AMERICAN ASSOCIATION for JUSTICE

Formerly the Association of Trial Lawyers of America (ATLA®)

August 6, 2013

Consumer Financial Protection Bureau
Attention: PRA Office
1700 G Street N.W.,
Washington, DC 20552

RE: Agency Information Collection Activities; Comment Request (Docket No: CFPB-2013-0016)

To Whom It May Concern:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization's response to the Consumer Financial Protection Bureau's (CFPB) notice and request for comments regarding the agency's new information collection, titled "Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements." *See* 78 Fed. Reg. 34352.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. AAJ supports efforts by the CFPB to expand consumer knowledge of forced arbitration in financial services contracts. While a survey of consumer experiences and knowledge of arbitration may provide useful insight about what consumers understand about forced arbitration clauses generally, AAJ believes CFPB action is warranted in this area regardless of the study's findings because of the endemic characteristics of forced arbitration in the financial services context. So while it will be useful to gauge what consumers understand about forced arbitration, simply collecting this information won't operate to limit the extreme damage done to consumers everyday by forced arbitration.

Forced arbitration in the financial services context is on its face a system which deprives consumers of their rights in a way that negatively impacts them. This is because forced arbitration clauses are written and designed by the very financial institution against which a consumer may have a complaint. Consumers have no say in the drafting of these clauses and they are offered on a take-it-or-leave-it basis, leaving the consumer with the choice of being bound by the terms of a forced arbitration clause, or going without the product altogether. This

www.justice.org • 777 6th Street, NW • Suite 200 • Washington, DC 20001 • 202-965-3500

"choice" is illusory in most contexts, but it is such especially in the area of financial services where most Americans cannot live in our modern society without things like a credit card or a checking account. A representative of the U.S. Chamber of Chamber of Commerce remarked on this "choice" a consumer has with forced arbitration clauses in cell phone contracts in the following exchange:

> "Senator BLUMENTHAL. But, in fact, in many instances of consumer life, consumers may have no choice, even if there is no gun pointed to their head, which is, again, the phrase you used, but to use a service or buy a good where pre-dispute mandatory arbitration is imposed. And we are not talking about arbitration that is knowingly entered into after there is a dispute. We are talking about mandatory pre-dispute arbitration without in any way dismissing your arguments that there may be benefits to knowing and informed arbitration clauses after the dispute has arisen.
>
> Mr. SCHWARTZ. I want to know more about—and you can share with me, or this hearing is not the end of all hearings on this subject—precisely the type of situation that you are talking about where the person absolutely needs the service. I mean, a surprise to some in this room, I lived in a world where there were no cell phones, and I kind of made it. I was all right...."[1]

Not only do consumers not have any choice in the matter, but forced arbitration is designed by the financial services institution to be (1) binding, (2) pre-dispute, and (3) pervasive. Consumers not only have no choice but to enter into arbitration in the event of dispute, but any results reached in the arbitration process are final and generally not reviewable by a court of law. While a survey of consumer experiences and knowledge of arbitration provides a useful overview of the public's awareness, consumers who choose not to be bound by arbitration altogether face a dead-end. The components of the forced arbitration system so favor the financial services industry that with or without a survey, it is clear that consumers suffer under the current system.

Further, there is increased reason for the CFPB to act with expediency given recent events. With the U.S. Supreme Court decisions in ***Concepcion*** and ***American Express*** severely limiting if not extinguishing the right to bring lawsuits under most consumer contracts, the CFPB and Congress must act to re-energize the Federal Arbitration Act to uphold its original intent: encouraging arbitrations between businesses on equal footing, rather than validating abusive contracts that deprive Americans of their rights and allow financial services providers to take advantage of their mass market power over individual consumers.

---

[1] Victor E. Schwartz, U.S. Chamber Institute for Legal Reform, U.S. Chamber of Commerce; United States Senate Judiciary Committee Hearing: "Arbitration: Is It Fair When Forced?", October 13, 2011; http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8bbe59e76fc0b6747b22c32c9e0a33f6

I. Forced Arbitration Clauses Are Detrimental to Consumers

We respectfully request that the Bureau consider the results of a recently released survey of the arbitration landscape in the consumer financial market, particularly among retail banks and credit unions, in which the non-partisan Pew Charitable Trust cited Minnesota Attorney General Lori Swanson's remarks that the process of forced arbitration "deprives the consumer of certain remedies, bars a consumer from joining a class action lawsuit, curtails certain judicial civil procedures and due processes such as a consumer's ability to appeal decisions, and raises conflict of interest issues if the financial institutions provide arbitration companies repeat business."[2] The results of the Pew study echo Swanson's sentiment as its research indicates that of the 92 financial institutions surveyed, 64 percent restrict dispute resolution by including forced arbitration clauses and jury trial waivers in consumer contracts, placing restrictions on damages, and shortening statutes of limitation.[3] Yet, even as an increasing number of financial institutions place limits on the venue within which consumers can file complaints, consumers themselves overwhelmingly want a choice between going to court and entering arbitration. More than two-thirds of consumers believe that they should have a choice between arbitration and litigation and almost nine in ten consumers are concerned about the fairness of the arbitration process. [4]

These findings support what many consumer advocates already know: that pre-dispute arbitration clauses are *de rigueur* in consumer contracts, written in a one-sided manner in favor of the businesses that drafted the clauses, and foster an environment of secrecy that erodes longstanding legal protections offered under the law, shifting unnecessary costs onto the consumer. Accordingly, AAJ believes that it is necessary to determine the practical impact forced arbitration clauses have on consumer protection, the development of the law, and a consumer's right to bring claims as an individual and as part of a collective action.

