



August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 20552

Re: Docket No. CFPB-2016-0020, Proposed Rule on Arbitration Agreements

Americans for Financial Reform (“AFR”) appreciates this opportunity to comment on the above-referenced proposed rule (the “Rule”) by the Consumer Financial Protection Bureau (the “CFPB” or “Bureau”) to restrict the use of forced arbitration clauses in consumer finance contracts. AFR is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.¹

Forced arbitration is a system designed to leave consumers with no practical ability to enforce their most basic rights and protections. Particularly by barring consumers from joining class actions, banks and lenders grant themselves an effective license to steal from consumers on a large scale, simultaneously keeping illegal behavior out of the public eye by confining disputes to a private forum. While we urge the Bureau to go further by prohibiting forced arbitration in individual cases in the final rule, we applaud the CFPB for moving to limit forced arbitration by restoring consumers’ right to join together in a class action and adding much-needed transparency to individual proceedings by establishing a public record of claims and outcomes.

I. Class actions provide substantial benefits to consumers; banning class actions effectively eradicates relief

The Bureau’s Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a) (the “Study”),² documents that class actions compensate victims of illegal corporate behavior, while forced arbitration effectively eradicates claims. The Study found an annual average of just 411 consumers initiated cases in forced arbitration³ – with only

¹ A complete list of Americans for Financial Reform’s coalition members is available at <http://ourfinancialsecurity.org/about/our-coalition/>.

² Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. Hereinafter, referred to as “CFPB Study.”

³ Id. at 11.

16 consumers receiving any cash relief.⁴ Between 2010 and 2011, consumers recovered just \$86,224 per year in forced arbitrations.⁵ These figures encompass every consumer finance case heard by the American Arbitration Association, the private firm that “administers the vast majority of consumer financial arbitration cases.”⁶

In contrast, the Study found that class action lawsuits, where still permitted, produce \$336 million in consumer relief annually.⁷ Between 2008 and 2012, 34 million consumers recovered \$2.2 billion in class actions against banks and lenders.⁸ It is unsurprising that industry representatives prefer a system that costs them \$86,224 per year to one that returns \$2.2 billion to harmed consumers, but it is similarly evident that class action bans are not in the public interest or for the protection of consumers. This data makes clear that the choice is not between class actions and forced arbitrations, but between class actions and virtually no consumer relief.

II. Restoring class action rights will protect consumers and deter illegal behavior

Critics of this proposal suggest that restoring these crucial consumer rights will only benefit the attorneys who represent consumers in class actions. This claim is demonstrably false, as shown by the Study’s findings. While attorneys’ fees can be large in absolute terms, they typically add up to less than a fifth of the awards generated by these cases.⁹ Notably, the \$366 million per year recovered by class action suits documented in the Study consists entirely of relief for consumers, excluding attorneys’ fees and court costs.

Industry representatives further claim that the very small number of consumers who receive cash relief in arbitration receive larger sums on average than consumers who recover in class actions. Yet this gap merely demonstrates the difference between individual claims and class claims rather than the difference between arbitration and class action litigation. As the U.S. Chamber of Commerce acknowledges,¹⁰ few consumers are willing to pay a \$400 filing fee to pursue a \$25 claim in arbitration. And even if that fee is waived, it is not worth the time off work to pursue a small claim.

Indeed, the Study found that only 25 consumers per year nationwide pursued arbitration when their claims were less than \$1,000 – and just four of those consumers received any cash relief. Thus, the handful of consumers sufficiently motivated to pursue an individual claim in arbitration likely draw much of that motivation from a higher-dollar claim than consumers who join class action suits. Class actions are not only a more efficient means of challenging systemic wrongdoing, they are frequently the sole recourse for consumers with small-dollar disputes.

⁴ Id. at 12.

⁵ Id.

⁶ Id. at 7.

⁷ See chart in CFPB Study at 33.

⁸ Id.

⁹ CFPB Study at 17. (“Across all settlements that reported both fees and gross cash and in-kind relief, fee rates were 21% of cash relief and 16% of cash and in-kind relief.”)

¹⁰ David Hirschmann, *Letter to the Consumer Financial Protection Bureau*, U.S. Chamber of Commerce - Center for Capital Markets Competitiveness (May 2, 2016), available at <https://cfpbmonitor.ballardspahrblogs.com/wp-content/uploads/sites/5/2016/05/05-02-2016-Letter-from-D-Hirschmann-to-Dir-Cordray-re-arbitration-fie-.pdf>.

