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August 22, 2016

Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552.
Via www.regulations.gov

RE: Comments of Public Citizen In the Matter of Arbitration Agreements; Docket No. CFPB-2016-0020, RIN: 3170-AA51

Public Citizen is grateful for the opportunity to submit comments to the Consumer Financial Protection Bureau (CFPB or Bureau) on its proposed rule to prohibit providers of consumer financial services and products from using mandatory pre-dispute arbitration clauses—or "forced arbitration" clauses—to block consumers from bringing class actions in public courts and in arbitration and, additionally, on its proposal to require certain disclosures to the Bureau by providers. Public Citizen is a national non-profit organization with more than 400,000 members and supporters. We represent the public interest through lobbying, litigation, administrative advocacy, research and public education on a broad range of issues that include consumer rights in the marketplace and access to justice.

Statement of Interest

Since its founding, Public Citizen has fought for the public interest in the courts and worked to make sure average Americans have access to the justice system. A strong civil justice system is critical to safeguarding individual rights and protecting consumers. To this end, Public Citizen has worked extensively to end the use of forced arbitration clauses, which block consumers from accessing the courts and push them into an unfair system of private arbitration. Public Citizen's involvement with this issue goes back several decades. Public Citizen is currently engaged in efforts to encourage the U.S. Department of Education, the Federal Communications Commission, the Department of Health and Human Services, the Securities and Exchange Commission, and other federal entities to address the consumer harms stemming from forced arbitration practices. For the past several years, we have also been engaged with members of Congress to advance legislative proposals that would reform federal law to counteract the abuses of forced arbitration, including the Arbitration Fairness Act[1] and Restoring Statutory Rights Act.[2] Finally, Public Citizen Litigation Group (PCLG) has represented parties in several major cases at the appellate level concerning the scope of the Federal Arbitration Act (FAA) and the enforceability of forced arbitration clauses.[3] PCLG also frequently participates as *amicus* in cases involving these issues.[4]

Introduction

Over the past 30 years, companies have increasingly sought to limit consumers' access to courts by including forced arbitration clauses and class action bans in boilerplate contracts. The courts' expansive readings of the FAA have rewarded those efforts with broad success. Public Citizen is opposed to the use of such clauses by corporate players, because they block consumers from making use of the judicial system to vindicate their statutory, constitutional, and common law rights. These clauses are fundamentally prejudicial to consumers' rights, encourage unlawful corporate behavior, and weaken the ability of law enforcement and regulators to protect the public.

At the outset, we express our support for the CFPB's proposal, which is based on years of statutorily mandated empirical study on the content and use, application, and consequences of forced arbitration clauses and class action bans in consumer financial contracts. The Bureau's final analysis in its March 2015 Arbitration Study (Study) is by far the most comprehensive study of its kind to date.[5] However, as explained in this comment, we believe the Bureau can and should go further than the current proposal to adopt a final rule that bars the practice of forced arbitration by consumer financial service providers outright. A bright-line rule banning forced arbitration in provider contracts is consistent with the CFPB's mission of protecting consumers from "unfair, deceptive, or abusive practices."[6] An outright ban on forced arbitration is the best way to ensure that banks and other financial institutions treat people fairly and is fully warranted by the Bureau's Study.

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[1] Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015).
[2] Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. (2016).
[3] *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).
[4] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).
[5] CFPB, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a) (2015) [hereinafter, CFPB Study].
[6] *About Us, The Bureau*, CFPB, http://www.consumerfinance.gov/about-us/the-bureau/ (last visited Aug. 18, 2016).

At its core, the proposed rule aims to curb corporate theft, deception, and exploitation of consumers committed by businesses that seek to maximize profits at all costs. Expectedly, the CFPB's proposal has received an avalanche of criticism from industry, which has benefited mightily from forced arbitration clauses and class action bans in particular. The financial services industry and its representatives have openly acknowledged that the purpose of forced arbitration clauses is to limit their legal exposure and to suppress consumer claims.[7] Such admissions are significant: They signal some providers' resolve to flout consumer protection laws by blocking private enforcement actions. It is particularly troubling that, during the continued challenges to economic security endured by everyday Americans as a result of the 2008 financial crisis, banks and other financial institutions continue to covet an effective "license to steal" without accountability from consumers.

