August 22, 2016

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

RE: Docket No. CFPB-2016-0020
Arbitration Agreements

Dear Madam:

Pursuant to notice published in the Federal Register of May 24, 2016, the Texas Bankers Association takes this opportunity to submit the following comments on the proposed rule limiting the use of arbitration agreements which specify that consumer disputes may not be resolved by means of class action litigation. The proposed rule would also require the filing of arbitration records with the Consumer Financial Protection Bureau (CFPB).

The Texas Bankers Association is the oldest and largest state banking association in the country, and has represented the banking industry in Texas since 1885. There are approximately 472 bank and thrift institutions headquartered in the State and another 56 financial institutions headquartered in other states that conduct business in Texas.

As required by Section 1028(a) of the Dodd-Frank Act (12 U.S.C. § 5518), the CFPB conducted a study on arbitration which by its own admission was "empirical, not evaluative."[1] This is certainly a useful exercise and contributory to the body of statistical information in this field, but a rulemaking initiative by an administrative agency requires a reasoned evaluation of the empirical record. 5 U.S.C. § 706(2)(E).

The seminal application of this specific requirement of the Administrative Procedure Act (APA) by the Supreme Court is that a federal agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). See also, *Chamber of Commerce v. SEC*, 412 F.3d 133, 140 (D.C. Cir. 2005). As more fully developed below, neither the CFPB Arbitration Study nor any other aspect of the administrative record in this instance sets forth a rational connection between the empirical data in the study and the proposed ban on pre-dispute arbitration agreements as an alternative to class action litigation.

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[1] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, p. 2. (March, 2015).

Absence of Meaningful Consumer Recovery via Class Action Litigation

As to the CFPB's own study, the results in terms of individual consumer recovery emanating from class action litigation can only be characterized as being either nonexistent or meaningless. The specific findings were as follows:

- There were no benefits to the consumer class in 87 percent of resolved class actions;
- Approximately 96 percent of class members received no benefit in the less than 13 percent of cases which did result in a class settlement; and,
- The average individual settlement payment when actually (and rarely) made was $32.

The CFPB's findings are consistent with other studies also referenced in the administrative record, e.g., Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, which found the following payout results in a representative survey of cases:

- Class members receive rights in buying club; attorney fees up to $1 million;
- Class members receive $20.42; attorney fees $21 million;
- Class members receive right to request $5 refund; attorney fees $1.3 million;
- Class members receive conference invitations; attorney fees $1.4 million; and,
- Class members receive nothing; attorney fees $2.3 million.

With respect to participation rates, the Mayer Brown study found these representative samples:

- Fair Credit Reporting Act case: less than one percent of the class participated in the settlement;
- Software case: 0.17 percent participation in the settlement;
- Product liability cases: 0.16 and 0.28 percent of the total class
- Credit-life insurance case: response rate of 0.1 percent; and,
- Credit card case: fewer than 0.06 percent.

Notwithstanding both the CFPB Study as well as other comparable empirical research indicating that consumer class actions have a 90 percent failure rate with the remaining cases producing individual consumer recovery so miniscule that less than one percent of the settlement class believes it is worth filing a claim, the rulemaking proposal makes the preliminary conclusion that "class actions provide a more effective means of securing relief for large numbers of consumers." 81 Fed. Reg. 32855 (May 24, 2016). We must respectfully suggest that no court could reasonably find a "rational connection" between the foregoing facts and the recited supposition.

Inadequate Legal Authority

The Federal Arbitration Act (FAA) provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, *or an agreement in writing* *to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable.*" 9 U.S.C. § 2 (emphasis added).

This federal statutory scheme has consistently been interpreted to mean that there is a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Among the numerous other Supreme Court cases making the point that the FAA has established a "national policy favoring arbitration" are *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) noting an "emphatic federal policy in favor of arbitral dispute resolution."

The Supreme Court has explained the rationale for this position in terms particularly apt to this rulemaking: "[A]rbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. *See, e. g.*, H.R. Rep. No. 97-542, p. 13 (1982); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) ("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…").

This long-standing judicial deference to the FAA has not been altered in the post-Dodd-Frank era as, for example, when the Supreme Court recently reiterated that courts must "rigorously enforce" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court reached the same conclusion on the precise topic under discussion herein: The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity," and not as a plaintiff or class member in any purported class or representative proceeding. *Id*. at 334.

It is also well established that the FAA's mandate, as described above, prevails unless it has been "overridden by a contrary congressional command." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987). That is the case even when the claims at issue are federal statutory claims. *Id.* Thus, it would follow that the same would be true for an agency rulemaking. In order to "defeat application of the Arbitration Act," the Court noted, it must be demonstrated "that Congress intended to make an exception to the Arbitration Act." *Id.* at 227.

Section 1028 of the Dodd-Frank Act, which serves as the underlying basis for this proposed rule by the CFPB, contains no specific or implicit language prohibiting the use of class action waivers in arbitration agreements. In the controlling context of *Shearson*, there is simply no "contrary Congressional command" to override the federal policy favoring arbitration agreements. In fact, Section 1028 of the Dodd-Frank Act makes no specific reference whatsoever to class action litigation.

