July 24, 2017

VIA ELECTRONIC DELIVERY

The Hon. Pete Sessions
US House of Representatives
Washington, DC 20515

RE: House Joint Resolution 111 CFPB Anti-Arbitration Rule

Dear Chairman Sessions:

On behalf of the Texas Bankers Association (TBA) representing approximately 450 bank and thrift institutions headquartered in the State and another 55 financial institutions headquartered in other states but conducting business in Texas, we are writing in strong support of H.J. Res. 111. This Resolution would overturn the recently adopted CFPB rule prohibiting the use of voluntary arbitration agreements specifying that consumer disputes should be resolved through arbitration proceedings rather than class action litigation. The rule would also require the filing of extensive individual arbitration information with the CFPB.

By its own admission, the CFPB Study underlying this rule-making was not an "evaluative" process.[1] Under well-established principles of federal law, however, any rule-making initiative by an administrative agency requires a reasoned *evaluation* of the empirical record. (5 U.S.C. § 706(2)(E)). As stated in numerous Supreme Court cases, 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."[2]

Neither the CFPB Arbitration Study nor any other aspect of the administrative record in this instance sets forth any rational connection between the arbitration data set forth in the CFPB Arbitration Study and the final rule banning pre-dispute arbitration agreements. In fact, the CFPB's own documentation includes the following findings:

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

In this regard, the CFPB's findings are fully consistent with other analyses included in the administrative record showing the following class action results:

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

[2] E.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

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- Class members receive $20.42; attorney fees $21 million;
- Class members receive right to request $5 refund; attorney fees $1.3 million;
- Class members receives conference invitations; attorney fees $1.4 million;
- Class members receive nothing; attorney fees $2.3 million; and,
- Class members receive rights in buying club; attorney fees up to $1 million.[3]

With respect to participation rates, representative results are equally deficient in terms of actual consumer participation:

- 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.

The CFPB arbitration rule is precisely the type of agency excess for which the Congressional Review Act was designed. Favorable action by Congress on H.J. Res. 111 will preclude the need for tens of thousands of financial firms to spend billions of dollars on an unnecessary and counterproductive regulatory scheme which will almost certainly be overturned by federal court action. There exists a 40-year record of Supreme Court cases establishing an "emphatic federal policy in favor of arbitral dispute resolution."[4] Just in May of this year, the Supreme Court added to these precedents via a 7-1 ruling that overturned a Kentucky decision invalidating an arbitration agreement signed under power of attorney.[5]

The last two actions by Congress in the class action field have also been to narrow the scope of this judicial remedy. The first of these was in 1995 when Congress enacted the *Private Securities Litigation Reform Act* (Pub. L. 104-67) 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.

Rather than acting consistently with the other branches of government to curb abuses and to address the inadequacies of class action litigation, the CFPB acted in the face of its own evidentiary findings to do the opposite by expanding the role of class action litigation in the financial services marketplace.

No valid public policy is served by the CFPB rule and we urge you to vote in favor of this CRA override resolution.

Thank you for taking our view under consideration.

Sincerely,

J. Eric T. Sandberg, Jr.
President/CEO

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[3] Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*.

[4] *Mitsubishi MotorsCorp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631 (1985).

[5] *Kindred Nursing Centers, L.P. v. Clark*, 581 U.S. ___ (2017).