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Comment Intake – 2024 NPRM Overdraft
c/o Legal Division Docket Manager
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Submitted via regulations.gov.

Comments of Eight Organizations Focused on Protecting Consumers on Docket No. CFPB-2024-0002; RIN 3170-AA42; Overdraft Lending: Very Large Financial Institutions

The undersigned organizations, representing the interests of millions of consumers, support the overdraft lending rule proposed by the Consumer Financial Protection Bureau ("CFPB"). We applaud the CFPB's continued commitment to create a stronger and fairer financial marketplace with rules to curb excessive junk fees, saving American families billions of dollars. This rule would close an outdated loophole that currently enables some of America's largest banks to avoid consumer financial protection laws, such as the Truth in Lending Act and interest rate disclosures. However, any proposed overdraft fee rule must be accompanied by a strong enforcement mechanism. In this regard, consumers and the public must be able to hold financial institutions accountable in public court for overdraft fee violations, and forced arbitration fine print traps should not be used as a get-out-of-jail-free card to avoid accountability for overdraft fee violations. The CFPB can and must continue to use their authority to rein in forced arbitration fine print traps, including the proposed overdraft fee rule.

As recently noted in another comment on forced arbitration filed by nearly 170 law professors, the Bureau is well within its authority to regulate forced arbitration, so long as a proposed rulemaking "is not substantially the same as the earlier regulation."[1] Professor David Vladeck notes, "[s]o long as the CFPB finds that mitigating the hardships caused by forced arbitration is in the 'public interest,' the CFPB is statutorily obligated to take action to protect consumers."[2] Without such protections in place, providers who break the law can simply continue hiding behind forced arbitration clauses to immunize illegal and abusive overdraft practices with no meaningful incentives to curb misconduct.

Forced arbitration fine print traps, slipped into take-it-or-leave-it terms and conditions, force upon consumers an opaque, secretive process that lacks transparency to the significant detriment of consumers. Consumers are more likely to be struck by lightning than win a

[1] Comments of Consumer Law Professors on Petition No. CFPB-2023-0047-0001; Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services, Nov. 14, 2023, at 6 ("Comment Letter"), https://fingfx.thomsonreuters.com/gfx/legaldocs/zgvorxbxypd/frankel-cfpbrule--lawprofletter.pdf.

[2] Comment Letter at 5, https://fingfx.thomsonreuters.com/gfx/legaldocs/lgpdlzkzzpo/frankel-cfbprule--vladeckcomment.pdf.

monetary award in forced arbitration,[3] and the outcomes are far worse for consumers of color, women, and low-income consumers.[4] Data from the American Arbitration Association (the world's largest private forced arbitration provider[5]) reveal that over a five-year period, from 2017-2021, only 237 out of 13,179 individuals won monetary awards against banks and other financial services providers, with a win rate of just 1.8%.[6] In 104 cases, it was the *consumer* who ended up being ordered to pay the bank,[7] and in those instances, consumers ended up paying an average of $24,000 each to the banks they had filed cases against.[8]

Many forced arbitration clauses also ban class and collective actions. Class action and collective action waivers stop consumers from being able to group similar cases together, a particularly useful tool for smaller dollar claims involving the same, repeat misconduct. In the context of overdraft and other smaller dollar disputes, it may not be economically feasible to bring individual cases, so retaining the ability to pool resources together and share legal representation is key to holding financial institutions accountable. Forced arbitration clauses coupled with class action and collective action waivers unfairly allow companies to retain the advantage of limiting group actions, by sending group actions that could otherwise be filed as class action suits, into individual forced arbitration. Simultaneously, it is almost impossible for consumers to bring individual arbitrations at any meaningful scale to deter widespread repeat misconduct.

The CFPB's own 2015 Arbitration Study confirms that forced arbitration significantly drives down settlement amounts stemming from overdraft fee violations *by over 50 percent*. A

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[3] The American Arbitration Association ("AAA") and JAMS (formerly known as Judicial Arbitration and Mediation Services Inc), two of the most dominant forced arbitration providers, recorded only approximately 30,000 consumer forced arbitrations over five years (2014-2018). This averages out to just 6,000 forced arbitrations per year, with only 1,909 consumers winning a monetary award over a five-year period – approximately 382 consumers each year, less than the number of people struck by lightning each year in the United States. *See* AM. ASS'N. FOR JUST., THE TRUTH ABOUT FORCED ARBITRATION 6 (2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration.

[4] Sydney A. Shapiro et al., Center for Progressive Reform, Private Courts, Biased Outcomes: The Adverse Impact of Forced Arbitration on People of Color, Women, Low-Income Americans, and Nursing Home Residents, Center for Progressive Reform (2022), https://progressivereform.org/publications/private-courts-biased-outcomes-forced-arbitration-rpt/.

[5] The AAA is the world's largest private global provider of arbitration, mediation and other ADR services, as reported on the organization's webpage at https://www.adr.org/.

[6] The forced arbitration win rate for consumers against banks and financial services providers was even lower than the already low 4.8%-win rate in forced arbitrations against all corporations. *See* AM. ASS'N FOR JUST., FORCED ARBITRATION AND BIG BANKS: WHEN CONSUMERS PAY TO BE RIPPED OFF (2022), https://www.justice.org/resources/research/forced-arbitration-big-banks.