The CFPB Study, as well as various other studies, surveys, and empirical research cited by the Study, lay the groundwork for the Bureau to take action so consumers can enforce their rights in the judicial system. We are pleased that the CFPB is taking corrective action to restore consumers' right to their day in court, and this comment—organized in two parts—explicates findings from the Bureau's Study as well as documents additional sources of support for the proposed rule, many of which are cited by the Study itself. First, it discusses the importance of class action litigation to protect consumers from unlawful practices by the financial services industry and responds to contrary industry arguments. Second, it argues that the Bureau should extend the rule to prohibit forced arbitration of individual claims and that such action is supported by the CFPB Study.

I. Class actions help consumers who have been victimized by banks and predatory lenders.

Class action lawsuits are in the crosshairs of the financial services industry,[8] for a very obvious reason: The class action is one of the most potent legal tools available to individuals to recover against the economically powerful. Class actions work because they allow people to aggregate their claims when it would be impossible or impractical for them to go after economically powerful defendants on their own. Corporations understand that if there were no feasible way for individuals

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[7] *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015; *see also* Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clauses as a Defense*, 7 Bus. L. Today 24 (1998); Bennet S. Koren, *Our Mini Theme: Class Actions*, 7 Bus. L. Today 18 (1998); Kate Berry, *How Banks Are Trying to Contain Cost of CFPB's Arbitration Plan*, AMERICAN BANKER (June 30, 2016), http://www.americanbanker.com/news/law-regulation/how-banks-are-trying-to-contain-cost-of-cfpbs-arbitration-plan-1081782-1.html.

[8] *See, e.g.,* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016, H.R. 1927, 114th Cong. (2015).

to enforce their rights, then rules protecting consumers against fraudulent business practices would largely become unenforceable, and bad actors could continue to break the law. That is precisely why banks and other financial service providers have not only rapidly incorporated class action bans in standard-form contracts,[9] but have also made clear that they are intent on thwarting the Bureau from moving forward on this powerfully pro-consumer proposed rulemaking.

a. Class action bans limit large-scale relief for consumers.

It is undeniable that class action bans limit the number of consumers that can benefit from a favorable judgment and, accordingly, can significantly limit a defendant's liability. In its Study, the Bureau determined that the 422 federal consumer financial class actions that were approved by courts between 2008 and 2012 involved more than 350 million class members.[10] Providers that ban class action claims not only limit the number of consumers who benefit from any one proceeding, but also discourage consumers from bringing claims at all, because the amounts of individual claims are typically quite modest, especially claims arising from many of the kinds of financial services covered by this proposed rulemaking.[11] Companies and their lawyers know most people cannot afford to sue over the individual impact of a larger transgression. A company thus may have a powerful incentive to engage in widespread violations of law that result in small, but significant, individual harms while benefiting the company tremendously in the aggregate. This incentive has time and again led companies to deceptively add hidden fees in consumer contracts or motivated debt collectors to fraudulently nickel-and-dime consumers to reap millions in additional profits. Class actions correct this problem by aggregating claims that would be difficult to bring on an individual basis; the economies of scale make pursuit of small dollar claims worthwhile. By facilitating the assertion of such claims, class actions act as a corrective to market forces that may otherwise encourage unlawful conduct. Ensuring efficient enforcement of small dollar claims through class actions is thus a core policy goal that has been expressed by Congress,[12] courts,[13] and the Standing Committee on Rules[14] in multiple contexts.

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[9] *See Consumers Want the Right to Resolve Bank Disputes In Court*, THE PEW CHARITABLE TRUSTS (Aug. 17, 2016), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court (finding that among 29 banks studied over a four year period use of class-action bans rose from 52% to 66%).

[10] CFPB Study §1.4.7 at 16.

[11] *See, e.g.*, *Concepcion*, 563 U.S. 333. In this case, the plaintiffs alleged that AT&T had engaged in false advertising and fraud by charging $30.22 sales tax on phones advertised as free.

