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August 22, 2016

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

Submitted Electronically via Regulations.gov

Re: Comments of the States of West Virginia, Arkansas, Michigan, Nevada, Oklahoma, South Carolina, and Texas on the proposed rule entitled *Arbitration Agreements*, 81 Fed. Reg. 32,830 (May 24, 2016), Concerning Arbitration Agreements in Consumer Financial Products and Services Contracts (Docket No. CFPB-2016-0020)

Dear Ms. Jackson:

The undersigned States submit the following comments regarding the Consumer Financial Protection Bureau's ("CFPB") proposed regulations governing arbitration agreements within the consumer financial products and services market, Arbitration Agreements, 81 Fed. Reg. 32,830 (May 24, 2016) (the "Proposal"). As we explain below, the Proposal exceeds the CFPB's statutory authority and fails to advance consumer protection or the broader public interest. The Proposal should be withdrawn.

BACKGROUND

As you know, Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") instructs CFPB to study pre-dispute arbitration provisions, report its findings to Congress, and determine whether to conduct a rulemaking. *See* 12 U.S.C. § 5518(a)–(b). The statute expressly limits the authority of CFPB to regulate pre-dispute arbitration clauses. CFPB may pursue rulemaking only if it is "in the public interest and for the protection of consumers" and the "[f]indings in such rule shall be consistent with the [Arbitration Study]." 12 U.S.C. § 5518(b). In other words, the data and results of the Arbitration Study must support CFPB's decision to pursue rulemaking and the ultimate findings of any rule proposed.

In March 2015, CFPB submitted to Congress the results of its Arbitration Study,[1] which drew numerous questionable conclusions. Despite finding that the modest cost and relatively expeditious pace of arbitration benefits consumers, CFPB concluded that pre-dispute arbitration clauses reduce consumer welfare. CFPB further concluded that class actions provide a more effective means for consumers to challenge companies' potentially harmful behaviors than arbitration.

Based on these conclusions, CFPB determined that rulemaking was appropriate and released the Proposal—a 377-page notice of proposed rulemaking. CFPB proposes two limitations on pre-dispute arbitration. The Proposal would prohibit companies who provide certain consumer financial products and services ("companies" or "providers") from including mandatory arbitration clauses in consumer agreements and would require providers to insert language into their arbitration agreements reflecting this limitation. And, it would require providers to submit records from arbitration proceedings to CFPB.

DISCUSSION

For at least two reasons, CFPB's Proposal fails to meet the statutory mandate that it be "consistent with" the Arbitration Study and "in the public interest and for the protection of consumers" and should be withdrawn immediately. *First*, the data in the Arbitration Study are not consistent with CFPB's findings in the Proposal. Specifically, the data do not support the conclusion that arbitration clauses reduce consumer welfare and that class actions provide a more effective means of securing significant consumer relief. Nor are the data consistent with the Proposal's conclusion that a blanket ban of pre-dispute arbitration best serves consumers. 81 Fed. Reg. 32,858. In fact, much of the data CFPB cites from the Arbitration Study are either inconclusive or actually support the opposite conclusion—that arbitration, and not litigation, benefits consumers.

Second, the Proposal does not advance the public interest and the protection of consumers. CFPB's analysis of the "public interest" is flawed, because it completely ignores the public's interest in liberty of contract, is likely to result in a *de facto* ban on an efficient and simple dispute resolution process for consumers, and fails to recognize that arbitration helps to prevent or reduce backlogs in state and federal court dockets. *See* 81 Fed. Reg. 32,853–54. In addition, the CFPB's proposed understanding of the "protection of consumers" is incomplete, because it excludes "consideration of other benefits or costs or more general or systemic concerns with respect to the functioning of markets for consumer financial products or services or the broader economy." 81 Fed. Reg. 32,854. This definition does not capture all the interests of consumers within the financial marketplace, including the interests of consumers in an unencumbered financial market with firms free to compete for their business.

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[1] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015*, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf ["Arbitration Study"].

