United States Senate
WASHINGTON, DC 20510

August 3, 2016

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Dear Director Cordray:

We write to commend the Consumer Financial Protection Bureau (CFPB) for its proposed rule to limit the use of mandatory, pre-dispute ("forced") arbitration clauses in consumer financial product and service contracts. Every day, Americans across the country are forced to sign away their constitutional right to access the courts as a condition of purchasing common products and services like credit cards, checking accounts, and private student loans. To restore Americans' access to justice and hold financial institutions accountable, we strongly support the CFPB's proposal to preserve the ability of consumers to band together in class actions when seeking relief through the civil justice system.

In recent decades, companies from a broad range of industries have increasingly employed forced arbitration clauses in their service and product contracts. These clauses require a consumer to submit any claim that may arise against a company to binding arbitration – a privatized justice system that studies show consistently produces results that favor large corporations and offers no meaningful appeals process. These contract provisions also frequently include a class action waiver, meaning that consumers are unable to band together through collective action to address widespread wrongdoings by powerful corporations. Depending on the claim, class action waivers can prevent consumers from seeking recourse altogether, because the claims are so small that consumers cannot afford to pursue them individually. As a result, consumers are left without redress, and companies are unaccountable for their unscrupulous behavior.

In the context of consumer financial products and services, arbitration clauses are included in contracts for loans, such as auto loans, credit cards, or private student loans, prepaid cards, checking and savings accounts, credit reports, debt collection, debt management and relief services, check cashing, and payment processing—essential services that American families rely on every day.[1] Armed with these clauses, banks and financial companies are able to prevent consumers from raising disputes in court individually or as a class, which might otherwise deter practices that harm consumers.

[1] Bureau of Consumers Fin. Prot., Proposed Rule with Request for Public Comment, Arbitration Agreements (CFPB-2016-0020), page 4. *Available at:* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf

Recognizing the urgent need to address these troubling practices, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (Dodd-Frank) in 2010 to improve accountability, strengthen the financial system, and establish the CFPB. Dodd-Frank included several restrictions on the use of forced arbitration, including a mandate for the CFPB to take action on arbitration. Under Section 1028 of Dodd-Frank, Congress specifically directed the CFPB to study the use of forced arbitration in connection with the offering of consumer financial products and services,[3] and authorized it to "prohibit or impose conditions or limitations on the use of" such agreements based on the study results.[4] Section 1028 directed the CFPB to promulgate regulations restricting forced arbitration clauses "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," thereby acknowledging the potential for forced arbitration to insulate financial institutions from accountability and harm consumers. Indeed, the Dodd-Frank committee report language on Section 1028 shows that Congress was concerned about consumer harm resulting from forced arbitration: "The Committee is concerned that consumers have little leverage to bargain over arbitration procedures when they sign a contract for a consumer financial product or service."[5] Dodd-Frank also included authority for the SEC to conduct rulemaking prohibiting the use of forced arbitration between customers and broker-dealers or investment advisers[6] and banned forced arbitration in mortgage loans in response to the housing crisis and widespread claims of misconduct.[7]

In fulfilling its Section 1028 mandate, in 2012, the CFPB initiated research into the effects of forced arbitration that lasted nearly four years and ultimately resulted in a comprehensive 728-page study.[8] Importantly, the CFPB engaged with key industry and consumer stakeholders and other interested parties throughout this process, issuing a comprehensive request for information[9] in the early stages of the study process seeking feedback on scope, methods, and data sources. The CFPB published preliminary results in December 2013, identifying nine additional work streams for inclusion in the report and seeking additional public feedback.[10] The CFPB also solicited public feedback on a consumer survey in June 2013 and May 2014,[11] and held roundtable discussions with industry and consumer representatives