[12] *See, e.g.*, Class Action Fairness Act § 2(a)(1), 28 U.S.C. § 1711 note; Electronic Fund Transfer Act, H. Rept. No. 95-1315, 15 (1978)("Class action suits for damages are an essential part of enforcement of the bill because, all too often,

b. Countering industry talking points against class actions

Industry's claim that class actions benefit plaintiffs' attorneys over consumers is a false talking point that should be laid to rest. According to the Study, between 2008 and 2012 consumers across the product markets studied received $2.2 billion in net relief—that is, over and above attorneys' fees and litigation costs.[15] In another empirical study, academic researchers found that class actions against illegal overdraft fees resulted in fair compensation to class members, in that the compensation was commensurate with the strength of the class claims and was delivered to a significant portion of class members.[16]

Moreover, most courts award attorneys' fees through the common fund doctrine, where the cost of litigation is paid out of the common fund created by the class recovery, typically a settlement.[17] Most commonly, courts will calculate fees as a reasonable percentage of the value of the settlement.[18] Accordingly, attorneys receive fees when they have created value for class members, which would not otherwise have existed. Plaintiffs' attorneys litigate class actions at considerable risk to themselves—they pay upfront costs of litigation—and if they lose, there is no recovery and, accordingly, no attorneys' fees. Additionally, Federal Rule 23(h) ensures that judges have flexibility in determining reasonable compensation to attorneys for their work.[19] Fee percentages can be modified by factors deemed appropriate by the judge, such as results achieved, risk, and the age and difficulty of the action.

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although many consumers have been harmed, the actual damages in contrast to the legal costs to individuals are not enough to encourage a consumer to sue.");

[13] *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 402 (2010) (Rule 23 is "designed to further procedural fairness and efficiency."); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her own rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.")).

[14] *See, e.g.*, Fed. R. Civ. P. 23, Advisory Comm. Notes to 1966 Amendment (stating that a class action suit can be justified under Rule 23 where "the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.").

[15] CFPB Study §8.1 at 4-5. The Study estimates gross relief at $2.7 billion and fees at 16% of this total, resulting in net relief of $2.2 billion to class members.

[16] *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J. L. & BUS. 767, 788 (2011).

[17] Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, at 10 (July 21-22, 2000), *available at* https://law.duke.edu/grouplit/papers/classactionalexander.pdf.

[18] *Id.* at 11.

[19] FED. R. CIV. P. 23(h).

The Bureau's evaluation of 400 private lawsuits that were brought in court and litigated as class actions revealed that the attorneys' fees amounted to 16% of gross relief, a very reasonable figure. This finding is consistent with other data-driven studies on this topic. Another seminal study evaluating class action settlements and associated fee awards found that in a representative sample of 688 class action settlements approved over a two-year period, involving nearly $33 billion, roughly $5 billion, or 15% of this total, was awarded as attorneys' fees.[20] This same study also found that client recovery is, overwhelmingly, the primary determinant of attorneys' fees: it found a strong inverse association between fee percentage and settlement size—in other words, the larger the settlement, the smaller the fee percentage for the attorneys.[21] This means courts will actually scale back fees when attorneys produce large recoveries for a class to avoid windfalls to attorneys. On the other hand, the age of the case at settlement was positively associated with fee percentage—meaning the longer attorneys worked on the case, the higher the fee percentage.[22] Attorney fee payment arrangements of this kind can hardly be said to be disproportionate or unfair.

c. <u>Benefit of private enforcement to consumers.</u>

Industry's anti-class action claims also intentionally overlook the value to consumers of private enforcement that holds lawbreakers accountable, deters misconduct, and, as explained above, provides efficient recovery for class members on small dollar claims. Opponents of this proposed rule ignore these law enforcement benefits as well as the equitable principles built into awarding of attorneys' fees.