I. THE ARBITRATION STUDY DOES NOT SUPPORT THE FINDINGS AND CONCLUSIONS OF THE PROPOSAL.

A. The data in CFPB's Arbitration Study do not support CFPB's conclusion in the Proposal that class action litigation produces superior results for consumers than does arbitration. *See* 81 Fed. Reg. 32,855. To reach this conclusion, CFPB compared the overall individual recovery in arbitration resolved on the merits in cases from 2010 – 2012 with overall class settlement recovery in cases from 2008 – 2012. The Arbitration Study reported aggregated data showing that more than 11 million consumer class members received $1.1 billion in settlement compensation,[2] as compared to a total recovery of $172,433 for 32 consumers whose arbitral claims resulted in a final award on the merits.[3] Based on this data, the Proposal concludes that "precluding providers from blocking consumer class actions . . . would better enable consumers . . . [to] obtain redress." 81 Fed. Reg. 32,861. But CFPB ignores that under its own calculations, the average arbitral result gave consumers substantially more relief ($5,389),[4] 81 Fed. Reg. 32,855, than the average class action result (approximately $32), *see* 81 Fed. Reg. 32,849 n.305, 32,858 n.376.[5] And it also ignores that this data is woefully incomplete; the class action numbers represent only the 60% of settlements (251 out of 419) where CFPB had enough data to calculate compensation,[6] and the arbitration numbers reflect only the 20.3% of consumers (32 out of 158) where CFPB had enough data to calculate the final award on the merits.[7]

In addition, the cross-over comparison that CFPB makes—contrasting arbitration awards on the *merits* with class action *settlements*—is a highly misleading comparison of apples to oranges. A more proper comparison would have contrasted arbitration awards on the merits with class action awards on the merits, or arbitration settlements with class action settlements. As two scholars note in their critique of the Arbitration Study, "[h]ad the CFPB made a proper . . . data comparison, it would have compared consumer recovery in successful consumer arbitrations not to class action settlements but to the 2% of consumer class actions in which consumers got an individual or classwide judgment."[8] But what CFPB did—comparing merits awards for arbitration with settlements for class actions—undervalues consumer recovery in arbitration by leaving out the recoveries in the strongest claims. Only 32.2% of the 1,847 arbitrations reviewed in Arbitration Study ended with an arbitral award on the merits, whereas 57.4% were known or likely to have settled. [9] The Study did not have data on the settlement awards in that 57%, but it

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[2] Arbitration Study, § 8.1, at 3–5.
[3] *Id.* § 5.6.6, at 41.
[4] *Id.*
[5] The Proposal cites to Arbitration Study, § 8 at 27, which does not include any calculation of the average recovery for class action awards and notes that "[s]ince the publication of the Study, some stakeholders have reported on this $32 figure." 81 Fed. Reg. 32,849 n.305 (citing Todd Zywicki & Jason Johnston , *A Ban that Will Only Help Class Action Lawyers*, Mercatus Ctr., Geo. Mason Univ. blog (Mar. 18, 2016), http://mercatus.org/expert_commentary/ban-will-only-help-class-action-lawyers). The Bureau confirmed that "this $32-per-class-member recovery figure is a reasonable estimate." 81 Fed. Reg. 32,849 n.305.
[6] Arbitration Study, § 8.1, at 4.
[7] *Id.* § 5.2.2, at 13, § 5.6.6, at 41.
[8] Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique*, 50, Mercatus Working Paper (Aug. 2015), http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf ["Critique"] (citing Arbitration Study, § 6.6.1, at 39).
[9] Arbitration Study, § 5.2.1 at 9, § 5.2.2, at 11, § 5.6, at 32–33 (figure 1).

is reasonable to assume that they were settled because they were generally stronger claims.[10] In fact, the Arbitration Study acknowledged that provider strategy of agreeing to settle especially strong consumer claims might explain the low amount of arbitral awards.[11]

Fundamentally, the problem is that CFPB forced its preferred conclusion from an incomplete dataset. CFPB compared class settlement to arbitral merits awards because that was the data it had. Every single class action case reviewed in the Arbitration Study settled,[12] and CFPB did not have access to data on any arbitral settlements.[13]

