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Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1275 First Street N.E.
Washington, D.C. 20002

Re: Docket No. CFPB-2016-0020, RIN 3170-AA51

Dear Ms. Jackson:

The Electronic Transactions Association ("ETA") hereby respectfully submits its comments in response to the Consumer Financial Protection Bureau's ("Bureau") above-captioned Notice of Proposed Rulemaking ("NPRM") on arbitration.[1] ETA submits that the proposed rules should not be adopted because the Bureau's findings that the rules will protect consumers and serve the public interest are not consistent with the Arbitration Study that the Bureau conducted pursuant to the Dodd-Frank Act. As a result of this inconsistency, adoption of the rules as currently drafted would not comply with the statutory mandate.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA's members

[1] Notice of Proposed Rulemaking on Arbitration, CFPB 2016-0020 ("NPRM").

include credit and debit card companies, general purpose reloadable prepaid card ("GPR") issuers and sellers, and mobile telephone service providers that may be adversely affected by the Bureau's proposed restrictions on the use of pre-dispute arbitration agreements for consumer financial products and services.

The Bureau proposes to adopt rules that (1) would prohibit entities providing consumer financial products and services from using pre-dispute arbitration agreements entered into after the compliance date[2] to block customers from filing or participating in class action suits; (2) would require pre-dispute arbitration agreements entered into after the compliance date to include specific language stating that the provider will not use the agreement to stop the consumer from being part of a class action suit; and (3) would require providers that enter pre-dispute arbitration agreements after the compliance date to submit to the Bureau any arbitration claims filed by or against them, the arbitration agreement, any judgment or award issued by the arbitrator, any communication from the arbitrator relating to a dismissal or refusal to administer a claim due to the provider's failure to pay a required fee and any determination by the arbitrator that the arbitration agreement does not comply with the administrator's fairness principles or rules.[3] Given the liberal federal policy favoring arbitration[4] and the lack of any evidence that

[2] The rules would become effective 30 days after publication in the Federal Register and would apply to any pre-dispute arbitration agreements entered into after the end of the 180 day period beginning on the effective date. NPRM at 5, 245. For purposes of these comments, we use the term "compliance date" to refer to the period beginning 211 days after publication of the final rule in the Federal Register.

[3] Proposed Rule 1040.4.

[4] *See e.g., AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011); *Green Tree Financial Corporation-Alabama v. Randolph,* 531 U.S. 79, 91 (2000).

arbitration proceedings harm consumers, are unfair to consumers or otherwise disserve the public interest, the Bureau should decline to adopt the proposed rules.

Introduction

Section 1028 of the Dodd-Frank Act directed the Bureau to conduct a study of, and provide a report to Congress concerning, the use of pre-dispute arbitration agreements in connection with offering or providing consumer financial products and services. Congress also authorized the Bureau to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements if it finds that such prohibitions or conditions are in the public interest and for the protection of consumers, provided that the Bureau's findings are consistent with the study conducted.[5] The Bureau released its Arbitration Study and Report to Congress in March 2015.[6] Many of the key findings the Bureau cites to support its proposed rules are not consistent with the Arbitration Study and do not justify the imposition of limitations on the use of pre-dispute arbitration agreements.

The Study showed that arbitration was inexpensive[7] and faster and more likely to result in a settlement or a decision on the merits than class litigation. The Study showed that providers

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[5] Public Law 111-203, 124 Stat. 1376 (2010), Section 1028, 12 U.S.C. §5518.

[6] Consumer Financial Protection Bureau, Arbitration Study, Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (March 2015) ("Arbitration Study").

[7] The Study found that consumers paid arbitration fees averaging $206. Arbitration Study Section 1 at 13. The American Arbitration Association caps the fees consumers pay in arbitration at $200. Arbitration Study Section 4 at 11. See also, AAA Consumer Arbitration Rules at 33, available at https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased; JAMS caps consumer arbitration fees at $250. Arbitration Study Section 4 at 12. See

rarely filed motions to dismiss or compel arbitration in judicial proceedings and when they did, the motions were not routinely granted. The Study showed that none of the class actions the Bureau examined was tried on the merits. The Study showed that the vast majority of putative plaintiffs in class action lawsuits received no relief because the cases were withdrawn or settled on an individual basis. The Study showed that for the class settlements approved by a court where putative class members were required to submit a claim in order to obtain financial redress, the weighted average claims rate was only 4 percent, meaning that 96 percent of class members obtained no relief. The Study showed that consumers who prevailed in arbitration were awarded much larger financial recoveries (average recovery $5,388) than the average settlement amount available to consumers in class action litigation ($32). In contrast to the paltry recoveries available to consumer class members, the Study showed that plaintiffs' counsel recovered close to half a billion dollars in fees and costs in the federal class settlements approved between 2008 and 2012.

The potential for huge legal fees in class action cases is undoubtedly what prompted plaintiffs' counsel to characterize the Bureau's proposed rule to prohibit providers from using arbitration agreements to block class actions as "extremely welcome news to the plaintiffs' bar. .

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also, JAMS Policy on Consumer Arbitrations Pursuant to Pre-dispute Clauses Minimum Standards of Procedural Fairness, available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf. Most of the arbitration agreements the Bureau reviewed contained provisions that had the effect of capping consumers' up front arbitration costs at or below the AAA's maximum consumer fee thresholds. AAA's consumer arbitration fee schedule also restricts the arbitrator's ability to reallocate fees. NPRM at 45.

. ."[8] In light of the absence of evidence developed in the Arbitration Study that the proposed rule would actually protect consumers or serve the public interest, however, adoption of the rule as currently drafted would be arbitrary and capricious.

I. The Bureau's Findings Are Inconsistent With The Arbitration Study

The Bureau analyzed arbitration provisions in consumer contracts for six financial service and product markets: checking accounts, credit cards, general purpose reloadable prepaid cards, payday loans, private student loans and mobile wireless contracts governing third party billing services.[9] It then attempted to identify individual and class action lawsuits filed between 2010 and 2012 relating to these markets, to determine whether motions to compel arbitration were filed and/or granted in the lawsuits and to analyze the results of the lawsuits.

A. Arbitration Agreements Are Not Widely Used To Block Consumers From Seeking Class Relief In Litigation

The Bureau contends that rules limiting arbitration are necessary because "predispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis"[10] and that "arbitration agreements block many class actions

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[8] Paul Bland and Gabriel Hopkins, Consumer Financial Protection Board Considering Important Rule on Arbitration Agreements (January 2016), available at http://www.plaintiffmagazine.com/Jan16/Bland-and-Hopkins_Consumer-Financial-Protection-Board-considering-important-rulje-on-arbitration-agreements_Plaintiff-magazine.pdf

[9] NPRM at 39-41. Mobile services providers generally offer consumers the option to block billing for third party products and services. *See e.g*., Verizon Customer Wireless Agreement, available at http://www.verizonwireless.com/b2c/support/customer-agreement; T-Mobile Terms & Conditions of Service, Effective March 17, 2016 available at http://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions.

[10] NPRM at 4.

that are filed and discourage the filing of others."[11] The Study does not support these findings. On the contrary, the Study reported that defendants moved to compel arbitration in less than 17 percent of the 562 federal and state class action cases reviewed[12] and that the motions were granted in full or in part in only 8 percent of the cases studied.[13] These numbers are not consistent with the Bureau's determination that arbitration agreements block *many* class actions that are filed or that they are being *widely used* to prevent consumers from seeking relief on a class basis.

The Bureau itself concedes that it is difficult to measure the scope of claims that may not be filed because of arbitration agreements. Nonetheless, the Bureau argues that "stakeholders that surveyed attorneys found that they frequently turn away cases – both individual and class – when arbitration agreements were present."[14] For this latter assertion, the Bureau cites a survey conducted four years ago by the National Association of Consumer Advocates ("NACA") stating that at least 80 percent of those consumer attorneys surveyed said they had turned down at least

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[11] NPRM at 92.

[12] Arbitration Study, Section 6 at 8, 57. Motions to compel were filed in 94 of the 562 class action cases.

[13] Arbitration Study, Section 6 at 8-9, 58. Motions were granted in 46 of the 562 class actions. The Bureau states that the Study "identified nearly 100 Federal and State class action filings that were dismissed or stayed because companies invoked arbitration agreements." NPRM at 66. The additional 50 cases the Bureau references were culled from a data set of over 1000 cases that included product markets beyond those that were the subject of the Arbitration Study, including car sales financing, car title lending, car repossession, life or disability insurance and medical malpractice or other lawsuit funding loans. Arbitration Study, Appendix P at 109-111. In this data set, the Bureau identified 157 cases where a motion to compel arbitration was filed (15.7 percent) and 77 class cases where a motion to compel was granted (7.7 percent), results that are comparable to those cited in Section 6 of the Arbitration Study.

[14] NPRM at 111.

one case that they believed to be meritorious because of an arbitration clause and that the median number of cases they turned away was 10.[15] As the Bureau acknowledges, however, the survey has basic methodological flaws.[16] For example, it does not examine whether a case turned down by one attorney was subsequently filed by another, nor does it purport to show the total number of cases turned away.[17] As a result, such anecdotal third party evidence cannot support a finding that arbitration agreements are frequently used to prevent class actions from proceeding.[18]

Even assuming that there are class actions that are not filed because of arbitration clauses, the Bureau did not attempt to show whether or how consumers are harmed. The Study showed that as of February 2014, there were class-wide settlements approved in only 12 percent of the 562 class action cases filed between 2010 and 2012 that the Bureau reviewed and that any financial relief made available to consumers as a result of the settlements was minimal.[19] There is no reason to believe that the numbers would be any different for putative class actions that were not filed.

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[15] National Association of Consumer Advocates, *Consumer Attorneys Report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear,* at 4, available at http://www.consumeradvocates.org/sites/default/files/NACA2012BMASurveyFinalRedacted_0.pdf; NPRM at 111, n. 392.

[16] NPRM at 111, n. 392.

[17] *Id.*

[18] See NPRM at 109.

[19] Arbitration Study Section 6 at 7.