The role of private attorneys in the enforcement of public laws is a critical one. Indeed, as the Bureau has acknowledged, many federal consumer protection laws were enacted by Congress to permit private enforcement by conferring private rights of action on consumers.[23] Further, Congress has specifically expressed its intent in numerous federal statutes to facilitate private enforcement through class actions by expressly addressing class actions in statutory text and legislative history.[24] Entrepreneurial lawyering drives private enforcement, as attorneys establish expertise in complex matters that require specialized experience in originating, developing, and

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[20] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7. EMPIRICAL LEGAL STUD. 811, 811 (2010).
[21] *Id.*; *see also* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 27 (2004) (finding a scaling effect in the awarding of attorneys' fees in which fees constitute a lower percent of the client's recovery as the client's recovery increases.)
[22] Fitzpatrick, *supra* note 20.
[23] Arbitration Agreements, 81 Fed. Reg. 32,830, 32,832 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).
[24] *Id.* at 32,832-33.

litigating class cases.[25] Class actions work precisely because they create incentives for lawyers to bring private enforcement actions. In turn, increased enforcement creates monetary incentives for legal compliance by corporations.[26]

Additionally, as the Study found, private enforcement through class actions supplements public enforcement by federal and state regulators. In the Study's sample of class action settlements, the Bureau was unable to identify overlapping public enforcement proceedings in 66% of the filings evaluated.[27] In other words, class actions facilitated recoveries for violations that otherwise had gone unaddressed by public enforcement agencies two thirds of the time. The data also suggested that private enforcement may provide valuable guidance to public enforcement agencies by identifying violations that merit additional enforcement action: When the Bureau did find overlapping activity by government entities and private class action lawyers, class action lawyers filed before the government between 62% and 71% of the time.[28]

d. Case Studies: Recent Examples of Consumers Recovering From Class Actions.

Though much empirical analysis is based on class settlement data, the Bureau should not overlook the importance of class action trials in securing substantial relief for consumers. Two recent financial services-related cases highlight benefits to consumers gained through class action verdicts.

One of the most notable cases in recent years is *Gutierrez v. Wells Fargo Bank*. In August 2010, after a two week bench trial, a California federal judge rendered a $203 million verdict against Wells Fargo, finding that Wells Fargo violated California consumer protection law by manipulating its processing of customer debit card purchases by customers to maximize overdraft fees.[29] The case was brought on behalf of California Wells Fargo customers who, from 2004 to 2008, incurred overdraft fees on debit card transactions as a result of the bank's practice of sequencing transactions from highest to lowest. Instead of posting transactions in the order they occurred, Wells Fargo would deduct the largest charges from customers' accounts first, drawing down customers' balances more rapidly. The practice resulted in a larger number of overdrafts for customers and a higher volume of overdraft fees for Wells Fargo, as it allowed Wells Fargo to charge customers for

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[25] *See* Cooper, *supra* note 17, at 2.
[26] *Id.*
[27] CFPB Study §1.4.8 at 18.
[28] *Id.*
[29] *Gutierrez v. Wells Fargo Bank*, 730 F.Supp.2d 1080 (N.D. Cal 2010).

overdrawing their accounts by small amounts multiple times a day. The court found that by fraudulently and unfairly manipulating banking transactions to maximize the fees, Wells Fargo was profiting off of their most financially vulnerable customers. The class included 1 million individuals who were charged overdraft fees. On April 4, 2016, the U.S. Supreme Court declined Wells Fargo's request to review its 2010 loss at trial.

In another decision rendered in Maryland this year, the debt collection operator LVNV Funding (LVNV) was accused of illegally obtaining default judgments against individuals in Maryland despite not being licensed in the state.[30] In the first round of the case, the plaintiffs brought a putative class action against LVNV, a company that focuses its business on buying distressed or defaulted consumer debt, alleging that the company engaged in illegal debt collection because it was not licensed as a collection agency in Maryland, in violation of several state consumer protection laws. The two named plaintiffs were consumers who incurred credit card debt that was eventually assigned to LVNV, which filed collection suits against them. LVNV obtained default judgments for thousands of dollars against the plaintiffs and collected on the judgments by garnishing their paychecks. The plaintiffs' proposed class action was brought on behalf of Maryland residents who were subject to the illegal debt collection and sought to recover their judgment sums, as well as costs and interest collected. Before a class was certified, a Maryland court held that LVNV was not licensed to operate in the state and therefore the judgments obtained against the plaintiffs were legally void.[31] Despite the judgment, LVNV continued to conduct business in Maryland without a license, continued to obtain default judgments, and garnished wages from the customers.

