



Consumer Federation of America

August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 205552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51 (forced arbitration clauses and class action waivers)

Consumer Federation of America (CFA) strongly supports the Consumer Financial Protection Bureau's (CFPB) proposed rule to strengthen consumers' rights to seek redress when they are harmed by a consumer financial services provider. The proposed rule would prohibit class action waivers in consumer finance contracts. It would also require companies to report information on individual arbitrations to the CFPB so that the agency can monitor the impact of arbitration on consumers and the fairness of the process.

Currently, forced arbitration clauses require consumers to waive their right to go to court if a dispute arises. The agreements typically require consumers to sign away both their right to pursue individual claims in court and their right to join in a class action brought by individuals who have been harmed in similar ways. These class action waivers prevent consumers who have been harmed on a systematic basis from joining together to seek remedies from the offending company—which is often the only method of obtaining redress. Instead, forced arbitration pushes consumers who have been harmed by a financial service provider's illegal practices, such as fraud, into an opaque, privately run, arbitration system.

While CFA believes more can and should be done to end forced arbitration entirely, this proposed rule is an important step toward restoring consumers' right to legal recourse. By restoring consumers' right to participate in class action lawsuits, it will help to ensure that defrauded consumers are made whole financially. Just as importantly, it will strongly encourage corporations to steer clear of fraudulent behavior as they know they can be held accountable in the courts. The reporting requirement will help to lay the foundation for further action to address forced arbitration in individual claims.

We urge the rule's speedy adoption without weakening any provisions.

The Utility of Class Actions

Class action lawsuits perform two key functions for consumers: 1) they allow consumers to recover relatively small amounts that would not otherwise be cost effective to pursue; and 2) they serve to deter unlawful behavior on the part of financial institutions.

As the result of its comprehensive arbitration study, the CFPB found that consumers are only bringing about 25 claims per year of \$1,000 or less.¹ It also found that consumers who won in arbitration only recouped an average of 12 cents per dollar claimed.² In contrast, the CFPB found that 34 million consumers were guaranteed recovery from financial class action settlements (largely in debt collection, checking/savings accounts, credit cards and credit reporting) from 2008 to 2012 with net relief (minus attorney’s fees and other costs) worth \$2.2 billion.³

While the money that goes to the individual consumer typically is small (\$2.2 billion divided by 34 million claimants, for instance, is only about \$64 each) the aggregate return of wealth to consumers is significant. It is obvious why corporations prefer arbitration—consumers aren’t using it.

And that’s because it isn’t realistic, fair, or effective to expect consumers to hold large corporations accountable one-by-one in arbitration over an illegal fee that might be only \$30. But that \$30 multiplied by millions of consumers is considerable. Only class actions give consumers the ability to join together to obtain relief and put corporations on notice that mistreating them is unacceptable.

Forced Arbitration Clauses and Class Action Waivers are Foisted on Consumers

While pre-dispute forced arbitration may be appropriate between sophisticated businesses that have equal bargaining power and enter into that agreement with open eyes, it is inappropriate in the realm of take-it-or-leave-it contracts between businesses and consumers. Consumers largely don’t understand the far-reaching implications of how these clauses restrict their options to access the courts if something goes wrong and there is no effective way to remedy that lack of understanding. Even if some consumers do understand how forced arbitration clauses impact their rights, and don’t want to assent to them, consumers are not in a position to bargain with businesses over them.

The CFPB’s exhaustive, congressionally mandated report on forced arbitration in consumer financial product contracts found that tens of millions of consumers use financial products with forced arbitration clauses⁴ and that consumer are not entering these contracts with open eyes:

- More than 75 percent of consumers surveyed did not know if their contracts contained forced arbitration clauses.⁵
- More than half of consumers surveyed whose credit card contracts included forced arbitration clauses did not know whether they could bring a suit in court.⁶

¹ Arbitration Study, Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015. Section 5, Pg. 10. http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

² Id. at Section 5, Pg. 13.

³ Id. at Section 8, Pgs. 3, 5, 24.

⁴ Id. at Section 1, Pgs. 9, 10.

