



NACA State Chairs

November 14, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Docket ID CFPB-2023-0047, Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services

Dear Director Chopra:

We, the undersigned state chairs of the National Association of Consumer Advocates (NACA), write to express our enthusiastic support of the petition, recently filed by NACA and other leading consumer advocacy organizations. We echo the petition's request urging the Bureau to exercise its statutory authority and promptly issue a rule to address pre-dispute mandatory arbitration (or, forced arbitration) provisions in the terms and conditions of consumer financial services and products, and specifically allow consumers to meaningfully consent to arbitration as a dispute resolution option, *after* a dispute arises.

Overall, in our collective experience, pre-dispute contract requirements that force consumers to surrender their legal right to get their claims heard in court against financial institutions have proven disastrous in our vast financial marketplace, costing American families billions of dollars in losses. Forced arbitration grants virtual legal immunity to entities that are determined to disregard the law and treat consumers unfairly or dishonestly. Forced arbitration has helped to give financial institutions, particularly repeat corporate offenders, free rein to engage in illegal practices for lengthy periods before they are detected and stopped, and typically only after causing widespread and avoidable harm.¹ Meanwhile, the prevalent use of forced arbitration clauses in financial services facilitates market-wide secrecy of unsafe activities and the activities' growth among institutions, until it is too late for the tens of thousands of consumers who ultimately have been impacted.²

We and our colleagues are on the frontlines everyday representing consumers across the country harmed by unfair, deceptive, abusive, and fraudulent misconduct in the financial sector.³ For too many years, we have observed and experienced the disappointment, despair, and certain frustration when far-off provisions in take-it-or-leave-it corporate contracts suppress our consumer-clients' right to access our public justice system. They are often unable to seek remedy for financial injuries when they are wronged. These injuries result from, but are not limited to, debt collection abuses, inaccurate credit reports and background checks, misleading and fraudulent predatory lending, illegal fees and charges, and prohibitive auto loan interest-rate markups.

¹ See, e.g., Michael Corkery and Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, NYTIMES, Dec. 6, 2016.

² See, e.g., Consumer Financial Protection Bureau, *Arbitration Study*, Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), Section 8 (Overdraft practices), March 2015, https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. CFPB Fines U.S. Bank \$37.5 Million for Illegally Exploiting Personal Data to Open Sham Accounts for Unsuspecting Customers, July 28, 2022, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-us-bank-37-5-million-for-illegally-exploiting-personal-data-to-open-sham-accounts-for-unsuspecting-customers/>. Associated Press, *Wells Fargo wants court to toss overdraft lawsuits and let it use arbitration*, LOS ANGELES TIMES, Aug. 24, 2017, <https://www.latimes.com/business/la-fi-wells-fargo-20170824-story.html>.

³ Includes private and public sector consumer attorneys, legal aid and nonprofit attorneys, law professors, and law students.

Notably, our consumer clients overwhelmingly have no awareness or knowledge about forced arbitration clauses included in the contracts of the financial products and services they use until an illegal practice impacts them. Moreover, they often remain unaware of the restrictive terms until after they seek assistance from us, their legal advocates.⁴ It is detrimental to individual consumers when forced arbitration requirements deprive them of their rights at the very beginning of transactions with financial services providers.

In the course of our work, we also witness and experience the various ways in which forced arbitration clauses are weaponized against consumers and the unjust results due to the lack of procedural protections, secrecy requirements, arbitrator bias, and limited appeal rights that make arbitration a significantly risky forum for harmed consumers. Institutions have even attempted to add forced arbitration in the middle of proceedings, and newer fintech entities have added even more burdensome arbitration requirements.⁵ In a lot of cases, consumers are simply unable to even go to arbitration due to the prohibitive costs and inconvenience of participating in an arbitration on an individual basis, which is a signature requirement of most arbitration provisions in financial services.⁶ Due to these difficult circumstances, consumers many times are unable to find legal counsel to help them seek accountability against the financial institutions that harmed them.

On behalf of consumers, we strive to vigorously enforce federal consumer financial protection laws that aim to protect individuals and families from the worst misconduct and abuses. We also rely on and enforce our state laws, some of which provide even stronger safeguards from financial abuses than federal protections. Due to the overwhelming pressure on, and limited resources of, public law enforcers, many of our federal and state statutes also contemplate private enforcement and afford specific relief for consumers who seek redress on their own with the help of their legal advocates.⁷ Regrettably, the ongoing use of forced arbitration clauses against consumers severely interferes with the proper enforcement of our consumer laws, virtually ensuring that entities that break the laws can escape accountability and deny our consumer-clients the justice they deserve. Forced arbitration also frustrates the development of consumer law in the courts. The Bureau has a clear public interest in following important legal questions presented in cases regarding the interpretation or application of consumer laws under its authority, particularly in cases that would create precedent that other courts will follow.⁸ Forced arbitration clauses thwart crucial opportunities to get important legal questions arising from these laws heard.

We strongly supported the Bureau's 2017 rulemaking which would have restricted class action waivers in forced arbitration clauses. The Bureau had concluded that very few consumers individually seek relief through pre-dispute forced arbitration and found that 75% of consumers did not know if they were subject to an arbitration clause.⁹ We were deeply disappointed by Congress' "disapproval" of the rule under the Congressional Review Act (CRA), which voided it.¹⁰ However, the CRA permits the Bureau to issue a new rule pursuant to certain conditions.

We urge the Bureau to grant the petition and promulgate a new rulemaking to ensure that consumers in the financial sector have meaningful choices over dispute resolution after a dispute arises.

⁴ See, also, Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, July 25, 2023, available at <https://ssrn.com/abstract=4521064>. (More than 99% of consumers who use popular products and services such as Netflix, Cash App, or Hulu, had no idea they are subject to forced arbitration).

⁵ See, e.g., *Story v. Heartland Payment Sys., LLC*, 461 F. Supp. 3d 1216, 1219 (M.D. Fla. 2020). See, also, *Comments of the National Association of Consumer Advocates and the UC Berkeley Center for Consumer Law and Economic Justice*, Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, Docket No. CFPB- 2023-0002, RIN 3170-AB14, April 2, 2023 ("For example, the terms and conditions for the fintech company Square (now Block) expressly require consumers to engage in an informal negotiation process with the company before initiating arbitration.")

⁶ CFPB Arbitration Study, Section 1.

⁷ See, e.g., 15 U.S.C. § 1640, 15 U.S.C. § 1679g, 15 U.S.C. § 1693m.

⁸ See, e.g. Consumer Financial Protection Bureau, Amicus Program, <https://www.consumerfinance.gov/compliance/amicus/>.

⁹ CFPB Arbitration Study, Section 3.

¹⁰ H.J.Res.111 - Providing for congressional disapproval under chapter 8 of title 5, U.S. Code, of the rule submitted by Bureau of Consumer Financial Protection relating to Arbitration Agreements, Nov 1, 2017.

Thank you for considering our views.

Sincerely,

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