July 10, 2017

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552

Re: CFPB-2016-0020, RIN 3170-AA51

Dear CFPB:

We write to strongly support proposed regulation CFPB-2016-0020, RIN 3170-AA51. We are 256 law professors and scholars who teach and write in such disciplines as civil procedure, contracts, consumer law, financial services law, and dispute resolution. This regulation would accomplish two important goals. First, it would bar companies that provide consumer financial products and services from imposing pre-dispute arbitration clauses combined with class action waivers. Second, the proposed regulation would require regulated parties to collect and transmit to the Consumer Financial Protection Bureau ("CFPB") information regarding use of arbitration in the consumer financial context.

As a group of experienced legal academics, we approach the issues of pre-dispute arbitration clauses and bans on class proceedings from a myriad of different perspectives and political sensibilities. Nonetheless, based on our varied scholarship and teaching backgrounds, we all agree (1) it is important to protect financial consumers' opportunity to participate in class proceedings; and (2) it is desirable for the CFPB to collect additional information regarding financial consumer arbitration.

The benefits and detriments of both forced arbitration and class actions have been debated vigorously for over twenty years in academia, as well as in litigated cases, Congressional hearings and among the general public. Although some good empirical work has been done on these issues, scholars have consistently asserted the need for more and better data-driven studies. Too often, heated discussions have been based on speculation, rather than data; this is especially problematic given the largely private world of confidential arbitration. Accordingly, we were very pleased when Congress, in enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act, mandated in Section 1028(a) that the CFPB study "the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services. . . ." After soliciting suggestions on how to conduct such a study, receiving and incorporating ideas from many corners, and spending three years collecting and analyzing massive amounts of data, the CFPB produced a comprehensive

and impressive report in March 2015.[1] The results of this study support the proposed regulation, as discussed below.

CFPB's study clearly shows that pre-dispute arbitration clauses are extremely common in the consumer financial context, and, indeed, are becoming standard practice across a number of different industries. While the incidence of pre-dispute arbitration clauses varies substantially depending on the consumer product or service, CFPB found that mobile wireless and payday loan contracts virtually always compelled consumers to resolve future disputes through arbitration, and that checking account and credit card contracts mandated arbitration roughly half of the time.[2] The CFPB study also found that almost all of the studied arbitration clauses precluded affected consumers from participating in class actions.[3] Yet, despite the prevalence of these clauses, the CFPB found that the majority of financial consumers are not entering into these arbitration clauses knowingly. Based on a national telephonic survey of credit card holders, the CFPB determined, unsurprisingly, that most consumers simply did not focus on dispute resolution clauses when deciding on a credit card, and the vast majority did not understand the implications of forced arbitration.[4] Less than seven percent of consumers whose credit card agreements included arbitration provisions understood that they were precluded from suing the company in court should a dispute arise.[5]

As a group, we have varying perspectives on whether the CFPB regulation goes far enough. Some among us believe the agency should issue a broader regulation banning forced arbitration clauses altogether in consumer financial contracts, whether or not these clauses contain class action waivers. Others among us believe that using pre-dispute arbitration agreements in the consumer context may not be harmful, or may even be beneficial, apart from the class action prohibition. And, still others among us are not sure where they stand on the desirability of banning forced arbitration in this context. Nonetheless, these differences in our perspectives do not undercut our strong agreement that the CFPB is right to both prevent companies from using arbitration to take away financial consumers' opportunity to participate in class proceedings and require the submission of additional data and information that will allow the agency to further study this important area. We believe that the proposed regulations are critically important to protect consumers and serve the interests of the American public.[6]

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[1] *See* Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1028(a) (March 2015) [hereinafter "CFPB Report"].
[2] *Id.* at Section 2.3. This finding is generally consistent with prior research.
[3] *Id.* at Section 2.5.5.
[4] *Id.* at Sections 3.4.1 & 3.4.3.
[5] These results are largely consistent with other studies, e.g., Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, *"Whimsy Little Contracts," With Unexpected Consequences: An Empirical Analysis of Respondent Understanding of Arbitration Agreements*, 75 MARYLAND L. REV. 1 (2015).
[6] See Dodd Frank Section 1028(b) (authorizing CFPB to issue regulations prohibiting use of arbitration or imposing conditions on its use, regarding consumer financial products or services, "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").

