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

Comments Responding to a Proposed Rule on Arbitration Agreements by the Consumer Financial Protection Bureau

Introduction

The National Association of Consumer Advocates (NACA) is pleased to submit comments to the Consumer Financial Protection Bureau's (CFPB or bureau) proposed rule to curb the use of predispute binding mandatory arbitration (forced arbitration) clauses in contracts for consumer financial products and services. NACA is a nonprofit association of private and public sector attorneys, legal services attorneys, law professors, and law students focused on the protection and representation of consumers. NACA is actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, and in serving as a consumer voice in the ongoing effort to curb fraudulent, abusive, and predatory business practices.

Forced arbitration clauses, inserted into standard-form contracts and presented to consumers as a condition for receiving products and services, are an impediment to the proper functioning of the consumer finance marketplace. Financial institutions use their superior bargaining position and their corporate fine print to strip consumers of their constitutional right to go to court before a judge and jury. Instead, consumers must resolve disputes with their financial services providers in private and secret arbitration proceedings. Consequently, the practice allows corporations to evade responding to allegations of wrongdoing and remedying harm they cause.

NACA commends the CFPB's exhaustive arbitration study[1] and the ensuing proposal to limit forced arbitration clauses in consumer financial services contracts pursuant to

[1] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street*

Section 1028(b) and Section 1022(b) and (c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Specifically, we support the CFPB's decision to eliminate terms in contractual arbitration requirements that bar consumers from filing or participating in class actions. NACA has advocated for the outright elimination of forced arbitration clauses due to the fact that they squash consumers' right to pursue remedies for individual disputes as well as collective actions. However, the bureau has asserted that it is not seeking to eliminate forced arbitration in individual cases at this time. Nevertheless, we appreciate its plan to collect and publish data to help shed light on consumers' experiences in individual arbitration. This additional examination should lead to future action to fully restore ordinary people's access to remedies in all cases.

CFPB correctly recognizes that corporate efforts to block access to the court system have had real and harmful consequences on consumers and the public interest.

Relying on its stellar research, the bureau published findings about forced arbitration in its proposed rule, which consequently validated similar conclusions of academic studies,[2] research papers and reports,[3] award-winning investigative journalism[4] as well as great numbers of consumer cases, anecdotes and experiences.[5]

Corporations dictate the terms and rules of arbitration proceedings, including the arbitration firm that will hear the dispute, the location of the proceeding, and the payment terms. Corporations repeatedly appear before arbitrators, giving the latter the economic incentive to favor the former at the expense of the individuals locked in disputes with the more powerful entities. The proceeding often is costly, even as the discovery process to obtain evidence to show wrongdoing and other procedural protections are severely limited. Arbitrators are not obliged to explain their reasoning or provide legal analysis, and their decisions have no binding effect on later proceedings.[6] Further, there is no real meaningful review of decisions even if a decision was glaringly wrong.

As the CFPB proves in its exhaustive study, the real consequence of the practice in consumer finance lies in the inability of most consumers to get their claims heard at all.

Reform and Consumer Protection Act § 1028(a), (March 2015).

[2] See, e.g. Brian T. Fitzpatrick et al, *An Empirical Look At Compensation In Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767, (Jan. 1, 2015) and Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive*?, 42 Wm. & Mary L. Rev. 1, (Oct. 2000).

[3] See, e.g., Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, May 2009; National Association of Consumer Advocates and Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April 2012.

[4]See, e.g., Jessica Silver-Greenberg and Robert Gebeloff, NEW YORK TIMES, *Beware the Fine Print*, a three-part series examining how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court, (2015).

[5] National Association of Consumer Advocates, *Comment on the Consumer Financial Protection Bureau (CFPB) Notice: Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, ID: CFPB-2012-0017-0041and CFPB-2012-0017-0042, (June 2012).

[6] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, UNIV. OF ILL.LAW REVIEW, Vol. 2016, No. 2.

Specifically, most financial institutions use forced arbitration clauses to bar their customers from participating in class or other group or collective actions. Class action bans cut off the overwhelming majority and types of claims typical in consumer finance disputes, where many individuals suffer similar harm from the same conduct.

