April 11, 2022

Consumer Financial Protection Bureau
1700 G St NW
Washington, DC 20552

Via: CFPB_FederalRegisterComments@cfpb.gov

Re: Docket ID-CFPB 2022-003 Request for Information Regarding Fees Imposed by Providers of Consumer Financial Services

Comments in Response to the Consumer Financial Protection Bureau's Request for Information on Consumer Fees

The National Association of Consumer Advocates (NACA), a national non-profit association of attorneys and advocates actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, submits these comments in response to the Consumer Financial Protection Bureau's request for information on fees imposed by providers of consumer financial services. NACA applauds the CFPB for its initiative in addressing junk fees, including this opportunity to comment, and its recent commitment to scrutinizing financial institutions that heavily rely on extra fees for revenue. In these comments we ask the CFPB to consider, in this context, another systemic practice – widespread use of forced arbitration clauses and prohibitions on participation in class actions – that has affected the public's ability to hold regulated financial entities' accountable for predatory and systemic use of junk fees.

I. Introduction

As the CFPB has acknowledged and consumer advocates have reported, financial institutions charge consumers a wide range of unfair and excessive mandatory "junk" fees. Consumers often have no choice but to pay these junk fees if they want to access essential financial products and services such as deposit accounts, or to complete necessary transactions like paying their mortgages. These fees allow financial institutions to pad their bottom lines without providing any additional benefits to consumers, while inflicting unnecessary economic harm onto them. Low- and middle-income consumers are especially negatively impacted by unfair fees. Not only do they have fewer choices in the marketplace in general, but a number of fees, such as overdraft and account maintenance fees, seem targeted to punishing them for having less capital.

In instances where a financial entity's fee practices are unlawful or egregiously unfair or deceptive, state and federal laws exist to protect consumers, allowing them to seek to hold the wrongdoer accountable. For instance, the federal Truth in Lending Act (TILA) requires lenders to disclose fees to a consumer before a transaction is final. If a lender violates TILA by failing to disclose any hidden fees, the law empowers consumers to bring claims against the lender in a public court to seek remedies.[1]

However, while the framework already exists for consumers to vindicate their rights when they are charged unfair fees, provisions inserted overwhelmingly in consumer finance contracts that require their customers to pursue claims in private arbitration and prohibit them from banding together in collective or class actions have cut off most consumers' ability to obtain recourse when cheated or ripped off by more powerful financial entities. So long as forced individual arbitration hampers private enforcement of consumer protection laws, consumers will be unable to receive meaningful remedies on the same scale in which they are harmed by unfair fees.

As an organization fully committed to the effort to curb unfair or abusive business practices, and protecting access to justice for consumers, NACA urges the CFPB to restart its work on predispute binding (forced) arbitration, as authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

NACA conducted a survey of 110 practicing consumer advocates across the country to collect their firsthand observations on consumer fees and the effects of forced arbitration on affected consumers. The results of this survey are presented throughout this comment.

II. Consumers Encounter Junk Fees Across the Entire Consumer Financial Marketplace

Consumer fees have become incredibly widespread, especially in the realm of consumer finance. No matter the financial product, whether it is credit cards, checks, mortgages, auto loans, or another, there are a variety of fees attached.

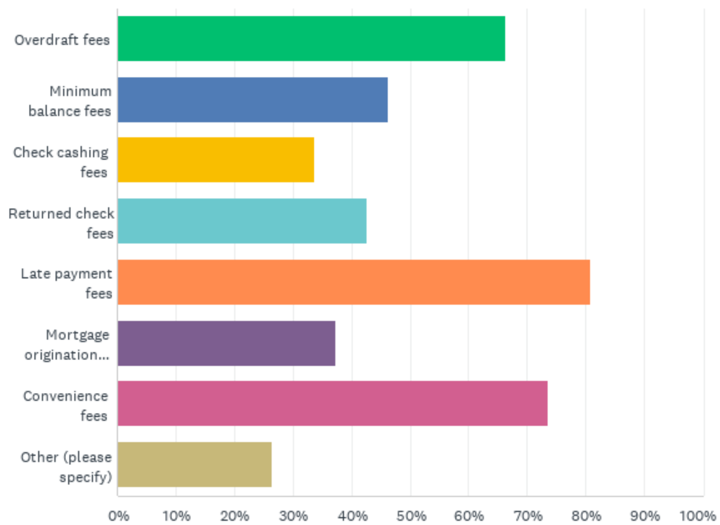
In the online NACA survey of consumer advocates, respondents were asked to indicate types of fees they had encountered in their professional lives representing consumers or in their personal lives: overdraft fees, minimum balance fees, check cashing fees, returned check fees, late payment fees, mortgage origination fees, and convenience fees.