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[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (2010).
[3] Dodd-Frank §1028(a), codified at 12 U.S.C. §5518.
[4] Dodd-Frank §1028(b).
[5] United States Senate Committee on Banking, Housing, and Urban Affairs Committee Report 111-176, commentary to Section 1028.
[6] Dodd-Frank § 921. See also Dodd-Frank § 922, which banned the use of forced arbitration in securities whistleblower claims ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.")
[7] Dodd-Frank § 1414 ("No residential mortgage and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.").
[8] *Id.*
[9] Bureau of Consumer Fin. Prot., Request for Information Regarding Scope, Methods and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 FR 25148 (Apr. 27, 2012).
[10] Bureau of Consumer Fin. Prot., Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a) (2015), section 1 at 9. Available at: *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf. [hereinafter "CFPB Report"]
[11] Id.

after releasing its final arbitration study in March 2015. Furthermore, in October 2015, the CFPB convened a Small Business Review Panel with the Small Business Administration and Office of Information and Regulatory Affairs in the Office of Management and Budget for additional small business and trade industry feedback.

We commend the CFPB for its comprehensive study and for carefully considering extensive public input before issuing its final proposal. The agency's notice of proposed rulemaking concludes that regulations restricting or prohibiting the use of forced arbitration serve the public interest, provide necessary protection for consumers, and are consistent with the findings in its study. We wholeheartedly agree, and we offer our strong support for the CFPB's proposal that rightfully recognizes the expansive harms of forced arbitration, prohibits the unfair use of class action waivers, and requires greater transparency concerning the arbitration of individual claims.

I. Forced Arbitration Favors Financial Institutions at the Expense of Consumers

The CFPB's multi-year process found that forced arbitration clauses are ubiquitous in consumer financial service contracts, impacting tens of millions of consumers.[12] The study's findings demonstrate that forced arbitration favors companies and provides no meaningful appeals process for consumers who do not agree with the outcome. For example, of the examined cases of forced arbitration in which *consumers* had affirmative claims, consumers were very rarely able to obtain affirmative relief.[13] In contrast, of the examined cases in which *companies* made affirmative claims or counterclaims, companies obtained relief in the vast majority of the disputes.[14] And for the consumers who did recover an award in their affirmative claims, the CFPB found that they won far less than they had claimed,[15] while the companies that obtained relief recovered nearly the entirety of their claim.[16]

Despite this obvious disparity, consumers can rarely appeal forced arbitration decisions if they feel the arbitrator got it wrong. From 2010 to 2012, the CFPB found evidence of only four consumer appeals, and no company appeals.[17] Finally, the CFPB also found that very few arbitrators arbitrate the majority of claims,[18] which suggests that companies using the arbitration process seek out repeat arbitrators who may have a strong financial incentive to rule in favor of the company that repeatedly hires them.

Despite claims suggesting otherwise, the CFPB also found that there is no evidence that forced arbitration lowers costs for consumers or limits the availability of consumer credit.[19] Further, arbitration clauses are often opaque to consumers, which results in a consumer not becoming aware of their existence until a dispute arises. The CFPB's study showed that three out

[12] CFPB Report, section 1.4.1.
[13] CFPB Report, section 1.4.3 at 12 and section 5.2.2 at 13.
[14] CFPB Report, section 4.5 at 14.
[15] CFPB Report, section 5.2.2 at 13.
[16] CFPB Report, section 5.2.2 at 14.
[17] CFPB Report, section 5.8 at 85.
[18] CFPB Report, section 2.5.3 at 34-35.
[19] CFPB Report, section 10.2 at 9-11 and section 10.4 at 19.

of four consumers do not know if they are subject to a forced arbitration clause, and very few consumers factor arbitration clauses into their financial decisions.[20]

II. Arbitration Clauses Frequently Prevent Consumers From Seeking to Vindicate Their Rights At All

The CFPB's study and proposal underscore the importance of class actions as a powerful tool to help consumers effectively vindicate their rights by returning billions of dollars to millions of consumers, in addition to achieving important non-monetary relief in the form of changes to harmful business practices.[21] Because the majority of individual claims against consumer financial services companies are worth only small amounts of money, as Judge Richard Posner of the Seventh Circuit Court of Appeals once put it, "the realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[22] The CFPB's data confirms this: although millions of financial consumers are covered by forced arbitration clauses and class action waivers, the CFPB found that only a few hundred consumers file arbitration claims each year[23] and that very few file individual claims in court,[24] particularly when compared to the 32 million consumers who benefit from class actions each year.

