at 14–16.
[23] *Id.* at 13–14.
[24] *Id.*
[25] *Id.* at 15.
[26] *Id.*
[27] *Id.* As to company requests to compel arbitration, the Bureau explains that this figure takes into consideration all cases studied, whether they included arbitration-bound contracts or not. When analyzing a subset of the cases that were based on credit card contracts that include arbitration clauses, the figure rises to 5.7%. *See Id.* at 1815–1816. Cases brought by companies amounted to 41,000, while consumers brought 870 claims against companies.
[28] *Id.* at 15–16.
[29] *Id.* at 16.

G. Class Settlements

As part of the study, the CFPB analyzed the use of class settlements in consumer financial products and legal services of class litigation. Said study found that the estimated class members throughout the test period was 350 million people, and the average settlement amount was $540 million. About 34 million members received a payment.[30] The attorney's fees were estimated at an average of 24% of the settlements payments, and the average time for the approval of settlements was 690 days.[31]

H. Public and Private Enforcement

The CFPB also analyzed if there was evidence of enforcement overlap between public and private class-action plaintiffs. In this regard, the Bureau did not find any such overlap in 88% of cases.[32] When there was overlap, private parties filed before the government between 62% and 71% of the time.[33]

I. Price and Output Effects of Arbitration Provisions

The CFPB did not identify any evidence that indicated an increase in price or a reduction in credit availability in firms who eliminated arbitration clauses from their credit card contracts.[34]

III. APPLICABLE LEGAL STANDARD:

As expressed before, Dodd-Frank gave the CFPB the authority to regulate and even prevent the use of arbitration clauses in consumer arbitration clauses if it found that it was "in the public interest and for the protection of consumers."[35] As part of the rule-making process, the CFPB gave its own interpretation regarding this standard. Its final interpretation was that the "public interest" and "for the protection of consumers" were two separate but related standards.[36] On the one hand, "in the public interest" is tied to the rule's implications for the Bureau's purposes and objectives. These include cost to providers and consumers, and the systemic concerns for markets and other entities.[37] On the other hand, the CFPB determined that "for the protection of consumers", conditioned any rule to an interpretation that serves to deter or redress violations to consumers; simply stated, it impacts compliance.[38]

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[30] ARBITRATION STUDY, *supra* note 19, at 16–17.
[31] *Id.* at 17.
[32] *Id.*
[33] *Id.* at 18.
[34] *Id.*
[35] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518(b) (2012).
[36] Arbitration Agreements, 82 Fed. Reg. 33251 (Jul. 19, 2017).
[37] *Id.*
[38] *Id.*

As explained by the Bureau, the starting point of this interpretation was §921(b) of Dodd-Frank which authorizes the SEC to "prohibit or impose conditions or limitations on the use" of pre-arbitration agreements between investment advisors and their clients, if doing so is "in the public interest and for the protection of investors.[39] The parallels between the two mandates is evident. Even though the SEC has not issued a rule under this authority, its language is similar to that used in the Securities Act and the Securities Exchange Act.[40] Under these statutes, the SEC has never interpreted separate and individual standards, since investors make up a substantial portion of the public the SEC is tasked with protecting. Although the same reasoning applies to the CFPB and consumers, the CFPB decided to interpret two separate tests because it believed it would provide a "fuller consideration of relevant factors".[41] Lastly, the CFPB found that the study supported the imposition of the final rule, as required by Congress.[42]

IV. EXECUTIVE REPORTS AGAINST RULE 4001

As mentioned above, Congress did not provide any justification or reasoning behind its decision to revoke the CFPBs rule. The only official expression regarding the rule came from two executive agencies that published two separate reports criticizing its implementation.

First, the Office of the Comptroller of the Currency published a report on September 20, 2017 centered on the CFPB's conclusion that elimination of arbitration agreements in contracts for credit cards would not conduce to an increase in costs to consumers. Using a similar model than the one used by the Bureau, it concluded that there is "a strong probability of a significant increase in the cost of credit cards as a result of eliminating mandatory arbitration clauses".[43] It should be noted that this study is concerned exclusively with the case of credit card contracts.

