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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

Dear Ms. Jackson:

The Center for Responsible Lending (CRL)¹ submits this comment in response to the Consumer Financial Protection Bureau's (CFPB) proposed rule on arbitration. Thank you for the opportunity to comment.

I. Introduction

CRL strongly supports the CFPB's proposed rule to limit pre-dispute mandatory (forced) arbitration clauses in consumer finance contracts. Forced arbitration is a widespread issue affecting a plethora of financial products and services; it impacts the consumers CRL advocates for and implicates CRL's mission to eliminate abusive financial practices. CRL applauds the CFPB for its efforts to restore consumers' ability to band together to protect their rights in class actions as well as increase transparency in the use of forced arbitration in individual cases.

Although the proposed rule is strong, CRL offers the following recommendations for improving the final rule:

- Prohibit forced individual arbitration;
- Require reporting on all uses of forced arbitration (not only where there is an arbitration proceeding);
- Expand the reporting requirements to require all institutions supervised by the CFPB to disclose their arbitration clauses;
- Apply the final rule to contracts and existing arbitration clauses that are modified after the date the rule goes into effect; and
- Expand the rule's coverage to more financial products and services.

¹ The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Self-Help has provided \$6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago.

II. The CFPB's Proposed Rule is Essential to Protect Consumers From the Documented Harms of Forced Arbitration

Forced arbitration clauses permit companies to operate without fear of serious recourse. In effect, these clauses allow a company to “opt-out” of consumer protections by avoiding the remedies provided in consumer protection laws. Forced arbitration shrouds companies’ practices in secrecy and thwarts discovery of evidence to prove corporate wrongdoing. A company can covertly and more easily settle an individual case; the public may never receive information of potentially unlawful acts. The risk of damages and reputational harm from a class action helps deter wrongdoing in the first place. In addition, the public nature of a class action signals wrongdoing to other consumers who may have also been harmed. This is essential, as many consumer cases involve small dollar damages in which it is unaffordable for a consumer to bring a case individually. Class action lawsuits are essential to root out wrongdoing that would otherwise never see the light of day.

Indeed, the CFPB’s comprehensive arbitration study shed a bright light on the many problems with forced arbitration in consumer finance products.² The CFPB’s study provided numerous key findings, including in 2010 and 2011, only 9% of consumers who brought affirmative claims obtained relief in forced arbitration – recovering an average of 12 cents per dollar claimed. In contrast, 93% of companies obtained relief in forced arbitration – recovering an average of 98 cents per dollar claimed. Without the option to join together in a class action, only 25 consumers with claims of less than \$1,000 pursued arbitration annually. In contrast, consumers received \$2.7 billion of gross relief in class actions from 2008-2012 – \$2.2 billion of which went straight to consumers after attorneys’ fees and litigation costs – with 34 million consumers receiving a cash payment. The data from the CFPB’s study makes clear that the Bureau’s actions to limit forced arbitration is proper and necessary to protect consumers in the financial marketplace.

Forced arbitration perpetuates the already existing inequities between consumers and the financial institutions they rely on for services. Most consumers do not realize that the adhesion contracts they sign for essential financial products come with buried clauses that require the consumer to use arbitration rather than the courts if a complaint arises. Arbitration clauses are complex, typically hidden in the dense fine print of a contract, and difficult for consumers to comprehend. The CFPB’s study revealed that 75 percent of consumers surveyed did not know whether they were subject to forced arbitration in consumer finance contracts, and fewer than 7 percent of those covered by arbitration clauses realized the clauses restricted their ability to sue in court. In addition, research from CRL and other consumer advocacy organizations shows that arbitration is a stacked deck that favors financial institutions at the expense of consumers.³ The financial institution generally selects and compensates the arbitration provider, giving the arbitrator a strong incentive to find for the entity that controls the flow of business, rather than a consumer who they may only see once.

² Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a).

³ Joshua M. Frank, *Stacked Deck: A Statistical Analysis of Forced Arbitration*, Center for Responsible Lending, May 2009, available at http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

Public policy generally recognizes that arbitration clauses are problematic for borrowers. For instance, following the 2008 financial crisis, Congress entirely prohibited arbitration clauses in home loans and the CFPB issued a rule implementing the prohibition.⁴ Prior to these reforms, mortgage borrowers were forced into arbitration and deprived of valuable legal protections, while unscrupulous lenders imposed unfair or abusive loan terms on borrowers and operated in secrecy.⁵ As noted above, data suggests that arbitration forums favor industry, as the financial institutions are repeat customers.⁶ The restoration of mortgage borrowers' legal rights has enabled borrowers to join class actions that have addressed systemic and widespread unlawful conduct, as well as provided homeowners with injunctive remedies, preventing more predatory practices. CRL believes that all consumers should be able to band together and assert their legal rights regarding unfair consumer finance practices, the same way homeowners can.

