

August 22, 2016

Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1275 First Street, NE  
Washington, DC 20002

**Re: Arbitration Agreements, Docket No. CFPB-2016-0020, RIN 3170-AA51**

Dear Ms. Jackson:

The American Financial Services Association (“AFSA”)<sup>1</sup> requests that the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) delay finalizing the proposed regulations governing agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services (“Proposed Rule”) until consideration is given to the concerns outlined below. Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) authorizes the CFPB to “prohibit or impose conditions or limitations on the use of a pre-dispute arbitration agreement between covered persons and consumers, only if the CFPB finds that doing so is in the public interest and for the protection of consumers.” It has not been determined that the Proposed Rule is in the public interest, or that it will protect consumers. In fact, there is abundant information that arbitration serves these goals better and more effectively than other options, such as class actions. And to ignore this information would conflict with the CFPB’s statutory duties. Until additional factors are considered, the CFPB does not have the authority to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements.

***I. “For the Protection of Consumers”***

Taking the second test first, the Proposed Rule is not “for the protection of consumers.” The CFPB states that this phrase “should be read to focus specifically on the effects of a regulation in promoting compliance with laws applicable to consumer financial products and services and avoiding or preventing harm to the consumers who seek to use those products.”<sup>2</sup> The CFPB also states that it proposes to interpret the phrase “for the protection of consumers” to “condition any regulation on a finding that such regulation would serve to deter and redress violations of the rights of consumers who are using or seek to use a consumer financial product or service.”<sup>3</sup> In short, the CFPB is claiming that the Proposed Rule would help consumers by making it more likely that consumers would be able to obtain meaningful relief when violations occur and by providing an incentive for financial institutions to increase their compliance.

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<sup>1</sup> Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

<sup>2</sup> 81 Fed. Reg. 32853 (May 24, 2016).

<sup>3</sup> 81 Fed. Reg. 32854 (May 24, 2016).

AFSA strongly disagrees. As discussed below in subsection A, arbitration provides an effective and equitable method for dispute resolution. Subsection B outlines why prohibiting the use of pre-dispute arbitration agreements will not help consumers obtain meaningful relief because class actions provide little benefit to consumers. And lastly, subsection C explains that the Proposed Rule will not increase compliance.

#### A. Arbitration

As a matter of public policy, Congress and the Supreme Court have long favored arbitration agreements.<sup>4</sup> The Federal Arbitration Act (“FAA”) provides that arbitration agreements are “valid, irrevocable and enforceable,”<sup>5</sup> and the Supreme Court has held such agreements to be fundamentally matters of contract which should be treated as such.<sup>6</sup> In *Moses S. Cone Memorial Hospital v. Mercury Construction Corporation*, the Court explained that the FAA amounts to a “congressional declaration of a liberal federal policy favoring arbitration agreements.”<sup>7</sup> In *Dean Witter Reynolds v. Byrd*, the Court held that the FAA “eliminates district court discretion and requires the court to compel arbitration of issues covered by the arbitration agreement.”<sup>8</sup> In *AT&T Mobility v. Concepcion*, the Court references the district court’s decision favoring arbitration, “It described AT&T’s arbitration agreement favorably, noting, for example, that the informal dispute resolution process was ‘quick, easy to use’ and likely to ‘promp[t] full or ... even excess payment to the customer without the need to arbitrate or litigate...’”<sup>9</sup>

The main reason for favoring arbitration agreements, according to the Supreme Court, is “to facilitate streamlined proceedings.”<sup>10</sup> Among the benefits of arbitral proceedings are the reduced costs and increased speed of dispute resolution.<sup>11</sup> The Court’s treatment of arbitration agreements “ma[kes] clear that the strong presumption in federal law in support of arbitration rests in large part on the idea that consumers benefit from the speed, simplicity, and low costs of arbitration.”<sup>12</sup>

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<sup>4</sup> United States. Cong. House. Committee on Financial Services. Subcommittee on Financial Institutions and Consumer Credit. *Examining the CFPB’s Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers*. Hearing, May 18, 2016. Statement of Andrew Pincus, Mayer Brown, LLP (on behalf of the U.S. Chamber of Commerce) Footnote 1: *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 24-25 (1983). Over the past two decades, the Supreme Court has repeatedly enforced arbitration agreements. See, e.g., *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. \_\_\_\_ (2013); *Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. \_\_\_\_ (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. \_\_\_\_ (2012); *CompuCredit Corp. v. Greenwood*, 565 U.S. \_\_\_\_ (2012); *KPMG LLP v. Cocchi*, 565 U.S. \_\_\_\_ (2011); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Preston v. Ferrer*, 552 U.S. 346 (2008) (Ginsburg, J.); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (Ginsburg, J.); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (Breyer, J.). <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba15-wstate-apincus-20160518.pdf>

<sup>5</sup> 9 U.S.C. § 2 (1925).

<sup>6</sup> *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010).

<sup>7</sup> 460 U.S. 1, 22 (1983).

<sup>8</sup> 470 U.S. 213, 218 (1985).

<sup>9</sup> *AT&T Mobility, LLC v. Concepcion*, 563 U.S. at 339 (2011).

<sup>10</sup> *Concepcion*, 563 U.S. at 333, 344.

<sup>11</sup> *Ibid.* at 345.

<sup>12</sup> Johnston, Jason Scott and Todd Zywicki. *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique*. Mercatus Working Paper. August 2015. <http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf>

The CFPB’s own study shows that these benefits are absent in class action proceedings. Class proceedings—whether a traditional class action or a class arbitration proceeding like that in *Concepcion*—“make[] the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>13</sup>

Pre-dispute arbitration agreements are the most effective and efficient way to resolve disputes with consumers that are not settled during the typical complaint resolution process. Many pre-dispute arbitration agreements have terms that are highly favorable to the consumer. For example, the financial institution may agree to pay the filing and arbitrator fees. Below, in Appendix II, are some examples of pre-dispute arbitration agreements that are favorable to the consumer. Pre-dispute arbitration agreements are not a way for financial institutions to avoid the consequences of their actions, but are an efficient way for both the institutions and their customers to quickly work out a resolution that serves the customer. It does not appear that the CFPB met with any consumers who had gone through arbitration. Before prohibiting the use of pre-dispute arbitration agreements, it would be beneficial for the CFPB to talk to consumers who have actually gone through arbitration. The results of such discussions would be highly informative. In arbitration, the customer gets an opportunity to have her case heard on the merits, at a time and a place (even over the phone) that is convenient for her. And the financial institution has a chance to provide a fair resolution that restores the relationship between the institution and the customer.

In fact, many disputes are resolved internally through negotiations without the need for an actual arbitration. This early resolution of disputes explains why the arbitration numbers cited in the CFPB’s March 2015 *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act* (“Arbitration Study”) are artificially low. Financial institutions would rather resolve an issue before beginning arbitration. This ability to work out an issue preliminarily disappears when a class action begins. The survival of a financial institution is based on strong, positive customer relationships. While the Arbitration Study claims that arbitration agreements are detrimental to consumers; a careful, unbiased reading shows that arbitration *benefits* consumers.

- Arbitration is quicker and more cost effective for consumers than litigation. Unlike in civil litigation where a consumer faces uncertain attorney fees, arbitration fees are modest and disclosed. Consumers paid an average of \$206 in fees in arbitration cases reviewed by the CFPB. Moreover, in order to meet procedural “fairness” requirements imposed by state and federal courts, the financial institution will in many cases provide in the agreement that the creditor will pay those fees for the first day or two of the arbitration up front, thus shifting those costs from the borrower to the financial institution. In some of those cases, consumers’ final fees were modified by the arbitrator’s decision. In addition, needy consumers may seek a waiver of fees.<sup>14</sup> Some financial institutions even cover the entire cost of the arbitration.
- Arbitration is a convenient option for consumers. Most arbitration clauses reviewed by the CFPB require hearings to take place close to the consumer’s residence. The Arbitration Study estimated that consumers traveled an average of 15 miles to attend in-person

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<sup>13</sup> *Concepcion*, 563 U.S. at 348.

<sup>14</sup> *Arbitration Study* at 16.

hearings.<sup>15</sup> Conversely, class action hearings can be held hundreds of miles from where the consumer resides.

- Arbitration provides consumers with fairly quick resolutions to their disputes. According to the Arbitration Study, telephone arbitrations were resolved in a median five months, and in-person hearings were resolved in a median seven months. By contrast, the Arbitration Study showed that class action settlements received final court approval after an average of 690 days, or close to two years.<sup>16</sup> AFSA members have seen class actions take much longer—four to five years, or more.
- Arbitration leads to higher monetary relief for consumers than lawsuits. Comparing cases where the CFPB could determine the award amount and excluding an outlier award, the average consumer relief in arbitrations was \$5,389. That’s 166 times what consumers recover in class actions. In cases studied by the CFPB, consumers who were represented by counsel in individual consumer lawsuits obtained judgments in their favor about 7 percent of the time, and settled approximately 48 percent of the time. Arbitration, on the other hand, leads to judgment in the claimants favor 6 percent of the time, with approximately a 57 percent settlement rate. By these metrics, arbitration leads to a payout for the claimant 63 percent of the time, whereas individual lawsuits do so about 55 percent of the time. While these numbers are not exact, they contradict the idea that arbitration weighs in the defendant’s favor.<sup>17</sup>

AFSA has several concerns regarding the Arbitration Study. Three are outlined here, others are discussed in different sections. First, as demonstrated above, the Arbitration Study does not support the CFPB’s claim that class actions provide more benefits to consumers than arbitrations. Second, because the CFPB did not have access to arbitration settlements, the CFPB inappropriately compared class action settlements to arbitral awards. Unsurprisingly, this method led to a seemingly vast disparity: 11 million consumer class members received \$1.1 billion, whereas only 32 consumers obtained affirmative relief from arbitration judgments totaling \$172,433. The correct comparison would be between the arbitral awards and the 2 percent of class action plaintiffs who obtained either an individual or class-wide judgment. The CFPB’s comparison of class settlements to arbitral awards is misleading.<sup>18</sup>

Third, in the Arbitration Study, the CFPB wrongly assumes that the dearth of small-dollar claims in arbitration represents a failure of the arbitration mechanism to protect consumer interests. Instead, most financial institutions are willing to write off small-dollar claims and consumers have a very real tool—the threat of taking their business elsewhere—to ensure they receive fair treatment. If a financial institution is in error and likely to lose in arbitration, then it is more likely to correct the issues and grant a customer a refund or credit prior to the filing of an official claim. Inasmuch as it promotes internal dispute resolution, “arbitration’s likely influence is under the hood.” So long as the threat of arbitration leads a financial institution to offer a refund when a true mistake has been made, but to deny one when no mistake has been made, then the process of

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Johnston and Zywicki* at 27.

