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August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW.,
Washington, D.C. 20552

Re: Arbitration Agreements
(Docket No. CFPB-2016-0020)
Filed electronically at: http://www.regulations.gov

Dear Ms. Jackson:

This letter is submitted on behalf of the Network Branded Prepaid Card Association (the **"NBPCA"**)[1] in response to the Consumer Financial Protection Bureau's (the **"CFPB"**) Notice of Proposed Rulemaking regarding pre-dispute mandatory arbitration agreements, which was published in the Federal Register on May 24, 2016 (the **"Proposed Rule"**).[2] The Proposed Rule would, among other things, prohibit providers of consumer financial products and services from relying on a pre-dispute arbitration agreement to defend a class-action concerning a covered financial product or service. While such a requirement on its face is not an outright ban on the use of arbitration by providers of consumer financial products and services, the NBPCA nevertheless believes that the likely impact of this requirement will be to operate as a de facto ban on arbitration, a process the vast majority of prepaid card providers rely on to resolve customer disputes after the providers have exhausted all other efforts to resolve a complaint. The NBPCA appreciates the opportunity to comment on the Proposed Rule, however, we have significant concerns with the Proposed Rule's likely impact of eliminating the use of arbitration to quickly and efficiently resolve disputes related to consumer financial products and services. The NBPCA believes that the Proposed Rule exceeds the scope of authority granted to the CFPB by Section 1028 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the

[1] The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this rapidly growing payments category. The NBPCA's members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card manufacturers, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.

[2] Federalregister.gov, Arbitration Agreements, May 24, 2016, available at: https://www.federalregister.gov/articles/2016/05/24/2016-10961/arbitration-agreements.

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"Dodd-Frank Act")[3] and that the CFPB's conclusion that the Proposed Rule is in the public interest and necessary for consumer protection have little support in the evidence provided. For these and other reasons detailed in this letter, the NBPCA urges the CFPB to withdraw its Proposed Rule and conduct further study into the arbitration process before moving forward with finalizing regulations prohibiting or limiting the use of pre-dispute arbitration clauses in relation to consumer financial products and services.

A. The CFPB exceeded its statutory authority in issuing the Proposed Rule

The CFPB based its authority to issue the Proposed Rule primarily on Section 1028 of the Dodd-Frank Act.[4] Section 1028 of the Dodd-Frank Act gives the CFPB the authority to issue regulations that would "prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties."[5] Prior to issuing such regulations, Section 1028 requires the CFPB to study the use of arbitration agreements in connection with consumer financial products or services.[6] The CFPB began its study of arbitration agreements in 2012, ultimately releasing the final results in March 2015 (the "Study").[7] Notably, however, the authority given to the CFPB in Section 1028 to prohibit or impose limitations on arbitration in relation to consumer financial products and services is not unfettered. In fact, Section 1028 states that the CFPB may only issue the contemplated regulations if the Study finds that such regulations are "in the public interest and [necessary] for the protection of consumers."[8] Further, Section 1028 also requires that the findings of any regulation "shall be consistent with the study."[9]

While the NBPCA and its members have a number of concerns with the Proposed Rule, our primary concern is that the CFPB has exceeded the authority given, and failed to meet the standard required, by Section 1028 of the Dodd-Frank Act. First, while Section 1028 of the Dodd-Frank Act directs the CFPB to study the use of arbitration agreements in relation to consumer financial products and services, the Study itself seems primarily focused on the results of class actions and the use of class-action waivers. Section 1028 does not direct the CFPB to study class actions or the use of class-action waivers. Indeed, Section 1028 makes no mention of

[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1028.
[4] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1028.
[5] *Id.* at Section 1028(b).
[6] *Id.* at Section 1028(a).
[7] Bureau of Consumer Fin. Prot., *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (2015), available at: http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[8] Section 1028(b).
[9] *Id.*

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class-action waivers at all. Nevertheless, the underlying purpose of the CFPB's Study appears to be laying support for a conclusion that class-action lawsuits achieve better results for consumers than the arbitration process. To reach such a conclusion, one would expect the Study to analyze how the arbitration process and class-action lawsuits operate in the real world and what the relative trade-offs are for consumers between each dispute resolution mechanism. Unfortunately, the Study does not perform this analysis. In fact, the NBPCA does not believe the Study and the CFPB's resulting conclusion that the Proposed Rule was "in the public interest" and necessary "for the protection of consumers" are based on an adequate cost/benefit analysis into the actual benefits the arbitration process affords to consumers and the costs of issuing regulations to limit or prohibit the use of that process. As such, the NBPCA believes the CFPB's findings in its Proposed Rule are questionable and not based on actual evidence that the arbitration process or the use of class-action waivers harms consumers.