[7] *Id.* at 2. These dire consumer outcomes also stop future complaints against businesses, as consumers see how unlikely and even risky it may be to initiate an arbitration against a financial services provider.

[8] *Id.*

survey of 18 overdraft fee related settlements covering 29 million class members[9] revealed that a consumer forced into arbitration ended up with less than half of the settlement amount compared to a consumer who settled a court-filed case.[10] The data showed that accountability among financial providers for engaging in predatory overdraft practices was inconsistent and lacking in many cases. Perhaps this is why the use of forced arbitration across all fields has skyrocketed, surging by 467% between 2021 and 2022, while consumer win rates plummeted.[11] Noted earlier, a consumer in 2021 was more likely to be struck by lightning than prevail in forced arbitration. One year later, that win rate was further slashed down by a factor of five to just 0.7%.[12]

This is due to the way forced arbitration is structured, with no transparency, and skewed towards corporate interests, since corporations have almost complete and total control over pre-determining the forced arbitration provider. And it is only corporations that have familiarity with arbitrators' records because of their repeat choice and use of the system.[13] Once selected, arbitrators often see the corporation as their client, even if they are supposed to be neutral.[14] For example, between 2014 and 2018, of the 1,064 cases handled by the 10 most frequently appearing JAMS arbitrators, only 51 (4.8%) resulted in a documented consumer victory.[15] Thirty-two of these consumer wins were handled by one arbitrator, and all but two of them involved payday lender CashCall, Inc. The other nine arbitrators handled around 102 cases each, ruling for consumers in less than three cases over five years.[16] The 10 most frequently used AAA arbitrators handled 712 cases, with

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[9] ARBITRATION STUDY, SECTION 8, TABLE 17, 41, CONSUMER FINANCIAL PROTECTION BUREAU (2015).

[10] ARBITRATION STUDY, SECTION 8, CONSUMER FINANCIAL PROTECTION BUREAU (2015). Section 8, titled "What is the value of class action settlements" surveyed several cases from *In Re Checking Account Overdraft Litigation,* MDL 2036, a proceeding that included cases filed in court and in arbitration. For banks that compelled arbitration, then settled, the average settlement per class member was $20.60 ($180,500,000 total settled for 8,759,500 class members), versus $58.12 for the average settlement that came from cases filed in court ($377,430,000 total settled for 6,493,837 class members).

[11] AM. ASS'N FOR JUST., FORCED ARBITRATION BY CORPORATIONS SURGES TO UNPRECEDENTED LEVELS 2-3 (2023), https://www.justice.org/resources/research/forced-arbitration-by-corporations-surges-to-unprecedented-levels.

[12] *Id.* at 3.

[13] Edmund Andrews, *Why the Binding Arbitration Game Is Rigged Against Customers,* STAN. GRAD. SCHOOL OF BUS., Mar. 8, 2019, *https://www.gsb.stanford.edu/insights/why-binding-arbitration-game-rigged-against-customers*.

[14] Jessica Silver-Greenberg and Michael Corkery. *In Arbitration, a 'Privatization of the Justice System*, N.Y. TIMES, Nov. 1, 2015, *https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html*.

[15] AM. ASS'N FOR JUST., THE TRUTH ABOUT FORCED ARBITRATION: AMERICANS ARE MORE LIKELY TO BE STRUCK BY LIGHTNING THAN WIN IN FORCED ARBITRATION 24 (2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration.

[16] *Id.* at 24.

consumers winning only 34 times in five years. And most of these consumer wins–28 out of 34–were handled by three AAA arbitrators. The most frequently used AAA arbitrator, a former insurance agent turned corporate defense attorney, handled 84 consumer forced arbitrations, claiming $6.8 million in damages. He ordered a consumer monetary award just once, for $1,682.[17]

Further, if arbitrators refuse to "play ball" with large corporations or corporate defense firms by refusing to change their rules to suit the preferences of the corporations mid-case, corporations can sue the forced arbitration provider. This ensures that any forced arbitration administrator that tries to operate fairly and impartially will find itself dragged into litigation with far better resourced opponents and encourages the emergence of forced arbitration administrators and arbitrators who will bow to any pressure companies impose on them simply to be able to operate without fear of litigation.[18] Worse, if a corporation doesn't like an arbitrator's decision, that corporation can simply remove a forced arbitration provider's designation from millions of consumer contracts and take its significant business elsewhere.

Once a consumer has gone through the process of forced arbitration, the proceedings and the findings are also secret, and private arbitrators often do not issue written, published decisions.[19] Because of this secrecy, companies that are repeat users of forced arbitration have a significant informational advantage. Over time, companies build up knowledge of the process and its outcomes, including decisional tendencies of specific forced arbitration providers, that they can use to their strategic benefit to insulate themselves from accountability. Patterns of repeat illegal actions are publicly visible through court filings and published opinions, and critical information related to misconduct can be uncovered through the civil discovery process, but companies can easily hide behind forced arbitration's secrecy, using it to perpetuate systemic and widespread harm and repeat misconduct.