The Dodd-Frank Act contains two arbitration provisions of the type allowed by *Shearson*. The first of these is Section 1414(a) which prohibited the use of arbitration agreements in certain mortgage contracts and does so through the following specific language:

ARBITRATION.— (1) IN GENERAL.—No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction. (Codified at 15 U.S.C. §1639c.)

The second of these is 922 of the Dodd-Frank Act which invalidated the use of arbitration agreements in connection with certain whistleblower proceedings as follows:

(e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—

(1) WAIVER OF RIGHTS AND REMEDIES.—The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.

(2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section. (Codified at 12 U.S.C. § 1036(h)(1)).

It is a well-established principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another, it is presumed that Congress acted intentionally and purposely to accomplish disparate results.[2] For example, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court properly drew a negative inference from "the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Id.* at 578. Likewise, in this instance where Sections 1404 and 922 of the Dodd-Frank Act included precise arbitration prohibitions, the absence of such a proscription in Section 1028 can only lead to the conclusion that Section 1028 failed to convey sufficient authority to override the statutory precedence favoring arbitration over litigation. *See Concepcion* at 344-45.

Since, as noted, it requires a "contrary congressional command" under *Shearson* when the issue is potentially conflicting federal statutory claims, it necessarily follows that an agency rulemaking with no specific statutory basis cannot override the FAA.

For this reason, the proposed rule stands in violation of a second explicit provision of the APA, namely that an agency action may not be "in excess of statutory jurisdiction, authority, or limitation." 5 U.S.C. § 706(2)(C).

<u>Ill-Conceived Solution in Search of Another Venue</u>

The commentary to the proposed rule provides historical background with respect to both class action and arbitration procedures including recent developments from the standpoints of the Congress and federal courts. 81 Fed. Reg. 32833-39 (May 24, 2016). Unfortunately, the CFPB

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[2] Congressional Research Service: *Statutory Interpretation: General Principles and Recent Trends*, p. 15 (December 19, 2011).

draws the wrong conclusion from both these important perspectives particularly as it relates to the views on the efficacy of class action litigation.

As correctly cited in the rule commentary, the last two actions by Congress in the class action field have been to narrow the scope of this procedural judicial remedy. The first of these was in 1995 when Congress enacted the Private Securities Litigation Reform Act (Pub. L. 104-67), which sought to reduce defense costs, and the second occurred in 2005 in the form of the Class Action Fairness Act (Pub. L. 109-2) which was aimed specifically at addressing widespread abuses in state court practices. *Id.*, at 32834.[3]

In the face of this 20-year pattern of Congressional activity to address the inadequacies of class action litigation, the CFPB nevertheless proposes a rule doing the opposite by expanding the role of class action litigation in the financial services marketplace.

In terms of judicial proceedings, the message from the Supreme Court, as cited *supra*, is likewise the opposite direction of the proposed rule. In fact, were it to be adopted, the proposed rule would constitute a specific reversal of the Supreme Court decision in *Concepcion* which upheld the validity and desirability of class action waivers in arbitration agreements.

Rather than acting consistently with the other branches of government, the CFPB and other regulatory agencies appear at the present time to be in search of more venues to promote a judicial remedy which, by acknowledgement of its own study and all other empirical data, evidences an individual claim ratio of less than one percent. Recent examples of this include:

- Center for Medicare and Medicaid Services; (80 Fed. Reg. 42,168 (July 16, 2015));
- U.S. Department of Education; (81 Fed. Reg. 39,330 (June 16, 2016)); and
- U.S. Department of Labor; (81 Fed. Reg. 21,089 (Apr. 8, 2016)).

The net effect of this extralegal pattern of behavior is to empower the class action bar notwithstanding its demonstrated record of venue manipulation, excessive fees and little or no individual recovery to persons alleged to have been harmed. As well summarized in a very recent study by Professor Joanna Shepherd of the Emory University School of Law:

> 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 actions. 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. Emory Legal Studies Research Paper No. 16-402 (February 1, 2016).

Conclusion

There is a serious disconnect between the proposed rule and the administrative record compiled to date. With respect to individual consumer benefits, the CFPB study actually

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[3] Currently before the Congress is another bill, H.R. 1927, the Fairness in Class Action Litigation which passed the House in early 2016.

replicates the empirical data of all other prior works finding that not only are individual consumers unrewarded by class litigation, they are better served by taking their disputes through the arbitration process, not to mention the often-used resolution of customer problems through direct interface with their financial service provider.

For this lack of an adequate administrative record and the inability of this fundamental flaw to be remedied by means of the public comment process, the CFPB should withdraw the proposed rule as promptly as feasible. Moreover, any change along the line of the proposed rule requires specific action of Congress contradicting the mandate of the FAA in favor of arbitral resolution.

Sincerely,

J. Eric T. Sandberg, Jr.

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President & CEO