Eventually, the trial court certified a class of LVNV's customers, and the case went to trial before a jury. According to the plaintiffs' attorneys, LVNV continued to file thousands of lawsuits against individuals who it claimed owed money and collected scores of illegal judgments until just a week before the trial.[32]

At trial, the plaintiffs presented evidence that LVNV had reaped millions of dollars in profits through its illegal collections from the class illegally, in blatant disregard of the earlier judgment of the Maryland court in favor of the individual plaintiffs. The jury awarded $38,630,344 to the class of 1,589 Maryland residents who were victims of LVNV's illegal actions.

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30 Telephone Interview with Phillip Robinson, Attorney, Consumer Law Center LLC (May 24, 2016)*; see also* http://www.marylandconsumer.com/finch-v-lvnv-verdict.
31 *Finch v. LVNV Funding, LLC*, 71 A.3d 193 (Md. Ct. Spec. App. 2013).
32 *Supra* note 30.

As these cases demonstrate, private enforcement through class actions result in significant benefits to consumers victimized by corporate fraud. Without class actions, providers can reduce the likelihood of liability for causing relatively small harms to a point approaching zero.[33] The proposed rule's prohibition on clauses that bar class actions will thus restore a crucial device for consumers to recover against companies for widespread harm caused to them by corporate misconduct.

II. The CFPB Should Ban Forced Arbitration in the Consumer Financial Services Industry Outright

As explained in the preceding section, class actions are a tremendously important mechanism that must be available to consumers to recover against providers who engage in widespread misconduct, and the proposed rule prohibiting pre-dispute arbitration agreements that prohibit consumers from participating in class actions would provide significant protection. Yet we believe the Bureau must go further. Public Citizen strongly supports a bright-line rule that prohibits providers of consumer financial services from forcing consumers to make a pre-dispute decision to arbitrate any claims they may have against providers. The final rule should therefore also prohibit pre-dispute agreements requiring arbitration of individual claims.

In order to fulfill its mission, the CFPB should ensure that providers of financial products and services adhere to a simple concept of fair play. Forced arbitration clauses are the opposite of fair—they require consumers to waive their basic constitutional right to resolve claims through the civil justice system,[34] and they result in severe impairment of consumers' ability to vindicate both statutory and common-law claims. Public Citizen believes the Study demonstrates that forced arbitration clauses are unfair and operate to cheat consumers out of full recovery when claimants are compelled to arbitrate individual claims, because consumers are not afforded full rights of the judicial system and arbitration procedures and outcomes are tilted to advantage the corporation over the consumer. Banning forced arbitration of individual claims is consistent with the Bureau's mandate to restrict the use of such clauses if it is in the public interest and for the protection of consumers.[35]

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[33] *See* Brian Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 163 (2015).
[34] U.S. CONST. amend. VII.
[35] 12 U.S.C. §5518(b) (2010).

a. Forced arbitration clauses suppress the assertion of individual claims.

It is well-accepted among consumer advocates that arbitration clauses suppress the assertion of individual claims because of the difficulty in securing counsel for arbitration proceedings. Few consumers feel empowered to bring a case in arbitration without the assistance of an attorney. Paul Bland, a leading national consumer attorney and arbitration expert, put it plainly in testimony before Congress: "[M]ost private consumer lawyers are very reluctant, or completely unwilling, to represent clients in a system that they believe is rigged against consumers. Unlike the banking industry lawyers, consumer lawyers generally only get paid if they win cases. Many of them have a reasonable, earned distrust of forced arbitration[.]"[36] Surveys of consumer advocates support this assessment. A 2014 survey of consumer attorneys conducted jointly by the National Association of Consumer Advocates (NACA) and National Consumer Law Center (NCLC) showed that more than 70% of respondents said they had decided against representation in auto-finance cases, even though consumers had viable claims, because of the existence of arbitration clauses.[37] Additionally, in a 2012 survey by NACA and NCLC, 84% of consumer attorneys who responded indicated they had rejected a client with a meritorious consumer claim because of an arbitration clause, and a number of respondents indicated they had turned down multiple cases for this reason.[38] This problem would not be addressed by eliminating class-action bans, because the problem affects lawyers' willingness to take on individual cases as well class actions.

b. Consumers are generally without knowledge that they are giving up their legal rights.

