
Docket No. CFPB-2016-0020

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

**CONSUMER FINANCIAL
PROTECTION BUREAU**

Concerning

***PROPOSED RULE TO PROHIBIT ARBITRATION AGREEMENTS
THAT BAR CONSUMERS OF FINANCIAL PRODUCTS
FROM SEEKING RESOLUTION OF FUTURE DISPUTES
IN A FEDERAL OR STATE-COURT CLASS ACTION***

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT 81 FED. REG. 32830 (May 24, 2016)

Richard A. Samp
Mark S. Chenoweth
John Easter
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

August 19, 2016

WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
202-588-0302

August 19, 2016

Submitted Electronically (<http://www.regulations.gov>)

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Proposed Rule to Prohibit Arbitration Agreements that Bar Consumers of Financial Products from Seeking Resolution of Future Disputes in a Federal or State-Court Class Action
Docket No. CFPB-2016-0020
81 Fed. Reg. 32830 (May 24, 2016)

Dear Ms. Jackson:

Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the Consumer Financial Protection Bureau (CFPB or “the Bureau”) regarding its proposed rule that would govern two aspects of consumer finance-related dispute resolution. WLF’s comments focus on the severe limitations that the proposed rule would impose on the rights of private parties to enter into binding arbitration contracts. WLF does not address the proposal regarding the submission of specified arbitration records to CFPB.

Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518, authorized CFPB to: (1) undertake a study of the use of agreements providing for arbitration of future disputes in connection with the offering or providing of “consumer financial products or services”; and (2) “prohibit or impose conditions or limitations on use of” such agreements, if CFPB determines that such action “is in the public interest and for the protection of consumers.” CFPB completed such a study (the “Study”) in 2015. Based on the Study, CFPB

on May 24, 2016 proposed adoption of regulations (the “Proposed Rule”) that would prohibit any firm that offers financial products or services to consumers from conditioning its offer on the consumers’ agreement that future disputes will be resolved via arbitration rather than a class-action suit filed in federal or state court.

The Proposed Rule should be withdrawn. It is premised on a misinterpretation of what constitutes “the public interest,” as that term is used in § 1028. As the Supreme Court has repeatedly held, Congress has determined that encouragement of arbitration (as a speedier and less expensive alternative to litigation) serves the public interest. There is no indication that Congress abandoned that determination when it adopted § 1028. To the contrary, the legislative history suggests that Congress directed CFPB to focus on whether arbitration agreements were unfair to consumers or otherwise undermined the public interest when applied in the specific context of consumer financial products or services. Importantly, § 1028 did not repeal the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, which reflects a “liberal federal policy favoring arbitration.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Yet, in determining that its proposed ban on mandatory arbitration provisions in the context of consumer financial products would serve “the public interest,” CFPB did not focus on arbitration features unique to or characteristic of such agreements in the consumer financial product or service category. Rather, it focused on factors that apply to virtually *all* arbitration agreements. *See, e.g.*, 81 Fed. Reg. at 32854 (focusing its “public interest” inquiry on “the broader economy, and the promotion of the rule of law and accountability.”) In the explanatory

material supporting its Proposed Rule, CFPB reasoned that encouraging more class actions advances the public interest because increased (and more expensive) litigation will deter violations of the law by causing providers of financial products or services to devote more resources to ensuring that they fully comply with federal and state laws governing their products or services. But because that reasoning would apply equally to class actions filed against virtually *any* class of defendants, it is utterly inconsistent with Congress's longstanding policy of encouraging arbitration as an alternative to litigation.

CFPB's Study did not purport to uncover evidence of rampant lawlessness in the provision of financial products or services—such that drastic measures designed to significantly increase deterrence are warranted. In the absence of such evidence, the Study failed to demonstrate that the radical step of imposing a total ban on a dispute-resolution procedure favored by federal law would serve the public interest. Accordingly, the ban is not authorized by § 1028, which provides that no “prohibitions,” or “limitations” on mandatory arbitration are authorized unless such measures are “consistent” with the findings of CFPB's Study.