B. Arbitration Agreements Are Not Widely Used To Block Individual Lawsuits

The Bureau only reviewed individual lawsuits concerning five of the six product markets and reviewed outcomes in only four of the five markets and a random sample of cases filed in the fifth market.[20] In the 1,205 individual federal lawsuits whose outcomes the Bureau reviewed, motions to compel arbitration were filed in less than one percent of the cases[21] and such motions were granted in less than one-half of one percent of the cases studied.[22] Moreover, the Study found that most pre-dispute arbitration agreements contain a carve-out for cases brought in small claims court.[23] Arbitration agreements with small claims carve-outs cover 99 percent of the credit card market, 99.7 percent of the mobile wireless market, and 84.7 – 94.4 percent of the prepaid card market.[24] The rules of the American Arbitration Association ("AAA") and JAMS, the two largest administrators of consumer financial arbitrations, require that pre-dispute arbitration clauses permit parties to pursue a remedy in small claims court as opposed to

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[20] NPRM at 60, 64-65. In contrast, the Bureau reviewed class actions cases concerning all six product markets filed in both state and federal court. *Id.* at 61.

[21] Arbitration Study, Section 6 at 8-9, 58. Motions to compel were filed in 12 of the 1,205 individual lawsuits whose outcomes the Bureau reviewed.

[22] Arbitration Study, Section 6 at 8-9, 58. Motions to compel were granted in 6 of the 1,205 individual lawsuits whose outcomes the Bureau reviewed.

[23] NPRM at 44; Arbitration Study, Section 2 at 33; Arbitration Study, Section 7 at 2. Both the American Arbitration Association ("AAA") Consumer Due Process Protocol and the JAMS Minimum Standards for consumer arbitration require that consumers have access to small claims courts as an alternative to arbitration. Arbitration Study, Section 7 at 3-4, n. 9.

[24] Arbitration Study, Section 2 at 33-34. Most unsecured consumer debts fit within the jurisdiction of small claims courts. Arbitration Study, Section 7 at 2, n. 3.

arbitration.[25] Thus, there is no basis for concluding that arbitration agreements are being used to block individual consumers from seeking relief in court.

C. The Bureau Underestimated The Number of Individual Lawsuits Filed

The Bureau asserts that the proposed restrictions on the use of pre-dispute arbitration agreements are also necessary because consumers rarely file individual lawsuits to obtain relief from legal violations. The Bureau's estimate of the number of individual lawsuits filed, however, is artificially low. The Bureau identified 3,462 individual federal lawsuits filed from 2010 through 2012 or just over 1,150 cases per year. It did not obtain data on the number of cases filed in state court.[26] With no data on the number of individual lawsuits that may have been filed in state court relating to consumer financial products and services, the Bureau has no basis for finding that consumers rarely file individual lawsuits to obtain relief.

There is also reason to question the Bureau's estimate of the number of federal consumer-initiated lawsuits filed during the relevant time period. According to the Transactional Records Access Clearinghouse, a data gathering and research organization at Syracuse University, there

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[25] NPRM at 31-32; Arbitration Study, Section 7 at 3. *See also*, American Arbitration Association Consumer Due Process Protocol Statement of Principles, available at https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014; JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, available at http://www.jamsadr.com/consumer-arbitration/.

[26] Arbitration Study, Section 1 at 15; Arbitration Study, Section 6 at 6, 12. Because the jurisdictional minimum for federal court cases is $75,000, breach of contract cases are more likely to be brought in state court than in federal court. 28 U.S.C. § 1332. Thus, the Bureau's failure to account for state court litigation is a serious shortcoming that totally undermines its determination that consumers rarely file individual lawsuits.

were 890 consumer credit lawsuits filed in federal district court in the month of May 2012[27] and 723 such suits filed in the month of September 2012 alone.[28] Another source estimates that more than 1000 consumers *per month* filed suits in federal courts in the years 2010, 2011 and 2012 for violations of the Telephone Consumer Protection Act, the Fair Credit Reporting Act and the Fair Debt Collection Practices Act alone.[29] At the very least, these numbers, which dwarf the Bureau's, provide a reality check and reason to question the accuracy of the basis for the Bureau's conclusion that consumers rarely file individual lawsuits to obtain relief from legal violations.

The Arbitration Study demonstrated that consumers did relatively well in individual lawsuits. More than 48 percent of the individual suits reviewed resulted in an identified settlement and another 41.8 percent involved an outcome consistent with settlement.[30] A consumer was able to establish liability against the provider in another seven percent of the cases, generally by summary judgment or default motion, and a suit was dismissed against a provider on a dispositive motion unrelated to arbitration in a little less than 4 percent of the

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[27] See Transactional Records Clearinghouse, TracReports, Consumer Credit Civil Filings for May 2012, available at http://trac.syr.edu/tracreports/civil/285/.

[28] Transactional Records Clearinghouse, TracReports, Consumer Credit Civil Lawsuits Starting To Fall, available at http://trac.syr.edu/tracreports/civil/298/.

[29] See WebRecon LLC, Out Like a Lion. . .Debt Collection Litigation and CFPB Complaint Statistics, Dec 2015 and Year in Review, available at https://webrecon.com/out-like-a-lion-debt-collection-litigation-cfpb-complaint-statistics-dec-2015-year-in-review/. The individual federal lawsuits the Bureau reviewed included claims for violations of the Telephone Consumer Protection Act, the Fair Credit Reporting Act and the Fair Debt Collections Practices Act. See Arbitration Study Section 6 at 20, 29-30.

[30] Arbitration Study Section 1 at 15; NPRM at 65.

cases. Finally, two of the cases went to trial, one of which resulted in liability for the provider.[31] Where consumers prevailed, the average award was $13,131.[32]

With respect to small claims cases filed by consumers, the Bureau limited its review to a sample of cases filed in state and county small claims courts against ten large credit card issuers in 2012.[33] It identified 870 small claims cases filed by consumers against these issuers in 14 state and 17 county jurisdictions.[34] No review was undertaken of small claims cases filed by consumers relating to the other five product or service markets or for small claims cases filed in any of the product markets in 2010 and 2011. Thus, the absolute number of small claims cases filed in the relevant product markets by consumers during the subject time period is significantly understated and cannot be used to support the Bureau's contention that consumers rarely file individual lawsuits to obtain legal relief. Because the small claims process tends to be faster, simpler and less expensive than litigation in courts of general jurisdiction and because claimants can proceed without counsel, small claims court represents a viable and workable alternative for consumers to pursue judicial relief for harms arising out of contracts for financial products and services.[35] The fact that the Bureau was unable to access a comprehensive and searchable source

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[31] *Id.*

[32] Arbitration Study Section 6 at 49, n. 85.

[33] NPRM at 68.

[34] *Id.*; Arbitration Study, Section 7 at 5-6.

[35] The jurisdictional limits for the small claims courts studied ranged from $3,000 to $25,000. (Appendix Q at 118 and Table 22).

of small claims court cases or dockets[36] demonstrates a weakness of the Study and further undermines the credibility of any assertion that consumers rarely proceed individually to obtain relief from legal violations.

II. Consumers Fared Better in Arbitration Than in Class Actions

Not only does the Arbitration Study not support the Bureau's factual findings that arbitration agreements block many class actions that are filed and are widely used to prevent customers from seeking relief on a class basis, the Study demonstrated that consumers filed the majority of arbitration disputes studied and did far better financially in arbitrations than they did in class actions. The Study identified 1,847 arbitration filings with the AAA in the six product markets for the years 2010, 2011 and 2012.[37] More than two-thirds of the arbitration filings were initiated by consumers with the balance filed mutually by companies and consumers or by companies alone.[38]

The Bureau only reviewed the outcomes for arbitration cases filed in 2010 and 2011. Of the 1,060 disputes whose outcomes the Bureau reviewed, 32 percent (341) were resolved by the arbitrator on the merits and 23.2 percent (246) settled according to AAA records. Another 34.2

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[36] Arbitration Study, Section 7 at 5.

[37] NPRM at 55.

[38] Arbitration Study Section 5 at 19. In the Preliminary Results of its Arbitration Study released in 2013, the Bureau reviewed 1241 AAA case filings for the credit card, checking account and payday loan markets only filed in 2010 through 2012. At that time, the Bureau reported that 72 percent of the arbitration disputes were filed by consumers, 13 percent were filed mutually by consumers and companies and 14 percent were filed by companies alone. Arbitration Study, Appendix A at 58, 68.

percent of the disputes (362) concluded in a manner consistent with settlement.[39] Of the cases resolved by an arbitrator, consumers recovered an average of $5,388 on their affirmative claims and obtained $4,111 in debt forbearance.[40] The average time to resolve a dispute where there was a decision by the arbitrator on the merits was 179 days and the median time was 150 days. The median time to settlement was 155 days from the initial filing of the claim.[41]

In contrast, class cases settled far less frequently, consumers recovered far less money when they did settle, and it took much longer for the cases to be resolved. The Bureau identified 562 putative state and federal class action cases for the six product markets filed by consumers from 2010 to 2012.[42] None of the cases went to trial. In 10 cases (1.78 percent) judgment against a company defendant was obtained on a motion, but only three of those cases involved a judgment on a class wide basis (0.5 percent). The remaining seven (1.2 percent) involved a judgment on a non-class basis,[43] which means that putative class members other than the named plaintiff(s) obtained no relief.

As of February 2014, only 12 percent of the cases had final class settlements approved. Another 24.4 percent of the cases involved a *non-class* settlement and 36.7 percent involved a potential *non-class* settlement. Putative class members other than the named plaintiff(s) get no

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[39] NPRM at 57-58.

[40] NPRM at 58.

[41] NPRM at 59.

[42] NPRM at 63. Unlike the Bureau's review of non-class litigation, the review of class cases included litigation relating to auto loans. Arbitration study at 6, 27.

[43] Arbitration Study, Section 6 at 7.

benefit from a non-class settlement. In 10 percent of the cases, the claims against at least one defendant were dismissed on a dispositive motion unrelated to arbitration.[44]

Undoubtedly due to the dearth of cases in the sample providing any class relief, the Bureau also reviewed a much larger set of federal class action settlements not limited to the relevant time period or to the six product markets.[45] That set consisted of 419 federal class action settlements finalized between January 1, 2008 and December 31, 2012 where either the complaint alleged a violation of one of the enumerated consumer protection statutes in Title X of the Dodd-Frank Act or the plaintiffs were primarily consumers and the defendants were engaged in selling consumer financial products and services, regardless of the basis of the claim.[46] The Bureau was only able to estimate the class size for 329 of the settlements.[47]

The value of cash payments received by consumers in the settlements averaged $32.[48] Only 13 percent of the settlements involved a commitment by the defendant to change its behavior on a prospective basis.[49] Moreover, for the settlements that required class members to file claims to obtain relief, the weighted average claims rate was 4 percent including the

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44 NPRM at 64.