> *"A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only way to halt and redress such exploitation."*[7]

In financial services, consumers often are cheated by small-dollar rip-offs, such as predatory and illegal charges and fees, and usurious interest rates. For these relatively small, individual charges a consumer cannot practically seek remedies for these losses on his or her own. Meanwhile, a financial firm can reap huge profits and then escape liability for depriving its customers by a small amount of money each because few are likely to bring claims on an individual basis.

As the bureau similarly determined, class action bans in financial services contracts are meant to block customers from seeking remedies for systemic but small-dollar harms. According to CFPB's study data, there were only on average about 25 cases per year involving an affirmative consumer claim of $1,000 or less that went to arbitration. For the tens of millions of consumers conducting banking, credit and other financial transactions with corporations in the marketplace, *25* individual disputes per year is minuscule. Similar-type losses and harms that consumers suffer at the hands of financial institutions' misconduct are not being adequately addressed. Most of these claims simply are wiped away by corporate contracts of adhesion.

The widespread suppression of consumer finance claims not only denies remedies for millions of American consumers and encourages ongoing risky conduct, it also stunts the necessary development of consumer protection laws.[8] Indeed, the bureau oversees compliance of, and enforces numerous and vibrant consumer protection laws, many of which afford a private right of action for consumers to pursue remedies of their own. Courts' opportunities to weigh factual disputes and interpret these laws and incidentally create precedent to be followed in future cases are reduced significantly by forced arbitration.[9]

We agree with the bureau's finding that informal dispute resolution systems, or corporations' customer service departments, cannot replace the court system and consumers' ability to band together in class actions. Banks' recent abusive overdraft fee practices are a telling example. In a class action against one bank, the court noted that

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[7] *Blue Chip Stamps v. Superior Court of L.A. Cty*., 18 Cal. 3d 381, 387, 134 Cal. Rptr. 393, 397, 556 P.2d 755, 759 (1976).
[8] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, UNIV. OF ILL. LAW REVIEW, Vol. 2016, No. 2.
[9] Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, at 415.

individual consumers complained to the bank about the order in which the bank would clear account expenditures. In a bench trial decision, the court reasoned that the bank built "a trap…(and) then exploited that trap with a vengeance, racking up hundreds of millions off the backs of the working poor, students, and others without the luxury of ample account balances."[10]

The bank helped relatively few consumers who complained to customer service about its conduct, but it continued the practice on many others. The California district court ordered the bank to return $203 million to consumers. The class action worked better than its individual customer service, for the bank's customers and the market. The trial court's considerable fact finding in this far-reaching case again highlights the contrast between a class action that identified sweeping misconduct and provided remedies for millions, and the forced-arbitration vehicle that would have suppressed most of the bank customers' claims. It is also worth noting that the bank fought the claims and appealed the trial verdict at every stage, including a futile post-verdict effort to impose an arbitration clause and class action ban, until the U.S. Supreme Court ultimately denied the bank's last appeal to avoid the judgment in April 2016.[11]

The bureau's study also demonstrated that hollow proposals, such as disclosures, opt out provisions and other meaningless changes to arbitration clauses fail to address the basic problems of forced arbitration: consumers' lack of choice and inability to choose how to resolve the dispute, whether in court, arbitration, as an individual or in a collective action. Section 3 of the study revealed that even bolded and underlined language describing forced arbitration in consumer contracts does not adequately inform consumers about the meaning and consequences of this industry practice. Disclosures and other cosmetic changes to arbitration clauses will fail to restore consumer choice in the market. Consumers simply need the freedom to participate in individual or collective actions after disputes arise.