<sup>18</sup> *Johnston and Zywicki, supra* note 5, at 50.

arbitration is achieving its purpose of promoting fast, efficient, and low-cost resolution of disputes.<sup>19</sup> Further, as the Arbitration Study reveals, “when they feel a credit card firm has wrongfully imposed a fee or charge that it refuses to reverse, consumers overwhelmingly prefer the market response of canceling their cards over litigating or arbitrating the dispute.”<sup>20</sup>

Not only does the Arbitration Study show the benefits of arbitration, but other government institutions including the U.S. Supreme Court and the U.S. Department of Labor also support arbitration. As noted by the Court in a 1995 decision upholding arbitration: “The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices...”<sup>21</sup> The Department of Labor encourages “the creative potential of alternatives to standard court litigation,” as long as the “legal needs and priorities of a diverse American workforce are fairly satisfied.”<sup>22</sup>

New York Attorney General Eric T. Schneiderman also highlighted the benefits of arbitration recently. “Schneiderman just announced that New York consumers recovered more than \$2.5 million in arbitrated lemon law claims in 2015, bringing the total to \$12.4 million since 2011.”<sup>23</sup> “The Lemon Law Arbitration Program has proven to be efficient and effective means for both consumers and the auto industry to resolve disputes,” Attorney General Schneiderman said in his press release, included in Appendix I below. “Under this program, hundreds of auto consumers have obtained compensation without the costs and delays of going to court.”

The CFPB itself seems to have a different perspective on resolving legal disputes outside of court when it comes to its own enforcement actions. “The unsparing criticism of arbitration [from the CFPB] leaves the distinct impression that the bureau believes that only state and federal courts dispense real justice. However, when it suits the bureau, it may avoid those same courts and channel its enforcement actions into a very different type of proceeding.”<sup>24</sup> Recognizing the benefits of avoiding protracted litigation, the CFPB has chosen to avoid court and bring many of its cases before an administrative law judge. The decision to use an administrative forum may be considered similar to arbitration. The decision is not subject to negotiation, the procedural rules are different from those in court, the administrative proceeding can effectively preclude a party from vindicating a right they could have pursued in court, and the results are routinely more favorable to one side when compared to results in court.<sup>25</sup> There may be benefits to choosing an administrative forum, though, just as there are for arbitration. For example, “A decision to use a streamlined dispute resolution system need not reflect a desire to gain an unfair advantage [in either the CFPB’s or the financial institutions’ case]. Instead, administrative proceedings and arbitration alike reflect good-faith efforts to remedy recognized shortcomings in the speed,

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<sup>19</sup> *Johnston and Zywicki* at 22.

<sup>20</sup> *Johnston and Zywicki* at 28 (citing CFPB, *supra* note 8, section 3, at 18).

<sup>21</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

<sup>22</sup> U.S. Dept. of Labor. *Employment and Dispute Resolution*.

[http://www.dol.gov/\\_sec/media/reports/dunlop/section4.htm](http://www.dol.gov/_sec/media/reports/dunlop/section4.htm)

<sup>23</sup> Hudson, Thomas B. *NY AG Says Arbitration is “Efficient and Effective.”* Spot Delivery. June 2016.

<sup>24</sup> Mogilnicki, Eric J. *The CFPB’s Two Faces on Avoiding The Courts.* Law360. May 3, 2016.

<sup>25</sup> *Ibid.*



efficiency and cost of judicial proceedings.”<sup>26</sup> If the CFPB finds arbitration so against the interests of the consumer, it is interesting that both the federal government and its affiliates (and to a lesser extent state and local governments) are excluded from the Proposed Rule.

It is important to note that while the Proposed Rule does not directly ban pre-dispute arbitration, only mandatory pre-dispute arbitration agreements, it would have the practical effect of eliminating arbitration as an option for consumers. It will be uneconomic for companies to continue subsidizing individual arbitration for their customers if the CFPB forces them to bear the massive expenses associated with class action litigation. Many financial institutions will drop individual arbitration rather than take on duplicative dispute resolution expenditures. (Although the Proposed Rule allows for class action arbitration, those types of arbitrations are extremely rare and defeat the purpose of a streamlined and cost-effective process.)

We are concerned that the Proposal, while not *directly* banning pre-dispute arbitration, would have the practical effect of eliminating arbitration as an option for consumers because it will be uneconomic for companies to continue subsidizing arbitration for their customers if the Bureau forces them to bear the massive expenses associated with class action litigation.

The benefits of arbitration outlined above, and supported by the Arbitration Study, the Supreme Court, the Department of Labor, and CFPB itself, demonstrate that the Proposed Rule is not “for the protection of consumers.”

#### *B. Class Actions*

The CFPB argues that class actions are more beneficial to consumers than arbitration. We disagree. Class actions, while they have their place in certain contexts such as some environmental litigation, in cases revolving around consumer financial services, they are less about “justice,” “righting wrongs,” or “restricting the financial industry” and more about plaintiffs’ counsel attempts to extort a particular outcome from defendants and line their own pockets. A class action lawsuit is filed, knowing that a company will weigh the costs of litigation and make a determination that it is easier and cheaper to settle, even if no real harm has come to the consumer. The money grab is obvious in ads run by plaintiffs’ counsel, that usually say something like this: “If you did business with ABC Company, you may be entitled to a refund (or cash settlement). Call 555-555-5555.”<sup>27</sup> Even now, and especially before financial institutions used arbitration agreements, there were dozens, if not hundreds of these ads on a regular basis. There was no correlation between wrongdoing or the need to enforce compliance. It was a blatant financial grab by plaintiffs’ counsel. Even if there are (very) occasional “bona fide” cases, these few cases are greatly outweighed by the tremendous number of cases that benefit no one but the plaintiffs’ counsel. For a company unable to absorb those costs, it is a reality that a company will have to consider filing bankruptcy, which benefits neither the consumer nor the lender.

The CFPB’s headline of the press release announcing the Proposed Rule is, “CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court.”

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<sup>26</sup> *Ibid.*

<sup>27</sup> The advertisements were so misleading that financial institutions had multiple customers come in and say that they did not even know they (the customers) were suing the financial institutions.

But the Proposed Rule will not give consumers a day in court, nor will they provide consumers with any real relief. Interestingly, none of the class actions studied by the CFPB went to trial.<sup>28</sup> The Arbitration Study found that the vast majority of class actions, 87 percent to be precise, provide no benefit at all to class members.<sup>29</sup> Among the 13 percent of cases that settle, only a very small 4 percent of class members submit claims.<sup>30</sup> And the average payout is small as well—only \$35.<sup>31</sup> And the time it takes to get that payout – is exceedingly long and not efficient—two to five years.<sup>32</sup> Again, these number are from the CFPB’s own study.

A close look at the Arbitration Study as it applies to class actions is revealing. The CFPB uses data which gives undue weight to a few large class action settlements. Furthermore, the CFPB’s methodology is internally inconsistent. As to the first point, the CFPB’s December 2013 Preliminary Report discussed only 8 class action settlements, each involving a “large number of members of the class [who] actually received small payouts.”<sup>33</sup> These classes all included between 10,000 and several million claimants, who received between \$9 and \$85 each. In the 2015 Arbitration Study, the CFPB included several hundred class settlements, which were much smaller on average with a lower percentage of class members receiving a payout. However, because the 8 classes from the 2013 report included more than 10,000,000 individuals, they influence the data such as to present an unrealistic picture of the benefits of class actions over arbitration proceedings.<sup>34</sup> In the final Arbitration Study, six class actions (just 2 percent of the CFPB’s class settlements with cash payouts) accounted for 83 percent of total cash payouts. The low attorneys’ fees and high payouts in these cases greatly distort the results of the remaining 98 percent of class settlements.<sup>35</sup>

As to the second point, the CFPB selectively chose to exclude certain classes on the basis that potential class members were not “customers” subject to a contractual arbitration provision. Chief among those cases excluded were ATM cases where a notice of fees was not posted “on or at” the machine, on the basis that ATM users often were not “customers” of the bank. The problem with excluding these cases is that 55 percent of the class actions the CFPB chose to study involved debt collection. “Debt collection companies are not in a contractual relationship with consumers; they are independent contractors hired by debt holders to collect debts.”<sup>36</sup> Therefore, by the same logic that it excludes the ATM cases, the CFPB should also exclude these cases from its study.

The CFPB’s methodology for calculating the percentage of settlement payments going to attorneys’ fees—add up all the attorneys’ fees and divide by the total award—is a blunt instrument that artificially deflates the average amount of attorneys’ fees. A closer look indicates that most of the low-value class actions contemplated by the CFPB will serve more as windfalls for plaintiffs’ attorneys than as remedies for consumers.<sup>37</sup> Combining all classes, the CFPB arrived at 21 percent

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<sup>28</sup> *Arbitration Study* at 17.

<sup>29</sup> *Ibid* at 19 – 20.

<sup>30</sup> *Ibid* at 17.

<sup>31</sup> *Ibid* at 19 – 20.

<sup>32</sup> *Ibid* at 20.

<sup>33</sup> *Johnston and Zywicki* at 39.

<sup>34</sup> *Ibid* at 39 – 43.

<sup>35</sup> *Ibid* at 48.