Out of all of these, late payment fees (80.91%), convenience fees (73.64%), and overdraft fees (66.36%) were encountered by more than half of the respondents. These three types of fees alone cover a wide range of consumer financial services ranging from deposit accounts to all types of consumer loans.

At least one-third of respondents reported encountering: minimum balance fees (46.36%), returned check fees (42.73%), mortgage origination fees (37.27%), and check cashing fees (33.64%). This suggests that even relatively uncommon fees likely still impact a significant number of consumers and remain worthy of scrutiny.

[1] 15 U.S.C. § 1640.

Q3 Which of the following types of unfair consumer fees have you encountered in your practice or daily life?



In addition, respondents in their comments reported fees associated with auto sales and mortgages such as document preparation fees and property inspection fees. These results seem to indicate that various unfair fees are especially common in the auto and mortgage industries where they can take many forms.

The prevalence of fees across financial product types and across providers can mean serious trouble for consumers, particularly those of modest means. Fees to maintain accounts, process payments, originate new lines of credit, and more can total up to significant added costs for consumers just attempting to get by in their daily lives. And when most financial institutions charge the same fees for similar products, there is little choice but to pay.

To illustrate how unfair and predatory many of these junk fees can be, we can turn to "pay-to-pay" fees as an example. "Pay-to-pay" fees, which fall under the broad category of convenience fees, are small-dollar add-on charges by loan servicers, landlords, credit card companies, etc. to enable consumers to make a payment through specific methods such as by phone or an online portal. While it may cost the provider slightly more to process payments made through these avenues, the fees they charge often exceeds that extra cost. For example, it may cost a mortgage servicer an additional $1 to process an online payment, but the servicer may charge consumers and extra $15 to make online payments; the additional $14 is purely additional profit for the servicer.

The CFPB has previously taken note of potentially predatory convenience fees and issued a compliance bulletin in 2017 to provide guidance to debt collectors on when their practices could be considered unfair and deceptive or violate the federal Fair Debt Collection Practices Act.[2] According to the bulletin, not informing consumers of fees to pay by phone, not disclosing the different fees charged for the full range of payment options, and misrepresenting all payment options or that a fee is mandatory, could all be considered illegal conduct.[3] Additionally, the CFPB also referenced several enforcement actions it had taken against illicit "pay-to-pay" fees.[4]

Consumers as well have brought legal claims against financial services providers over their "pay-to-pay" fee practices. In *Lembeck v. Arvest Central Mortgage Co.* and *Silveria v. M&T Bank*, two recent cases brought in California district courts, consumers accused their mortgage servicers of charging unjustified fees to make payments by phone or through an online portal. They alleged that the bank in *Silveria* charged consumers an excessive $15 fee to make phone payments which far exceeded the cost to process the transactions.[5] The customers alleged that the bank's conduct constituted breach of contract and a violation of the California Unfair Competition Law, the federal FDCPA, and the California Rosenthal Fair Debt Collection Practices Act.[6]

Similarly, consumers accused the servicer in *Lembeck* of similar violations along with violating the Texas and Florida unfair and deceptive practices laws.[7] According to the consumer complaint, the servicer charged consumers $10 to make mortgage payments by phone and $5 by internet although the actual cost, $0.50, to process each payment was clearly much lower.[8] Both *Silveira* and *Lembeck* reached settlements within the last two years with the consumer class in each case. According to the settlement, class members received an automatic payment to compensate them for the amount they had been overpaying in fees.[9]