⁵ Id. at Section 3, Pg. 23.

⁶ Id at Section 3, Pg. 3.

- Less than 7% of consumers with forced arbitration clauses stated that they could not bring their credit card company to court.⁷
- More than half of respondents whose agreements included forced arbitration clauses believed they could participate in class actions—given the prevalence of class action waivers they “were largely mistaken.”⁸

Consumers are being denied access to the courts and the proposed rule will go a long way to rectifying that.

Corporations Maintain Court Access for Themselves When it is in Their Interest

While financial product providers force consumers to arbitrate when it serves their interests, they do maintain access to small claims courts as an avenue to pursue debt collection actions—though of course this is done for their advantage not the consumer’s. The CFPB reviewed small claims filings by and against ten large credit card issuers in 2012 from jurisdictions with a combined population of 85 million.⁹ In those jurisdictions, consumers filed fewer than 870 small claims against the issuers¹⁰ while credit card issuer suits against individuals numbered over 41,000.¹¹ The CFPB noted that “substantially all” of these suits were likely debt collection cases.¹²

These statistics show that not only do small claims carve outs in forced arbitration clauses not act as an avenue for consumers to pursue small-dollar claims in the absence of class-actions, but that in reality they serve as a way for companies to sue consumers. Forced arbitration clauses, as they stand, offer access to the courts only where it is in the corporate interest for the parties to have access to the courts.

The Financial Industry Regulatory Authority Already Forbids Class Action Waivers

The CFPB proposal mirrors the approach taken in the securities markets. Financial Industry Regulatory Authority (FINRA), which is an industry self-regulatory organization for broker-dealers, allows forced arbitration clauses in brokerage contracts¹³ but does not allow those agreements to contain class action waivers.¹⁴ The history of FINRA Rule 12204(d), which

⁷ Id.

⁸ Id. at Section 3, Pg. 23.

⁹ Id. at Section 1. Pgs. 8, 15. Section 7. Pg. 2.

¹⁰ Id. at Section 7. Pg. 9.

¹¹ Id. at Section 7. Pg. 11, Table 1.

¹² Id. at Section 1. Pg. 16.

¹³ FINRA Rule 12200. Arbitration Under an Arbitration Agreement or the Rules of FINRA.

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106

¹⁴ In *Department of Enforcement v. Schwab*, the Board of Governors explained that Schwab’s inclusion of a class action waiver in its forced arbitration agreement “violated FINRA Rules 2268(d)(1) and (d)(3), and Rule 12204 of the Customer Code.” *Department of Enforcement v. Schwab*, Complaint No. 2011029760201, 2014. Pg. 15.

<https://www.finra.org/sites/default/files/NACDecision/p496824.pdf> FINRA Rule 2268. Requirements When Using Predispute Arbitration Agreements for Customer Accounts.

http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9955 Section (d) states that “No predispute arbitration agreement shall include any condition that: (1) limits or contradicts the rules of any self-regulatory organization” or “(3) limits the ability of a party to file any claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement.” Rule 12204 of the Customer Code. http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4110 Section (d) of 12204

forbids enforcing an arbitration agreement against a member of a class action, shows that this was a deliberate policy decision made to ensure that “investor access to the courts should be preserved for class actions.”¹⁵ The 2014 FINRA Board of Governors decision, *Department of Enforcement v. Charles Schwab*, found that class action waivers violated FINRA rules.

Since 1992 FINRA has had rules ensuring that investors can join together in class actions to fairly and efficiently have their disputes heard by the courts. Consumers of more mass market financial products should have the same right.

Other Agencies are also Working to Limit Forced Arbitration

There is a growing recognition among policy makers that forced arbitration is detrimental to consumers. Forced arbitration agreements and class action bans are already prohibited in most financial service contracts with members of the military¹⁶ and in home loans and lines of credit.¹⁷ Two other agencies are also looking at rules to limit forced arbitration clause use. The Centers for Medicare and Medicaid Services is considering a rule that would prohibit admission to a facility to be contingent upon signing a forced arbitration clause in long-term care facility contracts,¹⁸ and the Department of Education has proposed rules to eliminate forced arbitration clauses and class action waivers in certain instances.¹⁹

While none of these proposals completely protects consumers by totally eliminating forced arbitration clauses and class waivers (which we believe is necessary and should be the goal), they do show that a variety of policy makers recognize that it is in the public interest to limit the use of forced arbitration clauses and class action waivers. Forced arbitration clauses are not being used to keep consumers out of court in just one economic sector but across the entire economy, and it will take concerted action by policymakers, including at the CFPB, to restore consumer access to the courts.

makes clear that a company “may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.”