<sup>36</sup> *Ibid* at 45.

<sup>37</sup> For further discussion of this and the following subpoints, see *ibid.* at 46–47.

as the percentage of total awards paid out in attorneys' fees. In point of fact, however, the vast majority of class claims result in attorneys' fees much higher than 21 percent. If classes are separated by award amount, the reality of class action attorneys' fees comes into sharper focus. Class counsel took only 9 percent for settlements larger than \$1 million. On the other hand, class counsel took an average of 57 percent of all class awards of less than \$100,000.

Another problem with the Arbitration Study is that it fails to address the key question of whether or not a class action settlement is a representation of a defendants' desire to avoid "even a small chance of devastating loss" and the "massive discovery costs threatened in lawsuits of questionable substantive merit," or is an accurate resolution in line with the substantive merits of the dispute.<sup>38</sup> It is not socially desirable, and from a market standpoint, inefficient, for the threat of an adverse class action outcome to be used as a cudgel to force defendants to settle dubious cases. The failure to address these questions is a glaring omission of this stark reality.

The Arbitration Study also fails to capture the overlap between class actions and enforcement actions. The CFPB concludes that class actions and enforcement actions do not overlap, and so class actions are needed to supplement enforcement actions. AFSA disagrees with the CFPB's conclusion. In the first place, the CFPB found that in 32 percent (a not insignificant number) of the class actions the CFPB identified, the CFPB *did* find an overlapping public enforcement action.<sup>39</sup> In fact, some of the CFPB's first few enforcement actions—against Capital One Bank, Discover Bank, and JPMorgan Chase Bank—had class actions involving similar allegations. For example, "Discover Financial Services faces an enforcement action and fine from the Federal Deposit Insurance Corp. and CFPB over its marketing of the plans and other add-on products it pitches to credit-card customers. Discover said losses from the matter could exceed \$110 million, according to a regulatory filing. A U.S. district-court judge in Illinois in May approved a settlement Discover reached with the plaintiffs in eight class-action lawsuits against the company over its sale of various add-on products."<sup>40</sup> Not only have public enforcement actions overlapped with private enforcement actions in the past, but it seems likely that as the number of CFPB enforcement actions climb, the overlap will continue. Conversely, it stands to reason that increased CFPB enforcement will increase the number of private enforcement actions.

Not only does the Arbitration Study demonstrate the problems with class actions, but the Department of Labor acknowledges that, "...court litigation has become a less-than-ideal method of resolving employees' public law claims. As spelled out in the Fact Finding Report, employees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint."<sup>41</sup> The Department of Labor continues, "Moreover, the average profile of employee litigants—detailed in the Fact Finding Report—indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to

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<sup>38</sup> *Johnston and Zywicki* at 6.

<sup>39</sup> *Arbitration Study* at 383 – 385.

<sup>40</sup> Rieker, Matthias, Andrew R. Johnson, and Alan Zibel. *Capital One Dealt Fine For Pitch to Customers*. Wall Street Journal, July 18 2012. <http://www.wsj.com/articles/SB10001424052702304217904577534782507899336>

<sup>41</sup> *Ibid.*



afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries.”<sup>42</sup>

So, who does benefit from class actions? The numbers speak for themselves. Plaintiff’s attorneys make an average of \$1 million per settled case.<sup>43</sup> The fees in many instances are awarded in settlements with a minimal amount of work expended by the plaintiff’s lawyers. A law professor at Emory University recently completed a survey of no-injury class actions and found that plaintiffs typically receive less than 9 percent of the total monetary award.<sup>44</sup> Professor Joanna Shepherd concluded, “In comparison [to the plaintiffs], class counsel receives an average of 37.9 percent of available funds, over 4 times the funds distributed to the class. A result in which plaintiffs recover less than 10 percent of the award, with the rest going to lawyers or unrelated groups, clearly does not achieve the compensatory goals of class action.”<sup>45</sup> The most common federal statutes giving rise to the claims that were studied in the survey include the: Fair Debt Collection Practices Act, Telephone Consumer Protection Act (“TCPA”), Fair Credit Reporting Act, and Electronic Funds Transfer Act; statutes that plaintiffs’ attorneys will no doubt be looking closely at, should the Proposed Rule go into effect.

Professor Shepard clearly states, “Regardless of the validity of the arguments for or against no-injury class actions, one thing is clear: these actions only fulfill their compensatory purpose if plaintiffs receive an adequate share of the damages paid by defendants. **In contrast, if the lion’s share of the damage award is allocated to litigation expenses or attorneys’ fees, the actions inefficiently compensate plaintiffs and instead, benefit primarily the lawyers**” [emphasis added].<sup>46</sup> Furthermore, the amount, likely in the millions, that financial institutions will have pay for defense costs will become a drain on the system where the only winners are the plaintiffs’ lawyers.

### C. Compliance

As AFSA explained above, the Proposed Rule is not “for the protection of consumers” in banning pre-dispute arbitration agreements in favor of class actions. Nor is the Proposed Rule “for the protection of consumers” by increasing compliance. The Proposed Rule mistakenly suggests that prohibiting the use of pre-dispute arbitration agreements in class litigation strengthens incentives for financial institutions to engage in robust compliance.

The CFPB discusses at great length its belief that the Proposed Rule will increase compliance. Throughout the discussion, the CFPB appears to believe that financial institutions are not trying to comply with the law. Sentences like this: “The standard economic model of deterrence holds that individuals who benefit from engaging in particular actions that violate the law will instead comply with the law when the expected cost from violation, *i.e.*, the expected amount of the cost discounted by the probability of being subject to that cost, exceeds the expected benefit,” or this: “...

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<sup>42</sup> *Ibid.*

<sup>43</sup> *Arbitration Study* at 353 – 357.

<sup>44</sup> Shepherd, Joanna. *An Empirical Survey of No-Injury Class Actions*. Emory University School of Law. Feb. 1, 2016 at 2. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2726905##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905##)

<sup>45</sup> *Ibid* at 2.

<sup>46</sup> *Ibid* at 1.

[Financial institutions] that choose to adopt arbitration agreements to insulate themselves from being held to account by the vast majority of their customers and, as the Study showed, from virtually any private liability,” are very concerning and simply not true. Both before the Dodd-Frank Act and after it, AFSA members have worked hard to comply with a myriad of state and federal laws and regulations—laws and regulations that are at times convoluted and in direct conflict with one another. AFSA rejects the CFPB’s reasoning that without class actions, financial institutions are not trying to comply with the law.

Moreover, AFSA does not believe it is the responsibility of plaintiffs’ attorneys to ensure compliance with federal consumer financial laws. Congress has designated the CFPB, in fact it created the CFPB, to do just that. And the CFPB has done that job very thoroughly. The CFPB’s enforcement actions have accrued \$11.2 billion for over 25 million consumers.<sup>47</sup>

Even without the Proposed Rule, efforts to comply continue to increase. According to a recent survey, “In light of increased regulations over the past 12 months, 75 percent of financial services professionals surveyed have implemented CFPB-focused compliance programs within their organizations. Sixty-four percent are taking a top-down approach raising awareness about CFPB compliance to board and/or C-level executives.”<sup>48</sup> The survey also states, “Since the CFPB began regulation and enforcement in 2010, 86 percent of financial services professionals have seen an increase in regulatory compliance costs.”<sup>49</sup> In more detail, 23 percent of financial services professions report the cost increase to be between 30 and 40 percent, while 17 percent report a more than 50 increase.

## ***II. “In the Public Interest”***

In order to meet the standard that the Proposed Rule is “in the public interest,” the CFPB states that it must require the consideration of the entire range of impacts on consumers, as well as impacts on other elements of the public. For example, the CFPB must consider the effects of the Proposed Rule on pricing, accessibility, and the availability of innovative products, as well as impacts on financial institutions, markets, the rule of law and accountability, and other generic considerations. The CFPB must consider the benefits and costs to consumers and financial institutions, as well as general or systemic concerns with respect to the function of markets for consumer financial products or services, the broader economy, and the promotion of the rule of law and accountability. A careful examination demonstrates that the Proposed Rule is not in the public interest. The Proposed Rule would: increase costs for consumers, harm the institution/customer relationship, hurt consumer credit availability, put financial institutions out of business, further clog and stress an already delicate court system, and would not create a deterrent effect.

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<sup>47</sup> Consumerfinance.gov. Accessed on June 1, 2016. (Figures were updated on Jan. 8, 2016.)

<sup>48</sup> Aptean. *2015–2016 Consumer Complaints Compass*. 2016.  
[http://images.broadcast.aptean.com/Web/Aptean/%7Bd0da75db-6649-4133-bc5a-4f189f65282b%7D\\_Respond\\_APT\\_CFPB\\_Survey\\_Fast\\_Facts\\_03-18-16.pdf](http://images.broadcast.aptean.com/Web/Aptean/%7Bd0da75db-6649-4133-bc5a-4f189f65282b%7D_Respond_APT_CFPB_Survey_Fast_Facts_03-18-16.pdf)

<sup>49</sup> *Ibid.*

## A. *Increased Costs*

The Proposed Rule is not in the public interest because it would increase costs for financial institutions and their customers. The CFPB's cost estimates, which are based on a guess as to the increase in class actions, are, to put it bluntly, way off. The CFPB estimates that on an annual basis there would be about 103 additional class settlements in federal court. Based on this, the CFPB estimates that an additional \$342 million would be paid out to consumers, and additional \$66 million would be paid out to plaintiff's attorneys, and an additional \$49 million would be spent by financial institutions on their own attorney's fees and internal staff and management time. The CFPB also estimates that there would be a similar number of class settlements in state courts, but with markedly lower amounts paid out to consumers and attorneys. Furthermore, the CFPB estimates that there would be 501 additional federal court cases and 501 additional state cases filed as class actions that would not end up settling on a classwide basis.<sup>50</sup>

These estimates are ludicrously low. For example, according to an analysis by WebRecon LLC, the number of TCPA litigants alone increased from just fourteen in 2007 to an astounding 3,710 in 2015. In fact, TCPA case filings increased over 940 percent during the five-year-period between 2010 and 2015.<sup>51</sup> According to a recent survey, "Class actions were one of the few areas of litigation where spending increased since our last survey. In 2015, companies spent a total of \$2.1 billion on legal services related to class actions. ... A further increase is expected in 2016."<sup>52</sup> The survey goes on to state, "Across industries, the number of surveyed companies facing at least one major class action rose from 53.8 to 60.6 percent, representing an increase of nearly 13 percent in 2015."<sup>53</sup>

In a book about class action dilemmas, the authors write, "As long as the legal system rewards success with substantial fees, private law firms that are expert at selecting and pursuing cases that have a high potential for financial reward will flourish, enhancing their risk-taking capacity. Over the long run, we should expect these successful firms to seek increasingly risky opportunities for litigation..."<sup>54</sup>

It is not only class actions in federal courts that will increase. AFSA believes that the number of state-only class actions would be much higher than the CFPB anticipates. For example, in California alone, after the *Sanchez*<sup>55</sup> decision which upheld the arbitration clause in the standard form automobile purchase contract, resulted in hundreds of class actions being moved into arbitration. Moreover, a brief glance at the arbitration data provided by the three main arbitral forums shows the number of cases that would move from arbitration to the court system:

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<sup>50</sup> 81 Fed. Reg. 32908 (May 24, 2016).

