BEFORE THE
CONSUMER FINANCIAL PROTECTION BUREAU
WASHINGTON, D.C. 20552

PETITION FOR RULEMAKING: To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services

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Petitioners, the National Association of Consumer Advocates (NACA), Public Citizen, the American Association for Justice (AAJ), Public Justice, the National Consumer Law Center (on behalf of our low income clients), Consumer Federation of America (CFA), the UC Berkeley Center for Consumer Law & Economic Justice, Americans for Financial Reform, and Better Markets, Inc., organizations concerned about consumer financial protection and economic justice, respectfully petition the Consumer Financial Protection Bureau (CFPB or Bureau) to conduct a rulemaking under 5 U.S.C. § 553(e) and 12 U.S.C. § 5518 regarding the use of terms and conditions requiring arbitration of any future dispute in connection with the offering or providing of consumer financial products or services. Specifically, we petition the Bureau, with respect to protecting consumers and advancing the public interest, to promptly issue a rule addressing the use of mandatory pre-dispute arbitration (or forced arbitration) provisions in contracts between regulated entities and consumers of financial products or services that would allow the consumer to make a meaningful choice on whether to use arbitration after a dispute arises.

The Bureau, the U.S. Congress, academics, journalists, consumer advocates, other regulators, and public opinion surveys have repeatedly demonstrated that consumers have a very low level of consent and awareness of terms and conditions that require them to pre-commit to pre-dispute arbitration when they sign up for a product or a service. Consumers do not realize that through arbitration clauses in take-it-or-leave-it contracts with corporate entities, they lose their legal right to file claims in court if a dispute later arises with a financial services provider.

The use of pre-dispute arbitration requirements in contracts represents a “whole-scale privatization of the justice system,” and creates a severe power imbalance of one side over another in the resolution of legal claims.[1] Consumers’ interests are protected by competitive markets where they can make informed and meaningful choices about the products they use and the terms of service they are bound to, but the evidence shows that consumers are not aware of—and are not meaningfully consenting to—forced arbitration provisions. These provisions block consumers from making informed decisions about dispute resolution at the appropriate time—that is, after a dispute arises.

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[1] Jessica Silver-Greenberg and Michael Corkery, In Arbitration, a ‘Privatization of the Justice System,’ N.Y. TIMES, Nov. 1, 2015, available at https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html.

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I. BACKGROUND

As the Bureau knows, tens of millions of American consumers of financial products and services are subject to forced arbitration provisions.[2] At their most basic level, forced arbitration clauses inserted into financial services providers' contracts of adhesion prohibit consumers from exercising their constitutional right to a jury trial, allowing these entities to remove themselves from the public court system as to claims brought against them by consumers.[3] Forced arbitration clauses require private arbitration of disputes, often on an individual basis, because most of these clauses also bar individuals from joining with others in class actions or class arbitration. The financial services provider, having superior bargaining power, often sets the rules for the arbitration, including selection of the arbitration firm, making the provider a "repeat player" and "client" of that firm, which then has a strong monetary incentive to decide disputes in the provider's favor. It also dictates the hearing location and costs. The scope of arbitration clauses often is broad, applying to any disputes arising out of or relating to the contract for the account or card, and sometimes extending to other aspects of the parties' relationship.[4] In addition, financial services providers reserve the right to change their terms and conditions at any time, leaving consumers with no meaningful choice with respect to the imposition of forced arbitration provisions.[5]

Forced arbitration runs counter to the public interest. Privately hired arbitrators replace publicly appointed judges and juries. Severe limitations on discovery and evidence hinder the ability of consumers to obtain information from the financial services provider and, therefore, to prove their case. In addition, the proceedings are private, held outside of public view. Arbitration decisions are rarely published and are not subject to judicial review. This secrecy enables repeat corporate offenders to go undetected by both other consumers and the Bureau.

Meanwhile, the widely used prohibitions on aggregated or class claims in arbitration clauses eliminate the possible adjudication of systemic and widespread violations of the law. When consumers suffer small but serious injuries, banding together in a joint or collective action is often the only practical, cost-effective path for consumers to seek and obtain corporate accountability.[6] Without the ability to go to court and band together, consumers harmed by corporate wrongdoing are deterred from asserting claims against financial institutions because it is costly, risky, and impractical to pursue their claims alone in arbitration. And entities that break the law and harm

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[2] See Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a) (March 2015), available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[3] See, Szalai, Imre S., The Prevalence of Consumer Arbitration Agreements by America's Top Companies (Jan. 29, 2019). 52 U.C. Davis L. Rev. Online 233, 244 (2019), available at https://ssrn.com/abstract=3362049.

[4] Consumer Financial Protection Bureau, Arbitration Study, Section 2, at 32 (2015).

[5] See, e.g. The Pew Charitable Trusts "Consumers Continue to Load Up on Prepaid Cards," at 21 (Feb. 2014), available at https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardsstillloadedreportpdf.pdf, last accessed Aug. 17, 2023; The Pew Charitable Trusts, "Checks and Balances," (May 2013), available at https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/checksbalancesnewpdf.pdf, last accessed Aug. 17, 2023.

[6] See, Myriam Gilles, Testimony Before The House Committee On The Judiciary Subcommittee On Antitrust, Commercial, And Administrative Law, Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights, Prof. Myriam Gilles, Submitted February 9, 2021, available at https://docs.house.gov/meetings/JU/JU05/20210211/111171/HHRG-117-JU05-Wstate-GillesM-20210211.pdf.

consumers are emboldened to continue doing so because these bad actors can simply block access to the public court system and prohibit class action claims.[7] On the other hand, it is well-established that it is the threat of legal accountability from public law enforcement and from private consumers together that deters entities from engaging in overly risky and illegal practices.[8]

Arbitration may be a fair alternative to the court system in cases when the parties have equal ability to meaningfully consider and choose whether to arbitrate their dispute and under what conditions. Arbitration forced on consumers through a pre-dispute form contract, however, is inherently unfair to consumers. It is generally only after a dispute arises that consumers have access to counsel to help them make informed decisions about where and how to bring their claims. Moreover, the mere existence of forced arbitration clauses in the financial services market preemptively allows financial services providers to sidestep the legal system, avoid accountability for misconduct, and continue practices that violate the law and harm consumers.[9]

A. Brief history

The proliferation of forced pre-dispute arbitration clauses in the terms and conditions for consumers to use financial products, as well as in other consumer and worker contracts, follows the U.S. Supreme Court's broad interpretation of the Federal Arbitration Act. Congress enacted the FAA in 1925 to provide for enforcement of commercial arbitration agreements in contracts involving interstate commerce. For many years after, the FAA was applied to arbitration agreements between commercial entities.[10] More recently, however, a series of U.S. Supreme Court decisions expanded the reach of the FAA, applying it even in the absence of equal bargaining power and outside the context of commercial actors. [11] Among them was *AT&T Mobility v. Concepcion*, where the Court held that corporations can use nonnegotiable form contracts to bar consumers from bringing class actions and require arbitration on an individual basis, if the provision barring class actions is accompanied by a requirement that disputes be arbitrated.

