

June 23, 2012

Monica Jackson  
Office of the Executive Secretary,  
Consumer Financial Protection Bureau  
1700 G Street NW,  
Washington, DC 20552  
Via: <http://www.regulations.gov>

Re: Docket No. CFPB-2012-0017

**Comments Regarding the Notice and Request for Information on the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 FR 25148, (April 26, 2012)**

**Introduction**

The undersigned organizations respectfully submit these comments on the Consumer Financial Protection Bureau's (CFPB) notice and request for information regarding the scope, methods, and data sources for conducting a study of pre-dispute binding arbitration in contracts for consumer financial products and services. Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requires the CFPB to conduct a study of such contracts, which require arbitration of any future dispute between a "covered person" and a consumer.<sup>1</sup> The study is the necessary first step for finally addressing forced arbitration, which is a major impediment to safeguarding consumers from predatory financial practices.

Our organizations strongly supported the Dodd-Frank Act provision requiring a study and authorizing rulemaking on forced arbitration. However, years of research and analysis by our organizations, academics, and others have already demonstrated how harmful forced arbitration is to the public interest. We urge the Bureau to complete an effective study as quickly as possible so that it can initiate rulemaking to address this issue.

**Background**

It is well-established that companies, including but not limited to those providing financial services and products, increasingly have inserted forced arbitration clauses in their standard, non-negotiable contracts with consumers. The arbitration clauses eliminate consumers' rights to adjudicate claims against companies in open court. Instead, consumers are required to participate in private proceedings to resolve disputes. The corporate-written contracts typically state who the arbitrator will be, under what rules the arbitration will take place, the state the arbitration will occur in, and the payment terms. A person has no meaningful choice but to acquiesce or forgo the goods and services altogether.

The growing and widespread use of arbitration clauses is a result of the U.S. Supreme Court's expansive view of the Federal Arbitration Act (FAA), which Congress originally had passed to

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<sup>1</sup> 12 U.S.C. 5518(a).

facilitate private arbitration between sophisticated parties on equal footing. The FAA is now used to enforce arbitration in contracts between consumers and corporations.

In one of its most recent and significant decisions on arbitration, *AT&T Mobility v. Concepcion*,<sup>2</sup> the Court held that corporations may also use arbitration clauses to cut off consumers' and employees' right to join together through class actions to hold corporations accountable. The decision has mostly affected consumer claims that are small in individual value, but large in the aggregate – claims where consumer class actions would be most appropriate. The decision also preempted numerous state laws that had precluded class action bans in consumer contracts. Since *Concepcion*, many courts have indicated that their obligation to follow the Supreme Court's holding inevitably means that the claims of thousands of aggrieved consumers may go unheard.

Numerous examples demonstrate the impact of forced arbitration on the consumer financial services market. However, the Bureau should be mindful that a lack of empirical data exists on certain aspects of forced arbitration because arbitration proceedings are inherently private.

As it navigates through what we expect will be a huge mass of materials and opinions from various stakeholders, the Bureau should consider three fundamental issues: (1) the effect of forced arbitration on potential claims arising from harm suffered by large numbers of consumers; (2) whether arbitration clauses effectively prevent these consumers from vindicating their rights; and (3) whether companies that provide financial products and services are evading federal and state consumer financial protection laws as a result of forced arbitration and its resultant secrecy.

### **Overall Response to Questions**

Based on the categories of questions presented in its request for information, it is clear that the CFPB seeks to delve into the substantive issues presented by forced arbitration clauses. This is appropriate because an examination of the prevalence of arbitration; the use and impact of arbitration proceedings; and the impact of these clauses outside of the proceedings, is necessary to determine the effect of these clauses on millions of consumers, and on the CFPB's mission "to make markets for consumer financial products and services work for Americans."<sup>3</sup>

To fully consider the wide-scale impact of forced arbitration and the broad range of its effects on consumers, we advise the CFPB to concentrate its attention on the impact of arbitration clauses *outside* of actual arbitration proceedings, along with the prevalence of the practice. The study of the impact of forced arbitration clauses outside arbitration proceedings is critical for harms caused by wrongful corporate conduct felt on a mass scale, particularly when each harm is too small for most individuals to pursue on their own.

### **1. Prevalence of Use**

**1i.** Based on a review of case law and existing studies and reports, forced arbitration clauses

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<sup>2</sup> 131 S. Ct. 1740 (2011).

