August 6, 2013

Office of the Executive Secretary,
Consumer Financial Protection Bureau
1700 G Street NW,
Washington, DC 20552
Via http://www.regulations.gov

Re: Docket No. CFPB-2013-0016

Comments of the

National Association of Consumer Advocates

and

The National Consumer Law Center, on behalf of its low income clients

Regarding Docket No. CFPB-2013-0016

Notice and Request for Information on the ‘‘Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements.’’

TABLE OF CONTENTS

I. Introduction

The National Association of Consumer Advocates (NACA) is a national non-profit organization of attorney and advocate members who represent millions of consumers victimized by fraudulent, abusive, and predatory business practices. As an organization committed to promoting justice and a fair marketplace for consumers, NACA is pleased that the Consumer Financial Protection Bureau (CFPB) is moving forward on its study of mandatory pre-dispute arbitration ("forced")[1] agreements, which is required under Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[2] NACA respectfully submits these comments as a response to the CFPB's Request for Information on its new proposed survey, titled ''Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements.''

NACA works with consumer advocates to bring attention to the ways in which forced arbitration agreements trap consumers into a private, non-judicial system that fundamentally favors businesses. Through its efforts to educate consumers about forced arbitration clauses, NACA knows that the American public is woefully uninformed about the pervasiveness of forced arbitration clauses in common consumer contracts, and why these types of arbitration agreements are harmful.

[1] We are using the term "forced arbitration" to mean pre-dispute binding mandatory arbitration.
[2] Public Law 111–203, Title XIV.

The National Consumer Law Center, Inc. (NCLC) is a non-profit corporation specializing in low-income consumer issues, with an emphasis on consumer financial issues. NCLC publishes a series of treatises on consumer laws and provides legal, policy and technical consulting and assistance on to legal services, government, and private attorneys and advocates working on behalf of consumers across the country. One of the treatises, Consumer Arbitration Agreements (6th ed. 2011), focuses exclusively on case law interpreting the enforceability of consumer arbitration agreements.

The CFPB is well positioned to examine the issue of consumer awareness and comprehension of forced arbitration clauses in financial contracts, and NACA and NCLC fully support its efforts to do so. We expect that the CFPB's study and a clearly drafted and carefully executed consumer telephone survey will confirm what the available empirical research already demonstrates: that not only are forced arbitration clauses harmful to consumers and designed to immunize corporations, but very few consumers are actually aware of and meaningfully agree to forced arbitration clauses. We hope that once the CFPB has gathered and studied all the empirical evidence available, it will take concrete action to protect consumers from the harm caused by forced arbitration in consumer financial contracts.

II. Background

Forced arbitration occurs in the context of financial services and products when a company requires a consumer, as a condition of buying the product or service, to submit to private, binding arbitration if a dispute arises in the future. The ordinary consumer has absolutely no idea he or she is giving up constitutional, statutory and common law rights by waiving access to the court system. In other words, the consumer is forced to waive fundamental due-process rights, including the right to sue in court, the right to appellate review, and the right to participate in a class-action lawsuit. As empirical research already shows, most consumers never even notice forced arbitration clauses, which are buried in the fine print of standard-form contracts.[3] Indeed, most consumers are completely unaware of these "contract" terms unless and until a dispute arises and they seek the assistance of an attorney.

Arbitration happens with minimal judicial oversight and no well-established rules and procedures. Furthermore, because the arbitration forum is typically chosen by the business, and the business is frequently a "repeat player," arbitrators have an incentive to rule in the business's favor if they want to be selected again in the future.

This inherent unfairness is further exacerbated by the significant restrictions and limitations placed on consumers in arbitration. Besides very limited due-process protections (including the right to a fair and impartial decision maker), the arbitral process is almost always conducted in secret and typically requires strict confidentiality. Decisions generally are not published or otherwise made public even in the most extreme circumstances. Unfortunately, California is the only state in the nation that requires public disclosure of the results of arbitration disputes.

Various studies and reports make clear that forced arbitration clauses are becoming increasingly commonplace in standard consumer financial services and product agreements—including those

[3] Jean R. Sternlight, Creeping Mandatory Arbitration: Is It Just?, 57 Stan. L. Rev. 1631, 1648-1649 (April 2005).

used to obtain student loans, payday loans, car loans and leases, credit cards, retirement accounts, and investment accounts. According to a 2004 arbitration study, "the prevalence of arbitration clauses is highest (69.2%) in the financial category (credit cards, banking, investment, and accounting/tax consulting)."[4]

The widespread prevalence of forced arbitration clauses has been spurred on by recent Supreme Court decisions broadly interpreting the Federal Arbitration Act (FAA). Although the FAA's legislative history shows that Congress intended the FAA to apply to commercial arbitration agreements between two companies of generally comparable bargaining power, the Supreme Court has applied the law to employment and consumer contracts of adhesion, where the bargaining power lies only with corporations. As a result, the FAA is now used to enforce arbitration clauses in all contracts between consumers and corporations.

