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August 11, 2016

**First Class Mail &
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Richard Cordray
Director
Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: Docket No. CFPB-2016-0020 // RIN 3170-AA51
Proposed Rule Regrading Pre-dispute Arbitration Agreements, Pursuant to Dodd-
Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a).

Dear Director Cordray:

On behalf of the undersigned State Attorneys General, we write in support of the Consumer Financial Protection Bureau's (the "Bureau") proposed rules regarding pre-dispute arbitration clauses in consumer financial products and services contracts. We support the Bureau's proposal to prohibit the application of pre-dispute arbitration agreements to bar class action litigation in court (i.e., prohibiting the use of class action waiver provisions) and to require covered entities to submit to the Bureau initial arbitration claim filings and awards (the "Proposed Rules"). If enacted, the Proposed Rules will restore significant and much-needed consumer protections that have been eroded through the inclusion by financial services companies of mandatory arbitration clauses in their contracts with consumers.

The Bureau's comprehensive study of the use and outcome of mandatory arbitration clauses in consumer financial contracts (the "Study") not only supports the Proposed Rules, but it also confirms our views on mandatory pre-dispute arbitration clauses discussed in a prior letter to the Bureau submitted by a group of States on November 19, 2014. These clauses are ubiquitous, are mandated by financial services companies in situations where they have leverage and consumers have none, and are presented in a manner that often prevents consumers from understanding the adverse impacts on their rights. Arbitration clauses and class action waiver provisions are virtually always included by the more powerful, drafting party in adhesion contracts that are poorly understood or even unseen by consumers at the time the transaction is initiated. Consumers rarely, if ever, anticipate the legal claims that may arise under a consumer contract, much less the hurdles that such clauses will present to resolving their claims. Once discovered, these clauses often have the effect of preventing consumers from seeking redress,



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particularly for small dollar claims. The Proposed Rules are necessary and important to combat the inequities between consumers and the financial institutions they rely upon for essential services.

Although we believe consumers will be best served by the total prohibition of mandatory, pre-dispute arbitration clauses in consumer financial contracts and we encourage the Bureau to consider regulations to that effect, the Proposed Rules provide a substantial benefit to consumers by restoring their fundamental right to join together to be heard in court when common disputes arise in the commercial marketplace.¹ Many of our respective consumer protection laws include private right of action provisions, the purpose of which is to complement and extend the reach of our state enforcement efforts.² *See, e.g.*, California Unfair Competition Law (“UCL”), Bus. & Prof. Code, § 17200 *et seq.*; Massachusetts Consumer Protection Law, G.L. c. 93A, § 9; N.Y. Gen. Bus. Law § 349(h); District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3905(k)(1)(A). Often, these cases are pursued through class actions. The courts have “repeatedly recognized the importance of these private enforcement efforts,” including class actions, to “supplement the efforts of law enforcement and regulatory agencies.” *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 126 (2000), 99 P.2d 718, 725 (Cal. Sup. Ct. 2000) (“Class actions and representative UCL actions make it economically feasible to sue when individual claims are too small to justify the expense of litigation and thereby encourage attorneys to undertake private enforcement actions. Through the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition.”), *modified by statute on other grounds as stated in Arias v. Superior Court*, 46 Cal.4th 969, 977-78, 209 P.3d 923, 928 (Cal. Sup. Ct. 2009).

¹ To the extent the Proposed Rules would not also prohibit clauses that have the same effect as class action waiver provisions, such as clauses that prohibit a consumer from serving as a lead plaintiff or class representative, we recommend that the Bureau consider incorporating this additional clarification.