<sup>3</sup> Consumer Financial Protection Bureau web site, <http://www.consumerfinance.gov/the-bureau/>.

appear in all aspects of financial services.<sup>4</sup> The Bureau should conduct a review of recent case law, as well as existing reports and studies on the presence of forced arbitration in consumer financial products and services markets. For example, a 2004 study found: “(t)he prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking, investment, and accounting/tax consulting).”<sup>5</sup>

- The Bureau should send a request to “covered persons,” asking that they indicate whether their consumer contracts contain forced arbitration clauses. The survey should also request that respondents include information on all the provisions related to requiring consumers to resolve disputes in arbitration, including the arbitration rules set forth in the contract and whether the clauses include a prohibition on class actions.

- The Bureau should account for the 2010 settlement in the case, *Ross v. Bank of America*,<sup>6</sup> where four credit card issuers (JP Morgan Chase, Bank of America, Capital One, and HBSC) agreed to eliminate forced arbitration clauses from their consumer credit card contracts for a limited period of 3 ½ years.<sup>7</sup> However, the Bureau should note that a number of these companies continued to use forced arbitration clauses for other types of consumer financial services, such as banking.<sup>8</sup>

**1ii.** The Bureau should consider all markets under its jurisdiction in reviewing prevalence, including debt collection, debt settlement, payday lending, banking, credit card, and student loans. The Bureau should begin its investigation with the markets affecting the greatest number of consumers.

- The Bureau should also compare the widespread use of arbitration clauses in consumer financial services contracts to the use of arbitration clauses in the financial companies’ contracts with other businesses, e.g. non-consumer, non-employment contracts. The Bureau will likely find that companies are more inclined to resolve disputes with their business peers in court rather than in arbitration.<sup>9</sup> This suggests that the “purported advantages of arbitration” are not as compelling to business groups when it comes to resolving important business-to-business disputes.<sup>10</sup> In addition, their reasons for disfavoring arbitration as a method to resolve business-to-business disputes are similar to consumers’ reasons for disfavoring arbitration to resolve consumer-to-business disputes.<sup>11</sup>

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<sup>4</sup> See, e.g. Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision Are Plainly Evident*, April, 2012. <http://bit.ly/JcxLlw>, and see, Forced Arbitration Rogues Gallery, <http://bit.ly/MBc6Jg>.

<sup>5</sup> Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, *Law & Contemp. Probs.*, Winter/Spring 2004, at 55, 62.

<sup>6</sup> *Ross, et al. v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y.). Settlement documents available at <http://www.arbitration.ccfsettlement.com/documents/>.

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g. Chase Deposit Account Agreement, <http://bit.ly/HOAwMy>.

<sup>9</sup> See, Theodore Eisenberg et. al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871 (2008).

<sup>10</sup> Eisenberg et. al., at 887.

<sup>11</sup> Thomas J. Stipanowich, *Mediation Holds Steady, Arbitration Usage is Down in a New 2011 Fortune 1,000 Corporate Survey*, Daily Journal (Mar. 19, 2012).

**1iii.** The Bureau should also review the various terms that accompany forced arbitration clauses in consumer financial services contracts. The Bureau must not only determine prevalence, but it must also analyze the effect these terms have on great numbers of consumers. An academic has observed that a feature of “consumer arbitration is that companies are increasingly using their arbitration clause not only to require arbitration but also to further limit consumers’ procedural and even substantive rights.”<sup>12</sup>

- The Bureau should review terms in forced arbitration clauses, such as:
  - a) Prohibition of class actions. Forced arbitration clauses typically require arbitration on an individual basis.
  
  - b) Delegation clauses: These provisions require all challenges to the validity of an arbitration proceeding, including fairness, to be decided by the arbitrator.
  
  - c) Provisions that select classes of disputes for arbitration and reserves others for court.
  
- The Bureau should also review the prevalence of terms in arbitration clauses, such as shortened statutes of limitation to file claims; limits or elimination of discovery; requirements that claims be heard in distant forums; and prohibitions on particular forms of relief such as injunctive relief, compensatory damages, punitive damages, and attorney’s fees.

**1iv.** A review of how terms have changed over time will inform the Bureau of the growth of the clauses, and the changes to provisions related to reactions to recent case law. The Bureau may find that arbitration provisions in contracts may have become more restrictive since the 2011 U.S. Supreme Court decision, *AT&T Mobility v. Concepcion*.

