April 7, 2016

The Honorable Richard Shelby
Chairman, Committee on Banking,
Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

The Honorable Sherrod Brown
Ranking Member, Committee on Banking,
Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Chairman Shelby and Ranking Member Brown:

The Consumer Bankers Association (CBA)[1] appreciates the Banking Committee's continued oversight of the Consumer Financial Protection Bureau and its activities. We would like to take this opportunity to submit the following comments on the hearing entitled, "Consumer Financial Protection Bureau's Semi-Annual Report to Congress." CBA is the voice of the retail banking industry whose products and services provide access to credit for consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

Over the next year, the CFPB is expected to finalize a set of regulations and propose others that will have the potential to restrict the American consumer's ability to exercise free will over the financial products they use. The actions by the CFPB could place additional regulatory constraints on an already heavily regulated industry, ultimately limiting consumer choice and access to credit.

Small-Dollar Lending

In 2013, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) issued overly restrictive guidelines on bank-offered small-dollar loan alternatives, sometimes known as a deposit advance products. These safe and affordable bank-offered products were successfully serving bank customers, but the regulators practically forced them out of existence. The elimination of the deposit advance product significantly reduced consumer choice leaving consumers with fewer credit options in their time of need, making them more vulnerable to those who would take advantage of their economic situation.

In the coming months, the Bureau is expected to issue a proposed rule that would cover payday loans, certain loans secured with a vehicle title, "high-cost" installment loans, and lines of credit. CBA understands consumers should be protected from harmful predatory lending that can lead to a seemingly never-ending cycle of debt.

[1] Founded in 1919, the Consumer Bankers Association is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

We appreciate the Bureau recognizing the beneficial role banks could play and we are hopeful that the Bureau is actively exploring viable products for banks to offer customers who need access to safe and available forms of small-dollar credit. Unfortunately, the Bureau's current outline, published last year in advance of its small business review panel process, would make it difficult for any lender to offer affordable, easy-to-use products. [2] Specifically, the Bureau would require overly restrictive underwriting and unrealistic terms of use, including limits on frequency of use and limited loan-to-income ratios. For example, short-term loans (45 days or less) would require lenders to verify the consumer's income, "major financial obligations," and borrowing history, using third-party records. "Major financial obligations" would include such obligations as housing payments, car payments, and child support payments. Using this information, the lender would then have to make a determination whether the consumer has the ability to repay the loan after covering other major financial obligations and basic living expenses. This level of underwriting complexity ignores the cost of providing this type of loan. Requiring a level of underwriting similar to a home mortgage, would make it too costly to offer these much needed products. Additionally, consumers cannot afford to wait long periods of time for an underwriting decision when they have emergency expenses that need to be paid.

Consumers have demonstrated a strong demand for safe, small-dollar loan products. Regulators need to recognize that if banks are permitted to offer these products, competition will help keep prices affordable. We encourage the CFPB and prudential regulators to work with Congress, banks, and other stakeholders in the financial services industry to ensure the availability of properly regulated small-dollar loan products that will continue to meet the credit needs of consumers.

Arbitration

Arbitration is oftentimes the best way for consumers and banks to resolve disputes. It is regularly cheaper, faster, and easier for the consumer than going to court. Under the Dodd-Frank Act, the CFPB is charged with undertaking a study of mandatory pre-dispute arbitration, and subsequently deciding, based on the outcome of the study, if it is necessary to regulate or restrict the use of arbitration in consumer financial contracts. The CFPB has concluded its study and is now signaling an intention to effectively prohibit the availability of these terms in consumer financial agreements.

We believe the study, which was not peer-reviewed, lacked some critical elements necessary for a thorough analysis. In a letter to Director Cordray (see attached letter in Appendix A), CBA and other trade associations asked the Bureau to conduct additional research to complete its study before making any final policy decisions on arbitration, and we do so again here. Due to the inconsistency and concerns that have emerged from the CFPB's study, we provide several suggestions on how to clarify the data: the CFPB should perform a comparison between litigation and arbitration on the basis of accessibility, cost, fairness, and efficiency; the CFPB should determine if consumers would benefit from becoming more informed about arbitration; the Bureau should examine the net benefit of class actions to consumers in light of the supervisory or enforcement authorities of the regulatory and enforcement agencies; and finally, the Bureau should determine if prohibiting or restricting the availability of mandatory pre-dispute arbitration provisions would effectively eliminate arbitration as an alternative dispute resolution process for the majority of consumers.

[2] http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf

Even with its limitations, a strong argument could be made that the study demonstrates that consumers are better served taking their disputes through arbitration rather than participating in a class action to resolve a dispute. The study shows that very few class actions are tried on the merits and 60 percent of class actions produce zero benefit to putative class members. Moreover, while the CFPB highlighted that consumers obtained $2.7 billion through class action settlements between 2008 and 2012, this only amounts to $79.41 per consumer on average (and just $32.35 in cash recoveries), compared with the $5,389 on average consumers recover in a favorable arbitration decision. In summary, we believe the arbitration study provides an insufficient basis for prohibiting the use of arbitration and encourage Congress to work with the CFPB on the issue of arbitration so consumers can choose their best legal course of action.

Home Mortgage Disclosure Act Privacy

Since 1975 when HMDA was enacted, our members have strived to responsibly and fairly serve the housing needs of their communities and are committed to the purposes of HMDA: "1. help determine whether financial institutions are serving the housing needs of their communities; 2. assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and 3. assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes."[3]

The Dodd-Frank Act mandated the expansion of information collected under Regulation C, HMDA's governing regulation. However, the final HMDA rule, written by the CFPB, almost tripled the number of data fields and greatly increased the complexity of reporting. This is in addition to increased compliance pressures stemming from the Dodd-Frank Act's strengthened enforcement monitoring due to the uncertainty of what is an Unfair, Deceptive, and Abusive Acts and Practice ("UDAAP"), and additional rules and requirements that have inundated the banking industry, including the implementation of the Qualified Mortgage rules and TILA-RESPA Integrated Disclosure. The compliance burden placed on banks requires expenditures of resources that inevitably are reflected in the cost and availability of credit for consumers.

As institutions begin implementing the sweeping changes, we would like to raise our concerns about the sensitive data that CFPB intends to collect, store, and publish. We ask that the Bureau keep all the new HMDA data confidential and refrain from publishing it on the Federal Financial Institutions Examination Council (FFIEC) website. Consumers buying a home are forced to relinquish their most sensitive information often without understanding this information is being handed over to a governmental agency. The new data fields are *even more* sensitive than many of those currently collected, with the addition of credit score, debt to income ratio, and property address, among other new fields. It is the CFPB's duty to protect consumers from risks associated with data breaches and re-identification. In a 2005 speech, former Federal Reserve Board Senior

[3] CFPB Bulletin 2013-11 "Home Mortgage Disclosure Act (HMDA) and Regulation C – Compliance Management; CFPB HMDA Resubmission Schedule and Guidelines; and HMDA Enforcement" (October 9, 2013) http://files.consumerfinance.gov/f/201310_cfpb_hmda_compliance-bulletin_fair-lending.pdf

Advisor Glenn Canner raised concerns about HMDA's privacy risks, noting "approximately 95 percent of loan records are "unique," meaning loan amount and census tract can be attributed to a single person. With a cross match to private lien transfer records, one can identify these individuals in 95 percent of the cases."[4]

Simply put, "privacy in HMDA data: there is none."[5] With the inclusion of even more sensitive information under the new rule, it is critical that the CFPB protect consumers' information by establishing robust data security protections and decrease re-identification risks by not publishing the new information—even anonymized—to the FFIEC website.

Indirect Auto Lending Settlements

Our member banks are unequivocally committed to providing access to credit fairly and responsibly to qualified borrowers. To this end, our members maintain robust compliance programs and stringent internal procedures to ensure they are meeting that goal. Indirect vehicle lending poses a unique challenge in that regard, since the bank does not come into contact with the consumers obtaining a loan at the dealership and has no knowledge of their race or ethnicity. Therefore, the bank must ensure fair lending compliance under a disparate impact theory, using complex statistical approaches, which are, at their best, imperfect. Banks need clearer guidance from the CFPB on how best to maintain a strong and effective compliance program that meets its expectations in this area.