The chasm between what consumers understand as their rights and what their rights actually are exhibits the deeply deceptive nature of forced arbitration clauses. Providers count on the fact that consumers are unlikely either to read or to understand arbitration clauses contained in standard form contracts, which are typically buried in the fine print intended to be easily slipped past consumers. The Bureau found in its comprehensive study that consumers who are bound by such

36 *Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?*, Hearing Before the H. Subcomm. on Fin. Inst. and Consumer Credit, 114th Cong. (2016) (testimony of F. Paul Bland, Jr., Executive Director of Public Justice).

37 *See* Letter from NACA and NCLC, to Will Wade-Gery, Acting Assistant Director, Card and Payments Markets, CFPB, Aug. 21, 4014, *available at* https://www.nclc.org/images/pdf/arbitration/letter-cfpb-auto-survey-results-2014.pdf.

38 *See* NACA and NCLC Response to CFPB Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, June 23, 2012, *available at* http://www.consumeradvocates.org/sites/default/files/NACA.Comments.CFPB_.2012-0017.pdf.

clauses generally do not know whether they can sue in court or wrongly believe that they can do so.[39] The vast majority of consumers surveyed by the Bureau were unaware whether their contracts contained forced arbitration clauses: Data revealed that nearly 80% of consumers surveyed did not know whether they were subject to forced arbitration in their consumer financial contracts.[40] Fewer than 7% of consumers who were bound by a forced arbitration clause understood that meant they were barred them from suing their provider in court.[41] In another survey cited by the Bureau, academic researchers at St. John's School of Law surveyed consumers and found that even when consumers reviewed an arbitration clause, only 13% of survey respondents understood that the contract prohibited them from participating in a class action.[42] The Study concluded, "Consumer beliefs about credit card dispute resolution rights bear little to no relation to the dispute resolution provisions of their credit card contracts. Most consumers whose agreements contain arbitration clauses wrongly believe that they can participate in class actions."[43]

In addition to the Bureau's survey on this issue, numerous other studies provide additional support for the conclusion that consumers lack knowledge about the impact of forced arbitration clauses on their legal rights. For example, Public Citizen, in conjunction with the Employee Rights Advocacy Institute for Law and Policy, commissioned a survey which found that roughly two-thirds of respondents said they did not remember reading a forced arbitration clause in the terms of agreement for any goods or services despite the ubiquity of such clauses.[44] Another study by the Center for Responsible Lending found that 68 percent of consumers with auto loans did not know if their contract had a forced arbitration clause, even after the clause was explained to them.[45] In yet another study, researchers asked respondents to read a sample credit card contract with a forced arbitration clause and found more than half either did not realize the contract required arbitration or did not know whether it did.[46] And among those respondents that understood the contract included an arbitration provision, 61 percent believed that consumers would have a right to have a court

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[39] CFPB Study §1.4.2 at 11.
[40] CFPB Study §3.4.3 at 22.
[41] CFPB Study §3.1 at 4.
[42] CFPB Study §3.2 at 8.
[43] CFPB Study §1.4.2 at 11.
[44] Public Citizen & Employee Rights Advocacy Institute for Law and Policy, National Study of Public Attitudes on Forced Arbitration: Findings from a Survey of 800 Likely 2010 Voters Nationwide 15 (2009), *available at* http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf.
[45] Joshua Frank, Stacked Deck: A Statistical Analysis of Forced Arbitration 10 (2009), *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.
[46] Jeff Sovern *et al.*, *"Whimsey Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. LAW REV. 1, 45 (2015).

decide their dispute with the company.[47] Fewer than one in five respondents realized that the contract required them to give up their right to a jury trial, even though the arbitration clause made this waiver express.[48] These statistics demonstrate that forced arbitration deprives consumers of important procedural rights, and that consumers do not even understand what rights they are giving up. Industry's deliberate reliance upon and exploitation of this pervasive lack of understanding by consumers is inherently unfair and deceptive.