While forced arbitration clauses address private rights and remedies between consumers and financial institutions, a critical public component exists. Forced arbitration harms the marketplace. State and federal officials long have acknowledged the wider implications of the denial of individuals' legal rights on the public interest and on the general population of consumers.[12]

Forced arbitration clauses also have other nefarious effects on the market and society as a whole. As law professor Myriam Gilles observed, class actions are a critical tool of accountability for low-income members of the population because they "are more

[10] *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080, 1119 (N.D. Cal. 2010).
[11] *Wells Fargo Bank, NA v. Gutierrez*, 136 S. Ct. 1512 (2016).
[12] *See, e.g., Letter from State Attorneys General to Director Richard Cordray*, Consumer Financial Protection Bureau, Nov. 19, 2014.

susceptible to abusive practices in the marketplace," suffering disproportionate instances of misconduct such as predatory lending and consumer fraud.[13] The economically disadvantaged are "more likely to experience violations of statutory rights that give rise to class-wide and collective legal claims," said Gilles, partly because they lack access to traditional markets, and face lower quality lenders and products, such as payday loans or subprime car loans.[14] The difficulty "to detect and deter bad actors who prey on the poor [a consequence of forced arbitration and class action bans] only promotes chronic exploitation and the perpetuation of intractable poverty."[15]

Even as the CFPB released its study in March 2015 and issued its proposed rule in May, the points above continue to be demonstrated in recent failed efforts by consumers to seek accountability in potential class actions. These cases alleged misconduct in the consumer financial services sector, but have been compelled into individual arbitration, potentially squashing the claims and preventing a public hearing, full debate and resolution of important factual disputes and legal issues.

For example, from a 2016 district court decision, a consumer opened a credit account through a computer financing company to purchase a computer. He defaulted on the account in 2008, and the financing company sold his debt to a third-party debt buyer. In 2015, a collector law firm on behalf of the debt buyer sued the consumer in state court to collect on the debt. The consumer, seeking a class action to represent himself and others, asserted that the defendants tried to collect on time-barred debt. That is, the statute of limitations to sue and collect on the debt had expired in violation of the Fair Debt Collection Practices Act.[16] The original contract contacted an arbitration clause and class action ban which the court enforced.[17]

In another recent example, a consumer in Nevada sought a class action against a payday lender related to a $500 loan with an annual interest rate of 561.64 percent that ultimately was discharged in bankruptcy. According to the allegations, although the consumer informed the lender that the debt was discharged, the lender's representative maintained that it would continue attempting to collect the debt. These actions, the consumer alleged, violated the FDCPA and Nevada state law. The court enforced the arbitration clause in the loan contract, stopping a potential class action against the lender.[18]

The proposed rule (with suggested improvements below) will help restore fairness and accountability in consumer finance markets.

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[13] Myriam Gilles. *Class Warfare: the Disappearance of Low-Income Litigants from the Civil Docket*, Emory Law Journal. Vol. 65, No. 6 (2016), at 1531, 1537.
[14] Id. at 1541.
[15] Id. at 1532, 1538.
[16] *Hilton v. Midland Funding LLC*, 2016 U.S. Dist. LEXIS 43198 (March 31, 2016)
[17] Id.
[18] *Ashraf v. Nev. Title & Payday Loans*, No. 2:15-cv-1353-GMN-VCF, 2016 U.S. Dist. LEXIS 25053 (D. Nev. Mar. 1, 2016).

1) Eliminate the class action ban. We agree with the bureau's proposal to eliminate forced arbitration clauses that block consumers' participation in class actions. It is clear that class actions are an efficient and necessary tool to compensate consumers impacted by a harmful, widespread practice, but they are also critical to change and curb harmful corporate behavior. Courts have recognized the class action device as a way to deter companies from engaging in risky practices and it encourages compliance with consumer protection laws.