In fact, CFPB's Arbitration Study in many ways supports the conclusion that arbitration has significant, demonstrable benefits over litigation, including class action litigation. The Arbitration Study showed that arbitration is simple, less expensive, and more procedurally flexible than litigation.[14] Arbitration typically requires consumers to pay only a low filing fee ($200 for the service considered in the Study), making it an inexpensive process to initiate.[15] Arbitrations also resolve more quickly than litigation[16] and do not require counsel,[17] which further helps to keep costs down. And even if lawyers are involved, the individual client retains more control over the direction of the case, as less technical knowledge is required to understand the procedure.[18] For example, while filing a lawsuit includes complex pleading standards that can result in dismissal with prejudice of a claim, arbitrations require only a "demand" for arbitration, which includes simple and basic information.[19] Arbitrations also take place in locations convenient to the consumers.[20] And at the end of the day consumers are far more likely to obtain a decision on the merits and receive more meaningful relief, in part because arbitration clauses rarely place limits on a consumers' recovery.[21]

These findings are unsurprising. The long-standing view of Congress and the Supreme Court is that arbitration benefits consumers. *See, e.g.*, *DirectTv, Inc. v. Imburgia*, 136 S. Ct. 463

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[10] *See id*,, §§ 5.6.2–5.6.3, at 34.
[11] *Id.*, § 5.1, at 6.
[12] *See id.*, § 1.4.4, at 13–14.
[13] *See id.*, §§ 5.6.2–5.6.3, at 34–35.
[14] *See generally id.*, § 4.
[15] *Id.*, § 2.5.10 at 58 n.126, § 4.3, at 11.
[16] *See id.*, § 5.7.3, at 71–72; Critique, at 25.
[17] *See, e.g.*, Arbitration Study, § 4.3 at 11, §5.7.5 at 75 n.128; Critique, at 25–26.
[18] *See, e.g.*, Arbitration Study, § 4.1, at 6–7 & n.21 (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (describing "informality" as "the principal advantage of arbitration"); *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (stating that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985))), § 4.2, at 8–9 (discussing the process of initiating a lawsuit versus initiating an arbitration), § 4.4, at 13 ("Arbitration rules are more flexible than many courts about the identity of any party representative.").
[19] *Id.*, § 4.2, at 8–9.
[20] *Id.*, § 5.7.2, at 70–71
[21] Critique, at 25–27 (reviewing data from Arbitration Study and concluding that "arbitration seems to generate *comparable or even slightly better results* for individual claimants than do individual consumer lawsuits"); *see also* Letter from Nessa Feddis, Senior Vice President & Deputy Chief Counsel, Am. Bankers Ass'n, Steven I. Zeisel, Exec. Vice President & Gen. Counsel, & K. Richard Foster, Senior Vice President & Senior Counsel for Regulatory and Legal Affairs, Financial Servs. Roundtable, to Richard Cordray, Director, CFPB, at 3 (July 13, 2015), http://op.bna.com.s3.amazonaws.com/bar.nsf/r%3FOpen%3djbar-9ydsbc.

(2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). The Supreme Court has described the Federal Arbitration Act of 1925 as Congress expressly adopting "a national policy favoring arbitration" and a "liberal federal policy favoring arbitration agreements." *See, e.g.*, *Concepcion*, 563 U.S. at 346 (brackets and citations omitted). And the Supreme Court has time and again touted arbitration as a quick, efficient, and inexpensive means of dispute resolution for consumers. *See, e.g.*, *Concepcion*, 563 U.S. at 348 (in arbitration "parties forgo the procedural rigor and appellate review of the courts" and receive the benefits of "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (stating that "[a] prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 633 (1985)); *see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (discussing the numerous benefits of arbitration over litigation, including "speed and economy," cost savings, greater privacy, and "simplicity"); *Dunmire v. Schneider*, 481 F.3d 465, 467 (4th Cir. 2007).