Since 2013, the CFPB, along with the Department of Justice, has recovered more than $140 million from settlements in indirect auto finance cases using disparate impact claims. These settlements provide a broad outline of the CFPB's expectations for banks and finance companies, but they do not detail what monitoring and restitution are necessary to be in satisfactory compliance. Nor do they clearly describe how banks should best make use of sophisticated statistical methodologies and proxies for customer race and ethnicity, in order to make credit available fairly and responsibly in today's competitive marketplace.

It is concerning that the Bureau appears to be comfortable forcing marketplace change though enforcement actions that are then left up to interpretation. In order to confidently operate, banks need to ensure they are in compliance with the law. Only through a rulemaking process can these complex issues be addressed, giving certainty to banks and others that they are meeting regulatory expectations.

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[4] Glenn Canner, Senior Advisor, Federal Reserve Board, at the Georgetown Credit Research Center Conference: *Ensuring Fair Lending: What do we know about pricing in mortgage markets and what will the new HMDA data fields tell us?* (March 14, 2005).

[5] Anthony Yezer, Professor of Economics and Director of the Center for Economic Research at George Washington University, at the Georgetown Credit Research Center Conference: *Ensuring Fair Lending: What do we know about pricing in mortgage markets and what will the new HMDA data fields tell us?* (March 14, 2005).

Complaint Portal

CBA appreciates the Bureau heeding feedback from CBA member banks and releasing a revised Company Portal Manual earlier this month to clarify and update several items pertaining to its complaint portal. Specifically, CBA was pleased to see the more accurate definition of what constitutes a "duplicate" complaint, additional categories and "Administrative Response" options, and improved disclosure for companies that do not publically respond to complaint narratives, which better captures banks' commitment to customer relationships and maintenance of customer privacy. Though we applaud these improvements, we continue to ask the Bureau to follow the Consumer Product Safety Commission model and institute an appeals process where companies have the ability to flag and potentially eliminate materially inaccurate complaints.

Overdraft Services

Later this year, the CFPB will begin the process of writing a new rule for bank overdraft protection services. This widespread and longstanding service at depository institutions covers the amount a consumer overdraws from his or her deposit account, and charges the customer a fee for the service. If the bank does not cover the overdraft when there are insufficient funds, the customer's check will bounce or debit card will be denied, and the consequences, depending on the transaction, could involve a significant cost and inconvenience.

The existing federal regulation addressing this service, written five years ago by the Federal Reserve Board after long study, leaves the choice squarely in the hands of the consumer. It requires banks to give consumers the opportunity to affirmative opt-in to overdraft services for most typical debit transactions after a full disclosure, which is mandated by the regulation. Consumers are given the right to opt-in to the service when they open the account, or they can do so later at any time, or change their minds as they wish. Studies, such as one by Novantas,[6] have shown consumers make highly informed choices about whether and when to use overdraft services.

We urge the Bureau to take into consideration that without such access to short-term liquidity by depository institutions, consumers are left with few options other than the less well-regulated and supervised non-bank lenders, and more consumers will become "unbanked." The Bureau should work closely with the prudential regulators and the industry to ensure that consumers continue to have flexibility and choice from the banking industry.

Regulatory Overlap, Duplication, and Inefficiencies Persist

Despite Congressional efforts to streamline financial regulations, a March 28, 2016 Government Accountability Office (GAO) report finds that the financial regulatory framework is still too complex and fragmented. While the current structure allows for effective financial regulation in some key areas, the fragmentation and overlap "have created inefficiencies in regulatory processes,

[6] Novantas, "Understanding Consumer Choice: A Review of Consumer Overdraft Behaviors," October 2015, https://novantas.com/industry_insight/understanding-consumer-choice/.

inconsistencies in how regulators oversee similar types of institutions, and differences in the levels of protection afforded to consumers."[7]

The report further contends that although the Dodd-Frank Act consolidated some activities, the act failed to address many fragmentation and overlap concerns that persist throughout financial regulators, resulting in (1) inefficient and ineffective oversight, (2) inconsistent financial oversight, and (3) inconsistent consumer and investor protections.

Specifically, GAO found that "the sheer number of regulatory bodies and differences in their regulatory approaches continue to make coordination challenging," resulting in inefficient and inconsistent safety and soundness and consumer protection oversight. Such inefficiencies and inconsistencies make tracking violations, identifying emerging trends, and providing the same high levels of protections to consumers difficult. Fair lending laws, unfair and deceptive acts and abusive practices, and data collection are a few examples of where the GAO found either inconsistency in application and treatment across institutions and/or duplication in regulation and enforcement.

According to GAO, this kind of inconsistency and duplication can result in varying levels of consumer protection and delays in regulatory action, ultimately hurting the consumers the Bureau aims to protect. When multiple regulators are charged with similar goals but apply varying practices, procedures, and standards, it becomes challenging to hold agencies accountable for when they fail to protect consumers and achieve their regulatory objectives.

As the Bureau continues to fulfill its mission in protecting consumers, it should make a concerted effort to work in close coordination with the OCC, FDIC, and the Federal Reserve to reduce and eliminate fragmentation, overlap, and duplication that result in inefficient and ineffective regulation.

CFPB Commission

Improving the financial lives of consumers is a goal we share with the CFPB. The best way to ensure that shared outcome for consumers is to establish a governance structure at the CFPB that promotes debate and deliberation among leaders with diverse experiences and expertise so rules and regulations are written for the financial betterment of consumers.

Ensuring that the Bureau is an objective and neutral regulator that will issue rules based on consumer safety with input from a diverse array of perspectives, devoid of political volatility and bias, is the ultimate purpose of a commission. Serving as a source of balance and stability for consumers and the financial services industry, a commission would encourage internal debate and deliberation, ultimately leading to financial products that benefit the consumer.

The Financial Product Safety Commission Act (H.R. 1266), introduced this Congress, is common-sense, bipartisan legislation that would create a bipartisan five-member, Senate-confirmed board at the CFPB charged with the responsibility to provide a balanced and deliberative approach to

[7] GAO Study, "Financial Regulation: Complex and Fragmented Structure Could Be Streamlined to Improve Effectiveness," March 28, 2016, http://www.gao.gov/assets/680/675400.pdf.

supervision, regulation, and enforcement of rules and regulations that oversee the financial services sector. The passage of H.R. 1266 would transition the CFPB's governance structure to a bipartisan commission that would increase certainty, ensure greater collaboration from all stakeholders, improve consumer protection, and result in financial products that are safe, affordable, and meet the credit demands of our customers.

<u>Conclusion</u>

Strong and effective consumer protection, and fair and responsible banking, are profoundly important to our member banks. CBA routinely engages with the CFPB and other regulators to promote reasonable and effective regulation that ensures consumers have the ability to choose safe and affordable products and services. It is our concern that many of the CFPB's impending rules will further limit consumer choice and inhibit the ability of financial institutions to innovate and better serve their customers.

CBA stands ready to work with Congress and the CFPB to craft a regulatory framework that safeguards the American consumer and small business, ensures access to credit, and promotes competition in the financial marketplace. On behalf of our members, we appreciate the opportunity to submit this statement for the record.

Sincerely,

Richard Hunt
President and CEO
Consumer Bankers Association

APPENDIX A

Via Federal Express

July13, 2015

The Honorable Richard Cordray

Bureau of Consumer Financial Protection
1275 First Street, NE

Washington, DC 20002

Re: Comments on the Bureau's Consumer Arbitration Study

Dear Director Cordray:

The American Bankers Association,[8] the Consumer Bankers Association,[9] and The Financial Services Roundtable[10] (collectively, the Associations) appreciate the opportunity to provide comments regarding the Bureau of Consumer Financial Protection's (Bureau) March 10, 2015, Study

[8] The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits, and extend more than $8 trillion in loans.

[9] Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking – banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.

[10] As *advocates for a strong financial future*™, the Financial Services Roundtable (FSR) represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

on Consumer Arbitration (Study).[11] In accordance with Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Bureau, having completed its Study of the use of arbitration provisions in consumer financial services contracts, is now considering whether a regulation prohibiting or limiting such provisions would be "in the public interest and for the protection of consumers." Under Section 1028, any such regulation must be "consistent with the [S]tudy."