Further, to the degree the Study reviews the arbitration process, the CFPB's findings do not actually support the limitations and prohibitions the Proposed Rule seeks to impose. In fact, the findings of the Study actually evidence the many benefits the arbitration process affords consumers that would be lost under the Proposed Rule including that the arbitration process offers consumers a convenient, flexible, inexpensive, and effective means of resolving disputes, particularly when compared with the alternative of a class-action lawsuit. For these reasons, the NBPCA believes the Proposed Rule fails to meet the standard set in Section 1028 and urges the CFPB to withdraw it.

B. The CFPB did not conduct a sufficient cost/benefit analysis in concluding that the Proposed Rule would be in the "public interest" and necessary for the "protection of consumers"

The NBPCA steadfastly believes that, rather than study how the arbitration process works for and benefits consumers in the real world, the CFPB chose to focus its study on class actions and how the class-action process may theoretically benefit consumers. The NBPCA believes that a full analysis of the benefits the arbitration process affords to consumers, and a determination whether restrictions on the process is in fact in the public interest of consumers given those benefits, was a critical and mandatory preliminary step to the issuance of the Proposed Rule. Further, such analysis was particularly important in light of the fact that the increased costs to providers in having to defend class-action lawsuits likely means that arbitration clauses from contracts for covered products and services will disappear as there will be no significant benefit to providers in continuing to also pay for the costs of arbitration proceedings. Thus, the Study's focus on class-action waivers was beyond the scope intended by Congress in promulgating Section 1028. Nevertheless, the NBPCA is also concerned that, even if restrictions on class-action waivers were within the scope of the CFPB's authority, the Study failed to adequately

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balance the actual benefits of the arbitration process against the costs of class-action lawsuits and the likely impacts of the Proposed Rule. Given this, the NBPCA believes that the CFPB could not properly conclude that the Proposed Rule was in the public interest and necessary for the protection of consumers.

1. The CFPB did not sufficiently consider the myriad benefits the arbitration process affords consumers

When compared with other forms of dispute resolution, including class-action lawsuits, the typical arbitration process for consumer financial products and services is less costly and more convenient for consumers. [10] For example, the company providing the product or service that is subject to an arbitration clause typically agrees to pay for the cost of the arbitration, as opposed to class-action litigation where the plaintiffs ultimately bear their own costs. Further, rather than take place in a courtroom potentially on the other side of the country, the arbitration proceedings usually take place in a location convenient to the consumer and, in the case of arbitration proceedings over small amounts, the consumer may choose to conduct the arbitration proceedings telephonically or solely by submissions. Thus, when compared with other forms of dispute resolution, the arbitration process offers consumers a more flexible, more convenient, and comparatively inexpensive means of settling a dispute with a provider of a consumer financial product or service.

Accordingly, the NBPCA believes that, far from limiting a consumer's potential recovery in an action against a provider, the arbitration process actually gives consumers a broad array of potential remedies that may not be available in class-action litigation. This is because the arbitrator may generally award any form of individual relief, including injunctions and presumably punitive damages, rather than merely making a determination and award for actual damages. Thus, the arbitration process allows for enough flexibility to ensure that the consumer does not just receive a remedy, but the best remedy for her particular circumstance.

Further, it should be noted that the arbitration process generally does not preclude a consumer from seeking alternative relief. In fact, consumers who have entered into arbitration agreements featuring class-action waivers still have the option of bringing an action in small claims court in lieu of arbitration. Given the relatively low dollar amounts involved in most claims between consumers and providers of covered financial products and services, the NBPCA believes that consumers would have an effective alternative means of dispute resolution available.