Nor has CFPB demonstrated that a prohibition on mandatory arbitration is necessary “for the protection of consumers.” To the contrary, CFPB's Study demonstrated that consumers recover far more funds, on average, from arbitration proceedings than the average class member recovers in a class-action settlement. It further demonstrated that arbitration is faster and less expensive. While plaintiffs' lawyers make out quite handsomely in class actions, their welfare should not be confused with the welfare of the class members they purport to represent.

CFPB asserts that arbitration is not a viable option for many consumers whose potential claims are not large, citing as evidence the relatively small number of arbitration claims filed each year. But the number of consumer complaints that actually come before an arbitrator is not a fair or accurate indication of the viability of consumer arbitration, given that many such complaints are settled informally in advance of arbitration. Moreover, to the extent that CFPB concludes that the costs of arbitration deter many consumers from pursuing arbitration, it cannot seriously propose class-action lawsuits as a superior alternative when the transaction costs of such suits are much higher and the average recovery much lower. A remedy far more narrowly tailored than an outright ban on mandatory arbitration would be a CFPB rule mandating adoption of measures (*e.g.*, minimum recoveries) designed to increase the financial incentive for pursuing arbitration in the context of low-value claims.

I. Interests of Washington Legal Foundation

Washington Legal Foundation is a public-interest law firm and policy center based in Washington, DC, with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before federal and state courts and administrative agencies to support the rights of private parties to enter into binding agreements to arbitrate disputes arising between them, as a quicker and more efficient alternative to pricey civil litigation. *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009). WLF also litigates successfully in support of efforts to

curb abuses of class-action procedures by attorneys more intent on garnering fee awards than on representing the best interests of class members. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). In our wide experience, class actions rarely advance the public interest and frequently advance the personal financial interest of class-action plaintiffs' attorneys to the detriment of consumers.

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces articles and sponsors media briefings on a variety of legal issues related to arbitration and class actions. *See, e.g., J. Alan Warfield, California Court Sets Uniform "Substantive Unconscionability" Standard in Arbitration Decision*, WLF COUNSEL'S ADVISORY (Sept. 25, 2015); Mark C. Morrill, *Party Autonomy Reigns Supreme: Arbitration & Class Actions in the High Court's October 2012 Term*, WLF LEGAL BACKGROUNDER (Sept. 13, 2013); Andrew J. Pincus & Evan M. Tager, *Arbitration after AT&T v. Concepcion: Judicial, Regulatory, & Strategic Legal Responses to the High Court's 2011 Ruling*, WLF WEB SEMINAR (May 8, 2012).

WLF supports the longstanding policy of federal law that favors the right of contracting parties to choose arbitration of disputes as a quick, low-cost alternative to litigation. WLF is concerned that CFPB is abandoning that policy without congressional warrant and without adequate evidentiary support for its conclusion that increasing the already epidemic litigiousness of American society will improve the functioning of markets for consumer financial products or services.

I. Congress Favors Use of Arbitration but Has also Authorized CFPB to Adopt Some Limitations on Arbitration that Are *Both* “in the Public Interest” and “for the Protection of Consumers”

Congress adopted § 1028 in 2010 as part of Title X of the Dodd-Frank Act. The provision authorizes CFPB to adopt restrictions on mandatory arbitration clauses in certain consumer contracts; but it may do so if and only if it completes a study of the issue and the study concludes that such restrictions are “in the public interest and for protection of consumers.”¹

As CFPB correctly recognizes, the two operative phrases of § 1028—“in the public interest” and “for the protection of consumers”—are “related but conceptually distinct.” 81 Fed. Reg. at 32853. Both requirements must be met before CFPB is authorized to “prohibit or impose conditions or limitations on the use of” mandatory arbitration agreements.