Many of the Associations' members, constituent organizations, and affiliates (collectively, Members) utilize arbitration agreements in their consumer contracts, and many of those contracts were included in the Study's data set. The Associations' Members are major stakeholders in the Bureau's examination of consumer arbitration and will be affected negatively by any regulation of consumer arbitration adopted by the Bureau. Although the Bureau has not formally requested comment on the Study, we believe that, considering its potential impact on consumers and the business of banking as well as the misleading conclusions that have been drawn and reported about the Study, it is critical that the Bureau consider another perspective. Accordingly, we submit this analysis of the Study, which analysis we believe supports a conclusion that pre-dispute arbitration clauses benefit customers and that those benefits should not be restricted or prohibited.

I. SUMMARY

The Study clearly illustrates that arbitration has significant, demonstrable benefits over litigation in general and class action litigation in particular. It is faster, less expensive, and more effective than class action litigation. Customers who prevail in an individual arbitration recover monetary benefits that, on average, are approximately 166 times greater than the sums received by the average class member in a class action settlement.

Simply put, there are insufficient data in the Study to support a conclusion that mandatory pre-dispute customer arbitration provisions in financial services contracts, or the inclusion of class action waivers therein, should be prohibited; in fact, there are abundant data in the Study that contradict such a conclusion. Because such regulation would not be "consistent with the Study," in the public interest, or necessary for the protection of consumers, it would exceed the Bureau's authority under Section 1028 of the Dodd-Frank Act.

Moreover, if the Bureau were to over-regulate arbitration agreements or prohibit the use of class action waivers in such agreements, as some parties advocate, many companies are likely to discontinue offering arbitration to consumers. That outcome would harm consumers, as they would be deprived of a valuable and time-tested procedure for economically, expeditiously, conveniently, and efficiently resolving individual consumer disputes. Instead, consumers would be relegated to a procedure (class action litigation) in which they are likely to receive either no benefits at all or

[11] This is the Associations' third submission to the Bureau in connection with its study of consumer arbitration. On June 22, 2012, the Associations submitted comments in response to the Bureau's Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements. And, on August 6, 2013, the Associations submitted comments in response to the Bureau's request for comments on its proposed telephone survey of consumers.

minuscule benefits that are awarded years after the initiation of the lawsuit. New regulatory limitations on arbitration agreements are likely also to result in increased costs to consumers for financial products and services. Rather than regulating consumer arbitration in financial services contracts, the Associations believe the Bureau should concentrate its efforts on educating consumers about arbitration, including how to make best use of arbitration terms that a contract may contain and the differences between arbitration and litigation, particularly class action litigation, so that consumers gain a better understanding of the many benefits that arbitration offers.

In addition, we identify numerous additional issues the Bureau should research and analyze before any meaningful final conclusions regarding the efficacy of customer arbitration provisions can be reached. These include customer satisfaction with arbitration and whether the creation of the Bureau and its own regulatory, enforcement, and supervisory activities are supplanting what consumer activists contend are the main justification for class actions—*i.e.*, providing redress to large numbers of consumers and regulating corporate behavior.

Finally, we urge the Bureau to solicit public comment on the Study so that all interested stakeholders will have an opportunity to express their views on the important issues at hand before the Bureau decides whether to initiate a rulemaking proceeding. It would be premature for the Bureau to promulgate any regulation at this time considering the relatively brief time period that customer arbitration provisions have been used by companies.

A. Pro-Arbitration Findings

The data reported in the Study clearly demonstrate that arbitration is more beneficial to consumers than class action or individual litigation in a number of important ways. As discussed in detail in Section II.A. of this letter—

1. Arbitration is faster, less expensive, and more effective than litigation, including class action litigation, and customers are far more likely to obtain a decision on the merits and more meaningful relief.

2. The Bureau's statistics are consistent with the conclusion of the U.S. Chamber of Commerce in its December 2013 statistical analysis of class actions that the vast majority of class actions "produce[] no benefits to most members of the putative class" but "can (and do) enrich [their] attorneys." With respect to the 562 class actions examined by the Bureau in the Study—

    - At least **60%** of the class actions studied produced **no benefits** at all for the putative class members, because they were settled individually or withdrawn by the plaintiff.

    - Only **15%** of the class actions received final class settlement approval.

    - **No** class action was actually tried on the merits.

    - Consumers who received cash payments in class action settlements obtained an average of only **$32.35**.

- In class settlements that required putative class members to submit a claim form, the weighted average claims rate was only **4%**, meaning that **96% of the putative class members failed to obtain any benefits** because they did not submit claims.

- Notwithstanding the foregoing statistics, attorneys' fees awarded to class counsel in settlements totaled **$424,495,451**.

By contrast, **customers who prevailed in arbitration recovered an average of $5,389**, **compared to the $32.35 obtained by the average class member in class action settlements.** Thus, the average customer who prevailed in arbitration received **166 times more** in financial payments than the average class member in class action settlements.

3. The Study dispels the misconception that arbitration is a barrier to class actions. **Arbitration was not even a factor—and therefore presented no barrier—in 92% of the 562 class actions studied by the Bureau,** because so few defendants moved to compel arbitration and only about half of those few motions were granted. Moreover, there is abundant competition in the financial services marketplace to accommodate customers who prefer to resolve disputes via litigation as opposed to arbitration. The data show that 85% of credit card issuers and 92.3% of banks do not include arbitration provisions in their customer contracts. At least 25% of customers whose credit card and deposit account contracts contain arbitration provisions have a contractual right to reject the arbitration provision within 30 to 60 days of entering the contract without affecting any other provision in their contracts.

4. The Study also dispels the misconception that companies have an unfair advantage over customers in arbitration. The Study found that almost all of the arbitration proceedings involved companies with repeat experience in the forum. However, that was counter-balanced by the fact that counsel for the consumers were also usually repeat players in arbitration.[12] Moreover, in 81% of the arbitrations in which customers were awarded affirmative relief, the company was a "repeat player," but the customer prevailed anyway.[13]

5. Many of the other statistics recited in the Study also reflect favorably on arbitration when placed in the proper context. For example—

   - The Study's finding that customers initiated only 1,847 arbitration proceedings from 2010 through 2012[14] does not reflect customer dissatisfaction with arbitration nor suggest that it is an ineffective remedy. In context, this statistic is reasonable given the multitude of other factors that materially affect the number of arbitrations filed by customers. Those factors include, *inter alia*, that (a) the vast majority of customers resolve their disputes

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[12] Study, § 1, p. 12; § 5, p. 10 & n. 16.

[13] *Id.* § 5, p. 67.

[14] *Id.* § 5, p. 9.

with businesses informally without the need for arbitration or litigation,[15] (b) customer arbitration is still in its infancy compared to civil litigation, (c) plaintiffs' lawyers and consumer advocacy groups (many funded by plaintiffs' lawyers) have sent consistently negative messages about arbitration to customers for many years to dissuade them from using it; (d) government enforcement and supervisory actions have eliminated much of the need for customers to bring private arbitration actions; and (e) individuals are turning increasingly to on-line arbitration and mediation resources to resolve small dollar customer complaints, which the Bureau chose not to include in the Study.[16]

- The Study's finding that 75% of consumers surveyed telephonically did not know whether their contracts contain an arbitration provision underscores the need for the Bureau to concentrate its efforts on educating customers about the differences between arbitration and litigation (including class actions) and the many benefits that arbitration can offer customers for resolving their disputes with companies.

B. Analysis of the Study Underscores the Need for Additional Research to Inform Future Policy Decisions Regarding Arbitration

Before the Bureau decides whether or not to issue a regulation, it should research a number of important issues that either were omitted from or were not fully or properly analyzed in the Study. We believe that these issues, discussed in Section II. B below, are essential to a fair and balanced understanding of whether any regulation of consumer arbitration "is in the public interest and for the protection of consumers." They include–

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15 The Bureau itself has provided a portal through which financial services companies informally resolved more than 558,000 alleged customer complaints in the past three years. Each alleged complaint resolved obviated the need for the customer to commence an arbitration proceeding.

