

September 2017

# Arbitration agreements rule

Small entity compliance guide

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# 1. Introduction

On July 10, 2017, the Consumer Financial Protection Bureau (Bureau) issued a final rule governing agreements that provide for arbitration of future disputes between consumers and providers of specified covered consumer financial products and services (Arbitration Agreements Rule or Rule).

The Arbitration Agreements Rule imposes requirements on “providers,” as defined in the Rule as persons that provide certain consumer financial products and services covered by the Rule. The Rule also imposes requirements on certain service providers who provide services regarding these covered consumer financial products and services.

The Rule generally imposes the following obligations and restrictions on “providers”:

1. The Rule prohibits providers from relying on pre-dispute arbitration agreements to block class actions concerning consumer financial products and services covered by the Rule.
2. The Rule requires providers to include specific language in pre-dispute arbitration agreements they enter into concerning covered consumer financial products and services stating that the agreement may not be used to block class actions.
3. The Rule requires providers who use pre-dispute arbitration agreements to submit to the Bureau certain arbitration-related records. The Bureau will publish these records on its website in redacted form.

The Rule is effective **September 18, 2017** and compliance with the Rule is required with regard to “pre-dispute arbitration agreements” entered into on or after **March 19, 2018**. The Rule refers to **March 19, 2018** as the compliance date.

## 1.1 Purpose of this guide

The purpose of this guide is to provide an easy-to-use summary of the Arbitration Agreements Rule and to highlight information that may be helpful when implementing the Arbitration Agreements Rule.

**This guide is not a substitute for reviewing the Arbitration Agreements Rule.** The Arbitration Agreements Rule is the definitive source of information regarding its requirements. The Arbitration Agreements Rule is available at <https://www.federalregister.gov/documents/2017/07/19/2017-14225/arbitration-agreements>.

## 1.2 Scope and focus of this guide

The focus of this guide is the Arbitration Agreements Rule. Except when specifically needed to explain a provision of the Arbitration Agreements Rule, this guide does not discuss other laws, regulations, or regulatory guidance that may apply to arbitration agreements generally or arbitration rules or procedures.

The content of this guide does not include any rules, bulletins, guidance, or other interpretations issued or released after the date on the guide's cover page.

## 1.3 Use of examples in this guide

This guide contains examples to illustrate some portions of the Arbitration Agreements Rule. The examples do not include all possible factual situations that could illustrate a particular provision, trigger a particular obligation, or satisfy a particular requirement. Even though an example may identify a fictitious financial institution as, for example, "Ficus Bank," the provision or obligation being illustrated in the example may apply more broadly or more narrowly than to banks. For example, it may apply only to certain financial institutions, or it may apply broadly to other entities.

## 1.4 Additional implementation resources

The Bureau's Office of Regulations offers informal staff guidance on specific questions about the Bureau's regulations. The Bureau also makes available on its website extensive written implementation and guidance materials, which answer most common questions. You may also sign up at the Bureau's regulatory and guidance website at <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/> to join an email distribution list that the Bureau will use to communicate updates on regulatory implementation, including the issuance of additional resources as they become available. If you have a specific regulatory interpretation question about the Arbitration Agreements Rule after reviewing these resources, as well as the Rule and official commentary, you can submit it to us on the Bureau's website at <https://reginquiries.consumerfinance.gov/>. The responses from Bureau staff are not official interpretations and are not a substitute for formal legal counsel or other compliance advice.

## 2. Coverage

The Arbitration Agreements Rule applies to persons who are “providers” covered by the Rule in connection with “pre-dispute arbitration agreements” entered into on or after March 19, 2018. Certain persons are excluded from the definition of “provider.” The guide discusses each of these terms below.

### 2.1 Providers

A Provider is either of the following:

1. A person that engages in a “covered consumer financial product or service” (see Section 2.2 below), unless the person is specifically excluded from coverage under the Arbitration Agreements Rule (see Section 2.3 below). 12 CFR 1040.2(d)(1).
2. An affiliate<sup>1</sup> of a person described in (1), immediately above, but only when the affiliate is acting as a service provider to that person.<sup>2</sup> 12 CFR 1040.2(d)(2). The exclusions

🗨 **Implementation tip:** The Rule incorporates the Dodd-Frank Act’s definition of “person,” which means an individual, partnership, company, corporation, association, trust, estate, cooperative organization, or other entity. 12 U.S.C. 5481(19). 12 CFR 1040.2(d)(1).

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<sup>1</sup> The Dodd-Frank Act defines the term “affiliate” as any person that controls, or is controlled by, or is under common control with another person. 12 U.S.C. 5481(1).

<sup>2</sup> The definition of service provider includes a person that (i) participates in designing, operating, or maintaining the

discussed in Section 2.3 may also apply to this type of Provider.

A Provider that engages in activities regarding both “covered consumer financial products and services” and products or services that are not covered by the Rule must comply with the Rule only for the products or services that are “covered consumer financial products or services.”  
Comment 2(d)-1.

**Example:** A merchant transmits funds for a consumer. The merchant also sells gas, food, and other durable goods that are not “covered consumer financial products or services.” Assume the funds transmitting activity is not necessary to the sale of the durable goods or to any other product or service not covered by the Rule. The merchant is a Provider and would be subject to the Arbitration Agreements Rule with respect to the transmittal of funds unless an exclusion applies. However, the merchant is not subject to the Rule with regard to the offering or sale of the goods that are not “covered consumer financial products or services.”

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consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes). 12 U.S.C. 5481(26)(A). The definition of service provider does not include a person solely by virtue of such person offering or providing to a covered person (i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media. 12 U.S.C. 5481(26)(B).

## 2.2 Covered Consumer Financial Products and Services

A Provider under the Arbitration Agreements Rule is only subject to the Rule to the extent that the Provider engages in an activity, or acts as an affiliated service provider, regarding a product or service that is covered by the Rule. The guide refers to these products and services as Covered Consumer Financial Products or Services. In order for a product or service to be a Covered Consumer Financial Product or Service under the Rule, it must be both:

**1. A consumer financial product or service as defined in the Dodd-Frank Act.**

Generally, this prong of the definition requires that financial products or services, as defined in the Dodd-Frank Act,<sup>3</sup> be offered or provided to consumers primarily for personal, family, or household purposes, or delivered, offered, or provided in connection with another consumer financial product or service. 12 CFR 1040.3(a).

**Example:** Ficus Bank offers business loans to individuals who are sole proprietors. At the time that Ficus Bank makes such a business loan, the borrower agrees to use the loan proceeds solely for business purposes. The business loan is not delivered, offered, or provided in connection with another consumer financial product or service. In making the business loan, Ficus Bank is not providing a Covered Consumer Financial Product or Service under the Rule.

**2. Included in the list of financial products and services in the Rule.** Generally, the list includes:

- a. Providing an “extension of credit”<sup>4</sup> that is “consumer credit”<sup>5</sup> or participating in a

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<sup>3</sup> The full list of financial products and services covered by Title X of the Dodd-Frank Act can be found at 12 U.S.C. 5481(15).