In this context, the Bureau should additionally consider that consumers unequivocally want the right to resolve bank disputes in court. In a report released last week by the Pew Charitable Trusts, researchers found that a massive 95 percent of consumers would want access to the courts if they had a dispute with their bank.[49] Pew found that a high level of interest in access to legal options was consistent across demographic groups such as gender, age, race, income, and education, as well as across political spectrums.[50] Clearly, consumers overwhelmingly want to be able to access financial services without giving up their right to go to court, yet providers routinely obtain waivers of that right from them. This is a severe failure of the marketplace and calls for intervention by the Bureau to ensure that financial services are offered fairly and non-deceptively.

c. Arbitrator bias infects the process.

Despite industry assertions to the contrary, arbitration is not a forum for fair resolution of disputes. Repeat player bias is a well-documented phenomenon that arises because arbitrators have a direct financial incentive to favor the party that will bring them future business— the corporate provider of financial services and products. According to the CFPB's Study, corporations dominated arbitration filings in 2010 and 2011 as repeat players.[51] Statistical analysis supports the widely-held view among consumer advocates that arbitrators who favor corporations over consumers will receive more cases in the future.[52] Bias is also revealed when arbitration providers directly market themselves as "business friendly" and in documented instances where arbitrators who ruled against companies in previous cases are removed from later cases administered by the same arbitration service.[53]

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[47] *Id.* at 47
[48] *Id.*
[49] *Supra* note 9.
[50] *Id.*
[51] CFPB Study §5.6.12 at 59.
[52] Miles B. Farmer, *Note, Mandatory & Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2358 (2012).
[53] *Id.*

A recent study on this topic published in the Georgetown Law Journal analyzed nearly 5,000 complaints filed by consumers with the American Arbitration Association between 2009 and 2013 to document a repeat player effect leading to more favorable outcomes for corporate defendants.[54] The researchers found not only that forced arbitration shields big business from class liability, but also that the repeat player bias phenomenon has acquired a new urgency due to the higher volume of individual arbitration claims.[55] Corporations that the study terms "extreme repeat players" now appear in arbitration at such a high rate that they dominate individual cases with disproportionate win rates and damage payments.[56]

d. Arbitration rules limit procedural opportunities for claimants.

Proponents of forced arbitration like to portray arbitration as a cheap and efficient alternative to protracted litigation in the public court system.[57] However, the efficiencies touted by these parties are really the result of the loss of key procedural protections that directly affect substantive outcomes for consumers.

In arbitration, consumers lose their Seventh Amendment right to a civil jury trial.[58] Arbitration rules limit the right to discovery, so claimants are limited in what evidence they can bring to prove their case. The regular rules of appellate review do not apply: Judicial review of an arbitrator's decision is extremely narrow, limited to grounds set forth in the FAA, which covers only the most "extreme arbitral conduct,"[59] such as corruption or fraud.[60] Even clear errors of law or fact committed by an arbitrator are not enough to overturn arbitrator decisions,[61] so consumers are most likely stuck with whatever the arbitrator decides, even if the arbitrator gets everything wrong.

Arbitration is a closed process; consumers are generally unaware of any pending or resolved claims against a company and regulators are left in the dark regarding alleged or proven illegal behavior.[62] Arbitrators are obligated by ethics rules not to disclose information about the

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54 David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015).
55 *Id.* at 63.
56 *Id.*
57 *See* David Hirschmann and Lisa Rickard, *Why We Need to Save Arbitration*, POLITICO, May 5, 2016.
58 Jean Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001).
59 *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 522 U.S. 576, 586 (2008).
60 Federal Arbitration Act, 9 U.S.C. §10.
61 *See, e.g.*, *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064, 2068 (2013).
62 *See, e.g.*, American Arbitration Association Consumer Rule 30.

proceedings publicly,[63] and filings, hearings, and awards are not open to the public.[64] This lack of transparency stands in stark contrast to the public's right to access court proceedings—including the right to access hearings and filings—which are presumptively open to the public under the common law and First Amendment.[65]

e. Arbitration outcomes support the conclusion that consumers are less likely to recover in arbitration.