16 For example, in comments submitted to the Bureau when it initially proposed the Study, Modria, one of the leading companies offering online arbitration and dispute resolution services, stated that it handles more than 60 million disputes a year. *See* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0019. Even if only a fraction of the disputes handled by Modria involve consumer financial services companies, it is obvious that the universe of customer disputes being addressed outside the courtroom is much larger and diverse than just the AAA database examined in the Study. Modria is only one of many online dispute resolution services. In their own initial comments on the Study, the Associations asked the Bureau to study the extent to which customers resolve their disputes with businesses through online dispute resolution in order to place more traditional customer arbitration services (such as the AAA) in the proper context. *See* http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0017-0030. However, the Bureau did not do so. Before enacting any regulation affecting customer arbitration, the Bureau should study whether and how such a regulation would impact this ever-burgeoning national and international market for resolving customer disputes online.

1. Customer satisfaction with the arbitration process;

2. The cash awards, if any, that *individual* class members receive in class action settlements;

3. The economic consequences to customers and companies of regulation that would prohibit the use of arbitration provisions or class action waivers;

4. The impact of any regulation regarding customer arbitration on the provision of national and international online dispute resolution services (*see* note 9 supra);

5. Whether recent United States Supreme Court decisions, which make it more difficult to obtain class certification, weigh in favor of supporting arbitration as a method for customers to resolve their disputes with companies;

6. The impact of the Bureau's enforcement and supervisory actions from January 1, 2013, to date;

7. Whether the class actions analyzed in the Study or the complaints in the Bureau's Consumer Complaint Database can be qualitatively evaluated to determine how many involved systemic issues that would have been amenable to class action treatment and certification; and

8. Customer experience with analogous areas in which the use of arbitration has a lengthier and more developed history, such as employment arbitration.

II. DISCUSSION

Section 1028 of the Dodd-Frank Act requires the Bureau to "conduct a study of, and to 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." Section 1028 further provides that the Bureau, "by regulation, may prohibit or impose conditions and limitations for the use of [such] an agreement" if it "finds that such a prohibition or imposition of conditions and limitations is in the public interest and for the protection of consumers." The findings in such a regulation must be "consistent with the study."

Notably, the Study—consistent with prior empirical studies of consumer arbitration conducted by the Bureau's own consultant[17]—includes a significant quantity of data demonstrating that

[17] *See, e.g.*, Christopher R. Drahozal, et al., "An Empirical Study of AAA Consumer Arbitration," 25 Ohio St. J. on Disp. Resol. 843 (2010). This article discusses the results of the March 2009 study of AAA consumer arbitrations undertaken by the Searle Civil Justice Institute, Northwestern University School of Law. The study was based on a review of 301 AAA consumer arbitrations (240 brought by consumers, 61 brought by businesses) that were closed by award between April and December 2007. It reached the following conclusions: (a) the upfront cost of arbitration for

arbitration is more beneficial to consumers than class action or even individual litigation and dispels key misconceptions about arbitration. These data weigh heavily against any regulation that would prohibit the use of arbitration provisions in consumer financial services contracts altogether, or materially condition or limit their use (for example, by banning the use of class action waivers). We discuss these data in Section A below.

A. The Study Clearly Demonstrates that Arbitration Benefits Customers

1. Arbitration Is Faster for Customers than Litigation

The Study demonstrates that customer arbitration is up to twelve times faster than customer litigation. The data show that (i) the median desk arbitration[18] was resolved in 4 months; (ii) the median telephone arbitration was resolved in 5 months; (iii) the median in-person hearing was resolved in 7 months; and (iv) when the arbitration settled, the median arbitration proceeding lasted 2-5 months.[19] By contrast, the average class action settlement received final court approval in 1.89 years, and federal court multi-district litigation (MDL) class actions filed in 2010 closed in a median of 2.07 years.[20]

2. Arbitration Is Less Expensive for Customers than Litigation

The Study shows that customers pay far less to arbitrate than to sue in court. Prior to September 14, 2014, the customer's portion of the administrative and arbitrator fees charged by the American Arbitration Association (AAA) under its rules was capped at $125. The company paid all of the remaining fees. Under the AAA's revised rules, the customer's share of those fees is capped at $200, with the company paying the remainder.[21] That is only one-half of the $400 it costs to file a new complaint in federal court.[22]

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consumer claimants was quite low; (b) AAA consumer arbitration is expeditious (an average of 6.9 months); (c) consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed); (d) no statistically significant repeat-player effect was identified; and (e) arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574.

[18] **Desk arbitration** involves dispute resolution based on paper submission rather than a hearing.

[19] Study, § 1, p. 13.

[20] *Id.* § 6, pp. 9, 43.

[21] *Id.* § 1, p. 13; § 4, pp. 10-11. Moreover, customers are permitted to apply for a hardship waiver if they cannot pay these modest amounts, and many arbitration provisions offer to pay them for the customer if requested or unconditionally. *Id.* § 2, pp. 58-59; § 5, pp. 12, 76-77.

[22] *Id.* § 4, p. 10.

3. Customers Recover More in Arbitration than in Litigation

According to the Study, in arbitrations where customers obtained relief on affirmative claims and the Bureau could determine the amount of the award, the customer's average recovery was $5,389 (an average of 57 cents for every dollar claimed).[23] By contrast, based on 73 of 74 individual federal court claims in which a judgment was entered for the customer, the average amount awarded to the customer was $5,245.[24] At the other end of the spectrum are class members in consumer class action settlements. The Study states that cash payments to "at least 34 million consumers" during the period studied were "at least $1.1 billion." This means that the average class member's recovery was a mere $32.35.[25]

The Study further concluded that in 60% of the 562 putative class actions studied, the putative class members got nothing at all, because 25% of the class actions were settled individually, while 35% were withdrawn by plaintiffs.[26] These statistics create a strong inference that many class actions are marginal at best and are filed not to benefit putative class members, but with the intention of driving an individual settlement. (Of course, even marginal or frivolous class actions require the defendant company to incur substantial defense costs up to the point of settlement, withdrawal, or dismissal. Therefore, all customers pay for the cost of defending and managing such suits in the form of higher prices or impact on services as such expenses have to be funded.)

Moreover, according to the Study, only 15% of the class actions studied obtained final class settlement approval.[27] In the class settlements that required the putative class members to submit a claim form, the weighted average claims rate was only 4%, because 96% of the potentially eligible putative class members failed to submit claims and therefore did not receive a settlement award.[28] In addition, even those minuscule claims rates fell by 90% if documentary proof was required to be submitted along with the claim.[29]

The Study also shows that customers are more likely to obtain decisions on the merits in arbitration than they are in class action litigation. None of the 562 class actions studied by the Bureau went to trial.[30] By contrast, the Study found that of 341 cases resolved by an arbitrator, in-person

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23 *Id.* § 5, pp. 13, 41. Customers were also awarded attorneys' fees in 14.4% of the disputes resolved by arbitrators; the largest award of customer attorneys' fees was $37,275. *Id.* § 5, p. 79.

24 *Id.* § 6, p. 49 n. 85.

25 $1.1 billion divided by 34 million equals $32.35 per class member.

26 Study, § 1, pp. 13-14; § 6, p. 37.

27 *Id.* § 1, p. 14.

28 *Id.* § 1, p. 17, § 8, p. 30.

29 *Id.* § 8, p. 31.

30 *Id.* § 6, pp. 7, 38.

hearings were held in 34% of the cases, and an arbitrator issued an award on the merits in about one-third of the cases.[31]

Finally, the statistic that dwarfs all others is the amount paid to class action attorneys. The Study found that attorneys' fees awarded to class counsel in settlements during the period studied amounted to a staggering $424,495,451—*almost half a billion dollars*—in that relatively short period.[32] The Bureau's findings confirm the conclusions reached by the U.S. Chamber of Commerce, Institute for Legal Reform in a December 2013 empirical study of class actions titled, "Do Class Actions Benefit Class Members?"[33] The Chamber analyzed 148 putative consumer and employee class action lawsuits filed in or removed to federal court in 2009. Consistent with the Bureau's Study, the Chamber's report found, *inter alia*, that—

- Not one of the class actions studied ended in a final judgment on the merits for the plaintiffs. And none of the class actions went to trial, either before a judge or a jury.

