

August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51

The undersigned consumer, civil rights, labor, community, and non-profit organizations strongly support the Consumer Financial Protection Bureau (CFPB)'s proposed rule to limit pre-dispute binding mandatory (or forced) arbitration clauses in consumer finance contracts. The CFPB rule, which will restore consumers' ability to band together in court to pursue claims, is a significant step forward in the ongoing fight to curb predatory practices in consumer financial products and services and to make these markets fairer and safer.

Lenders and other financial services companies use forced arbitration to push consumers out of court and into a private arbitration system that is tilted against them. Forced arbitration eliminates the right to a civil jury trial, limits discovery, restricts or prohibits public disclosure of proceedings and outcomes, and makes meaningful appeals virtually impossible. It also often prohibits consumers from banding together in a class action to hold the company responsible.

The CFPB's thorough arbitration study¹ clearly documents how forced arbitration blocks consumer access to courts, shielding banks and lenders from meaningful accountability for their unlawful behavior. Finalizing the proposed rule will restore crucial class action rights that deter systemic abuses and bring much-needed transparency to consumer financial arbitration.

The CFPB Study Data Shows That Forced Arbitration Eliminates Consumer Claims and Shields Companies From Accountability

The CFPB's study verified the prevalence of forced arbitration clauses – including class action bans – in consumer financial contracts and found that this practice impacts tens of millions of consumers. Yet it also revealed that consumers typically have no idea they are signing away their right to sue in court when they participate in the financial marketplace.²

The most obvious impact of forced arbitration clauses is that they block most consumer claims from going forward at all. Class action bans prevent consumers from bringing complaints of fraud or other abusive or deceptive practices in financial services because the individual value of

¹ "Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)."

² Data revealed that more than 75 percent of consumers surveyed did not know whether they were subject to forced arbitration in their consumer financial contracts, and fewer than 7 percent of those covered by arbitration clauses realized the clauses restricted their ability to sue in court.

these claims is often too small for a single consumer to afford to bring alone. Without the option to join together in a class action, just 25 consumers with claims of under \$1,000 pursued arbitration each year. In a country of over 320 million, these numbers leave no doubt that class action bans effectively wipe out consumer claims and thus shield corporate wrongdoers from liability. In the few claims that went to arbitration, the study also confirmed that forced arbitration overwhelmingly favors industry over consumers.³

Class Actions Provide Great Benefit for Consumers Cheated by Systemic Wrongdoing and Deter Risky or Illegal Conduct

The data makes clear that class actions provide a practical way for groups of consumers who have suffered the same kind of abuse from the same corporate wrongdoer to join together to attempt to hold the financial institution accountable. The CFPB study found that 34 million consumers received a total of \$2.2 billion in cash payments, debt forbearance, and other in-kind relief from 2008-2012 – not including any attorneys’ fees or court costs.

These findings were echoed in an empirical study by disinterested academics, which found consumer class actions against illegal overdraft fees “deliver[ed] fair compensation to a significant portion of class members.” Several major banks settled class actions that claimed the banks had purposely reordered consumer transactions to maximize the amount of overdraft fees charged to the consumer. This study found that plaintiffs in these cases recovered up to “65% of damages, with the variation based largely on the strength of the class’s claims and the likelihood of winning certification of the class.”⁴ Yet unknown thousands of other consumers subject to similarly unlawful overdraft fee practices likely got little or no relief when class actions against their banks were dismissed due to arbitration clauses.⁵

Even assuming that their claims would be fairly resolved in arbitration, leaving 34 million consumers to find their own attorney, establish the individual facts of their case, and take time off work to attend an arbitration will never be more efficient than pooling time and resources between millions of consumers harmed in the same way by the same bank or lender to challenge abusive practices. Indeed, additional empirical scholarship demonstrates that most consumers are unaware when they have been harmed, unaware that the harm violates a law, or have decided that filing individual claims is not worth their time and expense.⁶

Collective action is critically important, not only for enabling those already victimized to obtain justice, but also for deterring bad behavior and preventing harm to other victims. While each

³ In 2010 and 2011, only 9% of consumers who brought affirmative claims obtained relief in forced arbitration, recovering an average of 12 cents per dollar claimed. In contrast, 93% of companies obtained relief in forced arbitration, recovering an average of 98 cents per dollar.

⁴ Brian T. Fitzpatrick and Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions* 11 NEW YORK JOURNAL OF LAW & BUSINESS 4 (2015). Available at <http://ssrn.com/abstract=2577775>.

⁵ See, e.g., *In re Checking Account Overdraft Litigation*, 2012 WL 660974 (11th Cir. Mar. 1, 2012) (finding arbitration contract was not unconscionable).

⁶ When consumers *are* aware of being wronged they may raise complaints internally with companies, file with a government agency, or seek protection from a credit card company if appropriate, rather than engage in more difficult and expensive litigation or arbitration. See Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWESTERN L. REV. 87, 101-102 (2012).

individual consumer may only lose \$25 or \$50 to a fraudulent charge or illegal fee, for example, unlawful practices implemented at a systemic level can add up to millions or more in ill-gotten gains for banks and lenders who violate the law. Government enforcers have limited resources, and the prospect of class actions helps ensure that banks and lenders obey legal requirements that protect consumers.

