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August 22, 2016

Via electronic delivery at
FederalRegisterComments@cfpb.gov

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 20552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51

Dear Ms. Jackson:

AARP¹ is pleased to submit comments in support of the proposed rule to establish 12 CFR part 1040 to govern the use of arbitration in consumer contracts for financial services and products.² AARP previously has elaborated in numerous comments filed with the Consumer Financial Protection Bureau (CFPB) the reasons behind AARP's conclusion that predispute mandatory arbitration harms consumers.³ Rather than repeat those points here, AARP refers the CFPB to its previous comments and incorporates them here by reference. In addition, we have attached our prior comments as part of our submission today.

A. INTRODUCTION

¹ AARP is a nonprofit, nonpartisan organization that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. We produce AARP The Magazine, AARP Bulletin, AARP Viva, NRTA Live and Learn, and provide information via our website, www.aarp.org. AARP publications reach more households than any other publication in the United States. AARP advocates for policies that enhance and protect the economic security of individuals.

² 81 Fed. Reg. 32830 (May 24, 2016).

³ See *AARP Comments submitted in response to Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Bureau of Consumer Financial Protection, Docket No. CFPB-2012-0017 (June 22, 2012).

As stated in prior comments, AARP strongly supports banning predispute mandatory arbitration, which eliminates accountability for unlawful practices and limits consumer access to remedies when they are injured by such practices. AARP therefore applauds the CFPB's proposal, and we urge the CFPB to finalize and implement the new rule. In particular, AARP fully supports the proposal to ban arbitration provisions that prevent consumers from filing class action lawsuits in court and to force consumers to agree to arbitrate before disputes arise. AARP further supports the CFPB's proposed monitoring of disputes that are arbitrated.

Overall, the proposed rule makes significant progress in restoring consumers' access to remedies that had been all but eliminated by the widespread use of forced arbitration clauses in contracts over which consumers have no ability to negotiate or protect themselves. But additional action is needed to ensure the intended protection is sufficiently comprehensive, and AARP therefore urges the CFPB to also provide the following protections for consumers:

- Require supervised providers with exempt contracts, formed prior to the final rule's effective date, to come into compliance with the Rule if they unilaterally change any material contract term;
- Monitor arbitration clauses used by all supervised parties as of the effective date of the final Rule and whenever an arbitration clause is materially altered;
- Require supervised providers to notify the CFPB whenever they seek to compel arbitration of a class action filed in court by a consumer; and
- Extend the scope of the rule to cover additional credit related providers, including credit reporting agencies, debt settlement providers, and credit repair provider

B. AARP supports the proposed Rule, which helps to mitigate the negative consequences of the imposition of predispute mandatory binding arbitration.

AARP strongly agrees with the conclusion of the CFPB's arbitration study that pre-dispute arbitration clauses and class action bans embedded in arbitration clauses harm consumers of financial services and products.⁴ Predispute arbitration is particularly pernicious when combined with class action waivers. When both are present, no class claims can be made, as arbitration is for individual claims, not class claims. In the financial services context, the lack of class claims can be especially difficult because the individual financial harms may be limited. Thus, AARP supports the proposed rule's ban of predispute arbitration provisions that also ban class actions. Pre-dispute arbitration clauses that ban class actions hinder consumer enforcement designed to remedy and prevent harmful practices, especially important where the provider has engaged in an illegal pattern or practice affecting a large number of consumers. And it is important to

⁴ See *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act*, § 1028(a), Consumer Fin. Prot. Bur. (March, 2015).

recognize that binding arbitration provisions in consumer contracts generally reflect both a lack of awareness by the consumer, as well as a lack of negotiating power.

It is also important to point out that class certification is not a simple process. In order to even consider bringing a class action, injured consumers first must have knowledge of the pattern and practice of the conduct of the provider causing them harm. Then, potential class members must request a court to certify the class. The court must first determine that the class members have common legal claims and the class members must provide rigorous proof of that commonality.