[10] *AT&T Mobility LLC v. Concepcion Et Ux.*, 563 U.S. 333 (2011); Joint Trade Letter to the CFPB's Arbitration Study from American Bankers Association, The Consumer Bankers Association, and the Financial Services Roundtable, dated March 10, 2015.

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In addition to not adequately considering the significant benefits described above, the NBPCA does not believe the Study or the Proposed Rule sufficiently considers how consumer choice privately influences the market making the proposed restrictions unnecessary. For instance, the CFPB did not consider that a consumer's first instinct when involved in a dispute with a provider of a covered product is not to sue, but rather to take their business elsewhere, which in turn impacts the market by encouraging providers to strive for better customer service in resolving disputes with consumers. The NBPCA believes a full evaluation of the role of consumer choice is necessary to determine whether a regulation that effectively forecloses an entire method of dispute resolution is necessary for the protection of consumers.

Finally, the benefits of the arbitration process are not limited to a particular subset of consumers, but are instead broadly applicable regardless of the nature of the consumer class or claim in question. By contrast, class-action lawsuits are only available to consumers who have a "classable" claim that satisfies the numerosity, commonality, typicality, and adequacy requirements contained in Rule 23 of the Federal Rules of Civil Procedure.[11] Thus, not only is the Proposed Rule eliminating a beneficial dispute resolution mechanism, it is doing so in favor of a process that benefits only a very small subset of consumers and not the market as a whole.

For these reasons, the NBPCA does not believe the CFPB conducted adequate analysis into the real world benefits the arbitration process affords consumers prior to making a determination that the Proposed Rule was in the public interest and necessary for consumer protection. The NBPCA believes that substantially more and different evidence would be necessary to conclude that consumers are harmed by arbitration or that they would benefit from its constructive removal as an alternative dispute resolution mechanism.

2. The CFPB did not sufficiently consider the costs that the Proposed Rule will impose on consumers and industry participants

In addition to not adequately considering the substantial benefits the arbitration process affords to consumers, the NBPCA does not believe the CFPB has considered the full costs and ramifications of the Proposed Rule. The NBPCA believes that full consideration of the likely negative consequences of the Proposed Rule should be made prior to moving forward and the NBPCA urges the CFPB to withdraw its Proposed Rule pending such further analysis.

[11] Federal Rules of Civil Procedure, Rule 23 (stating that, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.")

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First and foremost, the most likely impact of the Proposed Rule is that providers of covered products and services will eliminate arbitration as a method of dispute resolution, thereby depriving consumers of the significant benefits offered by the arbitration process detailed above. Arbitration programs impose significant additional costs on providers because, as noted above, providers typically pay all or virtually all of the costs of the arbitration proceeding. Providers are willing to take on these costs because, currently, they do not also have to absorb the enormous litigation costs of defending a class-action lawsuit. Class-action lawsuits are incredibly expensive to both defend and, in most cases, settle. In fact, the cost of defending a determination of class certification alone would be enough to drive many providers out of a particular market or put them out of business altogether. For this reason, arbitration clauses, when paired with class-action waivers, give providers the freedom to operate without the threat that the costs of defending a single class-action lawsuit could drive them out of business. In light of this fact, there is no significant benefit to providers offering arbitration without the incorporation of a class action waiver and providers will simply stop offering the arbitration process as an alternative dispute resolution mechanism altogether. As a result, the Proposed Rule will deprive consumers of the significant benefits of arbitration discussed above.

Further, because providers will be forced to operate in fear of incurring a class-action lawsuit that threatens the very viability of their business, the Proposed Rule will likely cause some providers to limit features, functionality, and kinds of consumer financial products and services that they make available in the marketplace. Thus, the impact of the Proposed Rule will be to stymy innovation and development in this area, ultimately limiting product choice and variety and thereby harming consumers.