Two recent Supreme Court decisions demonstrate just how broadly the Court has interpreted the FAA. In 2011, the Court held in *AT&T Mobility v. Concepcion*[5] that corporations may use arbitration clauses to deny consumers their right to join together in class actions and hold corporations accountable for their wrongful behavior. This decision has an enormous impact on consumers of financial services—where the value of claims can be small individually, but large in the aggregate, and so class actions are often the only effective way of obtaining relief. The Supreme Court went even further in *American Express Co. v. Italian Colors Restaurant*, decided on June 20, 2013.[6] There, the Court held that corporations can force small businesses and individuals into arbitration even when they have proven that they will not be able to vindicate their rights through arbitration—that is, even when arbitration is illusory. As a consequence of these decisions, thousands of valid claims will likely go unheard in *any* forum—whether in court or arbitration.

Enabled by these decisions, companies now use forced arbitration clauses to eliminate the ability of consumers to seek collective redress, leaving them without any practical way to vindicate their rights. The rise of forced arbitration clauses has enormous consequences for consumers; it allows businesses to engage in unfair and deceptive practices without fear of consumers privately obtaining relief (including an injunction). Further, the presence of forced arbitration clauses in consumer financial contracts means that many serious violations of law will go publicly undetected, either because cases will never be brought or because the evidence presented and decisions rendered in private arbitration proceedings are not made public.

Our comments below highlight the numerous surveys, reports and consumer case studies on forced arbitration, which have demonstrated the harmful impact forced arbitration has on the rights of Americans. We believe that the CFPB's proposed information collection will further demonstrate what these studies have already shown by revealing the inherent unfairness in the use of forced arbitration clauses in consumer financial contracts. It is crucial to this effort that the questions are clear and simple enough to obtain accurate responses. In our experience, consumers of modest means and education in particular do not like to admit how little they

[4] Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, Law & Contemp. Probs., Winter/Spring 2004, at 55, 62.
[5] *AT & T Mobility, LLC v. Concepcion*, 563 U.S. ---, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).
[6] *American Express Co. v. Italian Colors Rest., Slip Op. No. 12-133 (S. Ct. June 20, 2013) ("AMEX III").*

understand about legal matters in general and the civil justice system in particular. We thus provide some suggestions to enhance the clarity of CFPB's telephone survey questions. Finally, we urge the Bureau to complete its required arbitration study as quickly as possible so that it can initiate rulemaking to address this essential consumer-justice issue.

III. What We Know About Consumers' Awareness of Mandatory Pre-Dispute Arbitration Agreements

There have been numerous reports, polls and surveys conducted that demonstrate the negative impact of forced arbitration on the consumers and financial services marketplace. The CFPB cited some of these surveys and studies examining consumer awareness and perceptions of forced arbitration clauses in its supporting statement for this proposed information collection. Below we explore a few of the surveys cited by the CFPB, plus an additional survey performed by NACA entitled "*Consumer Attorneys report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear.*"[7]

Consumer Studies & Surveys. Focusing on consumer awareness, various studies have explored consumer attitudes toward dispute resolution in general, and arbitration in particular. One example is a survey conducted by The Pew Charitable Trusts (Pew) in November of 2012.[8] Pew reviewed the dispute-resolution clauses of the 100 largest financial institutions, as well as consumer attitudes about these clauses. Pew found that almost nine in ten consumers disapprove of forced arbitration clauses in checking accounts when they learned about the procedural components of arbitration, such as the ongoing relationship between the arbitration companies and financial institutions, and the limited scope of review of arbitrators' decisions. The survey also shows that consumers are generally unaware of forced arbitration, as 64% of those polled cannot remember reading about forced arbitration provisions in the contracts for goods and services that they buy. More than two-thirds of consumers polled believe that they should have a choice between taking their dispute to arbitration and taking it to court.