² *See also Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 697-700, 322 N.E.2d 768, 775-77 (1975) (“Chapter 93A contained no private remedy provisions when it was originally [enacted]... Because of the inability of the [Consumer Protection] Division to handle all the complaints it was receiving, it became clear that private remedies were needed under c. 93A.... The Attorney General sought to meet the pressing need for an effective private remedy under c. 93A by proposing [a] bill which...provides the consumer with a private remedy, including a minimum recovery of \$25.00, attorney’s fees, a class action provision, and, in certain cases, treble damages. In substantially the form proposed by the Attorney General, a private remedy bill was enacted.”) (internal citations omitted); *Karlin v. IVF Am., Inc.*, 93 N.Y.2d 282, 291 (1999) (“When section 349 was enacted in 1970, only the Attorney General was empowered to enforce it....It soon became clear, however, that the ‘broad scope of section 349, combined with the limited resources of the Attorney General, [made] it virtually impossible for the Attorney General to provide more than minimal enforcement.’ (Mem. of Assemblyman Strelzin, L 1980, ch 346, § 1, 1980 Legis. An. at 146). Accordingly, in 1980 the statute was amended to provide a private right of action....Among the remedies available to private plaintiffs are compensatory damages, limited punitive damages and attorneys’ fees.”); *Grayson v. AT&T*, 15 A.2d 219, 240 (D.C. 2010) (Providing a private right of action in order to “allow the government to coordinate with the non-profit and private sectors more efficiently....Public interest organizations will be able to bring additional resources to consumer protection enforcement in the District, contributing private and donated funds that will advance public priorities without causing the expenditure of additional government resources.”).

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Reinstating the right of consumers to join together in court to litigate common grievances against financial institutions is important to consumers whose only current recourse for their claims is individual adjudication in an arbitral forum. As both the Study and legal scholars³ have found, the expansion of the use and enforcement of arbitration clauses containing class action waivers following the United States Supreme Court decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*⁴ has resulted – foreseeably – in consumers simply foregoing their rights to pursue claims for small amounts under financial services contracts.⁵ Few consumers are willing to arbitrate a claim when the cost of hiring an attorney and paying arbitration fees far exceeds the total damages they seek. Indeed, as Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit stated in *Carnegie v. Household Int'l, Inc.*, 376 F.2d 656, 661 (7th Cir. 2004), “only a lunatic or a fanatic sues for \$30.” If consumers are barred from bringing class actions, the result is, in the words of Judge Posner, “not 17 million individual suits, but zero individual suits.” *Id.*

Like the states, the federal government has recognized the importance of class actions. Congress has articulated that “[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.” Class Action Fairness Act of 2005 (“CAFA”), 28 U.S.C. § 1711, *et seq.* (notes at Pub. L. 109–2, § 2(a)(1)). CAFA requires defendants in federal class actions to notify the Attorney General of each state in which a class member resides of a proposed class action settlement. *Id.* § 1715. Accordingly, our Offices are familiar with class actions filed every year throughout the country and have reviewed hundreds of proposed class settlements. Based on our extensive experience, we believe class litigation is capable of providing real and meaningful benefits to harmed consumers.

³ See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 Geo. L.J. 57, 92-97 (Nov. 2015) (finding that post-*Concepcion*, the number of bilateral arbitrations rose only “mildly,” as many of these arbitrations were filed by the same plaintiff lawyers against the same defendants on the same day, and it appears that many of these claims were later abandoned). Horton and Chandrasekher also found that “very few individuals bother to arbitrate minor grievances. In the entire four-and-a-half years covered by our study, only 184 of all 4,839 consumers in our sample demanded under \$1,000.” *Id.* at 117.

⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) are two of the recent U.S. Supreme Court rulings that have expanded the scope of the Federal Arbitration Act (“FAA”). As discussed in our November 19, 2014 letter to the Bureau, the result of these cases is that contractual mandatory arbitration clauses containing class action waivers are enforceable under the FAA even when they render it functionally impossible for plaintiffs to vindicate their rights, and thus effectively protect companies from any accountability for such consumer claims.

⁵ Recently, the NY Times collected records from arbitration firms across the country in connection with an extensive study into the impact of mandatory arbitration clauses and found that “between 2010 and 2014, only 505 consumers went to arbitration over a dispute of \$2,500 or less.” See Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, available at <http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html>.