Moreover, as noted above, the Proposed Rule will have an especially negative impact on consumers with claims that are not classable and therefore cannot be resolved through class-action litigation. For these consumers, the Proposed Rule will cause them to lose both access to the arbitration process and the benefits it affords while simultaneously replacing that process with one that disadvantages consumers through increased costs and delays in securing a remedy. A substantially large number of these consumers will thus have unremedied claims because they will simply be too costly to pursue in court, which is exactly the public policy reason that arbitration and other alternative dispute resolution mechanisms has been favored over the years. For example, a consumer who disputes a $5.00 fee may have to secure legal counsel which in some instances, depending on the jurisdiction and the experience of the attorney, could cost several hundreds of dollars per hour. Thus, a savvy cost conscious consumer may decide it is not in his/her best interest to bring a legal claim in the first place. A world with abundant class actions and no contractual arbitration provisions thus will leave substantially more consumers without a remedy than the current status quo.

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Further, the NBPCA is also concerned that the CFPB has not considered the negative consequences of its proposed requirement that covered providers using arbitration clauses must submit claims, awards, and other related materials to the CFPB for monitoring and publication on its website. A chief advantage of the arbitration process for the parties involved is the private nature of the proceedings. Not only would this positive feature be lost given this aspect of the Proposed Rule, but, additionally, the NBPCA is concerned that submitting such information to the CFPB for posting on its website could subject consumers to the unnecessary risk of privacy and data security violations. Furthermore, to the extent such a requirement is intended to unveil hidden issues with the arbitration process or covered products and services, the NBPCA believes this aspect of the Proposed Rule is particularly unnecessary given the existence of the CFPB's complaint database, which already provides a platform for consumers to file complaints against providers of covered products or services. The NBPCA notes that the CFPB's monthly complaint snapshot summarizing consumer complaints it receives through the database have not evidenced any significant issues or concerns from consumers relating to the arbitration process and the NBPCA believes this further evidences the fact that consumers are not encountering unfairness when using arbitration.

In addition, the NBPCA does not believe that the CFPB adequately considered the potential costs to providers in complying with the Proposed Rule's requirements to include specific disclosure language in any pre-dispute arbitration agreement they include for covered products or services. The timeline of the Proposed Rule will likely intersect with that of the CFPB's proposed rule governing prepaid accounts published in the Federal Register on December 23, 2014 (the "Prepaid Account Rule").[12] After the CFPB finalizes the Prepaid Account Rule, providers will very likely incur significant expense to update their card packaging and disclosures in order to comply with new regulatory requirements. The NBPCA is concerned that the Proposed Rule's disclosure obligations, even with a proposed exception for certain prepaid cards sold at retail, will force many providers to incur the double expense of having to update their customer disclosures and related materials a second time, possibly even having to pull recently updated products off the shelves on multiple occasions within a relatively short time-period in order to comply with the Proposed Rule.[13]

Finally, the NBPCA does not believe the CFPB considered that the Proposed Rule undermines both the Federal Arbitration Act (the "FAA")[14] and strong federal policies in favor of arbitration when it issued a Proposed Rule that effectively eliminates this alternative dispute

[12] 79 Fed. Reg. 77102 – 77335 (Dec. 23, 2014).
[13] There are many other prepaid products not sold at retail, such as payroll cards, which will encounter the same challenges with cards held in inventory by third parties, including employers, at multiple locations.
[14] 9 U.S.C. §§ 1 et seq. (2016).

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resolution mechanism for a large segment of the financial services market. In recent years, the Supreme Court has made it clear on multiple occasions that the policy in favor of arbitration expressed in the Federal Arbitration Act preempts efforts, by state courts in particular, to declare that arbitration clauses are unenforceable on public policy grounds.[15] In light of this, the NBPCA is also concerned that the CFPB may be inserting its own judgement in place of the Supreme Court's, as the Supreme Court has made it 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, the very benefits that would be lost if the Proposed Rule is finalized in its current form.[16]

In fact, the NBPCA is concerned that the Proposed Rule, more than just undermining the FAA and firmly established federal policies in favor of arbitration, effectively overrules provisions of the FAA requiring courts to enforce agreements to arbitrate, including those entered into both before and after a dispute has arisen.[17] The delegation of authority by Congress giving a federal agency the power to overrule federal law creates a host of issues, including questions surrounding whether such a broad delegation of authority constitutes unreasonable deference under the doctrine promulgated by the Supreme Court in *Chevron*.[18]

C. The Proposed Rule is inconsistent with the CFPB's findings in its study of arbitration

1. The findings in the CFPB's Study do not provide an adequate basis for the Proposed Rule

Even if the CFPB believes that the Proposed Rule and Study adequately weighed the benefits and costs of the arbitration process with the costs and likely impact of the Proposed Rule, Section 1028 of the Dodd-Frank Act also requires that the findings of any regulation be consistent with the CFPB's Study. Rather than provide evidence for the CFPB's findings in the Proposed Rule, the Study actually reveals that the arbitration process benefits consumers in a wide variety of ways.