For example, a federal court examining Congress' intent for the Truth in Lending Act, stated, "Congress concurred with an earlier conclusion by the Federal Reserve Board that "potential class action liability was an important encouragement to the voluntary compliance which was so necessary to ensure nation-wide adherence to uniform disclosure" since "most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to ensure compliance."[19]

In another example, Judge Richard Posner, discussing the Electronic Fund Transfer Act in a case against an ATM service accused of failing to give proper notice of fees, observed: "But even when as in this case the aggregate claim—the sum of all the class members' claims—is meager, such [class] treatment will often be appropriate. A class action, like litigation in general, has a deterrent as well as a compensatory objective... "[S]ociety may gain from the deterrent effect of financial awards...The deterrent objective of the Electronic Funds Transfer Act is apparent in the provision of statutory damages, since if only actual damages could be awarded, the providers of ATM services ... might have little incentive to comply with the law."[20]

Similarly, in its proposed rule, the Bureau said that it had preliminarily determined "that increasing compliance incentives would be for the protection of consumers. In other words, the monetary incentives for providers to comply with the law due to the threat of class actions are substantially greater than those due to the threat of consumers bringing individual disputes against providers." Based on our substantial experience, we agree with the bureau's conclusion. Corporations adjust their behavior, avoid risky and illegal practices, and appropriately increase their focus on compliance with laws, to avoid getting sued.

<u>Recommendations</u>: The proposed rule would prohibit covered providers of certain consumer financial product and services from using arbitration clauses that bar consumers from filing or participating in class actions and would require providers to insert language into their arbitration agreements reflecting a prohibition on class action bans. In our view,

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[19] *Johnson v. Tele-Cash, Inc.*, 1999 U.S. Dist. LEXIS 20653 (D. Del. Dec. 29, 1999).
[20] *Hughes v. Kore of Ind. Enter.,* 731 F.3d 672, 677 (7th Cir. 2013).

the proposed new language for covered providers that continue to use arbitration clauses is reasonably clear and should be understandable for consumers or their representatives.

The bureau also suggests an alternative version of proposed language for contracts that cover multiple products or services, some of which may not be covered by the rule. This alternative language likely will confuse consumers and even their legal representatives. We propose that the bureau either require different contracts for the various products or services, or contracts should specifically identify the products and services that fall under the rule and identify those that do not. The designations used for the products or services listed in contracts should be reasonably familiar to the individuals using them. For example, the language can state, "For product X and service Y, you may file a class action in court or you may be a member of a class action even if you do not file it…." "For product A and service B, you may not participate in a class action against us…and you are required to go to arbitration on an individual basis."

The bureau should consider including all representative actions in its definition of class action. A bank or lender's arbitration clause with a class ban typically includes broad language to express its sole will for arbitration on an individual basis. The forced arbitration language often prohibits "consolidated or joined claims," or claims that are brought as a class claim or other "representative proceeding." We encourage the bureau to consider applying its rule to joined, consolidated or representative claims that may or may not necessarily satisfy the specific requirements of "class action" claims.

2) Individual disputes forced into arbitration remain an issue.

While the CFPB data shows, and we agree, that the prevalent prohibition on groups of consumers to band together in court is the predominant obstacle to resolving financial services-disputes, NACA continues to observe clear cases where individual consumers who seek remedies for alleged harm, are forced into a one-sided arbitration process.

In January 2016 decision, a Maryland district court recounted a consumer's allegations that a servicer for her credit card account inaccurately reported information about her account to a credit reporting agency, in violation of the Fair Credit Reporting Act and the state's defamation law. She had entered into a credit card contract, but her credit card account had undergone changes from her original contract with its bank issuer and card brand (Discover to Mastercard).[21] She argued that the new card brand constituted an offer for a new contract, which she had not accepted. The consumer, pursuing an individual case against the servicer, argued against the servicer's motion to compel arbitration of the

[21] *Crawl v. Experian Info. Sols., Inc.*, No. PJM 15-97, 2016 U.S. Dist. LEXIS 12742 (D. Md. Jan. 29, 2016).

dispute. The court granted the motion, depriving the consumer of her choice to have her individual complaint heard in court.[22]

The bureau asks for comments on whether forced arbitration in individual cases should be eliminated. The bureau's own data along with additional evidence from other researchers support full restoration of consumers' options to choose to make decisions on how disputes will be resolved after they arise, for group litigation and individual cases. Indeed, the CFPB study revealed that even in the relatively low number of individual consumer finance arbitration cases it documented, consumers lost more than 90 percent of those disputes against financial firms.

