

August 3, 2016

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Docket No.: CFPB-2016-0020

Dear Director Cordray:

We write in strong support of the Consumer Financial Protection Bureau's proposed rule to prohibit the use of class-action waivers in forced arbitration agreements for financial services and products, and to increase transparency in the arbitration process.¹ Consistent with the Bureau's exhaustive study on forced arbitration, which found that forced arbitration restricts consumers' access to relief in disputes with financial service providers by limiting class actions,² the proposed rule is a critical step to protect the public interest by ensuring that consumers receive redress for systemic unlawful conduct.³

There is overwhelming evidence that class-action waivers in financial products and services agreements undermine the public interest. Originally used primarily in commercial settings,⁴ forced arbitration clauses have proliferated in everyday consumer contracts,⁵ and are now prevalent in financial services agreements.⁶ By restricting class

¹ Arbitration Agreements, 81 Fed. Reg. 32,380 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040), http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rule_making.pdf.

² CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 1 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

³ Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 1–2 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>; Editorial, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES, Nov. 7, 2015, at SR10, <http://nyti.ms/1Pv5KMg>; Jessica Silver-Greenberg & Michael Corkery, *Bank Customers Likely to Regain Access to Courts*, N.Y. TIMES, May 5, 2016, at A1, <http://nyti.ms/23qQgfY>.

⁴ See, e.g., Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 850, 858 (1961) (discussing arbitration in commercial settings); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 359 (Breyer, J., dissenting) quoting 65 Cong. Rec. 1931 (1924) (“It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts”).

⁵ See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015 at A1, <http://nyti.ms/1MyX60L>.

actions and class-wide arbitration in consumer contracts, these clauses enable corporations to avoid public scrutiny by precluding access to the courts.⁷ This is particularly problematic for small, diffuse misconduct that harms innumerable consumers.⁸ As the Bureau's research has shown, consumers rarely use arbitration to recover small claims, such as those associated with overdraft fees, because these cases are either too costly for consumers to pursue on an individual basis,⁹ or the individual consumer is unaware of a corporation's misconduct.¹⁰

The proposed rule is in the public interest and will protect consumers. As you know, Congress expressly granted authority to the Bureau to research the impact of forced arbitration clauses in financial products and services, and based on this evidence, to promulgate a rule to prohibit or impose conditions on the use of forced arbitration if the Bureau finds that it would be "in the public interest and for the protection of consumers."¹¹ There is little doubt that the Bureau's proposed rule will serve these twin goals. As more than 200 of the nation's leading law professors and scholars have observed, "class actions can serve as a powerful tool to help consumers of financial services and products vindicate their rights under federal and state law."¹² The Bureau's study confirms this conclusion, finding that in addition to providing consumers with financial remedies for unlawful, predatory, or fraudulent conduct, class action settlements also included behavioral relief for consumers through corporate commitments to alter fraudulent practices that gave rise to the claim.¹³ On an individual basis, these forms of relief would have been largely unavailable or greatly diminished.¹⁴ The Attorneys General from 16 states likewise note that the "need for regulations to protect the public interest has never been so great," observing that forced arbitration has predictably resulted in consumer harm and "a systemic failure to hold accountable those

⁶ Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 2 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>.

⁷ *Id.*

⁸ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 39 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁹ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 39 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

¹⁰ Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 5 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>.

¹¹ 12 U.S.C. § 5518(b) (2016).

¹² Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 3 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>.

¹³ CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY REP. TO CONG., PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) Section 8.1 (2015).

¹⁴ *Id.* at Section 5.2.1.

companies who abuse the trust placed in them by consumers.”¹⁵ In discrimination cases, individual consumers may not even be aware that they were harmed by a corporation’s unlawful conduct.¹⁶ As the Center for Justice and Democracy has found, class actions are uniquely capable of holding corporations accountable for civil rights violations for these claims.¹⁷

We strongly believe that your comprehensive study on forced arbitration unequivocally demonstrates that the proposed rule is necessary to the public interest and consumer welfare.¹⁸ Congress has already acted to ban forced arbitration clauses in residential mortgages and in financial products offered to service members and veterans.¹⁹ We have entrusted the Bureau with authority to extend these protections to the rest of the financial services marketplace. Accordingly, we encourage you to proceed quickly to ensure that consumers have equal protection under the law.

Sincerely,



Honorable Maxine Waters
Ranking Member
Committee on Financial Services



Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary



Honorable Henry C. “Hank” Johnson, Jr.
Member, Committee on the Judiciary

¹⁵ See Letter from Joseph R. Biden III, Delaware Attorney General, et al., to Richard Cordray, Director, Consumer Fin. Prot. Bureau 1, 3 (Nov. 19, 2014).

¹⁶ Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 5 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>.

¹⁷ CENTER FOR JUSTICE & DEMOCRACY AT NEW YORK LAW SCHOOL, *Civil Rights Class Actions: A Singularly Effective Tool to Combat Discrimination* (Jan. 4, 2014), <https://centerjd.org/content/fact-sheet-civil-rights-class-actions-singularly-effective-tool-combat-discrimination>.

¹⁸ Jean R. Sternlight, Director, Saltman Center for Conflict Resolution and Saltman Professor of Law, University of Nevada, et al., Comment Letter on Proposed Rule on Arbitration Agreements 1–2 (May 23, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-0003>; Editorial, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES, Nov. 7, 2015, at SR10, <http://nyti.ms/1Pv5KMg>; Jessica Silver-Greenberg & Michael Corkery, *Bank Customers Likely to Regain Access to Courts*, N.Y. TIMES, May 5, 2016, at A1, <http://nyti.ms/23qQgfY>.

¹⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 1414(e), Pub. L. 111 – 203; Military Lending Act, 10 U.S.C. 987(e)(3), (f)(4); Department of Defense Appropriations Act, 2010, Sec. 8116, Pub. L. No. 111-118.

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Gregory W. Muth

Carl E. Serna

Hjaltur Thormann
Erin Mone

Shawna Lee
Bral Shen

David A. Cicilline

Rubin Hingora

Kath Ellen

Babara Lee

Carolee P. Maloney

Michael J. Kelly

Erin

Robert J. Vining

Althea

Jan Schekowsky

Steph S. Lynn

AL

Red Dwyer

Liz V. Galt

Ann Cox

Jessie Madler

Wm H. Mt

Jeri Swell

Debbie Wasserman Schultz

Bobby

Ed Ralft

Matthew A. Cotto

Raul M. Grijalva

Mahn Jern

Michael Monrada

Dwight D.

Patrick Murphy

Danny D. Davis

Earl Blumen

Bill Foster

Zoe Lofgren

Michael E. Capuano

Tim Ryan

Tulsi Gabbard

Jared Polis

Lori Frankel

Alan Lowenthal

Daniel T. Kahan

FR

Karen Bass

Denny Heck

Dudd S Beyers Jr

James Grayson

Shel E Connolly

Wm. Lacy Clay

Judy Chu

Paul D. Tonko

Roe W Parkey

Eric Swalwell

Suzanne Brannin

John Welch

Mark White

Bob Latta

Shirley Dalbey

John Farameri

Dana DeLette