Out of 341 arbitrations evaluated by the Bureau in 2010 and 2011 where consumers had affirmative claims against a provider, consumers obtained some form of relief in a mere 32 disputes.[66] Comparatively, of the 244 claims evaluated in the Bureau's sample that were brought by providers against consumers, providers won an astounding 93 percent, or 227 of their claims.[67] Similarly, the National Arbitration Forum (NAF) disclosed in 2009 that corporations were winning in arbitrations NAF administered 94 percent of the time, after it was revealed that NAF was taking kickbacks from the very companies whose claims it presided over in arbitration.[68] NAF is discussed more fully below.

Consumers also fare poorly in arbitration when it comes to actual recovery, while corporations recover generously. According to the Study, consumers who had an affirmative claim against a company prevailed 20 percent of the time and recovered an average of 12 cents for every dollar claimed in arbitration.[69] By contrast, in arbitrations where companies filed claims against consumers, the companies not only prevailed to some degree 93 percent of the time, they were awarded an average of 91 cents on the dollar. The disparity is clear and quite troubling.

f. Case Study: National Arbitration Forum

The features of forced arbitration described above work to block full vindication of consumer rights and render arbitration unsuitable for fair dispute resolution. The procedural deficits described here are not merely anecdotal. They operate to deprive consumers of fair outcomes. No example is more illustrative than the anti-consumer system of arbitration operated by NAF, which in

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[63] CFPB Study section §2.5.8 at 52.
[64] *Id.* at 51.
[65] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980)(plurality opinion); *Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589, 597-98 (1978).
[66] CFPB Study section §1.4.3 at 12.
[67] CFPB Study section §5.6.7 at 43.
[68] Robin Sidel & Amol Sharma, *Credit-Card Disputes Tossed Into Disarray*, WALL STREET J. (July 21, 2009), http://www.wsj.com/articles/SB124822374503070587.
[69] CFPB Study section §5.2.2 at 13.

the not-so-distant past was the largest provider of arbitration services in the United States until it was excluded from most consumer arbitration after its activities came under intense, albeit belated, official scrutiny. In 2007, Public Citizen analyzed the results of 34,000 arbitration cases administered by NAF and found that consumers lost at the enormous rate of 94%.[70] Notably, this figure mirrors the findings by the Bureau's Study of arbitrations conducted by organizations generally regarded as more reputable. In an astonishing system of backdoor dealing, NAF operated to immunize lenders from consumer protection laws for the better part of a decade and was allowed to do so by the courts and law enforcement because of their inability or reluctance to police NAF's practices.[71] NAF operated in this manner until 2009, when the Attorney General of Minnesota sued it and its corporate affiliates for fraud, deceptive trade practices, and false advertising based on NAF's undisclosed financial relationship with one of the largest debt collection law firms in the country.[72] The suit resulted in a consent decree that barred NAF from most forms of consumer arbitration. Before that time, however, courts had regularly enforced arbitration clauses designating NAF as the arbitral forum. Behind closed doors, NAF had aggressively marketed itself to credit card companies and debt collectors as an effective tool for collecting debts and would overtly suggest to lenders that it would provide them with favorable outcomes, while publicly presenting itself as a fair and neutral dispute resolution company.[73]

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[70] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

[71] *See* Bland *supra* note 36, at 15-16.

[72] See Compl., *State of Minnesota v. National Arbitration Forum, Inc.*, No. 27–cv–0918550 (4th Jud. Dist. Minn. July 14, 2009).

[73] *See* Bland, *supra* note 36, at 17 (citing *Caroline E. Mayer, Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1 ("[A]rbitration industry experts say [that] the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing.") and Sean Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, MOBILE REG., Oct. 1, 2000, at A1 ("In marketing letters to potential business clients, [NAF's] executives have touted arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined.")).

III. Conclusion

For the foregoing reasons, we urge the Bureau to move forward with the proposed rule and prohibit providers of consumer financial services and products from using forced arbitration clauses to block consumers from participating in class actions in public courts and in arbitration. We further urge the Bureau to adopt a bright-line rule banning forced arbitration by consumer financial service providers outright, an action that is consistent with the CFPB's mission and is entirely supported by the Bureau's Study. Thank you for the opportunity to submit these comments.

Sincerely,

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