- The vast majority of cases produced no benefits to most members of the putative class—even though in a number of those cases the lawyers who sought to represent the class enriched themselves in the process.

- Over one-third (35%) of the class actions that were resolved were dismissed voluntarily by the plaintiff. Many of those cases settled on an individual basis, resulting in an award only to the individual named plaintiff and the lawyers who brought the suit, with the class members receiving nothing.

- Just under one-third (31%) of the class actions that were resolved were dismissed by a court on the merits, and the class members received nothing.

- For those cases that settled, there was often little or no benefit for class members. Moreover, few class members ever received those benefits, particularly in consumer class actions.

The close correlation between the Study and the Chamber's data reveals an empirical consensus that class actions benefit consumers' lawyers but not the consumers themselves. Both reports confirm that in class actions: (1) the vast majority of customers receive no benefit whatsoever from being a class member; (2) any economic benefit to individual class members in a class settlement is insignificant; and (3) the merits of the dispute are rarely reviewed or resolved. By contrast, the Study shows that customers can receive significant economic benefits in arbitration; they receive those benefits in months rather than years at little or no expense; and their disputes are resolved on the merits.

31 *Id.* § 5, pp. 11-12.

32 *Id.* § 8, p. 33.

33 A link to the report is available at http://www.instituteforlegalreform.com/resource/study-class-actions-benefit-lawyers-not-consumers/.

4. *The Study Dispels Key Misconceptions about Consumer Arbitration*

Plaintiffs' class action attorneys and consumer advocates contend that arbitration is unfair to consumers because (a) arbitration is a barrier to class actions, because it imposes individual arbitration or dissuades class actions from being brought; (b) very few consumers actually use arbitration to resolve disputes; (c) the arbitration provisions are contained in form contracts which give customers no choice but to arbitrate; and (d) companies have an unfair advantage in arbitration, because they are "repeat players" before the arbitration organizations they have named in their contracts. Study data, however, dispel each of these misconceptions.

a. Arbitration Is Not a Barrier to Class Actions

Substantial data in the Study contradict the argument that arbitration clauses are a barrier to class actions. The Study found that arbitration was a factor—and therefore potentially a barrier—in only 8% of the 562 class actions studied.[34] That is because the defendant companies moved to compel arbitration in only 94 of the 562 class actions (16.7%), and those motions were granted in only 46 (one-half) of the class actions.[35] Thus, arbitration had no causal effect whatsoever on 92% of the class actions studied by the Bureau and, therefore, could not have been a barrier to consumers obtaining class relief in the overwhelming number of examples.[36] These data are particularly remarkable since in the middle of the time period studied (2010-2012), the U.S. Supreme Court upheld the validity of class action waivers in consumer arbitration agreements in *AT&T Mobility LLC* v. *Concepcion*.[37] The Study found that while *Concepcion* generated a "slight upward trend" in the use of arbitration provisions, "the increase has not been as dramatic as predicted by some commentators."[38]

Inasmuch as the Study demonstrates that arbitration agreements with class action waivers have only a very minor (8%) impact on consumer class actions, regulating availability or use of such agreements would not be in the public interest, nor is such regulation needed to protect the public. Conversely, if the Bureau were to over-regulate arbitration agreements or prohibit the use of class action waivers in such agreements, as some advocate, many companies would likely discontinue offering arbitration to customers. That would harm consumers, as they would lose the arbitration forum to resolve a dispute. They would be deprived of a valuable and time-tested procedure for economically, expeditiously, conveniently, and efficiently resolving individual customer disputes. Instead, they would be relegated to a procedure (class actions) in which they are likely to receive either no benefits at all or minuscule benefits that are delayed for years.

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34 Study, § 6, p. 38 ("[a]ll claims against a company party were stayed or dismissed for arbitration in 8% of the [class] cases").

35 *Id.* pp. 8-9, 57-58.

36 *Id.* § 1, p. 14.

37 *See AT&T Mobility LLC* v. *Concepcion,* 131 S. Ct. 1740 (2011).

38 Study, § 2, p. 12.

In fact, the Study clearly shows that the vast majority of class action lawsuits fail, not because the underlying disputes are sent to arbitration for individual disposition, but because they inherently lack merit and/or are not certifiable. The Study found that 35% of the class actions filed between 2010 and 2012 were withdrawn by plaintiffs and 25% were settled individually.[39] As noted in the Study, "[t]he most common outcome was a potential non-class settlement (typically, a withdrawal of claims by the plaintiff) …. Classwide judgment for consumers … [was] the least frequent of the identified outcomes … occurring in less than 1% of cases."[40] The Study further found that "[c]lass certification rarely occurred outside the context of class settlement" and "[n]o class cases went to trial."[41]

These statistics strongly suggest that the vast majority of the so-called "class actions" studied were one-off disputes that did not involve systemic issues and/or were otherwise not meritorious or certifiable.[42] They buttress the conclusion that there is little, if any, causal relationship between the success of consumer class actions and the presence of arbitration clauses in the customers' contracts, since most class actions fail due to their own inadequacies entirely unrelated to arbitration. Even as to the 92% of the class actions studied that were not ordered to be arbitrated, the Study demonstrates that class actions are an exceptionally poor vehicle for producing relief to customers. Moreover, these numbers effectively challenge the notion that class actions are an effective enforcement tool.

The data also debunk the oft-asserted argument from plaintiffs' lawyers that the mere presence of an arbitration clause discourages or inhibits customers from pursuing remedies.[43] Assuming *arguendo* that there are class actions that are not brought because the potential plaintiffs' contracts contained an arbitration clause with a class action waiver, there is no evidence to demonstrate that such class actions, if initiated, would have had a higher success rate than those that were filed and studied by the Bureau. Presumably, 60% of those class actions would never have resulted in any relief to putative class members, less than 1% of them would result in a judgment for the plaintiffs, and any relief to putative class members afforded by class action settlements would be insignificant compared to the benefits obtainable in arbitration.

In sum, it is not arbitration that is a barrier to customers obtaining meaningful relief in class actions. Rather, the evidence demonstrates that *it is class action litigation that may be precluding consumers from obtaining meaningful relief in arbitration*.

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39 *Id.* § 1, pp. 13-14; § 6, p. 37.

40 *Id.* § 6, p. 37.

41 *Id.* § 1, p. 14.

42 Of course, even marginal or frivolous class actions must be defended, often at substantial cost to the defendant company.

43 *See, e.g., "*Public Justice Comments to Bureau of Consumer Financial Protection In Response to Request for Information for Study of Pre-Dispute Arbitration Agreements," Docket No. CFPB-2012-0017, p. 17 (June 23, 2012) (urging the Bureau to study "the claims suppression effects of arbitration clauses").

b. The Number of Consumer Arbitrations Initiated to Date Is Not a Meaningful Statistic

The Study noted a “relatively low” number (1,847) of arbitration proceedings filed by customers against financial services companies.[44] However, no inference should be drawn that customers prefer litigation to arbitration or that arbitration is an ineffective remedy compared to class actions. In reality, the vast majority of customer disputes are resolved by more direct methods without the need for arbitration or litigation, even small claims litigation.

Indeed, the Bureau has established a portal through which financial services companies resolve consumer disputes directly and without intervention, and the Bureau uses every opportunity to encourage consumers to file complaints through the portal. According to its website, from July 2011 through March 1, 2015, more than 558,800 consumer complaints and issues have been resolved in this manner.[45]

The Bureau’s Consumer Response Annual Report also provides monetary relief information for companies that report such relief. This includes median relief of $363 for 670 debt collection complaints, $475 for 1,000 mortgage complaints, $24 for 200 credit reporting complaints, $105 for 3,060 bank account and service complaints, $121 for 3,140 credit card complaints, $200 for 270 private student loan complaints, and $319 for 70 payday loan complaints.[46] In addition to the Bureau, a vast number of other federal agencies as well as state agencies such as state attorneys’ general offices provide their own complaint portals, as do private entities such as the Better Business Bureau.