Read in isolation, those two requirements are not self-defining; indeed, the phrase “public interest” is susceptible to multiple interpretations. However, when read within the context of the

¹ Section 1028, 12 U.S.C. § 5518, states in relevant part:

(a) Study and report. The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.

(b) Further authority. The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

entire scope of federal arbitration law, the intended meaning of those requirements is more easily discerned. In particular, § 1028 must be read in conjunction with the FAA, a 1925 federal statute that established the longstanding federal policy that encourages use of arbitration as an efficient means of resolving disputes.

Section 2 of the FAA provides in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Supreme Court has repeatedly stressed that the FAA evinces a federal policy “favoring” arbitration and has repeatedly rebuked lower courts for unwarranted reluctance to enforce arbitration clauses voluntarily entered into between freely contracting parties. For example, the Court explained in *AT&T Mobility*:

We have described [§ 2 of the FAA] as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.

563 U.S. at 339 (citation omitted). The Court added that it was “beyond dispute” that “the FAA was designed to promote arbitration,” given Congress’s conclusions that arbitration “facilitate[s] streamlined proceedings” and that “the informality of arbitral proceedings” is “desirable” because it “reduc[es] the cost and increas[es] the speed of dispute resolution.” *Id.* at 344-45.

The Court has rejected claims that other federal statutes authorizing aggrieved parties to

seek compensation in federal court should be deemed to override the FAA's commitment to the enforceability of pre-dispute arbitration agreements. For example, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), upheld the enforceability of an arbitration agreement entered into between a credit-card company and one of its customers, despite the customer's claim that policies embodied in the Sherman Act mandated that it be permitted to raise its antitrust claims on a class-wide basis. While acknowledging that the Sherman Act showed congressional intent to "go beyond the limits of law," at least to some extent, "in advancing its goals of deterring and remedying unlawful trade practices" (noting the Act's treble-damages provision), the Court concluded that "[t]he antitrust laws do not evince an intention to preclude a waiver of class-action procedure." *Id.* at 2309 (citations omitted). The Court stated that it would be "irrational" to conclude that "Congress must have intended whatever departures from ... normal limits [of the law that would] advance antitrust goals"; it observed that "no legislation pursues its purposes at all costs." *Ibid.*

In adopting § 1028, Congress explicitly authorized CFPB to restrict the use of one very specific category of arbitration agreements: those entered into in connection with the offering or providing of consumer financial products or services. But that authority exists only if CFPB determines, after extensive study, that the restrictions are in the public interest *and* serve to protect consumers. At the same time, Congress did nothing to amend the overriding federal policy, established by the FAA, that favors arbitration as an efficient alternative to litigation for settling disputes. The only plausible interpretation of § 1028, therefore, is that restrictions on

mandatory arbitration are warranted only when they serve “the public interest” in a manner that is uniquely applicable to consumer financial products. CFPB is not authorized to restrict mandatory arbitration in that context simply because it may believe (a belief shared by class-action plaintiffs’ lawyers) that the public interest is served by encouraging class actions (as an alternative to arbitration) in *all* contexts. CFPB cannot plausibly read § 1028 as impliedly repealing the FAA, given the disfavor with which federal and state courts regard repeals by implication. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189-90 (1978).

The legislative history of the Dodd-Frank Act indicates that Congress directed CFPB to study potential restrictions on mandatory arbitration of disputes arising in connection with consumer financial products for several reasons. First, Congress was concerned that the costs of arbitration proceedings might deter some consumers of financial products from seeking compensation to which they might be entitled. Second, Congress was concerned that such consumers might not be aware that the contracts they were signing contained arbitration clauses, or might not be in a position to bargain for alternative arbitration language. *See, e.g., S. Rep. 111-176, § 1028* (1990). Neither the statutory language nor the legislative history contains any suggestion that Congress was concerned that arbitration agreements were leading to under-enforcement of federal and state laws designed to protect consumers and/or that federal law should encourage the filing of more class actions as a means of persuading providers to devote more resources to ensuring 100% compliance with all applicable laws.