Another study by The Employee Rights Advocacy Institute for Law & Policy (The Institute) and Public Citizen in 2009 looked at people's knowledge of arbitration provisions. The Institute and Public Citizen conducted a nationwide survey of 800 voters exploring their awareness of the arbitration provisions in their employment agreements and certain agreements for goods and services.[9] In particular, the study polled respondents about their expectations regarding their ability to sue their employers in court as well as whether they recalled executing forced arbitration provisions in their employment contracts and other contracts. The survey found that

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[7] National Association of Consumer Advocates: *Consumer Attorneys report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear* (June 2012). http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted.pdf

[8] *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution*. The Pew Charitable Trusts. Released 11/26/09 *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf.

[9] National Study of Public Attitudes on Forced Arbitration: Findings from a Survey of 800 Likely 2010 Voters Nationwide. The Employee Rights Advocacy Institute for Law & Policy and Public Citizen. Released 04/09 (research funded by the Public Welfare Foundation) available at http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf.

59% of likely voters support the Arbitration Fairness Act, which includes majorities of Democrats, Republicans and Independents. In addition, 59% of likely voters oppose the use of mandatory binding arbitration clauses in employment and consumer contracts. According to the survey, most Americans are unaware of the rights being taken away from them. Roughly three-quarters of Americans believe they can sue an employer or company should they be seriously harmed or have a major dispute arise—even if they are bound by forced arbitration terms. Approximately two-thirds cannot remember seeing anything about forced arbitration buried in the fine print of the employment and consumer contracts that they have signed.

Finally, in May 2009, a Center for Responsible Lending (CRL) study entitled "Stacked Deck: A Statistical Analysis of Forced Arbitration" revealed that many consumers do not even know that the contracts they sign for most credit cards, auto loans, and other small loan products come with forced arbitration clauses. [10] CRL's report was based on data involving rulings in California on about 34,000 cases from 2003 to 2007 by the National Arbitration Forum (NAF), an arbitration firm. The vast majority of these cases involved credit card issuers seeking to collect money allegedly owed by consumers. Additional data on forced arbitration clauses in auto loan contracts was obtained from an original survey commissioned by CRL and conducted by Macro International as part of its regular CARAVAN® survey.

The report shows that there is an absolute bias in arbitration forums that favors credit card issuers and other businesses over consumers. Companies that have more cases before arbitrators get consistently better results from those same arbitrators. In addition, individual arbitrators who favor firms over consumers receive more cases in the future. Finally, when looking specifically at auto-loan contracts, over two-thirds (68%) of consumers surveyed did not even know if their contract included a forced arbitration clause. Without knowing whether the clause exists, it is impossible to negotiate it out of the contract's fine print (even assuming a consumer had the knowledge and bargaining power to do so). Arbitration also did not reduce the cost of lending, as its supporters claim. In fact, people with forced arbitration in their contracts paid a significantly *higher* rate on their loans than those whose contracts did not contain an arbitration clause.

NACA's survey. In a June 2012 survey, NACA looked at the perspective of consumer attorneys regarding the use of forced arbitration.[11] The survey revealed that even though forced arbitration clauses are in hundreds of millions of consumer contracts, very few consumers actually bring cases in arbitration.[12] NACA's survey found that the vast majority of consumer lawyers surveyed were much less likely to represent consumers in arbitration than they were to represent consumers in court. When asked about the disadvantages of arbitration compared to litigation, the overwhelming majority of consumer attorneys responded that arbitration was wholly disadvantageous to the consumer, with specific problems identified as: an uneven playing field,

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[10] Joshua M. Frank, Center for Responsible Lending, Stacked Deck: A Statistical Analysis of Forced Arbitration (2009) available at http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf (also concluding that average non-incentive loan rates were higher for contracts that included "forced arbitration" clauses than contracts that did not include such provisions).

[11] National Association of Consumer Advocates: *Consumer Attorneys report: Arbitration clauses are everywhere, consequently causing consumer claims to disappear* (June 2012). http://www.naca.net/sites/default/files/NACA2012BMASurveyFinalRedacted.pdf

[12] *Id.*

limited recourse for the consumer, questionable objectivity of the arbitrator, and lack of transparency in the arbitration process.[13]

NACA's survey also asked consumer lawyers about their personal experience with cases involving arbitration clauses. Attorneys were asked to describe cases where a consumer was denied relief because of the existence of an arbitration clause, as well as class-action cases that provided a substantial recovery and/or injunctive relief for consumers, which would not have been possible if an arbitration clause were present. Respondents provided over 100 examples of cases that they were unable to bring because of a forced arbitration clause.