Nonetheless, Congress has acted to limit the FAA and protect individuals and small businesses in certain sectors. For example, Congress has prohibited the use of forced arbitration clauses in contracts for residential mortgages and related lines of credit and has held that forced arbitration clauses in contracts with military members and their dependents concerning certain high-cost loans (payday lending, etc.) cannot be enforced.[12] In addition, Congress protected auto dealers from forced arbitration in resolving disputes with the more powerful auto manufacturers. Congress has also protected livestock and poultry growers engaging in transactions with big agribusiness from

[7] Id. at 2.
[8] Id.
[9] See, David L. Noll, Regulating Arbitration, 105 Calif. L. Rev. 985, 986 (2017). Alison Frankel, Consumer arbitration is on the rise but numbers are still puny, REUTERS, May 9, 2019, available at https://www.reuters.com/article/us-otc-arbitrationdata/consumer-arbitration-is-on-the-rise-but-numbers-are-still-puny-idUSKCN1S62NI.
[10] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346 (1985).
[11] See e.g. Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 130 S. Ct. 1758 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 130 S. Ct. 2772 (2010) AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); American Express v Italian Colors Restaurant, 133 S. Ct. 2403 (2013).
[12] 15 U.S.C. 1639c(e) and 32 C.F.R. § 232.

forced arbitration.[13] Most recently, in March 2022, Congress passed a law nullifying forced arbitration clauses and class action bans for sexual harassment or sexual assault cases, ensuring that individuals can choose to bring those disputes in court.[14]

B. Bureau's study and rulemaking

In 2015, fulfilling the mandate of the Dodd-Frank Act, the Bureau completed a comprehensive study on forced arbitration in the consumer financial services market, producing a data-driven and evidence-based examination.[15] Pursuant to its explicit statutory authority to prohibit, limit, or impose conditions on arbitration agreements consistent with the study, the Bureau promulgated a rule in 2017 that (1) rendered class action waivers in arbitration clauses unenforceable, and (2) required the reporting of arbitration records and certain court records. That is, identifying the deterrent effect of class actions on unlawful activity and the overall benefits of aggregate and class actions for consumers in the marketplace, the rule sought to restore consumers' ability to band together to pursue claims concerning covered consumer financial products or services. The 2017 rule did not prohibit forced arbitration clauses.

In late 2017, Congress introduced a joint resolution under the Congressional Review Act of 1996 to overturn the rule.[16] Following the House vote to pass the resolution, the Senate approved the resolution by a 51-50 vote, with Vice President Pence casting the tie-breaking vote.[17] The President signed the resolution into law. As a result, the consumer protections offered under the arbitration rule of 2017 did not go into effect.

C. Growth of arbitration since 2017

Since 2017, consumers' ability to access the civil justice system to resolve disputes with financial services providers has decreased even further. The use of forced arbitration clauses in consumer contracts continues to grow.[18] A 2019 study revealed that 81 of the 100 top American companies (and their subsidiaries and related entities) use arbitration clauses, and 78 of the 81 include class action bans.[19] The list of companies included traditional providers of financial services and products, such as banks and credit card companies,[20] as well as entities that have affiliations with financial services and products.[21] For example, Delta Air Lines, although not a financial services provider, offers a Delta SkyMiles credit card issued by American Express, which contains a broad

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[13] 15 U.S.C. § 1226 and 7 U.S.C. § 197c. See, also, 48 CFR 252.222-7006.
[14] Public Law 117-90 (117th Cong.), Mar. 3, 2022.
[15] Consumer Financial Protection Bureau, Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), March 2015.
[16] H.J.Res.111 - Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to Arbitration Agreements, Nov 1, 2017.
[17] See, Roll Call Vote on the Joint Resolution (H. J. Res. 111), Oct. 24, 2017, available at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00249.htm.
[18] Szalai, Imre S., The Prevalence of Consumer Arbitration Agreements by America's Top Companies (January 29, 2019), 52 U.C. Davis L. Rev. Online 233 (2019), available at https://ssrn.com/abstract=3362049.
[19] Id. at 238.
[20] Id. at 248-253.
[21] Id. at 237.

forced arbitration clause in its terms and conditions.[22] "Delta Air Lines benefits from and can likely seek to enforce the broad arbitration clause found in the American Express cardholder agreement if Delta Air Lines becomes involved in a dispute about its SkyMiles loyalty program," the study noted.[23] By demonstrating the extent to which financial products and services are affiliated with non-financial services providers, the study shows how forced arbitration permeates the consumer financial market and consumers' everyday lives.

D. Bureau's continued scrutiny of arbitration

It is promising then that the Bureau continues to scrutinize the pervasiveness of forced arbitration requirements and class action bans in the financial sectors it oversees. In its Notice of Proposed Rulemaking on Nonbank Terms and Conditions published in February 2023, the Bureau recognized that "consumers face risks when businesses use form contracts to impose terms and conditions that seek to waive consumer legal protections."[24] It acknowledged that boilerplate terms and conditions in contracts jeopardize consumers' ability to enforce their rights when they are wronged by covered entities.[25]

To address this concern, the CFPB proposed requiring nonbanks to register and report their use of certain terms or conditions that waive consumer rights or other legal protections or limit consumers' ability to enforce their rights on an annual basis.[26] Notably, the Bureau named arbitration clauses and any limits on a consumer's ability to band together in collective legal actions as risky provisions that would be included for required reporting under the proposed rule.[27] We agree with the CFPB when it highlights the risks of forced arbitration clauses and class action bans as including financial providers' reduced compliance with consumer laws, reduced accountability for violating those laws, and a potential absence of a deterrent (possibility of legal action in court) to comply.[28] These risks are compounded by the prevalence of forced arbitration clauses in the consumer finance market.[29]

In its nonbank proposal, the CFPB made compelling observations that support consideration of the instant petition. First, it acknowledges that federal, state, tribal, and local laws and regulations historically have limited certain terms and conditions and safeguarded consumers' legal protections in consumer form contracts.[30] This precedent along with the Bureau's explicit statutory authority strengthens the grounds for revisiting a rulemaking on forced arbitration. The Bureau also added