While the CFPB appears to be of the view that it should gather more data before seeking to outright ban forced arbitration clauses, it has acknowledged ongoing, long-established problems with the forum. Therefore, we support the bureau's proposal to collect and publish information from providers related to their individual arbitration cases. The bureau likely will collect even more evidence to support a future action to restore consumers' ability to choose a dispute resolution method, after the dispute arises.

Recommendations:

The bureau is proposing to require covered providers that continue using forced arbitration clauses for individual cases, to report information from those disputes. We agree with the documents and information that the bureau is seeking to require. Arbitration proceedings are often cloaked in secrecy and confidentiality, but the anecdotes and experiences shared with us over many years indicate that the one-sided process often results in biased decisions or low settlements as a way to avoid the process altogether. Collecting this information will bring some transparency to the practices that lead to these results.

We disagree with the bureau's trigger to initiate its reporting requirements. The bureau proposes that the reporting requirements would begin when there is a "filing that initiates the arbitration, such as the initial claim form or demand for arbitration." To obtain a more accurate picture about the impact of forced arbitration and its influence on consumer claims, the bureau should initiate reporting requirements when a provider relies on an arbitration clause. Consumer advocates may file a complaint in court, and then is notified by the provider's representative that the relevant contract contains an arbitration clause and that they intend to rely on it. The provider may file a motion to compel arbitration. The bureau should be willing able to collect this preliminary information, either from the

[22] *Id.*, at 5.

consumer's representative or the provider, to shed light on how the mere existence of the arbitration clause impacts consumers' ability to vindicate their rights.

We commend the bureau's awareness and intent to protect consumers' private information. Complaints, other pleadings and documents filed in court typically are available to the public. The bureau should consider the public nature of these disputes as it considers information it will accept in provider reports and information it will publish on its web site. We expect that the bureau will exercise care in appropriately protecting consumer privacy as it has in other data collection efforts.

The bureau also has indicated that it will closely monitor and evaluate whether arbitration provisions or procedures constitute unfair, deceptive, or abusive acts and practices pursuant to Dodd-Frank Act, section 1031. We agree with the bureau's approach. Some arbitration clauses, prevalent in certain sectors of the consumer finance market, contain egregious provisions that undoubtedly would deprive consumers of a potentially fair proceeding. These provisions have eliminated consumers' substantive legal rights, such as the ability to assert claims for damages authorized by any statute; or have required consumers to pay excessive costs and fees; or authorize the arbitrator to evaluate the fairness of an arbitration clause; or require inconvenient venues.

The most effective way to monitor the use of unconscionable terms in arbitration provisions is to continue collecting and reviewing arbitration agreements. The bureau previously has collected consumer contracts for credit cards and other covered services. We suggest that the bureau continue to collect arbitration agreements, beginning with the financial institutions subject to its supervisory authority.

Additional Recommendations - CFPB can improve the rule's applicability and coverage.

The scope and applicability of the bureau's rule should reach as many financial products and services as feasibly possible, as well as all covered providers subject to CFPB supervision, enforcement and rulemaking that execute or rely on written contracts with consumers as part of their business model. The bureau in its proposal lists products and services that may be covered under its rule. We agree that the rule should cover providers of at least those products and services listed , as consumers have been subject to forced arbitration with and without class action bans for most, if not all of the services listed.

The bureau attempts to limit coverage by carving out specific disputes for certain products and services, such as in credit reporting. The bureau should air on the side of covering all transactions and causes of action relating to financial products and services. The bureau should consider that a typical arbitration clause in a consumer finance contract is extremely broad, covering virtually every possible claim, including reasonably unforeseeable tort claims. The only causes of action typically excepted from arbitration in a contract are those that likely would be pursued by the financial institution, not the consumer. Therefore, the bureau should similarly seek to keep its coverage of the rule broad for products and services under its jurisdiction to similarly enable consumers to pursue these claims as part of a class or representative action.

