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CABINET NEWS

Research and commentary on regulatory and other financial services topics

Regulatory Rumbles

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As always, your comments and questions are valued. Feel free to reach out to us anytime by dropping a note **here**.

Mercedes Tunstall and Alix Prentice
Partners and Co-Editors, *Cabinet News and Views*

CFPB Litigation On Fire

April 18, 2024

By Mercedes Kelley Tunstall
Partner | Financial Regulation

The Consumer Financial Protection Bureau ("CFPB") is engaged in a firestorm of tricky litigation these days. Some highlights, in addition to the Third Circuit's **NCSLT ruling we reported on previously**:

- With respect to the **CFPB's credit card late fee rule**, which is supposed to go into effect May 14, industry groups challenging the rule in court have been tousling back and forth with the CFPB. To start, the Northern District of Texas denied the plaintiff industry group's motion to request an expedited preliminary injunction hearing due to the very short timeframe for the rule to go into effect, opining that the case was best to be handled by the District Court of the District of Columbia and then transferred the case to the court in DC. The plaintiffs appealed this denial and transfer to the Fifth Circuit, which handed down a decision that found that the denial of the expedited timeframe for hearing the preliminary injunction was effectively a denial of the preliminary injunction itself, and the Fifth Circuit then found that the case should be returned to the Northern District of Texas for adjudication. The CFPB then challenged the Fifth Circuit regarding whether one of the justices that participated in the decision should be recused, because he owns shares of a large credit card issuer that could be negatively impacted by the rule. On April 17, the Committee on Codes of Conduct of the Judicial Conference of the United States determined that the Fifth Circuit justice did not need to be recused from the case. At this point, the briefing schedule for the case will not see the CFPB's responsive brief due until after May 14. As a result, it is likely that the plaintiffs will either choose to request an accelerated briefing schedule or ask the Fifth Circuit to rule on an emergency motion to stay the rule until the lower court can consider the preliminary injunction.
- The CFPB and the Department of Justice ("DOJ") have **filed an amicus brief** supporting consumers who are challenging the prohibition against actions taken by a class in their credit card issuer's arbitration agreement. In the underlying case, the consumers are challenging aspects of the issuer's compliance with the Serviceperson's Civil Relief Act ("SCRA") and have brought the case in federal district court as a class, instead of proceeding to arbitrate in accordance with the arbitration agreement included in their credit card agreement with the issuer. The CFPB and the DOJ argue that despite the consumers agreeing to the arbitration agreement, it is permissible under the SCRA for the consumers to file a class action in court due to the following language in the SCRA: "[a]ny person aggrieved by a violation [of the SCRA] may in a civil action . . . be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary." 50 U.S.C. 4042(a)(3). The CFPB has long considered arbitration to not be a consumer friendly alternative to litigation, even though the financial services industry and the CFPB itself has demonstrated that consumers who prevail in arbitration receive on average $5,389 versus consumers who are part of a class that prevails and who receive on average $32.35.

FCA's Consultation Paper

April 18, 2024

By Juliette Mills
Associate | Financial Services

Since 3 January 2018, firms that provide portfolio management or investment advice on an independent basis must pay for the research they obtain, either by absorbing the cost of the research themselves or by passing on that charge to their clients by way of a "research payment account". Prior to 2018, the cost of research could be bundled together with the cost of other services provided to investment firms; however, the introduction of the Markets in Financial Instruments Directive, as revised ("MiFID II"), introduced a prohibition of bundled payments, with the intention of reducing the potential conflicts of interest of firms offering both execution and research services.

On 10 April, in response to the Investment Research Review of the UK market published by HM Treasury, the UK's Financial Conduct Authority (the "FCA") published a consultation paper proposing the re-introduction of bundled payments as an additional method to pay for investment research in order to afford greater flexibility to UK buy-side firms on how they can purchase investment research ("CP24/7").

In CP24/7, the FCA proposes for the new regime to sit along the other payments currently available that would enable firms (including asset managers) who wish to buy investment research to use bundled payments for third-party research and execution services.

Firms may avail of this method of payment: provided, that they meet certain requirements, including establishing the following:

- a formal policy on use of the approach;
- a budget for the amount of third-party research to be purchased, as well as ongoing assessments of research value and price;
- an approach to the allocation of costs across their clients and a structure for the allocation of payments across research providers;
- operational procedures for the administration of accounts to purchase research; and
- disclosures to clients on the firm's approach to bundled payments, their most significant research providers and costs incurred.

If the FCA chooses to proceed with its proposals, it will publish any rules or guidance in a policy statement in the first half of 2024. However, it notes that the timetable will be determined by the amount, strength and breadth of the information gathered in the consultation.

The FCA is aware that the proposed changes should also apply to fund managers (including undertaking for collective investment in transferable securities ("UCITS") managers and alternative investment fund managers) under the FCA Conduct of Business Sourcebook ("COBS 18"). It intends to consult on these rule changes in the course of 2024.

Comments can be made until 5 June 2024.