II. The Proposed Rule Is Not Authorized by § 1028 Because It Is Premised on a Misinterpretation of What Constitutes “the Public Interest”

As demonstrated above, § 1028’s “public interest” requirement contemplates that restrictions on arbitration agreements are authorized only if CFPB determines that such restrictions serve some “public interest” that is uniquely applicable to consumer financial products. Because arbitration continues to hold a favored position under federal law, § 1028’s “public interest” requirement cannot plausibly be satisfied by CFPB findings that could just as easily be used to support a ban on *all* mandatory arbitration agreements.

Yet, an examination of CFPB’s “public interest” findings demonstrates that they all suffer from this flaw. If applied universally, each of those findings would support a total ban on all mandatory arbitration agreements, an outcome that would be utterly inconsistent with federal law as interpreted by *AT&T Mobility* and a long line of Supreme Court decisions.²

For example, CFPB based its “public interest” finding in significant part on its finding that increased class-action filings would serve the public’s interest in increased enforcement of consumer-protections laws. It concluded:

[P]ublic enforcement cannot be relied upon to fully and effectively enforce all of

² WLF recognizes that the “public interest” component of § 1028 also requires consideration of whether arbitration agreements are in the best interest of consumers and whether some agreement terms may interfere with the ability of consumers to obtain a fair hearing of their claims. But as is discussed more fully below, any such concerns do not justify a complete ban on mandatory arbitration agreements. Rather, if CFPB concludes, for example, that the costs of arbitration deter some consumers from pressing meritorious claims, then the appropriate response is to impose conditions on the use of mandatory arbitration (*e.g.*, establishing minimum recoveries for prevailing consumers) rather than banning them altogether.

these [consumer financial] laws and private contracts; and class actions, when not blocked by arbitration agreements, provide a valuable complement to public enforcement and a means of providing substantial relief to consumers. ... Allowing consumers to seek relief in class actions, in turn, would strengthen the incentives for companies to avoid potentially illegal activities and reduce the likelihood that consumers would be subject to such practices in the first place.

81 Fed. Reg. at 32861. But none of the CFPB findings were unique to the provision of consumer financial products or services. WLF does not argue with CFPB's finding that setting class-action attorneys loose to practice their trade in an unrestricted manner on the providers of consumer financial services might "strengthen the incentives for companies to avoid potentially illegal activities." But the same could be said regarding *any* company that sells products or services.³

Furthermore, it is unremarkable to suggest that holding an enforcement hammer over a company's head will enhance enforcement levels. We have no doubt that a law requiring punitive damages of \$1 billion to be assessed against any company that violates a federal law would cause affected companies to devote more financial resources to avoiding violations. But in the absence of evidence that Congress adopted § 1028 based on a finding that laws designed to protect consumers of financial services do not currently provide a sufficient deterrent effect, a finding that the Proposed Rule would increase enforcement levels does not alone satisfy § 1028's "public interest" requirement.

³ Moreover, the exorbitant cost of class-action litigation often results in some valuable consumer products being withdrawn from the market or priced out of range for many ordinary consumers.

III. The Proposed Rule Takes a Distorted View of the Efficacy of Class Actions

In support of its Proposed Rule, CFPB contends that encouraging class actions by prohibiting mandatory arbitration is “a means of providing substantial relief to consumers.”

Ibid. As WLF explains in more detail below, that contention is belied by the findings of CFPB’s own Study, which does not support a conclusion that mandatory arbitration is uniquely problematic in the context of consumer financial services—such that the “public interest” requires a prohibition on mandatory arbitration in that context while simultaneously requiring its encouragement in other contexts.