II. Mandatory Binding Arbitration Clauses Are Pervasive In Credit Card Contracts

There is additional reason to act quickly based on the overwhelming information showing the negative impact of forced arbitration on consumers. Not only are arbitration provisions buried in fine print within the "terms and conditions" of credit card contracts, they also limit the

---

[2] Testimony of Lori Swanson, Minnesota Attorney General, U.S. Senate Committee on the Judiciary, Hearing on "Arbitration: Is It Fair When Forced?" (October 13, 2011), *available at* http://www.judiciary.senate.gov/pdf/11-10-13SwansonTestimony.pdf.

[3] The Pew Charitable Trust, Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf.

[4] *Id.* at 7.

type of relief available to consumers as the issuing banks and credit card companies withhold the right to change the terms. Examples of forced arbitration provisions include:

American Express:

"Arbitration: You or we may elect to resolve any claim by individual arbitration. Claims are decided by a neutral arbitrator. If arbitration is chosen by any party, neither you nor we will have the right to litigate that claim in court or have a jury trial on that claim. Further, you and we will not have the right to participate in a representative capacity or as a member of any class pertaining to any claim subject to arbitration. Arbitration procedures are generally simpler than the rules that apply in court, and discovery is more limited. The arbitrator's decisions are as enforceable as any court order and are subject to very limited review by a court...the arbitrator's decision will be final and binding." [5]

Wells Fargo Bank:

a. "Binding Arbitration. You and Wells Fargo Bank, N.A. (the "Bank") agree that if a Dispute arises between you and the Bank, upon demand by either you or the Bank, the Dispute shall be resolved by the following arbitration process. The foregoing notwithstanding, the Bank shall not initiate an arbitration to collect a consumer debt, but reserves the right to arbitrate all other disputes with its consumer customers. A "Dispute" is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to the Card or related services, Accounts, or matters; to your use of any of the Bank's banking locations or facilities; or to any means you may use to access the Bank. It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims. A Dispute also includes any disagreements about the meaning or application of this arbitration Agreement. This Arbitration agreement shall survive the payment or closure of your Account. YOU UNDERSTAND AND AGREE THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT."

b. "Arbitration Procedure; Severability. Either you or the Bank may submit a Dispute to binding arbitration at any time notwithstanding that a lawsuit or other proceeding has been previously commenced. NEITHER YOU NOR THE BANK SHALL BE ENTITLED TO JOIN OR CONSOLIDATE DISPUTES BY OR AGAINST OTHERS IN ANY ARBITRATION, OR TO INCLUDE IN ANY ARBITRATION ANY DISPUTE AS A REPRESENTATIVE OR MEMBER OF A CLASS, OR TO ACT IN ANY ARBITRATION IN THE INTEREST OF THE GENERAL PUBLIC OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Each arbitration, including the selection of the arbitrator(s),

[5] Consumer Financial Protection Bureau Credit Card Agreement Database, *available at* http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_8647.pdf

shall be administered by the American Arbitration Association (AAA), or such other arbitrator as you and the Bank may mutually agree to...To the extent that there is any variance between the AAA Rules and this Arbitration Agreement, this Arbitration Agreement shall control." [6]

When read carefully and with a full understanding of what terms such as "*neither you nor we will have the right to litigate that claim in court,*" "*discovery is more limited,*" and "*the arbitrator's decision will be final and binding,*" the one-sided nature of the clauses and the ramifications of their impact become clear. These credit card contracts are representative of the onerous terms and policies favoring the financial institution that consumers must agree to in order to open an account and obtain a line of credit. Not only are monetary transactions covered by the restrictive terms, but, as the Wells Fargo contract indicates, even tort claims arising out of accidents occurring in Wells Fargo banks and ATM outlets are subject to forced arbitration.

The above examples are culled from the more than 300 card issuer agreements that the CFPB has already compiled as part of its oversight duties. Thus, the Bureau has ample evidence of the unfair advantages that financial institutions enjoy when they dictate the terms within standardized mass consumer contracts.

Furthermore, this system of forced arbitration allows credit card issuers to operate a private system wholly apart from state or federal court systems, without any judicial or administrative oversight as there are no lawfully mandated standards governing most aspects of arbitration. AAJ strongly opposes this unregulated, secretive regime which clearly puts consumers at a disadvantage and urges the CFPB to implement rulemaking which ensures accountability for financial institutions through access to justice for consumers.