45 The Bureau did not include class settlements in state cases in this larger set. NPRM at 71.

46 NPRM at 70; Arbitration Study Section 8 at 3.

47 Arbitration Study Section 8 at 3.

48 NPRM at 73, n. 305.

49 Arbitration Study Section 8 at 4.

TransUnion settlement and 11 percent without *TransUnion.*[50] In other words, the vast majority of class members received no financial compensation from the settlements. Unless class members opted out of the settlements, they would be barred from seeking relief against the defendants in the future.

Federal class cases closed in a median of 218 days for cases filed in 2010 and 211 days for cases filed in 2011. Class cases in multi-district litigation closed in a median of 758 days for cases filed in 2010 and 538 days for cases filed in 2011. State class cases closed in a median of 407 days and 255 days for cases filed in 2010 and 2011, respectively.[51] For the 419 class settlements studied, the average time between filing of the complaint and approval of the settlement was 690 days and the median was 560 days.[52]

The evidence developed in the study clearly does not support the Bureau's contention that class actions are more effective or efficient than arbitration in delivering redress to consumers.

III. The Proposed Rules Will Not Protect Consumers Or Serve The Public Interest

A. Statutory Standard

Section 1040.4(a) of the Bureau's proposed rules would prohibit a provider of consumer financial goods and services from relying on a pre-dispute arbitration agreement to seek a stay or dismissal of any class action proceeding or any claims asserted therein unless and until the

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[50] Arbitration Study Section 8 at 5.

[51] NPRM at 65.

[52] Arbitration Study Section 8 at 5.

presiding court has ruled that the case may not proceed as a class action and the time to seek review of such ruling has elapsed or the review has been resolved. If a pre-dispute arbitration agreement is entered after the compliance date of the proposed rules, it must contain a provision stating that the provider will not use the agreement to stop the consumer from filing or participating in a class action.[53] The Bureau relies on Section 1028(b) of the Dodd-Frank Act for authority to adopt the proposed rule. That section authorizes the Bureau to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements if the Bureau finds that doing so is in the public interest and for the protection of consumers. The Bureau asks for comment on whether "in the public interest" and "for the protection of consumers" should be interpreted as having independent meanings or as a single integrated standard.[54] As the Bureau acknowledged, any set of findings that meets the two separate criteria would also be sufficient to meet a unitary interpretation of the phrases "in the public interest and for the protection of consumers."[55] Interpreting the two criteria separately, however, will allow for a more granular analysis and will compel the rejection of a condition or limitation that fails to satisfy either one or both of the criteria.[56] ETA urges the Bureau to adopt its proposed interpretation of the statutory provision as imposing two separate conjunctive requirements.

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53 NPRM at 361-362.

54 NPRM at 85-91.

55 NPRM at 88, n. 342 and 91, n. 348.

56 Compare *Verizon v. FCC,* 700 F.3d 961, 964 (D.C. Cir. 2014) (the statute identifies three criteria that all must be satisfied before relief may be granted); *Cellular Telecommunications and Internet Association v. FCC,* 330 F.3d 502 (D.C. Cir. 2003) (same).

B. The Bureau Has Not Demonstrated That The Proposed Restrictions On The Use Of Pre-dispute Arbitration Agreements Will Protect Consumers

The Bureau proposes that "for the protection of consumers" should be read to focus specifically on the "effects of a regulation in promoting compliance with laws applicable to consumer financial products and services and avoiding or preventing harm to consumers who use or seek to use those products."[57] It asserts that any regulation imposing restrictions on the use of arbitration agreements must be conditioned on a finding that such regulation would serve to deter and redress violations of the rights of consumers who use or seek to use a consumer financial product or service. The Bureau proposes to focus exclusively on the impact the regulation would have on the level of compliance with relevant laws, including deterring violations of those laws, and on consumers' ability to obtain redress or relief."[58]

As discussed, Section 1028 of the Dodd-Frank Act requires that any finding by the Bureau that conditions or limits the use of pre-dispute arbitration agreements as necessary to protect consumers must be consistent with the Arbitration Study. The Bureau makes five findings to support its proposal to prohibit the use of arbitration agreements to block class action litigation, none of which is consistent with the Arbitration Study: (1) the evidence is inconclusive on whether individual arbitration conducted during the study period is superior or inferior to individual litigation in terms of remediating consumer harm; (2) individual dispute resolution is insufficient as the sole mechanism available to consumers to enforce contracts and the laws applicable to consumer financial products and services; (3) class actions provide a more

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[57] NPRM at 87.

[58] NPRM at 90.

effective means of securing relief for large numbers of consumers affected by common legally questionable practices and for changing companies' potentially harmful behaviors; (4) arbitration agreements block many class action claims that are filed and discourage the filing of others; and (5) public enforcement does not obviate the need for a private class action mechanism.[59] ETA addresses each finding below.

1. The Arbitration Study Does Not Support The Bureau's Finding That The Evidence With Respect To The Fairness And Efficiency Of Individual Arbitration Vs. Individual Litigation Is Inconclusive.

Conspicuously absent from the Bureau's discussion of this issue is any reference to the Arbitration Study's findings with respect to individual litigation.[60] As noted above, the Study demonstrated that consumers did relatively well in individual litigation. More than 48 percent of the individual suits reviewed resulted in an identified settlement and another 41.8 percent involved an outcome consistent with settlement.[61] A consumer was able to establish liability against the defendant in seven percent of the cases, generally by summary judgment or default motion. Of the two cases that went to trial, the consumer prevailed in one.[62] The average monetary award to consumers was $13,131.[63] Companies filed motions to compel arbitration in

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[59] NPRM at 92. Significantly absent from the Bureau's findings is an acknowledgement of the superiority of the relief delivered to consumers in arbitrations when compared to that delivered in class actions.

[60] NPRM at 92-94.

[61] Arbitration Study Section 1 at 15; NPRM at 65.

[62] *Id.*

[63] Arbitration Study, Section 6 at 49, n.85.

less than one percent of the lawsuits and those motions were granted in less than 0.5 percent of the cases.[64] The Study also demonstrated that individual lawsuits were resolved relatively expeditiously. With the exception of those few cases that were transferred to multi-district litigation, federal individual cases closed in a median of 127 days from the date of filing of the complaint.[65]

With respect to arbitration, the Bureau concedes that arbitrated "disputes proceed relatively expeditiously, the cost to consumers of this mechanism is modest, and at least some consumers proceed without an attorney."[66] In 32 percent of the cases the Bureau reviewed, the arbitrator issued an award. The decisions on the merits were issued on average approximately 179 days after the filing of the claims.[67] Consumers who prevailed on their affirmative claims averaged a recovery of $5,388,[68] and those who obtained judgments on disputed debts averaged $4,111 in debt forbearance.[69]

More than half of the arbitration cases reviewed either settled or concluded in a manner consistent with settlement.[70] The Bureau was able to determine the terms of the settlement in six

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[64] Arbitration Study, Section 6 at 8-9, 58.

[65] Arbitration Study Section 1 at 15.

[66] NPRM at 93.

[67] Arbitration Study Section 5 at 32, 73.

[68] *Id.*

[69] Arbitration Study Section 1 at 12.

[70] NPRM at 57-58; Arbitration Study Section 5 at 11.

credit card cases. In those cases, the consumer received a monetary payment in one settlement and debt forbearance in three others with the debt forbearance averaging $6,968.[71] The median time to settlement was 155 days from initiation of the proceeding.[72]

Consumers initiated the proceedings in more than two-thirds of the arbitrations studied.[73] The balance were initiated either by mutual filings of the consumer and the financial product or service provider (9.5 percent) or by the provider alone (less than 24 percent).[74] More than two-thirds of the arbitrations studied involved disputes over debts a consumer allegedly owed and almost two-thirds involved affirmative consumer claims.[75] While the Bureau stated that the Study found that companies prevail more frequently on their arbitration claims than do consumers, it did not speculate as to why this is the case. It did acknowledge, however, that research suggests that companies prevail more often than consumers because of a difference in the relative merits of the cases.[76]

The Arbitration Study revealed no evidence that would call into question either the fairness or efficiency of either individual court litigation or arbitration in remediating consumer harms. Nonetheless, the Bureau contends that arbitration procedures "can pose risks to

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71 Arbitration Study Section 5 at 34, n. 68.

72 Arbitration Study Section 5 at 12.

73 Arbitration Study Section 1 at 11.

74 Arbitration Study Section 5 at 19.

75 Arbitration Study Section 5 at 9, 24.

76 NPRM at 93, n. 351.

consumers" citing "an agreement designating a tribal administrator that does not appear to exist and agreements specifying NAF as a provider even though NAF no longer handles consumer finance arbitration, making it difficult for consumers to resolve their claims."[77] ETA submits that these "risks" are red herrings.

The Bureau reviewed approximately 850 agreements for consumer financial products and services.[78] The Bureau appears to have reviewed approximately 259[79] or 262[80] arbitration agreements. It is unfortunate that one payday loan agreement designated a non-existent tribal entity as the arbitration administrator, but that would represent approximately 0.1 percent of the total agreements reviewed and less than 0.4 percent of the arbitration agreements reviewed. In any event, courts have not let the non-existence of a forum specified in an arbitration agreement bar a consumer's right to seek relief in a different forum.[81]

The Bureau also cited 8 agreements that specified NAF as the sole administrator.[82] These agreements represent less than 1 percent of the total agreements reviewed and 3 percent of the arbitration agreements reviewed. NAF has not handled consumer arbitrations in more than

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[77] NPRM at 94. NAF is the National Arbitration Forum.

[78] Arbitration Study Section 1 at 7.

[79] Arbitration Study Section 2, at 46.

[80] Arbitration Study, Section 2 at 31, 33-34, 49.

[81] *See e.g., Jackson v. Payday Financial, LLC,* 764 F.3d 765 (7th Cir. 2014), *cert. denied,* 135 S.Ct. 1894 (2015); *Green v. U.S. Cash Advance Ill., LLC*, 72 F. 3d 787 (7th Cir. 2013).