Perhaps more importantly, the Proposed Rule fails to address the dramatically expanded use of the class-action device in recent years by the plaintiffs’ bar, an expansion that was likely unforeseen by lawmakers who adopted the laws that are now being enforced by means of class actions. That expansion often provides significant benefits to plaintiffs’ attorneys (and, occasionally, their chosen class representatives), but those benefits rarely trickle down to absent class members. WLF urges CFPB to reconsider adopting a rule that will simply exacerbate this regrettable trend, which enriches plaintiffs’ attorneys at the expense of consumers (who bear the brunt of higher prices).⁴

⁴ CFPB places considerably stock in the supposed “deterrent benefit” of steps designed to encourage the filing of more class actions. But surprisingly, CFPB makes no effort to quantify that benefit; it simply assumes that any increased deterrence is a public good. In the absence of quantification, there is no means of determining whether the benefits of deterrent-enhancing measures outweigh their considerable costs (*e.g.*, the higher prices that CFPB concedes will result from increased class-action litigation).

We note, for example, that much of the supposed “benefit” of class-action settlements never reaches consumers. CFPB’s own study demonstrated that when class-action settlements require putative class members to submit a claim form to participate in the settlement, 96% of the members fail to do so—meaning that they receive *nothing* from the settlement. Plaintiffs’ lawyers have a strong incentive to cover up such failures of the class-action process because their fee award is often based on how much benefit they can claim to have provided to the plaintiff class. As an alternative, therefore, they often designate a charity to be the recipient of unclaimed funds. But such *cy pres* contributions bear little if any relationship to the supposed purpose of class actions—which is to provide compensation to individuals who have suffered an injury but whose injury is too small to justify an individual lawsuit. *See, e.g., Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Class actions were not designed, as the Proposed Rule suggests, as a roving commission to private attorneys-general whose function is to increase deterrence of potentially illegal or contract-violating activity.

The inefficacy of class actions as a means of providing benefits to individual consumers is well illustrated by class actions filed under the Electronic Fund Transfer Act (EFTA), one of the federal statutes that governs the provision of financial services to consumers. It requires that operators of automatic teller machines (ATMs) post warnings so that users of those machines will know if they will be charged a fee for using the machines.

Until recently, EFTA required ATM operators that charged transaction fees to provide two forms of notice at the time of the transaction: (i) a physical sign (usually a sticker) “on or at”

the ATM; and (ii) a notice “on the screen ... after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction.” 15 U.S.C.

§ 1693b(d)(3)(B)(i) & (ii). There is no evidence that *any* ATM operator failed to provide the required notice once the new notice requirements were called to their attention. However, it took a while for some smaller ATM operators to focus on the need for two separate forms of notification, and full compliance with both requirements (particularly the “sticker” requirement) was delayed somewhat until federal officials made a point of contacting ATM operators directly in order to explain the requirements.

In the meantime, self-serving plaintiffs’ attorneys jumped into action and filed numerous lawsuits against ATM operators whose full compliance with the law was delayed. In order to encourage individual consumers to seek redress if they paid a transaction fee when using an ATM that did not comply with the notice requirements, Congress created a private right of action for injured consumers. 15 U.S.C. § 1693m(a). The statute provides for recovery of between \$100 and \$1,000 for each violation (without regard to whether the consumer is actually injured), plus costs and attorneys’ fees. *Ibid.* There is no indication that Congress contemplated that EFTA suits could proceed as class actions. Attorneys nonetheless invariably inserted class claims into their lawsuits, thereby transforming minor EFTA violations into lawsuits in which potential damages often amounted to hundreds of millions of dollars.

So how much benefit did individual consumers derive from these lawyer-driven suits? Virtually none, the evidence suggests. Instead, the cases of which WLF is aware were settled for

undisclosed sums in advance of class certification ever being sought. As a result, the only beneficiaries were the lawyers and the named plaintiff—generally, someone who was recruited by lawyers to use ATMs that lacked the necessary stickers and who was fully aware that he/she was being charged a fee for the transactions.