Protection of Financial Consumer Class Actions

As teachers and scholars in a variety of legal disciplines, we have been disturbed by recent court decisions that have allowed companies in a broad range of consumer finance areas (e.g., banks, credit card providers, pay-day lenders, automobile finance entities) to use pre-dispute arbitration clauses to avoid class claims and thereby elude federal and state consumer protection laws. In particular, the Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), greatly diminished consumers' ability to attack class action waivers in arbitration clauses as unconscionable or otherwise invalid as a matter of traditional contract law; and the Court's decision in *American Express Co. v. Italian Colors*, 133 S. Ct. 2304 (2013), undercut consumers' argument that such clauses are unenforceable where they prevent claimants from vindicating their federal statutory rights. A number of lower courts have interpreted these decisions expansively, giving companies *carte blanche* to insulate themselves from consumer financial class actions.

In our view, the proposed regulation banning class action waivers in the consumer financial context is appropriate for three reasons: (1) class actions can serve as a powerful tool to help consumers of financial services and products vindicate their rights under federal and state law; (2) individual arbitrations are not and realistically will never be a sufficient substitute for consumer class actions; and (3) our legal system relies heavily on private enforcement of consumer rights through class actions, as public enforcement may face significant resource restraints. Below we set out our thinking on these points.

(1) <u>Class actions are a powerful tool that can help financial consumers vindicate their rights under federal and state law</u>

The CFPB Study clearly shows that class actions can be a powerful tool to help consumers vindicate their rights under federal and state law. After examining both federal and state court dockets, the CFPB found that millions of financial consumers participate in class actions, recovering billions of dollars in damages as well as important non-monetary relief in the form of changes to harmful business practices. Specifically, looking at consumer financial class action settlements in federal court from 2008-2012, the CFPB identified 419 consumer class action settlements in the financial sector, which together represented the interests of more than 160 million class members.[7] In these settlements, defendants agreed to pay roughly $2.0 billion in cash relief and $644 million in in-kind relief.[8] CFPB further found that, of the 251 settlements in which data were reported, defendants paid or were scheduled to pay $1.1 billion in either cash or debt forbearance.[9] Thus, on average, between 2008 and 2012, class action settlements in the studied cases committed to pay out more than $220 million annually to financial consumers. In addition, approximately fifteen percent of

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[7] CFPB Report at Section 8.1. The Report explains that these numbers are actually undercounts, in that they include only the 329 of 419 settlements for which CFPB could obtain accurate figures or estimates of class size, and exclude a single giant settlement including 190 million class members.
[8] *Id.*
[9] *Id.*

the studied settlements directly mandated what the CFPB called "behavioral relief" – commitments by the company to "alter its behavior prospectively, for example by promising to change business practices in the future or implementing new compliance programs."[10] In sum, this data demonstrates that class actions against companies that market financial services and products bring substantial relief to millions of consumers. These class actions also help ensure that our financial consumer laws are enforced and thereby deter companies from engaging in future violations of these laws. Companies engage in risk management calculations and are less likely to risk violating consumer laws if they know they may be sued in class actions for such violations.

While we appreciate that some consumer class actions can legitimately be critiqued on a variety of grounds, we also believe that reforming class action procedure should continue to be handled legislatively or administratively, rather than by allowing companies to impose arbitration clauses to insulate themselves from the class device. It is clear that consumer class actions can greatly benefit both consumers and the public at large.