<sup>4</sup> An “extension of credit” includes, but is not limited to, credit granted pursuant to an open-end credit plan; the refinancing or other renewal of credit, including the issuance of a new credit card in place of an expiring credit card or in substitution for an existing credit card; the consolidation of two or more obligations; or the continuance of existing credit without any special effort to collect at or after maturity. 12 CFR 1002.2(q). This definition of

credit decision<sup>6</sup> that is consumer credit when performed by a “creditor”<sup>7</sup> as those terms are defined in Regulation B. 12 CFR 1040.3(a)(1)(i)-(ii).

b. Referring applicants or prospective applicants for consumer credit to creditors when performed by a creditor. However, when this activity is incidental to a business activity of the referring person that is not covered by the Rule, the referring activity is not covered. 12 CFR 1040.3(a)(1)(iii)(A), (C).

c. Selecting (or offering to select) creditors for consumer credit when performed by a creditor. However, when this activity is incidental to a business activity of the selecting person that is not covered by the Rule, the selecting activity is not covered. 12 CFR 1040.3(a)(1)(iii)(B), (C).

d. Acquiring, purchasing, or selling an extension of consumer credit covered by the Rule. 12 CFR 1040.3(a)(1)(iv).

e. Servicing an extension of consumer credit covered by the Rule. This includes but is not limited to student loan servicing, as defined in 12 CFR 1090.106, and mortgage loan servicing, as defined in 12 CFR 1024.2(b). 12 CFR 1040.3(a)(1)(v) and Comment 3(a)(1)(v)-1.

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“extension of credit” applies throughout Section 2.2.

<sup>5</sup> “Consumer credit” is credit extended to a natural person primarily for personal, family, or household purposes. 12 CFR 1002.2(h). This definition of “consumer credit” applies throughout Section 2.2.

<sup>6</sup> This term has the same meaning in the Arbitration Agreements Rule that it has in Regulation B, 12 CFR 1002.2(l) (under the definition of “creditor”).

<sup>7</sup> A “creditor” is a person who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of the credit. 12 CFR 1002.2(l). The term creditor includes a creditor’s assignee, transferee, or subrogee who so participates. *Id.* The term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made. *Id.* The term does not include a person whose only participation in a credit transaction involves honoring a credit card. *Id.* This definition of “creditor” applies throughout Section 2.2.

**Example:** Ficus Servicing Company acts as a servicer of extensions of consumer credit and extensions of business credit offered and originated by Ficus Bank. Assume that (i) Ficus Bank is a Provider under the Rule regarding the offering and origination of the extensions of consumer credit, (ii) these extensions of business credit are not Covered Consumer Financial Products or Services, and (iii) Ficus Bank is not a Provider regarding any activity related to the extensions of business credit. Ficus Servicing Company is a Provider and is subject to the Rule regarding the servicing of the extensions of consumer credit, but is not subject to the Rule regarding the servicing of the extensions of business credit.

f. Extending or brokering automobile leases. 12 CFR 1040.3(a)(2). For this purpose “automobile leases” are leases for the use of an automobile<sup>8</sup> that are the functional equivalent of purchase finance arrangements, that are on a non-operating basis and that have an initial term of at least 90 days. 12 CFR 1090.108.

g. Providing services to assist with debt management or debt settlement, to modify the terms of any extension of consumer credit covered by the Rule, or to avoid foreclosure. 12 CFR 1040.3(a)(3)(i).

h. Providing products or services represented to remove derogatory information from, or improve, a person’s credit history, credit record, or credit rating.<sup>9</sup> 12 CFR 1040.3(a)(3)(ii).

**Implementation tip:** Services that offer to renegotiate, settle, or modify a consumer’s debt are Covered Consumer Financial Products and Services even if the debt does not arise from a consumer credit transaction or from a consumer financial product or service generally. Comment 3(a)(3)(i)-1.

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<sup>8</sup> An automobile is defined as a self-propelled vehicle used primarily for personal, family, or households and for on-road transportation, except motor homes, RVs, motor scooters, and golf carts. 12 CFR 1090.108(a).

<sup>9</sup> The description of these products and services in the Rule is generally based upon the coverage of credit repair goods or services in regulations implementing 15 U.S.C. 6101 *et seq.*, codified at 16 CFR 310.4(a)(2). However, the

i. Providing a “consumer report,”<sup>10</sup> a “credit score,”<sup>11</sup> or other information specific to a consumer derived from a “consumer file”<sup>12</sup> directly to a consumer, except for a consumer report provided solely in connection with an “adverse action”<sup>13</sup> with respect to a product or service that is not covered by the Rule. 12 CFR 1024.3(a)(4).

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Arbitration Agreements Rule also would apply even if such credit repair goods or services would not be covered under the regulations implementing 15 U.S.C. 6101 *et seq.*, codified at 16 CFR 310.4(a)(2), solely because they were not the subject of telemarketing as defined in 16 CFR 310.2(gg). Comment 3(a)(3)(ii)-1.

<sup>10</sup> “Consumer report” has the same meaning in the Rule as it does in the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), and is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for credit or insurance to be used primarily for personal, family, or household purposes; employment purposes; or any other purpose authorized under the Fair Credit Reporting Act. See the Fair Credit Reporting Act for more information.

<sup>11</sup> “Credit score” has the same meaning in the Rule as it does in the Fair Credit Reporting Act, 15 U.S.C. 1681g(f)(2)(A), and is a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default (and the numerical value or the categorization derived from such analysis may also be referred to as a “risk predictor” or “risk score”); and does not include any mortgage score or rating of an automated underwriting system that considers one or more factors in addition to credit information, including the loan to value ratio, the amount of down payment, or the financial assets of a consumer; or any other elements of the underwriting process or underwriting decision.

<sup>12</sup> “Consumer file” has the same meaning in the Rule as it does in the Fair Credit Reporting Act, 15 U.S.C. 1681a(g), and is all of the information on a consumer recorded and retained by a consumer reporting agency regardless of how the information is stored.

<sup>13</sup> “Adverse action” has the same meaning in the Rule as it does in the Fair Credit Reporting Act, 15 U.S.C. 1681a(k), and is a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. “Adverse action” does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default, or where such additional credit would exceed a previously established credit limit. The term means a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance; a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee; a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit; or an action taken or determination that is both made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account and adverse to the interests of the consumer.

j. Providing accounts subject to the Truth in Savings Act,<sup>14</sup> as implemented by 12 CFR part 707 and Regulation DD.<sup>15</sup> 12 CFR 1040.3(a)(5). Generally, these accounts are deposit accounts at a depository institution or share draft accounts at a credit union if the accounts are offered to or held by a consumer.<sup>16</sup>

**Example:** Ficus Bank offers its customers deposit accounts that are primarily for consumer purposes and accounts that are primarily for business purposes. Ficus Bank is not subject to the Rule regarding the business purpose deposit accounts. However, assuming that the consumer purpose deposit accounts are accounts subject to either the Truth in Saving Act or the Electronic Fund Transfer Act, Ficus Bank is a Provider and is subject to the Rule regarding the consumer purpose deposit accounts.

k. Providing accounts or “remittance transfers”<sup>17</sup> subject to the Electronic Fund Transfer Act, as implemented by Regulation E.<sup>18</sup> 12 CFR 1040.3(a)(6). Generally, covered accounts include demand deposit, savings, or other consumer accounts held directly or indirectly by a financial institution and established primarily for a personal, family, or

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<sup>14</sup> 12 U.S.C. 4301, *et seq.*

<sup>15</sup> 12 CFR part 1030.

