

VII. The CFPB Arbitration Rule: The First Step in Regulating Arbitration

A. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) created the Consumer Financial Protection Bureau (CFPB) to promote fairness and transparency for mortgages, credit lenders, and other financial services.¹ The CFPB's authorities are structured "into three broad categories: supervisory, which includes the power to examine and to impose reporting requirements on financial institutions; enforcement of various consumer protection laws and regulations; and rulemaking."² Over the past several years, the CFPB investigated mandatory arbitration clauses used by financial services companies in their contracts with consumers.³ In its investigation, the CFPB found that arbitration clauses insulate financial institutions from liability by effectively denying consumers their day in court and bar consumers from initiating class action lawsuits.⁴ Furthermore, the CFPB found that arbitration clauses do not lead to lower prices for consumers, and 75

¹ CONSUMER FIN. PROT. BUREAU STRATEGIC PLAN FY 2013 – FY 2017 9 (2013), <http://files.consumerfinance.gov/f/strategic-plan.pdf> [<https://perma.cc/69AP-6EKH>] ("As provided in section 1021 of the Dodd-Frank Act, the purpose of the CFPB is to implement and enforce Federal consumer financial laws consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that such markets are fair, transparent, and competitive.").

² DAVID H. CARPENTER, CONG. RESEARCH SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 12 (2014), <https://fas.org/sgp/crs/misc/R42572.pdf> [<https://perma.cc/UGF3-KWWR>].

³ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 5 (2015) [hereinafter Arbitration Study], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf ("[T]he Dodd-Frank Act requires the [CFPB] to conduct a study of the use of pre-dispute arbitration agreements 'in connection with . . . consumer financial products or services.'").

⁴ Press Release, Consumer Fin. Prot. Bureau, CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers (Mar. 10, 2015) [hereinafter Arbitration Study Press Release], consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/ [<https://perma.cc/3FMU-MMA6>] ("Arbitration clauses can act as a barrier to class actions . . .").

percent of consumers did not even know if they were subject to an arbitration clause in their financial services contracts.⁵ Thus, the CFPB issued a rule to limit financial services companies' use of arbitration clauses in their agreements with consumers.⁶ However, Congress overturned the CFPB's arbitration rule, leaving financial services companies free to use mandatory arbitration clauses in their contracts with consumers.⁷

This article discusses the CFPB's investigation into arbitration, the CFPB arbitration rule, and the impact on consumers of Congress officially overturning the rule. First, Part B provides insight into the history of arbitration provisions in financial services contracts. Second, Part C focuses on important aspects of the CFPB arbitration rule, including the CFPB's initial investigation into arbitration agreements between consumers and financial services companies, the language of the CFPB arbitration rule, what kinds of companies are covered by the rule, and the October 24, 2017 Senate vote overturning the rule. Third, Part D explores the CFPB arbitration rule in consideration of its benefits and drawbacks to consumers. Finally, Part E discusses the Senate vote on the CFPB arbitration rule and its implications on future arbitration regulation.

B. Brief History of Arbitration in the United States

In 1926, the Federal Arbitration Act (FAA) was enacted into law, and serves as the legislative framework of arbitration agreements in the United States.⁸ Congress intended the FAA to ensure arbitration agreements arising in maritime transactions and commerce were

⁵ *See id.* ("The CFPB found no statistically significant evidence that the companies that eliminated their arbitration clauses increased their prices or reduced access to credit relative to those that made no change in their use of arbitration clauses.")

⁶ Press Release, Consumer Fin. Prot. Bureau, Final Rule: Arbitration Agreements (July 10, 2017) [hereinafter Final Rule Announcement], <https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements> [<https://perma.cc/KKQ4-D3YB>].

⁷ Donna Borak & Ted Barrett, *Senate Kills Rule That Made It Easier to Sue Banks*, CNN (Oct. 25, 2017, 11:41 AM), <http://www.cnn.com/2017/10/24/politics/senate-cfpb-arbitration-repeal/index.html> [<https://perma.cc/V2XW-3LEZ>].

⁸ Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1-14, 201-208) (2012).