For example, the Study provides evidence that, as compared with class-action lawsuits, arbitration is more timely, inexpensive, and overall more effective. In particular, the Study shows that while the average class action lawsuit takes two years or more to complete, the average time

[15] *See* AT&T Mobility v. Concepcion, 563 U.S. 333 (reversing state court decisions that held arbitration clauses waiving class action litigation were unenforceable on public policy grounds).
[16] *See id.*
[17] 9 U.S.C. §§ 1 et seq.
[18] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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for completion of the arbitration process was only two to seven months. Similarly, according to the Study, while the average cost to a consumer for participating in the arbitration process totaled $200, the cost to a consumer seeking to resolve a dispute through litigation could be as much as $400 just to file a complaint. Finally, the Study found that while the average class action consumer received a cash settlement of $32.35, the average amount received by consumers who prevailed in arbitration was $5,389. The NBPCA believes these findings in the CFPB's own Study evidence the fact that consumers benefit far more from arbitration than they do from class-action lawsuits, which are not as fast, inexpensive, or effective for the consumer.

In addition to these findings, the Study also dispels the misconception that arbitration is a barrier to class actions. In fact, arbitration was not even a factor in 92% of the 562 class actions studied by the CFPB, because so few defendants moved to compel arbitration and only about half of those few motions were granted. Moreover, data in the Study indicated that there is sufficient competition in the financial services marketplace to accommodate customers who prefer to resolve disputes via litigation as opposed to arbitration, as many providers of covered products and services either do not include arbitration clause in their customer agreements or provide a contractual right to reject the arbitration provision within 30 to 60 days of entering the contract without affecting any other provision in the agreement.

Finally, the Study also dispels the misconception that companies have an unfair advantage over customers in arbitration. In fact, while the Study found that almost all of the arbitration proceedings involved companies with repeat experience in the arbitration process, the Study also found that counsel for consumers were usually experienced in the arbitration process as well. More importantly, the Study found that in 81% of the arbitrations in which customers were awarded affirmative relief, the provider was a "repeat player," but the customer prevailed anyway.

2. The CFPB's Study does not address a number of important topics and issues critical to the development of any regulation in this area and further analysis into these aspects of the arbitration process is necessary

In addition to failing to adequately consider the many benefits of the arbitration process detailed above and failing to show that the findings of the Proposed Rule were consistent with the Study, the CFPB, in conducting and presenting the findings of the Study, also appears to have failed to provide much of the other key information necessary to fully evaluate the relative roles of arbitration and class actions as dispute resolution mechanisms in consumer cases. Therefore, the NBPCA urges the CFPB to withdraw its Proposed Rule and conduct further analysis into several important issues prior to releasing a new proposal.

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First, as noted above, the Study appears to primarily focus on the use of class-action waivers, as opposed to the arbitration process itself. Such a focus exceeds the mandate given in Section 1028 of the Dodd-Frank Act, which directs the CFPB to examine the arbitration process overall and does not mention class-action or otherwise limit the scope of the Study to the use of class-action waivers. In light of the failure to examine the arbitration process itself, the Study should be re-conducted to examine how the arbitration and class action processes work in the real world and the corresponding trade-offs between each. Moreover, such a refocusing of the Study should include further examination of the use of small-claims court by consumers as a method to resolve disputes with covered providers. Aside from noting that the majority of pre-dispute arbitration clauses carve out filings in small-claims court as an exception, the Study does not appear to critically analyze the use of small-claims court as compared with that of arbitration or class-action litigation. The Study should be re-conducted to include further analysis into the use of the small-claims court process in the real world and the relative trade-offs it has with arbitration and class-action litigation.