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Class action settlements provide monetary relief to consumers, act as a deterrent to the specific defendant as well as to the industry, and lead to the reform of otherwise unchecked unlawful, unfair or deceptive business practices. Indeed, class action lawsuits have been a vehicle to prompt rapid reform through settlement across a variety of industries. In the last five years alone, we have seen class settlements provide *both* important monetary and injunctive relief to consumers in cases involving, among others, financial services,⁶ mortgage services,⁷ corporate retirement plans,⁸ insurance,⁹ travel,¹⁰ consumer goods,¹¹ automobiles,¹² advertising,¹³ and food manufacturing.¹⁴

⁶ See, e.g., Order on Motion for Attorney Fees, *De Leon v. Bank of America, N.A. (USA)*, C.A. No. 09-01251, Dkt. No. 148 (M.D. Fla. Jul. 10, 2015) (monetary relief); Order Approving Distribution Plan, *In re: Satyam Computer Services, Ltd. Securities Litig.*, C.A. No. 09-02027, Dkt. No. 404 (S.D.N.Y. Feb. 4, 2014) (same); Judgment, *Trombley v. Bank of America Corp.*, C.A. No. 08- 00456, Dkt. No. 140 (D.R.I. Sep. 12, 2013) 140 (same); Order on Motion for Settlement, *Rafton v. Rydex Series Funds et al.*, C.A. No. 10-01171, Dkt. No. 130 (N.D. Cal. Feb. 10, 2012) (same); Final Judgment, *Rodriguez et al. v. Sallie Mae (SLM) Corp.*, C.A. No. 07-01866, Dkt. No. 333 (D.C. Conn. Oct. 19, 2011) (monetary and injunctive relief; Final Order and Judgment, *Moody v. The Turner Corp. et al.*, C.A. No. 07-006982, Dkt. No. 145 (S.D. Ohio Oct. 18, 2011) (monetary relief); Order of Final Approval and Judgment, *Wike v. Vertrue, Inc.*, C.A. No. 06-00204, Dkt. No. 495 (M.D. Tenn. Oct. 6, 2011) (same).

⁷ See, e.g., Order, *Benway et al. v. Resource Real Estate Services, LLC et al.*, C.A. No. 05-03250, Dkt. No. 192 (D.C. Md. Oct. 12, 2011) (monetary relief); Final Order and Judgment, *Schroeder et al. v. Country Wide Home Loans, Inc. et al.*, C.A. No. 07-01363, Dkt. No. 126 (D. N.J. Sep. 9, 2011) (monetary relief).

⁸ See, e.g., Final Approval and Judgment, *Spano et al. v. The Boeing Co. et al.*, C.A. No. 06-00743, Dkt. No. 588 (S.D. Ill. Mar. 31, 2016) (In response to class claims that Boeing breached its fiduciary duty to its employees by charging excessive administrative fees for their retirement plans, Boeing paid employees \$57 million and reformed its retirement plan policies, including by soliciting competitive bids for services such as record-keeping to significantly reduce costs for retirement plan holders.).

⁹ See, e.g., Order and Final Judgment, *Lafayette Life Ins. Co. et al. v. Menasha City of Wisc. et al.*, C.A. No. 09-00064, Dkt. No. 155 (N.D. Ind. Dec. 1, 2011) (monetary relief).

¹⁰ See, e.g., Entered Judgment, *Kaufman v. American Express Travel Related Services, Inc.*, C.A. No. 07-01707, Dkt. No. 616 (N.D. Ill. Mar. 8, 2016) (monetary and injunctive relief); Order, *Hyun Park v. Korean Air Lines Co., Ltd.*, C.A. No. 07-05107, Dkt. No. 742 (C.D. Cal. Feb. 03, 2016) (monetary relief); Final Judgment and Order of Dismissal, *In re: Dockers Roundtrip Airfare Promotion Sales Practices Litigation*, C.A. No. 09- 02847, Dkt. No. 129 (C.D. Cal. Aug. 31, 2011) (same).

¹¹ See, e.g., Judgment and Order of Dismissal with Prejudice, *Ko v. Natura Pet Products, Inc. et al.*, C.A. No. 09-02619, Dkt. No. 100 (N.D. Cal. Sep. 9, 2012) (monetary and injunctive relief); Text Order, *Kelly v. Phiten USA, Inc.*, C.A. No. 11-00067, Dkt. No. 59 (S.D. Iowa Nov. 11, 2011) (same); Final Approval Order and Judgment, *Glenz v. Sharp Electronics Corp.*, C.A. No. 08-03652, Dkt. No. 113 (D.N.J. Oct. 3, 2011) (monetary relief).

