

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 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 these claims is often too small for a single consumer to afford to bring alone. Without the option

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.

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 individual consumer may only lose \$25 or \$50 to a fraudulent charge or illegal fee, for example,

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).

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 venues; (2) require consumers to withstand excessive costs; (3) limit discovery and the exchange

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).

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

9to5, National Association of Working Women
Action In Maturity, Inc.
Affordable Housing Alliance
AFL-CIO
Alliance for Justice
American Association for Justice
American Association of University Women (AAUW)
American Council of the Blind

American Family Voices
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers
Americans for Democratic Action
Americans for Financial Reform
Association of University Centers on Disabilities
Bankruptcy Law Center
The Bazelon Center for Mental Health Law
Center for Economic Integrity
Center for Economic Justice
Center for Global Policy Solutions
Center for Justice & Democracy
Center for Popular Democracy
Center for Progressive Reform
Center for Responsible Lending
Centro Legal de la Raza
CFED
Committee to Support the Antitrust Laws
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
Consumers Union
Consumer Voice
Daily Kos
Demos
Disability Rights Education & Defense Fund
Economic Analysis and Research Network (EARN)
Economic Policy Institute
The Employee Rights Advocacy Institute For Law & Policy
Equal Justice Society
Equal Justice Works
Fair Share
The Financial Clinic
Food & Water Watch
Fund Democracy
Government Accountability Project
Heartland Alliance for Human Needs & Human Rights
Hindu American Foundation
Homeowners Against Deficient Dwellings
Institute for Agriculture and Trade Policy
The Institute for College Access & Success
Institute for Science and Human Values
Interfaith Center on Corporate Responsibility
International Association for College Admission Counseling
Jobs With Justice
Justice in Aging

League of United Latin American Citizens
Main Street Alliance
Mission Asset Fund
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National Association for College Admission Counseling
National Association of Consumer Advocates
National Association of Social Workers (NASW)
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition For Asian Pacific American Community Development
National Community Reinvestment Coalition (NCRC)
National Council of Jewish Women
National Council of La Raza
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Employment Lawyers Association
National Employment Law Project
National Fair Housing Alliance
National Health Law Program
National Latino Farmers & Ranchers Trade Association
National Legal Aid and Defender Association
National LGBTQ Task Force
National Partnership for Women & Families
National Organization for Women
National Urban League
National Women's Law Center
New Rules for Global Finance
Occupational Safety & Health Law Project
Other98
People's Action
Privacy Rights Clearinghouse
Progressive Congress Action Fund
Protect All Children's Environment
Public Citizen
Public Law Center
Public Knowledge
The Rootstrickers Project at Demand Progress
Service Employees International Union (SEIU)
Small Business Majority
Southern Poverty Law Center
TURN–The Utility Reform Network
United Auto Workers (UAW)
United Church of Christ Justice and Witness Ministries
United Policyholders
U.S. PIRG

Veterans Education Success
Woodstock Institute
Workplace Fairness
Worksafe
World Hunger Education, Advocacy & Training (WHEAT)
Young Invincibles

State and Local Signatories

Woodmere Neighborhood Association – AL
Arkansans Against Abusive Payday Lending – AR
Arizona Community Action Association – AZ
Arizona PIRG – AZ
Gila County Community Services – AZ
Mesa Community Action Network – AZ
Save the Family Foundation of Arizona – AZ
California Reinvestment Coalition – CA
CALPIRG – CA
Center for Public Interest Law, University of San Diego School of Law – CA
Consumer Attorneys of California – CA
Consumer Federation of California – CA
Law Foundation of Silicon Valley – CA
The Greenlining Institute – CA
9to5 Colorado – CO
Build Our Homes Right – CO
Colorado AFL-CIO – CO
Colorado Alliance of Retired Americans – CO
Colorado Council of Churches – CO
Colorado Fiscal Institute – CO
Colorado Latino Forum, Denver Chapter – CO
Colorado Latino Leadership, Advocacy and Research Organization (CLLARO) – CO
Colorado Public Interest Research Group (PIRG) – CO
Colorado Trial Lawyers Association – CO
NAACP State Conference – CO, MT, WY
National Council of Jewish Women, Colorado Section – CO
The Interfaith Alliance of Colorado – CO
Capital For Change, Inc. – CT
CT. Citizen Action Group – CT
Connecticut Legal Services, Inc. – CT
ConnPIRG – CT
Legal Aid Society of the District of Columbia – DC
Delaware Alliance for Community Advancement – DE
Delaware Community Reinvestment Action Council, Inc. – DE
Catalyst Miami – FL
Fair Housing Center of the Greater Palm Beaches – FL
Florida Alliance for Consumer Protection – FL