<sup>16</sup> Generally, accounts not covered by the Truth in Savings Act include mortgage escrow accounts for collecting taxes and property insurance premiums, accounts established to make periodic disbursements on construction loans, trust accounts opened by a trustee pursuant to a formal written trust agreement (not merely declarations of trust on a signature card such as a “Totten trust,” or an IRA and SEP account), or accounts opened by an executor in the name of a decedent's estate. See 12 U.S.C. 4301(b), 12 CFR 1030.2(a) and 707.2 for more information on accounts subject to the Truth in Savings Act.

<sup>17</sup> “Remittance transfer” has the same meaning in the Rule as it does in 12 CFR 1005.30(e), and is the electronic transfer of funds requested by a sender to a designated recipient that is sent by a remittance transfer provider. The term applies regardless of whether the sender holds an account with the remittance transfer provider, and regardless of whether the transaction is also an electronic fund transfer, as defined in § 1005.3(b). There are certain exceptions, explained more fully in the Remittance Transfer Rule itself. More information and implementation materials on the Remittance Transfer Rule are available at: <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/remittance-transfer-rule/>.

<sup>18</sup> 12 CFR part 1005.

household purpose.<sup>19</sup> They also include payroll card accounts and government benefit accounts as defined in Regulation E, and, after the effective date of the Prepaid Rule, other prepaid accounts subject to Regulation E.<sup>20</sup>

l. “Transmitting or exchanging funds”<sup>21</sup> except when necessary to another product or service if that product or service that is offered or provided by the person transmitting or exchanging funds and is not covered by the Rule. 12 CFR 1040.3(a)(7). For example, if an attorney transmits funds from an escrow or trust account when necessary for real estate settlement services, this activity would not be covered. By contrast, if a merchant offers a money transfer service as a stand-alone product to consumers, this activity would be covered.

m. Accepting financial or banking data or providing a product or service to accept such data directly from a consumer for the purpose of initiating a payment by a consumer via any “payment instrument”<sup>22</sup> or initiating a “credit card” or “charge card”<sup>23</sup> transaction for the consumer, except by a person selling or marketing a good or service that is not covered by the Rule, for which the payment or charge is being made. 12 CFR

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<sup>19</sup> For more information on which accounts and remittance transfers are covered under this prong, see 15 U.S.C. 1693a and 12 CFR 1005.30, Comment 30(e).

<sup>20</sup> The Bureau recently issued a final rule to create comprehensive protections for prepaid accounts. The Bureau’s Prepaid Rule is generally effective on April 1, 2018. More information and implementation materials on the Prepaid Rule can be found here: <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/prepaid-rule/>.

<sup>21</sup> “Transmitting or exchanging funds” means receiving currency, monetary value, or payment instruments from a consumer for the purpose of exchanging or transmitting the same by any means, including transmission by wire, facsimile, electronic transfer, courier, the Internet, or through bill payment services or through other businesses that facilitate third-party transfers within the United States, or to or from the United States. 15 U.S.C. 5481(29). In turn, the statute also defines the term “payment instrument,” as noted below.

<sup>22</sup> “Payment instrument” means a check, draft, warrant, money order, traveler’s check, electronic instrument, or other instrument, payment of funds, or monetary value (other than currency). 15 U.S.C. 5481(18).

<sup>23</sup> The definitions of “credit card” and “charge card” provided in Regulation Z, 12 CFR 1026.2(a)(15), apply. Comment 3(a)(8).

1040.3(a)(8). For example, if a payment processor allows consumers to initiate payments to third parties via the payment processor’s online billing platform, that activity would be covered if the payment processor does not market the third party goods or services for which the payment is being made.

n. Providing check cashing, check collection, or check guaranty services. 12 CFR 1040.3(a)(9).

o. Collecting debt arising from a Covered Consumer Financial Products or Service when performed by:

1) A person offering or providing the product or service giving rise to the debt being collected, an affiliate of such person, or a person acting on behalf of such person or affiliate;

2) A person purchasing or acquiring an extension of consumer credit, an affiliate of such person, or a person acting on behalf of such person or affiliate; or

**Implementation tip:** If the debt was not incurred in connection with a Covered Consumer Financial Product or Service, then the collection of that debt is not covered. For example, if a debt buyer purchases a portfolio of credit card debt that includes both consumer and business debt, the collection of the consumer debt would be covered, but not the collection of the business debt. Comment 3(a)(10)-1.

3) A “debt collector”<sup>24</sup> subject to the Fair Debt Collection Practices Act. The Fair Debt Collection Practices Act generally covers the collection activities of persons collecting debts owed or due or asserted to be owed or due to others but not the collection activities of first-party debt collectors (*i.e.*, creditors collecting on debts owed to them). 12 CFR 1040.3(a)(10)(i) – (iii).

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<sup>24</sup> Under the Fair Debt Collection Practices Act, a “debt collector” is defined as any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C. 1692a(6). However, there are a number of exceptions from the definition of debt collector. 15 U.S.C. 1692a(6)(A) through (F).

## 2.3 Exclusions

The Arbitration Agreements Rule sets out exclusions from coverage. Even if a person otherwise provides a Covered Consumer Financial Product or Service, the person is not a Provider subject to the Rule if the person also satisfies one or more exclusions.

☞ **Implementation tip:** If you are a service provider to an affiliated entity that is excluded under the Rule, and you are not a Provider for any other reason, you are not considered a Provider under the Rule. 12 CFR 1040.2(d)(2).

Some of the exclusions in the Arbitration Agreements Rule apply to all of a person's activities, but others only apply to the extent that the person engages in specific activities or engages in activities regarding a specific Covered Consumer Financial Product or Service.

A federal agency, as defined in 28 U.S.C. 2671, is excluded and is not a Provider. Additionally, the following are excluded and are not Providers: any state (including the District of Columbia and territories and possessions of the United States) and any federally recognized "Indian tribe"<sup>25</sup> or other person to the extent such person is an "arm" of a state or tribe under federal sovereign immunity law and the person's immunities have not been abrogated by the United States Congress. 12 CFR 1040.3(b)(2)(i) - (ii) and Comment 3(b)(2)(ii)-1.

The following are excluded and are not Providers under the Arbitration Agreements Rule but only to the extent they are engaging in the specific activity described in the applicable exclusion:

1. A person regulated by the Securities Exchange Commission as defined in 12 U.S.C. 5481(21). 12 CFR 1040.3(b)(1)(i).
2. A person to the extent regulated by a state securities commission (or any agency or office performing like functions), but only to the extent that the person acts in such regulated capacity<sup>26</sup> as either a broker dealer or an investment adviser. 12 CFR 1040.3(b)(1)(ii).

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<sup>25</sup> "Indian tribe" is defined by the Secretary of the Interior under section 102(2) and section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a-1(a). Comment 3(b)(2)(ii)-2.

<sup>26</sup> As described in 12 U.S.C. 5517(h).

3. A person that is registered, or required by statute or regulation to be registered, with the Commodity Futures Trading Commission (CFTC),<sup>27</sup> but only to the extent that the activities of such person are subject to the jurisdiction of the CFTC under the Commodity Exchange Act.<sup>28</sup> 12 CFR 1040.3(b)(1)(iii).

