



U.S. COMMODITY FUTURES TRADING COMMISSION

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Via E-Mail to: FederalRegisterComments@cfpb.gov

Monica Jackson
Office of the Executive Secretary
U.S. Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB-2016-0020; RIN 3170-AA51, Arbitration Agreements

Dear Ms. Jackson:

The staff of the Commodity Futures Trading Commission (“CFTC staff”) appreciates the opportunity to comment on the proposal by the Bureau of Consumer Financial Protection (“CFPB”) to establish regulations under 12 CFR Part 1040 that would prohibit certain arbitration agreements (“CFPB Proposed Rule” or the “Proposal”).¹ CFTC staff recognizes the importance of the CFPB’s mission to protect consumers from unfair, deceptive, or abusive practices in consumer financial markets, as well as the importance of the Proposal. However, the Proposal raises concerns with respect to the CFTC’s exclusive jurisdiction under the Commodity Exchange Act (“CEA”)² and with respect to provisions of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which likewise make clear that CFTC jurisdiction is exclusive with respect to a CFTC registrant’s CFTC-regulated activities.³ Therefore, CFTC staff respectfully requests that the CFPB clarify that any final CFPB rule on arbitration agreements does not apply to any CFTC registrant with regard to such registrant’s CFTC-regulated activities.

The CFPB Proposed Rule would prohibit covered providers of certain consumer financial products and services from using pre-dispute arbitration agreements that bar consumers from filing or participating in a class action with respect to the covered consumer financial product or

¹ Arbitration Agreements, 81 Fed. Reg. 32830 (May 24, 2016).

² 7 U.S.C § 1 *et seq.*

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

service. As the CFPB recognizes,⁴ the CFTC has its own rule on dispute settlement procedures for CFTC registrants, Commission regulation 166.5.⁵ This rule is silent as to prohibitions on class actions, but does require customer use of dispute settlement procedures to be voluntary. The text of the CFPB Proposed Rule is silent on the CFTC and CFTC registrants. The preamble to the Proposal, however, states that “[u]nder the proposed rule, any product or service that is subject to both the Bureau’s proposed rule and the CFTC rule would therefore need to meet the requirements of both rules.”⁶

We are pleased that the Proposal seeks comment on, among other things, “whether the Bureau should exempt consumer financial products and services that are subject to the CFTC rule or more broadly activities that are subject to the jurisdiction of the CFTC under the [CEA].”⁷ The Proposal also notes that the Dodd-Frank Act limits the CFPB’s authority over persons regulated by the CFTC.⁸ As the CFPB recognizes, Section 1027(j) of the Dodd-Frank Act explicitly states that the CFPB “shall have no authority to exercise any power to enforce this title with respect to a person regulated by the [CFTC].”⁹ For the purposes of Title X of the Dodd-Frank Act, a “person regulated by the [CFTC]” is any person registered with the CFTC to the extent the person’s activities are subject to CFTC jurisdiction under the CEA.¹⁰

⁴ 81 Fed. Reg. at 32880-81.

⁵ 17 C.F.R. 166.5.

⁶ 81 Fed. Reg. at 32881.

⁷ *Id.*

⁸ *Id.* at 32881 n.494 (citing Section 1027(j) of the Dodd-Frank Act).

⁹ Section 1027(j) of the Dodd-Frank Act.

¹⁰ Section 1002(20) of the Dodd-Frank Act. Legislative history reinforces the plain text of the Dodd-Frank Act. During floor consideration of the conference report on Dodd-Frank by the House of Representatives, after a colloquy between House Financial Services Chairman Barney Frank and Congressman Dennis Moore confirming that the creation of the CFBP was not intended to duplicate existing CFTC and SEC regulation, Congressman Moore submitted a clarification on this point for the record. In relevant part, it states:

...the final report provides exclusive authority to . . . the CFTC over persons they regulate to the extent those persons act in a “regulated capacity.” If such persons are not acting in a regulated capacity, their activities relating to the offering and provision of consumer financial products or services may be subject to the authority of the Bureau instead of the SEC or CFTC. But to the extent they are acting in a “regulated capacity,” only their functional regulator—the SEC or the CFTC—has rulemaking, supervisory, examination or enforcement authority over the regulated person or such activities. To that end, the conference report specifically states that “the Bureau shall have no authority to exercise any power to enforce this title with respect to any person regulated by the Commission [SEC] or the CFTC.”

The Proposal's suggestion that there could be products or services subject to both CFPB and CFTC jurisdiction also runs counter to the CEA, which grants exclusive jurisdiction to the CFTC over the futures and swaps markets.¹¹ In our view, there is no consumer financial product or service that could be subject to both the CFPB Proposed Rule and Commission regulation 166.5, because Section 2(a)(1) of the CEA grants the CFTC exclusive jurisdiction over the futures and swap markets.¹² Thus, the notion of shared or overlapping jurisdiction with the CFTC is inconsistent with the Dodd-Frank Act and the CEA.

CFTC staff recognizes that the fact that a person or business is a CFTC registrant does not make any activity that the person or business engages in subject to exclusive CFTC jurisdiction. On the contrary, a person or business that is a CFTC registrant may also engage in activity that is outside the CFTC's regulatory ambit. Our request is that the CFPB clarify that, consistent with the Dodd-Frank Act and the CEA, the only activity that CFPB could regulate with respect to CFTC registrants is activity that is *not* CFTC-regulated activity.

For the reasons stated above, CFTC staff requests that the CFPB clarify that any CFPB final rule on pre-dispute arbitration agreements does not cover any CFTC registrant with regard to such registrant's CFTC-regulated activities, regardless of whether such activities would meet the definition of a covered consumer financial product or service.

Like the CFPB, the CFTC has a strong interest in consumer protection. In fact, the CFTC's mission includes the protection of consumers, market users and the public from fraud, manipulation, and abusive practices related to the products we regulate.¹³ In light of any final CFPB rulemaking on this matter, the CFTC staff may consider whether changes to Commission regulation 166.5 are appropriate in the interest of consumer protection.

We appreciate the opportunity to comment on the Proposal. Should you require any further information or wish to discuss the matters set forth in this letter, please do not hesitate to contact me.

Sincerely,



Jonathan L. Marcus
General Counsel

¹¹ CEA Section 2(a)(1), 7 U.S.C. 2(a)(1).

¹² See *Hunter v. FERC*, 711 F.3d 155 (D.C. Cir. 2013) (holding that absent a clearly expressed congressional intention to repeal CEA Section 2(a)(1)(A), FERC could not demonstrate that amendments to its own enabling statute gave FERC authority to encroach on the CFTC's exclusive jurisdiction).

¹³ See CEA Section 3(b), 7 U.S.C. 5(b).