“valid, irrevocable, and enforceable.”⁹ The Supreme Court has consistently upheld arbitration agreements under the FAA against the states’ attempts to invalidate arbitration provisions based on unfavorable terms to the consumer.¹⁰ The CFPB’s rule is the first to directly address the validity of arbitration provisions and class action waivers in financial services agreements since the CFPB’s enactment in 2010 and stands in conflict with the Supreme Court’s rigorous enforcement of the FAA and arbitration provisions.¹¹ After the financial crisis, the creation of Dodd-Frank specifically “mandate[d] the CFPB to conduct a study on the use of pre-dispute arbitration clauses in consumer financial markets.”¹² Dodd-Frank gave the CFPB the authority to prohibit or impose limitations in an agreement between a covered company and a consumer if the CFPB found that the prohibition or limitation was in the public interest for consumers.¹³ In April 2012, along with the CFPB’s mandate to protect consumers from deceptive practices against companies, the CFPB initiated a public inquiry to determine how arbitration clauses in financial services agreements affect consumers.¹⁴ Despite the fact that the Supreme Court has routinely upheld arbitration clauses, the CFPB began its investigation into mandatory arbitration’s effect on consumers and to

⁹ 9 U.S.C. § 2 (2012) (“A written provision . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”).

¹⁰ See *American Express Co. v. Italian Colors*, 133 S. Ct. 2304, 2306 (2013) (holding that the Federal Arbitration Act does not allow courts to invalidate a class action waiver because the plaintiff’s costs of individually arbitrating a claim exceeds the plaintiff’s potential recovery); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a California law invalidating class action waivers as unconscionable was preempted by the Federal Arbitration Act); *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) (holding that contracts containing arbitration provisions cannot be avoided by allowing one party to ignore the contract and resort to courts).

¹¹ See generally Arbitration Study, *supra* note 3 (discussing the Supreme Court’s approach to mandatory arbitration clauses).

¹² Arbitration Study Press Release, *supra* note 4 (discussing findings regarding arbitration agreements between financial services companies and consumers).

¹³ 12 U.S.C. § 5511 (2010) (discussing the applicable powers of the CFPB).

¹⁴ Arbitration Study Press Release, *supra* note 4 (reviewing the launching of the inquiry).

determine whether consumers needed protection from such clauses by limiting mandatory arbitration clauses.¹⁵

C. CFPB's Investigation into Arbitration and the CFPB Arbitration Rule

Upon completion of its public inquiry into the effects of arbitration clauses in financial agreements with consumers, the CFPB reported its findings to Congress on March 10, 2015.¹⁶ Over two years later on July 10, 2017, the CFPB issued a rule that restricted certain financial institutions from limiting consumers' ability to join class action lawsuits, thereby enabling consumers to better hold companies accountable for wrongdoings.¹⁷ The CFPB used its research and analysis of arbitration agreements to issue its arbitration rule.

1. CFPB's Investigation into Arbitration

Under Dodd-Frank, the CFPB's mandate to study "the use of pre-dispute arbitration clauses in consumer financial markets" resulted in years of research and analysis on these arbitration clauses, beginning in 2012 until the CFPB released its study in 2015.¹⁸ The CFPB reviewed nearly 850 consumer finance agreements to examine the prevalence of arbitration clauses and their terms.¹⁹ Additionally, the CFPB reviewed more than 1,800 consumer finance disputes

¹⁵ See generally David Lazarus, *Supreme Court's Arbitration Ruling Is Another Blow to Consumer Rights*, L.A. TIMES (Dec. 18, 2015, 4:00 AM), <http://www.latimes.com/business/la-fi-lazarus-20151218-column.html> ("Just don't look to the Supreme Court for help. We know where it stands.").

¹⁶ Arbitration Study Press Release, *supra* note 4 (announcing that the CFPB "released a study indicating that arbitration agreements restrict consumers' relief for disputes with financial service providers by limiting class actions.").

¹⁷ Press Release, Consumer Fin. Prot. Bureau, CFPB Issues Rule to Ban Companies from Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017) [hereinafter Arbitration Rule Press Release], <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/> [<https://perma.cc/NTN3-9E7P>] ("Many consumer financial products like credit cards and bank accounts have arbitration clauses in their contracts that prevent consumers from joining together to sue their bank or financial company for their wrongdoing.").