Two particularly egregious EFTA class actions reached the Eighth Circuit in 2013 on a motion to dismiss for lack of standing. The Eighth Circuit concluded that the named plaintiff had standing to sue two tiny Nebraska banks, and the Supreme Court later denied a petition for review. *Charvat v. Mut. First Fed. Credit Union and First Nat'l Bank of Wahoo*, 725 F.3d 819 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014). The two banks had provided electronic notice of their ATM fees, but had failed to provide the second form of required notice—a sticker attached to their machines. The Eighth Circuit concluded that the named plaintiff (the same individual filed both class actions) had suffered the requisite injury-in-fact because he had been denied the warning information required by EFTA's sticker requirement, even though he admitted that: (1) he had received that same warning electronically; and (2) he was fully aware that he was incurring fees as he ran around town using ATMs that he knew were deficiently labeled. *Id.* at 823-24.

The cases settled for an undisclosed sum following the Supreme Court's denial of certiorari. Counsel undoubtedly benefitted handsomely. But because the settlement occurred prior to class certification, putative class members other than the named plaintiff derived no benefit. Nor could one even argue that the public derived some "increased deterrence" benefit

from the settlement. Long before the case reached the Eighth Circuit in 2013, two events had occurred that undercut any such argument: (1) banks and other ATM operators came into full compliance with EFTA's sticker requirement once the requirement was brought to their attention by regulatory officials; and (2) Congress later repealed the "sticker" requirement (the sole basis for the claim against the Nebraska banks) as superfluous in light of the electronic-notification requirement.

The history of class claims asserted in connection with EFTA fee-notification litigation amply demonstrates that, contrary to CFPB's conclusion, the public interest is often ill-served by measures designed to encourage the filing of more class actions. That history provides no support for the conclusion that the public interest is served by prohibiting enforcement of mandatory arbitration agreements.

At the very least, CFPB should amend the Proposed Rule to provide that it is inapplicable to lawsuits filed to enforce federal statutes, such as EFTA, which do not include provisions explicitly authorizing class-wide enforcement. The evidence suggests, for example, that Congress contemplated that EFTA litigation would be pursued by individuals, not on a class-wide basis.⁵ Yet, experience has demonstrated that most EFTA litigation has been filed on a class-wide basis—creating the potential for massive damages awards and thereby essentially

⁵ EFTA encourages individual litigation by, among other things, providing for an award of between \$100 and \$1,000 in statutory damages per violation to all prevailing plaintiffs, without requiring proof of any actual damages. If Congress had contemplated enforcement on a class-wide basis, the statutory-damages provision would have been unnecessary as a means of encouraging private enforcement of EFTA.

compelling defendants to settle. Under those circumstances, there is no basis for concluding that the “public interest” requires a rule banning the enforcement of mandatory arbitration agreements; permitting the enforcement of such agreements would cut back on the ability of plaintiffs’ lawyers to demand extortionate settlements that are unlikely to benefit injured consumers any more than an arbitration would.⁶

In announcing its proposed rule, CFPB rejected requests that it exempt specific statutes from the rule. It concluded, “While the Bureau recognizes the concern ... that particular statutes may create the possibility of disproportionate damages awards, the Bureau believes that Congress and the courts are the appropriate institutions to address such issues.” 81 Fed. Reg. at 3288. That conclusion makes little sense. It is the CFPB, by proposing to exercise discretionary authority to ban mandatory arbitration, that is significantly increasing the problem of potentially disproportionate damages awards. Accordingly, CFPB is the entity best positioned to determine whether to create exceptions to its Proposed Rule in order to ameliorate a problem of its own creation.

⁶ Such settlements provide no *direct* benefit to injured consumers when, as in the EFTA example, settlement occurs in advance of class certification. Moreover, even the *indirect* benefits of such settlements (*e.g.*, the potential that the settlement will deter future violations) is no greater for class actions than for arbitrations. That is, when the remedy involves a simple signage or policy change, the deterrence incentives are equivalent. In both scenarios, the offending business will have been alerted to its (likely inadvertent) violation and will correct the deficiency. But if the claim is asserted in an arbitration, a windfall recovery to the plaintiff’s attorney is not required. Such windfalls occur, of course, because plaintiffs’ attorneys can demand a large premium for themselves and their individual client in return for agreeing to dismiss the lawsuit with prejudice in advance of class certification.

