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GENERAL ASSEMBLY
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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: Arbitration Agreements—Proposed Rule; Docket No. CFPB-2016-0020 or RIN 3170-AA51

We write in strong support of the proposed regulation, which would preserve consumers' ability to band together to protect their rights in class actions. For many years, payday lenders, credit card companies, banks, auto lenders, debt collectors, and many other providers of financial products and services have used so-called "arbitration" clauses to deprive their consumers of the right to participate in class actions against these companies. The proposed rule would represent an important step in restoring fairness to the marketplace.

By law, the CFPB's regulation must be "in the public interest and for the protection of consumers." 12 U.S.C. § 5518(b). In deciding whether its proposed rule is consistent with that mandate, we encourage you to consider our perspective as twenty-seven state legislators from fourteen states. In particular, we urge you to take into account how the proliferation of forced arbitration agreements has not only harmed consumers of financial products and services but has also undermined states' rights. Prohibiting lenders and other financial services companies from banning class actions through the use of arbitration clauses in contracts for consumer financial products and services is critical to restoring a healthy and vibrant federalism with respect to regulation of consumer financial products.

As your March 2015 report on forced arbitration concludes, forced arbitration clauses—particularly those that require consumers to arbitrate their claims on an individual basis without the benefit of class, collective, or other representative proceedings—don't create an alternative forum for resolving disputes. They prevent consumers from bringing their claims in ***any*** forum. Whether it be because litigation is expensive, time consuming, or intimidating (or some combination of the above), individual consumers are unlikely to enforce their rights alone.[1] And they are particularly unlikely to do so when their individual monetary harm is relatively small.[2]

[1] Bureau of Consumer Fin. Protection, Arbitration Agreements, 81 FR 32830-01 (proposed May 24, 2016) (to be codified at 12 C.F.R. at 1040) ("NPRM"), *available at* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf, at 95 ("The Study showed that consumers rarely pursue individual claims against their companies, based on its

In practice, then, arbitration agreements and class waivers undermine the enforcement of consumer protection laws through the private cause of action. Because the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, applies in both state and federal court and applies to both state and federal claims, class waivers have the effect of squelching not only federal claims but also state claims, including (perhaps most importantly) claims under the state consumer protection statutes that prohibit unfair and deceptive acts and practices against consumers.[3]

Your Notice of Proposed Rulemaking (NPRM) is sensitive to the central role that private enforcement has in giving effect to consumer protection laws. Unless consumers can sue to enforce their rights, the enforcement of consumer protection laws must fall to under-resourced public enforcement agencies. For example, you point out that your own Bureau has only about 1,500 employees.[4] But the figures are even more dire at the state level. Because of these resource limitations, states rely on the private cause of action to give effect to their consumer protection laws. Arbitration agreements that undermine the effectiveness of the private cause of action undermine the force and effectiveness of state consumer protection law too.

In this way, the proliferation of forced arbitration agreements places states in an impossible bind. We do not have the resources to provide anywhere near the amount of public enforcement necessary to offset the spread of forced arbitration agreements. By way of example, according to your March 2015 study, over 80 percent of storefront payday lending contracts contain arbitration requirements, and the vast majority of those require arbitration on an individual basis.[5] This means that most of the victims of predatory payday loans cannot band together in a class action to prosecute claims under the robust and diverse state-level rules regulating payday lenders.[6] To police wrongdoing in the payday lending market without the benefit of effective private enforcement, states would have to dedicated significantly more money to public enforcement—that's money we don't have.

On the other hand, without significantly increasing our public enforcement budgets, we're left to watch as arbitration agreements effectively force some of our state-level consumer protections into dormancy. That has immediate and apparent harms for consumers. After all, state consumer regulation is a necessary component of American consumer protection law,[7] and consumers lose an important tool in their fight against unfair practices without the full protection of state law.

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survey of the frequency of consumer claims, collectively across venues, in Federal courts, small claims courts, and arbitration.").

[2] Of 1000 respondents to a CFPB study of credit card consumers, only 2.1 percent said they would seek legal advice or consider legal proceedings if their credit card provider charged them a fee they knew to be wrong. NPRM at 48.

[3] NPRM at 28. By contrast to state consumer protection laws, the federal FTC Act does not provide a private cause of action. *Id.*

[4] NPRM at 113.

[5] NPRM at 42.

[6] National Conference of State Legislatures, Payday Lending Laws, Jan. 14, 2015, *available at* http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx.

[7] Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 16 (2005) ("In the 'heyday of consumerism,' the FTC urged states to adopt their own little-FTC Acts as a way of combining resources to target unfair and deceptive practices at both the local and national levels.").

But undercutting the enforcement of state consumer protection law also has broader systematic effects that are frequently not addressed in discussions about forced arbitration. States often serve as the "laboratories of democracy" that allow for experimentation with consumer protection regulation.[8] This experimentation is critical to the calibration of a regulatory scheme that allows for easy access to safe and affordable credit. When consumers cannot enforce state consumer protection laws, lawmakers like us cannot measure the efficacy of those laws and cannot observe the effects of those laws as they evolve through litigation. That stifles the healthy development of consumer protection laws nationwide.

Your proposed rule represents a significant step in resolving this conundrum. The Dodd-Frank Act requires you to examine the "public interest" in promulgating a regulation of forced arbitration agreements in products within your jurisdiction. Preserving the strengths of our system of federalism is one more reason why the CFPB should adopt the proposed rule.

Yours truly,

Rep. Matthew Lesser, Connecticut

Rep. Beth McCann, Colorado

Rep. Susan Lontine, Colorado

Sen. John Kefalas, Colorado

Rep. Hilda Santiago, Connecticut

Rep. James Albis, Connecticut

Rep. Joe Aresimowicz, House Majority Leader, Connecticut

Rep. Roland Lemar, Connecticut

Sen. Gary Winfield, Connecticut

Sen. Mae Flexer, Connecticut

Rep. Liz Bennett, Iowa

[8] Carolyn Carter, Nat'l Consumer Law Center, *Consumer Protection in the States*, February 2009, *available at* https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

Rep. Barbara Flynn Currie, Illinois

Sen. Jacqueline Y. Collins, Illinois

Sen. Daniel Biss, Illinois

Rep. Sean Garbelley, Massachusetts

Delegate Andrew Platt, Maryland

Rep. Jon Hoadley, Michigan

Rep. Aaron Regunberg, Rhode Island

Rep. Arthur Handy, Rhode Island

Rep. Teresa Tanzi, Rhode Island

Rep. John Ray Clemmons, Tennessee

Rep. Kesha Ram, Vermont

Sen. Chris Larson, Wisconsin

Assemblyman Jeffrey Dinowitz, New York

Assemblywoman Helene Weinstein, New York

Rep. Dan Ramos, Ohio

Sen. Dwight Bullard, Florida