B. A second mismatch between the Proposal and the Arbitration Study's data is found in CFPB's conclusion that individual dispute resolution—either in arbitration or litigation—does not sufficiently serve consumers. 81 Fed. Reg. 32,861. In the Proposal, CFPB asserts that class action options must be available for consumers to seek proper redress. 81 Fed. Reg. 32,857. As support, CFPB points to data reporting that a small number of consumers pursued individual claims in arbitration or litigation. 81 Fed. Reg. 32,857. But that data alone does not indicate that consumers find individual claims to be an insufficient mechanism for relief. The critical question is why consumers did not choose to file, which the Arbitration Study did not address.[22]

CFPB speculates that there are two reasons for the dearth in individual arbitration claims or lawsuits. Specifically, such individual actions do not occur because either: 1) the harm imposed on consumers by providers is going undetected; or 2) consumers think their claims are too small to be worthwhile.[23] 81 Fed. Reg. 32,856. But these theories are mere conjecture without supporting data from the Arbitration Study.

In fact, one can draw various other plausible conclusions from the same data, including that the data shows that consumers simply prefer recourse other than formal dispute resolution through arbitration or litigation. The Arbitration Study concluded that "[c]onsumers are very unlikely to consider bringing formal claims" even when they know that they have been wronged.[24] For example, when confronted with a hypothetical scenario where they were inappropriately assessed credit card fees, 57.2% of consumers said that they would discontinue their cards.[25] A mere 1.4% of respondents said they would seek legal advice and a miniscule

[22] *See* Arbitration Study, § 1.4.2, at 11.
[23] Consumer Fin. Prot. Bureau, Small Business Advisory Review Panel For Potential Rulemaking On Arbitration Agreements (Oct. 7, 2015), at 14, http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf
[24] Arbitration Study, § 3.1, at 3.
[25] *Id.*

0.7% said they would consider legal proceedings.[26] This data suggests that the problem is not the detection of harm, because even when consumers are aware of the harm, they vastly prefer a market solution (by taking their business elsewhere) over legal action. And while it is possible that one reason for this preference is that consumers think their claims are not worth the cost of formal dispute resolution, another possible reason is that consumers believe that a market solution is more direct and will be more effective. The data do not tell us whether one or the other (or yet another reason) is more prevalent, and CFPB is wrong to assume without more evidence that its preferred reason is the right one.

Another plausible conclusion that could be taken from the data is that consumers prefer to pursue internal redress options, such as bringing a complaint directly to their providers, instead of litigation or arbitration. The Proposal briefly considered this argument before rejecting it as not "persuasive," because "many consumers may not be aware that a company is behaving in a particular way." 81 Fed. Reg. 32,857. But again, this is mere speculation that does not necessarily follow from the data. All that the data shows is that a small number of consumers pursued formal dispute resolution. That says nothing about why the numbers are low, nor does it speak to whether consumers are generally aware of harms caused by providers. And even if the data showed that many consumers are unaware of harms they have suffered, that would say nothing definitive about how consumers would prefer to address those harms. It is certainly plausible that consumers would generally prefer internal dispute resolution that could result in an immediate refund over formal arbitration or litigation, which will require at least some additional time and expense, and which depends on the uncertain judgment of a third party judge or arbitrator.

C. Finally, there is also a data problem with the Proposal's conclusion that its ban on pre-dispute arbitration clauses will not raise consumer prices.[27] 81 Fed. Reg. 32,911–12. The Arbitration Study concedes that "[t]here is little empirical evidence to support either position [*i.e.*, that arbitration provisions do or do not result in lower prices for consumers]."[28] By its own admission, CFPB has no way of knowing how consumer pricing will be affected by a pre-dispute arbitration ban.[29] As one commenter said, "the Arbitration Study established that proving a correlation between arbitration clauses and pricing is near impossible."[30]

In fact, data and findings in the Arbitration Study actually suggest that a ban on pre-dispute arbitration *will* increase consumer prices by increasing costs to providers. The Arbitration Study conceded that arbitration unquestionably saves providers money both by reducing courts costs and attorneys' fees inherent in extensive discovery litigation, and by