IV. CFPB’s Study Does Not Demonstrate that Its Proposed Ban on Mandatory Arbitration Is Necessary “for the Protection of Consumers”

CFPB should withdraw the Proposed Rule for the additional reason that its own Study does not support its conclusion that the rule is necessary “for the protection of consumers.”

The Study reported data indicating that arbitration offers numerous advantages over class litigation to the typical consumer. Among those findings:

- Arbitration is resolved far more quickly than consumer litigation. The typical arbitration that was not settled in advance of a hearing took four to seven months to resolve. In contrast, even though none of the class actions studied by CFPB went to trial, those suits still averaged nearly two years from initial filing to final approval of a settlement.
- Arbitration is much more convenient. For example, arbitration proceedings are often conducted in the evening or by phone.
- On average, consumers received considerably more compensation in arbitration than in class actions. In arbitrations in which consumers prevailed the average recovery was \$5,389. In contrast, consumers who received cash payments in class-action settlements recovered, on average, less than 1% of that amount—only \$32.35.
- Arbitration is more efficient. Its streamlined procedures mean that a lower percentage of funds consumed by the dispute-resolution process is devoted to compensating attorneys. In the class-action settlements studied by CFPB, fees awarded to class counsel amounted to a staggering \$425 million.

Given those findings, CFPB has failed to demonstrate that “the protection of consumers” requires adoption of a rule that prevents enforcement of voluntary agreements to submit future disputes to mandatory arbitration. CFPB points to findings that the money paid to plaintiffs in all studied class actions significantly exceeds the total paid to consumers in all studied arbitrations; it asserts that those findings demonstrate that consumers are better served by channeling more disputes into class actions and away from individual arbitrations. But those

overall findings are irrelevant from the perspective of an individual consumer who feels aggrieved and seeks compensation for his injuries. Can there be any doubt that if a typical aggrieved consumer were offered a choice ahead of time, he would choose arbitration (with its \$5,389 average payout) over class-wide litigation (with its average \$32.35 payout)? The Study data demonstrate that such a consumer is better served (as measured by speed, efficiency, and the extent of recovery) by pursuing arbitration rather than class-wide litigation. Moreover, because the added costs of increased class actions are inevitably reflected in higher prices for consumers, the data further demonstrate that the interests of *all* consumers (*i.e.*, including those who have no grievances to pursue) are also better served if those with grievances choose the arbitration path.

CFPB responds that if a consumer wishes to pursue arbitration, nothing in the Proposed Rule prevents him from doing so. 81 Fed. Reg. at 32867. That terribly misleading response ignores the very real possibility that if, as a result of the Proposed Rule, companies can no longer use arbitration agreements as a means of channeling dispute resolution toward arbitration and away from class actions, they may be unwilling to continue to offer arbitration as an option to their customers. After all, by offering customers a low-cost method of filing claims against

them, companies are both incurring higher costs and risking increased liability.⁷ They may very well conclude that they are unwilling to assume those costs and risks if, as a result of the Proposed Rule, offering an arbitration option provides no protection from class actions.

CFPB posits that arbitration does not adequately protect the interests of consumers because its Study found that the number of consumers who seek redress through arbitration is relatively small. It concludes that if the arbitration system really provided an adequate means of asserting claims, more consumers would be making use of that system. But the number of consumer complaints that actually come before an arbitrator is not a fair or accurate indication of the viability of consumer arbitration, given that many such complaints are settled informally in advance of arbitration. The ability of a consumer to threaten to demand arbitration if his informal requests for redress are not satisfied makes it considerably more likely that the provider of financial services will meet those demands in order to avoid the arbitration demand.