¹⁸ Arbitration Study Press Release, *supra* note 4.

¹⁹ Arbitration Study, *supra* note 3, at 7.

resulting in arbitration that were filed over three years ago and more than 3,400 federal court lawsuits, specifically relating to individual actions.²⁰ Almost all of the arbitration clauses that the CFPB reviewed, which dictated terms for tens of millions of consumers, disallowed class action lawsuits by including “provisions stating that arbitration may not proceed on a class basis.”²¹ During arbitration, financial services companies were represented by counsel almost all of the time, whereas consumers were represented by counsel in “roughly 60% of the cases.”²² Of 341 cases filed by consumers in 2010 and 2011, “consumers obtained relief regarding their affirmative claims in 32 disputes.”²³ After performing a statistical analysis to determine whether arbitration provisions lowered consumer prices, the CFPB did not find any evidence that arbitration clauses lowered financial services and products prices for consumers.²⁴ Furthermore, the CFPB did not find any statistically significant evidence that companies without arbitration provisions increased prices for their financial services.²⁵ The three key findings that the CFPB discovered in its research into arbitration clauses blocking class action lawsuits was that mandatory arbitration clauses: (1) “deny consumers their day in court,” (2) allow financial services companies to “avoid paying out big refunds,” and (3) financial services companies will “continue harmful practices” if consumers cannot do anything to stop the wrongdoing from happening again.²⁶

2. *The CFPB’s Arbitration Rule*

The CFPB arbitration rule generally “restores consumers’ right to file or join group lawsuits” and “deters companies from violating the law” so as to hold financial services companies

²⁰ *Id.* at 7–8 (introducing the scope of the report).

²¹ *Id.* at 9–10.

²² *Id.* at 12 (“Companies almost always had counsel.”).

²³ *Id.* (finding that “[t]he total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107”).

²⁴ *See id.* at 2–5 (“The assertion that pre-dispute arbitration clauses generate cost savings . . . is difficult to test and has not been established or disproved.”).

²⁵ *Id.* (“[E]ven a correlation between the use of pre-dispute arbitration clauses and price levels should not be construed as a causal relationship between the two, absent additional information.”).

²⁶ Arbitration Rule Press Release, *supra* note 17 (discussing the CFPB arbitration study’s main findings).

accountable for wrongdoings.²⁷ The CFPB's arbitration rule included two major components.²⁸ The CFPB arbitration rule first prohibits certain financial services providers from restricting customers' ability to participate in a class action lawsuit against the covered financial institution by "using an agreement" that requires "arbitration of any future dispute between the parties."²⁹ Additionally, financial services providers that are covered by the rule must submit "specified arbitral records" to the CFPB for review, along with court records of the companies' lawsuits.³⁰ Companies can still include arbitration provisions in their financial services agreements with consumers, however, as the CFPB arbitration rule "does not bar companies from including arbitration agreements outright."³¹ Rather, covered financial companies cannot use arbitration provisions to prohibit their customers from participating in class action lawsuits against such companies.³²

The CFPB refers to Dodd-Frank as the legal authority that allowed the bureau to create the two-part arbitration rule.³³ Section 1028(b) of Dodd-Frank allows the CFPB to create rules relating to arbitration provisions between consumers and financial services companies,³⁴ while § 1028(c) limits the CFPB from banning voluntary

²⁷ *Id.*

²⁸ Final Rule Announcement, *supra* note 6 (discussing the two main components of the CFPB arbitration rule).

²⁹ Arbitration Rule Press Release, *supra* note 17 ("[T]he final rule prohibits covered providers of certain consumer financial products and services from using an agreement with a customer that provides for arbitration of any future dispute between the parties to bar the consumer from filing or participating in a class action . . .").

³⁰ *Id.* ("[T]he final rule requires covered providers that are involved in arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau and also submit specified court records.").

³¹ Donna Borak, *Republicans Move to Kill New Rule That Made It Easier to Sue Banks*, CNN (July 20, 2017, 6:34 PM), <http://money.cnn.com/2017/07/20/news/economy/republicans-cfpb-arbitration-rule/index.html> [<https://perma.cc/MN2M-L9ZF>] ("The new rule does not bar companies from including arbitration agreements outright in their contract.").