Second, the Study should be re-conducted to examine customer satisfaction with the arbitration process. In other words, prior to eliminating the arbitration process as a method of dispute resolution, the CFPB should analyze whether or not consumers are satisfied with the current process. Similarly, since the CFPB appears to believe that class-action litigation is more beneficial to consumers than the arbitration process, the CFPB should re-conduct its Study to more accurately compare and contrast the two with, among other things, appropriate consumer interviews. The Study should also be re-conducted to evaluate the economic impact on providers and consumers of regulations that prohibit the use of class action waivers. Further, it would be beneficial for the CFPB to analyze the consumer experience with arbitration in areas where the arbitration process has been in use for a longer period of time, such as employment arbitration.

Third, the CFPB should conduct further analysis to gain a better understanding of consumer comprehension with respect to arbitration clauses. From the CFPB's previous remarks, it is clear that it does not believe that consumers read or are generally aware of the existence of pre-dispute arbitration clauses in their agreements with providers. For example, in the CFPB's remarks that opened the October 2015 field hearing on Arbitration, the CFPB stated, "the majority of consumers do not even know that the arbitration clause exists."[19] Similarly, upon

[19] ConsumerFinance.gov, Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing, Oct. 7, 2015, available at: http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/.

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releasing the Proposed Rule, the CFPB stated, "[w]e have investigated arbitration, and our research found that very few consumers know anything about these 'gotcha' clauses."[20]

The indication from the CFPB that consumers do not read and are not even aware of pre-dispute arbitration clauses in their agreements with providers, appears to be in stark contrast to the CFPB's treatment of consumers in its other rulemakings. For example, take the CFPB's proposed Prepaid Account Rule. If that proposal is finalized in its current form, it is conceivable that consumers acquiring a prepaid card account would potentially be required to receive three, and, in the case of certain payroll cards, four, disclosures from a provider.[21] In addition, providers will be required to provide their account agreements to the CFPB to be posted on its website. An important reason given by the CFPB for proposing such prescriptive and substantial disclosures and posting requirements is to provide a consumer with the ability to fully assess the features and benefits of the prepaid product in relation to other prepaid products, before that consumer makes a purchase.

The CFPB is sending mixed messages regarding consumer comprehension and understanding of the terms and conditions of their financial products and services. It is inconsistent that, in one instance, consumers are savvy enough to wade through three or four disclosures in order to select the prepaid card that best fits their needs, when, in another instance, that same consumer is unable to follow or understand the arbitration clause contained in their agreement with the provider. Similarly, if the CFPB believes that consumers generally are not aware of or do not understand, the arbitration clauses contained within a provider's agreement, the NBPCA does not understand how the CFPB can then believe that consumers will be able to locate, digest, and understand the arbitration materials submitted to the CFPB and eventually posted to its website. On its face, it appears that the CFPB's rationale for regulation and its views on the aptitude of the consumer shifts as needed, even if it undermines the rationale for other rulemakings.

The NBPCA believes that an evaluation of the topics above, in addition to fully considering the benefits arbitration affords to consumers and actual impact and costs the Proposed Rule will have on consumers and providers, should be a prerequisite to issuance of any regulations in this area.

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[20] ConsumerFinance.gov, Prepared Remarks of CFPB Director Richard Cordray at the Field Hearing on Arbitration Clauses, May 5, 2016, available at: http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/.

[21] To enhance simplicity and the effectiveness of disclosures, in the NBPCA's comment letter to the CFPB dated March 23, 2015 regarding the proposed Prepaid Account Rule, the NBPCA strongly advocated for a single, consumer-friendly, pre-acquisition disclosure that provides more flexibility than the prescriptive requirements in the proposed Prepaid Account Rule.

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D. At a minimum, the CFPB should include appropriate carve outs and a safe-harbor to minimize the costs and negative impact of the Proposed Rule

One of the more troubling aspects of the Proposed Rule for our members has been its uniform application to all providers of covered financial goods and services. This fact is particularly worrisome for smaller providers who are less equipped to bear the significant costs of defending a class-action lawsuit and therefore face the very real risk of being driven out of business by the requirements of the Proposed Rule. The NBPCA is further concerned that in light of financial risks posed by the Proposed Rule for small entities, if left unchecked, the provisions of the Proposed Rule actually could create a barrier to entry for smaller entities looking to enter the consumer financial services market. In turn, this barrier to entry would lead to less competition, more consolidation within the industry, and ultimately fewer choices for consumers in the marketplace.