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[22] Id.
[23] Id.
[24] Bureau of Consumer Financial Protection, Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections, Proposed rule with request for public comment, 88 Fed Reg. 6906 (Feb. 1, 2023) (The proposal has not been finalized as of the date of this petition).
[25] Id.
[26] Id. at 6906.
[27] Id.
[28] Id. at 6916.
[29] Id. at 6921. ("…in the Bureau's experience and expertise, arbitration agreements remain a common term or condition in contracts for supervised consumer financial products or services.")
[30] E.g. Federal Trade Commission's Holder in Due Course Rule, 1984 Credit Practices Rule, and the Credit Repair Organizations Act.

that consumers generally do not choose most contract terms and conditions in the agreements for consumer financial products or services.[31] As the Bureau said, "(f)orm contracts often specify a fixed set of terms and conditions which the consumer typically must accept in their totality."[32] This type of contracting, as common and expected as it may be, gives rise to certain risks and consequential harm. The Bureau can address these risks directly and reduce said harm to consumers by enabling critical consumer choices regarding the use of forced arbitration.

The undersigned organizations support the Bureau's proposal to require nonbanks to register terms and conditions it finds unsafe for consumers.[33] Yet, it is necessary for the Bureau to proceed a step further to adequately address the issue that a registry alone cannot wholly resolve: forced arbitration clauses unjustly deprive consumers of meaningful consent when they need it the most.

Notwithstanding the reversal of the 2017 rule, the Bureau retains statutory authority to address forced arbitration provisions in consumer financial services contracts. In support of that authority, the Bureau's 2015 study of forced arbitration's impact on the marketplace and its recent observations in subsequent agency actions are still true. Moreover, the problems created by forced arbitration provisions in consumer financial services contracts have been reinforced by the growth and changes in the market and in the legal and regulatory landscape in the years since. Arbitration clauses that eliminate a consumer's legal options remain a grave risk to a consumer's financial safety and to the wellbeing of the consumer finance market.

II. THE CFPB CAN AND SHOULD ISSUE AN ARBITRATION RULE PURSUANT TO ITS STATUTORY AUTHORITY.

The Congressional Review Act (CRA) provides a period after issuance of certain agency final rules in which Congress may "disapprove" and overturn the rule, using procedures that do not allow for a Senate filibuster. [34] If both houses pass a CRA resolution, and it is signed by the President, the disapproved rule will not go into effect.[35] Before the end of 2016, the CRA had been used to overturn one regulation. Between 2017 and 2022, Congress blocked 19 rules under the CRA, including the CFPB's arbitration rule.[36]

Disapproval under the CRA does not prevent an agency from revisiting the subject matter of the disapproved rule. The CRA provides, however, that the agency may not issue a later rule in "substantially the same form" as the one that was overturned (absent a new statute authorizing such action).[37]

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[31] Id. at 6907.
[32] 88 Fed. Reg. 6906, 6908 (Feb. 1, 2023).
[33] See, Comment from Ten Consumer Organizations on Docket No. CFPB-2023- 0002, Apr. 3, 2023, and Comment from National Association of Consumer Advocates & UC Berkeley Center for Consumer Law and Economic Justice, on Docket No. CFPB-2023- 0002.
[34] 5 U.S.C. §§801-808. See, also, Congressional Research Service, The Congressional Review Act Frequently Asked Questions, Updated Nov. 12, 2021, available at https://crsreports.congress.gov/product/pdf/R/R43992,
[35] Id.
[36] Congressional Research Service (CRS), The Congressional Review Act Frequently Asked Questions, Updated Nov. 12, 2021, at 2, available at https://crsreports.congress.gov/product/pdf/R/R43992.
[37] 5 U.S.C. §801(b)(2).

The CRA does not define the phrase "substantially the same form."[38] In two instances, agencies issuing new rules on the same topic as an earlier disapproved rule have shown them to be not "substantially the same form" by reviewing Congress's discussion when it overturned the earlier rule, and explaining how the new rule is different from the first one.[39]

Here, the rule proposed by this petition would not be in "substantially the same form" as the 2017 rule. The CFPB's 2017 arbitration rule prohibited class action bans in arbitration clauses and required reporting of certain arbitral records. By contrast, the rule proposed in this petition would not prohibit, or even address, class-action bans. Rather, it would give consumers the right to make the choice about dispute resolution after a dispute arises, thereby ensuring that consumers can make informed, meaningful choices at the most relevant time.

Importantly, the Bureau's statutory authority to issue an arbitration rule remains unchanged. Given Congress' decision to give the Bureau express statutory authority to limit or prohibit forced arbitration, and the Bureau's ongoing experience with the broad impact of forced arbitration on consumers and the financial market, the Bureau must revisit a rulemaking on forced arbitration as a matter of public interest and for the protection of consumers. As Prof. David Vladeck wrote, "Congress' razor-thin disapproval of the CFPB's first forced arbitration rule did not somehow erase the underlying statutory mandate under which the CFPB continues to operate."[40]

III. DEVELOPMENTS SINCE 2017 DEMONSTRATE CONTINUED NEED FOR MEANINGFUL CONSUMER CHOICE AND CONSENT IN DISPUTE RESOLUTION.

The current landscape for consumers in the consumer finance market presents compelling reasons for the Bureau to issue a new arbitration rule. Consumers should have meaningful consent in the exercise or waiver of their fundamental legal rights, including the right to access the civil justice system. The examples below, in addition to the Bureau's own previously gathered evidence, more than satisfy the statutory requirements directing a rulemaking on this topic if it is in the public interest and for the protection of consumers. Consumers' lack of knowledge, awareness, and understanding of forced arbitration provisions and their consequences in financial services should be a critical factor as the Bureau considers taking future action on the issue.