[82] Arbitration Study Section 2 at 35.

seven years.[83] Consumers that are parties to agreements that specify NAF as the administrator can pursue their claims in court or can seek to have a different administrator appointed and pursue their claims in arbitration.[84] In no way are consumers precluded from pursuing their claims because the arbitration agreement specifies NAF as the administrator.

Contrary to the Bureau's finding that the evidence is inconclusive, the Study showed that both individual litigation and individual arbitration resulted in positive outcomes for consumers in the vast majority of cases, whether via settlement or via financial relief. Both mechanisms were more efficient and more effective than class actions in delivering relief to consumers.

2. The Arbitration Study Does Not Support The Bureau's Finding That Individual Dispute Resolution Is Insufficient In Enforcing Laws Applicable To Consumer Financial Products And Services Contracts.

The Bureau's finding that individual dispute resolution is insufficient in enforcing laws applicable to financial products and services contracts is based upon its unsupported assertion that consumers are unlikely to file individual formal disputes with their providers. The Bureau, however, failed to appropriately account for the universe of cases/complaints consumers file against their financial products and services providers. As demonstrated above, there is reason to question the Bureau's estimate that only 3,462 individual cases were filed in federal court from 2010 to 2012 and therefore the basis for the Bureau's allegation that consumers rarely pursue

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[83] Arbitration Study Section 5 at 16-17; *State v. National Arbitration Forum, Inc.*, 2009 Minn. Dist. Lexis 340 (Minn. Dist. Ct. 2009) (NAF agreed to cease administering consumer arbitrations as of July 24, 2009).

[84] *Wright v. GGNSC Holdings LLC,* 808 N.W. 2d 114 (S.D. 2011) (court could appoint administrator to substitute for NAF).

individual claims against their companies.[85] Not only did the Bureau fail to include any state lawsuits in its estimate, its federal numbers are far lower than those put forth by at least two organizations that track federal consumer credit lawsuit filings. The Bureau's estimate of small claims court filings by consumers is also necessarily low because it was based only upon a count of cases brought against the ten largest credit card issuers in a limited number of states and counties during a single year. Finally, there is no basis for the Bureau's assumption that the 1,234 arbitration cases filed with the AAA represent "substantially all consumer finance arbitration disputes that were filed during the study period."[86] The Study showed that the arbitration agreements reviewed designated JAMS as an administrator option at least 50 percent as often as they designated the AAA.[87] Yet, the Bureau failed to include any JAMS arbitration cases filed during the study period in its exploration of the extent to which consumers pursue claims against providers of financial products and services.

In addition to downplaying the effectiveness of individual litigation and arbitration efforts to "enforce effectively the law for all consumers of a particular provider, including Federal consumer protection laws and consumer finance contracts,"[88] the Bureau ignores a significant mechanism to which consumers frequently turn to resolve disputes with their providers: filing complaints with their State Attorneys General or other state agencies and filing

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[85] NPRM at 95; see pp.9-11, *supra*.

[86] NPRM at 96.

[87] Arbitration Study Section 2 at 38.

[88] NPRM at 99.

complaints with the Bureau itself. The Bureau affirmatively encourages consumers to file complaints against their providers, sends "thousands of consumers' complaints about financial products and services to companies for response" each week,[89] and extols the benefits its complaint resolution process can deliver to consumers other than the complainant:

> ## How one complaint can help millions
>
> By submitting a complaint, consumers can be heard by financial companies, get help with their own issues, and help others avoid similar ones. Every complaint provides insight into problems that people are experiencing, helping us identify inappropriate practices and allowing us to stop them before they become major issues. The result: better outcomes for consumers, and a better financial marketplace for everyone.[90]

The Bureau began accepting consumer complaints in July 2011 and as of July 1, 2016, it had handled over 930,700 complaints.[91] The Bureau contends that the complaint process has been a tremendous operational success, noting that companies "have responded to [consumer] complaints in a timely manner, which often leads to relief and explanations for the consumer. . . [and] have increasingly embraced our advice to analyze and address the patterns revealed both

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[89] CFPB Consumer Complaint Database, available at http://www.consumerfinance.gov/data-research/consumer-complaints/

[90] CFPB Consumer Complaint Database, available at http://www.consumerfinance.gov/data-research/consumer-complaints/

[91] Consumer Financial Protection Bureau, Consumer Response Annual Report, January 1 – December 31, 2015 (March 2016) at 1, available at http://files.consumerfinance.gov/f/201604_cfpb_consumer-response-annual-report-2015.pdf; Monthly Complaint Report, Vol. 13 at 3 (July 2016), available at http://www.consumerfinance.gov/data-research/research-reports/monthly-complaint-report-vol-13/

by our consumer complaint data and their own customer complaint data, as a guide to changing business practices that consumers find harmful."[92]

Congress directed the Bureau to determine whether the use of pre-dispute arbitration agreements should be restricted or limited based on the results of its Arbitration Study. Due to the flaws in the Study identified above and the Study's failure to even take into consideration the effectiveness of the Bureau's own consumer complaint process as a means of resolving consumers' issues with their financial products and services, there is no basis for the Bureau to assert that the "relatively small number of arbitration, small claims and Federal Court cases" it uncovered demonstrate that individual dispute resolution mechanisms are insufficient to deliver relief to consumers for legal violations. To be consistent with Congressional intent, any proposed restriction on the use of arbitration agreements must have a far more solid foundation. The Bureau cannot rely on its flawed study to draw such sweeping conclusions.

3. The Arbitration Study Does Not Support The Bureau's Finding That Class Actions Provide A More Effective Means Of Securing Significant Consumer Relief And Changing Companies' Potentially Illegal Behavior.

The Bureau assumes that class actions serve to deter and redress violations of the rights of large numbers of consumers. A study conducted by the Federal Judicial Center, however, showed that in the vast majority of cases filed as class actions, a class is not certified,[93] a finding consistent with the Bureau's own Study. When class cases are not certified, they deliver *no*

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[92] *Id.* at 2.

[93] Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum In Class Action Litigation: What Difference Does It Make?,* Notre Dame Law Review, Vol. 81:2, 591, 635 (2006).

relief to large numbers of consumers, much less *significant* relief. The Bureau's own Study showed that the financial relief provided to class members in class settlements was minimal and that few class action settlements (13 percent) resulted in a commitment or obligation on the part of the defendant to change its behavior on a going forward basis.

The Bureau contends that "[i]n the five year period studied, 419 federal consumer finance class actions reached final class settlements."[94] But what the Study actually shows is that for the 562 state and federal class cases filed in 2010, 2011 and 2012 in the six product markets that were the subject of the Arbitration Study,[95] only 69 class settlements were approved (12 percent of the total). In three other cases there was a class-wide judgment for consumers.[96] The majority of the cases (more than 60 percent), however, were resolved by individual settlement or in a manner consistent with a non-class settlement.[97] Such individual settlements would *not* have provided any relief to putative class members other than the named plaintiff(s) nor resulted in a change in the defendant's "potentially illegal behavior." Another 10 percent of the cases were dismissed based on a motion unrelated to arbitration,[98] resulting in no relief to the plaintiffs.

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[94] NPRM at 103.

[95] Again, the markets reviewed were Checking Account/Debit Card, Auto Loans, Payday Loans, Private Student Loans, Prepaid Cards and Credit Cards. Arbitration Study Section 8 at 2.

[96] Arbitration Study, Appendix N at 95-100; Arbitration Study Section 8 at 2.

[97] Arbitration Study Section 1 at 13-14.

[98] NPRM at 64.

In order to get to 419 settlements, the Bureau expanded the data set to include settlements reached in 2008 and 2009 and settlements reached in all consumer financial markets.[99] These cases were pending for an average of 690 days before final settlements were approved.[100] The Bureau asserts that these settlements involved approximately 160 million consumers.[101] Cash relief was provided in 410 settlements and in-kind relief in 24 settlements.[102] The Bureau included in the cash relief total *cy pres* payments made pursuant to 28 settlements even though the *cy pres* payments involved no cash distributions to class members.[103]

According to the Bureau, $1.1 billion had been or was scheduled to be paid to 34 million consumers pursuant to these settlements. Assuming that a payment was made to each of these

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99 Arbitration Study, Section 8 at 2. In addition to the six markets referenced in n. 95, the Bureau also looked at settlements reached in the Debt Collection, Savings Account, Credit Reporting, Money Transfer, Debt Settlement, Mortgage-related and Privacy/ID markets. *Id.* at 3.

100 Arbitration Study Section 8 at 5.

101 NPRM at 103. Excluded from this number are the 190 million consumers who were members of the class in the *Trans Union Privacy Litigation. Id.* at n. 374; Arbitration Study Section 8 at 3. The settlement in that case was approved by the court in 2008 and class members were required to register for in-kind relief (credit monitoring) and contingent cash payments. A Settlement Fund was established to pay plaintiffs who filed individual lawsuits against Trans Union, class counsel's attorneys' fees and costs, fees and costs for notice and administration, and a *cy pres* payment to a non-profit organization. Any remaining funds were to be distributed to class members that registered for contingent payments. See *Trans Union Privacy Litigation* Settlement Notice, available at https://www.listclassaction.com/content/Detailed_Notice.pdf.

102 Arbitration Study Section 8 at 4.

103 Arbitration Study Section 8 at 4, n.5.

class members, which is not necessarily the case, the average payout per consumer was $32.[104] In 63 percent of the cases, consumers were required to file claims in order to obtain monetary relief. The number of consumers who actually filed claims was extremely low. The weighted average claims filing rate was 4 percent including the *TransUnion Privacy Litigation* settlement and 11 percent without *TransUnion.*[105] These facts contradict the Commission's finding that "class actions provide a more effective means of securing significant consumer relief" for violations of law or contract than individual litigation or arbitration. Moreover, and as the Bureau acknowledged,[106] once a court certifies a class, potential class members who do not opt out of the class are bound by the eventual outcome of the case, precluding them from seeking relief on their own.

The Bureau contends that "the best measure of the effectiveness of class actions for all consumers" is the "magnitude of the relief that these cases collectively . . . deliver to consumers."[107] The Bureau, however, has not provided evidence of the "magnitude of the

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[104] Arbitration Study Section 8 at 5; NPRM at 104, 107. As the Bureau noted, the settlements providing data on payments to class members did not overlap completely with the settlements providing data on the number of class members receiving payment.