In light of these concerns, the NBPCA does not believe it is appropriate to apply a one-size-fits all approach to this issue and requests that the CFPB, at a minimum, include a carve out in any final rule for certain entities which, based on a number of factors, would both be more likely to be negatively impacted by the provisions of the Proposed Rule than other providers and who have demonstrated a track record of responding to and resolving customer complaints in a timely and effective manner. Some factors we would urge the CFPB to consider in developing a carve-out from the requirements of the Proposed Rule include the following:

- The relative size of the entity. The NBPCA reiterates that our members are particularly concerned that small entities providing covered products or services could be especially harmed by the impact of the Proposed Rule as the minimum costs of defending class action litigation would be a disproportionately higher percentage of their assets or net income. In fact, the costs of defending a single class-action litigation suit could drive some small entities out of business.

- The volume of consumer complaints made against a particular class of entity, industry, or product. The NBPCA believes that industries with a track record of responding to consumer concerns in a timely fashion and with high consumer satisfaction rates should have the opportunity to continue to resolve consumer disputes in a manner that is consistent with that particular industry's track record without the lingering threat of class litigation. The NBPCA notes that the CFPB has been collecting and analyzing consumer complaints in the financial services market for some time now, and suggests that CFPB could utilize its collected information in determining appropriate industries or market segments to carve out from the requirements of the Proposed Rule.

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- Grace Period for providers covered by the Proposed Rule which have made a "good faith" effort to try to resolve the concern in a timely fashion. In addition to considering carve outs for certain entities and market segments, the NBPCA believes the CFPB should also consider including a "safe harbor" grace period in any final rule to allow providers to continue to rely on mandatory arbitration clauses with respect to aspects of class-action litigation in instances where the provider can demonstrate it has made a good faith effort to resolve the consumer's concerns in a timely fashion. The purpose of such a grace period would be to allow providers to address consumer concerns or harm before permitting consumers (or a class of consumers) to immediately skip any attempt to work with the provider before filing a lawsuit (class action or otherwise). In short, if the CFPB is going to bar class action waivers from arbitration agreements, it should at a minimum implement alternative measures to try to capture the spirit of the public policy behind arbitration, which is for parties to resolve their disputes in a timely and cost efficient manner instead of sprinting to court to file a class action lawsuit. For example, today a number of NBPCA members aggressively track their customer feedback and make the resulting data available to all business units as soon as the feedback is collected. Additionally, a significant number of our members utilize a variety of avenues to provide customer feedback through their websites, social media and even with the CFPB. Moreover, these companies examine customer complaint data for trends and other broader issues in an effort to drive improvements in overall customer experience in an effort to make litigation unnecessary. The CFPB rulemaking should encourage companies to quickly identify and resolve consumer concerns in an efficient manner, rather than promote a method of dispute resolution that is expensive, inconvenient, inefficient, and that typically takes several months if not years to play out.

Conclusion

While the NBPCA appreciates the opportunity to comment on the CFPB's Proposed Rule, we have serious concerns that the likely impact of the Proposed Rule will actually harm consumers by depriving them of what has proven to be a broadly applicable, effective, inexpensive, and convenient method of resolving disputes, in favor of a more expensive, less convenient alternative not available to all consumers for all claims. Moreover, the NBPCA is concerned that the downstream impacts of the Proposed Rule will be just as harmful to consumers, causing consolidation and a stymying of innovation in the consumer financial products and services market, and ultimately leading to less consumer choice and freedom. Further, because the CFPB's Study required under Section 1028 does not contain a sufficient analysis into the benefits of the arbitration process and how it operates and works for consumers in the real world as compared with class-action lawsuits, the NBPCA does not believe that the

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CFPB appropriately concluded that the Proposed Rule was in the public interest and necessary for consumer protection or that the Proposed Rule is supported by the findings in the study as required by Section 1028. For these reasons, the NBPCA urges the CFPB to withdraw its proposal.

Sincerely,

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