4. A person with respect to any account, contract, agreement, or transaction to the extent the account, contract, agreement, or transaction is subject to the jurisdiction of the CFTC under the Commodity Exchange Act.<sup>29</sup> 12 CFR 1040.3(b)(1)(iii).

5. Activities excluded from the Bureau's rulemaking authority.<sup>30</sup> These activities or persons include but are not limited to<sup>31</sup>:

a. The sale, servicing, and leasing of motor vehicles in circumstances described in 12 U.S.C. 5519.

b. Activities by an agent, volunteer, or representative of a tax-exempt organization related to charitable contributions as described in 12 U.S.C. 5517(l).

c. Certified Public Accountants and tax preparers when engaged in customary and usual accounting activity as described in 12 U.S.C. 5517(d).

d. Employee benefit and compensation plans as described in 12 U.S.C. 5517(g).

e. A person to the extent that they are engaging in the "business of insurance"<sup>32</sup> under

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<sup>27</sup> As defined by 12 U.S.C. 5481(20).

<sup>28</sup> 7 U.S.C. 1 *et seq.*

<sup>29</sup> *Id.*

<sup>30</sup> For example, pursuant to 12 U.S.C. 5517 or 5519.

<sup>31</sup> This is a non-exhaustive, summarized list. It does not include activities and persons that are separately excluded under the Arbitration Agreements Rule, such as merchants, retailers, or other sellers of nonfinancial goods or services in certain circumstances. Entities should review 12 U.S.C. 5517 and 5519 for more information regarding excluded entities and activities.

<sup>32</sup> Dodd-Frank Act section 1002(3) states that the term "business of insurance" means the writing of insurance or the

the Dodd-Frank Act section 1002(3) and 1002(15)(C)(i). 12 CFR 1040.3(b)(6).

6. Merchants, retailers, or other sellers of nonfinancial goods or services to the extent they:
  - a. Extend credit directly to a consumer exclusively for the purpose of enabling that consumer to purchase a nonfinancial good or service directly from the merchant, retailer, or seller, regardless of whether they assign, sell, or otherwise convey to another person such debt owed by the consumer; and
  - b. Are not subject to the Bureau's rulemaking authority under 12 U.S.C. 5517(a)(2)(B)(ii) because the credit extended does not significantly exceed the market value of the nonfinancial good or service provided, and the sale of the nonfinancial good or service is not done as a subterfuge; and
  - c. Are not subject to the Bureau's rulemaking authority under 12 U.S.C. 5517(a)(2)(B)(iii) because they do not regularly extend credit subject to a finance charge.<sup>33</sup> 12 CFR 1040.3(b)(4)(i).
7. Merchants, retailers, or other sellers of nonfinancial goods or services to the extent they purchase or acquire an extension of credit made under the exclusion described immediately above. 12 CFR 1040.3(b)(4)(ii).
8. An "employer,"<sup>34</sup> as defined in the Fair Labor Standards Act, to the extent that it offers a Covered Consumer Financial Product or Service to its employees as an employee benefit. If

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reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.

<sup>33</sup> Merchants, retailers, or other sellers of nonfinancial goods or services should also review the Limitations and Rules described in 12 U.S.C. 5517(a)(2)(C) and (D). Small business merchants, retailers, and sellers of nonfinancial goods or services may find it helpful to review 12 U.S.C. 5517(a)(2)(D)(ii) – (iv).

<sup>34</sup> An "employer" for this purpose includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 203(d).

an employer offers the Covered Consumer Financial Product or Service to the employee on terms and conditions made available to the general public, it is not considered an employee benefit for purposes of the Rule. 12 CFR 1040.3(b)(5) and Comment 3(b)(5)-1.

9. A person to the extent that such person and its affiliates collectively provide a Covered Consumer Financial Product or Service to 25 or fewer consumers in the current calendar year and 25 or fewer consumers in the preceding calendar year. If a person exceeds the threshold during a calendar year, then the person is not eligible for this exclusion for the specific product or service for the remainder of the year and the following year. 12 CFR 1040.3(b)(3) and Comment 3(b)(3)-2.

🗨 **Implementation tip:** The 25 consumer threshold exclusion applies based on the number of consumers to whom you provide, rather than offer, a product. However, participating in a credit decision, even if an application is denied, still counts towards the 25 consumer threshold. Comment 3(b)(3)-1.

🗨 **Implementation tip:** The number of consumers that your affiliates provide a product or a service to count towards the 25 consumer threshold. Comment 3(b)(3)-1.

**Examples:** Ficus Bank offers student loans to the general public and to its employees on the same terms and conditions. Ficus Bank also offers to help its employees pay for continuing education through a continuing education loan program that is not available to the general public. Assuming that Ficus Bank is an employer under the Fair Labor Standards Act, it is excluded from being a Provider with regard to the continuing education loans. However, it may be a Provider with regard to the student loans it offers to the general public, including its employees.

Assume the same facts as above. Also, assume that Ficus Bank uses Acme Loan Servicing to service and collect on the continuing education loans. Assuming that Acme Loan Servicing does not meet the definition of employer under the Fair Labor Standards Act with respect to the consumer, Acme Loan Servicing would be a Provider under the first prong of the definition of the term Provider because it is servicing an extension of consumer credit.

Ficus Retailer offers financing to enable consumers to purchase its appliances. Consumers who obtain loans from Ficus Retailer do not incur interest or other finance charges. For purposes of these transactions, Ficus Retailer is exempt from the Bureau's rulemaking authority. Acme Retailer acquires Ficus Retailer's consumer credit accounts. Acme Retailer services and collects the consumer credit that Ficus Retailer extended. Ficus Retailer is not a Provider with regard to the extensions of consumer credit on the terms described above, and Acme Retailer is not a Provider with regard to the servicing and collection of those acquired consumer credit accounts.

Ficus Bank provides credit bureau monitoring services to approximately three customers in calendar year 2018 and did not provide such services to any consumers in 2017. Ficus Bank does not have any affiliates that offer or provide credit bureau monitoring services. Because this is below the 25 consumer threshold, Ficus Bank is excluded from coverage for the offering and providing of credit bureau monitoring services for as long as Ficus Bank they does not exceed the 25 consumer threshold. However, Ficus Bank would still be considered a Provider and would be covered under the Rule with regard to any other Covered Consumer Financial Product or Service for which they have more than 25 consumers in the current or previous calendar year.

Assume that Ficus Bank's credit bureau monitoring services have become increasingly popular, and in January 2019, Ficus Bank provides credit bureau monitoring services to its 26th customer. At this point, Ficus Bank ceases to be eligible for the 25 consumer threshold exclusion. Ficus Bank must begin complying with the Rule for the 26th customer and must continue complying for new customers later in 2019 and throughout 2020.

Ficus Lending is a tribal lender that qualifies as an arm of the Tribe within the meaning of federal law concerning sovereign immunity and their immunities have not been abrogated by the U.S. Congress. Ficus Lending is excluded from coverage under the Rule. However, Ficus Lending hires Acme Debt Collection to collect on delinquent debt. Acme Debt Collection is not an arm of the Tribe within the meaning of federal law concerning sovereign immunity. Thus, Acme Debt Collection would be a Provider if the loan is a Covered Consumer Financial Product or Service and no other exclusion applies.

