INDEPENDENT COMMUNITY BANKERS of AMERICA®

REBECA ROMERO RAINEY
Chairman
R. SCOTT HEITKAMP
Chairman-Elect
TIMOTHY K. ZIMMERMAN
Vice Chairman
DEREK B. WILLIAMS
Treasurer
J. MICHAEL ELLENBURG
Secretary
JACK A. HARTINGS
Immediate Past Chairman
CAMDEN R. FINE
President and CEO

http://www.regulations.gov.

August 19, 2016

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

Re: Docket No. CFPB-2016-0020, Arbitration Agreements

Dear Ms. Jackson:

The Independent Community Bankers of America[1] appreciates the opportunity to provide comments to the Consumer Financial Protection Bureau (CFPB or Bureau) on the Arbitration Agreements proposed rule (Proposal). The Proposal would prohibit covered providers of most consumer financial products and services from using an agreement with a consumer that provides for arbitration of any future dispute between

[1] The Independent Community Bankers of America®, the nation's voice for more than 6,000 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 52,000 locations nationwide, community banks employ 700,000 Americans, hold $3.6 trillion in assets, $2.9 trillion in deposits, and $2.4 trillion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

the parties to bar the consumer from filing or participating in a class action with respect to the covered consumer financial product or service. In addition, the Proposal would require a covered provider that is involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to the Bureau.

The CFPB indicates it intends to use the information it collects under the Proposal to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action. The CFPB also intends to publish these materials on its website in some form to provide greater transparency into the arbitration of consumer disputes.

I. Summary of ICBA's Comments

ICBA is very concerned that the Proposal would effectively remove arbitration as a meaningful option for community banks to resolve consumer disputes as it would not be economical for community banks to continue subsidizing arbitration for customers if they are forced to carry the high costs associated with class action lawsuits. Community banks invest heavily in resolving customer complaints amicably; however, when claims are unable to be resolved, arbitration is a preferable option over judicial litigation.

The Bureau's own report on the subject contains information indicating arbitration offers a better process and outcomes for consumers as opposed to class actions which are slower and provide on average, little financial recovery to putative class members. Given these findings, CFPB has not met the statutory requirements for regulating arbitration agreements. ICBA is also strongly concerned that the collection and possible dissemination of arbitral data – even if it is anonymized – could lead to the re-identification of consumers and the release of sensitive personal and financial information. ICBA urges the Bureau to withdrawal the Proposal and collaborate with all stakeholders to develop alternative policies which preserve consumers' access to arbitration.

II. Background

Section 1028 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides the CFPB the authority to "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers." This same section of Dodd-Frank also requires the Bureau to "conduct a study of, and to provide a report to Congress concerning, the use of agreements providing for arbitration

of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."

Prior to issuing the Proposal, the CFPB issued the report required by Section 1028 in March 2015 (the Report).[2] The Report, which is over 700 pages, offers data on the Bureau's study of pre-dispute arbitration agreements and litigation over consumer financial products or services.

III. Resolving consumer complaints amicably and preventing consumer harm are primary objectives for community banks.

As community-based financial institutions, community banks' success is in large part determined by their reputations. Consequently, community banks invest heavily in customer service and addressing consumer complaints. Community banks make every effort to resolve consumer complaints before they reach litigation. In addition, community banks have implemented an unprecedented number of new and amended consumer protection regulatory requirements put into effect over the past several years. Meeting these regulatory requirements and preventing consumer harm are of utmost importance for community banks.

Unfortunately, not all disputes can be resolved before a claim is brought. Arbitration and pre-dispute arbitration clauses are important tools that – as discussed further in this comment – provide significant savings in time and cost for all parties. Considering these savings, many community banks subsidize the arbitration process for their customers.

