August 6, 2013

Consumer Financial Protection Bureau
Attention: Matthew Burton & PRA Office
1700 G Street NW
Washington, DC 20552

Re: Docket No. CFPB-2013-0016: Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements

Ladies and Gentlemen:

The Financial Services Roundtable, [1] the Consumer Bankers Association, [2] and the American Bankers Association[3] appreciate the opportunity to comment on the request by the Consumer Financial Protection Bureau (the "Bureau") for information concerning a proposed survey of "consumer awareness of dispute resolution provisions in their agreements with credit card providers," and "[w]ays to enhance the quality, utility, and clarity of the information to be collected" in the course of the survey.[4]

We urge the Bureau not to proceed with the proposed survey. As designed, the survey is inconsistent with the Consumer Financial Protection Act ("CFPA") mandate and is flawed in concept and execution. Instead, we urge the Bureau to conduct rigorous and sound peer-reviewed research comparing the various methods of consumer dispute resolution, notably, litigation and arbitration, and thus satisfy the Congressional mandate articulated in Section 1028 of the CFPA.

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

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

[3] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $185 million in assets. Learn more at www.aba.com.

[4] 78 Fed. Reg. 34352, 34352 (June 7, 2013).

Introduction

Arbitration provides a fair, convenient, efficient, and cost-effective method for consumers and financial services companies to resolve those disputes that are not resolved through the "first round" of dispute resolution, namely, the customer service process. Arbitration of consumer disputes has been used for decades and there are many millions of consumer financial services contracts in force that include arbitration agreements.

For these consumers, arbitration provisions make it easier to resolve disputes with card issuers fairly, efficiently, and quickly. And, for those consumers who might prefer a credit card without an arbitration provision, the market currently provides that option for them without regulatory intervention.[5]

I. The Proposed Survey is not Consistent with the Consumer Financial Protection Act Mandate

Section 1028(a) of the CFPA provides that the Bureau shall "conduct a study of, and shall 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."[6]

A reasonable interpretation of this provision indicates that the Bureau must examine the extent to which various dispute resolution systems provide consumers with an effective means of resolving disputes. Doing that requires an analysis not just of arbitration but also of the alternatives to arbitration, such as individual litigation (including small claims suits and class action suits).

In addition, Section 1028(b) makes clear that the study should provide a foundation for the exercise of the Bureau's rulemaking authority. "The Bureau, by regulation, may 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. The findings in such rule *shall be consistent with the study* conducted under subsection (a)."[7]

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[5]A recent study by Peter Rutledge and Christopher Drahozal found that as of December 31, 2010, 15% of credit card issuers used arbitration clauses, while 48% of outstanding "credit card loans [were] subject to arbitration agreements."

[6]12 U.S.C. § 5518(a).

[7]*Id*. § 5518(b)(emphasis added).

As discussed in our letter of June 22, 2012 in response to the Bureau's request for information regarding the scope, methods, and data sources for conducting a study of pre-dispute arbitration agreements:

> The Bureau should . . . study the benefits to consumers of individual arbitration as compared with class action litigation, in particular: (a) whether class actions provide meaningful benefits to individual consumers as compared with individual arbitration in term of outcome, duration, costs, ease of access and consumer satisfaction; (b) the costs and impact of class action lawsuits, including frivolous or nuisance class action lawsuits; and (c) whether class actions are an efficient, cost-effective mechanism to ensure compliance with the law given the range of enforcement powers afforded the Bureau and other state and federal enforcement authorities.

As we and other commenters have noted, there is a wide range of issues that the Bureau must study and report to Congress on the ***use*** of pre-dispute arbitration agreements before it can determine what, if any, limitations or conditions on that use will be in the public interest.

To secure Office of Management and Budget ("OMB") approval for its survey proposal, the Bureau must demonstrate that "it has taken every reasonable step to ensure that the proposed collection of information…" complies with legal requirements, achieves program objectives and has practical utility.[8]

The Bureau's proposed survey does not satisfy these standards. The proposed lengthy and complex telephone questions will not produce information that is meaningful in determining whether regulation of the use of mandatory arbitration would be "in the public interest and for the protection of consumers." Questions that explore consumers' limited and uninformed assessments, and preferences of dispute resolution options offer little if anything in evaluating how arbitration actually functions and, thus, lack practical utility.

We urge the Bureau to apply its resources to produce data that will truly be useful in carrying out its statutory authority. Specifically, as discussed in our June 22, 2012 letter, we believe that the Bureau should examine and measure the benefits and costs to consumers, businesses, and society as a whole of individual arbitration as compared with both individual litigation and class action litigation. We believe that such a study is critical for advancing the Bureau's objective in fulfilling its mandate under CFPA to determine whether regulating or prohibiting pre-dispute arbitration is in the "public interest and for the protection of consumers."