A. Protection against consumers' lack of awareness and understanding of forced arbitration's existence, meaning, and consequences

In July 2023, Roseanna Sommers, a social psychologist and assistant professor at the University of Michigan Law School, released an empirical investigation of consumers' understanding and

[38] Supra, CRS, at 18.
[39] Department of Labor, Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012, 84 Fed. Reg. 53037 (Oct. 4, 2019); and Securities and Exchange Commission, "Disclosure of Payments by Resource Extraction Issuers," 86 Fed. Reg. 4662 (Jan.15, 2021).
[40] Id.

awareness of arbitration clauses in consumer contracts.[41] Sommers, whose body of work often seeks to empirically document "people's intuitions about legal concepts such as consent, autonomy, and moral responsibility," surveyed a sample of about 1,071 U.S. consumers, inviting them to read a bank's deposit account agreement and then answer a series of questions relating to it.[42] The survey also included questions about the survey participants' use of common products and services, such as mobile payment applications, cell phone companies, and streaming services, all of which include arbitration clauses in their terms and conditions. In the Sommers' study, the participants' references to the arbitration clause made up 1.4% of the total mentions of what participants could recall from the deposit account agreement presented to them.[43] Most survey participants were either unsure whether they had (35%), or said they had not (48%), agreed to be bound by an arbitration clause. Of the 48% who said they had never entered into a contract with an arbitration clause, 99% of them actually had signed up for an account with at least one named product or service that uses arbitration clauses in its terms and conditions.[44]

Sommers' survey, an updated and expanded review of this core aspect of forced arbitration, reinforces the findings of a similar study released in 2015 and the Bureau's own 2015 survey.[45] Most consumers in the 2015 CFPB survey were unaware of whether their financial contracts included forced arbitration clauses. The CFPB reported that fewer than 7% of consumers covered by arbitration clauses realized that the clauses restricted their ability to sue in court.[46] Sommers' article demonstrates that, 8 years later, consumers' awareness and understanding of arbitration clauses remains extremely low. The status quo, where consumers cannot make choices about arbitration when they need to, continues to deprive them of important rights while providing legal immunity for financial entities that break the law.

1. *Consumer understanding*

Consumers do not understand the consequences of an arbitration clause until it is too late. The Sommers' survey confirmed that consumers have mistaken beliefs about their rights even after signing up for products and services with arbitration clauses, including wrongly believing they can still sue in court.[47] Study participants were presented with a hypothetical about identity theft at a bank with the deposit account agreement referenced in the survey. When asked, most respondents believed that they would be able to sue in court, thought that they retained the right to a jury trial, or were unsure of their rights.[48] Sommers also notes that less than 5% of survey participants understood that they could not appeal erroneous arbitration decisions or go back to court.[49] The

[41] Roseanna Sommers, What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation, July 25, 2023, available at https://ssrn.com/abstract=4521064.
[42] Id. See, also, http://www.roseannasommers.com.
[43] Sommers study at 12.
[44] Sommers study at 18.
[45] Jeff Sovern, et al, "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. LAW REVIEW, Issue 1 (2015); CFPB Arbitration Study, Section 3.
[46] CFPB Arbitration Study, Section 1, at 11.
[47] Sommers study at 1.
[48] Sommers study at 15.
[49] Id. at 16.

Bureau's 2015 survey made similar findings: Consumers were unaware of their procedural rights when subject to forced arbitration, including wrongly believing that they could join with other consumers in a class action to hold a corporation accountable.

The Bureau has acknowledged that it considered consumers' lack of understanding of certain terms and conditions in adhesion contracts as a factor in proposing a registry this year for nonbank terms and conditions.[50] A registry is appropriate to collect data and bring transparency for a collection of risky terms and conditions. However, the risks and consequences for consumers when they are unaware of and misunderstand the consequences of arbitration clauses necessitate additional action by the Bureau. The Bureau must ensure that consumers are presented with meaningful choices with respect to their right to access the civil justice system.

2. *Lack of consumer choice*

Given the prevalence and nonnegotiable nature of arbitration clauses in everyday contracts, it is no surprise that consumers do not tend to factor in dispute resolution when deciding whether to use a product or service, as the Sommers study found.[51] When signing up for financial products or services, consumers are not in a position to bargain over terms.[52] Indeed, it may be pointless for most consumers to fully review the terms in contracts for financial products because the contracts are offered on a take-it-or-leave-it basis. And even consumers who may be aware of the existence of forced arbitration have no meaningful choice about whether to agree to it.[53]

When shopping for a financial product or service and entering into an agreement, consumers focus on the price and product description. As the Bureau observed recently, "[a]s a result, providers of consumer financial products and services may seek to insert terms and conditions that pose risks to consumers who may not notice, until the consumer has a problem that they need to resolve or the terms and conditions face wider public scrutiny."[54] Financial institutions insert forced arbitration clauses in consumer contracts, keenly aware of the serious risks they pose to consumers. These are risks that consumers typically do not notice, understand, or appreciate until they are harmed and are forced to seek legal redress. The Bureau, through the requested rulemaking, should provide a means for increasing consumers' options about arbitration, allowing them to make choices about dispute resolution at a time when they are more likely to understand the choices and appreciate the potential consequences.

Terms in arbitration clauses that allow individuals to opt out of forced arbitration for a limited period after entering into the agreement do not improve the quality of consent for consumers. Opt-out provisions are a feature in a significant number of financial products of services, including credit cards, prepaid cards, and storefront payday loan contracts.[55] According to the Bureau's analysis, the time allowed for opting out was generally either 30 or 60 days after opening an

[50] CFPB nonbank terms and conditions proposal, at 6916.
[51] Sommers study, at 18-19.
[52] See, 88 Fed. Reg. 6906, 6908 (Feb. 1, 2023).
[53] Sommers study, at 20.
[54] CFPB nonbank terms and conditions proposal, at 6908.
[55] CFPB arbitration study, Section 2, at 31 - 32.

account or submitting an application.[56] As Sommers notes in her study, the limited period allowed to opt out is "especially significant" because consumers would still have to opt out "before any wrongdoing has occurred or been discovered."[57] Here, she identifies a central problem with forced arbitration: that consumers are unable to make decisions at the pertinent time.

Those terms, too, are often neither noticed nor understood by consumers at the time of purchasing the product or service. Indeed, the Bureau recently described these opt-out provisions as a "nominal choice."[58] And Sommers' study confirms the Bureau's 2015 findings that consumers are unaware of the existence of terms that permit them to opt out of forced arbitration. Most surveyed consumers in Sommers' study did not recall having a time-restricted choice to opt out of forced arbitration in identified products and services, all of which included arbitration clauses and opt-out terms in their terms and conditions.[59] They are as unlikely to notice an opt-out provision as the arbitration clauses themselves. Even if they notice the opt-out provision, it will not be meaningful to them if they do not understand the significance of the forced arbitration provision.