## 2.4 Pre-Dispute Arbitration Agreements

The Arbitration Agreements Rule’s requirements apply only to Providers in connection with arbitration agreements that satisfy the Rule’s definition of a “pre-dispute arbitration agreement” and that are entered into on or after March 19, 2018. The guide refers to agreements that satisfy the Rule’s definition as Pre-Dispute Arbitration Agreements.

A Pre-Dispute Arbitration Agreement is an agreement that:

1. Is between a “covered person” (see Section 2.4.1 below) and a “consumer;” and
2. Provides for arbitration of any future dispute concerning a Covered Consumer Financial Product or Service.

🗨 **Implementation tip:** A “consumer” is an individual or an agent, trustee, or representative acting on behalf of an individual. 12 CFR 1040.2(b).

12 CFR 1040.2(c).

The form or structure of the agreement is not determinative. An agreement can be a Pre-Dispute Arbitration Agreement under the Rule regardless of whether it is a standalone agreement, an agreement or provision that is incorporated into, annexed to, or otherwise made a part of a larger contract, is in some other form, or has some other structure. Comment 2(c)-3.

The term Pre-Dispute Arbitration Agreement also includes a delegation provision, which is an agreement to arbitrate threshold issues concerning a Pre-Dispute Arbitration Agreement. For example, a delegation provision might state that if there is a dispute between the parties about the enforceability of the arbitration agreement, that dispute must be resolved by an arbitrator, not by a court. Delegation provisions may sometimes appear elsewhere in a contract containing or relating to the arbitration agreement. Comment 2(c)-2.

🗨 **Implementation tip:** If you are a Provider of a Covered Consumer Financial Product or Service and permit consumers to access information about that product or service by a technological means, such as an app or website, and if those technological means are subject to a separate agreement to arbitrate future disputes, that agreement is Pre-Dispute Arbitration Agreement. Comment 3(a)-2.

## 2.4.1 Covered Persons

The Arbitration Agreements Rule incorporates the definition of “covered person” from the Dodd-Frank Act, which defines “covered person” as any person that engages in offering or providing a Covered Consumer Financial Product or Service, and any affiliate of such a person if the affiliate acts as a service provider to the Covered Person. 12 U.S.C. 5481(6). Persons excluded from the Bureau’s rulemaking authority or otherwise not included or excluded from the Arbitration Agreements Rule’s definition of Provider may still meet the definition of a Covered Person. However, the Rule’s requirements would not apply to such Covered Persons, because the requirements apply only to Providers. 12 CFR 1040.2(c) and 12 CFR 1040.2(d) and Comment 2(c)-1(i) – (ii).

**Example:** Acme Auto is an automobile dealer that is excluded from the Bureau’s rulemaking authority and Acme Auto extends consumer credit in the form of automobile loans. Acme Auto also executes retail installment contracts. Because Acme Auto is an automobile dealer excluded from the Bureau’s rulemaking authority, it is not a Provider and is not required to comply with the Rule. However, Acme Auto frequently sells auto loans to Ficus Debt Buying, a debt buyer, which is a Provider under the Rule. After March 19, 2018, Ficus Debt Buying acquires several of Acme Auto’s retail installment contracts (RISCs) and becomes party to the Pre-Dispute Arbitration Agreements that apply to those RISCs. The Arbitration Agreements Rule generally would apply to the use of Acme Auto’s Pre-Dispute Arbitration Agreement by Ficus Debt Buying, for these RISCs.

## 2.4.2 Entering into a Pre-Dispute Arbitration Agreement

The Arbitration Agreements Rule’s requirements apply only to Pre-Dispute Arbitration Agreements that a Provider or another Covered Person *enters into* on or after March 19, 2018.

If a Provider enters into the Pre-Dispute Arbitration Agreement on or after March 19, 2018, the Provider:

1. Must include certain language in the agreement stating that the Pre-Dispute Arbitration Agreement cannot be used to block a class action, as discussed in Section 3;
2. Is prohibited from relying on the Pre-Dispute Arbitration Agreement to block a class action, as discussed in Section 4; and
3. Must submit to the Bureau certain arbitration-related records as discussed in Section 5.

12 CFR 1040.4(a)(1) – (2) and Comment 4-1.

If a Provider does not enter into the Pre-Dispute Arbitration Agreement on or after March 19, 2018, but another Covered Person does, the Provider:

1. Is prohibited from relying on the Pre-Dispute Arbitration Agreement to block a class action, as discussed in Section 4; and

📌 **Implementation tip:** The Arbitration Agreements Rule defines “consumer” to mean an individual or an individual’s agent, trustee, or representative. Thus, a person could enter into a Pre-Dispute Arbitration Agreement with someone other than an individual. 12 CFR 1040.2(b).

2. Must submit to the Bureau certain records concerning the Pre-Dispute Arbitration Agreement, as discussed in Section 5.

12 CFR 1040.4(a)(1) – (2) and Comment 4.

If neither a Provider nor another Covered Person enters into the Pre-Dispute Arbitration Agreement on or after March 19, 2018, the Arbitration Agreements Rule does not apply to that Pre-Dispute Arbitration Agreement. Comment 4(a)(2)-1.

**Example:** Acme Debt Collection collects on student loan debt on behalf of the State of Ficus (a hypothetical 51<sup>st</sup> state). Assume Acme Debt Collection is not eligible for any exclusion in the Rule. Acme Debt Collection does not enter into Pre-Dispute Arbitration Agreements with respect to the accounts on which it collects. Acme Debt Collection is prohibited from relying on Pre-Dispute Arbitration Agreements entered into by the State of Ficus after the compliance date, with respect to any aspect of a class action filed against Acme Debt Collection concerning its debt collection products or services for these student loans. Acme Debt Collection is prohibited from relying on the Pre-Dispute Arbitration Agreements in such cases because the State of Ficus is a Covered Person, even though the State of Ficus is excluded from coverage under the Rule.

Comment 4-2.ii.

The Rule provides several examples of when a Provider enters into a Pre-Dispute Arbitration Agreement, including the following:

1. A consumer obtains a new Covered Consumer Financial Product or Service from a Provider and the terms and conditions include a Pre-Dispute Arbitration Agreement;
2. A consumer and Provider are already subject to a Pre-Dispute Arbitration Agreement and the Provider, on or after March 19, 2018, provides the consumer with a new Covered Consumer Financial Product or Service that is subject to the existing Pre-Dispute Arbitration Agreement. The Rule applies to the new Covered Consumer Financial Product or Service;

**Example:** Prior to March 19, 2018, a consumer opens a checking account with Ficus Bank, and executes an agreement to arbitrate all future disputes related to the checking account or any other product or service that the consumer has with or obtains from Ficus Bank. On April 1, 2018, the consumer opens a savings account with Ficus Bank. The savings account is subject to the pre-existing agreement to arbitrate future disputes. Assuming that the savings account is a Covered Consumer Financial Product or Service, Ficus Bank has entered into a Pre-Dispute Arbitration Agreement for the savings account after March 19, 2018. However, because the consumer entered into the agreement for the checking account prior to March 19, 2018, Ficus is not subject to the Arbitration Agreements Rule with respect to the checking account, but is subject to the rule with respect to the savings account.