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[26] *Id.*
[27] Richard Cordray, Director, Consumer Financial Protection Bureau, Prepared Remarks at the Arbitration Field Hearing (Oct. 7, 2015), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/.
[28] Arbitration Study, § 10, at 5.
[29] *Id.*, § 10, at 3–4.
[30] Brenna A. Sheffield, *Pre-Dispute Mandatory Arbitration Clauses in Consumer Financial Products: The CFPB's Proposed Regulation and Its Consistency with the Arbitration Study*, 20 N.C. Banking Inst. 219, 234 (2016) (citing Arbitration Study, § 10, at 2).

limiting providers' exposure to aggregated claims.[31] Litigation imposes substantial transaction costs on businesses, while arbitration offers a less-expensive dispute resolution forum. As one commenter has said, while "a company that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations – costs that the company does not incur in connection with judicial litigation. . . . [c]ompanies are willing to incur these costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court."[32] A ban on pre-dispute arbitration therefore would increase costs to businesses, and basic economic principles instruct that some portion of those increased costs will pass along to consumers in the form of price increases.[33]

II. THE PROPOSAL IS NOT "IN THE PUBLIC INTEREST AND FOR THE PROTECTION OF CONSUMERS"

A. CFPB's analysis of the "public interest" is flawed, because it fails to take into account the public's interest in liberty of contract. 81 Fed. Reg. 32,853–54. The Proposal defines the public interest as "consider[ing] the entire range of impacts on consumers and impacts on other elements of the public . . . [including] impacts on consumers such as effects on pricing, accessibility, and the availability of innovative products, as well as impacts on providers, markets, the rule of law and accountability, and other general systemic considerations." 81 Fed. Reg. 32,853. But CFPB does not consider the benefit to the public of empowering parties to enter into the contracts they choose, including contracts that agree to binding and mandatory arbitration. In general, such economic freedom correlates positively with many measurements of societal good, including increased prosperity, life expectancies, and political freedom.[34]

The Proposal is also contrary to the public interest because it is likely to result in a *de facto* ban on an efficient and simple dispute resolution process for consumers. Providers have already stated that they will abandon arbitration clauses if class action waivers are prohibited.[35] Yet as noted above, there is overwhelming evidence, including in the Arbitration Study, that arbitration provides consumers a quick, efficient, and inexpensive means of dispute resolution.[36] *See, e.g.*, *Concepcion*, 563 U.S. at 348; *Kyocera Corp., Inc.*, 341 F.3d at 998; *see also Dunmire*, 481 F.3d at 467.

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[31] Arbitration Study, § 10, at 2–3.

[32] Letter from David Hirschmann & Lisa A. Rickard, U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform to Consumer Financial Protection Bureau, 41 (Dec. 11, 2013), http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf (last visited Aug. 18, 2016).

[33] *See* Stephen J. Ware, The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration Of Class Actions and Arbitration Fees, 5 J. Am. Arbitration 251, 254–57 (2006) ("[I]t is inconsistent with basic economics to question the existence of the price reduction" that gets passed onto consumers when companies can include arbitration agreements in contracts.)

[34] *See* The 2016 Index of Economic Freedom, The Heritage Foundation, available at http://www.heritage.org/index/about.

[35] Alan Kaplinsky, Our Thoughts on Director Cordray's Comments to the *CFPB* Consumer Advisory Board, Ballard Spahr Consumer Fin. Servs. Group: CFPB Monitor (Oct. 22, 2015), https://www.cfpbmonitor.com/2015/10/22/our-thoughts-on-director-cordrays-arbitration-comments-to-the-cfpbs-consumer-advisory-board/.

[36] Arbitration Study, § 4.3, at 10–12, § 4.4, at 13–14.