(2) Individual arbitrations are not a realistic substitute for consumer financial class actions

Proponents of class action waivers have suggested that financial consumers can vindicate their rights more quickly, cheaply and better in individual arbitrations than in litigated individual claims or class proceedings. Yet, the data gathered by the CFPB belies this claim: although millions of financial consumers are covered by pre-dispute arbitration clauses, the CFPB study found that just a few hundred such consumers file individual arbitration claims each year. Specifically, the CFPB found that between 2010 and 2012 only a few hundred financial consumers filed arbitration claims with the American Arbitration Association, even though the AAA handles more consumer arbitration claims than any other arbitration provider.[11] Moreover, of the arbitration claims that were brought by individual consumers, most involved claims of over $1,000. In other words, a minuscule number of consumers bring individual arbitrations to recover low-dollar claims.[12] Notably the CFPB also found that very few individual consumers bring lawsuits in court, particularly as compared to the millions of consumers who receive protection in class actions.[13]

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[10] *Id.* at Section 8.1 n. 7. Of course, additional defendants and other companies may also have changed their behavior as a result of these class actions.
[11] The CFPB Report at Sections 5.2.1 & 5.5.1 identified 1,847 AAA consumer arbitration disputes involving credit cards, checking accounts, payday loans, GPR prepaid cards, auto purchase loans, or private student loans, but also noted that a substantial number of these disputes were filed by the company rather than the consumer and/or involved claims of unpaid consumer debts rather than affirmative claims brought by consumers.
[12] The CFPB's study of six product markets found only approximately 25 claims per year brought by consumers seeking affirmative relief of $1,000 or less. CFPB Report at Section 5.2.1. Similarly, another study looking at a broader array of consumer arbitration claims found less than 4% of the claims were brought for $1,000 or less. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 117 (2015).
[13] *See* CFPB Report at 6.2.1 (finding 3,462 individual consumer cases filed in federal court during a three year period in six product markets).

It is easy to see why consumers are reluctant to bring claims individually. First, many individual claims against consumer financial services companies[14] are worth only small amounts of money. As Judge Posner 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." *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). It simply is not worth a consumer's time or trouble, nor a lawyer's, to pursue a small claim. Second, it is difficult to obtain legal representation to bring low-value individual claims: consumers typically cannot afford to pay attorneys an hourly rate to represent them on such a claim and attorneys cannot afford to handle these claims on a contingent fee basis. Third, individual consumers may not be aware that a financial services company has harmed them, nor that the harm was unlawful. For example, a consumer might well not realize they were charged an improper interest rate or discriminated against on the basis of their race with respect to a loan rate. By contrast, class proceedings are well designed to deal with each of these problems – they allow many small claims to be grouped together, make it easier for financial consumers to obtain representation, and allow financial consumers who may not realize they have been wronged to participate in a class action where their rights can be adjudicated.

In other words, one of the harmful consequences of pre-dispute arbitration clauses containing class action waivers is that they suppress claims that consumers might otherwise bring. While it is true that fairly few consumers file individual claims to vindicate their legal rights, this is not necessarily because they lack valid claims; rather, most consumers are simply unaware that they have been harmed, unaware that the harm violates a law, or have decided that filing individual arbitration claims is not worth their time and expense.[15] Yet, from both an individual and societal standpoint it can be important to allow such claims to be brought.

Nor is there reason to believe, as some have suggested, that consumers would bring more individual arbitration claims against financial service providers if only they were better educated about the purported virtues of arbitration. Rather, a consumer who was truly well-informed about consumer arbitration would likely conclude that -- given the financial and other costs of arbitration and the limited likelihood of success -- it makes absolutely no sense to file an individual arbitration claim. Thus, if we want to ensure the enforcement of substantive laws protecting consumers we need to preserve consumer class actions.

The securities industry approach to aggregate claims also informs our perspective on the propriety of using arbitration clauses to eliminate class action claims. The

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[14] We are aware that the proposed regulation would govern companies that market both consumer financial services and also consumer financial products. However, in an effort to simplify, at times this comment uses the phrase "financial services" to also encompass financial products.

[15] When consumers *are* aware of being wronged they may raise complaints internally with companies, file with a government agency, or seek protection from a credit card company if appropriate, rather than engage in more difficult and expensive litigation or arbitration. *See* Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SOUTHWESTERN L. REV. 87, 101-102 (2012).