³² *Id.* (describing the ramifications of the CFPB arbitration rule).

³³ Consumer Financial Protection Bureau Arbitration Rule, 82 Fed. Reg. 33,210, 33,247 (July 19, 2017) (to be codified at 10 C.F.R. pt. 1040) (discussing the legal authority for the CFPB arbitration rule).

³⁴ *Id.* ("Section 1028(b) of the Dodd-Frank Act authorizes the Bureau to issue regulations that would 'prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration . . .").

arbitration agreements completely.³⁵ Thus consumers are still able to enter into voluntary arbitration agreements with covered companies.³⁶

As required by Dodd-Frank, the CFPB had to determine that its rule was “in the public interest” of consumers and “for the protection of consumers.”³⁷ The CFPB concluded that its arbitration rule was “in the public interest” and “for the protection of consumers” after finding the rule “better enable[d] consumers to enforce their rights” against financial services companies.³⁸ However, it is important to note that the CFPB did not “consider more general or systemic concerns” that can be read to be in the “public interest.”³⁹

3. *What Types of Companies Are “Covered”?*

Generally, the CFPB arbitration rule applies to “providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money.”⁴⁰ The “certain types” of financial products and services that are covered include credit lenders, automobile leases, debt management or settlement, providing consumer reports, savings accounts, exchanging funds, and collecting debt.⁴¹ The CFPB arbitration rule uses several other Congressional Act’s definitions to determine if a financial services company fits into one of these

³⁵ 12 U.S.C. § 1028(c) (2010) (“The authority [of § 1208(b)] may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement . . .”).

³⁶ Consumer Financial Protection Bureau Arbitration Rule, 82 Fed. Reg. at 33,247.

³⁷ *Id.* at 33,249.

³⁸ *Id.* at 33,280 (“[T]he Bureau preliminarily found . . . precluding providers from blocking consumer class actions through the use of arbitration agreements would better enable consumers to enforce their rights . . . and obtain redress when their rights are violated.”); *id.* at 33,310 (“[I]n light of . . . serious concerns about the fairness of thousands of past arbitration proceedings, . . . the Bureau believed that it was appropriate to propose a system to facilitate monitoring and public transparency . . .”).

³⁹ *Id.* at 33,249 (“[T]he Bureau does not consider more general or systemic concerns with respect to the functioning of the markets . . .”).

⁴⁰ *Id.* at 33,210 (“The final rule applies to providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money . . .”).

⁴¹ *Id.*

categories.⁴² For example, the CFPB arbitration rule uses definitions such as a company that “provid[es] directly to a consumer report as defined in the Fair Credit Reporting Act (FCRA)” or “providing savings accounts under the Truth in Savings Act (TISA)” such as the Equal Credit Opportunity Act (ECOA).⁴³ Based on the broad categories that the CFPB arbitration rules uses, the CFPB likely intended to cover most consumer finance companies to be bound by the CFPB arbitration rule.

4. Congress’s Power to Overturn the CFPB Arbitration Rule

On July 19, 2017, the CFPB arbitration rule was published in the Federal Register.⁴⁴ The rule had an effective date of September 18, 2017.⁴⁵ Per the Congressional Review Act signed into law in 1996 by President Bill Clinton, Congress has the power to review new rules issued by government agencies and overrule an agency decision within “sixty days of session.”⁴⁶ Throughout the summer and into the fall of 2017, individuals speculated that Congress would overturn the CFPB arbitration rule.⁴⁷ No one knew for sure when Congress would

⁴² *Id.*

⁴³ *Id.* (discussing other Congressional Acts definitions that are used to determine whether a company is covered).

⁴⁴ Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

⁴⁵ Consumer Financial Protection Bureau Arbitration Rule, 82 Fed. Reg. at 33,247 (indicating the effective date of September 18, 2017).