Finally, arbitration clauses help to keep state and federal court dockets manageable. Many courts faced with backlogs are already channeling disputes to alternative dispute resolution,[37] arbitration clauses are another way to do so. In contrast, class action suits, in particular, frequently consume a large amount of time from the court adjudicating them and then proceed to settle regardless, rather than proceeding to a jury verdict.[38] Compared to ordinary arbitrations, class arbitrations and especially class actions are "slower, more costly, and more likely to generate procedural morass." *See Concepcion*, 563 U.S. at 348. This slows down redress not only for the parties involved, but for all parties in other controversies seeking resolution by the same court.

B. In addition, the CFPB's proposed understanding of the "protection of consumers" is incomplete. 81 Fed. Reg. 32,854 ("'for the protection of consumers' should be read . . . narrowly"). The Proposal understands this clause to encompass only "the level of compliance [by a provider] with relevant laws" and "consumers' ability to obtain redress or relief [against providers]." 81 Fed. Reg. 32,854. The Proposal specifically excludes "consideration of other benefits or costs or more general or systemic concerns with respect to the functioning of markets for consumer financial products or services or the broader economy." 81 Fed. Reg. 32,854. This definition does not capture all the interests of consumers within the financial marketplace.

Consumer interests include access to a vibrant and flourishing financial market, with firms free to compete for their business. Consumers in a market with increased competition have greater bargaining power relative to that of any individual firm. That competition means lower prices or better products. In the financial marketplace, that can mean better interest rates for those looking to save or borrow.

The paternalistic approach of CFPB to protect consumers by banning certain contract options harms consumers, by limiting their freedom to contract and their ability to participate in an unfettered marketplace. CFPB relies on the assumption that consumers do not have a choice of whether to enter contracts with arbitration clauses. But arbitration clauses are not universally used in consumer contracts. In fact, "[m]ost consumer contracts do not include arbitration clauses, and even most credit card issuers do not, and never have, included arbitration clauses in their cardholder agreements."[39] Data from the Federal Reserve, with which credit card issuers are required to file their credit card agreements, show that as of 2009, only 17 percent of credit card issuers used arbitration clauses in their agreements.[40] And as the Arbitration Study showed, most consumers in CFPB's survey said that if they were dissatisfied, they would simply cancel their credit card or bank account and walk across the street to another provider.[41]

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[37] *See, e.g.*, Federal Judicial Center, Alternative Dispute Resolution in the U.S. District Courts (2014), http://www2.fjc.gov/sites/default/files/2015/Alternative-Dispute-Resolution-English-2014-08-07.pdf.
[38] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. of Empirical Legal Studies 811, 812–13 (2010).
[39] Arbitration: Is it Fair When Forced? Hearing Before the S. Comm. on the Judiciary, 112th Cong. (2011) (statement of Christopher R. Drafhozal at 2), http://www.judiciary.senate.gov/imo/media/doc/11-10-13DrahozalTestimony.pdf.
[40] *Id.* at 3.
[41] Arbitration Study, § 3.1, at 3–4.

CFPB argues that group claims, as opposed to individual claims, must be brought in order to adequately deter bad behavior by large firms. 81 Fed. Reg. 32,855. But this conclusion fails to recognize other mechanisms that protect consumers. For example, consumer protection laws—which every state has—are designed to prevent businesses that engage in fraud or unfair and deceptive trade practices from taking advantage of consumers. The risk of treble damages under such laws, *see, e.g.*, N.J. Stat. Ann. § 56:8-19 (West), is a powerful deterrent against bad behavior. In addition, market competition will reward firms who deal fairly with consumers while punishing those who do not. And with respect to arbitration agreements in particular, they may still be rejected "upon such grounds as exist at law or in equity for the revocation of any contract," including fraud and unconscionability. *Concepcion*, 563 U.S. at 339. Those grounds can still be used to protect consumers, so long as they are not applied in a way that interferes with the "fundamental attributes of arbitration." *Id.* at 344.

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In sum, the Proposal fails to meet the statutory mandate and therefore is unlawful. We appreciate the opportunity to submit these comments and request that the Proposal be withdrawn.

Sincerely,

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