<sup>51</sup> U.S. Chamber Institute for Legal Reform. *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013*. Feb. 5, 2016. <http://www.instituteforlegalreform.com/resource/analysis-tcpa-litigation-skyrockets-since-2007-almost-doubles-since-2013>

<sup>52</sup> Carlton Fields. *Class Action Survey*. 2016. <http://classactionsurvey.com/spending-budgets/>

<sup>53</sup> *Ibid.*

<sup>54</sup> Hensler, Deborah, Bonnie Dombrey-Moore, Elizabeth Giddens, Jennifer Gross, and Erik Moller. *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. RAND Institute for Civil Justice. 2000 at 119.

<sup>55</sup> *Sanchez v. Valencia Holding Co., LLC*. (S199119; Aug. 3, 2015).

- AAA: Between April 2011 and February 2016, 9,123 consumer claims were resolved in arbitration (this excludes construction and employment disputes):
- JAMS: Between April 2011 and February 2016, 1, 867 consumer claims were resolved in arbitration.
- ADR Services: In 2015, 343 cases were resolved in arbitration.

Not only are the estimates of the number of cases low, but the estimates of the costs of class actions are low, too. “Class actions are complex and expensive to litigation,” according to Janet Cooper Alexander, a professor at Stanford Law School. Professor Alexander explains:

“The class action rules require a number of special procedures, such as class certification and court approval of the settlement, that impose significant additional expense. Because many claims are aggregated in one suit, the relevant facts are more complex than in an individual action. ... Because the stakes are high, both sides may feel justified in spending more time and money on legal work. Additionally, lawyers for both sides are usually specialists in class actions, and they have developed the custom of doing intensive pretrial discovery and filing many complex pretrial motions.”<sup>56</sup>

One class action alone can cost a company millions in attorneys’ fees—both the plaintiff’s and their own. Companies can spend between \$0.2 million (on the very low side, for a routine case) to \$26 million for their own attorneys.<sup>57</sup> And with cases like *In Re Initial Public Offering Securities Litigation*, where the attorneys were awarded \$202 million (or the Enron settlement where the lawyers got \$670 million, or the Fen-Phen diet drug class action where the attorneys got \$567 million),<sup>58</sup> an estimate of \$66 million seems awfully low.

In an example of class action case from a smaller finance company: actual damages were about \$15,000.; compensatory damages were awarded at about \$1.4 million; punitive damages were awarded at about \$70 million; the total costs exceeded \$1 million (when the companies net worth was around \$10 million).

The CFPB is incorrect in assuming that cases in state courts are less expensive. Because state courts lack the controls, oversight, and often the judicial expertise found in federal court, the rulings can be wildly inconsistent. State and local judges often do not have the capability of dealing with the complex issues raised and multiple motions filed in financial services cases. Moreover, and where possible, many cases that begin in state courts are routinely moved to federal courts to avoid these inconsistencies. Furthermore, cases that arise in one state often sprout up quickly in others. Professor Alexander writes:

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<sup>56</sup> Alexander, Janet Cooper. *An Introduction to Class Action Procedure in the United States*. Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland. July 21-22, 2000 at 13. <https://www.law.duke.edu/grouplit/papers/classactionalexander.pdf>

<sup>57</sup> *Carlton Field’s Class Action Survey*.

<sup>58</sup> Schonbrun, Lawrence W. *The Class Action Racket*. American Thinker. April 1, 2013. [http://www.americanthinker.com/articles/2013/04/the\\_class\\_action\\_racket.html](http://www.americanthinker.com/articles/2013/04/the_class_action_racket.html)

“In the United States the possibility of multiple suits is a serious problem. . . . A class action against a manufacturer of a nationally distributed product may be brought in virtually any state. The manufacturer may be faced with suits in several states, each purporting to represent a nationwide class. There is no way to consolidate cases pending in different state courts. This can lead to inefficiency, duplication of effort, the possibility of collusion whereby defendants make a ‘sweetheart deal’ with the least threatening plaintiffs’ lawyer in exchange for a large fee, and possibly to inconsistent results.”<sup>59</sup>

Because the CFPB’s estimates of the litigation costs are wrong, the estimates of the costs that may be passed down to consumers are necessarily wrong. The CFPB states that it believes that if costs are passed on to the consumer, it will only result in an increase in prices of less than one dollar per account per year when averaged across all markets. This is just not economically possible. If businesses are sued more often, there are three possible actions they must take: (1) accept the increased cost and make less profit; (2) pass the increased costs to consumers in the form of higher prices or restriction of access to credit, or (3) go out of business. The last two are harmful to consumers; the first defies logic and is unlikely to occur. The last two are the real options, both of which harm consumers. Professor Shepard writes, “Instead, the costs of no-injury class actions are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation. As a result, much of the no-injury litigation harms consumers instead of helping them as intended.”<sup>60</sup>

The RAND Institute for Civil Justice agrees, “If defendants pay large amounts to settle claims of individuals whose injuries were most likely *not* caused by the defendants’ products, then these costs as well are passed on to consumers who end up paying higher prices for products than they should.”<sup>61</sup>

The CFPB calculates the “under one dollar per account” based on its estimation that the class action exposure would result only about 103 class settlements with \$342 million paid to consumers, \$66 million to plaintiff’s attorneys, and \$39 million spent by financial institutions on their own attorney’s fees and internal staff and management time. The CFPB divides this total number (\$447 million) by the millions of accounts in the credit card market. “Thus,” the CFPB concludes, “averaged across all markets, the monetized estimates provided above amount to less than one dollar per account per year.”<sup>62</sup> This calculation is misleading. An accurate method of calculate the potential cost would be the cost of class actions (plus possibly enforcement actions stemming from the class actions) for one company divided by the number of accounts held by that company.

Furthermore, the CFPB’s analysis of potential costs also did not discuss the overlap between public enforcement actions and class actions. As noted above, there is overlap between the two. The costs to a company facing a multi-million dollar enforcement action, as well as a multi-million dollar

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<sup>59</sup> *Alexander* at 21.

<sup>60</sup> *Shepard* at 5.

<sup>61</sup> *Henslar etc.* at 121.

<sup>62</sup> 81 Fed. Reg. 32911 (May 24, 2016).



class action will be astronomical. There is simply no way that a portion of those costs will not be passed on to the consumer in a significant way.

*B. Harm to the Institution/Customer Relationship*

Prohibiting the use of pre-dispute arbitration agreements in class actions substantially increases the risk of class action litigation, which in turn devastates the relationship between customers and financial institutions. This is extremely problematic because financial institutions rely on good customer relations to survive. Satisfied customers tell their friends and family members about their good experience and send those friends and family members to that provider for needed services.

This will not happen if financial institutions no longer have an opportunity to work one on one with their customers. Class action litigation cuts off the opportunity for financial institutions to work with their customers. In the vast majority of disputes, the issue is resolved pre-arbitration and customer walks away satisfied. When a customer requests arbitration a dialog starts and 99.99 percent of the time the situation is resolved amicably. The cost of the arbitration incentivizes the financial institution to resolve the matter favorably for the consumer. In comparison, to end a class action, the financial institution has to satisfy the plaintiffs' attorneys, which requires millions of dollars in attorneys' fees and not much attention to what the plaintiffs' themselves require.

*C. Hurt Consumer Credit Availability*

The Proposed Rule's encouragement of costly class actions will have a disproportionate impact on state-licensed and regulated consumer finance companies and their customers. These companies operate pursuant to what are universally known as "small loan" laws and offer unsecured installment loans and credit for the financing of durable goods.

These state laws generally contain statutory caps on the interest rate that may be charged as well as limitations on other fees. Unlike many banks which extend credit subject to a federal preemption of state law and often "export" their transactions from states with higher or no rate caps, these consumer finance companies must follow state law. Banks may simply raise rates to cover the increased cost of litigation if arbitration ceases to be an option, but finance companies must absorb the cost—likely by making fewer loans to their customers.

This will be particularly damaging to the many working Americans who rely on these companies for small-dollar credit. These loans are the only alternative to payday lending and are a good way for consumers to manage credit and build a positive payment history with the credit bureaus.

This will be painful for both lenders and consumers in some states. One commentator, writing about Mississippi, put it this way: "As business defendants know well, many state courts have a long and distressing history of tolerating abuses of the class-action device (or analogous procedures like mass actions and representative proceedings)."<sup>63</sup>

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<sup>63</sup> Parashamari, Archie A., and Kevin Ranlett. "Class Defense Blog - Cutting-Edge Issues in Class Action Law and Policy." *Class Defense Blog*. Mayer Brown, 6 Nov. 2013.