Most important, many consumer protection statutes were designed to be enforced primarily through private litigation brought by injured consumers, rather than by taxpayer-funded government enforcement agencies. To achieve the level and type of protection that such laws were intended to provide, consumers must have meaningful access to redress their claims through private litigation. Such laws have become less effective as forced arbitration and class action bans have become increasingly prevalent. Practically speaking, many businesses have used predispute arbitration provisions with class action bans to insulate themselves from accountability for consumer harm.

Contrary to claims of proponents, forced arbitration clauses along with class action bans do not provide a net benefit to consumers. As many have already pointed out, businesses would not need to impose forced arbitration if consumers believed that it benefits them. Nevertheless, proponents argue that it lowers the cost of providing consumer products and services. This claim has not been supported with any credible economic data or studies. Even if such claims were true, there is no evidence to suggest that any such cost savings have been passed on to consumers.

C. In order to minimize compliance questions, the CFPB should be explicit concerning the applicability of the final rule.

The CFPB should be explicit concerning the applicability and effective date of the final rule. Clearly, the final rule should apply to all new contracts and relationships between a consumer and a service provider. However, the final rule should also apply to every existing contract when it is renewed (such as, for example, the issuance of a new credit card) or if the existing contract is materially modified (such as, for example, new terms for a credit card). Without this proposed modification, millions of consumers, including many older consumers who already have contracts with financial services entities, will not benefit from the rule change.

The most important anticipated benefits of the proposed rule are that it will restore the probability that unlawful practices will be remedied and eliminated and that businesses will be held accountable. The remedial and deterrent effect of robust enforcement of laws that protect consumers makes the marketplace safer, thereby benefitting all consumers. This powerful result will not be accomplished if millions of existing contracts are exempt from these provisions in perpetuity.

Many consumers, especially older consumers, have maintained their existing relationships with their banking, credit card, and other financial services providers over many years. Most contracts for such services include a provision that allows the provider to unilaterally amend the terms of the contract; continued use of the product or service signifies the consumer's consent to the changed terms. Ironically, the arbitration provision currently included in contracts for such services may have been imposed or significantly altered over the years pursuant to unilateral changes to the contracts. Other terms subject to such unilateral amendment may increase interest charges, impose fees or penalties, or limit consumer remedies.

Technological advances have revolutionized financial products and services, prompting providers to offer new ways to communicate and interact with consumers. To the extent that a consumer takes advantage of an offering made by a provider that has an existing contract with the consumer, the new service, at a minimum, should be subject to the final rule.

Although AARP understands the CFPB may not impair existing contracts, there is no impediment to requiring supervised providers of financial products and services to comply with the terms of the final arbitration rule beginning when they take action to unilaterally amend the contract terms in material respects or renew the term of the consumer contract. Not only will doing so ensure that consumers are protected without them having to switch providers, such a requirement will also make compliance and supervision more efficient and less confusing for consumers.

D. Providers should be required to report their enforcement of class action bans.

In the event a regulated provider of consumer financial products and services seeks to enforce an arbitration provision against a consumer that has filed an action against it in court, such as by seeking to compel arbitration, stay the legal action, or otherwise, the provider should be required to notify the CFPB. Again, this is merely a matter of adding the CFPB to the service list. Requiring such reporting will permit the CFPB to monitor compliance with the final rule. It will also alert the CFPB to complaints about practices that may be harming a large number of consumers. Reports regarding claims filed will supplement the information the CFPB gathers through the consumer complaint database and increase transparency. Such monitoring is particularly important for contracts entered into prior to the effective date of the final rule, which will continue to include class action bans. Such contracts merit greater scrutiny, for all the reasons that the CFPB found it necessary to regulate the use of arbitration provisions.

F. Providers of credit related products and services should also be covered by the rule.

AARP urges the CFPB to extend the scope of the proposed rule over additional supervised providers. For example, credit reporting agencies, debt settlement, and credit repair agencies should be prohibited from banning class

actions and should be subject to the reporting requirements with which other supervised providers must comply.

G. CONCLUSION

AARP appreciates the opportunity to address our significant concerns about the widespread use of predispute mandatory arbitration in the financial services marketplace. If you have any questions, please feel free to contact Cristina Martin Firvida at (202) 434-6194 or by email [at CMfirvida@aarp.org](mailto:CMfirvida@aarp.org).

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and Legislative Policy Director
Government Affairs