3. A Provider purchases or acquires a Covered Consumer Financial Product or Service, on or after March 19, 2018, and that Covered Consumer Financial Product or Service is subject to a Pre-Dispute Arbitration Agreement, and the Provider becomes a party to the Pre-Dispute Arbitration Agreement at the time of purchase or acquisition. This is an example of *entering into* a Pre-Dispute Arbitration Agreement, even if the seller is excluded from coverage or the Pre-Dispute Arbitration Agreement was entered into before March 19, 2018; or

**Example:** Acme Auto, an automobile dealer that is excluded from the Bureau's rulemaking authority, includes an agreement to arbitrate all future disputes in its motor vehicle installment sales contracts. Prior to March 19, 2018, Acme Auto enters into a motor vehicle installment sales contract with a consumer. After March 19, 2018, Ficus Debt Buying acquires Acme Auto's motor vehicle installment sales contract and becomes a party to Acme Auto's Pre-Dispute Arbitration Agreement. Assuming the motor vehicle installment sales contract is a Covered Consumer Financial Product or Service, Ficus Debt Buying entered into the Pre-Dispute Arbitration Agreement. Although Acme Auto is a Covered Person, it is excluded from the Bureau's rulemaking authority and not a Provider under 12 CFR 1040.3(b)(6), and is thus, excluded from the Rule. Ficus Debt Buying, however, is subject to the Rule because it entered into and became a party to the Pre-Dispute Arbitration Agreement after the compliance date.

4. A Provider adds a Pre-Dispute Arbitration Agreement, on or after March 19, 2018, to the terms and conditions of an existing Covered Consumer Financial Product or Service.

**Example:** A consumer opens a credit card account with Ficus Bank prior to March 19, 2018. After March 19, 2018, Ficus Bank adds a new provision to the terms of the credit card account requiring the consumer to arbitrate all future disputes related to the credit card or credit card account. Assuming the credit card account is a Covered Consumer Financial Product or Service, Ficus Bank has entered into a Pre-Dispute Arbitration Agreement after March 19, 2018.

12 CFR 1040.4(a) and Comment 4-1.i.

The Rule also provides several examples of when a Provider does not enter into a Pre-Dispute Arbitration Agreement, including when a Provider:

1. Modifies, amends, or implements the terms of a Covered Consumer Financial Product or Service that is subject to a Pre-Dispute Arbitration Agreement before March 19, 2018. However, a Provider does enter into a Pre-Dispute Arbitration Agreement if the modification, amendment, or implementation constitutes the provision of a new Covered Consumer Financial Product or Service.

**Example:** A consumer obtains a payroll card account subject to Regulation E from Ficus Bank prior to March 19, 2018. The terms and conditions for the payroll card account include an agreement to arbitrate all future claims and disputes related to the payroll card account. After March 19, 2018, Ficus Bank amends the terms and conditions for the card for the sole purpose of allowing the consumer to notify Ficus Bank of errors related to the account and to dispute whether certain electronic fund transfers were authorized. Ficus Bank does not amend any other provisions. Ficus Bank has not entered into a Pre-Dispute Arbitration Agreement after March 19, 2018.

2. Acquires or purchases a Covered Consumer Financial Product or Service that is subject to a Pre-Dispute Arbitration Agreement but does not become a party to the Pre-Dispute Arbitration Agreement.

**Example:** Acme Auto, an automobile dealer, has its customers sign a separate Pre-Dispute Arbitration Agreement when they enter into Acme's motor vehicle installment sales contracts. The Pre-Dispute Arbitration Agreement applies to third parties. On April 1, 2018, Acme Auto enters into a motor vehicle sales contract with a consumer and has the consumer sign the separate Pre-Dispute Arbitration Agreement. Acme Auto later assigns the motor vehicle installment sales contract, but not the separate Pre-Dispute Arbitration Agreement, to Ficus Bank. Ficus Bank has not entered into a Pre-Dispute Arbitration Agreement because it has not become a party to the Pre-Dispute Arbitration Agreement. Thus, Ficus Bank is not required to amend the agreement to add the required language. However, because the agreement was entered into by a Covered Person after March 19, 2018, Ficus Bank is prohibited from relying on the agreement to block a class action, and Ficus Bank must comply with the reporting requirement for any claim filed in arbitration or in court by or against Ficus Bank.

12 CFR 1040.4(a) and Comment 4-1.ii.

### 3. General requirement to include language in Pre-Dispute Arbitration Agreements

The Arbitration Agreements Rule generally requires that upon entering into a Pre-Dispute Arbitration Agreement on or after March 19, 2018, a Provider ensures that the Pre-Dispute Arbitration Agreement includes certain language notifying consumers that the Provider cannot rely on the Pre-Dispute Arbitration Agreement to block any aspect of a class action related to a Covered Consumer Financial Product or Service. The Rule includes specific language that the Provider must use for this purpose.

The Rule also prescribes other language that providers may use in certain specified situations, including when a Provider enters into a Pre-Dispute Arbitration Agreement that existed between other parties prior to the Provider entering into the agreement. The Rule also includes a temporary exception for Pre-Dispute Arbitration Agreements for certain general-purpose reloadable prepaid cards.

The general requirements, the special provisions, and the temporary exception are each discussed below. For more information on when a Provider enters into a Pre-Dispute Arbitration Agreement, see Section 2.4.2.

## 3.1 Required language

Generally, a Provider that enters into a Pre-Dispute Arbitration Agreement on or after March 19, 2018 must ensure that the agreement contains the following provision at the time that the parties enter into the agreement:

*“We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.”*

12 CFR 1040.4(a)(2)(i).

If a Pre-Dispute Arbitration Agreement applies to multiple products or services and only some of them are Covered Consumer Financial Products or Services, the Provider may use the following alternative provision in the agreement (instead of the provision set forth above):

*“We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. The following provision applies only to class action claims concerning the products or services covered by that Rule: We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.”*

12 CFR 1040.4(a)(2)(ii).

☐ **Implementation tip:** You may provide any notice required by 12 CFR 1040.4(a)(2) in a language other than English if the Pre-Dispute Arbitration Agreement also is written in that other language. 12 CFR 1040.4(a)(2)(vii).

☐ **Implementation tip:** If you use a standard term in the rest of the Pre-Dispute Arbitration Agreement to describe the Provider or the Consumer, you may use that term instead of the term “we” or “you.” 12 CFR 1040.4(a)(2)(v).

## 3.2 Special provisions for pre-existing Pre-Dispute Arbitration Agreements

If a Provider enters into a Pre-Dispute Arbitration Agreement on or after March 19, 2018 and that agreement existed previously between other parties, the Provider must determine if the agreement contains either of the two provisions discussed in Section 3.1. If not, the Provider must either amend the Pre-Dispute Arbitration Agreement to include one of the two provisions discussed in Section 3.1 or provide applicable consumers with a written notice informing them that the Provider cannot rely on the agreement to block class actions. 12 CFR 1040.4(a)(2)(iii)(A).

☐ **Implementation tip:** You may provide the written notice permitted by 12 CFR 1040.4(a)(2)(iii) in any way that you communicate with your customer, including electronically. The notice may be provided either as a standalone document or included in another notice that the customer receives, such as a periodic statement, to the extent permitted by other laws and regulations. Comment 4(a)(2)-3.