The fact that the number of consumer arbitrations is relatively small can also be explained by the following facts: (a) for almost two decades consumer advocates have sent consistently negative messages about arbitration to dissuade consumers from arbitrating;[47] (b) consumer arbitration is still “the new kid on the block” compared to litigation;[48](c) government enforcement actions, including vigorous regulatory and supervisory activities by the Bureau,[49] reduce the field for consumers to bring

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[44] Study, § 5, p. 9.

[45] *See* http://files.consumerfinance.gov/f/201503_cfpb_complaints-by-the- numbers.pdf.

[46] CFPB, Consumer Response Annual Report (January 1-December 31, 2014), p. 43, available at http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf.

[47] For example, the consumer advocacy organization Public Justice states on its website that “[o]ur Mandatory Arbitration Abuse Prevention Project is the acknowledged national leader in the battle against corporate efforts to use arbitration ….” *See* http://www.publicjustice.net/what-we-do/access-justice/mandatory-arbitration.

[48] *See* Prepared Remarks of Bureau Director Cordray at the March 10, 2015 Arbitration Field Hearing, p. 1 (although the Federal Arbitration Act was passed in 1925, “[a]rbitration clauses were rarely seen in consumer financial contracts until the last twenty years or so”).

[49] *See* discussion at pages 18-20 of this letter.

private actions;[50] (d) individuals are turning increasingly to on-line arbitration and mediation resources to resolve small-dollar customer complaints (*see* note 9 *supra*); and (e) the Bureau has done little to educate consumers about the many benefits that arbitration can offer. With respect to this latter point, the Study found that over 75% of consumers surveyed said they do not know whether their credit card agreement contained an arbitration clause. The Bureau can play an important role in rectifying that situation by having its Consumer Education and Engagement division educate customers about the relative costs and benefits of arbitration and litigation—particularly class action litigation.

c. Customers Have Choices Regarding Arbitration

The Study found that 85% of credit card issuers (covering 47% of the market) and 92.3% of banks (with 56% of insured deposits) do not include arbitration provisions in their customer contracts.[51] Clearly, customers who prefer not to have an arbitration provision in their account agreement can choose companies that do not offer arbitration programs. These include four of the ten largest credit card issuers (Bank of America, Capital One, Chase, and HSBC), which before 2009 included arbitration provisions in their account agreements but no longer do so.[52] Moreover, at least 25% of those contracts that contain arbitration provisions also provide the customer with a contractual right to reject the arbitration provision, typically within 30 to 60 days of entering the contract, without affecting any other provision in the contract.[53]

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50 The Study identified 1,150 consumer financial enforcement actions filed between 2008 and 2012 by state, municipal, and federal entities. Of those, only 15% had one or more matching class action litigations. Study, § 9, p. 14.

51 *Id.* § 1, pp. 9-10; § 2, pp. 7, 9, 14.

52 *Id.* § 2, pp. 10-11.

53 *Id.* § 2, p. 31. Scores of federal and state courts have enforced arbitration provisions on the basis that it permitted the consumer to opt out. See, e.g., *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002); *Marley v. Macy's South*, No. CV 405-227, 2007 WL 1745619, at *3 (S.D. Ga. June 18, 2007); *Providian National Bank v. Screws*, 894 So. 2d 625 (Ala. 2003); *Tsadilas v. Providian National Bank*, 13 A.D.3d 190, 786 N.Y.S.2d 478 (N.Y. App. Div. 1st Dep't 2004), *appeal denied*, 5 N.Y.3d 702, 832 N.E.2d 1189, 799 N.Y.S.2d 773 (June 4, 2005); *Webb v. ALC of West Cleveland, Inc.*, No. 90843, 2008 WL 4358554 (Ohio Ct. App., 8th App. Dist. Sept. 25, 2008); *Pivoris v. TCF Financial Corp.*, No. 07-C 2673, 2007 U.S. Dist. LEXIS 90562 (N.D. Ill. Dec. 7, 2007); *SDS Autos, Inc. v. Chrzanowski*, Case No. 1D06-4293, 2007 WL 4145222 (Fla Ct. App., 1st Dist. Nov. 26, 2007); *Honig v. Comcast of Ga., LLC*, Civil Action No. 1:07-cv-1839-TCB, 537 F. Supp. 2d 1277 (N.D. Ga. Jan. 31, 2007); *Davidson v. Cingular Wireless, LLC*, No. 2:06-cv- 00133, 2007 WL 896349, at *6 (E.D. Ark. Mar. 23, 2007); *Martin v. Delaware Title Loans, Inc.*, No. 08-3322, 2008 WL 444302 (E.D. Pa. Oct. 1, 2008); *Columbia Credit Services, Inc. v. Billingslea*, No. B190776, 2007 WL 1982721 (Cal. Ct. App. July 10, 2007); *Eaves-Leanos v. Assurant, Inc.*, No. 07-18, 2008 WL 1805431 (W.D. Ky. Apr. 21, 2008); *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 06-0032, 2008 WL 830262 (E.D. Ark. March 25, 2008); *Crandall v. AT&T Mobility, LLC*, No. 07-750, 2008 WL 2796752 (S.D. Ill. July 18, 2008); *Guadagno v. E*Trade Bank*, No. CV 08-03628 SJO (JCX), 2008 WL 5479062 (C.D. Calif. Dec. 29,

d. Companies Do Not Have an Unfair Advantage in Arbitration as "Repeat Players"

The Study found that almost all of the arbitration proceedings involved companies with repeat experience in the forum. However, that was counter-balanced by the fact that counsel for the consumers were also usually repeat players in arbitration.[54] Moreover, in 81% of the arbitrations in which customers were awarded affirmative relief, the company was a "repeat player," but the customer prevailed anyway.[55]

B. Important Issues that Warrant Additional Study

The Associations strongly urge the Bureau to conduct additional research on several important issues before making policy decisions regarding whether restricting or prohibiting consumer arbitration clauses would be in the public interest.

First, the Bureau should study consumer satisfaction with the arbitration process. The Bureau's telephone survey of 1007 consumers merely purported to explore consumers' "default assumptions" concerning arbitration and intentionally excluded consumers who had actually participated in an arbitration proceeding.[56] Both logic and common sense dictate that the Bureau should seek to measure consumer satisfaction with arbitration as it is an essential factor to be considered in an analysis of whether consumer arbitration is in the public interest.

As the Study acknowledges, there is precedent for studying this issue.[57] For example, in 2005 Harris Interactive conducted an online poll of 609 individuals who had participated in an arbitration proceeding in which a decision was reached.[58] That poll concluded, *inter alia*, that (1) arbitration was widely seen as faster (74%), simpler (63%), and cheaper (51%) than going to court; (2) two thirds (66%) of the participants said they would be likely to use arbitration again, with nearly half (48%) saying they were extremely likely to do so, and even among those who lost, one-third said they were at least somewhat likely to use arbitration again; (3) most participants were very satisfied with the arbitrators' performance, the confidentiality process, and its length; and (4) although winners found the process and outcome very fair and losers found the outcome much less fair, 40% of those who

2008); *Magee v. Advance America Servicing of Ark, Inc.*, No 6:08-CV-6105, 2009 WL 890991 (W.D. Ark. April 1, 2009); *Clerk v. ACE Cash Express, Inc.*, No. 09-05117, 2010 U.S. Dist. LEXIS 7978 (E.D. Pa. Jan. 29, 2010).

54 Study, § 1, p. 12; § 5, p. 10 & n. 16.

55 *Id.* § 5, p. 67.

56 *Id.* § 3, p. 4 ("[w]e opted not to explore consumer satisfaction with arbitration (or litigation proceedings").

57 *Id.* § 3. p. 5 n. 5.

58 *See* Harris Interactive, *Survey of Arbitration Participant*s (April 2005), available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf.

lost were moderately to highly satisfied with the fairness of the process, and 21% were moderately to highly satisfied with the outcome.

The Associations submit that, notwithstanding the Bureau's assertion that it is difficult to find consumers who have personal experience with both arbitration and litigation,[59] the opinions of consumers who have experienced the arbitration process are more valuable than the opinions of the consumers questioned in the Bureau's telephone survey who had never participated in an arbitration. The Associations believe that the Bureau's survey greatly diminished the value and relevance of the data as well as the Study as a whole.