As noted above, the CFPA requires any rulemaking under Section 1028 to be based on a finding that limiting or restricting arbitration would serve the public interest and

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[8] 5 C.F.R. § 1320.5(d)(1) & (d)(1)(i)-(iii).

consumer protection. However, it is unlikely that consumers selected at random for a phone survey will have sufficient information to assess and compare arbitration and litigation to support conclusions related to public interest or consumer protection.

To appreciate the consequences of any limit or condition on pre-dispute arbitration agreements, the Bureau's information collection should be focused on a comprehensive review of the disputes that may arise about consumer financial services and how they can be resolved. Resolution methods run the gamut from informal correction, to formal complaint handling, appeal to agency consumer response options, supervisory oversight and intervention and, finally, to arbitration and alternative judicial options.

The proposed survey covering only credit card arbitration agreement awareness does not suffice to meet the scope of the legal requirement, nor achieve the program objective, of CFPA 1028 to study and report to Congress on the gamut of pre-dispute arbitration agreements pertaining to consumer financial products. We are concerned the survey design will interfere with the statutory mandate and regulatory process and will result in unnecessary limits on credit card arbitration provisions.

The OMB should deny the Bureau's request to conduct this survey as inconsistent with the legal requirements of Section 1028 and outside the Congressional objective. As demonstrated in the next section, the current survey design does not satisfy the practical utility standard.

II. The Survey Design is Flawed

There are two fundamental flaws to the survey design as proposed: First, the experience of respondents with credit card disputes and the resolution of those disputes through mandatory arbitration or judicial process is demonstrably inadequate under the proposed methodology to yield informed consumer response. Second, the survey does not account for the availability in "choice architecture" (as discussed below) that could influence a consumer's election of pre-dispute arbitration. Therefore, the resulting data on consumer preference will be unreliable in the real world situations to which policy must apply.

As noted above, CFPA authorizes the Bureau to limit arbitration if it finds arbitration agreements would not be in the public interest and for the protection of consumers. However, consumers are unlikely to have sufficient information to make meaningful assessments about the comparative merits of arbitration and litigation or about the rights available under their credit card agreements. Few consumers will have knowledge about the benefits, disadvantages, and costs of arbitration and the various forms of judicial litigation (small claim litigation, individual, non-small claims litigation, and class action litigation) as dispute resolution mechanisms unless they have been involved in each. Thus, the vast majority of responses to the Bureau's proposed telephone survey will lack adequate foundation.

Given that the survey will certainly yield unreliable data, we are also concerned that any conclusions derived from the data will lack credibility and foundation, and will be misleading. This problem may be compounded if consumers are asked to compare arbitration with litigation, as most consumers lack experience and expertise in the judicial process and are likely to respond to such questions based on misconceptions and conjecture. They may assume, for example, that arbitration is slower and more expensive than litigation, contrary to the conclusions of expert research.

Question 11 is just one example that illustrates the flaws that mar all of these survey questions. This Question asks the respondents to assume they have a choice of two cards. "With Card A you can sue your company in court if you have a dispute with them. Card A allows you …to participate in *court-approved* class action proceedings against your credit card company. With Card B, either you or the company can *force* the other side to have an arbitrator decide the dispute *even if* the other side wants to have the dispute decided in court. Card B would *prevent* you from participating in any class actions against your credit card company." (Emphasis added.)

Question 11 then asks which card the respondent would prefer. Even those not expert in survey development will understand how the question is misleading. It is easily predicted that the answer to whether a person would prefer to have no choice or two choices is the latter. Thus, regardless of the nature or content of choices, the answer will simply be to have more choices. The problem is exacerbated with the use of loaded words such one side may "force" you to do something or "prevent" you from doing something else, and one card offers a "court-approved" option.

This question also illustrates the failure to account for the variability of choice architecture that consumers may face in expressing a "preference" for pre-dispute arbitration or its alternatives. The preference that any given consumer may reveal for any form of dispute resolution is a function of the utility that the consumer derives from the bargain he or she strikes in connection with that election. Choosing a credit card with pre-dispute arbitration may afford associated features that are distinct from those associated with a card that does not include pre-dispute arbitration. How such a choice is presented in real life may also alter the outcome. For instance, if an existing cardholder already has a pre-dispute arbitration agreement for an account with x% APR, what preference will be expressed for eliminating that agreement if he or she must accept a x+1% APR? Will the choice be different if the cardholder does not have a pre-dispute arbitration agreement and is already paying x+1% APR, but is offered x% APR if they add pre-dispute arbitration terms to the account agreement?

This simple example could be replicated in numerous variations, which underscores the inadequacy of the proposed survey design to capture actionable information relevant either to the study required by Section 1028 or to how the ramifications of limits or conditions on such use will actually play out in the future. We urge the Bureau to address choice architecture to ensure that its research produces results that have practical utility.

In conclusion, we strongly urge the Bureau not to move forward with the survey in its current form, as it has the real potential to result in rulemaking on arbitration that would be based on inaccurate data and conclusions.

Sincerely,

American Bankers Association
Consumer Bankers Association
The Financial Services Roundtable