The example of Mississippi is instructive. Before a legal reform in 2003, Mississippi was famed as a haven for mass tort and consumer litigation abuse using a permissive joinder mechanism, even though it did not have a conventional class action regime.<sup>64</sup> In fact, “abuse” may be a modest description. In 2004, the American Tort Reform Foundation named Mississippi’s 22<sup>nd</sup> Judicial Circuit a “Judicial Hellhole.”<sup>65</sup> Others called it the “lawsuit capital of the world.”<sup>66 67</sup> With the recent repeal of arbitration in high-cost mortgage loans, class action lawsuits have already been filed on essentially “technical” issues.

Consumer finance companies were not immune from this organized barratry. One AFSA member company reports it spent ten percent of its book net worth on defense costs. Others simply settled meritless cases and others were faced with the real possibility of having to file bankruptcy.

#### *D. Put Financial Institutions Out of Business*

Class action litigation also harms consumers because it drives up prices and limits competition. In order to settle large class actions, financial institutions need money, necessitating a rise in prices or a tightening of credit. If the settlement is too high, it will drive small or even medium-sized financial institutions out of business, thus limiting competition. As mentioned above, class actions are expensive. Defending a class action claim will typically be hundreds of thousands to millions of dollars. Merely addressing a demand letter, even just to get the case to go away, costs between \$15,000 - \$50,000. Even if a financial institution is right on the merits of the case, class action discovery is too expensive to pursue, so a provider will often settle.

In a Supreme Court opinion, Justice Scalia wrote, “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”<sup>68</sup> It is difficult to see how this advances the protection of consumers from inappropriate creditor conduct. Rather, it is legal extortion that benefits a small number of people—mostly plaintiff’s attorneys—without any proof that the consumer suffered harm that is, was, or should be redressed. This will encourage the same attorney, or other attorneys, to file additional lawsuits. Class actions are not just expensive, they take time. Financial institutions will have to spend a significant amount of time responding to the lawsuit—time that is not spent serving their customers.

#### *E. Impact on the Court System*

The increase in class action litigation described above, will further encumber an already overburdened court system. The immense transfer of cases currently handled by private arbitrators has the very real potential of “crashing” the judicial system, an impact the CFPB has yet to examine. Not only will the courts be overburdened by the number of cases, they will be fiscally overwhelmed as well. The CFPB’s proposal is basically an unfunded mandate. District, state, and

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<sup>64</sup> Howard M. Erichson, *Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 Miss. C. L. Rev. 285 (2004-2005) Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/214](http://ir.lawnet.fordham.edu/faculty_scholarship/214)

<sup>65</sup> See, <http://www.atra.org/reports/hellholes/report.pdf>

<sup>66</sup> Tim Lemke, *Lawyers in Paradise: Mississippi Has A Reputation as a haven For Trial Lawyers Pursuing Mega-Lawsuits*, Insight On The News, August 12, 2002

<sup>67</sup> For an excellent review of the abuses and the eventual reform, see: Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Miss. C.L. Rev. 393 (2005)

<sup>68</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

federal courts will have to pick up the costs of an increased case load. The federal courts already have concerns about effects of budget reductions have had on their court system.

As far back as 1995, the Judicial Conference of the U.S. was concerned with the increase in litigation. “Today, a number of the federal court’s core values are in jeopardy, largely for reasons beyond the courts’ control. The increasing atomization of society, its stubborn litigiousness, the breakdown of other institutions, and paradoxically, the very popularity and success of the federal courts, have combined to strain the courts’ ability to perform their mission.”<sup>69</sup> The Conference’s report continues, “Huge burdens are now being placed on the federal courts. An historical overview of cases commenced in the federal district and appeals courts since 1904 reveals remarkable growth.”<sup>70</sup> The report specifies, “The U.S. population has increased slightly more than 200 percent since 1904. In the same period, however, while federal criminal cases commenced annually in the district courts have increased a relatively modest 157 percent, civil case filings have increased 1,424 percent, with most of that growth in the period since 1960.”<sup>71</sup>

In September 2015, the Judicial Conference issued a strategic plan. The plan mentions issues such as delays and backlogged cases, budget constraints, insufficient number of judges, limited juror resources, as well as overburdened and congested courts.<sup>72</sup> Interestingly, the Judicial Conference specifically mentions alternative dispute resolution:

“To improve access, rules of practice and procedure undergo regular review and revision to reflect changes in law, to simplify and clarify procedures, and to enhance uniformity across districts. Rule changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. National mechanisms to consolidate and coordinate multidistrict litigation avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. In addition, many courts provide settlement conferences, mediation programs, and other forms of alternative dispute resolution to parties interested in resolving their claims prior to a judicial decision. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. Court operations and processes vary across districts and chambers, and *pursuing federal litigation can be time consuming and expensive.*”<sup>73</sup> [emphasis added]

An example of how arbitration can help the court system can be found in California. After the California Supreme Court upheld an arbitration provision in a consumer contract in *Sanchez*, hundreds of cases that had been stayed in the court system were removed to arbitration. One plaintiffs’ attorney had over 150 cases sent to arbitration as a result of *Sanchez*.

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<sup>69</sup> Judicial Conference of the United States. “Long Range Plan for the Federal Courts.” December 1995 at 9 -10. <http://www.uscourts.gov/file/2826/download>.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Judicial Conference of the United States. “Strategic Plan for the Federal Courts. Sept. 2015. <http://www.uscourts.gov/file/18424/download>

<sup>73</sup> *Ibid.* at 13

The problem in the judicial system is clear. A Wall Street Journal article that was published shortly after the CFPB's arbitration study described the fate of a consumer, "Ronald Porter filed a federal lawsuit in 2007 after the Navy eliminated his job. He still is waiting for his employment-discrimination case to be heard."<sup>74</sup> The article states that Mr. Porter, now 60, has not found steady work in a decade. He ekes by on his savings and worries about how he will manage. "Clearly, justice delayed is justice denied," he said.<sup>75</sup> The article explains:

"Civil suits such as Mr. Porter's are piling up in some of the nation's federal courts, leading to long delays in cases involving Social Security benefits, personal injury and civil rights, among others.

"More than 330,000 such cases were pending as of last October—a record—up nearly 20% since 2004, according to the Administrative Office of the United States Courts. The number of cases awaiting resolution for three years or more exceeded 30,000 for the fifth time in the past decade.

"The federal court for California's Eastern District, where Mr. Porter filed his suit, has a particularly deep backlog. The number of cases filed per judge, 974 last year, is almost twice the national average. More than 14% of civil cases in that district have been pending for three years or more.

"... 'Over the years I've received several letters from people indicating, 'Even if I win this case now, my business has failed because of the delay. How is this justice?' said Judge Lawrence J. O'Neill in Fresno, Calif., who sits in the Eastern District. "And the simple answer, which I cannot give them, is this: It is not justice. We know it."<sup>76</sup>

There is no indication that the problem with over-worked courts with too few judges is getting any better. According to the Huffington Post, "The last time Congress passed a major judgeship bill was in 1990. Since then, there's been a 39 percent increase in filings at district and circuit courts but only a 4 percent increase in judgeships. The Judicial Conference recommended in March that Congress create 77 more judgeships for district courts and five more for circuit courts to keep up with current workloads. Lawmakers haven't passed anything."<sup>77</sup> The recent *Spokeo*<sup>78</sup> decision could contribute to the problem. Some plaintiffs have already filed in state court to force defendants to remove and thereby assert federal jurisdiction.

These problems hurt Americans, "When court seats go unfilled, cases get seriously delayed and regular people suffer. In a civil case, that means someone suing an employer for discrimination

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<sup>74</sup> Palazzolo, Joe. *In Federal Courts, the Civil Cases Pile Up*. WSJ. April 6, 2015. <http://www.wsj.com/articles/in-federal-courts-civil-cases-pile-up-1428343746>

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Bendery, Jennifer. *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*. Huffington Post. Sept. 20, 2015. [http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies\\_us\\_55d77721e4b0a40aa3aaf14b](http://www.huffingtonpost.com/entry/judge-federal-courts-vacancies_us_55d77721e4b0a40aa3aaf14b)

<sup>78</sup> *Spokeo v. Robbins* (13-339)

will wait years to go before a judge. In a criminal case, that means defendants can finish their jail terms before their case is even resolved.”<sup>79</sup>

A report published by the Brennan Center for Justice at New York University School of Law states concluded that unusually high judicial vacancy levels coupled with unprecedented workloads are burdening federal district courts like never before.<sup>80</sup> Federal Bar Association, the professional organization for private and government lawyers and judges practicing and sitting in federal courts, has stated that “high numbers of vacancies on the federal bench, coupled with increasing caseloads, are creating significant and unprecedented obstacles for the prompt administration of justice in our federal courts.”<sup>81</sup>

Russell Wheeler, an expert on the federal judiciary and visiting fellow in governance studies at the Brookings Institution, said some of the nominees who have cleared the committee have been awaiting confirmation votes since the middle of last year, “It’s a very slow pace.” Wheeler said the situation is especially bad in Texas, which has “10 or 11 vacancies that don’t even have nominees. . . . I think in Texas it’s difficult to get a civil case heard now because criminal cases get priority.”<sup>82</sup>

The Proposed Rule will only serve to compound the overburdened court system. Not only will the cases that would currently go to arbitration remove to court, but those cases that never make it to actual arbitration because they are resolved amicably without the need for the arbitration to proceed will also end up in court. Class actions simply cannot be resolved the same way as arbitrations.

AFSA believes that it is crucial for the CFPB to study how the Proposed Rule would affect the court system before proceeding with the rulemaking.

#### *F. Deterrent Effect*

The CFPB claims that it has, “. . .analyzed a variety of evidence that, in its view, indicates that companies invest in compliance to avoid activities that could increase their exposure to class actions.”<sup>83</sup> The evidence appears to be alerts from law firms notifying financial institutions about class actions, not any actual activity on behalf of the institutions. The CFPB even admits, “While the Bureau believes that such monitoring and attempts to anticipate litigation affect the practices of companies that are exposed to class action liability, the impacts can be hard to document and quantify because companies rarely publicize changes in their behavior, let alone publicly attributing those changes to risk-mitigation decisions.”<sup>84</sup>

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<sup>79</sup> *Bendery*.