The Proposed Reporting Requirements Add Crucial Transparency to Arbitration

While our organizations have urged the CFPB to prohibit forced arbitration entirely,⁷ we support the proposed provision to begin shining a light on individual arbitrations through reporting requirements as a useful step. Unlike our legal system, which is built upon hundreds of years of precedent, common law principles, and statutory standards of fairness and ethics, arbitration firms have few constraints on their practices and scant record of their proceedings. The substantially shorter history of consumer arbitration has nonetheless produced both anecdotal claims of unethical behavior⁸ and documented systemic abuses by unregulated arbitration firms.⁹

The proposed reporting requirements will lend crucial transparency and accountability to a previously opaque system. Increased transparency can help consumers make informed decisions when choosing how to pursue their claim, in line with well-established principles of the free market. Data collected by the CFPB will also help other government entities, as well as the general public, ensure that arbitrators operate within the law and treat all parties fairly.

The Rule Can Be Strengthened to Further Protect Consumers

Because arbitration clauses are pervasive in consumer financial contracts and often drafted with broad reach, the scope and application of this rule should be as clear and comprehensive as possible. It is especially crucial that the rule apply to contracts and existing arbitration clauses that are modified, amended, or renewed after the rule takes effect. For example, bank accounts or credit cards that are entered into before the compliance date should not be exempt from the rule for decades while banks claim the right to alter those contracts unilaterally – including increasing prices – into the future. Companies should not be able to change product cost, impose new terms, or extend existing terms on consumers while opting out of current legal rules themselves.

We also encourage the CFPB to expand the rules' reporting requirements by requiring all supervised financial providers to submit their arbitration agreements, regardless of whether the company is actually involved in a dispute filed in arbitration. Collection and review of these terms will help to shine a light on unreasonably restrictive terms that interfere with consumers' access to remedies. For example, the CFPB should be aware of companies that are using arbitration clauses with terms that: (1) require consumers to resolve disputes in inconvenient

⁷ Americans for Financial Reform, *Joint Letter: AFR, 163 Groups Call for Strong CFPB Action Against Forced Arbitration*, Apr. 28, 2016, <http://ourfinancialsecurity.org/2016/04/afr-164-organizations-urge-cfpb-to-restrict-forced-arbitration-in-letter-and-statement/>.

⁸ Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* THE NEW YORK TIMES, Nov. 1, 2015, <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

⁹ See, e.g., *Complaint for Injunctive Relief & Civil Penalties for Violations of Business & Professions Code Section 17200, People v. Nat'l Arbitration Forum, Inc.*, No. CGC-08- 473569 (Cal. Super. Ct. Mar. 24, 2008).

venues; (2) require consumers to withstand excessive costs; (3) limit discovery and the exchange of information; (4) limit substantive rights of consumers, including their rights under state and federal laws; or (5) facilitate unreasonable delays in payment to the consumer. Mere inclusion of these terms in a contract may chill consumer claims that the CFPB will never see.

The reporting requirements for individual arbitrations should also be triggered any time a company relies on an arbitration clause, such as filing a motion to dismiss or stay, rather than only applying once a “claim is filed in arbitration.” In order to fully assess the impact of forced arbitration on consumers, the CFPB must be able to track how frequently consumers decline to pursue a claim once blocked from accessing the court system.

Lastly, the final rule should have broader coverage for credit reporting, including both full coverage of credit bureaus and of companies that furnish information to credit bureaus regarding consumer financial products or services. The credit bureaus are the companies about whom the CFPB receives the highest number of consumer complaints. In addition, the rampant errors in credit reports come in part from the companies that furnish that information to credit bureaus, and that furnishing activity should be covered by the arbitration rule.

The Proposed Rule is in the Public Interest and for the Protection of Consumers

Because forced arbitration undermines compliance with laws and creates an uneven playing field between corporations that use forced arbitration and those that allow for greater consumer choice in dispute resolution, it is in the public interest and in the interest of consumer protection to prohibit or strictly curtail the use of forced arbitration clauses in consumer financial contracts. We commend the CFPB for its proposed rule to address the public harm caused by forced arbitration, as thoroughly documented in its study, and we urge the Bureau to use its full authority to restore consumers’ right to choose how to resolve disputes with financial institutions in the final rule.

Your consideration of these comments is appreciated. For questions, please contact Amanda Werner, Arbitration Campaign Manager with Americans for Financial Reform and Public Citizen, (202) 973-8004, awerner@ourfinancialsecurity.org; and Christine Hines, National Association of Consumer Advocates, (202) 452-1989, christine@consumeradvocates.org.

Thank you for the opportunity to share our views.

National Signatories

Alliance for Justice
American Family Voices
Americans for Financial Reform
Center for Responsible Lending
Center for Justice & Democracy
Consumer Action

Consumers for Auto Reliability and Safety
Homeowners Against Deficient Dwellings
National Association for College Admission Counseling
National Association of Consumer Advocates
National Association of Social Workers (NASW)
National Coalition For Asian Pacific American Community Development
National Consumer Law Center (on behalf of its low income clients)
Public Citizen
Woodstock Institute

State and Local Signatories

The Greenlining Institute – CA
9to5 Colorado – CO
Colorado Council of Churches – CO
Colorado Latino Forum, Denver Chapter – CO
Colorado Latino Leadership, Advocacy and Research Organization (CLLARO) – CO
Colorado Public Interest Research Group (PIRG) – CO
NAACP State Conference – CO, MT, WY
Georgia Watch – GA
Hudson River Housing – NY
Oregon Consumer League – OR