III. Financial entities that impose unfair, wrongful fees must be held accountable

When junk fees prove to be unlawful, deceptive, unfair, or otherwise harmful to consumers, then the entities that charge those fees must be held accountable in order to safeguard consumers and honest businesses. Recently, state and federal public enforcement and grassroots pressure over unfair fee practices have proven to be effective in curtailing some junk charges.[10]

For instance, overdraft fees, which are one of the top three fees that consumer advocates from the NACA survey encounter the most, have experienced a major public reckoning. Throughout its lifetime, the CFPB has successfully pursued multiple enforcement actions against banks and other depository institutions for abusive overdraft practices. Most recently, in 2020, it settled

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[2] See Consumer Fin. Prot. Bureau, Compliance Bulletin 2017-01, Jul. 31, 2017, available at https://files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf.
[3] Id.
[4] Id. at 3.
[5] Complaint, 2, *Silveira v. M&T Bank*, Case No. 2:19-cv-06958 (C.D. Cal. 2019).
[6] Id. at 8-12.
[7] First. Am. Compl., 13-21, *Lembeck v. Arvest Central Mortgage Co.*, Case No. 3:20-cv-03277-VC (N.D. Cal. 2021).
[8] Id. at 1.
[9] See *Website for the Arvest Central Mortgage Co Payment Processing Fees Class Action Settlement*, available at http://www.paytopayfeesettlement.com/; *Settlement website for the class action lawsuit, known as Lisa Silveira v. M&T Bank, in the U.S. District Court, Central District of California*, available at http://www.mortgagefeesettlement.com/.
[10] See, e.g. Consumer Fin. Prot. Bureau, *Comparing overdraft fees and policies across banks*, Feb 10, 2022, available at https://www.consumerfinance.gov/about-us/blog/comparing-overdraft-fees-and-policies-across-banks/.

with TD Bank for $122 million, including $97 million to repay consumers who were illegally charged overdraft fees.[11]

Furthermore, beyond direct enforcement, the CFPB has also published research on overdraft fees and announced its intention to scrutinize banks that derive a large amount of income from overdraft fees.[12] As CFPB scrutiny increased, a number of banks publicly announced that they will stop charging consumers overdraft fees or reduced the amount of their overdraft fees. Among their number are some of the country's largest banks including Capital One and Ally, which have done away with overdraft fees altogether, and Bank of America, which has reduced its overdraft fee from $35 to $10.[13]

These actions are commendable and demonstrate awareness of how unpopular overdraft fees are with consumers and the widespread harm they have inflicted. However, it is impractical to expect consumers to rely on government agencies and their limited resources alone to police the vast financial services marketplace. As shown in the survey of consumer advocates, fees still pervade nearly every aspect of consumers' financial lives. Due to the nature of most harmful fees, private enforcement is also needed to maximize accountability for wrongdoers and remedies for harmed consumers.

Most state and federal consumer protection laws such as the Fair Debt Collection Practices Act, the Truth in Lending Act, the Fair Credit Reporting Act, and state UDAAP laws include provisions that allow consumers to go to court to vindicate their legal rights when their rights are violated.[14] Many of these same laws also contain specific protections against harmful fees. At the time they were written and passed, legislators recognized that private enforcement would be essential to their effectiveness. For instance, the Senate Committee on Banking, Housing, and Urban Affairs, which developed the FDCPA, noted that the law was meant to be self-enforcing and would rely on consumers to bring claims.[15]

However, in cases involving harmful fees, consumers would still be hard-pressed to bring individual claims even when authorized by law. Fees tend to be relatively small, (the average overdraft fee is around $33.58)[16] and consumers typically cannot justify hiring an attorney and challenging a financial institution in court on their own. If individual claims were the only way to seek redress for junk fees, systemic wrongdoing in the financial marketplace would be able to go unchecked and millions of consumers would have to accept their losses.