¹⁵ *Department of Enforcement v. Schwab*, Complaint No. 2011029760201, 2014. Pg. 15.

<https://www.finra.org/sites/default/files/NACDecision/p496824.pdf> Citing October 1992 Approval Order, 1992 SEC LEXIS 2767, at *8-9.

¹⁶ 10 U.S. Code § 987 – Terms of consumer credit extended to members and dependents: limitations

<https://www.law.cornell.edu/uscode/text/10/987>

¹⁷ 2 CFR 1026.36 – Prohibited acts or practices and certain requirements for credit secured by a dwelling

<https://www.law.cornell.edu/cfr/text/12/1026.36>

¹⁸ Medicare and Medicaid Programs, Proposed Rule, Reform of Requirements for Long-Term Care Facilities, §483.70. <https://federalregister.gov/a/2015-17207>

¹⁹ Department of Education, Proposed Rule, ED-2015-OPE-0103, § 685.300 Agreements between an eligible school and the Secretary for participation in the Direct Loan Program.

<https://www.federalregister.gov/articles/2016/06/16/2016-14052/student-assistance-general-provisions-federal-perkins-loan-program-federal-family-education-loan#citation-60>

We Support the Proposed Rule but Believe there is Room for Improvement

- **The Rule Should Apply to Amended Agreements:** If a company amends an agreement that was entered into before this rule takes effect, the prohibition against class waivers should be triggered upon that amendment.
- **Reporting of Arbitration Agreements Should be Expanded:** All financial product providers supervised by the CFPB should be required to submit all of their arbitration agreements whether or not they are currently involved in a dispute filed in arbitration. Knowing exactly what terms are being used, including terms that may have a chilling effect on consumers' pursuing arbitration at all, will help the CFPB understand what future action on forced arbitration may be needed.
- **An Early Trigger for Reporting Individual Arbitrations Should be Adopted:** Reporting individual arbitrations should be required any time a financial product provider relies on an arbitration clause (such as a motion to dismiss) not just once a claim is filed in arbitration. This will provide the CFPB with valuable information about how consumers react to being denied access to the courts.
- **The CFPB Should Prohibit all Forced Arbitration Clauses:** While prohibiting class action waivers will go a long way towards restoring consumer access to the courts (especially for small dollar claims), it is in the public interest to allow individuals to access the court system if they feel that best serves their interest.
- **Credit Reporting and the Companies that Furnish the Information:** A large number of consumer complaints to the CFPB are about the credit reporting companies and so they, as well as the companies that furnish their data, should be fully covered by the rule.²⁰

The Proposed Rule is in the Public Interest and We Urge Swift Adoption

The use of forced arbitration clauses has created a closed system where corporations allow court access only when it's in their interest, where it is functionally impossible for consumers to recover small dollar amounts they are due under law, and where the deterrent effect of class actions has been lost.

It is in the public interest to rectify this situation and level the playing field by giving consumers back their right to access the court system. Beyond being in the public interest, it is also practical and feasible. FINRA has guaranteed the right of investors to join together in class actions to hold investment houses accountable since the early 90s. There is no reason consumer financial companies cannot do the same.

²⁰ See Consumer Financial Protection Bureau Monthly Complaint Snapshot Spotlights Credit Card Complaints, July 26, 2016. "The top three companies that received the most complaints from February through April 2016 were credit reporting companies Equifax, Experian, and TransUnion." <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-monthly-complaint-snapshot-spotlights-credit-card-complaints/>

Thank you for your consideration of these comments. Please don't hesitate to contact us with any questions.

Sincerely,

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