CONSUMER FEDERATION OF CALIFORNIA

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Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552
FederalRegisterComments@cfpb.gov

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51 (forced arbitration clauses and class action bans)

Dear Consumer Financial Protection Bureau:

The Consumer Federation of California writes in strong support of the proposed rule that would restore consumers' ability to band together to protect their rights in class actions and would increase transparency in the use of forced arbitration in individual cases. Prior to the Supreme Court's decisions in *Concepcion* and *AmEx III*, consumers in California enjoyed greater protection from private, civil lawsuits seeking to enforce California state consumer protection laws. However, in more recent years, and after the Supreme Court struck down the so-called *Discover Bank* Rule, Californians have not had the benefit of private, civil lawsuits protecting their interests. Now, payday lenders, credit card companies, banks, auto lenders, debt collectors, and others have free reign to use forced arbitration clauses to deprive consumers of access to justice and to prevent courts from holding law breaking companies accountable for widespread wronging. The CFPB's proposed rule would help ensure that companies follow the law and that, when they do not, injured consumers are made whole.

Forced arbitration clauses are a get-out-of-jail-free card that deny consumers justice.

In most cases, forced arbitration is not an alternative dispute resolution forum; it prevents consumers from getting relief at all. Attorneys frequently will not represent consumers if a contract has an arbitration clause that cannot be defeated. Or, after a case is sent to forced arbitration, consumers are forced to accept weaker settlements—with no relief for absent class members—because their attorneys either will not handle a case in arbitration or do not have confidence in the fairness of the arbitration forum. Forced arbitration clauses also make it difficult to obtain evidence to prove corporate wrongdoing.

The CFPB's Report to Congress on forced arbitration demonstrated that mandatory pre-dispute arbitration clauses, including class action bans, are prevalent in consumer financial contracts. It found that few consumers understand that these clauses waive their right to sue in court when a financial institution engages in unfair, deceptive or fraudulent practices. The study found that on average, only 25 consumers with claims of under $1,000 pursued arbitration each year. In a nation with hundreds of millions of consumer financial contracts, these minuscule numbers demonstrate that mandatory arbitration's net practical effect is to eliminate consumer utilization of this flawed venue, even when millions of aggrieved consumers have lost many millions of dollars, but each individual consumer's loss is a modest amount of money.

Mandatory arbitration clauses eliminate incentives for financial institutions to curb behavior that is unfair or abusive. These corporations no longer face a risk of losing a major consumer class action case in court, regardless of the impropriety of their conduct. Risk aversion is an element to proper corporate conduct. Freed from any exposure to facing one's victims in court, forced arbitration unleashes the worst instincts that exist within a corporate culture that is driven by maximizing profits and bloating executive compensation.

Class actions are a critical vehicle to address widespread wrongdoing.

Class actions allow consumers that have experienced relatively small harm to band together and find an attorney, without spending the resources needed to bring a case individually. Class actions also allow courts to order the wrongdoer to repay all of its victims. Class actions are particularly important for low-income and vulnerable consumers, who may not realize that they have been the victim of unlawful predatory practices. The public nature of class actions provides an important deterrent effect against wrongdoing.

Two pre-*Concepcion* California cases demonstrate the power of class action litigation to curb corporate misbehavior:

- In 2010, in ***Gutierrez v. Wells Fargo Bank***, a class action case challenged Wells Fargo for its practice of manipulating the order in which it processed transactions so as to maximize revenue from overdraft fees. A judge found that the bank not only failed to adequately disclose its practices but in fact misrepresented how transactions were processed in its account agreements and marketing materials. As a result, Wells Fargo was ordered to pay $203 million in restitution to customers who were illegally overcharged and was prohibited from continuing its practice. No individuals were fraudulently charged enough to merit the expense of litigation, but by acting as a class the group was able to bring an end to a practice that was unjustly enriching Wells Fargo at the expense of many California consumers. Under *Concepcion*, consumer access to civil justice would have been eliminated and Wells Fargo would have been immunized for unjustly enriching itself in excess of two hundred million dollars.

- Also in 2010, a settlement was reached before the case went to trial in ***NAACP v. Wells Fargo Bank.*** This California class action did not seek monetary damages but rather aimed to change Wells Fargo's predatory lending practices. The banking giant had repeatedly steered African-American borrowers to higher-interest subprime mortgages while giving better deals to white borrowers of similar means. As a result of the lawsuit, Wells Fargo agreed to change its practices, open its books to regular audits, and provide financial literacy education to underserved communities. A contract clause preventing class actions and mandating arbitration would have kept the NAACP from being able to demonstrate the scope of the misbehavior and would have kept it from being able to use the power of the class to bring change.

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The proposed rule is strong, but it should be improved.

- **The CFPB should prohibit forced individual arbitration.** Forced arbitration is a problem in individual cases as well as class actions. Often times, individual arbitration will be confidential, and the decision will have no binding, precedential effect on the company. Wrongs are not redressed, and the company is able to continue violating a practice or the law.

- **Companies should report on *all* uses of forced arbitration, not just cases that result in an arbitration proceeding**. Consumers are often forced to dismiss their case or settle on weak terms after the court compels arbitration. The CFPB should have data on all instances in which a forced arbitration clause resulted in a denial of justice.

- **All companies supervised by the CFPB should disclose their arbitration clauses,** so the CFPB can understand the full impact of these clauses and arbitration practices. Some clauses may be so punitive that they even deter consumers from filing lawsuits.

- **Credit cards and bank accounts should be subject to the rule if the agreement is amended after the effective date**. Consumers may have a credit card or bank account for decades – even their entire life. Yet banks claim the unilateral right to amend the contract at any time, including raising the price. Any agreement that is amended should be covered in order to prevent companies from avoiding the rule for decades.

- **Credit reporting, credit repair, lead generators, and personal finance apps should be fully covered**. The credit bureaus are the top subject of CFPB complaints, and much information furnished to them is inaccurate. Credit repair scams are widespread. Lead generators pose numerous problems and should be covered not only in the credit area.

Consumers are exposed to data breaches and unauthorized charges when personal finance apps access their sensitive bank and credit account data. These products are partially left out of the rule but need the rule's protection because they can cause consumer harm.

Thank you for your efforts to protect consumers and for the opportunity to submit these comments.

Sincerely,

Richard Holober

Richard Holober
Executive Director