The calculus changes when customers who have all been charged the same unfair fees can band together and aggregate their claims in a single action. They can overcome the financial barriers

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[11] Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Announces Settlement with TD Bank for Illegal Overdraft Practices*, Aug. 20, 2020, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-settlement-td-bank-illegal-overdraft-practices/.

[12] Consumer Fin. Prot. Bureau, CFPB Research Shows Banks' Deep Dependence on Overdraft Fees (Dec. 01, 2021), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-research-shows-banks-deep-dependence-on-overdraft-fees/.

[13] Elizabeth Dilts Marshall, Reuters, *Bank of America, Wells Fargo scrap some overdraft fees as regulatory scrutiny* grows, Jan. 11, 2022, available at https://www.reuters.com/business/finance/bank-america-reduce-overdraft-fees-this-spring-2022-01-11/.

[14] See e.g. 15 U.S. Code § 1692k; 15 U.S. Code § 1681n.

[15] S. Rep. No. 95-382, at 5 (1977).

[16] Alicia Adamczyk, CNBC, *Overdraft fees hit another record high this year – here's how to avoid them*, Oct. 20, 2021, available at https://www.cnbc.com/2021/10/20/overdraft-fees-hit-another-record-highheres-how-to-avoid-them.html.

preventing individual consumers from bringing their claims, efficiently deliver justice and redress to large groups at once, and deter bad market actors; all important functions when attempting to address illicit junk fees which tend to be small but have widespread impact.

"*Companies' fees are usually $50 or less and may seem relatively small. But these fees are staggering in relation to the financial services that companies offer,"* said a Huntsville, AL consumer attorney in a response to NACA's survey. "*I have paid fees more than 3000% higher than the dollar amount of the baseline transaction. I believe financial institutions have made it the industry norm to extract fees based on consumer behavior, trended data, and profitability instead of relating the fees to risk or cost. Because these fees are relatively small but significant in aggregate, forced arbitration is unfair to consumers because it is unlikely that consumers will enforce their rights. Also, class actions are more efficient and effective for remedial measures than obscure arbitration procedures*."

In *Scharfstein v. BP West Coast Products LLC*, an Oregon consumer brought a class claim against a large gas station operator for charging consumers an undisclosed $0.35 fee when using their debit cards.[17] In the ensuing trial, a jury found that failing to disclose the fee was illegal under Oregon's Unlawful Trade Practices Act.[18] Additionally, according to the consumer's complaint, which was first filed in 2011, the operator should have known that its practices were illegal because it had previously been the target of an earlier class action alleging the same facts.[19]

Though each individual fee charged was miniscule, it was charged so often and to so many consumers that the jury ordered the gas station operator to pay $409 million, the majority of which went towards paying back ripped off consumers.[20] Records uncovered during the case revealed that over two million consumers had been charged the fee between 2011 and 2013 and that it was being charged nearly 13,000 times a day.[21]

Scharfstein illustrates how unscrupulous businesses can make massive amounts of ill-gotten profits by charging even incredibly small fees that would be economically infeasible to challenge on an individual basis. It was only because consumers who had been overcharged small amounts could aggregate their claims that they could afford to bring this action and hold the gas station operator accountable and strip it of its illicit gains.

In *Lambert v. Navy Federal Credit Union*, a North Carolina consumer brought a class action claim against a large credit union over its non-sufficient funds (NSF) fee practices. According to the consumer, she had written a check to an insurance company which the credit union rejected

[17] Anne Bucher, Top Class Actions, *Settlement Reached in Arco, AmPm Debit Card Fee Class Action* Lawsuit, Feb. 14, 2014, available at https://topclassactions.com/lawsuit-settlements/lawsuit-news/settlement-reached-arco-ampm-debit-card-fee-class-action-lawsuit/.

[18] Id.

[19] Id.