The CFPB's proposal recognizes that class action waivers frequently suppress consumers' claims entirely and prevent the effective enforcement of substantive federal and state laws aimed at protecting consumers – perhaps uniquely more so in the financial services context than any other area of the law, since consumers' claims in the financial services context are frequently for low-dollar amounts. The proposal also rightfully acknowledges the limitations of the CFPB's mandate, which requires that any proposal be directly tied to the study results. Because the CFPB's study demonstrates that class actions are the most effective and often the only tool available for consumers to seek justice in this context, the proposal smartly preserves the ability of consumers to band together when seeking relief through the civil justice system by prohibiting class action waivers in consumer financial product and services contracts.

Finally, while the proposal does not prohibit companies from forcing consumers to arbitrate individual cases, we strongly support the CFPB's efforts to require companies to report certain information about individual arbitrations and the CFPB's proposal to provide access to that information online. The collection and examination of this information will hopefully encourage more consumer-friendly behavior and accountability from the companies who frequently utilize this process.

As the CFPB has demonstrated with its comprehensive study, forced arbitration shields corporations from accountability for abusive, anti-consumer practices, which only encourages unscrupulous business practices by allowing violations of the law to go unchecked. This comes at the expense of consumers, small businesses, and—just as importantly—law abiding businesses. Recognizing this, the CFPB has proposed a narrowly-tailored but important rule to

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[20] CFPB Report.
[21] CFPB Report, section 8.1 at 3.
[22] *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).
[23] CFPB Report, section 5.2.1 at 9 and section 5.5.1 at 19.
[24] CFPB Report, section 6.2.1 at 6.

restore access to our civil justice system and promote transparency within the forced arbitration system. We, the undersigned, strongly support the CFPB's proposal and urge the Bureau to move forward quickly to finalize this proposed rule to protect American consumers.

Sincerely,

Harry Reid
United States Senator

Al Franken
United States Senator

Patrick Leahy
United States Senator

Sherrod Brown
United States Senator

Edward J. Markey
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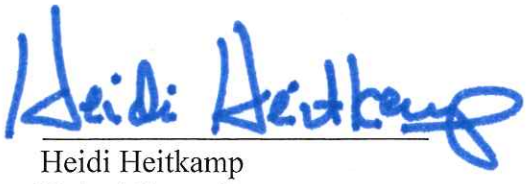

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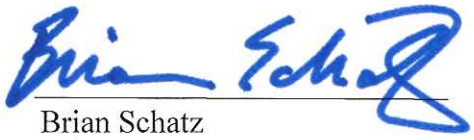

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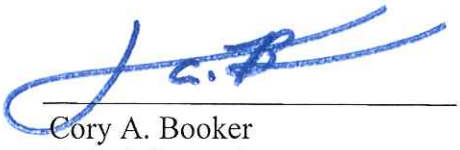

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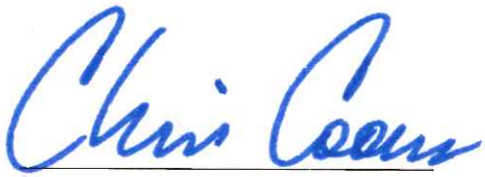

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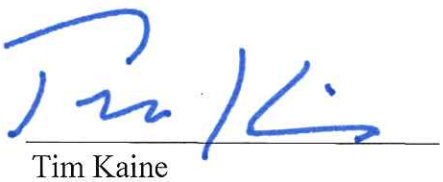

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