⁴⁶ RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001), <https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf> [<https://perma.cc/L9AL-WSVQ>] (“The Senate may use the procedure for 60 days of session after the agency transmits the rule to Congress.”); see also Jack Holmes, *How an Obscure, Decades-Old Law Could Dismantle Obama’s Legacy*, ESQUIRE (May 1, 2017), <http://www.esquire.com/news-politics/videos/a54835/republicans-congressional-review-act> [<https://perma.cc/3UZP-6GDR>] (“Republicans have used the Congressional Review Act more than a dozen times since February to roll back regulation.”).

⁴⁷ Diana Hembree, *Republicans Accelerating Repeal of Rule to Restore Consumers’ Right To Sue Banks*, FORBES (Aug. 30, 2017, 9:43 PM), <https://www.forbes.com/sites/dianahembree/2017/08/30/republicans-accelerating-repeal-of-cfpb-rule-protecting-consumers-right-to-sue-banks/#a20e13140b97> [<https://perma.cc/L9AL-WSVQ>]; Ian McKendry,

overturn the CFPB arbitration rule, but it would have to occur before 2018, as the sixty days of session would certainly expire.

D. The CFPB Arbitration Rule Has Individuals Split in Opinion

Since its initial announcement that it would be investigating arbitration provisions, the CFPB has received both praise and criticism, which continued through the CFPB's rulemaking process and into the House and Senate votes. Those in favor of the rule believe that the rule is in consumers' best interest, as the rule gives consumers a better ability to hold financial services companies accountable when these companies commit wrongdoings against consumers.⁴⁸ However, other individuals believe that the rule will increase costs for consumers and increase the time it takes to receive remedies against a company, since the judicial system takes much longer than arbitration.⁴⁹

1. Consumers Should Not Be Deprived of Their Day in Court

The purpose behind the CFPB's Arbitration Rule is to ensure that consumers are not deprived their day in court and preserve

Equifax Breach May Kill Repeal of CFPB Mandatory Arbitration Rule, AM. BANKER (Sep. 8, 2017, 4:51 PM), <https://www.americanbanker.com/news/equifax-breach-may-kill-repeal-of-cfpb-mandatory-arbitration-rule> [<https://perma.cc/5XPD-DSZ2>].

⁴⁸ Borak, *supra* note 31 (“Last week, Richard Cordray, the current CFPB director who is an Obama appointee, said the clauses force people to ‘go it alone or give up.’”).

⁴⁹ Tom Cotton & Keith Rothfus, Opinion, *Repeal the CFPB's Anti-Consumer Bank on Mandatory Arbitration Clauses*, FORBES (July 25, 2017, 12:32 PM), <https://www.forbes.com/sites/realspin/2017/07/25/repeal-the-cfpbs-anti-consumer-ban-on-mandatory-arbitration-clauses/#2c6b49aa7fb0> [<https://perma.cc/R6W4-JNCE>] (“Arbitration is 12 times faster than litigation, according to a study by the CFPB itself—and, on average, it results in bigger rewards for the people who bring disputes.”); see Joe Lynam, *Bad News and Good News—The CFPB's Arbitration Rule*, DORSEY & WHITNEY LLP: CONSUMER FINANCIAL SERVICES LEGAL UPDATE (July 10, 2017), <https://consumerfinancialserviceslaw.us/bad-news-and-good-news-the-cfpbs-arbitration-rule/> [<https://perma.cc/6R3P-WU9E>] (asserting that “the Rule creates a new procedural and compliance nightmare” as companies must report arbitration agreements subject to the CFPB's Arbitration Rule).

consumers' ability to band together in a class action against covered financial services providers.⁵⁰ Prior to the enactment of the CFPB arbitration rule, consumers would agree to mandatory arbitration clauses that generously favored financial services companies both in costs and judgments.⁵¹ Without the CFPB arbitration rule, consumers had no choice but to agree to mandatory arbitration clauses and class action waivers as arbitration clauses are essentially in every consumer financial agreement.⁵² By requiring individual consumers to individually arbitrate disputes with the company, financial services companies avoid the cost of class action lawsuits.⁵³ Through the use of mandatory arbitration and class action clauses, financial services companies are effectively able to avoid liability for the wrongdoings against their customers.⁵⁴ Thus, the CFPB arbitration rule is a more effective means of holding more accountable financial services companies who commit wrongdoings.