The U.S. Department of the Treasury also published a report on October 23, 2017, with a broader scope and range than the OCC's study. Its conclusion is stated as:

> The Bureau's Rule would upend a century of federal policy favoring freedom of contract to provide for low-cost dispute resolution. An agency implementing such a drastic shift in policy should typically subject its

[39] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 921(b), 124 Stat. 1841 (2010). Amending section 205 of the Investment Advisers Act of 1940, 15 U.S.C. 80(b). It is worth pointing out that even though Congress used very similar language for the SEC's authority, it did not require this agency to carry out a study before implementing its rule.

[40] Securities Act of 1933, 15 U.S.C. 77(c)(b)(1) (2012); Securities Exchange Act of 1934, 15 U.S.C. 78(k)(a)(2) (2012).

[41] Arbitration Agreements, 82 Fed. Reg. 33248 (Jul. 19, 2017).

[42] *Id.* at 33251.

[43] OFFICE OF THE COMPTROLLER OF THE CURRENCY, PROBABLE COST TO CONSUMERS RESULTING FROM THE CONSUMER FINANCE PROTECTION BUREAU'S FINAL RULE ON ARBITRATION AGREEMENTS 4 (2017).

> rulemaking to the rigors of *cost-benefit analysis* and require incremental *efficiency justification* for more stringent regulations. The Bureau's analysis fell short of these standards for agency rulemaking, as well as its own statutory command to determine that the Rule serves the public and consumer interests. And the Rule fails to account for significant *costs of class action litigation and benefits of arbitration* in a meaningful way. At bottom, the Bureau's Arbitration Study and Rule do not show that the Bureau's prohibition on arbitration will efficiently improve compliance with the federal consumer financial laws or serve public and consumer interests as the Dodd-Frank Act commands.[44]

V. PREVIOUS ADMINISTRATIVE ARBITRATION RULES

As the scholar Daniel T. Deacon points out, administrative agencies have taken an ever-larger role in addressing the issues raised by the use of pre-dispute arbitration clauses.[45] Specifically, they have used two mechanisms through which to play a part: (1) through their authority as enforcers in their respective areas of expertise; and (2) through direct regulation of arbitration agreements.[46] The latter is of interest for the purposes of this paper. Deacon goes on to explain that agencies have two grounds in which to regulate the use of these agreements directly: (1) an express delegation from Congress; and (2) an implied power that the agency holds from its enabling act.[47]

As mentioned above, apart from the CFPB, another agency which received an express authority to regulate arbitration agreements is the SEC. Its power also derives from the Dodd-Frank legislation, but it has yet to act on its authority. Another such agency is the Federal Trade Commission, which in 1975 was granted the express authority to prescribe rules for alternate methods of dispute resolution in consumer product warranties.[48] Furthermore, other agencies have tried, with mixed results, to regulate this issue. The following is a summary of these efforts, and the rules that have resulted.

A. Federal Trade Commission

§110 of Pub. L. 93–637, commonly referred to as the Magnuson-Moss Warranty Act (MMWA), directed the FTC to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is

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[44] U.S. DEP'T OF THE TREASURY, LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE 17 (Oct. 23, 2017) (emphasis ours).
[45] Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 993 (2017).
[46] *See id.* at 994–995.
[47] *Id.* at 1014.
[48] Magnuson-Moss Warranty Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(a)(2) (2012).