[20] Paul Bland, *Major Victory in Oregon Vindicates Class* Actions, Jul. 16, 2019, available at https://www.publicjustice.net/major-victory-in-oregon-vindicates-class-actions/.

[21] Id.

due to insufficient funds.[22] Because of this, she accrued a $29 NSF fee.[23] Two days later, the credit union attempted to process the same check again and once again rejected it and charged a second NSF fee.[24]

This practice allegedly violated the credit union's deposit agreement, which stated that only one NSF fee would be charged per transaction.[25] Additionally, the consumer alleged that charging multiple NSF fees would be considered an unfair and deceptive practice under North Carolina law.[26]

After the claim was filed in 2019, the credit union eventually agreed to pay $16 million to refund 700,000 consumers who had been overcharged NSF fees.[27] These funds were automatically distributed to the settlement class as either payments or account credits.[28] It would have been virtually impossible for a consumer to challenge these fees on an individual basis.

In *Brotz v. Simm Associates*, a Florida consumer brought a class action in state court against a debt collector over a $12.95 "convenience fee" she was allegedly charged to make payments on a defaulted loan.[29] The fee was allegedly not disclosed or authorized in the terms of the original loan document, but the collector automatically withdrew it from the consumer's checking account every time she made a payment for 16 months.[30] Eventually in 2017, the consumer filed a claim against the collector on behalf of herself and other Florida consumers who had similarly been charged a "convenience fee" to make payments. The suit alleged that the fees violated the federal Fair Debt Collection Practices Act and the Florida Fair Collection Practices Act.[31] Notably in the complaint, the consumer noted that the CFPB's Supervisory Highlights for Fall 2014 had singled out convenience fees like the one at issue as an unfair and deceptive practice that violated the FDCPA.[32]

Brotz successfully settled in 2018 with 1,197 Florida consumers receiving refunds for the amount they paid in unjustified fees. These funds were automatically distributed to the settlement class via checks.[33]

IV. Forced arbitration hinders effective enforcement of consumer protection laws and leaves consumers vulnerable to abusive fee practices

The prevalence of forced arbitration clauses in consumer finance contracts is the most significant obstacle blocking consumers from recovering from unfair fees. Forced arbitration clauses, which

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[22] Compl., 5, *Lambert v. Navy Federal Credit Union,* Case 1:19-cv-00103 (E.D. Va 2019).
[23] Id.
[24] Id.
[25] Id. at 5-6.
[26] Id. at 16.
[27] Peter Strozniak, Credit Union Times, *Federal Judge Grants Final Approval Over Navy Federal's $16 Million Class Action* Suit, Apr. 09, 2021, available at https://www.cutimes.com/2021/04/09/federal-judge-grants-final-approval-over-navy-federals-16-million-class-action-suit/.
[28] See *Navy Federal Representment NSF Fee Settlement Website,* available at *https*://www.lambertnsffeelitigation.com/.
[29] Compl., 3-4, *Brotz v. Simm Associates Inc.*, Case 6:17-cv-01603-PGB-TBS (M.D. Fla 2017).
[30] Id.
[31] Id. at 9-14.
[32] Id. at 4-5.
[33] Janet Varnell, Email to Sophia Huang, April 8, 2022.

are often buried in the fine print of the take-it-or-leave-it consumer contracts employed by many businesses, strip consumers of their right to go before a judge and jury when they are harmed. Instead, consumers must take their claims to private closed-door arbitration where they have far fewer procedural rights than they do in court and a decisionmaker who may have a financial incentive to favor the more powerful party.

The most insidious are forced arbitration clauses that restrict consumers' right to join their claims together and seek justice as a group. As discussed above, class actions are the most efficient and effective way to obtain consumer remedies in cases involving large-scale but relatively small-value harms and to hold businesses accountable for systemic wrongdoing.