Section 1028(d) of the Dodd-Frank Act sets forth requirements for a compliance date for contracts containing forced arbitration clauses that consumers "enter into" with covered providers. Specifically, the bureau addresses the issue of amended and revised contracts, and unfortunately has decided not to regard current contracts that revised or amended after the compliance date as "entered into," and therefore subject to the rule's requirements. These are services that consumers may retain for extended periods of time, such as credit and banking.

Credit card companies, banks and other financial institutions regularly revise their nonnegotiable consumer contracts without consumers' input or initial consent. Meanwhile, consumers typically will maintain their credit or bank accounts for years or even decades.

The bureau has documented the fundamental unfairness of class action bans in forced arbitration clauses. The bureau's ultimate goal in issuing this rule should be to completely phase out the practice in a reasonable period of time. We appreciate that contracts amended (post-compliance date) to add new covered products or services will be considered "entered into" under the statutory requirements. The bureau should also ensure that the arbitration requirements cover the new products or services under the contracts *as well as* the existing products or services under that contract.

The bureau should reconsider its position on amended, revised and renewed contracts. Courts have treated modified, revised or renewed contracts as new contracts under respective state contract laws.[23] Arguably, a separate and new contract is formed each time a consumer uses a financial product and service (after receiving notice of modified terms).

Third-party contracts – successors or assigns.

We agree with the bureau's conclusion that a third party to a covered contract, such as a debt collector or debt buyer, must submit records to the bureau relating to individual arbitration cases, in accordance with the rule's reporting requirements.

In a recent case, a consumer alleged that a debt buyer, the third owner of consumer's alleged debt, had violated the Fair Debt Collections Practices Act in its attempt to collect on the account. The consumer sought a class action against the debt buyer on behalf of herself

[23] See, e.g. *In re Brown*, 403 B.R. 1, 5 (Bankr. E.D. Ark. 2009) citing *Garber v. Harris Trust & Sav. Bank*, 104 Ill. App. 3d 675, 683, 432 N.E.2d 1309, 1315 (1982); "A modification to a contract creates a new contract that includes the new modified provisions and the unchanged old provisions." – *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, No. 05-13-00870-CV, 2015 WL 4472893, at *6 (Tex. App. July 22, 2015).

and others. The district court held that the debt buyer was entitled to enforce the arbitration clause contained in the original credit contract, which had required arbitration for "assigns and successors" of the contract.[24] The court granted the motion to compel arbitration of the consumer's claims.

It is important that third parties, such as debt buyers in the above example that seek to rely on original account contracts with forced arbitration clauses and class action bans, are covered by the arbitration rule. Original credit contracts and contracts for other financial services and products, often are drafted broadly to cover successor parties. The bureau can ensure that prohibitions on class action bans also are void for subsequent institutions that become involved in the transactions with consumers.

We also urge you to bar covered providers from acquiring or relying on terms in any other consumer contracts that prohibit consumer participation in class actions. This policy should be applied even where the contract at issue was not originated by a covered provider, but where the current covered provider acquired a contract related to a consumer financial product or service. Auto financing companies may fall under this scenario. Their purchase and acquisition of consumer auto loans should be subject to the bureau's requirements on forced arbitration clauses. Class action bans should be unenforceable and subject to the notice requirements.

The bureau has clear authority and substantial bases to restrict forced arbitration.

(1) The bureau is authorized to fully restore consumers' access to remedies. The bureau has explicit authority under the Dodd-Frank Act to issue a rule to restrict forced arbitration in consumer contracts under its jurisdiction. To some, the bureau's action may appear to contravene another federal law, the Federal Arbitration Act of 1925. Indeed, the Supreme Court has expanded the reach of the FAA to permit the use of forced arbitration clauses and class action bans in nonnegotiable consumer contracts and more recently to expressly permit prohibitions on class actions in those contracts.[25] But the FAA, which was originally passed to facilitate business-to-business transactions, has been curbed numerous times by subsequent federal laws and regulatory actions, including the passage of the Dodd-Frank Act.