While an individual consumer may only lose less than \$100 to an improper fee, unlawful practices implemented on a broad scale quickly amount to millions in unearned profit for banks and lenders who violate the law. Though industry representatives might prefer to shift the focus to attorneys' fees, it is essential to note that – without class actions to return money to large numbers of consumers – banks and lenders that violate the law retain a full 100% of these ill-gotten funds. Thus, consumers' ability to challenge such practices in private class actions can help deter fraudulent behavior that might otherwise prove very profitable. Because government enforcement agencies lack the resources to police every instance of financial fraud, consumer class actions serve as a necessary check to ensure a fair and competitive financial market.

The threat of private enforcement is vital to making consumer laws and rules meaningful; consumer protections are too often empty promises if individual consumers cannot enforce their rights independent of a government actor. Indeed, many consumer protections were designed by Congress to be enforced substantially by private plaintiffs, including the Fair Housing Act¹¹ and the Equal Credit Opportunity Act.¹² Banks and lenders must not be permitted to opt out of federal law and regulations with cleverly-drafted fine print.

III. The Rule will not increase consumer costs or reduce access to credit

Critics of the Rule additionally suggest that restoring class action rights will increase the costs of financial products and services and decrease the availability of credit. The Study specifically examined these claims by comparing changes in consumer prices after a subset of issuers eliminated their arbitration clauses. It found no statistically significant evidence of an increase in prices or a reduction in credit relative to companies who did not change their arbitration clauses.¹³

Because class actions serve as a crucial check on systemic fraud and malfeasance, they help ensure a level playing field for banks and lenders that operate within the law. Free market principles indicate that, if anything, deterring this sort of anticompetitive behavior through class actions may ultimately decrease cost and increase access to credit for consumers.

IV. The vast majority of consumers want the right to sue financial institutions if they break the law and to join class actions

While it is evident that restoring class action rights and increasing transparency in arbitration will make our financial markets safer, it is also clear that consumers oppose class action bans and forced arbitration by wide margins. A recent national poll conducted by Lake Research Partners and Chesapeake Beach Consulting found that, by a margin of 3 to 1, voters strongly support

¹¹ See 42 U.S.C. § 3601 *et seq.*; *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

¹² “Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult to detect and ferret out, the Committee believes that strong enforcement of this Act is essential to accomplish its purposes. ... The chief enforcement tool, however, will continue to be private actions for actual and punitive damages.” S. REP. 94-589, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 415.

¹³ CFPB Study at 18.

restoring consumers' right to bring class action lawsuits against banks and lenders.¹⁴ The poll found no partisan divide; after hearing an argument for and against, voters of all political parties expressed majority support for federal action to restore these rights.¹⁵

Another survey, released just last week by the Pew Charitable Trusts, suggests an even greater margin of consumers support the right to sue banks and lender, in both individual and class suits. Pew found that 95% of participants supported the right of consumers to have a dispute with their bank or lender heard by a judge or jury and 89% agreed that consumers should be able to participate in group lawsuits to challenge illegal fees.¹⁶

Though broad public support cannot be the sole basis for federal regulatory action, these findings provide one more layer of argument that the Rule is indeed in the public interest and for the protection of consumers.

V. The Rule should be improved to further protect consumers

The scope and application of the final rule must be as clear and comprehensive as possible. Most importantly, the Rule should be expanded to apply to contracts and existing arbitration clauses that are modified, amended, or renewed after this new regulation takes effect. The final rule should also 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.

Lastly, the Rule's reporting requirements should be triggered any time a company relies on an arbitration clause, including filing a motion to dismiss or stay, rather than being limited to claims filed in arbitration. We encourage the CFPB to expand the proposed reporting requirements by additionally requiring all supervised financial providers to submit their arbitration agreements, regardless of whether the company is presently involved in a dispute.

VI. Conclusion

We commend the CFPB for its proposed rule to limit the use of forced arbitration in consumer finance contracts by prohibiting class action bans and adding much-needed transparency to individual proceedings through reporting requirements. Restoring consumers' ability to band together in court will return illegal fees and charges to consumers' pockets, help curb predatory practices in consumer financial services, and make our financial markets fairer and safer.

For questions, please contact Amanda Werner, Arbitration Campaign Manager with Americans for Financial Reform and Public Citizen, (202) 973-8004, awerner@ourfinancialsecurity.org

¹⁴ Americans for Financial Reform, "New AFR/CRL poll: By a 3 to 1 margin, voters of all parties support restoring right to consumer class actions," (July 6, 2016), *available at* <http://ourfinancialsecurity.org/2016/07/new-afrcrl-poll-3-1-margin-voters-parties-support-restoring-right-consumer-class-actions/>

¹⁵ *Id.*

¹⁶ The Pew Charitable Trusts, "Consumers Want the Right to Resolve Bank Disputes in Court: An update to the arbitration findings in 2015 Checks and Balances," (Aug. 17, 2016), *available at* <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/08/consumers-want-the-right-to-resolve-bank-disputes-in-court>.

Sincerely,

Americans for Financial Reform