⁵⁰ See generally Arbitration Study Press Release, *supra* note 4 (pointing to CFPB Director Richard Cordray's statement, "Tens of millions of consumers are covered by arbitration clauses, but few know about them or understand their impact").

⁵¹ *Id.* ("In the 1060 arbitration cases filed with the American Arbitration Association (AAA) in 2010 and 2011, 341 resulted in decisions by arbitrators. Consumers obtained relief from arbitrations on affirmative claims in 32 cases and obtained debt forbearance in 46 cases.").

⁵² *Id.* ("In recent years, many contracts for consumer financial products and services have included a "pre-dispute arbitration clause" stating that either party can require that disputes that may arise about that product or service be resolved through arbitration instead of the court system.").

⁵³ Lauren Saunders, Opinion, *Why CFPB's Arbitration Rule Is Essential (Two Words: Wells Fargo)*, AM. BANKER (July 21, 2017, 9:30 AM), <https://www.americanbanker.com/opinion/why-cfpbs-arbitration-rule-is-essential-two-words-wells-fargo> [<https://perma.cc/B8CK-NFTD>] ("[B]anks that are exposed to class actions are likely to be more careful about violating the law—avoiding litigation costs and government enforcement actions.").

⁵⁴ *Id.* ("Forced arbitration is not a different way of resolving disputes; it is a way of blocking justice.").

2. *Impact of CFPB Arbitration Rule on Financial Services Costs and Time for Class Action Lawsuits*

Class action lawsuits can potentially take years to settle or come to a judgment in addition to the substantial attorneys' costs.⁵⁵ Thus, arbitration agreements between financial services companies and consumers allow the financial services companies to limit the unpredictable cost of lawsuits and the legal uncertainty that potentially comes with years of litigation against them.⁵⁶ By limiting these legal costs, companies are presumably able to provide cheaper services and products to consumers.⁵⁷ Furthermore, attorneys' fees can significantly reduce damages awarded in consumers' class action lawsuits due to the length and complexity of litigation.⁵⁸ Some facts suggest that members of large class action lawsuits would have received more from arbitration than joining a class action lawsuit.⁵⁹

⁵⁵ Carol Moore, *Class-Action Lawsuit May Not Be Rewarding*, BANKRATE (Apr. 24, 2012), <http://www.bankrate.com/finance/personal-finance/class-action-lawsuit.aspx> [<https://perma.cc/8RFD-DVL9>] (“[T]here is a huge benefit to lawyers bringing class actions because of the enormous fees that they can be awarded as part of the settlement or . . . victory’ . . .”).

⁵⁶ See Hans von Spakovsky, *The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System*, THE HERITAGE FOUND. 9 (July 17, 2013), <http://www.heritage.org/report/the-unfair-attack-arbitration-harming-consumers-eliminating-proven-dispute-resolution-system> [<https://perma.cc/D7QT-YG8A>] (“Limiting arbitration would also hurt employees and consumers ‘in the form of lower wages, higher prices or reduced share value.’”).

⁵⁷ See *id.* (“[I]f contractual arbitration were an anathema to millions of consumers, and there was consumer outrage about them, an enterprising business seeking a competitive advantage would simply offer a product or service without such a provision—although that business would probably have to increase the price of that product or service to cover the increased risk of expensive litigation.”).

⁵⁸ David Hirschmann & Lisa A. Rickard, *CFPB Arbitration Rule Will Enrich Trial Lawyers, Not Protect Consumers*, THE HILL: CONGRESS BLOG (Aug. 22, 2016, 6:59 AM), <http://thehill.com/blogs/congress-blog/judicial/292051-cfpb-arbitration-rule-will-either-protect-consumers-or-enrich>

[<https://perma.cc/T8DJ-RQ53>] (“Consumers also can’t sue in court on their own: individual litigation is time-consuming and will in many cases cost more in attorneys’ fees than the amount of the consumer’s dispute. That is why consumers need user-friendly, less expensive arbitration.”).

⁵⁹ *Id.* (indicating class actions lawsuits generally do not benefit consumers).