**1v.** The Bureau should request data on the prevalence and use of forced arbitration clauses from arbitration providers as well as “covered persons,” or companies providing consumer financial products and services. The Bureau should also review recent case law discussing forced arbitration in financial services contracts.

## **2. Use and Impact in Particular Arbitral Proceedings**

**2Ai.** The Bureau should determine how often consumers bring claims in arbitration. The Bureau will likely find that “few consumers will in fact exercise their rights under arbitration clauses.”<sup>13</sup> The information will assist the Bureau in determining whether arbitration is a viable alternative to pursuing claims in open court. The Bureau should also seek to compare the number of consumers who bring claims in arbitration to the estimated numbers of viable consumer claims that are not brought in arbitration, particularly where claims cannot be brought collectively in class actions.

**2Aii.** The Bureau should analyze the types of claims that consumers bring in arbitration. The

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<sup>12</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, (April 2005).

<sup>13</sup> Theodore Eisenberg et. al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 890 (2008).

Bureau should determine whether individual consumers are being forced to bring valid consumer financial services claims in individual arbitration that would more efficiently vindicate the rights of others with similar claims if they were pursued in class actions. In other words, are there large numbers of consumers affected by similar conduct whose claims are not being heard because of an arbitration clause that requires arbitration on an individual basis to resolve disputes?

- Generally, the Bureau and the public will be better informed about the impact of arbitration clauses if the Bureau determines whether claims relating to particular financial markets, such as payday lending and student loans, are being brought by consumers in arbitration.

**2Aiii.** The financial services industry and other business groups that push forced arbitration upon consumers often contend that arbitration is better for consumers because it is economical and efficient. They also argue that arbitration outcomes are favorable to consumers, despite the fact that some of the studies cited in the past show individuals a) receiving lower average payments in arbitration than court, b) receiving larger median payments in court, and c) winning at a higher rate in court than in arbitration. We encourage the Bureau to examine these claims.

- Courts also have made observations about the arbitration process (cost, speed, and outcome) which the Bureau should consider. For example, in a decision by a North Carolina district court to enforce an arbitration award, the judge noted that the bank involved in the case “handles hundreds of arbitrations a year” and that the bank’s counsel handled 30 to 40 a year and never lost a single case against consumers.<sup>14</sup> The court noted the bank’s “clear advantage” over customers. “The bank will know from experience, . . . which arbiters are the most likely to favor the bank; therefore, the bank will naturally choose that arbiter to arbitrate the bank’s case.”<sup>15</sup>

- The Bureau should seek to determine the total number of consumer arbitrations per year for banks and other institutions that provide financial services and products, and determine whether the business or the consumer initiated the arbitration.

- The Bureau should distinguish between corporate and consumer cost savings. It should also identify the reasons for cost savings and efficiency for companies in arbitration. Do cost savings stem from process costs (i.e. arbitrator v. court costs)? Do lower costs stem from limits on discovery that impede the ability of consumers to prove their claims? Do lower costs stem from low awards per individual consumer arbitration? Or, do cost savings stem from the ability of forced arbitration to deter consumers from bringing viable claims against companies in the first place?

- The Bureau should examine the cost and fee structure in private arbitration, including individual arbitrator’s hourly charges (compared to public court fees), and other costs incurred during an arbitration proceeding? What is the impact on consumers in the financial services market when contract provisions require them to pay “covered persons” costs, when consumers win or lose in arbitration?

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<sup>14</sup> *Wells Fargo Advisors, LLC v. Watts*, 2012 WL 831878 (W.D. N.C. Dist Ct. March 2012), Memorandum of Decision and Order. Also available at <http://bit.ly/OLBHzi>.

<sup>15</sup> *Id.*, at 2.

• The Bureau should determine the predictability (or lack thereof) of private arbitration costs.<sup>16</sup> Does the lack of consistency in fees and costs affect consumer willingness to participate in the process?

**2Aiv.** The Bureau should review various factors in the process to determine the impact on consumers' understanding and satisfaction in arbitration, including (a) the "repeat-player effect" that may benefit companies seeking arbitration; (b) the ability (or lack thereof) to appeal an unsatisfactory decision; (c) the arbitrator's monetary interests; and (d) the typical consumer's understanding of an arbitration provision and other terms in a consumer contract.