B. Protection against entities' additional maneuvers that further exploit forced arbitration against consumers

Evidence gathered by scholars, public policymakers, researchers, journalists and advocates show that the proliferation of forced arbitration is "not a vindication (for consumers) but an unconstitutional evisceration of statutory and common law rights."[60] The evidence establishes that forced arbitration allows corporate entities to take advantage of consumers' lack of control over terms and conditions and their lack of understanding of the consequences of the restrictive terms.[61] It facilitates the actions of financial providers that are inclined to sidestep the law and avoid accountability. Since 2017, petitioners have observed additional features of forced arbitration practice where entities insulate themselves from legal accountability even further. These developments demonstrate the need for the Bureau to issue a rulemaking to protect consumers from being bound by pre-dispute arbitration provisions that capitalize on consumers' lack of meaningful consent and understanding.

1. Growth of additional constraints in forced arbitration provisions

Eliminating public accountability afforded by the court system, forced arbitration pushes consumers into a secret and private process. Forced arbitration allows a company to write the rules, select the umpire, and even unilaterally change the rules to immunize themselves against *any* possibility of being held accountable.

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[56] Id.
[57] Sommers study, at 22-23.
[58] 88 Fed. Reg. 6906, 6908 (Feb. 1, 2023).
[59] Sommers study, at 21-23.
[60] Resnik, Judith, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale Law Journal 2015, April 30, 2015, available at https://ssrn.com/abstract=2601132.
[61] See, e.g., Gupta, Deepak and Khan, Lina, Arbitration as Wealth Transfer, YALE LAW & POLICY REVIEW, Vol. 35, p. 495 (July 11, 2017), available at SSRN: https://ssrn.com/abstract=3000505.

For instance, corporations are unilaterally modifying terms and conditions, even mid-dispute; imposing various procedural hurdles and pre-filing requirements *before* an individual may initiate arbitration. Such restrictions further abridge consumers' ability to make informed decisions about dispute resolution and can severely delay a consumer's ability to seek justice that the consumer is forced to give up.[62]

Being able to unilaterally modify terms and conditions of arbitration is particularly egregious when companies can anticipate potential claims arising from facts that are known only to them, not to consumers.[63] Some financial services providers have even held a consumer's funds hostage to a requirement that the consumer accede to the new terms before they can access their account.[64]

- Recent reports revealed that after cryptocurrency exchange and lender Gemini learned that it had entrusted $900 million worth of customer funds to an investment fund that was likely to lose nearly all of the customer funds, it repeatedly updated its dispute resolution provisions, adding nearly 2,000 words, changing forced arbitration administrators, and imposing extensive administrative exhaustion requirements and complex consolidation procedures as conditions to initiate arbitration.[65]

- Despite being ordered to pay more than $3 billion in redress and civil penalties for illegal conduct, Wells Fargo reportedly continued to try to avoid accountability through procedural tactics within the forced arbitration system.[66] Initially, Wells Fargo's forced arbitration clause included a class action waiver and required customers to arbitrate only on an individual basis. The bank promised to pay arbitration fees so long as customers paid the initial filing fees. However, when 3,000 customers alleging that they had been illegally charged surprise overdraft fees paid the filing fees to proceed in arbitration, Wells Fargo demanded that the arbitration provider it had chosen, AAA, adopt its wish list of procedural requirements to make arbitration even more ineffective for its customers.

  Wells Fargo effectively halted all current and future cases by successfully imposing a heightened pleading standard. Customers would now have to provide evidentiary proof before being allowed to proceed, while at the same time, Wells Fargo was allowed to

[62] MacClelland et al. v. Cellco P'ship et al., No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), appeal filed, No. 22-16020 (9th Cir. July 13, 2022). See also Brief for American Association for Justice as Amicus Curiae in Support of Plaintiffs-Appellees, MacClelland, et al. v. Cellco P'ship, et al., No. 22-16020 (9th Cir. Mar. 24, 2023).
[63] See Comments of Ten Consumer Organizations on Docket No. CFPB-2023- 0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, (Apr. 3, 2023) at 10-11 ("Comment Letter").
[64] Id.
[65] See Complaint, Picha et al. v. Gemini Trust Company, LLC et al., No. 1:22-cv-10922-NRB (S.D.N.Y. Mar. 17, 2023). See also Nguyen v. OKCoin USA Inc., No. 22-cv-06022-KAW, 2023 WL 2095926 (N.D. Cal. Feb 17, 2023) (granting the cryptocurrency company's motion to compel arbitration although it adopted revised forced arbitration clause two months after collapse of a company in which customers were invested).
[66] CFPB Orders Wells Fargo to Pay $3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts, CFPB (Dec. 20, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-wells-fargo-to-pay-37-billion-for-widespread-mismanagement-of-auto-loans-mortgages-and-deposit-accounts/.

withhold the information customers needed to satisfy the new pleading standard.[67] This change "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[68]

The two examples above show how financial entities can refuse to play by the rules that they themselves chose when consumers attempt to follow the forced arbitration terms. The examples show that corporate entities' preference for forced arbitration is not about providing a fair and efficient method of dispute resolution, but with insulating themselves against potential liability.

Another tactic used to make arbitration even more difficult for consumers are pre-dispute dispute resolution, or "PDDR," clauses inserted into consumer contracts which add procedural and substantive hurdles, even before arbitration occurs. Many of these clauses are inconsistent with state and federal consumer protection laws[69] that provide substantive rights for consumers or offer procedures that consumers may use to dispute transactions.[70] At first glance, the PDDR process may appear informal and an easy way to resolve conflicts, but in reality PDDR is a complex legal process with real and permanent consequences which severely curtail consumer rights even further within forced arbitration procedures, and make it more difficult or impossible to seek a fair outcome in private dispute resolution. This is an added call for consumers to be able to make choices about arbitration and agreed-upon procedures after the dispute arises.

- Klarna's vaguely worded requirements could stop individuals from initiating any sort of dispute resolution process. For example, Klarna's terms and conditions include an Initial Dispute Resolution provision that requires customers to "try, for 60 days, to resolve any Dispute informally." This "material term" of the Agreement is "a requirement that must be fulfilled before commencing any arbitration."[71] Such vague language may allow the company to argue that the consumer's effort was insufficient or incomplete—subjective arguments that would be decided by the arbitrator. Klarna and other corporate defendants who use these types of provisions also get a "free peek" at the consumers' arguments. Although an "informal" attempt to resolve disputes is sometimes useful, this mandatory contract term is rife with potential to block consumers' claims.