<sup>80</sup> Bannon, Alicia. *Federal Judicial Vacancies: The Trial Courts*. Brennan Center for Justice. 2013. <http://www.brennancenter.org/publication/federal-judicial-vacancies-trial-courts>

<sup>81</sup> Brunker, Mike and Luke Russert. *Judicial Nominee Backlog Mired in Partisan Politics*. NBC News. Feb. 21, 2016. <http://www.nbcnews.com/news/us-news/judicial-nominee-backlog-mired-partisan-politics-n521736>

<sup>82</sup> *Ibid*.

<sup>83</sup> 81 Fed. Reg. 32862 (May 24, 2016).

<sup>84</sup> 81 Fed. Reg. 32863 (May 24, 2016).



In fact, class actions do not provide a deterrent effect. Professor Shepherd writes:

“Moreover, although plaintiff compensation is irrelevant to whether defendants are deterred from future harmful behavior, achieving deterrence through private class actions is exceptionally imprecise and inefficient. Whereas actions brought by state attorneys general are typically brought in ‘the public interest’ and designed to curtail future behavior that is harmful to the citizens of a state, actions brought by private attorneys in class actions are rife with conflicts of interest and unlikely to be in the public interest. For example, the redundant and indulgent provisions in many state consumer protection laws—such as guaranteed awards of attorneys’ fees, mandatory trebling of damages, and no requirement of actual harm—create incentives for private attorneys to aggregate not only meritorious suits, but also frivolous suits in order to extort settlements. Moreover, any claim brought under a statute allowing for the recovery of attorneys’ fees is likely to achieve deterrence less inefficiently than a comparable public enforcement action; private attorneys in these actions have an incentive to maximize their hourly billing beyond the efficient level.”<sup>85</sup>

The RAND Institute for Civil Justice concurs: “For those who believe that a key objective of damage class actions is regulatory enforcement, a central dilemma is how to keep these expansionary forces from producing significant amounts of non-meritorious litigation. For whenever the justice system rewards litigation without regard to its legal or factual merit, the deterrent potential of litigation is squandered.”<sup>86</sup>

AFSA members have found this to be true. Class actions do not provide a deterrent effect because the point of many of these class actions is to exploit statutory violations, not resolve any real harm to the consumer. Financial institutions would love to have perfect systems and avoid all statutory violations. They, in fact, try hard to do so—as evidenced, in part, by the law firm alerts the CFPB cites. However, it is just not possible. Statutory violations still happen, despite all efforts.

### *III. Specific Comments/Questions about the Proposed Rule*

AFSA has a few comments about the implementation of Proposed Rule. First, on a high level, it is not clear how a motor vehicle dealer can enforce an arbitration clause in a contract, but the clause becomes unenforceable when the contract is sold. As the CFPB points out, it does not have jurisdiction over dealers and so cannot impose an arbitration content requirement on contracts originated by dealers in indirect, three-party contract transactions. How can the dealer assign its interest in a contract, which includes an arbitration clause that the dealer can enforce, but because the contract is being assigned to a finance company that is regulated by the CFPB, suddenly the class action waiver provision in the arbitration clause is unenforceable? This turns the doctrine of assignment/transferability of contracts on its head. Either a contract provision is unenforceable from the time of creation of that contract, or it is enforceable from the beginning. The enforceability of a contract provision cannot be dependent upon the identity of the party that is

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<sup>85</sup> *Shepherd* at 4

<sup>86</sup> *Henslar etc.* at 120.

attempting to enforce it. This would also have a similar impact on merchants who sell goods to consumers, but who finance those goods through outside lenders.

In a similar vein, AFSA is concerned that § 1040.4(a)(2)(iii) effectively serves to make the Proposed Rule retroactive for contracts that were entered into before the effective date, but which are assigned after the effective date. If the clause was valid at origination, it should remain so, regardless of whether a contract was assigned or not.

Second, on a more granular level, AFSA has some concerns about the suggested language in the Proposed Rule. In practice, § 1040.4 requires the use of two different pre-dispute arbitration agreement language: § 1040.4(a)(2)(i) and § 1040.4(a)(2)(ii). This implies, from an operational standpoint, that two separate loan agreements might be required. One loan agreement would be for those loans a financial institution makes directly and one for those obtained from dealers or other financial institution. AFSA suggests that the CFPB draft language that could be used in any loan agreement to avoid consumer confusion. In particular, AFSA is concerned that the language in § 1040.4(a)(2)(ii) that covers multiple products or services may be confusing to consumers. For example, a consumer will likely not know what products or services are covered by the rule. AFSA also asks that the CFPB clarify if other “products” or “services” include services such as auto club memberships or even insurance.

#### ***IV. Submission of Arbitral Records***

AFSA suggests that, should the CFPB decide to proceed with the rulemaking, the CFPB should consider requiring the submission of arbitral records before prohibiting pre-dispute arbitration agreements in class action litigation. The CFPB would then have the opportunity to analyze the arbitral records and learn more about how consumers benefit from arbitration.

However, AFSA cautions the CFPB that the requirement that the judgment or award be disclosed to the CFPB may act as a disincentive to the arbitrator in making findings, as this would allow the CFPB to conduct further scrutiny of the lender.

The CFPB explains that it is concerned about financial institutions’ use of arbitration agreements that may violate arbitration administrators’ fairness principles or rules. AFSA, for its part, is concerned that this may be an effort to influence arbitrator actions by putting the onus on the arbitrators to “regulate” arbitration agreements. Typically the fairness of an agreement has been determined by the courts.

#### ***V. Effective Date***

The CFPB has proposed a compliance date that is 211 days after the publication of the final rule in the Federal Register. AFSA asks that the CFPB extend the compliance date to a 18 months after publication of the final rule. AFSA members will need a sufficient time to implement the new rule, particularly given that the Proposed Rule includes a strict liability standard if contracts contain the clauses, whether or not they are enforced.

Although it may seem that all the Proposed Rule requires is the removal of a few lines in a contract which could be done in a few months, the proposed changes are actually quite extensive. For example, indirect vehicle finance companies have limited ability to modify the impacted contracts with addendums or side letter due to the single document rule in many states. These finance companies need sufficient time to get all of the agreements modified appropriately and in the hands of the dealers well in advance of the effective date.

One AFSA member specified that it would have more than 200 forms that would need to be revised – paper forms, electronic forms, forms in other languages, etc. Each form would need to be revised, checked, corrected, reviewed and approved. Finance companies usually do this activity in cycles, one group of contracts at a time because there are too many forms to follow this process with all of them, all at once. One cycle takes approximately three to five months. Printing, distribution, dealer bulletins, implementation all take additional time. Moreover, removing the “Notice of Arbitration” signature box from contracts is likely to cause programming issues for dealers.

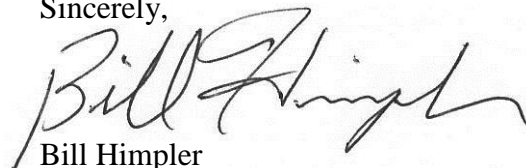
If the CFPB does not change the compliance date, we ask that the CFPB consider including a safe harbor in the final rule. The safe harbor would not punish financial institutions for having a contract with a pre-dispute arbitration agreement, as long as the agreement was not enforced.

## ***VI. Conclusion***

The CFPB should not finalize the Proposed Rule at this time. AFSA asks that the CFPB continue its study of this important issue. Specifically, the CFPB should further examine the costs associated with the Proposed Rule, the potential increase in class actions, and the impact the Proposed Rule could have on the court system. With further study, AFSA believes that the CFPB will have no choice but to conclude that the Proposed Rule is not in the public interest, nor is it for the benefit of consumers.

Please contact me by phone, 202-466-8616, or e-mail, [bhimpler@afsamail.org](mailto:bhimpler@afsamail.org), with any questions.

Sincerely,



Bill Himpler  
Executive Vice President  
American Financial Services Association

## **APPENDIX I**

### **Attorney General Eric T. Schneiderman**

#### **Press Release**

**February 10, 2016**

## **A.G. Schneiderman Announces More Than \$2.5 Million In Consumer Recovery Under Lemon Law In 2015, \$12.4 Million Since 2011**

*New Yorkers Recovered \$2 Million On New Car Purchases And Almost \$500,000 On Used Cars That Were Lemons In 2015*

*Schneiderman: Lemon Law Arbitrations Provide A Fair And Efficient Process For Both Consumers And The Auto Industry To Resolve Disputes*

NEW YORK – Attorney General Eric T. Schneiderman today announced that in 2015, more than \$2 million was refunded to 53 New York consumers who claimed their new cars were lemons, and nearly \$500,000 was awarded to 15 consumers who had problems with used cars. Lemon laws provide a legal remedy for consumers who are buyers or lessees of new cars and certain used cars that do not conform to the terms of its written warranty, and the manufacturer or its authorized agent is unable to repair defects with the car after a reasonable number of attempts. Since Attorney General Schneiderman took office, New York consumers have recovered \$12,391,367 through the Attorney General’s Lemon Law Arbitration Program.

The \$2 million in refunds in 2015 include cash awards, vehicle replacements, and out-of-court settlements. Specifically, cash awards to consumers totaled more than \$1.6 million for new cars and more than \$400,000 for used cars. Consumers recovered more than \$400,000 in out-of-court settlements that were reported to the Attorney General’s office after claims were initially submitted for arbitration. Twenty-three consumers also received favorable arbitration decisions reducing by more than \$33,000 in total the amounts claimed for wear and tear on their leased vehicles.

“The Lemon Law Arbitration Program has proven to be efficient and effective means for both consumers and the auto industry to resolve disputes,” **Attorney General Schneiderman** said. “Under this program, hundreds of auto consumers have obtained compensation without the costs and delays of going to court.”