incorporated into the terms of a written warranty. . . ."[49] On that basis, the FTC issued a rule on December 31, 1975 in which it stated that "[d]ecisions of the Mechanism *shall not* be binding on any person."[50] The rule also defined the term "mechanism" as "an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies".[51] On July 20, 2015, the FTC issued a final rule concerning its interpretation of its authority under the Act.[52] For purposes of alternate methods for dispute resolution, the FTC explains that since the promulgation of Rule 703, some appellate courts have found arbitration agreements to be excluded from the MMWA because they are not informal dispute settlement procedures.[53] In response, the FTC stated that "the Commission reaffirms its long-held view that the MMWA disfavors, and authorizes the Commission to prohibit, mandatory binding arbitration in warranties."[54]

As the Commission reiterated in its final rule, the basic principles that guided, and continue to guide Rule 703 are "speed, fairness, and independent participation."[55]

B. Financial Industry Regulatory Authority

In 1992, the National Association of Securities Dealers (NASD), now called the Financial Industry Regulatory Authority (FINRA), issued an amendment to its Code of Arbitration Procedure for Consumer Disputes to bar motions to compel arbitration of class actions.56 Rule 12204's subsections provide for: (a) the exclusion of class action claims from the Code; (b) claims filed in another forum as putative or certified class actions to be illegible if it is encompassed in the class action; (c) determining if the claim encompassed will be referred to a three-arbitrator panel, or to the judge with jurisdiction of the class action; and (d) members not to enforce an arbitration agreement against a member of a putative or certified class action, unless: (1) certification is denied, (2) class is decertified, (3) member is excluded from class, or (4) member decides not to participate. 57

As a self-regulatory organization, FINRA's actions are subject to the SEC's oversight. On October 28, 1992 the SEC issued a release approving the changes.[58] In its discussion of the rule change, the SEC stated that "the NASD believes, and

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[49] 15 U.S.C. § 2310(a)(2) (2012).
[50] Commercial Practices, 16 C.F.R. §703.5(j) [emphasis ours].
[51] *Id.* § 703.1(e).
[52] Rules and Regulations, 80 Fed. Reg. 42710–42723 (July 20, 2015) (to be codified at 16 C.F.R. pts. 700, 701, 703).
[53] *Id.* at 42719. *See* n.115 (citing Davis v. Southern Energy Homes, Inc., 305 F.3d 1268 (11th Cir. 2002) and Walton v. Rose Mobile Homes, LLC, 298 F.3d 470 (5th Cir. 2002)).
[54] *Id.* at 42719.
[55] *Id.* at 42718.
[56] *See* Code of Arbitration Procedure for Consumer Disputes, FINRA, Rule 12204 (2008).
[57] *Id.*
[58] Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceeding; Exchange Act Release No. 31371, 52 S.E.C. Docket 2189–2192. (Oct. 28, 1992).

the Commission agrees, that the judicial system has already developed the procedures to manage class action claims. Entertaining such claims through arbitration at the NASD would be difficult, duplicative, and wasteful."[59] Importantly, the Commission goes on to say that it agrees with the NASD by stating: "in all cases, class actions are better handled by the courts."[60] Additionally, the Commission found that the proposed rule was consistent with the requirements of the Exchange Act, which require the NASD's rules be designed "to protect investors and the public interest."[61] The exclusion of class actions through the arbitral process established by FINRA, and the prohibition to compel arbitration, are a necessary step to ensure consumer abuse is not undertaken by member institutions. Otherwise, consumers with arbitration agreement clauses would be left without class action remedy, even if there was no class action waiver as part of the agreement.

C. Commodity Futures Trading Commission

The Commodities Futures Trading Commission has also issued a rule regarding the use of alternative dispute resolution mechanisms, of which one of them is arbitration.[62] The Customer Protection Rules of the Code of Federal Regulation state: "the use by customers of dispute settlement procedures shall be voluntary as provided in paragraphs (c) and (g) of this section."[63] Also, under subsection (c), a pre-dispute arbitration agreement cannot become a condition to receive the services offered by a Commission registrant, therefore if the agreement is contained as a clause of a larger agreement, the customers must endorse the agreement separately. At the same time, some claims are foreclosed from being waived, and the customers elect the forum to be used. All fees of such agreement are to be paid by the Commission registrant, and registrants are required to include boilerplate language regarding the use of alternative resolution methods.[64] Additionally, subsection (g) cements the customer's right to negotiate any term of an agreement in which he or she agrees, a priori, to submit any dispute to any settlement procedure.[65]