To secure blanket immunity from even the theoretical possibility of ever being held accountable, corporations are now resorting to tactics that make it difficult to even initiate the process of forced arbitration. With no accountability or transparency, the unregulated system of forced arbitration fine print traps is trending towards eliminating even

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[17] The arbitrator awarded the consumer $7,960 but offset that with a $6,278 award to the defendant corporation. *Id.*

[18] *See Uber Techs., Inc. v. Am. Arb. Ass'n Inc.*, 204 A.D.3d 506, 510, 167 N.Y.S.3d 66 (2022) (court found in favor of AAA, when AAA issued an invoice asking Uber for $10.879 million in case management fees, noting, "[W]hile Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision.").

[19] *Examining Mandatory Arbitration in Financial Service Products: Hearing Before the Senate Committee on Banking, House and Urban Affairs* 117th Cong. 8 (2022) (statement of Myriam Gilles, Professor of Law at Benjamin N. Cardozo School of Law, Yeshiva University), *https://www.banking.senate.gov/imo/media/doc/Gilles%20Testimony%203-8-22.pdf*.

theoretically available relief for consumers. In the context of illegal overdraft fees, repeat offenders such as Wells Fargo have reportedly continued trying to avoid accountability through procedural tactics within the forced arbitration system.

Initially, Wells Fargo's forced arbitration clause included a class action waiver that also required customers to file forced arbitrations only on an individual basis. The bank promised to pay forced arbitration fees so long as customers paid their initial filing fees. However, when 3,000 customers who alleged they had been illegally charged surprise overdraft fees and tried to proceed in forced arbitration by paying those initial filing fees to begin the process, Wells Fargo *then* demanded that their preferred forced arbitration provider, AAA, adopt de facto class procedures to handle consumer cases.[20]

The bank proceeded to convince arbitrators to adopt a corporate wish list of procedural requirements frequently requested in court such as heightened pleading requirements, multiple dispositive motions, and drawn-out discovery disputes, without any of the benefits that their customers would have gotten in the court system, such as the ability to group cases together, or seek discovery into widespread corporate policies and practices.[21] Wells Fargo effectively halted all current and future cases by successfully imposing the new heightened pleading standard. Customers would now have to provide evidentiary proof before being allowed to proceed, while at the same time, Wells Fargo was allowed to withhold the information customers needed to satisfy the new heightened pleading standard.[22]

In North Carolina, Charlotte Metro Credit Union customers who tried to end abusive and deceptive overdraft fee practices were ultimately forced into arbitration *nearly a decade later*, even as North Carolina's Attorney General Josh Stein weighed in with the North Carolina Supreme Court, deeming these types of overdraft charges "unfair and deceptive." Instead of stopping these predatory charges, it was reported that Charlotte Metro Credit Union unilaterally changed its terms and conditions to include forced arbitration provisions, further immunizing itself from overcharge cases,[23] while insisting customers abide by new individual arbitration requirements since they were emailed new terms.[24] As North Carolina Attorney General Josh Stein noted, charging consumer overdraft fees "for purchases that they had enough money to cover when their payment was authorized is 'antithetical to the purpose of credit unions, detrimental to members, and inconsistent with

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[20] *See* Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration, *Mosley et al. v. Wells Fargo & Co. et al.*, No. 3:22-cv-01976-DMS-AGS (S.D. Cal. Mar. 3, 2023).

[21] *Id.*

[22] *Id.*

[23] Ryan Harroff, *NC AG Backs Consumers in Credit Union Arbitration Fight*, Law360, Aug. 18, 2023.

[24] Hayley Fowler, *Credit Union Tells NC Justices Arbitration Add-On Is Valid*, Law360, Oct. 20, 2023.

the credit union system's statutory mission of meeting the credit and savings needs of consumers, especially those of modest means.' "[25]

As these examples show, any proposed rulemaking to curb excessive overdraft fees must go hand in hand with a strong enforcement mechanism, including continued efforts to reign in forced arbitration fine print traps. For these reasons, the CFPB must continue to use its statutory authority to protect consumers by taking the "forced" out of forced arbitration and ensuring that arbitration is only allowed to proceed when it has been meaningfully and voluntarily chosen by a consumer, post-dispute. We urge the Bureau to act now to rein in forced arbitration in financial services and look forward to supporting the Bureau's efforts to protect consumers. Please do not hesitate to reach out to Christine Zinner at christine.zinner@justice.org, with any additional questions or concerns.

Sincerely,

American Association for Justice
Americans for Financial Reform Education Fund
Consumer Federation of America
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low-income clients)
National Consumers League
Public Citizen
Public Justice

[25] Brief for the State of North Carolina as Amicus Curiae in Support of Plaintiffs-Appellants, *Latoya Canteen et al. v. Charlotte Metro Credit Union,* No. 10A23 (S.C. of N.C. Aug. 16, 2023), *citing* Nat'l Credit Union Admin., *NCUA Chairman Todd M. Harper Remarks at the Indiana Credit Union League* (May 19, 2023).