IV. Arbitration provides superior results to class action litigation and is easier for consumers to access.

According to information found in the Bureau's Report, arbitration provides a faster, better, and more cost-effective method of addressing consumer disputes than claims brought through a class action. In addition, arbitration proceedings allow consumers the flexibility to participate in a number of convenient ways, including in-person, telephone, web conference, or email. Importantly, arbitration also allows consumers the opportunity to choose whether or not they would like to be represented by legal counsel. On the other hand, the technical requirements of filing a class action dictate that legal counsel is almost a requirement.

[2] Consumer Financial Protection Bureau, *Arbitration Survey: Report to Congress, pursuant to Dodd-Frank Wall Street and Consumer Protection Act* § 1028(a).

A. Arbitration provides quicker and larger recoveries for consumers.

In the lawsuits reviewed in the Report, putative class members received a little over $32 on average, and the average final approval of a class action took nearly two years.[3] While in arbitration proceedings, the Report indicates the average award to a prevailing consumer was approximately $5,400 and in cases that were settled, the decision generally was issued or the settlement reached within five months after the case was initiated.[4]

B. Most class actions do not result in any relief to the putative class.

Of the 532 class actions studied in the Report, approximately 61 percent provided no relief to the class as a whole because the plaintiffs either withdrew their claim(s) (36.7 percent) or there was a settlement outside the class (24.7 percent).[5] Just 12.3 percent of the class actions reviewed in the Report resulted in a class settlement approved by a court.[6] None of the putative classes in the Report went to trial, either on a class or individual basis.[7] In cases that did reach settlement, the weighted average claim rate was just 4 percent, meaning 96 percent of putative class members never submitted a claim.[8]

As described above, the monetary recovery for consumers in class actions is quite low. However, it is much more remunerative for the attorneys that bring these cases. In the class action cases reviewed by the Bureau in its Report, the plaintiffs' attorneys received $424.5 million which averages over $1 million per class action.[9] The disparity in the funds that actually are recovered by consumers in class actions and fees awarded to the class action attorneys driving these suits begs the question who would really benefit from the Proposal.

If the Bureau believes that financial service providers are harming consumers, then the proper response for it and other regulators is to use their supervisory and examination powers to investigate and, if needed, correct that harm. While

[3] Id. § 1; p. 17; Id. § 8, p. 4; Id. § 6, p. 43. Note, the $1.1 billion cash relief the report indicates that was recovered through class actions during the period of the study divided by the 34 million class action members during the same period equals $32.35 per consumer.
[4] Id. § 5, p. 13; Id. § 1, p. 13.
[5] Id. § 6, p. 37.
[6] Id.
[7] Id. § 6, p. 38.
[8] Id. § 8, p. 5.
[9] Study § 8, p. 33;

the Bureau indicates in the Proposal that class action settlements can advance regulatory objectives, the interests of those bringing class action suits do not always align with the CFPB or other financial regulators. Furthermore, turning regulators' supervisory role over to class action attorneys is not good public policy.

V. The Proposal does not provide sufficient evidence for the regulation of arbitration agreements.

Under Dodd-Frank, the CFPB is permitted to regulate arbitration agreements if it finds that doing so would be "in the public interest and for the protection of consumers."[10] The data presented by the Bureau in its Report and Proposal do not meet the statutory pre-requisites in Dodd-Frank and does not provide a foundation for the regulation of consumer arbitration agreements. On the contrary, the Bureau's Report indicates arbitration benefits consumers through quicker resolution and higher individual recoveries.

VI. Prohibiting pre-dispute arbitration agreements that include class action waivers would likely effectively end the use of all arbitration in consumer financial services and products.

Arbitration is generally subsidized by financial service providers. However, community banks report that arbitration remains much less expensive than litigating a case in court. The savings realized in arbitration are passed onto consumers in the form of lower prices for products and services. While the Proposal does not ban the arbitration of disputes over consumer financial products and services, we are strongly concerned that arbitration will cease to be economically viable because it will become uneconomical for community banks to continue subsidizing arbitration for their customers if they are forced to carry the expenses associated with class action litigation. If arbitration disappears as an option to handle disputes, it is likely that the increased costs of litigation will be borne by consumers.