In response, the CFTC stated that "no customer, regardless of their level of sophistication, should be required to sign a pre-dispute arbitration agreement as a condition for doing business in the futures industry."[66]

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[59] 52 S.E.C. Docket, at 2191.
[60] *Id.*
[61] *Id.*
[62] Customer Protection Rules, 17 C.F.R. §166.5 (2016).
[63] *Id.* § 166.5(b).
[64] *See id.* § 166.5(c).
[65] *See id.* § 166.5(g).
[66] Rules Relating to Intermediaries of Commodity Interest Transactions, 65 Fed. Reg. 240, 78005 (Dec. 13, 2000) (to be codified at 17 C.F.R. pts. 1, 3, 4, 140, 166).

D. Department of Labor

Lastly, most recently the Department of Labor's Employee Benefits Security Administration has ruled on the use of pre-dispute arbitration agreements that include class action waivers in employee pension plans and IRA accounts.[67] Specifically, the Rule primarily concerns an exception to fiduciary rules imposed by the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). Particularly, in order to request relief under the Rule, the Department requires that the institution's contract terms cannot include any provision that "waives or qualifies [the Retirement Investor's] right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution . . . ."[68]

In discussing its reasoning, the Department stated that:

> [T]he option to pursue class actions in court is an important enforcement mechanism for Retirement Investors. Class actions address *systemic violations* affecting many different investors. Often the monetary effect on a particular investor is too small to justify pursuit of an individual claim, even in arbitration. Exposure to class claims creates a powerful incentive for Financial Institutions to carefully supervise individual Advisers, and ensure adherence to the Impartial Conduct Standards.[69]

Relevant to our analysis, the Department states in its rule that it "proposed this class exemption on its own motion."[70]

CONCLUSION

As demonstrated above, there have been various attempts to regulate the use of arbitration agreements, and class action waivers in distinct types of consumer and commercial contracts. The reasoning behind most of these efforts have centered on efficiency, compliance, and equity concerns, which were the same principles which guided the CFPB's rulemaking process. Thus, it may be implied that these concerns are not, in themselves, enough to function as a basis under which to restrict the use of arbitration agreements and class action waivers. This is also supported by the reports by the Treasury and the Comptroller outlined above.

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[67] *See* Best Interest Contract Exception, 81 Fed. Reg. 68, 21002–21088 (Apr. 8, 2016) (to be codified at 29 C.F.R. Part 2550).
[68] *Id.* at 21078.
[69] *Id.* at 21043.
[70] *Id.* at 21004.

Nonetheless, there are a few distinctions to be observed between the rules studied above and the CFPB's effort. First, save for the Federal Trade Commission, the authority under which most of the rules mentioned were created lies in the agencies' general rulemaking authority, and not from an express power granted by Congress. This provides agencies with more flexibility and room for interpretation when regulating their respective areas. Coincidentally, the events concerning the CFPB's rule can be seen as setting a persuasive precedent whereby a higher standard must be applied by agencies looking to regulate the use of arbitration agreements.

Secondly, the CFBP's case had the interesting characteristic that its decision was tied to the results of the Study, whereby other agencies were only subject to general standards for administrative rulemaking and their respective organic statutes. Although other agencies are not necessarily subject to this more stringent requirement, the prospective use of the Congressional Review Act makes any move for more regulations subject to dismissal.

In the end, the CFPB's case shows an interesting development in the efforts to reign in what has become a system of liberal deference in favor of arbitration. It is important to mention that although Congress overruled the CFPB's actions, the Bureau still maintains the authority to issue regulations on the subject under Dodd-Frank. This means there is still a prospect for a reviewed rule which satisfies all parties' concerns.