

Dear Members of Congress:

The undersigned trade associations representing thousands of banks, credit unions, financial institutions, and businesses of all sizes that serve America's consumers write to express our strong disapproval of the Consumer Financial Protection Bureau's (CFPB) final rule to restrict the use of arbitration agreements. We thank Senator Mike Crapo (R-ID) and Representative Keith Rothfus (R-PA) for introducing resolutions (S.J. Res. 47/ H.J. Res. 111) to repeal this rule under the authority provided by the Congressional Review Act (CRA) and we urge Congress's immediate approval of these resolutions.

The CFPB's rule severely undermines the ability of our organizations to continue to offer this convenient, simple, and efficient dispute resolution process to our customers. We are particularly troubled by the CFPB's willingness to ignore clear directions from Congress set out in Section 1028 of the Dodd-Frank Act when it produced an incomplete Arbitration Study¹ and issued a final rule inconsistent with its own findings, contrary to the public interest, and at odds with consumer protection. The Bureau's own examination of arbitration found it to be a faster, more cost-effective, and higher recovery alternative to class action litigation in resolving consumer disputes.

In summary:

- The CFPB's Study is incomplete and its findings fail to support the final rule.
- The rule is contrary to the public interest and fails to enhance consumer protection as required by law.
- The rule harms the consumers it purports to help, instead enriching trial attorneys at their expense.

The CFPB's Arbitration Study is Incomplete

Although the CFPB's Study is possibly the broadest study ever conducted on the use of arbitration agreements in the consumer financial markets, it falls short on several key issues for one to consider the report a complete, balanced, and unbiased overview of arbitration. Several of our organizations brought these issues to the Bureau's attention shortly after the release of its Study,² but they remain unresolved to this day. These shortcomings include the lack of:

- A thorough examination of the arbitration process and an assessment of consumer satisfaction with the experience.
- A calculation of the average and median cash recoveries for individual class members in class action settlements. The Study only provides figures for class-wide recoveries, which masks actual recoveries for individual plaintiffs in the class.
- The economic consequences to consumers, companies, and taxpayers if arbitration is no longer available to settle disputes.
- The benefits of providing consumers with more education and information about arbitration and class action lawsuits.

¹ CFPB, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (Mar. 2015), available at <https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/> [hereinafter, "Study"].

² Consumer Bankers Association, American Bankers Association, and Financial Services Roundtable, Comments on the Bureau's Consumer Arbitration Study (July 13, 2015), at <http://consumerbankers.com/cba-issues/comment-letters/joint-trades-consumer-arbitration-study-comment-letter>.

- The effect of the CFPB’s complaint database on reducing unresolved consumer dispute volumes.
- The effect CFPB enforcement and supervisory actions have had on compliance with federal consumer financial laws.
- An examination of the potential elimination of beneficial products and services from the marketplace due to the inability to mitigate class action risk under certain statutes.

The CFPB’s Arbitration Rule is Inconsistent with its Arbitration Study

Notwithstanding the incomplete nature of the Study, the accumulated data and the conclusions drawn provide no foundation for imposing new restrictions or prohibitions on arbitration agreements. Indeed, the Study’s data clearly show arbitration is faster and more cost-effective, and provides consumers a higher recovery dispute resolution process when compared to class action lawsuits:

- Arbitration is up to 12 times faster than litigation in providing consumers with a resolution to their dispute. Disputes in arbitration were generally resolved in 2-8 months,³ while a class action lawsuit averaged about 1 year for completion (and frequently over 2 years).⁴
- Arbitration provides 166 times more in recovery, as consumers obtained an average of \$5,389 in arbitration versus \$32.35 in class actions.⁵
- Over 60 percent of class actions resulted in no relief for putative class members, as these cases were either settled individually or withdrawn by the plaintiff.⁶ In addition, only 12 percent of class actions even obtained a final *class* settlement.⁷
- About one-third of arbitrations resulted in a decision on the merits, while class actions rarely receive a final verdict.⁸

The CFPB’s Arbitration Rule is Contrary to the Public Interest

In light of the substantial strengths and benefits of arbitration over class action lawsuits as an effective dispute resolution process, it is clear the promotion of class actions would not be in the public interest. Indeed, the Bureau’s own findings in the final rule only serve to reinforce this conclusion:

- The final arbitration rule is expected to expose an additional 53,000 consumer financial products and services providers (“providers”) to class action litigation.⁹
- The CFPB estimates an additional 1,208 class action lawsuits filed against providers each year, at an estimated total cost of over \$1 billion. This estimate includes 604 additional federal class

³ Study, § 1, 13; § 5, pp. 71-3.

⁴ Study, § 1, p. 14; § 6, pp.9, 42-46.

⁵ Study, § 5, pp. 13, 41.

⁶ Study, § 1, pp. 13-14; § 6, p. 37.

⁷ CFPB, Proposed Rule, Arbitration Agreements, 81 Fed. Reg. 32830, 32847, 32908 n. 604 (May 24, 2016), at <https://www.gpo.gov/fdsys/pkg/FR-2016-05-24/pdf/2016-10961.pdf> [hereinafter “Proposed Rule”].