(a) the Dodd-Frank Act barred forced arbitration in residential mortgages and lines of credit, and prohibited forced arbitration of whistleblower claims under the Sarbanes-Oxley Act of 2002;

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[24] *Harris v. Midland Credit Mgmt.*, Civil Action No. 15-4453 (SDW)(SCM), 2016 U.S. Dist. LEXIS 14869 (D.N.J. Feb. 8, 2016).

[25] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011).

(b) Congress has protected auto dealers from forced arbitration in their transactions with auto manufacturers (Pub. L. 107-273, 15 U.S. Code § 1226);

(c) Congress restored choice and rights of livestock and poultry growers in their transactions with big agribusiness (7 U.S. Code § 197c);

(d) Employees of government defense contractors with Title VII and sexual assault tort claims are shielded from forced arbitration (the federal government is finalizing an executive order to similarly protect employees of all federal contractors)(48 CFR 252.222-7006);

(e) Under the Military Lending Act, military members and their dependents cannot be forced into arbitration to resolve disputes arising from a wide range of high-cost loans (payday loans, etc.)(10 U.S.C. 987(e)(3) and (f)(4) and 79 Fed. Reg. 58602).

(2) The bureau's four-year process leading up to the proposed rule was meticulous and transparent.

NACA has followed the bureau's work on forced arbitration since the agency began its examination of forced arbitration in 2012. Indeed, we previously had advocated for and supported the passage of the Dodd-Frank Act, which created the CFPB, and among other things, directed the bureau to examine forced arbitration in the financial markets and authorized it to issue a rule to restrict the practice.

Based on the bureau's public representations and exhaustive data collection and resulting report, it is clear that the bureau adopted and followed a methodical course to collect and analyze information and deliberate over the comprehensive issues presented that overall led to rational and logical policy decisions for this rulemaking. We believe, and the bureau has asserted itself, that its data-driven and evidence-based examination of forced arbitration is the most comprehensive analysis of the issue ever. As part of its process, the bureau engaged in the following with accompanying public feedback and support:

In April 2012, the CFPB officially launched its study with a public Request for Information, and received 64 comments from public interest organizations, industry trade associations, law firms and individuals. Afterward, the CFPB scheduled meetings with stakeholders.[26]

In June 2013, the CFPB launched a telephone survey to study consumer awareness and perception of arbitration clauses with a Federal Register notice, and invited public comment.[27]

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[26] *Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, CFPB-2012-0017-0001, April 27, 2012, http://1.usa.gov/1N59nVB.

[27] *Agency Information Collection Activities; Proposals, Submissions, and Approvals*, CFPB-2013-0016-0001, June 7, 2013, http://1.usa.gov/23bhxVx.

In December 2013, the CFPB released preliminary results from its ongoing study.[28] It held a public field hearing on the issue, inviting participation from industry and consumer interests.[29] Afterwards, it held additional meetings to obtain stakeholder feedback.

In May 2014, the CFPB issued a second Federal Register notice on its proposed telephone survey on consumer awareness, inviting public comment.[30]

In September 2014, the Office of Management and Budget approved the CFPB's request to proceed with the consumer awareness survey,[31] which the bureau completed in December 2014.[32]

In March 2015, the CFPB released the final arbitration report. It held a second field hearing, and announced it would conduct roundtables with stakeholders.[33]

In October 2015, the CFPB publicly released its initial outline for an arbitration rule prepared for a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel review. It held yet another public field hearing, inviting additional feedback from industry and consumer interests.[34]

In May 2016, the CFPB released its notice of proposed rulemaking and request for comment at a public field hearing, receiving feedback from consumer advocates and industry representatives.[35]

The proposed rule is "in the public interest and for the protection of consumers."

Section 1028(b) of the Dodd-Frank Act authorizes the bureau to restrict or limit forced arbitration if it finds its action to be "in the public interest and for the protection of consumers.[36] The bureau proposes to consider "in the public interest" and "for the protection of consumers" as having two independent meanings. The phrase for practical purposes can be treated as one standard. The bureau referred to similar statutory interpretations that treated the phrase as a single standard. The bureau can do the same.