[105] Arbitration Study Section 8 at 5, 20. Actual distribution of class benefits to consumers is typically quite low. *See e.g., Strong v. BellSouth Telecommunications, Inc.* 137 F.3d 844, 851 (5th Cir. 1998) (noting that the claims made for benefits against a $64 million settlement fund totaled only $1,718,594); *Sylvester v. CIGNA Corp.,* 369 F. Supp. 2d 34, 52 (D. Me. 2005)(claims made settlements regularly yield response rates of 10 percent or less) *Yeagley v. Wells Fargo & Co.,* 2008 U.S. Dist. LEXIS 5040 (N.D. Cal. Jan. 18, 2008) (less than 1 percent of class members filed claims to participate in settlement).

[106] NPRM at 16.

[107] NPRM at 106.

relief" that these class cases actually delivered to consumers.[108] As the Bureau acknowledged, actual payment information is difficult to obtain because payment information is often not public in claims-made settlements and court records do not always specify the amount of relief or the number of class members receiving relief in automatic payment settlements.[109] What the data does show is that the gross relief (which includes amounts for attorneys' fees and costs, in-kind relief, and settlement and administrators' fees and costs) in close to half of the settlements was $100,000 or less and the gross relief in 79 percent of the settlements was $1 million or less.[110] Even assuming that each of the 34 million class members actually recovered an average of $32, that recovery is a fraction of the average consumer arbitration award and the average award to consumers in individual litigation.

The Bureau describes commitments by defendant companies to alter their behavior prospectively as "being at least as important to consumers as monetary relief."[111] Such commitments are relatively rare, however, occurring in less than 13 percent of the identified consumer class actions settled between 2008 and 2012.[112] Without knowing the nature of the

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108 NPRM at 104, n. 376.

109 Arbitration Study Section 8 at 26.

110 Arbitration Study Section 8 at 34. Significantly, the average attorneys' fee award for settlements of $100,000 or less was 56 percent of the gross relief and the average attorneys' fee award for settlements of $1 million or less was 34 percent of the gross relief. *Id.*

111 Arbitration Study Section 8 at 22; NPRM at 104.

112 NPRM at 104.

behavioral changes at issue,[113] it is impossible to comment on the Bureau's characterization of the value of the benefit provided to consumers.

4. The Arbitration Study Does Not Support The Bureau's Finding That Arbitration Agreements Block Many Class Action Claims That Are Filed And Discourage The Filing Of Others.

As demonstrated above, the Study reported that defendants moved to compel arbitration in less than 17 percent of the 562 federal and state class actions cases reviewed[114] and that the motions were granted in full or in part in only 8 percent of the class action cases studied.[115] In other words, in 92 percent of the class actions the Bureau reviewed, arbitration agreements were not an obstacle. These numbers are not consistent with the Bureau's finding that "arbitration agreements have the effect of blocking a *significant portion* of class action claims that are filed."[116]

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[113] The only data the Bureau provided for the behavioral relief addressed in class settlements were commitments made by ten banks involved in the Checking Account Overdraft MDL Litigation to alter their transaction posting methodologies. Arbitration Study Section 8 at 43-45.

[114] Arbitration Study, Section 6 at 8, 57. Motions to compel were filed in 94 of the 562 class action cases.

[115] Arbitration Study, Section 6 at 8-9, 58. Motions were granted in 46 of the 562 class actions. The Bureau states that the Study "identified nearly 100 Federal and State class action filings that were dismissed or stayed because companies invoked arbitration agreements." NPRM at 66. The additional 50 cases the Bureau references were culled from a dataset of over 1000 cases that included product markets beyond those that were the subject of the Arbitration Study, including car sales financing, car title lending, car repossession, life or disability insurance and medical malpractice or other lawsuit funding loans. Arbitration Study, Appendix P at 108-111. In this data set, the Bureau identified 157 cases where a motion to compel arbitration was filed (15.7 percent) and 77 class cases where a motion to compel was granted (7.7 percent), results that are equivalent to those in Section 6 of the Arbitration Study. *Id.*

[116] NPRM at 107.

There is also no foundation for the Bureau's finding that when a court grants a motion to dismiss class claims based on arbitration agreements, "the large number of consumers who would have constituted the putative class are unlikely to pursue the claims on an individual basis."[117] As noted above, very few putative class cases are even certified. A motion to dismiss based on an arbitration agreement is likely to be filed at the outset of the litigation and certainly before a class certification ruling is made. The Bureau has no basis for assuming that the size of a putative uncertified class is "large" or for assuming that unknown putative class members who are unlikely to even be aware of the dismissal will not pursue alternative avenues to resolve disputes with their providers, such as discussions with the company, an individual lawsuit or arbitration, a small claims court filing or filing a complaint with the Bureau or another state or federal government agency.

The Bureau also reviewed eight class settlements in which the consumer contracts had arbitration clauses and in which 3,605 of the 13 million class members opted out of receiving cash relief from the settlements. It found only three instances where the consumers who had opted out filed subsequent arbitration claims with the AAA against the same settling defendants, and asserts that this low number supports its contention that consumers are unlikely to pursue relief on an individual basis.[118] The difficulty with the Bureau's assertion is that it is based on a very limited set of data. The Bureau did not research whether any of the consumers that opted out of the class settlements pursued relief in court or in an arbitration forum other than the AAA.

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[117] NPRM at 110.

[118] NPRM at 110.

The Bureau cannot assume that individual consumers are unlikely to pursue relief against their providers based on its very limited review of post opt-out consumer activity.

The Bureau speculates that "arbitration agreements inhibit a number of putative class action claims from being filed at all" and that plaintiffs and their attorneys may choose not to file such claims because arbitration agreements substantially lower the possibility of class-wide relief.[119] In support of its speculation, the Bureau cites the 2012 NACA survey of consumer lawyers, which, as the Bureau itself acknowledges, has serious methodological flaws.[120] Significantly, the Bureau's own consumer survey undertaken as part of the Arbitration Study provides no support for its speculation.[121] Although respondents were asked several questions about arbitration, class actions and other litigation, consumers were *not asked* whether they would decline to file a class action against their credit card issuer because an arbitration agreement would substantially lower the possibility of class-wide relief.[122]

5. The Arbitration Study Does Not Show That Public Enforcement Is Not A Sufficient Means To Enforce Consumer Protection Laws and Consumer Finance Contracts

The Bureau contends that state and federal government agencies charged with enforcing consumer protection laws are overworked and understaffed and that class actions are necessary to enforce consumer protection laws and finance contracts and to provide "substantial relief to

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[119] NPRM at 111.

[120] NPRM at 111, n. 392.

[121] Arbitration Study Section 3.

[122] Arbitration Study Appendix D at 20-26.

consumers."[123] The Arbitration Study does not support the Bureau's contention. The Study showed that the majority of suits filed as class actions settle on an individual basis, providing no relief for putative class members other than the named plaintiff(s), that the financial relief available to consumers is meager where there is a class settlement, and that fewer than 13 percent of class settlements involve a commitment by defendants to alter their behavior on a prospective basis.

The Study turned up no evidence that public enforcement efforts are insufficient to protect consumers and the public interest. Instead, the only questions the Bureau attempted to answer were (1) to what extent do private class actions overlap with public enforcement activity and (2) when they do overlap, which was filed first.[124] Using the websites of federal and a limited number of state and municipal agencies with jurisdiction over consumer financial products and services,[125] the Bureau identified 1,150 public enforcement actions filed between 2008 and 2012 and 103 matching private class actions. The Bureau acknowledged that these numbers do not represent the complete universe of public enforcement and private class actions relating to the same subject matter brought during the relevant period.[126] While the Bureau

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[123] NPRM at 113-114, 115.

[124] Arbitration Study Section 9 at 4.

[125] Arbitration Study Section 9 at 7-9.

[126] Arbitration Study Section 9 at 8-14. State and federal law enforcement/regulatory agencies also use mechanisms to resolve problematic practices without bringing enforcement actions. For example, the Federal Trade Commission and state Attorneys General often send "warning" letters to companies or conduct investigations and decline to bring enforcement actions because the company agrees to end the problematic practice.

uncovered minimal duplication of private class actions and public enforcement actions, it did not look for, nor uncover, any evidence relating to the effectiveness or sufficiency of public enforcement actions in protecting consumer rights. Therefore, the Study does not demonstrate that public enforcement is an insufficient means to enforce consumer protection laws. The Bureau's recent announcement that it alone has obtained $11.7 billion in relief for more than 27 million consumers over the last five years[127] would indicate otherwise.

The Bureau also contends that because government agencies cannot enforce private contracts or pursue common law claims against providers of consumer financial products and services, class actions "are often the only likely means by which consumers can enforce their rights."[128] As discussed above, consumers have several avenues to enforce their rights, including informal dispute resolution with the company, arbitration, small claims, individual lawsuits or filing a complaint with a regulatory agency. The Study provides no factual or legal support for the Bureau's contention that class action suits are the only likely means by which consumers can enforce their rights.

C. The Arbitration Study Does Not Support The Bureau's Finding That The Class Proposal Is In The Public Interest And For The Protection Of Consumers

As the foregoing demonstrates, the Bureau's Arbitration Study does not support any of the five findings that the Bureau alleges demonstrate that precluding parties from blocking class

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[127] Zixta Q. Martinez, Consumers Count: Five Years Standing Up For You (July 16, 2016). available at http://www.consumerfinance.gov/about-us/blog/consumers-count-five-years-standing-you/. These numbers would be even higher if they included Federal Trade Commission and state Attorney General recoveries.

[128] NPRM at 114.

actions through the use of arbitration agreements is in the public interest and for the protection of consumers.

1. Consumer Protection Issues

Despite the contrary findings of the Arbitration Study, the Bureau insists that class actions "better enable consumers to enforce their rights" and obtain redress when their rights are violated.[129] Citing no factual or legal support whatsoever, the Bureau also contends that exposure to consumer financial class action litigation would strengthen the incentives for companies to avoid engaging in potentially illegal activity and reduce the likelihood that consumers would be subject to illegal practices.[130]

The Bureau repeatedly alleges that providers of consumer financial products and services have little incentive to comply with state and federal laws and regulations that address, and that are designed to correct, market failures unless they are potentially subject to class action litigation.[131] The Bureau identifies the alleged reduced incentives to comply with the law as a

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129 NPRM at 115.