⁸ Study, § 5, p. 11; § 6, pp. 7, 37-39.

⁹ CFPB, Final Rule, Arbitration Agreements, at 665 (July 10, 2017), available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_Arbitration-Agreements-Rule.pdf.

action lawsuits per year and \$523 million in settlement costs, defense costs, and trial attorneys' fees.¹⁰ It also includes an equal number of new state class action suits.¹¹

- According to the CFPB, the rise in litigation costs will be passed through to consumers, either through higher prices or reduced quality of products or services, although the Bureau is uncertain as to the magnitude of the effect.¹²

The CFPB's Arbitration Rule Fails to Enhance Consumer Protection

The CFPB's inability to present a strong argument for why favoring class actions over arbitration is in the public interest is echoed with regard to consumer protection. The Bureau provides little, if any, credible evidence to suggest consumer protection would be enhanced by the issuance of this rule. Indeed, the CFPB actually avoids addressing this issue:

- The CFPB's Study generally ignores the Bureau's own effect on the industry's compliance with federal consumer financial laws. The Study examined the enforcement activity of state and federal agencies between January 1, 2008 and December 31, 2012,¹³ but selecting this period glosses over the growing volume and impact of the Bureau's own enforcement activities since 2012. Over the course of its six year existence, CFPB claims its enforcement actions have resulted in \$11.8 billion in relief for over 29 million consumers – or about \$407 per consumer.¹⁴ Yet, remarkably, it failed to consider the impact of its own actions on industry's compliance with consumer protection laws from 2012.
- The Bureau did not consider other alternatives to promoting class action lawsuits that may have provided a more significant consumer protection benefit. One of the Study's most significant findings was that consumers are generally unaware or ill-informed about arbitration. The logical conclusion would be to educate and inform consumers. In fact, the small businesses that participated in the small entity review process recommended that the Bureau educate consumers about arbitration *and* consider a number of specific improvements to arbitration to make it more consumer-friendly.¹⁵
- The CFPB's promotion of class action lawsuits discounts the important consumer protection benefits of individualized remedies. Many of the federal consumer protection laws offer statutory damages that greatly exceed the average class action recovery. The Truth in Lending Act, for example, provides a prevailing plaintiff with \$200 to \$5,000 (depending on the type of account) per violation. Members of class actions do not benefit from those statutory damage awards. Furthermore, certain consumer claims for relief cannot be joined in a class action as they do not meet the requirements outlined in the Federal Rules of Civil Procedure. Their only alternative now is to go to court, which is time-consuming and can be stressful and intimidating. It is these consumers who will be harmed the most by the CFPB's arbitration rule.

¹⁰ *Id.* at 671.

¹¹ *Id.* at 666.

¹² *Id.* at 681.

¹³ Study, § 9, p. 9.

¹⁴ The CFPB's homepage provides quarterly data on relief obtained for consumers as a result of Bureau enforcement actions. See <https://www.consumerfinance.gov/> (last visited July 12, 2017).

¹⁵ Final Report of the Small Business Review Panel on the CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements, at 36 (Dec. 11, 2015) available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf.

The CFPB Rule Enriches Trial Attorneys at Consumers' Expense

The CFPB's final arbitration rule should be disapproved and invalidated for failing to meet the statutory requirements set out in Section 1028, but the Bureau should also be criticized for putting the interests of trial attorneys ahead of consumers.

- Trial attorneys can expect a windfall from the final arbitration rule. In the 12% of class action suits where they obtain any award, consumers average \$32 in recoveries and their attorneys receive \$1 million per case.¹⁶ Trial attorneys take on average 21 percent (and sometimes up to 63 percent) of all class recoveries.¹⁷
- The CFPB estimates an additional 1,208 new class action lawsuits per year attributable to the new arbitration rule, which will produce \$132 million in attorney fees.¹⁸

Conclusion

For the reasons outlined above, the undersigned trade organizations urge Congress to swiftly exercise its oversight authority under the CRA to disapprove of the CFPB's final arbitration rule. Arbitration can ensure that consumers receive faster, more cost-effective, and higher recovery resolutions than offered by class action litigation favored by trial attorneys, and it will be harmful to them if this dispute resolution process is eliminated.

Sincerely,

American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Data Industry Association
Credit Union National Association
Electronic Transactions Association
Financial Services Roundtable
Mid-Size Bank Coalition of America
National Association of Federally-Insured Credit Unions
Network Branded Prepaid Card Association
U.S. Chamber of Commerce

¹⁶ Study, § 8, p. 33.

¹⁷ *Id.*

¹⁸ The CFPB estimates 604 additional federal class action lawsuits per year, which would result in about \$342 million in class settlements and \$66 million in plaintiff's attorneys' fees. The CFPB also estimates an equal number of new state class action lawsuits. Therefore, we can expect a total of 1,208 new class action suits, \$684 million in class settlements and \$132 million in attorney fees.