Second, the Bureau should continue to study the benefits, if any, that individual class members receive in class action settlements. The Study reports data on the benefits of class actions in aggregate terms, failing to disclose the small sums that individual class members receive. Based upon the Bureau's finding that aggregate cash payments to "at least 34 million consumers" during the period studied were "at least $1.1 billion,"[60] the Associations estimate that the average cash payment received by individuals in a settlement class was a mere $32.35. That figure pales by comparison with the $5,389 that the average customer received in arbitration.[61] In addition, the Bureau should conduct a survey of consumers who have gone through class action litigation. Such a survey would shed much light on the issue of consumer satisfaction with class actions.

While the Associations have sought to make apples-to-apples comparisons between arbitration and class action litigation based upon the Study's aggregate data, the Study itself attempts to shy away from doing so. Instead, the Study urges readers to exercise "caution in drawing conclusions as to how well consumers or companies fare in arbitration as compared to litigation."[62] It reiterates that "[c]omparing outcomes across litigation and arbitration is especially treacherous" and "quite challenging."[63] If that is so, then what was the basis for the Bureau's press release for the March 10 field hearing, which emphasized the benefits of class actions over arbitration?[64] More importantly, what basis could there be for any regulation that would prohibit or materially limit consumer arbitration provisions in financial services contracts if the Bureau is unable to demonstrate clearly and convincingly that individual consumers fare worse in arbitration than they do in class action litigation?

The fact that the Bureau has acknowledged that in 60% of the putative class actions studied, class members recovered absolutely nothing makes it incumbent on the Bureau to analyze the amount

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[59] Study, § 3 p. 5.

[60] *Id.* § 1, pp. 16-17, § 8, pp. 27-28.

[61] *Id.* § 5, pp. 13, 41.

[62] *Id.* p. 7.

[63] *Id.* § 6, p. 4.

[64] *See* http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/.

that individual class members received in the 15% of the class actions that received final settlement approval. Any regulation by the Bureau that is based upon the alleged superiority of class actions as a means of resolving customer disputes must be supported by specific data showing that customers fare better in class actions than in arbitration. Such data are presented nowhere in the Study. In fact, the data in the Study show that arbitration is superior to class actions in terms of financial recovery for consumers ($5,389 versus $32.35).

Third, the Bureau should conduct additional analysis of whether the use of consumer arbitration provisions by companies lowers the costs of the goods and services these companies provide to customers and, conversely, whether the elimination of arbitration provisions or of class action waivers within them would increase the costs of goods and services to customers. The results of the Study on this issue were inconclusive as the Bureau found "little empirical evidence" and a "lack of a statistically significant effect."[65] The Bureau acknowledged that "we have not specifically isolated and studied the effect of removing arbitration clauses on the pricing of small issuers," and further acknowledged that "our analysis cannot be interpreted as establishing that companies did not save money from their use of pre-dispute arbitration clauses."[66]

The Associations believe that this merits further study. Congress has recognized the extraordinary costs and burdens that companies are forced to incur in defending class actions, even the costs of defending against frivolous and marginally meritorious lawsuits. In enacting the Class Action Fairness Act of 2005, Congress found, *inter alia*, that—

> [C]orporate defendants are forced to settle frivolous claims to avoid expensive litigation, thus driving up consumer prices.
>
> *   *   *
>
> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits.
>
> *   *   *
>
> Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has explained, "Certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability …. [Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." Hence, when plaintiffs seek hundreds of millions of

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65 Study, § 10, pp. 5, 16.

66 *Id.* p. 16.

dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.[67]

If there is a correlation between a company's use of arbitration and the costs of the goods and services it supplies to customers, any regulation that eliminated the arbitration provision or its class action waiver could cause companies to incur substantially increased dispute resolution costs that could drive up the cost of the goods and services they provide to customers, the purported beneficiaries of such regulation. Basic economic theory dictates that if companies' litigation costs increase, there will be corresponding pressure to increase revenue or reduce value. Many courts and commentators have so concluded.[68]

Fourth, the Bureau should study the impact of recent U.S. Supreme Court decisions, such as *Comcast Corp. v. Behrend* and *Wal-Mart Stores, Inc. v. Dukes*, which make it more difficult for plaintiffs to obtain class certification.[69] The Associations believe that these decisions decrease the likelihood that putative class members will benefit from the class proceedings, which in turn supports arbitration as a preferred method in the first instance for consumers to resolve their disputes with companies.[70]

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[67] Senate Report No. 14, The Class Action Fairness Act of 2005, 109th Congress, 1st Sess., 2005 WL 627977, at *14, 20-21 (Feb. 28, 2005).

[68] *See, e.g.*, *Metro East v. Quest*, 294 F.3d 294, 297 (7th Cir.), *cert. denied*, 537 U.S. 1090 (2002) (The "benefits of arbitration are reflected in a lower cost of doing business that is passed along to customers. That is because by limiting discovery and dealing with individual rather than class claims it "curtails the cost of the proceedings and allows swift resolution of small disputes."); *Provencher v. Dell*, 409 F. Supp. 2d 1196, 1203 n. 9 (C.D. Cal. 2006) ("it is likely that consumers actually benefit in the form of less expensive computers reflecting Dell's savings from inclusion of the arbitration clause in its contracts"); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) ("it stands to reason that passengers containing a forum clause … benefit in the form of reduced fares …"); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements,* 2001 J. Disp. Resol. 89, 91-93 (2001); Richard A. Posner, Economic Analysis of Law 7 (6th ed. 2003).

[69] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). *See also* C. Fisk & E. Chemerinsky, "The Failing Faith in Class Actions: *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*," 7 Duke J. of Const. Law & Pub. Policy 73 (2011) ("[i]n *Wal-Mart v. Dukes* … the Supreme Court revamped the law concerning … Rule 23 of the Federal Rules of Civil Procedure, allowing businesses to insulate themselves from class action suits …."); R. Bone, "Class Actions and Access to Justice," 82 Geo. Wash. L. Rev. 651, 654 (2014) (as a result of *Wal-Mart* and *Comcast*, "class certification has become more difficult to obtain").

[70] Moreover, in *Spokeo, Inc. v. Robins*, No. 13-1339 (*cert. granted* April 27, 2015), the Supreme Court agreed to review whether a plaintiff who cannot show any actual harm from a violation of the Fair Credit Reporting Act (FCRA) nevertheless has standing under Article III of the U.S. Constitution to sue for statutory damages in federal court. The consequences of the Supreme Court's eventual decision will likely extend significantly beyond FCRA litigation and affect numerous other statutes and the viability of class actions where alleged technical violations did not cause any actual harm. In addition to the FCRA, such statutes include the Truth in Lending Act, the Telephone Consumer Protection Act, the Electronic Fund Transfer Act, the Fair Debt Collection Practices Act, the Homeowners Protection Act, the Fair Housing

Fifth, the Bureau should consider whether the government enforcement section of the Study, which excludes the bulk of the Bureau's own enforcement and supervisory actions, should be updated to include the Bureau's enforcement and supervisory actions from January 1, 2013, to date and to take account of anticipated future enforcement activities. The Study examined federal and state enforcement actions from January 1, 2008, through December 31, 2012.[71] However, the Bureau did not report its first enforcement action until July 2012, and it has reported 47 enforcement actions in 2013, 2014 and to date in 2015.[72]

Although the Bureau has been in operation less than four years, it would appear that its regulatory and supervisory activities are supplying what consumer advocates argue are the goals of class actions—providing redress for large numbers of consumers and the regulation of corporate behavior. Since the record of the Bureau's regulatory and enforcement activities is just beginning to emerge, the Study should be updated to consider the Bureau's enforcement activities from January 2013 to date. We believe they are reshaping the government enforcement landscape and significantly decreasing the alleged "enforcement" need for class actions. In July 2014, the Bureau stated on its website: "To date, our enforcement actions have resulted in $4.6 billion in relief for roughly 15 million consumers harmed by illegal practices."[73] The Bureau also reported in its *Supervisory Highlights* of Winter 2015 that "recent supervisory resolutions [by the Bureau] have resulted in remediation of approximately $19.4 million to more than 92,000 consumers."[74] Its more recent *Supervisory Highlights* of Summer 2015 report an additional $11.6 million to more than 80,000 consumers for a total of $31 million to 172,000 consumers for the combined periods. Analyzing just the enforcement action statistics, the Bureau's enforcement efforts have resulted in an average

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Act, the Credit Repair Organizations Act, the Employee Retirement Income Security Act, the Lanham Act, the Americans with Disabilities Act, and the Video Privacy Protection Act. The Supreme Court's ruling could also discourage the filing of class actions under those statutes. In countless class actions in federal court, the plaintiffs' class action bar has obtained recoveries despite the absence of actual injury to the named plaintiffs and class members. In addition, the Supreme Court recently agreed to review whether an unaccepted offer of complete relief to the named plaintiff made prior to certification of a class moots not only the plaintiff's individual claims, but also the class action and deprives the court of federal subject matter jurisdiction. *See Campbell-Ewald Company v. Gomez*, No. 14-857 (*cert. granted* May 18, 2015). A decision in that case could also make class actions harder to sustain.