In 2015, there were a total of 292 new car applications received. A total of 79 new car cases were decided by arbitrators in 2015, with 43 in favor of the consumer and 36 in favor of the manufacturer. Counting settlements and decisions in favor of the consumer, it was estimated that approximately \$2,089,000 was refunded to consumers in 2015 under the new car program.

Since 2011, the new car arbitration program has resulted in more than \$10,382,000 being returned to consumers.

In the used car lemon law program, there were 253 arbitration applications received in 2015. There were 26 decisions rendered: 13 for consumers and 13 for dealers. The estimate for the total recovery by consumers in 2015 was \$456,342. Since 2011, the used car arbitration program has returned more than \$1,846,000 to consumers.

The top 10 hearing locations for accepted applications by the OAG by region from 2015 are:

- Hempstead: 89
- Smithtown: 37
- Brooklyn: 23
- Yonkers: 18
- Bronx: 17
- Albany: 16
- Manhattan: 14
- Rochester: 11
- Buffalo: 11
- Staten Island: 11
- Poughkeepsie: 10
- New City: 10
- Syracuse: 9
- Jamaica: 9

To apply for arbitration, a consumer must first complete a "Request for Arbitration" form, which may be obtained from the Attorney General's website, or from any of the Attorney General's regional offices and returned to the Attorney General's Lemon Law Arbitration Unit, Office of the Attorney General, 120 Broadway, New York, New York 10271.

Both programs are administered by the New York State Dispute Resolution Association. The arbitrators are volunteers who have been trained in the lemon law and in arbitration procedures by the Attorney General's office and the Administrator. All Requests for Arbitration are reviewed by the Attorney General's office. This review is for screening purposes only—to determine whether the claim may be heard by an arbitrator. If the form is accepted, it is forwarded to the Administrator for further processing. More information about the Lemon Law program is available [here](http://www.ag.ny.gov/press-release/ag-schneiderman-announces-more-25-million-consumer-recovery-under-lemon-law-2015-124).

<http://www.ag.ny.gov/press-release/ag-schneiderman-announces-more-25-million-consumer-recovery-under-lemon-law-2015-124>



## **APPENDIX II**

Section \_\_\_\_ . ARBITRATION CONSENT

By signing below, I elect arbitration to resolve disputes. I have read and consent to the Arbitration provision (see Section \_\_\_\_). I waive the right to a jury trial and to bring class claims.

Lessee's Initials: \_\_\_\_\_

Co-Lessee's Initials: \_\_\_\_\_

Section \_\_\_\_ . ARBITRATION

**PLEASE READ THIS ARBITRATION PROVISION CAREFULLY TO UNDERSTAND YOUR RIGHTS. BY ELECTING ARBITRATION, YOU AGREE THAT ANY CLAIM THAT YOU MAY HAVE IN THE FUTURE MUST BE RESOLVED THROUGH BINDING ARBITRATION. YOU UNDERSTAND THAT DISCOVERY AND APPEAL RIGHTS ARE MORE LIMITED IN ARBITRATION.**

Arbitration is a method of resolving any claim, dispute or controversy without filing a lawsuit. By agreeing to arbitrate, **YOU** and **COMPANY** waive the right to go to court and agree instead to submit any claims, disputes or controversies to binding arbitration. This provision sets forth the terms and conditions of our agreement to binding arbitration. **YOU** and **COMPANY** agree and acknowledge that this Lease affects interstate commerce and the Federal Arbitration Act ("FAA") applies to this provision.

By signing the Arbitration Consent in Section \_\_\_\_ of this Lease, **YOU** elect to have disputes resolved through arbitration. **YOU, COMPANY** or any involved third party may pursue a Claim. "Claim" means any dispute between **YOU, COMPANY**, and/or any involved third party relating to your account, this Lease, or our relationship, including but not limited to any application, the vehicle, its performance and any representations, omissions or warranties related thereto. "Claim" does not include personal injury or wrongful death claims. **YOU** or **COMPANY** may seek remedies in small claims court or provisional judicial remedies without arbitrating.

**YOU** or **COMPANY** may select arbitration before the American Arbitration Association (AAA), JAMS or National Arbitration and Mediation (NAM). Contact these sponsors to obtain their rules. The hearing will be in the federal district where **YOU** reside. It may be held by telephone or by written submissions if **YOU** and **COMPANY** agree. The filing and arbitrator fees will be paid according to the sponsor rules. You may contact the sponsor about a fee waiver. If it does not provide fee waivers, **COMPANY** will pay the filing and arbitrator fees up to \$5,000, unless the law requires more. Each party is responsible for other fees (e.g., attorneys, experts, documents, etc.). The arbitrator may award costs or fees to a prevailing party, but only if the law expressly allows it. **COMPANY** will not seek fees, unless the arbitrator finds your claims to be frivolous.

The arbitrator shall be an attorney familiar with automotive or consumer finance issues or be a current or retired judge. The arbitrator shall follow the substantive law and statute of limitations and decide all issues relating to the interpretation, construction, enforceability and applicability of this provision. The arbitrator may order any relief if permitted by law. This provision is governed by and enforceable under the FAA. Any award shall include a written opinion and shall be final, subject to appeal under the FAA.

This provision survives termination of this Lease or relationship, bankruptcy, assignment or transfer. If part of this provision is unenforceable, the remainder shall remain in effect. If any unenforceability would allow arbitration to proceed as a class action, then this provision shall be unenforceable in its entirety. **COMPANY** reserves the right to make material changes to this provision after providing **YOU** written notice and an opportunity to opt out. **YOU** may opt out of this provision within 30 days of signing this Lease by sending a signed, written notice to **COMPANY** at [address].

For purposes of this Section \_\_, Arbitration provision, **COMPANY** means [define "Company"], their parents, subsidiaries, predecessors, successors, assignees, and their officers, employees, representatives and agents. **YOU** means Lessee and each Co-Lessee to this Lease.

## DEPOSIT ACCOUNT AGREEMENT

**TO STOP PAYMENT ON AN ITEM, OR PAY AN ITEM BEARING AN UNAUTHORIZED SIGNATURE, FORGED SIGNATURE, OR FORGED ENDORSEMENT OR ALTERATION, OUR LIABILITY, IF ANY, WILL BE LIMITED TO THE FACE AMOUNT OF THE ITEM.**

If this agreement conflicts with any statements made by one of our employees or our affiliates' employees, this agreement will control.

### 7. Sub-accounts

For accounting purposes, all checking accounts consist of two sub-accounts: i) a transaction sub-account where all deposits, withdrawals, and fees are posted, and ii) a holding sub-account, where available balances above a certain level are transferred daily. Funds will be retransferred to your transaction sub-account to meet your transactional needs; however, all balances in the holding sub-account will be transferred to the transaction sub-account with the sixth transfer in any calendar month or monthly statement period.

Both sub-accounts are treated as a single account for purposes of your deposits and withdrawals, earning interest, access and information, tax reporting, fees, etc.

### 8. Research, legal process and requests for information

If we receive any legal process relating to you or your account, you authorize us to comply with it. "Legal process" means any document that appears to have the force of law that requires us to hold or pay out funds from your account, including a garnishment, attachment, execution, levy, or similar order. We do not have to determine whether the legal process was validly issued or enforceable. As permitted by law, we will charge your account a Legal Processing fee or costs and expenses we incur in complying with the order, or both.

If any action, including administrative proceedings, garnishment, tax levies, restraining orders, or another action is brought against you or your account, you will be liable to us for any loss, cost, or expense (including attorneys' fees) resulting from our compliance with any legal process.

If we receive any subpoena, court order, or request for information or documents relating to your account from a governmental entity or arbitration panel, we are authorized to comply with it. If we are required to answer a subpoena or similar order requesting records of your account, we may charge you a Research fee, less any amount we are paid by the person issuing the subpoena before we deliver our response.

### 9. Permitted time for filing a lawsuit

You must file any lawsuit or arbitration against us within 2 years after the cause of action arises, unless state law or an applicable agreement provides for a shorter time. This limit is in addition to limits on notice as a condition to making a claim, as described in Section E.2 above. If applicable state law does not permit contractual shortening of the time during which a lawsuit must be filed to a period as short as 2 years, you and we agree to the shortest permitted time under that state's laws.

We abide by federal and applicable state record retention laws and may dispose of any records that have been retained or preserved for the period set forth in these laws. Any action against us must be brought within the period that the law requires us to preserve records, unless applicable law or this agreement provides a shorter limitation period. Any action against us on an automatically renewable CD must be brought within the time that the law requires us to preserve records based on the stated maturity date in the most recent record of the CD.

### 10. Location of legal proceedings

If you file any lawsuit or other legal proceeding against us that's connected in any way to your accounts or services, you agree to do so in an appropriate court in the state where your account is located (see section I.6 above). In addition, if we file any lawsuit or legal proceeding that is connected in any way to your accounts or services, you consent to jurisdiction and venue in an appropriate court in the state where your account is located. If either party chooses to have disputes determined under the section entitled "Arbitration," that section rather than this section governs the process and location of the arbitration proceedings.

### 11. Pre-judgment interest rate

If either you or we are awarded a judgment against the other in connection with your account, the rate of interest earned before judgment on the judgment amount will be the rate of interest the account earned during that period unless state law requires a different rate. If the account is not interest-bearing, the rate will be the lowest generally available rate for a personal interest-bearing checking account.

### 12. Arbitration

You and we agree that upon the election of either of us, any dispute relating in any way to your account or transactions will be resolved by binding arbitration as discussed below, and not through litigation in any court

## DEPOSIT ACCOUNT AGREEMENT

(except for matters in small claims court). This arbitration agreement is entered into pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

YOU HAVE A RIGHT TO OPT OUT OF THIS AGREEMENT TO ARBITRATE, AS DISCUSSED BELOW. UNLESS YOU OPT OUT OF ARBITRATION, YOU AND WE ARE WAIVING THE RIGHT TO HAVE OUR DISPUTE HEARD BEFORE A JUDGE OR JURY, OR OTHERWISE TO BE DECIDED BY A COURT OR GOVERNMENT TRIBUNAL. YOU AND WE ALSO WAIVE ANY ABILITY TO ASSERT OR PARTICIPATE ON A CLASS OR REPRESENTATIVE BASIS IN COURT OR IN ARBITRATION.