If the Provider elects to provide the notice, it must include the following language:

*“We agree not to rely on any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else.”*

12 CFR 1040.4(a)(2)(iii)(A).

If the Pre-Dispute Arbitration Agreement applies to multiple products and services, only some of which are Covered Consumer Financial Products and Services, the provider may also include the following language:

*“This notice applies only to class action claims concerning the products or services covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau.”*

12 CFR 1040.4(a)(2)(iii)(A).

A Provider may modify either of these provisions by adding the following sentences:

*“This provision does not apply to parties that entered into this agreement before March*

19, 2018.”

*“This provision does not apply to products or services first provided to you before March 19, 2018 that are subject to an arbitration agreement entered into before that date.”*

*“This provision does not apply to persons that are excluded from the Consumer Financial Protection Bureau’s Arbitration Agreements Rule.”*

12 CFR 1040.4(a)(2)(iv)(A) and (B).

If a Provider has included the required language under § 1040.4(a)(2)(i)-(ii) in their Pre-Dispute Arbitration Agreements, the Provider must either include the required language in any delegation provisions, or add the following phrase to the required language:

*“This provision also applies to the delegation provision.”*

12 CFR 1040.4(a)(2)(iv)(C) and Comment 4(a)(2)-4.

If a person has a genuine belief that sovereign immunity from suit under applicable law applies to a person that may seek to assert the Pre-Dispute Arbitration Agreement, the Provider may add the following sentences to the language required under § 1040.4(a)(2)(i)-(ii):

*“However, the defendants in the class action may claim they cannot be sued due to their sovereign immunity. This provision does not create or waive any such immunity.”*

12 CFR 1040.4(a)(2)(vi).

Providers must amend Pre-Dispute Arbitration Agreements or provide the notice to consumers within 60 days of entering into the Pre-Dispute Arbitration Agreement.

12 CFR 1040.4(a)(2)(iii)(B).

### 3.3 Temporary exception for pre-packaged general-purpose reloadable prepaid card agreements

The Arbitration Agreements Rule’s requirement to ensure that Pre-Dispute Arbitration

Agreements contain specified language does not apply to a Pre-Dispute Arbitration Agreement for a general-purpose reloadable (GPR) prepaid card if the agreement is acquired by the consumer in a retail store and was packaged with the card prior to March 19, 2018.<sup>35</sup> However, if a Provider has the ability to contact the consumer in writing (for example, when the consumer registers the card and gives the Provider the consumer's mailing address or email address), then the Provider, within 30 days of obtaining the consumer's contact information, must provide to the consumer an amended Pre-Dispute Arbitration Agreement that contains the required language. 12 CFR 1040.5(b) and Comments 5(b) and 5(b)(2).

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<sup>35</sup> The Bureau recently issued a final rule to create comprehensive protections for prepaid accounts, including GPR prepaid cards. The Bureau's Prepaid Rule is generally effective on April 1, 2018. More information and implementation materials on this rule can be found here: <https://www.consumerfinance.gov/policy-compliance/guidance/implementation-guidance/prepaid-rule/>.

# 4. Prohibition on relying on Pre-Dispute Arbitration Agreements to block class actions

The Arbitration Agreements Rule prohibits a Provider from relying on a Pre-Dispute Arbitration Agreement with respect to any aspect of a class action that concerns any Covered Consumer Financial Product or Service. A “class action” is a lawsuit in which one or more parties seek or obtain class treatment pursuant to Federal Rule of Civil Procedure 23 or any analogous state process. 12 CFR 1040.2(a).

This prohibition only applies to Pre-Dispute Arbitration Agreements that the Provider or another Covered Person entered into on or after March 19, 2018. 12 CFR 1040.4(a) and 12 CFR 1040.2. Even if the Provider does not enter into the Pre-Dispute Arbitration Agreement, the prohibition applies to the Provider’s use of any Pre-Dispute Arbitration Agreement entered into by another Covered Person on or after March 19, 2018. Comment 4-2.

❏ **Implementation tip:** The Rule does not prevent the use of Pre-Dispute Arbitration Agreements for non-class action proceedings, such as individual claims. Additionally, in a class action concerning multiple products or services where only some are Covered Consumer Financial Products or Services, the prohibition applies only to those claims that concern a Covered Consumer Financial Product or Service.. 12 CFR 1040.4(a)(1) and Comment 4(a)(1)-3.

**Example:** In April 2018, Ficus Credit, a Covered Person, extended credit for a Covered Consumer Financial Product or Service to a consumer and entered into a Pre-Dispute Arbitration Agreement related to that extension of consumer credit. In January 2019, Ficus Credit hired Acme Debt Collection, which began collecting the debt owed on the extension of credit. In December 2019, the consumer filed a class action against Acme Debt Collection for its collection practices related to the debt collected on the behalf of Ficus Credit. Acme Debt Collection is prohibited from relying on the Pre-Dispute Arbitration Agreement entered into by Ficus Credit.

## 4.1 Reliance on a Pre-Dispute Arbitration Agreement

The Arbitration Agreements Rule prohibits a Provider from relying on a Pre-Dispute Arbitration Agreement for any aspect of a class action that concerns any Covered Consumer Financial Product or Service. For purposes of the prohibitions in the Arbitration Agreements Rule, relying on a Pre-Dispute Arbitration Agreement includes, but is not limited to, any of the following:

- Seeking dismissal, deferral, or stay of any aspect of a class action;
- Seeking to exclude a person or persons from a class in a class action;
- Objecting to or seeking a protective order intended to avoid responding to discovery in a class action;
- Filing a claim in arbitration against a consumer who has filed a claim on the same issue in a class action. This includes (1) during the time after the trial court has denied a motion to certify the class but before an appellate court has ruled on an interlocutory appeal of that motion, if the time to seek such an appeal has not elapsed or the appeal has not been resolved; and (2) during the time after the trial court in that class action has granted a motion to dismiss the claim and, in doing so, the court noted that the consumer has leave to refile the claim on a class basis, if the time to refile the claim has not elapsed.

Comment 4(a)(1)-1.i.

Reliance on a Pre-Dispute Arbitration Agreement does not include, among other things, a class action defendant seeking or taking steps to preserve the defendant's ability to seek arbitration after the trial court has denied a motion to certify the class and either an appellate court has affirmed that decision on an interlocutory appeal of that motion, or the time to seek such an appeal has elapsed. Comment 4(a)-1.ii.

Additionally, a class action defendant does not violate the Arbitration Agreements Rule by relying on a Pre-Dispute Arbitration Agreement if it has a genuine belief that it is not subject to the Rule, for example, because it is not a Provider under the Rule or because none of the claims asserted in the class action concerns a Covered Consumer Financial Product or Service. Comment 4(a)-2.

**Examples:** Ficus Bank enters into a Pre-Dispute Arbitration Agreement with a consumer on April 1, 2018. Subsequently, the consumer files a class action lawsuit against Ficus Bank concerning a Covered Consumer Financial Product or Service. Assuming no exclusion applies to Ficus Bank and Ficus Bank is a Provider, the Rule prohibits Ficus Bank from relying on the Pre-Dispute Arbitration Agreement in the class action. The Rule prohibits Ficus Bank from, among other things, moving to compel arbitration, seeking to exclude the consumer from the class action based on the Pre-Dispute Arbitration Agreement, and seeking a protective order that relies on the Pre-Dispute Arbitration Agreement and that is intended to avoid responding to discovery in the class action. In addition, the Rule requires Ficus Bank to have language in its Pre-Dispute Arbitration Agreement as described in Section 3 above.

