Politics, Populism, and Polarism

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In yet another example of misplaced priorities, the CFPB issued its long-awaited and much-ballyhooed proposed arbitration rule ("Rule"). It is, for the most part, consistent with Director Cordray's comments to the American Constitution Society (described in my April 2016 column, "Please Pass the Gravy") and generally bans class action waivers in arbitration agreements relating to the provision or financing of consumer financial products or services.

The Dodd-Frank Act ("DFA") mandated that the CFPB study the use of mandatory pre-dispute arbitration causes and report its findings to Congress, which it did on February 18th of this year. It further authorized the CFPB to prohibit or impose conditions or limitations on the use of mandatory pre-dispute arbitration agreements in consumer financial products or services if it finds that to be "in the public interest and for the protection of consumers," and such prohibition, conditions or limitations are consistent with the findings of the study.

Unfortunately, the CFPB's study is so flawed that its "findings" cannot legitimately support any rulemaking, much less one "in the public interest and for the protection of consumers." And, as many commenters before me have said, neither the Rule nor the CFPB study's "findings" bear much relation to the objective data contained in the study. Congress seemed to agree in a recent hearing on the matter, but the political wrangling of an election year provide little hope impacting an purportedly "data-driven" agency that routinely ignores data inconsistent with its political agenda du jour. And we all know how much good politics does for anyone.

The ongoing challenge for industry is so much larger that this ill-advised Rule. If we lived in not a perfect world, but at least a somewhat responsible one, everyone would just stop, take a breath, and reboot with an eye toward building a CFPB that implements the law in a thoughtful, considered and consistent manner, with an understanding of the "big picture" effects of its actions, large or small. The Bureau has been around long enough now that it should be moving beyond its infancy and growing pains towards becoming a clear and predictable overseer that balances consumer protection with efficient and reasonable marketplace operations. Unfortunately, the CFPB's awkward and contorted efforts to comport the Rule to its study – flawed as it is – suggests we are not heading in that direction.

I don't mean to denigrate the CFPB's mission. Quite the opposite. The CFPB has a valuable role to play in financial regulation and consumer protection. It could be enforcing the law while making clear how their view of compliance fits within accepted legal principles and interpretations. True, our regulatory structure makes it virtually impossible for businesses to maintain perfect compliance

with the myriad laws and regulations imposed on the financial services industry, but many of the companies I've had the honor to represent over the years try awfully hard to color within the lines. Most crave clear guidance from their regulators as to where those lines are drawn, and all of them expect – not unreasonably – the line drawing to take into account operational realities and the competitive nature of the marketplace. They also expect their regulators to understand their industry, the complexities and costs of available resources, and the settled interpretations of law they rely upon to manage their compliance, and to bring that understanding to the regulatory process.

I think the CFPB made a serious error of judgment that will have lasting negative effects on it and our economy when it chose to pursue a goal of staffing the CFPB with young people not already "seduced" by evil businesses and corrupt regulators – or encumbered by actual knowledge of the laws they are to enforce. The approach is certainly consistent with the current brand of populism we see in today's politics, but it's not particularly useful or effective. How does one "fix" a system that is allegedly "unfair" or "rigged" by managing it with on-the-job training for people unfamiliar with the law and the industry they are tasked with regulating? If the CFPB were a business, it would most certainly be out of business by now.

But its approach does, perhaps, explain the CFPB's early and ongoing focus on its law enforcement role (as opposed to its rulemaking and supervisory role) as the putative "new cop on the beat." By regulating through an enforcement and litigation process, it can operate on the well-tested theory that litigators don't need substantive knowledge, just substantive guidance. While that may be true for some kinds of litigation, 20+ years in this business has shown me that the serious litigators in this sector are as well versed in their substantive knowledge and understanding of consumer financial laws as any dedicated compliance attorney. Today's regulatory structure is simply too complex for a litigant to take a chance on someone without the requisite knowledge and experience, or for a responsible litigator to wade into this maze of malpractice without the armor of expertise. Knowledge and experience are key.

The Rule is another example of this "data-driven" agency contorting data to justify inflicting pain and costs on the financial services industry without regard to the harm it does to consumers. It does a disservice to, and will harm, the very people the CFPB is charged with protecting. It also illustrates the danger of the single director structure and why a politically balanced commission structure is better for everyone. Who would a President Trump would appoint as the next CFPB director in 2018 – an Elizabeth Warren disciple? Most assuredly, it would be her polar opposite. And while we don't know who the next president will be, we do know a bi-polar agency does no good for anyone.