Research has shown that consumers fare significantly worse in arbitration than they would in court.[34] Only 9% of consumers who bring claims to arbitration obtain relief and worse still, consumers are often ordered to pay the businesses they are accusing of misconduct.[35] Even when a consumer feels their case has been wrongly decided, it is almost impossible to appeal an arbitrator's decision once it has been made. It is no wonder then, that even according to the CFPB's own data, consumers very rarely file claims in arbitration.[36] The low number of cases does not indicate that few consumer harms are taking place, but that going to arbitration is not worth it for consumers even when they have promising cases.

According to NACA's survey of consumer advocates, 70% of respondents have declined to move forward with a case involving unfair fees because of the presence of a forced arbitration clause or class action ban. Along the same lines, only 42.73% of respondents have ever represented a consumer harmed by fees in individual arbitration and 78.18% of respondents agree that it is financially infeasible for consumers to pursue individual arbitration over junk fees.

"The idea that individual consumers could possibly pursue individual arbitrations on the vast majority of assessed fees is patently absurd. Who would spend the time and effort of commencing an arbitration over a $20, $30, even $200 fee?" commented a Rye, NY-based consumer attorney in his survey response.

Another consumer advocate, based in Tampa Bay, FL said that *"(i)n order to impose fees on consumers without causing too strong of an objection or catching the eye of watch dogs, the fees are always too small to be economically viable absent a class action. Where there is an arbitration clause there is also a class action ban. Thus, consumers are left without a remedy."*

[34] Heidi Shierholz, *Correcting the Record: Consumers Fare Better under Class Actions Than Arbitration*, Economic Policy Institute, August 1, 2017, available at https://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/.
[35] Id.
[36] See Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a) (March 2015) 11-12, available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

Indeed, in a notorious example, Wells Fargo Bank is known for its past repeated attempts to enforce its arbitration clause containing a class action ban to avoid accountability for predatory overdraft practices.

Wells Fargo was one of the many banks accused of re-ordering transactions to maximize the amount of overdraft fees it could collect. In one of the cases filed against Wells Fargo, a California court found that the bank had engaged in "unfair and fraudulent" conduct and ordered it to pay $203 million in restitution to California consumers.[37] Additionally, the other banks hit with similar claims, such as Bank of America and JP Morgan Chase, settled all of the proceedings against them relatively quickly.[38] Despite the judgment finding it liable for misconduct and its peers resolving matters without much struggle, Wells Fargo continued to move forward with aggressive attempts to enforce its arbitration clause in the cases still pending against it.

In April 2021, its attempts succeeded when the 11th Circuit ruled that Wells Fargo could compel individual arbitration in five separate overdraft fee class actions that had been filed against it.[39] As a result, the affected consumers lost all the advantages of a class action and would have to resort to a private arbitration system on an individual basis while the bank could sidestep comprehensive accountability and avoid returning tens of millions of dollars it siphoned out of consumers' pockets.[40]

Wells Fargo has since changed its overdraft practices to be more consumer-friendly but has not eliminated overdraft fees altogether like some of its peers.[41] However, the bank continues to use forced arbitration clauses and class action bans in its consumer contracts, meaning other potentially systemic, harmful practices will get swept under the rug and go unremedied.[42]

Public enforcement is not enough to fill the justice gap that forced arbitration has created. Government agencies like the CFPB do not have the resources to police the entire financial services marketplace and as discussed above, many state and federal consumer protection laws were intended to rely primarily on private enforcement.

The CFPB's previous research offers additional support to this end. In its study on forced arbitration, the CFPB noted that commenters held different views on the utility of consumers class actions, with some finding them less necessary due to public enforcement and others

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[37] Order Granting in Part and Denying in Part Motion for Judgment Following Remand, 1, *Gutierrez et. al. v. Wells Fargo Bank, N.A.*, Case 3:07-cv-05923-WHA (N.D. Cal. 2013); Jonathan Stempel, Reuters, *Wells Fargo ordered to pay $203 million in overdraft case*, May 15, 2013, available at https://www.reuters.com/article/wellsfargo-overdraft-decision/update-1-wells-fargo-ordered-to-pay-203-million-in-overdraft-case-idUKL2N0DW32820130515.