130 *Id.*

131 *See e.g.,* NPRM at 115, 116 (arbitration agreements obstruct effective enforcement of the law through class proceedings which makes consumers more likely to be subject to potentially illegal conduct because of underinvestment in compliance activities and deliberate risk-taking by companies); 117 (companies have less of an incentive to invest in compliance management where costs from exposure to putative class action litigation have been reduced or eliminated); 123 (exposure to consumer financial class actions creates incentives for companies to change potentially illegal practices); 129 (class proposal creates enhanced incentives to enforce compliance with federal and state law); 256 (in the absence of exposure to potential class action litigation, providers have reduced incentives to comply with the law and current incentives are weaker than economically efficient levels); 263 (arbitration agreements that can be invoked in class litigation lowers providers' incentives to comply with the law); 311 (by blocking class

related market failure that can only be corrected through increased private enforcement via class actions.[132] Not surprisingly, the Bureau cites no evidence from the Arbitration Study or anywhere else to support these allegations. ETA submits that there is no basis for the Bureau's apparent assumption that all entities operating in the consumer financial product and services market are scofflaws and that restricting the use of arbitration agreements in consumer contracts is necessary to eradicate unidentified violations of law and contracts.

Companies, especially companies that offer products or services that are subject to regulatory oversight, have strong incentives to be good corporate citizens and to comply with the law, with or without the possibility of being subject to a class action suit. In addition to the strong incentive that providers have to deliver good service to their customers in a competitive marketplace,[133] companies have every incentive to avoid being the subject of an individual lawsuit, an arbitration, an enforcement action by a state or federal government agency, a complaint to a regulatory agency or a complaint to the Better Business Bureau, all of which can be costly and result in harm to business reputation.

The Bureau concedes that companies already monitor class action litigation relevant to the products and services they offer in an effort to mitigate their liability by changing their

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actions, arbitration agreements reduce compliance incentives in connection with the underlying laws).

[132] NPRM at 256.

[133] The Bureau estimates that each of "the product markets affected has hundreds of competitors or more." NPRM at 306.

conduct before being sued themselves.[134] Keeping abreast of legal developments, class action or otherwise, that may impact company liability and changing conduct where necessary is a prudent and cautious business practice in which all reasonable companies engage regardless of whether they have arbitration agreements with their consumer customers. Regulatory oversight creates a strong incentive to comply with the law. The Bureau concedes that it is impossible "to quantify the benefit to consumers from increased compliance incentives attributable to the class proposal."[135] While there is no question that compliance with the law protects consumers, there is also no basis for the Bureau's assumption that companies exposed to potential class action litigation will be more compliant with the law than will others.

The Bureau states that the Arbitration Study confirms consumers are unlikely to engage in any formal dispute resolution process even when they suspect that they have been legally harmed. It bases this statement on the hypothetical responses it received to a hypothetical question posed to credit card users in its consumer survey.[136] The question asked what the consumer would do if a charge appeared on his bill for a service he did not order and his provider declined to remove the charge.[137] Very few respondents said they would seek legal advice or pursue legal remedies, but close to 60 percent said that they would cancel their card.[138]

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[134] NPRM at 118-122.

[135] NPRM at 123.

[136] NPRM at 258.

[137] Arbitration Study Appendix D at 22.

[138] Arbitration Study Section 3 at 3.

ETA submits that the survey posed the wrong question to consumers. The appropriate question would have asked whether a charge had ever appeared on the consumer's bill for a service he did not order and if so, what he did about it. The responses to such a question would have allowed the Bureau to actually determine whether consumers are likely to engage in a dispute resolution process if they know they've been harmed and how receptive providers are to resolving consumer complaints informally. The hypothetical responses to the Bureau's hypothetical question provide no more than a basis for speculation as to what consumers may do. Nonetheless, the fact that consumers expressed a willingness to cancel their cards if they felt they were harmed demonstrates the absence of a market failure. When poor customer service results in a loss of business to the provider, the competitive marketplace is functioning as it should. Further, a potential loss of business is a strong incentive for companies to do right by their customers.

The Bureau also "finds that the class proposal would enable many more consumers to obtain redress for violations than do so today when companies can use arbitration agreements to block class actions."[139] Again, there is no basis in the Study for the Bureau's finding. On the contrary, the Study showed that consumers obtained little, if any, financial redress from the 419 class action settlements the Bureau reviewed.[140] The big winners from a financial perspective

[139] NPRM at 124.

[140] As noted above, the average financial recovery for consumers in the class actions the Bureau reviewed was $32 whereas the average amount recovered by consumers who prevailed in arbitration proceedings was $5,388. None of the class actions that the Bureau reviewed went to trial and class-wide settlements were approved in only 12 percent of the cases.

were class counsel. The 419 settlements the Bureau reviewed generated close to half a billion dollars in fees and costs for class plaintiffs' attorneys.[141]

While the Bureau assumes that exposure to potential class action liability "would increase compliance and increase redress for non-compliant behavior,"[142] there is nothing in the Study that would support its assumption. For example, the Bureau did not compare compliance rates of companies that have arbitration agreements with consumers with compliance rates of companies that do not have arbitration agreements with consumers or compare compliance spending by companies with arbitration agreements to that of companies that do not use arbitration agreements. In terms of redress for non-compliant behavior, Courts have long recognized that class action defendants are often under tremendous economic pressure to settle regardless of the lack of merit in the plaintiff's case or the strength of their own defenses. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *Kohen v. Pacific Investment Mgmt. Co.,* 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.") When already compliant defendants settle class actions in an effort to limit

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[141] Arbitration Study Section 8 at 24. This equates to approximately $100 million per year for each of the five years studied.

[142] NPRM at 126.

their litigation expenses and potential damages, settlement payments do not constitute redress for non-compliant behavior.[143]

The Bureau asserts that through class actions, consumers are better able to cause providers to cease engaging in unlawful or questionable conduct prospectively. The relative infrequency of behavioral relief in class actions (less than 13 percent of the class settlements reviewed by the Bureau involved a commitment by the defendant to change its behavior on a going forward basis) calls into question the validity of this assertion.

2. Public Interest Issues

The Bureau reads the "public interest" prong of the statute to require consideration of the proposed regulation's entire range of impacts on consumers, including impacts on pricing, accessibility and the availability of innovative products, and impacts on providers, markets, the rule of law and accountability, and other elements of the public interest.[144] Not surprisingly, the Bureau finds that prohibiting providers of consumer financial products and services from using arbitration agreements to block class actions is also in the public interest.[145]

In addition to allegedly protecting consumers, the Bureau contends that its class proposal will level the playing field for providers and enhance the rule of law.[146] Although it has no factual basis for making such a finding, the Bureau expressed the "belief" that companies that

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143 As discussed *infra*, the fact that companies have to bear such defense and settlement costs even for meritless class action suits cannot help but raise prices for consumers.

144 NPRM at 87-88.

145 NPRM at 127.

146 *Id.*

use arbitration agreements to manage their liability "may possess certain advantages over companies that instead make greater investments in compliance to manage their liability, both in their ability to minimize costs and to profit from the provision of potentially illegal consumer products and services."[147] The Arbitration Study, however, does not show that companies that use arbitration agreements invest any less in compliance or are any less law-abiding than companies that do not use arbitration agreements. Indeed, companies that participated in the SBREFA process stated that they would not alter their compliance spending whether or not their customer agreements included arbitration clauses and

> rejected the Bureau's reasoning . . . that the potential for class action litigation encourages companies to comply with relevant consumer finance laws and deters companies from practices that may harm consumers. Instead, most of the SERs stated that they believed that they fully complied with all relevant consumer protection laws and that they intended to continue such full compliance in the future. [148]

Without a statistically meaningful comparison of the extent to which companies that use arbitration agreements comply with the law and their consumer contracts vs. the extent to which companies that do not use arbitration agreements comply with the law and their consumer contracts, the Bureau cannot rely on its unsupported "beliefs" to demonstrate that its class proposal will level the playing field for providers, enhance the rule of law or otherwise serve the public interest.

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[147] NPRM at 128.

[148] Final Report of the Small Business Review Panel on the CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements at 22, 34 (Dec. 11, 2015), available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf

The Bureau asserts that class litigation exposure provides a "deterrence incentive" to providers above and beyond any other incentives that they may have to comply with the law. Because the Bureau has assumed that providers that have arbitration agreements with their customers are engaging in questionable and potentially illegal activity, it argues that "economic theory suggests that providers who are immune from class litigation currently undercomply from the economic welfare perspective and therefore this additional deterrence is beneficial."[149] The Bureau reasons that as long as class litigation is not brought randomly without regard to the level of providers' compliance with the laws, providers would want to ensure more compliance than if there was no threat of class litigation.[150] The Arbitration Study provides reason to doubt the Bureau's assumption that class actions are not brought randomly without regard for the provider's level of compliance with the law. The Study showed that a class-wide settlement was approved in only 12 percent of the class actions the Bureau reviewed and that no cases went to trial. Class settlements involve no adjudication of wrongful conduct and, as discussed above, defendants often have economic reasons for agreeing to settle regardless of the merits of the plaintiff's claims. In 10 percent of the cases reviewed, defendants were dismissed on dispositive motions unrelated to arbitration. Plaintiffs prevailed on dispositive motions in only 0.5 percent of the cases.[151] These numbers suggest that class action suits are not directly tied to a company's

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[149] NPRM at 267.

[150] *Id.*

[151] Arbitration Study Section 6 at 7. Plaintiffs obtained a judgment against a defendant in ten cases. Only three of those cases involved a judgment on a class-wide basis, however, and the remaining seven involved a judgment on non-class basis. *Id.*

compliance with the law, calling into questions the Bureau's assumption that providers undercomply with the law if they are not threatened with the possibility of class action liability.[152]

a. Increased Costs for Providers and Consumers

The Bureau received feedback during the SBREFA process and from other stakeholders that the class proposal would not be in the public interest for several reasons. First, the proposal will impose costs on providers that will raise prices for consumers.[153] The increased costs the stakeholders identified included increased litigation costs from having to defend class actions and settlement payouts, but they did not include increased compliance costs.[154] The Bureau cites no reason to question the veracity of stakeholders' assertions that their compliance costs would not change regardless of whether they had arbitration agreements with their customers. Nonetheless, in a further effort to justify its proposal, the Bureau alleges that providers will incur "costs associated with increased compliance, including compliance management costs and costs of eschewing potentially illegal but profitable activities" and that it is in the public interest and for the protection of consumers for the class proposal to cause providers to incur these costs.[155] Having failed to point to any support in the Study for its allegation that providers will spend

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[152] *See also,* submission of Philip Lathrop to SBREFA Panel, Final Report of the SBREFA Panel at 152-156, available at available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf.