Securities and Exchange Commission (SEC) concluded that, to carry out its statutory mandate of ensuring investor protection, it must preserve the right of individual investors to pursue class claims in court. As a result, the securities self-regulatory organization FINRA bans broker-dealers from including class action waivers in their agreements with customers.[16] The SEC's view that class claims belong in court and that investors are not fully protected through individual arbitration claims further supports the CFPB's approach to class action waivers in the consumer financial context.

(3) The U.S. legal system depends on private enforcement of rights

Whereas some other countries have invested substantial resources in large government agencies in order to enforce their laws, the United States has chosen to rely substantially on private enforcement of rights.[17] Although state and federal agencies have authority to enforce consumer protection laws, they lack the resources to carry out that role in a comprehensive manner. Further, the CFPB study shows that, while there is some overlap between government enforcement actions and claims raised in consumer class actions, consumer class actions provide monetary recoveries and reform of financial services and products to many consumers whose injuries are not the focus of public enforcers.[18]

Nor do we believe, as some have suggested, that on-line claims systems or social media can currently take the place of consumer financial class actions. Such creative ideas are worth exploring, certainly, and may benefit some groups of consumers, particularly for simple and obvious claims. However, financial consumers who do not know they have been harmed, do not know the harm is illegal, and do not have the time or energy to be educated, will fail to take advantage of informal claims procedures; and on-line arbitration systems cannot help consumers or their advocates amass the expert testimony, legal research, or statistical studies sometimes necessary to prove financial harm.[19] Thus, to the extent we allow financial services companies to use arbitration to eradicate consumer class actions, we are allowing these companies to insulate themselves from enforcement of our laws. This harms not only individual consumers but also the public at large.

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[16] *See* Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act,* 1 STAN. J. COMPLEX LITIG. 1, 27-28 (2012) (detailing development of and SEC's support for FINRA rule that prohibits investors from bringing class claims in arbitration and preserves investors' right to bring those claims in court); *see also FINRA Dep't of Enforcement v. Charles Schwab & Co., Inc.* (FINRA OHO Feb. 21, 2013) (disciplining broker-dealer for inserting a class action waiver in its form customer agreement). The 2015 report from the FINRA Dispute Resolution Task Force recommended an even more explicit FINRA rule prohibiting such clauses. *See* Final Report and Recommendations of the FINRA Dispute Resolution Task Force Final Report, at http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf (Dec. 16, 2015).

[17] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

[18] CFPB Report, Section 9.

[19] *See* Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 451-454 (2014) (explaining why internet and social media cannot adequately replace consumer class actions).

Required Reporting of Consumer Financial Arbitration Results

As legal scholars, we also heartily endorse the portion of the CFPB's proposed rule that would require regulated parties to submit initial arbitral filings, arbitral awards, and certain other correspondence regarding arbitration to the CFPB. Specifically, the draft rule would require regulated companies to provide to CFPB two categories of information: (a) claims, clauses, and judgments (if any) relating to consumer arbitration filings; and (b) any determinations by arbitrators or arbitration providers to the effect that a particular arbitration agreement does not comply with relevant fairness principles. The CFPB has stated an intent to publish redacted or aggregated versions of this information on its website. We believe that by implementing this portion of the rule CFPB will provide greater transparency regarding the nature of financial consumer arbitration, and that this will be helpful to the public, to attorneys, to regulators, and to academics.

Traditionally, arbitration has mostly been a private and confidential process, as neither parties nor arbitration providers have typically provided the public access to arbitration filings or awards. While this privacy is sometimes chosen knowingly and voluntarily by sophisticated parties as a positive feature of arbitration, this secrecy can be detrimental to the public-regarding values of law. If arbitration is entirely private, we cannot learn what kinds of claims are filed, what kinds of defenses are raised, the rate at which arbitral disputes are settled, the rate at which claimants prevail, what kinds of recoveries are typical, whether it is important to be represented by an attorney, whether frequent claimants or respondents have a "repeat player" advantage, or whether repeat arbitrators tend to rule more frequently for one side than the other. By contrast, while researching court processes can also be difficult, at least some aspects of federal and state processes are public. Researchers can more easily study litigation and word does tend to trickle out regarding the fairness and efficiency of the process.

