November 14, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Re: Comment Letter in Response to "Petition To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services" ("Petition") (Docket No. CFPB-2023-0047)

Dear Director Chopra:

This letter is submitted on behalf of ACA International, American Bankers Association, American Financial Services Association, American Transaction Processors Coalition, Bank Policy Institute, Credit Union National Association, Electronic Transactions Association, Independent Community Bankers of America, National Association of Federally-Insured Credit Unions, National Association of Mutual Insurance Companies, Online Lenders Alliance, Real Estate Services Providers Council, Inc. (RESPRO), Small Business & Entrepreneurship Council, and the U.S. Chamber of Commerce.

We write to urge the Bureau to deny the recent Petition for rulemaking seeking promulgation of a regulation banning pre-dispute arbitration provisions in contracts for consumer financial services.[1]

Relying on the protections that Congress put in place when it enacted the Federal Arbitration Act ("FAA"), numerous businesses, including many companies that provide financial products or services, have for decades resolved consumer disputes by arbitration rather than through costly and burdensome litigation in our overburdened court system. Arbitration reduces transaction costs and enables fair, speedy, and efficient dispute resolution, thereby providing significant advantages to consumers, businesses, and the public at large. Petitioners offer no valid basis for depriving the public of these advantages, and there is none.

We write to highlight five overarching reasons why the Bureau should deny the Petition.

First, the Congressional Review Act ("CRA") bars the proposed rule.

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[1] *See* https://www.regulations.gov/document/CFPB-2023-0047-0001 ("Petition").

Congress disapproved the Bureau's previous anti-arbitration rule in its 2017 CRA resolution. The CRA bars an agency from promulgating a rule that is "substantially the same" as a rule invalidated under the Act.[2] The rulemaking Petition proposes just such a rule.

Petitioners' proposal would invalidate pre-dispute arbitration agreements containing class waivers—the exact category of agreements covered by the 2017 rule.[3] And, because virtually all arbitration agreements bar class proceedings—either expressly or implicitly by failing to authorize them[4]—the proposed ban will have the same effect as the invalidated 2017 rule. That demonstrates that the two rules are "substantially the same."

The 2017 rule would have reached that result by targeting a fundamental characteristic of arbitration—individualized resolution of claims—while Petitioners now propose to make explicit the outright ban that the prior rule would have accomplished. Congress and the President have already rejected the proposition that the Bureau's prior ban on pre-dispute arbitration would benefit consumers—a determination that would apply equally to Petitioners' proposal.

Second, the Bureau lacks the statutory authority to promulgate Petitioners' proposed rule.

Section 1028 of the Dodd-Frank Act requires the Bureau to conduct a study before attempting to regulate pre-dispute arbitration, and the Bureau must demonstrate that any regulation that it proposes is "consistent with the study," in addition to demonstrating that the regulation is "in the public interest and for the protection of consumers."[5]

Petitioners propose that the Bureau skip Dodd-Frank's study requirement and instead rely on the Bureau's prior study from 2015 (based on data that is now over a

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[2] 5 U.S.C. § 801(b)(2).

[3] *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (Jul. 19, 2017).

[4] Unless parties affirmatively contract for class arbitration—which essentially never happens—their arbitration agreement contains either an implicit or explicit class action ban. That follows from the Supreme Court's holding that arbitration agreements bar class proceedings unless the agreement expressly authorizes them. The Court has explained that because individualized proceedings are an inherent characteristic of arbitration, "courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.' Silence is not enough; the 'FAA requires more.'" *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 687 (2010)).

[5] *Id.* § 5518(b).

decade old) that formed the basis for the Bureau's anti-arbitration rule that Congress rejected. That plainly violates Section 1028, for multiple reasons.