With the CFPB arbitration rule, financial services company would be subject to more litigation, which “drains corporate resources” and would probably pass the costs of that litigation down to consumers.⁶⁰ Thus, arbitration agreements provide consumers lower costs in addition to a more timely way to seek relief.⁶¹ A limitation on arbitration agreements may also hurt employees, as the company may be forced to lower wages because of litigation costs.⁶²

E. Congressional Vote on CFPB Arbitration Rule and Future Implications

As noted in Part C, under the Congressional Review Act, Congress has the authority to reject federal rules and regulations within 60 days of publication in the Federal Register.⁶³ On July 25, 2017, House Representatives voted to overturn the CFPB arbitration rule by a vote of 231 to 190.⁶⁴ GOP lawmakers used the CFPB’s own study to show that arbitration, rather than hiring expensive lawyers, save consumers more money.⁶⁵ In favor of overturning the CFPB arbitration rule, Representative Blaine Luetkemeyer stated that the CFPB arbitration rule has “devastating consequences to American consumers.”⁶⁶ Although the Senate was widely expected to vote on the

⁶⁰ Moore, *supra* note 55 (“Lawsuits drain corporate resources and can even drive a company to lay off employees or go out of business entirely . . .”).

⁶¹ Hirschmann & Rickard, *supra* note 58 (“The Bureau pitches its proposal as giving consumers a choice between suing and arbitration, but in reality, the Bureau’s class action proposal would leave consumers with no economically sensible outlet for relief-arbitration, no class action, and no economically viable individual litigation.”).

⁶² See Spakovsky, *supra* note 56 (discussing lower legal fees for companies with arbitration programs).

⁶³ Beth, *supra* note 46, at 5 (“In sum, the 60-day waiting period established by the Congressional Review Act applies only to ‘major rules’ for which the President has not waived its application.”).

⁶⁴ Yuka Hayashi, *House Votes to Repeal CFPB’s Arbitration Rule*, WALL ST. J. (July 25, 2017, 5:24 PM), <https://www.wsj.com/articles/house-votes-to-repeal-cfpbs-arbitration-rule-1501017889> (“The U.S. House on Tuesday voted 231-190 to overturn . . .”).

⁶⁵ Borak, *supra* note 31 (“Republican lawmakers argue the CFPB’s own study shows consumers get more money in their pockets when they use arbitration as opposed to hiring expensive class action trial lawyers.”).

⁶⁶ *Id.* (remarking how Congress needs to “intervene” in the CFPB arbitration rule and how the rule is “devastating” for consumers).

CFPB arbitration rule in August 2017, it did not, and the vote was pushed off to later in the year.⁶⁷ Senate Majority Leader Mitch McConnell did not mention the CFPB arbitration rule in his agenda for the two weeks before August recess.⁶⁸ At that time, Republican Senators allegedly did not have enough votes to proceed in overturning the rule on the floor.⁶⁹ In August, Senator John Kennedy stated he did not decide on the CFPB arbitration rule “because of his focus on health care legislation.”⁷⁰ Other senators, such as Senator Lindsey Graham stated that although he was not a “big fan” of the CFPB, he was pessimistic about the usefulness of the waiver, and does not support the resolution in its current form.⁷¹ However, Senator Elizabeth Warren argued that the CFPB arbitration rule “will allow working families to hold big banks accountable when they’re cheated and help discourage the kinds of surprise fees that consumers hate.”⁷²

Although later in the year than many expected, the Senate did vote to overturn the CFPB arbitration rule on Tuesday, October 24, 2017.⁷³ Republican senators Lindsey Graham and John Kennedy voted to not overturn the rule, resulting in a 50-50 tie, and Vice President Mike Pence cast the tie-breaking vote to officially overturn the CFPB arbitration rule.⁷⁴ President Trump signed the Congressional repeal of the CFPB arbitration rule on November 1, 2017.⁷⁵ The official repeal

⁶⁷ Ryan Rainey, *Prospects Dim for Senate Vote on CFPB Arbitration Rule This Month*, MORNING CONSULT (Aug. 1, 2017, 4:35 PM), <https://morningconsult.com/2017/08/01/prospects-dim-senate-vote-cfpb-arbitration-rule-month> [<https://perma.cc/R5PM-4489>].