Access to information about arbitration filings, awards, underlying clauses, and their compliance with fairness principles could be extremely useful to disputants, their attorneys (if represented), regulators, and academics. Disputants and their representatives would like more information in order to make more informed assessments of the likelihood of success.[20] Regulators such as the CFPB would like more information in order to determine the efficiency, access and fairness of arbitration, so that they can better determine whether any further regulation is necessary. And, of course, researchers and scholars would appreciate more access so that they might better inform those discussions.

While certain private arbitration providers have occasionally provided research access to their files, they generally have offered such access only to particular researchers and only to a subset of their files. Thus, even the few data-driven studies on arbitration have often been subject to challenge on the grounds that the researchers or their data were handpicked to support a particular perspective. Moreover, researchers

[20] Such information is likely to be particularly important to consumers, as they usually are one-shot players who therefore lack information about arbitrators' practices.

cannot legitimately conclude that results obtained from one arbitration provider are necessarily predictive of what they might find in the files of another arbitration provider. For example, the CFPB had to base its arbitration research on data obtained from just one source—the American Arbitration Association.[21] The CFPB therefore explicitly recognized that its findings might have been different had it had the opportunity to review data from other arbitration providers.[22]

Some may worry that providing greater access to arbitration filings or awards would harm the arbitral process, but prior grants of access in certain arbitration contexts have convinced us that complete privacy is not needed. For example, securities arbitration awards are made public by FINRA;[23] arbitral awards regarding internet domain name disputes are published by the Internet Corporation for Assigned Names and Numbers,[24] and some labor arbitration awards are required to be made public.[25] Despite this publication, arbitration works reasonably well in each of these fora. Further, the CFPB has stated that it will use redaction or aggregation to protect personal information to the extent it publishes information on its website. Any deterrence to the use of arbitration that publication might bring is speculative, and greatly outweighed by the benefits of transparency in furthering fairness and justice in the arbitration context.

An arbitration true story illustrates the benefits of arbitration transparency. The National Arbitration Forum, an arbitration provider, formerly marketed itself to debt collection companies and law firms, asserting they could use arbitration to cheaply and efficiently collect debts supposedly owed by consumers. NAF largely kept its files private, except when it provided occasional access to particular researchers. Yet, the Minnesota Attorney General eventually obtained access to these files and accused NAF of grossly failing to maintain neutrality by consorting with the companies engaged in debt collection actions against consumers.[26] Once these charges were brought, NAF quickly settled the enforcement action by agreeing to discontinue administering consumer debt collection arbitrations.[27] Had NAF been required to open its files to researchers and the public from the outset, presumably regulators and others would have learned of NAF's practices much more quickly, and perhaps NAF would not have entered into questionable agreements with debt collection entities in the first place.

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[21] CFPB Report, Section 5.4. AAA provided this data pursuant to a non-disclosure agreement.
[22] *Id.* at Section 5.1.
[23] *See* http://www.finra.org/arbitration-and-mediation/arbitration-awards (providing a searchable online data base). To enhance transparency even more in the securities arbitration context, the FINRA DR Task Force recently recommended requiring arbitrators to write explained awards, unless the parties opt out. *See* FINRA DR Task Force Report, at 20-23.
[24] https://archive.icann.org/en/udrp/proceedings-list.htm.
[25] *See, e.g.*, State of Minnesota Bureau of Mediation services, Arbitration Awards http://mn.gov/admin/bms/arbitration/awards/index.jsp.
[26] *See generally* Nancy A. Welsh, *What is "(Im)partial Enough" in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 396, 427-430 (2010) (telling story of NAF consumer debt arbitration).
[27] *Id.*

Conclusion

CFPB's proposed regulation is desirable because it will prevent companies from using consumer financial arbitration to eliminate consumers' access to class actions and because it will require greater transparency regarding the nature of consumer financial arbitration. Both aspects of this proposed regulation will serve the interests of justice. For all of the reasons stated above, we enthusiastically support the CFPB's proposed regulation.

Sincerely,

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[28] While we have listed the academic affiliations of signatories it is important to note that we have each signed in our individual capacity rather than as representatives of our respective institutions.

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