2. Changing terms to add forced arbitration after legal actions started in court

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[67] See Memorandum of Points and Authorities In Support of Plaintiffs' Opposition to Defendant's Motion to Compel Arbitration, Mosley et al. v. Wells Fargo & Co. et al., No. 3:22-cv-01976-DMS-AGS (S.D. Cal. Mar. 3, 2023).
[68] See Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).
[69] See Comments of Ten Consumer Organizations on Docket No. CFPB-2023- 0002; RIN 3170-AB14; Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, (Apr. 3, 2023) at 19-21 ("Comment Letter").
[70] While some state unfair and deceptive practice statutes require consumers to provide notice before filing suit, the statutory requirements are not as burdensome as those typically imposed in PDDR clauses; they also impose reciprocal obligations on companies. For example, California's Consumer Legal Remedies Act requires companies to offer consumers an opportunity to make reasonable corrections within 30 days of receiving the consumer's statutory notice letter. See Cal. Civ. Code § 1782.
[71] See Terms for Klarna Shopping Service, Initial Dispute Resolution, Provision 6, available at https://cdn.klarna.com/1.0/shared/content/legal/terms/0/en_us/user#mandatory-disputes (last accessed on July 1, 2023).

Some providers recently have unilaterally altered their forced arbitration clauses to be increasingly restrictive, including imposing forced arbitration after a dispute has arisen. In such instances, there can be no question that the consumer has any ability to meaningfully consent.

For example, in *Story v. Heartland Payments*, a class of parents of public school children in Florida challenged transaction fees assessed to process routine payments for items like school lunches, after-school programs, bus passes, and athletic fees.[72] After the lawsuit was filed, Heartland updated its online terms of service, adding a *retroactive* requirement that any disputes by resolved in arbitration and adding a waiver of the right to resolve disputes through a class action. The terms expressly provided that if "you accept these terms of service and a class is certified in the Story matter, you will not [be] permitted to participate in the Story case as a class member."[73] The district court permitted Heartland to continue using these new terms and conditions, thereby effectively barring parents from joining the class action that had already been filed. Even while upholding the new provisions as a matter of contract law, the court recognized that the consumers "have no real bargaining power with Heartland."[74]

3. Use of credit monitoring contracts to end run federal regulations and impose forced arbitration clauses on Fair Credit Reporting Act claims

The Big Three credit bureaus are nationwide consumer reporting agencies (CRAs) referred to in the Fair Credit Reporting Act (FCRA). The CRAs have limited opportunities to require arbitration, because consumers typically do not enter into agreements with them. And they cannot impose arbitration provisions when consumers request a free annual report, because Regulation V prohibits them from imposing terms or conditions on the annual disclosure. See 12 C.F.R. 1022.136(h). However, one nationwide CRA, Experian, has tried to impose forced arbitration by using arbitration provisions in the contracts of its credit monitoring affiliate, Experian Consumer Services ("ECS"). These provisions cover not only the credit monitoring service, but all FCRA claims against both ECS and Experian.

ECS likely has tens of millions of subscribers, given that Experian claims to have added 11 million new members in the preceding year.[75] These subscribers may have unknowingly signed away their right to go to court over credit reporting errors and abuses. Experian's strategy has been largely effective: Numerous federal courts, including the Ninth Circuit, have granted Experian's motions to compel arbitration for FCRA claims using the forced arbitration provision in ECS's agreements.[76]

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72 Story v. Heartland Payment Sys., LLC, 461 F. Supp. 3d 1216, 1219 (M.D. Fla. 2020).
73 Story, 461 F. Supp. 3d at 1221-22.
74 Story v. Heartland Payment Sys., LLC, 461 F. Supp. 3d 1216, 1219 (M.D. Fla. 2020).
75 Experian Annual Report 2022 - Year ended 31 March 2022, at 39, June 2022, available at www.experianplc.com/media/4480/experian_ar2022_web.pdf.
76 Abukar v. Experian Info. Sols. Inc., 2023 WL 3394827 (E.D. Wis. Apr. 11, 2023); Yates v. Experian Info. Sols., Inc., 2023 WL 4355045 (S.D. Tex. July 5, 2023), Kinkle v. Experian Info. Sols., Inc., 2023 WL 4105804 (S.D. Ind. June 21, 2023); Salazar, v. Experian Info. Sols., Inc., 2023 WL 3529635 (W.D. Mo. May 15, 2023); Capps v. JPMorgan Chase Bank, N.A., 2023 WL 3030990 (E.D. Cal. Apr. 21, 2023); Levy v. Credit Plus, Inc., 2023 WL 2644352 (S.D.N.Y. Mar. 27, 2023); Alvarez v. Experian Info. Sols., Inc., 2023 WL 2519249 (E.D.N.Y. Mar. 15, 2023); Cimillo v. Experian Info. Sols., Inc., 2023 WL 2473403 (S.D.N.Y. Mar. 13, 2023); Stephens v. Experian Info. Sols., Inc., 614 F. Supp. 3d 735 (D. Haw. 2022); Chong v. Bank of Am., N.A., 2022 WL 16832742 (D. Haw. Nov. 8, 2022); Solis v. Experian Info.

Additional discussion of these legal cases and this issue is provided in comments submitted on July 15 by the National Consumer Law Center in response to the CFPB's Advance Notice of Proposed Rulemaking dated March 15, 2023.[77]

Consumers who merely desired to check their credit reports and scores through credit monitoring services ended up forfeiting their day in court to address egregious credit reporting errors, likely without any awareness that they had done so. Given that tens of millions of Americans access their credit reports and reports through credit monitoring products, broad forced arbitration clauses threaten to eliminate consumers' ability to litigate many FCRA claims in court.

FCRA claims brought in open court are an essential backstop to ensuring the fairness and accuracy of the credit reporting system. The CFPB itself has documented the difficulties that consumers face resolving disputes through FCRA dispute resolution procedures.[78] Preventing the secretive and one-sided arbitration of FCRA claims would help hold CRAs accountable and correct errors when the FCRA dispute process is unsuccessful.

C. Protection against market-wide, systemic wrongdoing

Borne out of a financial crisis caused by market-wide misconduct that crippled the economy for years, the Bureau has a vested interest in tackling systemic, widespread financial practices that are risky or dangerous, to deter repeat offenders and prevent future large-scale harms. The involvement of consumers impacted by repeat offenses to seek accountability on their own is integral for the Bureau to achieve its goal. Because corporations, including entities that repeatedly violate the law, have used forced arbitration to strip consumers of meaningful choice about how to exercise their legal rights, widespread systemic harms have gone unchecked.