**2Av.** The Bureau should distinguish between claims that a consumer brings first to arbitration and claims that are forced into arbitration after a consumer initiates the claim in court. The distinction indicates which consumers were perhaps unaware of the arbitration clause and were denied access to the court after the company succeeded in compelling the consumer into arbitration. The Bureau may obtain helpful data on the number of consumers who sought arbitration alone. By distinguishing between the two, the Bureau may be able to determine whether consumers who initially filed their claims in court, pursued their claims in arbitration or abandoned their claims.

**2Avi.** The Bureau should consider relevant factors to determine whether data and conclusions from studies on arbitration proceedings are reliable, such as:

- a) How does a study or report determine a "consumer win"? Is the arbitrator award counted as a win regardless of its relation to the amount sought?
- b) Were the contracts in the study individually negotiated between the individual and the business or were these standard adhesion contracts, written by the business?
- c) If the Bureau is considering surveys regarding experiences in arbitration proceedings, is the arbitration experience related to predispute arbitration clauses or is the arbitration experience related to voluntary arbitration (that is, arbitration entered into voluntarily after a dispute arises)?

**2Bi to 2Biv.** Arbitration claims initiated by financial services companies, particularly debt collection claims, led to the discovery of some of the worst arbitration practices against consumers.<sup>17</sup> The Bureau should review the market to evaluate whether claims against consumers are being filed in arbitration, and evaluate the process for these claims. The Bureau should seek to determine consumers' understanding and experience in prior and recent cases, where financial services companies initiated claims against them.

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<sup>16</sup> See, e.g. AnnE. Krasuska. *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DePaul J. Health Care L. 263, 293-296 (Fall 2004).

<sup>17</sup> See, also, Public Citizen, *The Arbitration Trap, How Credit Card Companies Ensnare Consumers* (September 2007).

**2Bv.** The Bureau should review the following cases regarding findings and impact of claims, particularly debt collection cases brought by companies:

a) State of Minnesota v. National Arbitration Forum (2009);<sup>18</sup>

b) People of California v. National Arbitration Forum, Inc. (2011);<sup>19</sup> and

c) Ross, et al. v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y.)<sup>20</sup>

- The Bureau should contact the Offices of the Minnesota Attorney General and the San Francisco, California City Attorney regarding data and information collected from these matters.

- The Bureau should evaluate arbitration data from states with arbitration disclosure laws, particularly California, because California data has been a source of study and analysis for several years.

- The Bureau should request that major arbitration providers give it access to data regarding proceedings brought pursuant to predispute binding mandatory arbitration clauses.

### **3. Impact and Use Outside Particular Arbitral Proceedings**

**3i.** The Bureau should evaluate collective actions in consumer financial services disputes. Is it economically viable for consumers to litigate small claims individually? Does forcing consumers to arbitrate these claims individually, provide a way for financial services companies to avoid compensating consumers for injuries and allow them to evade compliance with state and federal statutes? Is the public interest harmed when private litigants are unable to enforce laws?<sup>21</sup>

- The Bureau should determine the extent to which purported savings for companies from their use of forced arbitration clauses have been passed on to consumers.<sup>22</sup>

- The Bureau should review recent case law to evaluate the impact of forced arbitration clauses on industry compliance with state and federal consumer financial protection laws, such as the Servicemembers Civil Relief Act, Fair Debt Collection Practices Act, Truth in Lending Act, Racketeer Influenced and Corrupt Organizations Act (RICO), Equal Credit Opportunity Act (ECOA), and state unfair and deceptive acts and practices (UDAP) statutes. The case law is instructive on the limitations on consumers' ability to assert and vindicate rights under these statutes resulting from the presence of forced arbitration in their contracts.<sup>23</sup>

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<sup>18</sup> <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

<sup>19</sup> <http://bit.ly/OQvlyC>.

<sup>20</sup> Documents are available here: <http://www.arbitration.ccfsettlement.com/documents/>.

<sup>21</sup> Eisenberg et. al., at 874.

<sup>22</sup> Eisenberg et. al., at 874. "Avoiding aggregate actions may save money for companies...but there is no guarantee that the savings will be passed on to consumers."