A consumer files a motion for class certification against Ficus Bank. The consumer's agreement with Ficus Bank contains a Pre-Dispute Arbitration Agreement. Ficus Bank and the consumer entered into the Pre-Dispute Arbitration Agreement on April 1, 2018. The Rule prohibits Ficus Bank from relying on the Pre-Dispute Arbitration Agreement in the class action, for example, by moving to compel arbitration. Assume Ficus Bank is concerned that, by litigating the motion for class certification, it may be found to have waived its right to arbitrate if it later seeks to compel arbitration after class certification is denied and any appellate review is resolved such that the case may not proceed as a class action (which would be permitted under the Rule). The Rule does not prohibit Ficus Bank from notifying the court that it may seek to compel arbitration of the plaintiff's claim in the event that the court denies the plaintiff's motion for class certification and appellate review is resolved such that the case may not proceed as a class action.

A consumer entered into an agreement to arbitrate future disputes with Acme Merchant on April 1, 2018. The consumer then filed a class action lawsuit against Acme Merchant. Acme Merchant has a genuine belief that it is not covered by the Rule because the class action does not concern a Covered Consumer Financial Product or Service). The Rule does not prohibit Acme Merchant from relying on the arbitration agreement in the class action.

## 5. Submission of records

The Arbitration Agreements Rule requires Providers to submit to the Bureau certain arbitration-related records concerning a Covered Consumer Financial Product or Service. The requirement to submit records only applies to: (1) certain records filed in arbitration or court proceedings in which a party relies on a Pre-Dispute Arbitration Agreement entered into on or after March 19, 2018; and (2) correspondence pertaining to whether a Pre-Dispute Arbitration Agreement complies with an arbitral administrator's due process or fairness standards if the Pre-Dispute Arbitration Agreement was entered into on or after March 19, 2018. 12 CFR 1040.4(b)(1). Additional information on the specific records that must be submitted is included in Section 5.1.

Generally, if a Provider is required to submit a record to the Bureau, it must submit a copy of the record within 60 days of the date that it filed or received the record. Additional information on the timing for submitting records is discussed in Section 5.1.2. 12 CFR 1040.4(b)(2).

The Provider must submit the record in the manner and form specified by the Bureau and must redact certain personally identifiable and financial information from the record prior to submitting it. Additional information on the form of records to be submitted and how to submit records is included in Section 5.2. 12 CFR 1040.4(b)(1) and (3).

The Bureau will post records it obtains from Providers (subject to additional redactions) on a publicly available website that the Bureau will establish and maintain by July 1, 2019. Additional information on the Bureau's posting of redacted records is included in Section 5.3. 12 CFR 1040.4(b)(4)-(6).

A Provider must submit to the Bureau any communication that the Provider receives related to any arbitration administrator's determination that the Provider's Pre-Dispute Arbitration Agreement does not comply with the administrator's fairness principles or rules. Examples of such principles or rules include, but are not limited to:

- The American Arbitration Association's Consumer Due Process Protocol, available at:

<https://www.adr.org/consumer>

- JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, available at:

<https://www.jamsadr.com/consumer-minimum-standards/>

Comment 4(b)(1)(ii).

🗨 **Implementation tip:** You do not need to submit communications regarding fairness principles if you have not entered into a Pre-Dispute Arbitration Agreement with a consumer (e.g., if you submit a prototype Pre-Dispute Arbitration Agreement for review by the arbitration administrator and never include the Pre-Dispute Arbitration Agreement in any consumer agreements). Comment 4(b)(1)(ii).

## 5.1 Records to be submitted to the Bureau

The requirement to submit records to the Bureau applies to the records described below if the records are related to claims:

1. By or against the Provider;
2. Concerning a Covered Consumer Financial Product or Service; and
3. That rely on a Pre-Dispute Arbitration Agreement entered into on or after March 19, 2018.

For such claims, the Provider must submit:

1. The initial claim and any counterclaim;

2. The answer to any initial claim and/or counterclaim, if any;
3. The Pre-Dispute Arbitration Agreement filed with the arbitrator or arbitration administrator;
4. The judgment or award, if any, issued by the arbitrator or arbitration administrator;
5. If an arbitrator or arbitration administrator refuses to administer or dismisses a claim due to the Provider's failure to pay required filing or administrative fees, any communication the Provider receives from the arbitrator or an arbitration administrator related to such a refusal;
6. Any submission to a court that relies on a Pre-Dispute Arbitration Agreement in support of the Provider's attempt to seek dismissal, deferral, or stay of any aspect of a case; and
7. The Pre-Dispute Arbitration Agreement relied upon in the motion or filing.

12 CFR 1040.4(b)(1).

The requirement to submit records to the Bureau also applies to communications the Provider receives from an arbitrator or an arbitration administrator determining that a Pre-Dispute Arbitration Agreement for a Covered Consumer Financial Product or Service does not comply with the administrator's fairness principles, rules, or similar requirements, if such a determination occurs. This requirement applies whether or not a claim has been filed by or against a Provider in arbitration or if no claim has been filed. 12 CFR 1040.4(b)(1)(ii) and Comment 4(b)(1)(ii)-1.

Providers are not required to submit these records themselves and may arrange for another person, such as an arbitration administrator, or an agent of the Provider, to submit the records on the Provider's behalf. The obligation to comply nevertheless remains on the Provider, and the Provider must ensure that the person redacts the records in accordance with the requirements under the Rule. Comment 4(b)-1.

## 5.2 Form of the records to be submitted

The Arbitration Agreements Rule requires that the records submitted to the Bureau be redacted so that they do not contain certain personal and financial information. Providers must ensure that the following information, as applicable, is redacted prior to the submission of a record to the Bureau:

- Names of individuals, except for the name of the Provider or the arbitrator where either is an individual;
- Addresses of individuals, excluding city, state, and zip code;
- Email addresses of individuals;
- Telephone numbers of individuals;
- Photographs of individuals;
- Account numbers;
- Social Security and tax identification numbers;
- Driver's license and other government identification numbers; and
- Passport numbers.

12 CFR 1040.4(b)(3).

Providers are not required to perform the redactions themselves and may arrange for another person, such as an arbitration administrator, or an agent of the Provider, to redact the information from the records. The obligation to comply nevertheless remains on the Provider, and the Provider must ensure that the person redacts the records in accordance with the requirements under the Rule. Comment 4(b)-1.

## 5.3 Public posting of arbitral and court records

The Rule requires the Bureau to establish and maintain on its website a central repository of the records that Providers submit to it. The Bureau will make records easily accessible and retrievable by the public no later than July 1, 2019. The Bureau will make records available each year thereafter for documents received by the end of the prior calendar year.

🗨 **Implementation tip:** If you are a Provider, you may want to inform consumers that Providers are required to redact and submit records described in Section 5.1 to the Bureau for publication.

Prior to making records easily accessible and retrievable by the public as required by the Arbitration Agreements Rule, the Bureau will make further redactions if necessary to comply with applicable privacy laws. 12 CFR 1040.4(b)(4)-(6).