⁶⁸ *Id.*

⁶⁹ *Id.* (“A Senate GOP aide said that supporters of the resolution do not have the votes needed . . . given the absence of Sen. John McCain . . .”).

⁷⁰ *Id.*

⁷¹ *Id.* (quoting Senator Lindsey Graham as stating “I’m not a big fan of the CFPB, but I’m also very firm that that’s not a meaningful waiver . . .”).

⁷² Press Release, Senator Elizabeth Warren, Statement from Senator Warren on the CFPB’s New Arbitration Rule (July 10, 2017), https://www.warren.senate.gov/?p=press_release&id=1726 [<https://perma.cc/B3RU-JL26>] (criticizing “big business lobbying groups” she fears will galvanize Republican support against the rule).

⁷³ Borak & Barrett, *supra* note 7.

⁷⁴ *Id.* (“Two Republican Senators, Lindsey Graham of South Carolina and John Kennedy of Louisiana, sided with Democrats in opposition to the resolution.”).

⁷⁵ Sylvan Lane, *Trump Repeals Consumer Arbitration Rule, Wins Banker Praise*, THE HILL (Nov. 1, 2017, 4:43 PM), <http://thehill.com/policy/finance/358297-trump-repeals-consumer-bureau-arbitration-rule-joined-by-heads-of->

praised by banks and business groups as a great victory, while “signing away consumers’ right to their day in court.”⁷⁶ Senator Warren described the repeal of the CFPB arbitration rule as “a giant wet kiss to Wall Street.”⁷⁷ However, advocates for the repeal, including the Trump Administration, announced that without the CFPB arbitration rule, consumers have better options to quickly and efficiently resolve financial disputes.⁷⁸

F. Conclusion

Arbitration clauses that are found in financial services companies’ agreements with consumers make it harder for consumers to file or join class action lawsuits against those financial services companies.⁷⁹ The CFPB’s arbitration rule’s main goal of protecting consumers from financial services company wrongdoings, would have given consumers more power in financial services agreements. Because Congress overturned the CFPB arbitration rule and financial services companies are free to include mandatory arbitration in agreements with consumers, consumers may not have adequate protection against wrongdoing. Consumers cannot take advantage of their right to the judicial system if they are subject to mandatory arbitration without even knowing they have agreed to mandatory arbitration. Thus, consumers may not be able to hold financial services companies accountable with only arbitration, without full access to the judicial system.⁸⁰ Furthermore, the CFPB arbitration study did not ban

banking [<https://perma.cc/W7HHG-267H>] (discussing that President Trump signed the Congressional repeal of the CFPB arbitration rule).

⁷⁶ *Id.* (“The arbitration rule repeal is a major victory for finance and business groups.”).

⁷⁷ Borak & Barrett, *supra* note 7 (describing the effects of the repeal of the CFPB arbitration rule).

⁷⁸ *Id.* (arguing that the CFPB arbitration rule “would neither protect consumers nor serve the public interest.”).

⁷⁹ Arbitration Study Press Release, *supra* note 4 (“By design, arbitration clauses can be used to block class actions in court. The CFPB found that it is rare for a company to try to force an individual lawsuit into arbitration but common for arbitration clauses to be invoked to block class actions.”).

⁸⁰ *See id.* (quoting CFPB Director Cordray as stating, “Our study found that these arbitration clauses restrict consumer relief in disputes with financial companies . . .”).

voluntary agreements to arbitrate disputes.⁸¹ Individuals who would rather arbitrate would still have been free to agree to arbitrate their disputes with financial services companies.⁸² Regardless, the CFPB's study into arbitration provided valuable information and research that can serve as a stepping stone for future arbitration regulation. Though Congress officially overturned the CFPB arbitration rule, regulators are now in a better position to understand mandatory arbitration issues and the negative effects of mandatory arbitration on consumers.

Joe Muccio⁸³

⁸¹ 12 U.S.C. § 1028(c) (2010) (“The authority [of § 1208(b)] may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.”).

⁸² *Id.*

⁸³ Student, Boston University School of Law (J.D. 2019).