VII. Collecting information on arbitration proceedings and making it available publicly may lead to the dissemination of sensitive private financial information.

The Bureau continues to seek and collect large amounts of sensitive data on American consumers. ICBA has long warned that public and non-public information compiled by financial regulators – including the CFPB – poses a threat to consumers' privacy. While

[10] Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028, 12 U.S. Code § 5518

the Proposal would require that certain personally identifiable financial information (PIFI) be redacted by the financial service provider prior to the submission of arbitration data to the Bureau, ICBA remains concerned that even redacted data could be combined with other publicly-accessible information to re-identify consumers who have arbitrated disputes, exposing them to embarrassment or worse. Others share these concerns. A 2014 White House report outlined the dangers of re-identification and individuals' resulting loss of privacy.[11]

Protection of personal consumer information must be a primary goal of the federal government, especially in light of the ongoing and highly-publicized public- and private-sector security breaches involving consumer financial and personal information. Last year, the Office of Inspector General (OIG) for the Federal Reserve and the CFPB issued a report on the data security of the Bureau's Complaint Database.[12] While most of the report remains confidential, the executive summary indicated that the OIG identified several security deficiencies and indicated that the Bureau should take certain steps to correct control issues.[13] In June, Reuters reported that the Federal Reserve detected more than 50 cyber breaches between 2011 and 2015.[14] More recently, a U.S. House of Representatives report found that hackers had compromised computers at the Federal Deposit Insurance Corporation (FDIC) repeatedly between 2010 and 2013.[15] The House report also detailed other security breaches at the FDIC in which multitudes of sensitive personal and financial data – including thousands of social security numbers – were put at risk.

Before the CFPB proceeds to collect and release information for public dissemination on arbitration proceedings, ICBA strongly urges the Bureau to further consider the potential privacy ramifications of its proposed data collection. If the CFPB decides to move forward with this Proposal, the agency should release for public comment the process by which it intends to collect, secure, and disseminate arbitration data.

---

[11] Executive Office of the President, The White House, *Big Data: Seizing Opportunities, Preserving Values*, pg. 8 (May 2014) http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

[12] Office of the Inspector General, Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau, *Executive Summary: Security Control Review of the CFPB's Data Team Complaint Database* (July 2015).

[13] Id.

[14] Jason Lange and Dustin Volz, *Fed Records Show Dozens of Cybersecurity Breaches*, Reuters, June 1, 2016, http://www.reuters.com/article/us-usa-fed-cyber-idUSKCN0YN4AM.

[15] Interim Staff Report: The Science, Space, and Technology Committee's Investigation on FDIC's Cybersecurity (July 2016).

VIII. Any regulatory requirements concerning arbitration should preserve the benefits and viability of arbitration for community banks.

Considering the many issues examined in this comment, ICBA strongly urges the CFPB to withdraw the Proposal. Community banks are committed to providing excellent customer service and preventing consumer harm. We encourage the CFPB to set aside this rulemaking and work with all interested stakeholders to develop policies that meet the Bureau's policy objectives as prescribed in Section 1028 of the Dodd-Frank Act while retaining maximum flexibility for consumers and community banks to pursue alternative forms of dispute resolution. Any policies developed by the Bureau should also recognize the commitment that community banks make to resolve customer disputes amicably.

IX. Conclusion

ICBA appreciates the opportunity to comment on the Proposal. Considering that the CFPB's Report on arbitration shows arbitration is not detrimental to consumers and that the Proposal would likely have the effect of making the arbitration process uneconomical for resolving all consumer financial disputes, ICBA strongly urges the Bureau to withdraw its proposed rule and work with all interested stakeholders to develop alternative options which maintain non-judicial options for dispute resolution. We also encourage the CFPB to address cybersecurity and privacy concerns associated with reporting of the proposed information.

If you have any questions regarding this letter, please contact me at joseph.gormley@icba.org or 202.659.8111.

Sincerely,

/s/

Joseph M. Gormley
Assistant Vice President and Regulatory Counsel