[71] Study, § 9, p. 9.

[72] *See* http://www.consumerfinance.gov/administrativeadjudication/.

[73] *See* http://www.consumerfinance.gov/blog/category/bureau-milestones/.

[74] *See Supervisory Highlights* (Winter 2015) at http://www.consumerfinance.gov. The study notes that remediation numbers represent remedial actions that gave been completed "since the publication of the last issue of the Supervisory Highlights and during the period under review," but does not indicate the date of the prior *Supervisory Highlights.*

payment of $305 to each consumer, approximately 10 times the $32.35 received by the typical putative class member in the class action settlements studied by the Bureau.

In addition, the Bureau has remedies and resources not available to plaintiffs' class action lawyers, such as the Civil Penalty Fund.[75] Moreover, unlike class action lawsuits, when the Bureau acts, there is less potential conflict between consumers and the attorneys representing them in the ultimate resolution of the case. In private class action litigation, counsel for the class seeks a sizeable percentage of any recoveries obtained **(**$424,495,451, almost half a *billion* dollars, in attorneys' fees in the limited class action data studied by the Bureau).[76] Notably, the $4.6 billion in consumer relief provided by the Bureau's enforcement activities through July 2014 was not reduced by a half-billion dollars to pay attorneys' fees.

Updating the Study to include these statistics, and anticipated future enforcement and regulatory activities by the Bureau, is critically important since the Bureau's robust enforcement activities reduce the need for class actions as a mechanism to protect consumers or discipline proscribed behavior. In the Study, the Bureau analyzed the extent of overlap between government enforcement and private class actions involving consumer financial issues. The Study concluded that "we were unable to find an overlapping private class action complaint in 88% of the enforcement actions."[77] Thus, when the Bureau acts, it potentially eliminates or reduces the need for private class actions. Reducing the supposed need for class actions should also reduce any concerns that arbitration agreements may be harming customers because they impair class actions. Any new regulation of consumer arbitration before the impact of the Bureau's enforcement activities on class actions is determined, and future enforcement activities by the Bureau are taken into account, would therefore be myopic.

Sixth, the Bureau should attempt to evaluate qualitatively the class actions it studied to determine whether the disputes involved were of a nature that would be likely to lead to certification. The Study seems to assume that if a class action is filed, it must be serious and legitimate for purposes of comparing class actions to arbitration. As discussed above, however, the Bureau's own statistics reveal that 60% of the class actions studied were settled individually or were withdrawn by the plaintiffs.

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75 *See* http://www.consumerfinance.gov/budget/civil-penalty-fund/.

76 Study § 8, p. 33.

77 *Id.* § 9, p. 4.

These statistics are inconsistent with the Bureau's assumption about the legitimacy of class actions, and they challenge the conclusion that class actions are useful as an enforcement tool. Even the finding that 15% of the class actions received final settlement approval does not establish that the class actions were certifiable, since many companies settle to avoid the enormous cost, burden, and distraction of protracted class action proceedings and the discovery process. At the very minimum, the Bureau should review the pleadings in the class actions it studied and report on the percent, if any, that involved disputes that were adequately systemic in nature and therefore reasonably likely to result in class certification.

Seventh, the Bureau should study whether and how a regulation affecting consumer arbitration would impact the ever-burgeoning national and international market of online dispute resolution services. (*See* note 9 *supra*).

Finally, because financial consumer arbitration is in its relative infancy, the Bureau should study analogous areas, such as employment arbitration, in which the use of arbitration has a lengthier history. Several earlier studies have concluded that employees fare well in arbitration and have high levels of satisfaction with the arbitral process. For example—

- One study dealing with AAA employment arbitration found that employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations (including those initiated by employers).[78]
- A study that compared the results in employment arbitration with the results in federal court during the same period of time found that 63% of employees won in arbitration compared to 15% of employees who won in federal court. Awards to employees in arbitration were on average 18% of the amount demanded versus 10.4% of the amount demanded in court. The study also demonstrated that while arbitration awards to employees were on average lower than judgments to employees in court, the outcome for employees was still better in arbitration because of their higher win-rates of arbitration and the shorter duration of arbitration compared to court proceedings.[79]
- In yet another study, it was reported that employees won 51% of arbitrations, while the EEOC won 24% of cases in federal court.[80]

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[78] Lisa B. Bingham, "Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Active Cases and Outcomes," 6 Int'l J. Conflict Management 369, 378 (1995).

[79] L. Maltby, "Private Justice: Employment Arbitration and Civil Rights," 30 Colum. Hum. Rights L. Rev. 29, 46-48 (1998).

[80] G. Baxter, "Arbitration in Litigation for Employment Civil Rights?," 2 Vol. of Individual Employee Rights 19 (1993-94).

- Another study reported that employees won 68% of the time before the AAA as contrasted with only 28% of the time in litigation.[81]

- A study examining employment arbitration in California concluded that consumers prevailed 71% of the time.[82]

- A report comparing arbitration and litigation of employment claims found that higher-compensated employees (*i.e.*, those with annual incomes of $60,000 or more) obtained slightly higher awards in arbitration before the AAA than in court.[83]

- A study compared the results of employment discrimination cases filed and resolved between 1997 and 2001 in the Southern District of New York versus arbitrations conducted by the NASD and NYSE. Employees prevailed 33.6% of the time in court versus 46% of the time in arbitration. The median damages award was $95,554 in court versus $100,000 in arbitration. The median duration was 25 months in court versus 16½ months in arbitration. The study also found that of over 3,000 cases filed in court, only 125 (2.8%) went to trial.[84]

- A study of 171 employment arbitration cases filed with the AAA in 1992 concluded that there was no basis for believing that the arbitrators would favor employers who were repeat players.[85]

III. CONCLUSION

The Associations believe that the Bureau's Study, inadequate as it is in many respects, nevertheless clearly supports a conclusion favoring pre-dispute arbitration agreements. We urge the Bureau to recognize and give full credit to the many pro-arbitration findings in the Study and to the other issues raised in this letter when it begins its policy deliberations. Moreover, we urge the Bureau to solicit public comment on the Study so that all interested stakeholders will have an opportunity to express their views on the important issues presented and amplify the record of information available

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81 W. Howard, "Arbitrating Claims of Employment Discrimination," Disp. Res. J. Oct-Dec 1995, at 40-43.

82 "Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure," California Dispute Resolution Institute (August 2004), available at www.mediate.com/cdri/ cdri_print_ Aug_6.pdf.

83 T. Eisenberg & E. Hill, "Arbitration and Litigation of Employment Claims: An Empirical Comparison," Disp. Resol. J. Nov. 2003 – Jan. 2004, at 44.

84 M. Delikat and M. Kleiner, "An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?," Disp. Resol. J. Nov. 2003 – Jan. 2004, at 56.

85 L. Bingham, "Is there a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes," 6 Int'l J. of Conflict Mgmt. 369 (1995).

before the Bureau decides whether to initiate a rulemaking. Without doing so, we do not believe that the Bureau, based upon the evidence presented to the public, can meet the test established by Congress for imposing new rules to limit, restrict, or otherwise prohibit consumer arbitration, an effective avenue for redress relied upon each year by many consumers.

Respectfully submitted,

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