Florida PIRG – FL
Jacksonville Area Legal Aid, Inc. – FL
Progress Florida – FL
Georgia PIRG – GA
Georgia Rural Urban Summit – GA
Georgia Watch – GA
Iowa Citizens for Community Improvement – IA
Iowa PIRG – IA
Chicago Jobs Council – IL
Citizen Action – IL
Illinois Asset Building Group – IL
Illinois PIRG – IL
Metropolitan Tenants Organization – IL
Partners In Community Building, Inc. – IL
Project IRENE – IL
Habitat for Humanity of Northeast Indiana – IN
HomesteadCS – IN
Interfaith Housing Services, Inc. – KS
Labette Assistance Center – KS
Homeless & Housing Coalition of Kentucky – KY
Kentucky Council of Churches – KY
Kentucky Equal Justice Center – KY
The Middleburg Institute/LABEST – LA
PREACH – LA
Cambridge Economic Opportunity Committee, Inc. – MA
Consumer World – MA
Massachusetts Consumers Council, Inc. – MA
MASSPIRG – MA
The Midas Collaborative – MA
Baltimore CASH Campaign – MD
Baltimore Neighborhoods, Inc. – MD
Belair-Edison Neighborhoods, Inc. – MD
Housing Options & Planning Enterprises, Inc. – MD
Howard County Office of Consumer Protection – MD
Maryland CASH Campaign – MD
Maryland Consumer Rights Coalition – MD
Maryland PIRG – MD
Maryland United for Peace and Justice – MD
Public Justice Center – MD
Michigan Association for College Admission Counseling – MI
Michigan Disability Rights Coalition – MI
PIRG in Michigan (PIRGIM) – MI
Progress Michigan – MI
Mid-Minnesota Legal Aid – MN
Minnesota Association for College Admission Counseling – MN
Missouri Association for College Admission Counseling – MO

Missouri PIRG – MO
MORE - Missourians Organizing for Reform and Empowerment – MO
Mississippi Center for Justice – MS
Montana Organizing Project – MT
Rural Dynamics, Inc. – MT
Financial Pathways of the Piedmont – NC
North Carolina Consumers Council – NC
North Carolina Justice Center – NC
NCPIRG – NC
OnTrack WNC Financial Education & Counseling – NC
Reinvestment Partners – NC
The Collaborative NC – NC
Winston Salem Forsyth County Asset Building Coalition – NC
North Dakota Economic Security and Prosperity Alliance – ND
Sacred Pipe Resource Center – ND
Granite State Organizing Project – NH
NHPIRG – NH
Consumers League of New Jersey – NJ
Legal Services of New Jersey – NJ
New Jersey Association for College Admission Counseling – NJ
New Jersey Citizen Action – NJ
NJ PIRG – NJ
Sisters of St. Dominic of Caldwell – NJ
Center for Economic Integrity - New Mexico Office – NM
NMPIRG – NM
Opportunity Alliance Nevada – NV
Bankruptcy Law Center – NY
Central New York Citizens in Action, Inc. – NY
Community Service Society of New York – NY
Empire Justice Center – NY
Empire State Consumer Project – NY
Housing and Family Services of Greater New York, Inc. – NY
Hudson River Housing – NY
JASA Legal Services for the Elderly in Queens – NY
Keuka Housing Council, Inc. – NY
Long Island Housing Services, Inc. – NY
MFY Legal Services, Inc. – NY
NELA/NY (New York Affiliate of National Employment Lawyers Association) – NY
New Economy Project – NY
New York Legal Assistance Group – NY
New York Public Interest Research Group (NYPIRG) – NY
New York State Association for College Admission Counseling – NY
Public Utility Law Project of New York – NY
Western New York Law Center – NY
Cleveland Tenants Organization – OH
COHHIO – OH

Habitat for Humanity of Findlay/Hancock County – OH
Miami Valley Fair Housing Center, Inc. – OH
Neighborhood Housing Services of Greater Cleveland – OH
Ohio PIRG – OH
Ohio Poverty Law Center – OH
Innovative Changes – OR
Oregon Consumer League – OR
Oregon PIRG (OSPIRG) – OR
Integra Home Counseling, Inc. – PA
Keystone Progress – PA
PathWays PA – PA
Pennsylvania Association for College Admission Counseling – PA
Pennsylvania National Organization for Women – PA
PennPIRG – PA
RIPIRG – RI
Columbia Consumer Education Council – SC
SC Association for Community Economic Development – SC
South Carolina Appleseed Legal Justice Center – SC
New Level Community Development Corporation – TN
Tennessee Citizen Action – TN
Chinese Community Center, Houston – TX
Equal Justice Center – TX
Family Houston – TX
Literacy Advance of Houston – TX
Take Back Your Rights PAC – TX
Texas Appleseed – TX
Texas Consumer Association – TX
Texas Watch – TX
TexPIRG – TX
United Way of Greater Houston – TX
Virginia Citizens Consumer Council – VA
Virginia Poverty Law Center – VA
Virginia Organizing – VA
Vermont PIRG (VPIRG) – VT
Columbia Legal Services – WA
SafeWork Washington – WA
WashPIRG – WA
Legal Aid Society of Milwaukee – WI
WISPIRG – WI
Mountain State Justice – WV
WV Center on Budget and Policy – WV
West Virginia Citizen Action Group – WV
Potomac and Chesapeake Association for College Admission Counseling
Southern Association for College Admission Counseling
Tri-State Coalition for Responsible Investment
Western Association for College Admission Counseling