CRL also supports the reporting requirements in the proposed rule. As arbitration case records are typically not publicly available, consumers have little ability to determine the fairness of an arbitration forum. The reporting requirements will bring important transparency and accountability to the arbitration system.

Critics of the CFPB's proposal contend that it will result in frivolous class actions and a windfall for trial attorneys. We believe this assertion is a red herring. The Federal Rules of Civil Procedure already provide mechanisms for courts to dismiss frivolous claims prior to discovery. The more serious issue is the hurdles consumers face when their rights have been violated. Consumer protection law requires meaningful enforcement provisions as a deterrent to unfair and deceptive lending practices.

III. The Proposed Rule Should Be Improved to Provide More Robust Consumer Protections

While the proposed rule is strong, we encourage the CFPB to provide additional consumer protections in key parts of the rule. First, we urge the CFPB to prohibit forced individual arbitration in addition to prohibiting class action bans. Individual access to justice is key. Consumers should be permitted to their day in court without necessarily joining a class action.

Furthermore, companies should report on all uses of forced arbitration, not only cases in which there is an arbitration proceeding. The CFPB must be able to track cases where the consumer declines to pursue a claim after being blocked from the court system.

We also encourage the CFPB to expand the reporting requirements to require all institutions supervised by the CFPB to disclose their arbitration clauses. Review of the terms will help the CFPB understand the full impact of these clauses and arbitration practices.

⁴ 12 C.F.R. § 1026.36(h). In addition, as early as 2004, Fannie Mae and Freddie Mac established a policy to no longer invest in mortgage loans with forced arbitration clauses. As a result, conventional mortgage tended to not include these clauses.

⁵ See, e.g., *Anders v. Hometown Mortg. Services, Inc.*, 346 F.3d 1024 (11th Cir. 2003) (compelling arbitration on TILA and RESPA claims); Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 Banking L.J. 483 nn.86-94 and accompanying text (2005) (detailing harms caused by mandatory mortgage arbitration).

⁶ See *supra* note 3.

In addition, it is important for the rule to apply to contracts and existing arbitration clauses that are modified, amended, or renewed after the final rule takes effect. As recent research shows, over the last four years, the share of 29 big banks that use forced arbitration clauses in their contracts has increased to 72 percent from 59 percent.⁷ Credit cards and bank accounts that are entered into before the compliance date should not be exempt from the rule for decades while banks claim the right to alter those contracts unilaterally into the future, including changing pricing. A typical way for consumers to “opt-out” of the change in contract is to close the account. However, it is unfair to require consumers to close their account in order to obtain a remedy. Plus, consumers will have a difficult time locating a lender that does not insert forced arbitration clauses in its contracts.

Lastly, the scope of the rule is critical because it determines which financial products and services can be the subject of a class action and which providers must report data regarding their individual arbitrations. Consumers should expect the same legal rights to apply across financial products. We urge the CFPB to close gaps by including more activities and products in the scope of the rule’s coverage. The rule should apply to mortgage settlement services; all consumer leases; all lead generators connected to a financial product or service; personal financial management and product advice websites and apps that aggregate or access personal information from consumer financial accounts or other data; all credit reporting activities; identity theft prevention products; general-use prepaid gift, loyalty, award or promotional cards; EBT cards and prepaid cards used for needs-tested benefits; and payment processing by third party payment processors and financial institutions that do not directly accept data from or interact with the consumer. Expanding the rule’s coverage to include all credit reporting activities is particularly important, as the credit bureaus are regularly the top subject of complaints to the CFPB.

We appreciate the CFPB’s efforts to protect consumers from forced arbitration and for the opportunity to comment.

Sincerely,

Center for Responsible Lending

⁷ The Pew Charitable Trusts, *Consumers Want the Right to Resolve Bank Disputes in Court* (Aug. 2016), available at <http://www.pewtrusts.org/~media/assets/2016/08/consumerswanttherighttoresolvebankdisputesincourt.pdf>.