[153] NPRM at 130.

[154] Final Report of the SBREFA panel at Appendix A.

[155] NPRM at 130-131.

more money on compliance if they are exposed to potential class action liability, the Bureau's public interest justification fails.

The Bureau contends that litigation and remediation costs "are vital to uphold a system that vindicates actions brought through the class mechanism."[156] As the Study shows, however, few class actions result in "vindication" for putative class members and even where settlements are reached, the payouts to consumers are minimal. Under these circumstances, it is disingenuous for the Bureau to assert that it will serve the public interest for providers to incur enormous legal fees to defend against class actions, the enormous costs involved in settling a case regardless of the merits, the enormous costs for plaintiffs' counsel fees as well as the costs of employee time and effort devoted to dealing with the litigation rather than their core responsibilities, especially because the Bureau has conceded that these types of costs are not economically efficient.[157]

The Bureau estimates that its proposal will create class action exposure for an additional 53,000 providers of consumer financial products and services, 51,000 of which are small businesses.[158] It also estimates that this exposure will result in an additional 103-109 settlements per year in federal class action cases. In those settlements, the Bureau estimates that providers will pay out an additional $342 million to $475 million to consumers, an additional $66 million to $114 million to plaintiffs' class counsel and an additional $39 million to $67 million to their

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[156] NPRM at 131.

[157] NPRM at 268.

[158] NPRM at 285, 323.

own attorneys and for internal staff and management time.[159] The Bureau also estimates that there will be an additional 501 putative class action cases filed in federal court per year that will not settle on a class wide basis and that providers will incur defense costs of $76 million for those cases.[160] As enormous as the Bureau's estimate is, it is unrealistically low for at least two reasons. First, it does not include defense costs incurred and payments made for settlements in state class action cases.[161] Secondly, it does not include the cost of payments made to plaintiffs in putative class actions that are settled on an individual basis. It is naïve to assume that these enormous class action expenses will not be passed through to consumers in the form of higher prices.

The Dodd-Frank Act requires the Bureau to consider the potential benefits and costs to consumers and covered persons resulting from a proposed rule.[162] In addition to the economically inefficient costs that covered persons will incur detailed above, consumers will also bear the cost of potentially losing the option of arbitrating disputes with their providers. These costs must be measured against the alleged benefit of the proposed rule that the Bureau

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[159] NPRM at 285 and n. 601.

[160] NPRM at 287. Surprisingly, the Bureau contends that the number of putative class actions resulting in individual outcomes is "quite low," citing Arbitration Study Section 6 at 42, n. 431. What the Study actually showed, however, is that two-thirds of the putative class actions the Bureau reviewed resulted in individual outcomes. *Id.*

[161] Although the Bureau states its belief that providers would enter into a similar number of class settlements in state cases, it does not provide an estimate of the costs of those settlements. The Bureau also notes that it believes an additional 501 putative class actions will be filed in state court per year that will not be settled on a class-wide basis, but it included no estimates of costs to defend or settle those cases on an individual basis. NPRM at 285-287.

[162] 12 U.S.C. §5512(b)(2).

identifies: exposure to class actions will benefit consumers by increasing providers' incentive to comply with the law and refrain from engaging in potential unlawful activity. The Bureau has not quantified or monetized this alleged benefit, nor is there any evidence to support the Bureau's "belief" that the potential for being named a defendant in a class action suit will improve a provider's compliance with the law. The Arbitration Study did not review covered providers' compliance with the law or compare the compliance of providers that use arbitration agreements in their consumer contracts with that of providers that do not use arbitration agreements in their consumer contracts. The evidence the Bureau does have refutes its assumption. The majority of participants in the SBREFA panel stated that they would not alter their compliance efforts if the Bureau prohibited providers from using arbitration agreements to block class actions.[163] Because the potential costs of the proposed rule will far exceed any alleged benefits, adoption of the rule would not be in the public interest.

b. Innovation. Second, stakeholders submitted that the arbitration proposal would disserve the public interest because it would discourage innovation. Providers may refrain from offering products or services that benefit consumers because such products or services may pose novel legal questions and therefore increased legal risks.[164] The Bureau gives short shrift to the innovation issue, arguing that if the proposed rules deter certain innovations from being

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[163] Final Report of the Small Business Review Panel on the CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements at 23 and Appendix A (Dec. 11, 2015), available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf

[164] NPRM at 132.

launched, it is a price worth paying.[165] The Bureau's argument may have merit if increasing providers' exposure to class action litigation otherwise protects consumers and serves the public interest. As demonstrated above, however, the Arbitration Study does not support the Bureau's position that class action exposure will incentivize compliance or deter wrongdoing. To the extent that the proposed regulation will unnecessarily inhibit providers' willingness to invest in consumer-friendly innovations for fear they will be targeted by class action plaintiffs' counsel, it will not serve the public interest or protect consumers.

c. Windfall Recoveries for Plaintiffs

Third, stakeholders pointed out that the class proposal would result in windfall recoveries to entire classes on the grounds that certification would induce providers to settle claims with little or no merit because of the litigation expense and risk of massive recoveries.[166] This contention is consistent with observations made by courts that certification of a class may so increase potential liability and legal expenses that a defendant may choose to settle to contain the damage even though it has a meritorious defense or the class claims are weak.[167] The Bureau disagrees, arguing that the Study found that not infrequently, settlements follow a decision by a court rejecting a dispositive motion filed by the defendant.[168] What the Study actually showed was that dispositive motions were granted before settlement in approximately 40 percent of the

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165 NPRM at 133.

166 NPRM at 134.

167 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Kohen v. Pacific Investment Mgmt. Co.,* 571 F.3d 672, 678 (7th Cir. 2009).

168 NPRM at 135.

419 class cases whose settlements the Bureau reviewed. The Study does not disclose, however, whether the plaintiffs or the defendants prevailed on those motions.[169] In the 562 federal and state class actions filed between 2010 and 2012 that the Bureau reviewed, dispositive motions filed by the plaintiffs were granted in only 0.5 percent of the cases. In 10 percent of the cases, at least one defendant was dismissed on a summary judgment motion.[170] Nonetheless, even where a defendant prevails on a dispositive motion, settlement may still be the economic choice to end the litigation and avoid the costs of appeal.

d. Individual Dispute Resolution

Finally, some stakeholders argued that providers are likely to eliminate their arbitration agreements if the class proposals are adopted and that removal of the arbitration option would harm consumers.[171] The Bureau contends that elimination of an arbitration option will not disserve the public interest because individual dispute resolution is not an adequate substitute for class litigation.[172] What the Study shows, however, is that arbitration is superior to class litigation in terms of the relief delivered to consumers. The Study demonstrated that arbitration provides a relatively fast and inexpensive means by which consumers can resolve disputes with their providers and that consumers do far better financially in arbitrations than they do in class actions. For the Bureau to insist that class actions are better for consumers than arbitrations is to

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[169] Arbitration Study Section 8 at 38-39.

[170] Arbitration Study Section 6 at 37-38.

[171] NPRM at 136.

[172] NPRM at 138.

ignore the minimal relief that consumers obtain in class actions, if they receive any relief at all, and the inordinate length of time it takes to obtain that relief.

The Bureau's insistence that individual arbitration is not an adequate substitute for class litigation also ignores the fact that not all disputes are suitable for class litigation. As the Bureau acknowledges, Federal Rule of Civil Procedure 23 requires that all class actions meet certain prerequisites, including numerosity and commonality of questions or law or fact.[173] Consumers who may have claims against their providers that are particularized and not subject to class treatment will be harmed if the Bureau's adoption of the proposed rule leads providers to remove the arbitration option. Where a consumer's particularized claim is less than the filing fee for a federal or state lawsuit, for example, he may be left with no economically viable recourse against his provider in the absence of arbitration.[174] It would not serve the public interest or protect consumers to adopt restrictions on the use of arbitration that would cause providers to discontinue offering consumers arbitration as a dispute resolution mechanism.

D. The Bureau Has Not Demonstrated That The Arbitration Monitoring Proposal Will Serve The Public Interest And Protect Consumers

The Bureau proposes that any providers that continue to include pre-dispute arbitration provisions in their consumer contracts after the compliance date of the rule be required to submit to the Bureau any arbitration claims filed by or against them, any arbitral awards, the arbitration

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[173] NPRM at 14-15.

[174] *See, Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995) (disavowal of a contract's arbitration provisions could leave a consumer who has only a small damages claim "without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery").

agreement filed with the administrator, any communications with the arbitrator regarding the provider's failure to pay required fees and any communications with the arbitrator regarding a determination that the arbitration agreement does not comply with the administrator's fairness principles. The Bureau proposes to post these arbitration materials on its website. Such materials would not have to be submitted for arbitrations where the agreement to arbitrate is made after a dispute arises.[175] The Bureau asserts that such a rule is necessary to protect consumers and serve the public interest because the potential remains for consumers to be harmed where arbitration is used to resolve individual disputes because (1) the arbitrations could be administered by biased administrators; (2) harmful arbitration provisions could be enforced; and (3) arbitrations could be conducted in an unfair manner.[176]

By gathering information on arbitration proceedings, the Bureau claims that it will be able to monitor whether arbitrations and arbitration agreements evolve in ways that harm consumers, the types of claims that are filed in arbitration, how arbitrators resolve those claims and whether consumer rights are protected.[177] This information in turn would allow it to "learn of and assess consumer allegations that providers have violated the law, and more generally, determine whether arbitrations proceed in a fair and efficient manner," which would serve the public interest in "maintaining a functioning, fair and efficient arbitration system."[178] The

[175] Proposed Rule 1040.4(b); NPRM at 228.

[176] NPRM at 139-141.

[177] NPRM at 141.