ALL DISPUTES, EXCEPT AS STATED BELOW, MUST BE RESOLVED BY BINDING ARBITRATION WHEN EITHER YOU OR WE REQUEST IT.

### *What claims or disputes are subject to arbitration?*

Claims or disputes between you and us about your deposit account, transactions involving your deposit account, safe deposit box, and any related service with us are subject to arbitration. Any claims or disputes arising from or relating to this agreement, any prior account agreement between us, or the advertising, the application for, or the approval or establishment of your account are also included. Claims are subject to arbitration, regardless of what theory they are based on or whether they seek legal or equitable remedies. Arbitration applies to any and all such claims or disputes, whether they arose in the past, may currently exist, or may arise in the future. All such claims or disputes are referred to in this agreement as "Claims."

The only exception to arbitration of Claims is that both you and we have the right to pursue a Claim in a small claims court instead of arbitration, if the Claim is in that court's jurisdiction and proceeds on an individual basis.

### *Can I (the customer) cancel or opt out of this agreement to arbitrate?*

You have the right to opt out of this agreement to arbitrate if you tell us within 60 days of opening your account. If you want to opt out, call us at 1-800-935-9935, or see a banker. Otherwise this agreement to arbitrate will apply without limitation, regardless of whether 1) your account is closed; 2) you pay us in full any outstanding debt you owe; or 3) you file for bankruptcy.

### *What about class actions or representative actions?*

Claims in arbitration will proceed on an individual basis, on behalf of the named parties only.

YOU AND WE AGREE NOT TO:

- 1) SEEK TO PROCEED ON ANY CLAIM IN ARBITRATION AS A CLASS CLAIM OR CLASS ACTION OR OTHER COMPARABLE REPRESENTATIVE PROCEEDING;
- 2) SEEK TO CONSOLIDATE IN ARBITRATION ANY CLAIMS INVOLVING SEPARATE CLAIMANTS (EXCEPT FOR CLAIMANTS WHO ARE ON THE SAME ACCOUNT), UNLESS ALL PARTIES AGREE;
- 3) BE PART OF, OR BE REPRESENTED IN, ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE; NOR
- 4) SEEK ANY AWARD OR REMEDY IN ARBITRATION AGAINST OR ON BEHALF OF ANYONE WHO IS NOT A NAMED PARTY TO THE ARBITRATION.

If these terms relating to class or representative procedures are legally unenforceable for any reason with respect to a Claim, then this agreement to arbitrate will be inapplicable to that Claim, and the Claim will instead be handled through litigation in court rather than by arbitration. No arbitrator shall have authority to entertain any Claim on behalf of a person who is not a named party, nor shall any arbitrator have authority to make any award for the benefit of, or against, any person who is not a named party.

### *Does arbitration apply to Claims involving third parties?*

Arbitration applies whenever there is a Claim between you and us. If a third party is also involved in a Claim between you and us, then the Claim will be decided with respect to the third party in arbitration as well, and it must be named as a party in accordance with the rules of procedure governing the arbitration. No award or relief will be granted by the arbitrator except on behalf of, or against, a named party. For purposes of arbitration, "you" includes any person who is listed on your account, and "we" includes [REDACTED], all its affiliates, and all third parties who are regarded as agents or representatives of ours in connection with a Claim. (If we assign your account to an unaffiliated third party, then "we" includes that third party.)

The arbitration may not be consolidated with any other arbitration proceeding.

### *How does arbitration work?*

The party filing a Claim in arbitration must select either: JAMS or the American Arbitration Association ("AAA") as the arbitration administrator. That organization will apply its code of procedures in effect at the

## DEPOSIT ACCOUNT AGREEMENT

time the arbitration claim is filed. If there is a conflict between that code of procedures and this arbitration provision and/or this agreement, this arbitration provision and this agreement will control. In the event that JAMS or the AAA is unable to handle the Claim for any reason, then the matter shall be arbitrated instead by a neutral arbitrator selected by agreement of the parties (or, if the parties cannot agree, selected by a court in accordance with the FAA), pursuant to the AAA rules of procedure.

The arbitrator will decide the Claim in accordance with all applicable law, including recognized principles of equity and statutes of limitations, and will honor all claims of privilege recognized by law. The arbitrator will have the power to award to a party any damages or other relief provided for under applicable law. A single arbitrator will conduct the arbitration and will use applicable substantive law, including the Uniform Commercial Code, consistent with the FAA and the applicable statutes of limitations or conditions precedent to suit, and will honor claims of privilege recognized at law. The arbitrator can award damages or other relief provided for by law to you or us, but not to anyone else. The arbitrator's authority is limited to the Claims between you and us.

*Is the arbitrator's decision final? Is there an appeal process?*

The arbitrator's decision will be final and binding on the parties. A party can file a written appeal to the arbitration administrator within 30 days of award issuance. The appeal must request a new arbitration in front of three neutral arbitrators designated by the same arbitration administrators. The panel will reconsider all factual and legal issues, following the same rules of procedure, and will make decisions based on majority vote. Any final arbitration award will be binding on the named parties and enforceable by any court having jurisdiction.

*Who will pay for costs?*

We will pay any costs that are required to be paid by us under the arbitration administrator's rules of procedure. Even if not otherwise required, we will reimburse you up to \$500 for any initial arbitration filing fees you have paid. We will also pay any fees of the arbitrator and arbitration administrator for the first two days of any hearing. If you win the arbitration, we will reimburse you for any fees you paid to the arbitration organization and/or arbitrator. All other fees will be allocated according to the arbitration administrator's rules and applicable law. If you consider that you are unable to afford any fees that would be yours to pay, you may request that we pay or reimburse them, and we will consider your request in good faith.

*How do I (the customer) file an arbitration claim?*

Rules and forms may be obtained from, and Claims may be filed with, JAMS at 620 Eighth Avenue, 34th Floor, New York, New York 10018, or [jamsadr.com](http://jamsadr.com); or the AAA at 335 Madison Avenue, Floor 10, New York, New York 10017, or [www.adr.org](http://www.adr.org). Arbitration hearings will take place in the federal judicial district that includes your address at the time the Claim is filed, unless the parties agree to a different place.

### 13. Assignment of agreement and successors

This agreement will be binding on your personal representative, executors, administrators, and successors, and on our successors and assigns.

You may not grant a security interest in, transfer, or assign your account to anyone other than us without our written consent. No assignment will be valid or binding on us, and we won't be considered to have "knowledge" of it, until we consent and the assignment is noted in our records. However, by noting the assignment, we do not have any responsibility to assure that the assignment is valid. Any permitted assignment of your account is subject to our setoff rights.

### 14. Authorization to share information

You authorize us to share information about you and your account with affiliates and third parties, unless the law or our Privacy Notice prohibits us from doing so. Please see our Privacy Notice for your choices about information sharing.

### 15. Referrals

If you request it, our employees may at times provide contact information about third parties, such as lawyers, accountants, or contractors, who offer products or services to the public. Some of these third parties may be our customers. We provide this information only as a courtesy and convenience to you and the third party, but in some cases we may be compensated for a referral. We do not make any warranties or representations about the third parties or their products or services. If you choose to do business with any third party, that decision is yours alone, and we are not responsible for the third party's performance or to help resolve any dispute between you and the third party. Our employees may also receive compensation when you purchase a [REDACTED] product based on their referral.



**CONTRACT ADDENDUM****ARBITRATION AGREEMENT: PLEASE REVIEW, THIS AGREEMENT AFFECTS YOUR LEGAL RIGHTS**

This contract addendum modifies the retail installment sales contract dated \_\_\_\_\_  
for motor vehicle VIN# \_\_\_\_\_.

This Arbitration Agreement ("Arbitration Agreement" or "Arbitration Clause" or "clause") is an addendum to the retail installment sales contract referenced above ("contract") and fully incorporated herein, that was executed between you, the buyer (and Co-Buyer or Guarantor, if any) and the Creditor - Seller ("we" or "us" in this addendum).

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations, and its applicable rules, to conduct the arbitration: JAMS, 1920 Main St., Ste. 300, Irvine, CA 92614 ([www.jamsadr.com](http://www.jamsadr.com)), the American Arbitration Association, 1633 Broadway, 10th Floor, New York, NY 10019 ([www.adr.org](http://www.adr.org)), or any other organization subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law and the applicable statutes of limitation. Unless applicable law provides otherwise, the arbitration hearing shall be conducted in the federal district in which you reside unless the seller of the vehicle is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will pay your filing, administration, service and case management fee, your arbitrator and hearing fee and any arbitration appeal fees you incur all up to a maximum of \$5,000, unless the law requires us to pay more. The amount we pay may be reimbursed in whole or in part by decision of the arbitrator if the arbitrator finds that any of your claims are frivolous under applicable law. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this clause, then the provisions of this clause shall control. The arbitrator's award shall be final and binding on all parties, except that you may appeal any arbitrator's award pursuant to the rules of the arbitration organization, and we may only appeal an award against us exceeding \$100,000. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) and not by any state law concerning arbitration.

You retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, and we agree to reimburse your filing fees for such proceedings. You and we retain any rights to self-help remedies, such as repossession. You also retain the right to seek individual injunctive relief in court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.

BY SIGNING BELOW YOU ACKNOWLEDGE THAT IF EITHER YOU OR WE CHOOSE TO ARBITRATE A CLAIM OR DISPUTE, THE CLAIM OR DISPUTE WILL BE RESOLVED BY BINDING ARBITRATION AS DESCRIBED ABOVE.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Buyer Name

\_\_\_\_\_  
Co-Buyer/Guarantor Name

\_\_\_\_\_  
Buyer Signature

\_\_\_\_\_  
Co-Buyer/Guarantor Signature

\_\_\_\_\_  
Seller Name

\_\_\_\_\_  
By