

Congressional Override Offers Industry Reprieve from CFPB Arbitration Rule but Battles Ahead Still Likely

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October 30, 2017

Last week, the Senate voted 51 to 50 (with Vice President Pence casting the tiebreaking vote) to override the Consumer Financial Protection Bureau's Arbitration Rule, which was finalized earlier this year in July. As previously discussed [here](#) and [here](#), the Arbitration Rule would have prohibited providers of covered consumer financial products and services from using pre-dispute arbitration agreements to compel consumers to participate in arbitration to resolve disputes about those products and services. Shortly after the vote, the White House released a statement applauding the override vote and indicating that President Trump intended to enact it, effectively confirming that the Arbitration Rule will not come into effect.



The override occurred pursuant to the Congressional Review Act (CRA), which was enacted in 1996 to provide an easier mechanism for Congress to undo agency regulations without enacting wholly new legislation. Under the CRA, both the House and Senate can use streamlined procedures that limit debate and the amendment process and allow Congress to overturn agency regulations with a simple majority in each chamber. The CRA also prohibits agencies from issuing regulations that are “substantially the same” as the overturned regulation unless authorized by a subsequent law, meaning that the CFPB will be unable to simply pass a substantially similar rule in the next session of Congress. The meaning of “substantially the same” under the CRA has yet to be litigated, so it’s at least possible that the CFPB could try to reissue another arbitration rule down the road even without subsequent legislation.

While the battle over the Arbitration Rule appears to be over for now, proponents of the rule vowed to continue to push related reforms and encouraged the CFPB to use existing authority to review and take action against unfair, deceptive, or abusive arbitration provisions. The CFPB remains authorized to use its supervisory and enforcement authorities under the Dodd-Frank Act to regulate arbitration provisions. While the repeal of the Rule means the CFPB can’t prohibit arbitration clauses in the aggregate via rule, it could still allege that particular arbitration provisions are unfair, deceptive or

abusive on a case-by-case basis. Providers of financial products and services, therefore, should remain cognizant of the CFPB's regulatory and enforcement authority and evaluate consumer arbitration provisions in light of relevant court precedent and guidance to minimize the likelihood that such provisions are invalidated and/or garner CFPB interest.