[38] Kate Berry, American Banker, *Wells is last big bank standing in overdraft* litigation, Jun. 26, 2017, available at https://www.americanbanker.com/news/wells-is-last-big-bank-standing-in-overdraft-litigation.

[39] Holly Barker, Bloomberg Law, *Wells Fargo Gets to Arbitrate Overdraft Suits, 11th Circuit Says,* Apr. 7, 2021, available at *https*://news.bloomberglaw.com/class-action/wells-fargo-gets-to-arbitrate-overdraft-suits-11th-circuit-says.

[40] Berry, *supra* note 24.

[41] Press Release, Wells Fargo, Wells Fargo to Help Millions of Consumer Customers Avoid Overdraft Fees and Meet Short Ter Cash Needs (Jan. 11, 2022), available at https://newsroom.wf.com/English/news-releases/news-release-details/2022/Wells-Fargo-to-Help-Millions-of-Consumer-Customers-Avoid-Overdraft-Fees-and-Meet-Short-Term-Cash-Needs/default.aspx.

[42] See e.g. Wells Fargo, Deposit Account Agreement Effective Oct. 15, 2021, available at https://www.wellsfargo.com/fetch-pdf?formNumber=CCB2018C&subProductCode=ANY.

viewing them as a valuable supplement to government action.[43] In examining the relationship between public enforcement actions and consumer financial class actions, the CFPB found that the two rarely overlapped and when they did, class actions preceded public enforcement 71% of the time.[44]

These results indicate that not only are class actions addressing harms that public enforcement is not, but that class actions can also alert government actors to misconduct in the marketplace and prompt public enforcement activity. Therefore, forced arbitration clauses and class actions bans are not only cutting off countless consumers' access to remedies, but also hampering the effectiveness and efficiency of government action.

In a 2016 letter commenting on the Bureau's proposed rulemaking that would have barred arbitration provisions that prohibited participation in class actions, Iowa's attorney general Thomas J. Miller noted that *"(t)hough state attorneys general and federal agencies such as the Bureau and the Federal Trade Commission contribute mightily to ensuring consumers are protected through our legal actions, everyone knows that our resources are limited and that we must be good stewards of the public resources we receive to do our work."*[45]

Unscrupulous businesses are highly aware that forced arbitration can act as a get-out-of-jail-free card that handcuffs private enforcement, virtually leaving public enforcement as the sole arbiter. This has led to businesses becoming increasingly emboldened. For instance, in a case filed in Virginia state court, the Virginia Attorney General's office sued a high-interest online lender for violating the state consumer protection act.[46] In response, the lender attempted to enforce the forced arbitration clause in its consumer contract *against the state*.[47] By all accounts, an attempt to enforce an arbitration clause against a government arm seeking to enforce laws on behalf of the public is cynical and outrageous. Not surprisingly, the attempt failed. The court found that the state of Virginia was not a party to the contracts in question and could not be bound by the arbitration clause.[48] But the case demonstrated the lender's contempt for the justice system, a lack of remorse for its underlying actions, and a belief that the arbitration clause may help it escape from all accountability, including from the government itself. If bad actors believe they are bulletproof, they are more likely to engage in riskier and more harmful conduct for the sake of profit.

As a Scottsdale, AZ consumer attorney commented in our survey, *"[arbitration] also strips away a consumer's right to have his/her claims heard by a jury and virtually eliminates the risk of a substantial award in favor of a consumer, making the bad actors more bold and less willing to settle cases where they have committed violations of law."*

Indeed, since the 2008 financial crisis and the passage of the Dodd-Frank Act, it has become even more evident that eliminating forced arbitration clauses and empowering consumers to band

[43] Consumer Fin. Prot. Bureau, *supra* note 31 at 371 - 372.
[44] Id. at 373
[45] Letter from Iowa Attorney General Thomas J. Miller to the Consumer Financial Protection Bureau, Docket No. CFPB-2016-0020, at 2, Aug. 22, 2016.
[46] *NC Financial Solutions of Utah v. Commonwealth of Virginia*, Record No. 190840 (Cir. Ct. Fairfax County 2021).
[47] Id.
[48] Id.