III. Inherent Limitations of Consumer Knowledge Survey Data

AAJ understands and appreciates the innumerable challenges faced by the CFPB as it aims to carefully craft a consumer knowledge survey that will sufficiently explore and accurately reflect what the public believes arbitration to be. While AAJ believes that any exploration of what the public may or may not understand about arbitration is useful, the administered survey as currently written may not reflect a consumer's full understanding of the norm of *forced* arbitration in the financial services industry.

There are many types of dispute resolution mechanisms available to consumers. AAJ supports post-dispute, voluntary arbitration, as well as other types of dispute resolution processes when the consumer has a clear choice of whether to take her complaint to arbitration or court and has power over how an arbitration process should proceed. However, the current landscape of *forced* arbitration in the financial services context is very different than that which is chosen and agreed to by a consumer *after* a dispute has arisen. Accordingly, without the CFPB survey

[6] *Id.*

including a definition of which type of arbitration applies, and making the distinction between pre and post dispute arbitration clear, the proposed information collection by the CFPB may not result in data which accurately reflects most consumers' views towards the *forced* arbitration process as it currently exists in the financial services context.

In light of the challenges described above with the lack of a definition of a particular type of arbitration or dispute resolution process, the CFPB survey could benefit from including additional questions about the typical characteristics of a credit card forced arbitration clause, as evinced above. Such questions could include the following:

(i) Would your opinion of arbitration change if I told you that under arbitration, the credit card company is allowed to choose which company hears your arbitration claim? (i.e., *See* Wells Fargo Contract)

(ii) Would your opinion of arbitration change if I told you that under arbitration, the credit card company is allowed to choose all of the rules that will govern your arbitration claim? (i.e., *See* American Express Contract)

IV. Suggestions For The CFPB To Enhance The Quality, Utility, And Clarity Of The Survey Questions And Results

There are two areas of clarification that AAJ urges the CFPB to review and revise within the draft of the script and questionnaire made available with the notice of information collection. First, there must be uniformity in the questioning format. For example, in question six, following the prompt, there are three choices available to the respondent:

(i) In court (not including small claims court)?
(ii) In small claims court, provided your claim is small enough to quality?
(iii) By an arbitrator?

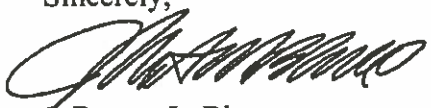
While the survey aims to be non-biased, posing questions like the sequence above results in a subtle shift in tone. The first two options envision the respondent in adversarial forums whereas the last option, rather than reading "In arbitration," offers an apparently direct and personal adjudication process whereby disputes are settled "By an arbitrator." In reality, nothing could be further from the truth. According to a study conducted by the National Consumer Law Center (NCLC), "[c]onsumers almost never win [in arbitration]—even when the facts and the law are on their side. The arbitration forum depends on the corporation—and not the consumer—for its very existence. Consumers are forced into a private system of justice that is inherently biased in favor of creditors and collectors."[7] While AAJ recognizes that including an explicit definition of "forced arbitration" could be at odds with the open-ended, exploratory nature of the survey, providing greater uniformity in the format of the questioning may enhance the accuracy of the survey results.

[7] "Forced Arbitration: Consumers Need Permanent Relief," National Consumer Law Center, April 2010, *available at* http://www.nclc.org/images/pdf/arbitration/report-forced-arbitration.pdf.

Second, AAJ urges the CFPB to consider the clarity of the questions in the proposed script in light of the fact that for the general population, arbitration is an amorphous and confusing topic. Specifically, question number eleven poses potential difficulties for the average survey respondent. The prompt outlines two different credit cards with the sole difference that card A allows for litigation and class actions while card B does not. Part c of the question goes on to ask "How much money would it take for you to accept the other credit card instead?" This open-ended question invites a litany of potential responses. Simply asking for a dollar amount seems incongruous with the way in which credit card companies typically present incentives. Normally, a low interest rate is attached or bonuses such as airline miles or rewards points. Rarely, if ever, is money offered outright to a credit card applicant. Thus, this question is likely to cause confusion for the survey respondent and any confusion will likely carry over to subsequent questions, tainting other answers as well. Although an absolute dollar amount may be informative to the CFPB, we propose that in many cases, it may be nearly impossible for a respondent to arrive at an answer given the fact that there are currently no credit cards on the market which offer such an incentive and objective speculation may lead to misleading results.

AAJ appreciates this opportunity to submit comments in response to the CFPB's Information Collection Request related to its forthcoming national telephone survey of consumer awareness of dispute resolution provisions in credit card agreements. If you have any questions or comments, please contact Ivanna Yang, AAJ's Assistant Regulatory Counsel at (202) 944-2806.

Sincerely,



J. Burton LeBlanc
President
American Association for Justice