Consumer attorneys were also asked about the claim-suppressive effects of arbitration. Specifically, they were asked if they had ever turned down a meritorious consumer case, where there was a clear violation of law, because of the presence of an arbitration clause. In other words, have they observed consumer claims being suppressed? Eighty-four percent (84%) of all respondents answered yes—they had, in fact, rejected a client with a meritorious claim because of an arbitration clause. Of those vast majority of attorneys who turned away good cases, the median number of cases they turned down was 10, while 11% of respondents reported that they had turned away as many as 90-100 cases because of an arbitration clause. [14]

Finally, the NACA survey asked attorneys about their experience bringing consumer class actions. Specifically, what would have been the impact of arbitration clauses on their class-action cases, and the injunctive relief that those cases can provide consumers? A full 91.4% of attorneys answered that they had obtained relief for consumers that could not have been achieved had there been an arbitration clause. Additionally, many of these attorneys noted that since the Supreme Court *Concepcion* decision they have seen a significant decrease in the number of consumer claims that are being raised.[15]

The data collected in the NACA survey reveal a few key observations about how the corporate use of forced arbitration clauses in consumer contracts has impacted consumer's ability to seek redress when they have a claim against the company. First, the settlement data showing that cases in arbitration are significantly less likely to settle prior to a final decision suggests that arbitration may not be as efficient as its proponents claim. Second, consumer attorneys have seen a significant correlation between the increase in arbitration clauses in consumer contracts and the suppression of meritorious consumer claims. As many consumer attorneys reported, they "won't even look at a case if there is an arbitration clause involved." Finally, the survey highlights that arbitration clauses are succeeding in significantly suppressing meritorious claims. Consumers' legal claims are being tossed out by courts, without considering the legal or factual merits of the claims, as a consequence of the *Concepcion* decision.

A Public Citizen and NACA analysis published in April 2012 identified 76 potential class-action cases in the year after *Concepcion* was decided where courts cited the decision and held that the arbitration clause was enforceable. The consumers and employees who brought these cases were forced to seek redress in arbitration on an individual basis and, as a result, many had to forgo

[13] *Id.* at 5.
[14] *Id.* at 5-6.
[15] *Id.* at 6.

their claims altogether.[16] Public Citizen's recent review of cases up to March 7, 2013 found that since *Concepcion*, courts have enforced arbitration clauses in more than 100 cases,[17] including cases involving allegations of lenders applying undisclosed fees to student loans, gender discrimination in the workplace, illegal lending practices harming active-duty service members, and numerous violations of state and federal civil rights, employment and consumer protection laws.

IV. Why the CFPB's Proposed Collection of Information on Consumers' Perception of Mandatory Pre-Dispute Arbitration Agreements Is Valuable

We are pleased that the CFPB is exploring consumer awareness of and perceptions regarding forced arbitration in credit card agreements. Although previous studies and surveys have already demonstrated that very few consumers are actually aware of, comprehend the consequences of, and meaningfully agree to forced arbitration clauses in lending contracts, this CFPB survey will help confirm this fact, while focusing solely on consumer awareness of arbitration provisions in a specific type of consumer financial product—credit cards. The survey will provide an opportunity for the Bureau to further demonstrate with its own research that consumers are unaware of the existence and impact of the arbitration clauses that they are forced to sign as a condition of obtaining a credit card.

According to the CFPB's Request for Information, the CFPB survey will explore the following aspects of consumers' awareness and perceptions of dispute resolution provisions in their agreements highlighted below:

First, the survey will explore the extent to which credit card consumers are aware of dispute resolution provisions in their contracts with credit card issuers.

Second, it will investigate whether credit card consumers' assumptions about their formal dispute resolution options, on the one hand, correspond to the choices set out in the applicable provisions of their credit card contracts, on the other hand. The survey will ask about the extent of respondents' prior experiences with litigation or arbitration, to identify potential correlations between past experiences and current assumptions.

Third, the survey will probe whether and how consumers weigh dispute resolution provisions when choosing credit card products.

Fourth, it will investigate credit card consumers' beliefs regarding formal dispute resolution options (e.g., the smallest claim amounts respondents believe they would pursue in arbitration vs. litigation; whether respondents feel that they need a lawyer for either forum).

NACA and NCLC support each of these goals.

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[16] Public Citizen: *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April, 2012. http://www.naca.net/sites/default/files/Justice%20Denied%20Concepcion%20Anniversary%20Report.pdf

[17] http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3830.