Moreover, a relatively low number of arbitration requests may well indicate that consumers are by-and-large satisfied with the service they receive from financial service providers—not, as the CFPB assumes, that arbitration agreements are discouraging aggrieved

⁷ Among those risks is the possibility that the arbitrator will determine that the arbitration agreement permits the consumer to assert claims on a class-wide basis as part of the arbitration. The Supreme Court has made clear that an arbitrator's interpretation of the arbitration agreement is not subject to second-guessing by a reviewing court, no matter how outlandish that interpretation appears to the court. *See, e.g., Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068-70 (2013). The Court has thus stated its unwillingness to second-guess an arbitrator's decision, based on his interpretation of the arbitration agreement, that class-wide arbitration is warranted. *Ibid.*

consumers from pursuing meritorious claims. WLF recognizes that there will always be bad apples, that some providers of consumer financial products or services will break contracts or even deliberately set out to defraud consumers. But in the absence of evidence from CFPB that such activity is widespread, there is every reason to believe that the numerous federal and state agencies that regulate financial-services providers—including CFPB and the FTC—can adequately deal with deliberate lawbreakers.

Finally, to the extent that CFPB believes that the “problem” of the low number of arbitration requests is caused by excessive barriers to the filing of such requests, the obvious solution is a rule that reduces those barriers, not a rule that prohibits *all* mandatory arbitration agreements.⁸ If CFPB worries that the costs of bringing an arbitration proceeding are excessive in relation to the consumer’s anticipated recovery, a remedy far more narrowly tailored than an outright ban on mandatory arbitration would be a CFPB rule requiring adoption of measures (*e.g.*, minimum recoveries) designed to increase the financial incentive for pursuing arbitration.⁹ If CFPB worries that some consumers are finding themselves bound by mandatory arbitration agreements that they were unaware they had signed, a narrowly tailored rule might declare that such agreements are unenforceable unless the financial-services provider takes specified steps

⁸ Section 1028 explicitly contemplates that CFPB might adopt regulations that “impose conditions or limitations” on the use of mandatory arbitration agreements rather than regulations that impose an outright ban.

⁹ Many arbitration agreements already offer such features. For example, in *AT&T Mobility* the Supreme Court spoke approvingly of the generous financial terms that the defendant offered to customers who resolved their disputes through arbitration. 563 U.S. at 351-52.

designed to bring the agreements to the attention of potential customers. Finally, if CFPB worries that consumers lack bargaining power to resist demands that they agree to mandatory arbitration, a narrowly tailored rule might require all providers to offer (at a higher price) an alternative contract that does not include a mandatory arbitration agreement.¹⁰ Given the favored status that arbitration enjoys under federal law, any of these more narrowly tailored alternatives would better serve “the public interest” than would the Proposed Rule.

CFPB rejects such more-narrowly-tailored alternatives out of hand, arguing that there is no evidence to suggest that a significantly greater number of consumers would pursue arbitration even if all financial barriers to arbitration were eliminated. 81 Fed. Reg. at 32901. But if all such barriers were eliminated, there would be no reason for CFPB to be concerned about the allegedly “low” number of arbitration claims. Under that scenario, the most logical reason for a “low” number of claims would be that consumers are generally satisfied with the services they are receiving—in which case there would be no reason for CFPB to adopt severe measures designed to increase the number of class actions filed each year.

¹⁰ Lacking such an option, CFPB’s Proposed Rule further disadvantages consumers who would prefer arbitration over class-action litigation, because they cannot avoid the higher prices class actions will bring to all consumers.

Conclusion

WLF respectfully requests that CFPB withdraw its Proposed Rule and not propose a new one in the absence of a new Study demonstrating that a ban on mandatory arbitration agreements “is in the public interest and for the protection of consumers.”

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

/s/ Mark S. Chenoweth
Mark S. Chenoweth
General Counsel

/s/ John Easter
John Easter
Judge K.K. Legett Fellow