[178] NPRM at 144.

information would also allow the Bureau to bring actions against providers that engage in potentially illegal conduct or impede consumers' ability to bring claims against their providers.[179]

It is questionable whether the Bureau has jurisdiction to monitor arbitration proceedings as proposed. The Bureau contends that the monitoring proposal would allow it to better evaluate whether the Federal consumer protection laws are being enforced consistently, citing Dodd-Frank Section 1021(b). The Dodd-Frank Act provides that the Bureau "shall seek to implement and, where applicable, enforce Federal consumer financial law consistently."[180] While the Bureau is charged with enforcing consumer protection laws consistently, it is not charged with monitoring whether arbitrators are applying those laws consistently. Moreover, while Congress has authorized the Bureau to monitor for risks to consumers "in the offering or provision of consumer financial products or services," and to gather information "regarding the organization, business conduct, markets and activities of covered persons and service providers,[181] arbitration is a dispute resolution mechanism, not a consumer financial product or service. Finally, while Congress authorized the Bureau to prohibit or impose limitations on the use of pre-dispute arbitration agreements under certain circumstances,[182] Congress has not authorized the Bureau to

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[179] NPRM at 142-143.

[180] 12 U.S.C. §5511(a)

[181] 12 U.S.C. §5512(c).

[182] 12 USC § 5518.

determine whether arbitrations conducted by AAA, JAMS or any other forum proceed in a fair or efficient manner or to maintain a functioning, fair and efficient arbitration system.

Assuming *arguendo* that the Bureau does have jurisdiction to require providers to submit arbitral documents and to monitor arbitration proceedings, which is doubtful, the Bureau has not demonstrated that such filing or monitoring is necessary to protect consumers or serve the public interest. The Bureau made no finding that any of the 1,847 arbitration cases that it reviewed were administered by biased administrators, were conducted in an unfair manner or involved the enforcement of harmful arbitration provisions.[183] In the absence of any evidence that arbitration does not provide consumers a fair opportunity to present their claims[184] and defenses before a neutral, unbiased arbitrator, the Arbitration Study provides no basis for finding that the monitoring proposal is necessary to protect consumers or serve the public interest. The Supreme

[183] Indeed, the Bureau acknowledges that both AAA and JAMS have "created consumer arbitration protocols that contain procedural and substantive safeguards designed to insure a fair process." NPRM at 139.

[184] The Bureau states that it identified at least 50 instances where consumer-filed cases were closed because providers failed to pay arbitration fees, citing Arbitration Study Section 5 at 66 n. 110. NPRM at 237. That footnote, however, references 50 quasi-default cases in which the *provider not only paid its own fee but also paid the consumer's initial filing fee*. Company payment of the consumer's filing fee allowed the proceeding to continue to an award. Arbitration Study Section 5 at 43-44 and n. 85. If a provider failed to pay a required fee, presumably the consumer could pay the fee and similarly obtain an award against the provider. In the cases the Bureau identified in which the provider actually failed to pay the arbitration fees, the Bureau stated that it was unable to determine whether the provider did not pay the fees because the case settled, because the parties' contract did not provide for AAA arbitration or for some other reason. Arbitration Study Section 5 at 34 n.69.

Court itself has rejected attacks on arbitration that rest "on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants."[185]

Significantly, the Bureau does not propose to require the filing of arbitration materials in cases where the agreement to arbitrate is made after a dispute arises.[186] At the very least, this would indicate that the Bureau does not believe that arbitration is inherently unfair to consumers. On the contrary, the Bureau conceded that the evidence developed in its Arbitration Study showed that agreements that compel arbitration of individual consumer financial disputes do not necessarily lead to case outcomes that harm consumers.[187] Nonetheless, the Bureau seeks comment "on known and potential consumer harms in individual arbitration" and whether it should prohibit individual arbitrations altogether.[188] The Arbitration Study did not identify any known or potential consumer harms in any of the nearly 2,000 arbitration cases the Bureau reviewed. It is hard to imagine how it could possibly be in the public interest to deprive consumers of the right to use a fast, inexpensive and efficient mechanism to resolve disputes with their providers. The Bureau's preference that consumers use class actions to resolve disputes with their providers must not be confused with the public interest. The Bureau should

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[185] *Rodriguez v. Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 481 (1989).

[186] NPRM at 228.

[187] Small Business Advisory Review Panel For Potential Rulemaking on Arbitration Agreements, Appendix C: Outline of Proposals Under Consideration and Alternatives Considered at 4 (Oct. 7, 2015) available at http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf.

[188] NPRM at 231.

not prohibit individual arbitrations or otherwise interfere with consumers' access to expeditious and efficient mechanisms to seek relief.

IV. The Bureau's Proposed Restriction on the Use of Arbitration Agreements Does Not Comply With The Statutory Requirements

The Bureau may only prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements if it finds that such prohibition or conditions or limitations are for the protection of consumers and are in the public interest. The Bureau's findings must be consistent with its Arbitration Study.[189] As demonstrated above, the Bureau's findings that form the basis for its proposal to prohibit providers from using pre-dispute arbitration agreements to block class actions are *not* consistent with the Arbitration Study.

The Bureau contends that class actions provide a more effective means of securing relief for large numbers of consumers in a single case than individual lawsuits or arbitrations.[190] There is no question that when plaintiffs prevail in a class action or where there is a class-wide settlement, more consumers may be eligible for monetary and other relief than when a single consumer prevails in or settles an individual lawsuit or arbitration case. An Arbitration Study was not necessary to reach that finding. The relevant question should be "are class actions *more effective* in providing consumer relief than individual lawsuits or arbitration cases?" Based on the evidence developed in the Study, the answer is no.

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[189] 12 U.S.C.§ 5518.

[190] *See e.g.*, NPRM at 92.

None of the class actions that the Bureau reviewed went to trial .and only 12 percent resulted in a class-wide settlement. In those settlements that required consumers to file a claim in order to obtain relief, very, very few class members filed such a claim.

In contrast, the Study showed that almost 90 percent of the individual lawsuits reviewed resulted in a known settlement or an outcome consistent with settlement.[191] A consumer was able to establish liability against the company in another seven percent of the cases, generally by summary judgment or default motion. Finally, of the two of the cases that went to trial, one resulted in liability for the company.[192] Where consumers prevailed, the average award was $13,131.[193] The Study also showed that consumers did far better in arbitration than they did in class action litigation. More than 57 percent of the arbitrations the Bureau reviewed either settled or concluded in a manner consistent with settlement. Arbitrators issued awards in another 32 percent of the cases. Consumers who obtained arbitration awards on their affirmative claims averaged a recovery of $5,388,[194] and those who obtained judgments on disputed debts averaged $4,111 in debt forbearance.[195]

The evidence developed in the Arbitration Study clearly demonstrates that individual litigation and arbitrations offer consumers a far superior opportunity to obtain financial redress,

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[191] Arbitration Study Section 1 at 15; NPRM at 65.

[192] *Id.*

[193] Arbitration Study Section 6 at 49, n. 85.

[194] Arbitration Study Section 5 at 13.

[195] Arbitration Study Section 1 at 12; Section 5 at 14.

recoup losses and vindicate harms they may have suffered than class actions do. In the absence of evidence that providers will increase their compliance efforts or refrain from engaging in questionable conduct if they are exposed to potential class action lawsuits, which the Study did not provide, restricting the ability of providers to use arbitration clauses to block class actions will neither protect consumers nor serve the public interest.

V. Alternatives

ETA submits that before adopting a rule prohibiting providers from invoking arbitration agreements to block putative class actions filed against them, the Bureau must do further study to come into compliance with the statutory mandate. The existing Study does not show that the proposed prohibition will either protect consumers or promote the public interest as required by the Dodd-Frank Act.

In the alternative, the Bureau should consider other possibilities that would achieve its goal of improving consumer access to available fora in which they can seek redress for harms they may have suffered. To the extent that the Bureau believes that consumers with relatively small claims are reluctant to seek relief through individual arbitration due to the expense, it should consider requiring providers to pay the consumer's filing fee in all arbitration cases brought against them. To the extent that the Bureau believes that consumers are unaware of their dispute resolution rights, it should consider adopting improved disclosure requirements and/or posting information on its website that would educate consumers about the arbitration process and how it differs from litigation.

Both of these alternatives have the potential to increase the number of individual arbitrations that are filed. The Bureau contends that neither of these alternatives would remedy

the market failure that arises when a consumer does not know he has been harmed,[196] or when the dollar value of the claim is too small to be pursued. The Bureau believes that the only remedy for this market failure is a class action lawsuit, in which plaintiffs' lawyers will inform consumers that they have been harmed and solicit consumers to join the class. The very low class settlement rate (12 percent) together with the very low weighted average claims rate (4 percent) that the Arbitration Study uncovered, however, belies the assertion that class litigation is an effective and efficient means of redressing consumer harm.

The Study showed that dispute resolution mechanisms are not a priority for consumers shopping for a credit card and that many consumers are unaware of the dispute resolution rights set forth in their agreements.[197] To address this issue, the Bureau should consider requiring all providers to give consumers the right to opt-out of any arbitration provisions in their contracts for a period of 30 to 60 days. Such a requirement would also address the Congressional concern that "consumers have little leverage to bargain over arbitration procedures" when they sign an agreement for a financial product or service.[198] Permitting consumers to make the choice would be consistent with the Bureau's statutory objective of ensuring that consumers are provided with timely and understandable information to make responsible decisions[199] and would remove the

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[196] NPRM at 327.

[197] Arbitration Study Section 3 at 3.

[198] *See*, The Restoring American Financial Stability Act of 2010, Report from the Committee on Banking, Housing and Urban Development to Accompany S. 3217, 111th Cong., 2d Sess., Report No. 111-176 at 171 (Apr. 30, 2010) (commentary on Section 1028).

[199] 12 U.S.C. §5511(b)(1).

government from the decision-making process. Perhaps due to the lack of value that consumers attach to dispute resolution mechanisms when choosing a financial product or service,[200] the Bureau expresses concern that consumers will not have sufficient incentive to opt-out of arbitration agreements, and that the option of class litigation is not valuable if there are not enough consumers that could be in a potential class.[201] The Bureau does not allow for the possibility that a lack of incentive on the part of consumers to opt-out of arbitration agreements may reflect their preference for a speedy and inexpensive dispute resolution mechanism should one be needed. The public interest would be far better served by preserving the right of consumers to make the choice than by allowing the Bureau's preference for class action litigation to override their choice.

Conclusion

For the foregoing reasons, the Bureau's Arbitration Study does not support its conclusions that prohibiting the use of arbitration agreements to block class actions will protect consumers or serve the public interest. The proposed rules fail to meet the statutory requirements and must be rejected.

Respectfully submitted,

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200 Arbitration Study Section 3 at 3.

201 NPRM at 329.