together against unfair fees is an effective accountability tool. Notably, the financial reform law barred the use of forced arbitration for claims involving residential mortgage loans and home extensions of credit.[49] For example, in recent cases involving pay-to-pay "convenience" fees that mortgage servicers allegedly charged homeowners, a servicer sought to compel arbitration against customers. While holding that the arbitration clauses were invalid, courts have stated that "the Dodd-Frank Act prohibits the use of arbitration provisions or pre-dispute waivers of federal statutory causes of action in connection with residential mortgages."[50] Access to the court system and banding together to address fees in the mortgage sector granted consumers more options, outside of reliance on government enforcement, for pursuing remedies after wrongful charges.

V. Next steps on junk fees for the CFPB

First, NACA appreciates the CFPB taking initiative to address junk fees. The Bureau should pursue aggressive enforcement on illicit fees when possible and continue to prioritize enforcement against repeat bad actors, especially those that use forced arbitration.

Second, the Bureau should reconsider taking new action on an ongoing, pervasive practice that the Bureau itself has previously acknowledged as risky to consumers in the financial markets: forced arbitration. The Dodd-Frank Act authorized the Bureau to study arbitration and to write a rule to limit or restrict the practice in consumer finance. The CFPB's investigation of forced arbitration revealed the extent and impact of the corporate practice on ordinary people's rights and access to remedies in the financial market. Following the three-year long data collection, analysis, and consideration of public feedback, the bureau spent the next two years preparing a rule in response.

The final rule would not have ended forced arbitration, but it would have eliminated class action bans in response to data showing that such terms comprehensively removed access to remedies for consumers with small-dollar claims, such as unfair fees. The final rule would have also set up a program to monitor and collect data on existing individual arbitration cases that were not a part of a class action. Ultimately, the U.S. House and Senate passed a joint resolution under the Congressional Review Act, disapproving of the arbitration rule.[51] Since then, forced arbitration has remained a perpetual cloud over consumers' rights in the financial marketplace and the CFPB's clear statutory authority to take action on this issue remains valid.

VI. Conclusion

While forced arbitration clauses are allowed to proliferate in consumer contracts, any actions the CFPB takes to address junk fees or other harmful practices will not be as effective as they could be unless it also acts to restrict forced arbitration in some capacity.

"(A)ddressing junk fees in [the] context of forced arbitration is a futile endeavor," according to a Great Neck, NY-based consumer advocate in their response to NACA's survey.

[49] 15 U.S. Code § 1639c.
[50] See, eg, *Thomas-Lawson v. Carrington Mortg. Servs., LLC*, No. 2:20-cv-07301-ODW (Ex), 2021 U.S. Dist. LEXIS 65841 (C.D. Cal. Apr. 5, 2021)
[51] Final rule; CRA revocation, 82 Fed. Reg. 55500, Nov. 22, 2017.

As such, NACA strongly recommends that the CFPB revisit its previous work on forced arbitration and begin a new rulemaking. In support of the Bureau's previous rulemaking on arbitration, Iowa Attorney General Miller wrote that "Congress authorized the Bureau to act to reclaim this lost ground for consumers and for the marketplace..."[52]

Indeed, the CFPB has a responsibility to ensure that the country's consumer protection laws are actually working to protect consumers. This means the CFPB should not only be exercising its own enforcement power where appropriate, but also ensuring that private enforcement, a key component of consumer protection law, can function as intended. Consumers in the financial services marketplace should be able to avail themselves of all provisions of the applicable consumer protection laws when they are harmed, whether through burdensome junk fees or another bad practice.

Thank you for considering our views.

Sincerely,

Christine Hines	Sophia Huang
Legislative Director	Advocacy & Outreach Associate

[52] Letter from Iowa Attorney General Thomas J. Miller to the Consumer Financial Protection Bureau, Docket No. CFPB-2016-0020, at 2, Aug. 22, 2016.