In 2022, the Bureau identified several repeat offenders in the consumer financial marketplace and later proposed creating a public registry of non-bank firms that were subject to state and federal consent orders.[79] While building public awareness of known bad actors is an important step in correcting the informational imbalance between consumers and financial services providers, this step alone is insufficient to combat the systemic harm caused by repeat offenders—many of which use forced arbitration to deprive consumers of access to the civil justice system and, often, of any remedy at all. And because many of the repeat offenders identified by the Bureau are dominant firms with tens of millions of customers, consumers have few alternatives to these firms when seeking essential financial services.[80] With consumers unable to negotiate fair contracts, and unable

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Sols., Inc., 2022 WL 4376077 (C.D. Cal. Sept. 21, 2022); Sauer v. Experian Info. Sols., Inc., 2022 WL 2163016 (C.D. Cal. May 12, 2022); Morgan v. Experian Info. Sols., Inc., 2022 WL 681359 (W.D. Wash. Mar. 4, 2022); Roberson v. Experian Info. Sols., Inc., 2022 WL 62270 (W.D. Tex. Jan. 5, 2022); Coulter v. Experian Info. Sols., Inc., 2021 WL 735726 (E.D. Pa. Feb. 25, 2021). See, also, Meeks v. Experian Info. Servs., Inc., 2022 WL 17958634 (9th Cir. Dec. 27, 2022).

[77] These comments are available at https://www.nclc.org/resources/nclc-request-for-cfpb-to-limit-arbitration-of-fcra-lawsuits/.

[78] Cons. Fin. Prot. Bureau, Annual Report of Credit and Consumer Reporting Complaints, January 2023, available at https://www.consumerfinance.gov.

[79] Rohit Chopra, "Reining in Repeat Offenders": 2022 Distinguished Lecture on Regulation, University of Pennsylvania Law School, March 28, 2022, available at https://www.consumerfinance.gov/about-us/newsroom/reining-in-repeat-offenders-2022-distinguished-lecture-on-regulation-university-of-pennsylvania-law-school/; CFPB Proposes Registry to Detect Repeat Offenders, Dec. 12, 2022, available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-registry-to-detect-repeat-offenders/.

[80] Id.

to meaningfully engage in choosing their preferred dispute resolution forum after a dispute arises, repeat offenders have little fear of legal accountability and have more room to engage in bad practices for a longer period of time.

The Bureau's work against "junk fees," is another example of how systemic harm can be compounded by forced arbitration. Junk fees, or surcharges surreptitiously added to the back-end of transactions for products and services, pose a systemic financial harm to consumers and hurt competition by hiding true market prices.[81] The Bureau is addressing pervasive junk fees throughout the consumer finance sector, including overdraft fees, pay-to-pay (bills) fees, "convenience fees" and late charges that are affixed to financial products. Fees to maintain accounts, process payments, originate new lines of credit, among other types of junk fees, impose burdensome added costs for consumers, especially those of modest means.

Unfortunately, most consumers' hands are tied when they are charged unlawful fees because their efforts to seek accountability are often stymied by class-action banning forced arbitration clauses. As the Bureau has determined, individual claims are a wholly ineffective way to seek redress for harms that involve relatively low amounts of damages. The 2015 arbitration study found that most arbitration clauses prohibit class actions and financial services providers often adopt forced arbitration clauses for the specific purpose of blocking class actions.[82] Consumers charged unlawful fees are thus unable and discouraged from seeking redress when financial services providers impose terms that force arbitration.

IV. ANTICIPATED IMPACT ON THE MARKET

A financial services market where consumers are empowered to make decisions about dispute resolution when a dispute arises would foster competition and market transparency, facilitate an environment that values safer financial products and services, and bring greater accountability for market participants.

Consumers, regulators, and financial services providers share a strong interest in maintaining an open and competitive marketplace. Consumers of financial services face an imbalance of power because large market players have outsized influence over the market and over the nonnegotiable contract terms they impose.[83] Forced arbitration clauses in the contract terms further interfere with natural competition by cutting off consumer choice and creating a private dispute resolution system that insulates wrongdoer corporations from liability.

Meanwhile, law-abiding financial services providers suffer in a market when a competitor breaks the law and any questions over its conduct are either heard in a private proceeding or, likely, are not heard at all. Allowing consumers a meaningful and timely choice on whether to arbitrate

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[81] The White House, The President's Initiative on Junk Fees and Related Pricing Practices, Oct. 26, 2022, available at https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/ (last accessed on Aug. 16, 2023).
[82] See CFPB, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a), Section 2, at 44-46.
[83] See, e.g., Gupta, Deepak and Khan, Lina, Arbitration as Wealth Transfer, Yale Law & Policy Review, Vol. 35, p. 495, 499, (July 11, 2017).

disputes or litigate them in court would restore public accountability and improve business practices. Financial services providers would have renewed incentive to improve their products and practices to attract and retain customers.

A rule that restores meaningful consent for consumers will also enable consumers to make more informed decisions. Forced arbitration impedes consumers' ability to make educated choices about the financial products and services in the marketplace. Because consumers often do not pursue claims at all if required to arbitrate, and because of the closed-door nature of arbitration, consumers are unable to learn about potential fraud, illegal fees, and other unfair or abusive practices.[84]

In recent years, financial services providers in certain cases, particularly those under regulatory scrutiny, have made changes to forced arbitration provisions to supposedly make those terms fairer for their customers.[85] For instance, some have removed confidentiality requirements in the provisions or discounted arbitration costs. However, the terms still lack essential fairness due to the ongoing forced arbitration requirement. Consumers will be better protected if they are able to decide whether to arbitrate after a dispute has arisen.

Financial services providers are well aware that their use of forced arbitration diminishes private enforcement and public accountability. As the Bureau knows, most state and federal consumer protection laws, such as the Truth in Lending Act (TILA), the Fair Debt Collection Practices Act (FDCPA), and the Fair Credit Reporting Act (FCRA), include provisions that allow consumers to go to court to vindicate their legal rights. They also offer tools to remedy widespread harms including the right to seek public injunctive relief against unlawful conduct that threatened the public.[86]

At the time these laws were written and passed, legislators recognized that private enforcement would be essential to their effectiveness. For instance, the Senate Committee on Banking, Housing, and Urban Affairs, which developed the FDCPA, noted that the law was meant to be self-enforcing and would rely on consumers to bring claims.[87] Private enforcement is integral to fostering safer financial products and services. A move by the Bureau to usher in meaningful choices with respect to the resolution of consumers' financial services claims would enable the private enforcement mechanism to play its intended role effectively.