<sup>23</sup> See, e.g. *Alfeche v. Cash Am. Int'l, Inc.*, 2011 WL 3565078 (E.D. Pa. Aug. 12, 2011); *Beard v. Santander Consumer USA, Inc.*, 2012 WL 1292576 (E.D. Cal. Apr. 16, 2012); *Estrella v. Freedom Fin.*, 2011 WL 2633643 (N.D. Cal. July 5, 2011); *Kilgore v. KeyBank, Nat. Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Black v. JP Morgan Chase &*

- The Bureau should evaluate the impact on consumer awareness when certain claims are forced into individual arbitration. For example, claims arising from corporate misconduct or fraud that affect a large number of consumers may be suitable for resolution in a class action. A class action would provide many consumers with notice of the wrongful conduct. Courts have said that without class actions to enforce consumer protections laws most consumers would never have known that their legal rights had been violated. With class actions, a wider group of consumers would be compensated for their losses.<sup>24</sup>

- The Bureau should consider and evaluate whether typical consumers are able to identify and understand forced arbitration clauses in their consumer financial product and service contracts. For example, “(e)mpirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.”<sup>25</sup>

- The Bureau should evaluate the impact of forced arbitration on the development, interpretation, and application of the rule of law. Are arbitrators bound by laws? Are they required to follow case precedent? Are they required to explain their decisions to the parties involved? What is the effect of private proceedings on the rule of law, particularly when a case highlights critical financial practices that affect the public interest?

**3ii.** The Bureau should evaluate how the use of forced arbitration clauses impacts consumers and/or “covered persons” in other ways that are independent of their role in particular arbitral proceedings, including the following:

a) The Bureau should consider the impact of the nonconsensual nature of forced arbitration. How do the non-negotiated terms set by the “covered person,” impact consumers, covered persons, and/or the public interest?

b) The Bureau should consider the other terms in forced arbitration clauses and determine whether they are potential deterrents for consumers to file claims. As one observer put it, “(m)uch of mandatory arbitration’s impact is that it deters people from bringing claims at all and causes them to settle on unfavorable terms.”<sup>26</sup>

c) The Bureau should consider whether forced arbitration affects consumers’ ability to retain legal representation to adequately pursue claims against companies providing financial services and products.

**3iii.** Due to the limited empirical data, the Bureau should consider experiences of consumers and legal representatives, as well as recent case law documenting the dismissal of financial services

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Co., CIV.A. 10-848, 2011 WL 3940236 (W.D. Pa. Aug. 25, 2011) report and recommendation adopted, 2011 WL 4089411 (W.D. Pa. Sept. 14, 2011).

<sup>24</sup> See, e.g. *Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88, 100 (N.J. 2006).

<sup>25</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 Stan. L. Rev. 1631, 1648-1649 (April 2005).

<sup>26</sup> Jean R. Sternlight, *Counterpoint: Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, 16 No. 1 Disp. Resol. Mag. 5 (Fall 2009).

claims from the court, into individual arbitration.<sup>27</sup> The Bureau should consider conducting surveys where consumers and their legal representatives can convey their experiences.

### **Conclusion**

We believe that reliable data and responses to the questions presented in the Notice and Request for Information should lead to the logical conclusion that forced arbitration is a predatory practice which should be eliminated from consumer financial services contracts. However, it is the information related to the consumer experience with arbitration *outside* of the proceedings, in particular, that is crucial to understanding the impact of forced arbitration. The CFPB will find that the arbitration experience is relatively rare for most consumers, but the impact of the mere *existence* of arbitration clauses in consumer contracts is tremendous, because they suppress valid legal claims of most, if not all, American consumers who are parties to financial services contracts. We urge the CFPB to complete the study quickly so that it can begin rulemaking on this important issue.

Sincerely,

Alliance for Justice  
Citizen Works  
Center for Justice and Democracy  
Consumer Action  
Consumer Federation of America  
Consumers for Auto Reliability and Safety  
Community Legal Services, Inc., Philadelphia, PA  
Essential Information  
The Leadership Conference on Civil and Human Rights  
Homeowners Against Deficient Dwellings  
Maryland Consumer Rights Coalition  
National Association of Consumer Advocates  
National Consumer Law Center (on behalf of its low income clients)  
National Consumers League  
Public Citizen  
U.S. Public Interest Research Group (U.S. PIRG)

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<sup>27</sup> See, e.g. Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Conception Decision Are Plainly Evident*, April, 2012. <http://bit.ly/jcxLlw>.