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[28] *CFPB Arbitration Study Preliminary Results*, Dec. 2013, http://1.usa.gov/18WUWEy.
[29] CFPB, *Live From Dallas!,* Dec. 12, 2013, http://1.usa.gov/1XcG0X1,
[30] *Agency Information Collection Activities; Proposals, Submissions, and Approvals*, CFPB-2014-0011-0002, May 29, 2014, http://1.usa.gov/1W6dlEy.
[31] *Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements*, OMB Control No: 3170-0046 http://1.usa.gov/1UUc9oV
[32] CFPB, *Arbitration Study: Report to Congress 2015*, Section 1, at 6, http://1.usa.gov/1EPG8nT .
[33] CFPB, *Arbitration Study,* http://1.usa.gov/1EPG8nT and Live From Newark!, http://1.usa.gov/18xSGDQ.
[34] CFPB, *Small Business Advisory Review Panel For Potential Rulemaking On Arbitration Agreements; Outline Of Proposals Under Consideration And Alternatives Considered*, Oct. 7, 2015, http://1.usa.gov/1MpoIPr, and CFPB, *Live From Denver*!, http://1.usa.gov/226ymhW.
[35] CFPB, *Live From Albuquerque*, http://1.usa.gov/21AL1uR, and *CFPB proposes prohibiting mandatory arbitration clauses that deny groups of consumers their day in court, http://1.usa.gov/1QT9gwr*, May 5, 2016.
[36] 12 U.S. Code § 5518.

The plain meaning of the phrases indicates that there would be significant overlap between the two. Protecting ordinary American consumers and empowering them to pursue remedies to make them whole when harmed, are a necessary element to acting in the public interest. But in any case, the extent of the problem, its impact on the market, the data-driven evidence of harm caused by forced arbitration, and the deterrent effect of class actions, provide more than enough support to satisfy the statute whether the phrasing is treated as a single standard, or two independent requirements.

The proposed rule would deter and redress violations for the protection of consumers. As has been established in the bureau's own study and subsequent findings, the consumer financial markets need a procedural mechanism for aggregating claims. Without one, "individuals will not realistically seek to redress corporate wrongdoing."[37]

Arguments that favor a focus on potential higher prices for consumers, or transactional costs of litigation on businesses, ignore the impact of corporate immunity from liability. Without liability and accountability, corporations can engage in risky practices to increase their profits. This is familiar conduct that led up to the 2008 financial crisis and the Great Recession. On the other hand, class actions that raise potential transactional costs for corporations who seek to engage in illegal conduct, incentivize the entities to avoid the risky behavior in the first place.[38] As a result, consumers and the financial market also avoid future harm. In the financial market, the bureau's rule, which will restore consumer access to group claims and increase transparency in individual arbitration will serve the public interest and protect consumers.

For example, it is in the public interest for lending institutions to comply with consumer protection laws, such as the Truth-in-Lending Act, and "be found responsible to consumer borrowers if they do not comply."[39] Individual litigation is often a cost-prohibitive endeavor to pursue for some financial claims, and the class action device is the only tool available for consumers to vindicate their rights in court.[40] By seeking to restore access to class actions in the financial marketplace, the bureau has acted in the public interest and for the protection of consumers.

When it launched its comprehensive study in spring 2012, a year after the Supreme Court's *Concepcion* decision, the bureau started on a path to examine and then attempt to fix a rapidly growing defect in the consumer finance sector: the loss of remedies to millions of consumers harmed by predatory conduct. We urge the bureau to continue on that path. It should address suggestions to improve and strengthen the rule. After finalizing and issuing

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[37] Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOKLYN L. REV. 743 (Spring 2015).
[38]Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOKLYN L. REV. 743, 792-93 (Spring 2015).
[39] *Hughes v. Cardinal Fed. Sav. & Loan Ass'n*, 97 F.R.D. 653, 655-56 (S.D. Ohio 1983)
[40] Jean R. Sternlight, *As Mandatory Binding Arbitration Meets The Class Action, Will The Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, FN 387.

the final product in a timely manner, we urge the bureau to vigorously enforce all of its components.

Sincerely,

Christine Hines
Legislative Director
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