The 2015 study was seriously flawed, as an academic analysis demonstrated.[6] Now it is also hopelessly out of date—relying on data that is more than ten years old, which fails to take into account the significant increase in the use of arbitration. And it does not consider a recent study, based on newer data, demonstrating the benefits of arbitration for consumers.[7]

Moreover, Petitioners' reliance on the 2015 study is contradicted by their own Petition, which states that their proposal is based on "developments since 2017."[8] Section 1028 requires the Bureau to conduct a new and appropriate study reflecting current reality before it may exercise its limited authority over pre-dispute arbitration agreements. In addition, the 2015 study was focused on class actions and does not support Petitioners' proposal to ban pre-dispute arbitration agreements with respect to individual claims.

Third, by exceeding the Bureau's limited authority under Section 1028 of the Dodd-Frank Act, Petitioners' proposal also runs afoul of the Federal Arbitration Act ("FAA") itself. The proposal rests on an impermissibly hostile view of arbitration that contradicts the FAA and the Supreme Court's recognition "that the FAA was designed to promote arbitration" and that the FAA mandates placing "arbitration agreements on equal footing with all other contracts."[9] Section 1028 represents the only path by which the Bureau can act contrary to the FAA, but Petitioners' proposal does not comply with Section 1028.

Fourth, the Administrative Procedure Act bars Petitioners' proposal, which would result in arbitrary, capricious, and irrational agency action. Petitioners' proposal is based on the demonstrably false premises that arbitration harms consumers and that the use of arbitration to resolve disputes makes companies more likely to violate federal laws.

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[6] Jason Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique,* Mercatus Working Paper, Mercatus Center at George Mason University (Aug. 2015).

[7] *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf.

[8] Petition at 8.

[9] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 345 (2011).

In fact, the best empirical evidence shows that consumer claimants in arbitration fare better than or at least as well as consumer claimants in court.[10] In addition, most claims asserted by consumers are small and individualized; the Petitioners ignore that for those consumers, arbitration provides the only feasible mechanism for redressing their claims.

Moreover, a recent study evaluating the Bureau's own data shows that there is *no connection* between the use of arbitration and increased violations of law. The use of arbitration is not correlated with either increased consumer complaints or heightened enforcement activity by the Bureau.[11]

Petitioners also incorrectly assert that companies can structure arbitration to disfavor consumers. In fact, the nation's largest arbitration providers require fair procedures, accepting cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards.[12] Courts provide another layer of oversight, invalidating arbitration agreements that contain unfair provisions.

Fifth, the Bureau lacks the authority to promulgate Petitioners' proposed rule because its funding structure is unconstitutional, as the Fifth Circuit recently held in *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*.[13]

The Supreme Court heard oral argument in the *Community Financial* case at the beginning of the October 2023 Term, and the Court's decision is expected by the end of June 2024. Should the Supreme Court agree with the Fifth Circuit, this

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[10] *See* Nam D. Pham & Mary Donovan, *supra* note 7; *see also*, *e.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

[11] *See* Nam D. Pham & Mary Donovan, *A Critique of the CFPB Proposed Rule: Companies That Use Arbitration Agreements Do Not Pose Any Greater Risks To Consumers Than Those That Do Not* (Mar. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/03/CFPB-Report-Final-March-29-2023.pdf.

[12] *See* Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV; JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), https://perma.cc/NBA4-4U3N.

[13] 51 F.4th 616 (5th Cir. 2022), *cert. granted,* No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023).

constitutional infirmity in the Bureau's structure will provide yet another reason why the Bureau lacks the lawful authority to promulgate Petitioners' proposed rule.

In sum, the Bureau should deny the Petition. The rule Petitioners propose would harm businesses without any benefit to consumers. And, if promulgated, it would violate at least four Congressional mandates: the Congressional Review Act, the Dodd-Frank Act, the Federal Arbitration Act, and the Administrative Procedure Act.

Sincerely,

ACA International
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American Financial Services Association
American Transaction Processors Coalition
Bank Policy Institute
Credit Union National Association
Electronic Transactions Association
Independent Community Bankers of America
National Association of Federally-Insured Credit Unions
National Association of Mutual Insurance Companies
Online Lenders Alliance
Real Estate Services Providers Council, Inc. (RESPRO)
Small Business & Entrepreneurship Council
U.S. Chamber of Commerce