V. CONCLUSION

Forced arbitration requirements eliminate a consumer's legal options before a problem even emerges and constitute a grave risk to a consumer's financial safety and to the wellbeing of the consumer finance market. It is in the public interest and for the protection of consumers for the

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[84] See, Gilles, Myriam E., Examining Mandatory Arbitration in Financial Service Products, Testimony, March 8, 2022, available at https://larc.cardozo.yu.edu/faculty-testimony/9.
[85] See, e.g., Testimony of Charles W. Scharf, Chief Executive Officer and President, Wells Fargo and Company, Hearing Before The United States Senate Committee On Banking, Housing, And Urban Affairs, (Sept. 22, 2022).
[86] Gilles, Myriam and Friedman, Gary B., Unwaivable: Public Enforcement Claims and Mandatory Arbitration, FORDHAM LAW REVIEW, Vol. 89, Forthcoming, Cardozo Legal Studies Research Paper No. 615, (June 10, 2020), available at https://ssrn.com/abstract=3624397.
[87] See e.g., 15 U.S. Code § 1692k; 15 U.S. Code § 1681n; S. Rep. No. 95-382, at 5 (1977).

Bureau to promulgate a rule on the use of forced arbitration provisions in the terms and conditions of financial products and services that would allow individual consumers to make meaningful choices over their use of arbitration after the dispute arises and at any time before arbitration proceedings begin.

The Congressional Review Act poses no barrier to such a rulemaking. Meanwhile, the Bureau's findings in its 2015 study of forced arbitration, addressing prevalence of forced arbitration, consumers' awareness and understanding, the dynamic between public and private enforcement, product pricing, among other things, remain important and consequential. Likewise, the Bureau's recent observations of the continued use and consequence of forced arbitration in the financial services sector support petitioners' call for action.

Consumers' interests are protected by competitive markets where they can make informed and meaningful choices about the products they use and the terms of service they are bound to, but the evidence shows that consumers are not aware of, and therefore are not actually consenting to, ubiquitous forced arbitration provisions in the terms and conditions of financial services and products. Evidence gathered over the years by the Bureau and others shows that the proliferation of forced arbitration eviscerates financial consumers' statutory and common-law rights. Moreover, financial providers afford themselves the right to change their terms and conditions at any time, further shielding themselves from accountability by depriving consumers of the ability to meaningfully consent to the forum or procedures for dispute resolution.

Recent developments in consumer contract terms show that the ongoing attack on consumers' ability to make informed decisions about dispute resolution both delays and denies consumers' ability to seek redress. The Bureau is also acutely aware of the consequences of market-wide misconduct and its ability to continue unabated without the meaningful involvement of private enforcement. The CFPB's continued focus on repeat offenders and systemic misbehavior illustrates that consumers need true consent over dispute resolution. Providing consumers with a voice, meaning, access to the court system if they prefer and when the choice becomes relevant for them, will deter misconduct, reduce harm, and create a fairer marketplace.

Thank you for considering our views. We welcome questions and future discussion regarding this petition. Please contact Christine Hines, 1215 17th St. NW, 5th Floor, Washington, DC 20036, at Christine @ consumeradvocates.org or (202) 452-1989.

Respectfully submitted,

National Association of Consumer Advocates (NACA)
Public Citizen
American Association for Justice (AAJ)
Public Justice
National Consumer Law Center (on behalf of our low income clients)
Consumer Federation of America (CFA)
UC Berkeley Center for Consumer Law & Economic Justice
Americans for Financial Reform
Better Markets, Inc.

DATED: *September 13, 2023*

ABOUT PETITIONERS

The National Association of Consumer Advocates (NACA) is a nationwide non-profit membership organization of private, public sector, legal services and non-profit attorneys, law professors, and law students whose primary interest is the protection and representation of consumers. Since its inception, NACA has focused on issues concerning unfair, deceptive, abusive, and fraudulent practices by businesses that provide financial and credit-related services. To that end, NACA is dedicated to preserving consumers' constitutional right to seek a civil remedy in the courts.

Public Citizen is a national non-profit organization with more than 500,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, worker safety, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

The American Association for Justice ("AAJ") is the world's largest plaintiffs' trial bar, established to safeguard individuals' rights, strengthen the civil justice system, and promote corporate accountability. For over 75 years, AAJ has worked to preserve the constitutional right to trial by jury, ensuring that individuals have access to justice through the legal system when their rights are violated. This petition is critical to restoring the rights of Americans to decide for themselves how to seek accountability when harmed.

Public Justice is a nonprofit legal advocacy organization focused on taking on the biggest systemic threats to justice of our time – abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. We connect high-impact litigation with strategic communications and the strength of our partnerships to fight these abusive and discriminatory systems and win social and economic justice.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (8th ed. 2020) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses and access to justice for consumers.

Consumer Federation of America (CFA) is a national association of over 250 nonprofit organizations that advances the consumer interest through research, advocacy, education, and service. CFA investigates consumer issues and publishes research that assists policymakers and individuals, and it advances pro-consumer legislation at the national and state levels. CFA has worked with federal and state enforcement agencies to provide research and perspective about the harms of forced arbitration clauses and routinely advocates for consumers' right to obtain recourse in the forum of their choosing.

The UC Berkeley Center for Consumer Law & Economic Justice works to establish equity and fairness in the marketplace. We believe that building economic justice means developing and enforcing laws that fight fraud and deception, that protect low-income communities and communities of color, and that promote financial security and empowerment. Through research, advocacy, policy, and teaching, the Center strives to apply robust consumer protection laws in places, and among people, where those laws have not been used before, and to create a society in which economic, racial, and social justice are available to all.

Americans for Financial Reform is a nonpartisan and nonprofit coalition of more than 200 civil rights, consumer, labor, business, investor, faith-based, and civic and community groups. Formed in the wake of the 2008 crisis, AFR is working to lay the foundation for a strong, stable, and ethical financial system and one that serves the economy and the nation. AFR has been called "the leading voice for Wall Street accountability" in Washington. AFR envisions a world where the rules that govern the economy center human needs and help all families and communities to flourish and its mission is to fight to eliminate inequity and systemic racism in the financial system in service of a just and sustainable economy.

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters on proposed rules, litigation, independent research, and public advocacy. It fights for a stable financial system, fair and transparent financial markets, and measures that effectively protect investors and consumers from fraud and abuse, so that all Americans can achieve greater economic prosperity. Much of Better Markets' advocacy has focused specifically on the need to provide investors and consumers with meaningful remedies through the courts when they have been victimized by unscrupulous practices among banks, brokers, and other financial service providers. https://www.bettermarkets.org/