A major basis for the Supreme Court's arbitration decisions—and corporate support of forced arbitration clauses—relies on the idea that arbitration is supposedly voluntarily and consensual. The Court regularly characterizes arbitration as such. And the corporations that support use of arbitration clauses make this argument as well. In the experience of NACA's consumer attorneys, however, there is almost never actual knowing consent by consumers, even if there are many situations in which consumers may have technically or constructively consented (*e.g.*, they continued to use a credit card after receiving a fine print contract term adding an arbitration clause, or they clicked "accept" to a lengthy set of terms and conditions on a website). We know from numerous past studies that most consumers never even notice arbitration clauses in the fine print of the contracts that they sign—contracts that are presented to them on a take-it-or-leave-it basis, and that they must agree to if they want to take out a student loan, for example, or have a credit card, or buy a car, or obtain a cell phone. Indeed, "(e)mpirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read."[18] Even if consumers acknowledge the existence of an arbitration clause (e.g., responding to the salesman's instruction to "sign here, initial here, here and here"), the consumer has no idea what forced arbitration entails. A study focusing on employees' understanding of arbitration agreements states that empirical research also demonstrates that employees "do not understand the remedial and procedural consequences of consenting to arbitration" and that "[v]ery few are aware of what they are waiving."[19]

Many consumers first learn that they have lost their right to sue only after a dispute rises. Time and again, in litigation over whether to enforce a contractual arbitration provision, we've seen the consumer allege (or the court determine) that the consumer was unaware of the existence or meaning of the arbitration clause.[20]

NACA and NCLC believe that the results of the CFPB survey will further confirm that consumers do not meaningfully understand forced arbitration clauses. We believe that the CFPB should act upon its statutory authority to ban the use of forced arbitration clauses in financial products and services agreements.

V. Enhancing Clarity of CFPB's Telephone Survey Questions

The following are recommendations regarding the CFPB's survey and its proposed script of questions:

<u>General comments</u>

1. We know that many consumers are not aware that they lack a choice in how to resolve disputes with businesses until after a dispute arises. The proposed survey focuses on awareness of the consumer of dispute resolution provisions at the time when they enter

[18] Sternlight at 1648.
[19] Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1225 (2002).
[20] E.g. *Yarbarough v. Regions Nat. Bank & Trust, Co*., 3:10CV161-HTW-FKB, 2012 WL 4596181 (S.D. Miss. Sept. 4, 2012) report and recommendation adopted, 3:10-CV-161HTW-FKB, 2012 WL 4595046 (S.D. Miss. Sept. 29, 2012). *Wallace v. Red Bull Distrib. Co*., 5:12-CV-02431, 2013 WL 3823130 (N.D. Ohio July 23, 2013).

into a financial services contract. The survey questions should also ask whether consumers believe that they should be able to make a choice at the time that a concrete dispute arises.

2. The survey is quite long and verbose. The CFPB should take into consideration the consumer's time and attention span for the survey. The CFPB could try to minimize lengthy and repetitious questions.

3. The proposed survey focuses only on credit card holders. As the CFPB prepares its arbitration study and evaluates the survey, we ask that it look into consumer awareness and perceptions of forced arbitration in all sectors of consumer financial services and product agreements.

4. We appreciate that the survey interviews will be conducted in English or Spanish. We are also pleased that the effort of insuring that respondent samples will be selected to provide good geographic coverage of the United States. The CFPB must also ensure the race/ethnicity, gender, age, and income diversity of its survey participants. We also suggest collecting education information from the survey participants.

Suggestions for Proposed Script Questions

Group One

1. Add VISA and Mastercard to Discover and American Express

Group Two

Delete to your satisfaction

6b. add I, Do you know what the term "opt-out" means here?

6c. [version B] change "review " to ""read"

Group Three

7(a)(i) Replace with "Please tell me what you think are the important features of bringing a consumer dispute to an arbitration proceeding."

8(a)(ii) delete "state or federal district"

(b) add after "settlement notice" if you did not have to find your own records or receipts"

8(a), 10(a), 10 (b) change "billing error…accounts, including yours." to "Billing error in your account."

Group Four

12 delete "or you spouse"

12(b) delete "for example by filing a claim?"

ADD:

Were you ever discouraged or prevented from bringing a claim in court because a contract required arbitration?

VI. Conclusion

We strongly support the CFPB's effort to conduct a telephone survey on consumers' awareness and perceptions of forced arbitration issues. We believe the survey will provide further valuable information on whether consumers are aware of forced arbitration clauses in credit card contracts and whether the clause provides a meaningful choice to pursue their desired form of dispute resolution.