¹² See, e.g., Order Awarding Attorney Fees, Expenses, and Service Awards, *Sugarman v. Ducati North American, Inc.*, C.A. No. 10-05246, Dkt. No. 106 (N.D. Cal. Jan. 12, 2012) (monetary and injunctive relief); Order Approving Final Settlement, *Howard Pardue/Pardue's Auto Repair, Inc. v. Cummins Inc. et al.*, C.A. No. 08-01677, Dkt. No. 176 (E.D. La. Dec. 16, 2011) (monetary relief); Order, *Elliot Fixler v. Toyota Motor Sales, U.S.A., Inc.*, C.A. No. 10-03124, Dkt. No. 48 (C.D. Cal. Oct. 17, 2011) (same); Final Order and Judgment, *S.B. Atlass v. Mercedes-Benz USA, LLC*, C.A. No. 07- 02720, Dkt. No. 208 (D.N.J. Sep. 9, 2011) (same).

¹³ See, e.g., Final Judgment and Order of Dismissal with Prejudice, *Kramer v. Autobytel Inc. et al.*, C.A. No. 10-02722, Dkt. No. 148 (N.D. Cal. Jan. 27, 2012) (monetary and injunctive relief); Judgment and Order of Final Approval, *Palmer v. Sprint Nextel Corp.*, C.A. No. 09-01211, Dkt. No. 91 (W.D. Wash. Oct. 21, 2011) (same); Final

The industry-wide impact of class litigation is well-illustrated by recent class actions challenging banking overdraft fees. Several national banks had implemented overdraft policies wherein the banks would reorder consumers' daily transactions in their checking or debit accounts, making withdrawals in the order of the largest to the smallest transaction. These policies resulted in available balances being drawn down as rapidly as possible, increasing the likelihood that customers would overdraft multiple times, thereby permitting the bank to collect multiple overdraft fees. Bank customers filed class actions challenging this practice and in August 2010, following a two week bench trial, one federal court ordered Wells Fargo to pay \$203 million in restitution to its customers and enjoined future abusive practices.¹⁵ This decision had ripple effects throughout the banking industry. Just one month after the *Wells Fargo* ruling, Umpqua Bank announced that it would change how it processed debit transactions. Debit transactions would be reordered, but starting with the *lowest* expenditure to the highest expenditure to decrease the likelihood that a consumer would overdraft multiple times.¹⁶

Moreover, successful class actions have led to important legislative reforms. For instance, class actions first successfully barred companies and manufacturers from using "All Natural" advertising for products that actually contain genetically modified and synthetic ingredients.¹⁷ These cases prompted wider industry reform and regulatory and legislative action.

Approval Order, *Glen Ellyn Pharmacy, Inc. v. La Roche-Posay, LLC et al.*, C.A. No. 11-00968, Dkt. No. 29 (N.D. Ill. Oct. 19, 2011) (monetary relief).

¹⁴ See, e.g., Final Judgment, *Dennis v. Kellogg Co.*, C.A. No. 09-01786, Dkt. No. 116 (S.D. Cal. Sept. 16, 2013) (monetary and injunctive relief); Order and Final Judgment, *Smajlaj v. Campbell Soup Co.*, C.A. No. 10-01332, Dkt. No. 61 (D.C. N.J. Nov. 29, 2011) (monetary relief); Order Approving Final Settlement, *Michelle Weeks et al. v. Kellogg Co. et al.*, C.A. No. 09-08102, Dkt. No. 157 (C.D. Cal. Nov. 23, 2011) (same); Final Order Approving Class Action Settlement and Dismissing Cases with Prejudice, *In re: Enfamil LIPIL Marketing and Sales Practices Litig.*, C.A. No. 11-92222, Dkt. No. 79 (S.D. Fla. Nov. 14, 2011) (same).

¹⁵ See *Gutierrez v. Wells Fargo Bank, N.A.*, 730 F. Supp. 2d 1080 (N.D. Cal. 2010). This decision was upheld following multiple appeals and Wells Fargo is "permanently enjoined from making or disseminating, or permitting to be made or disseminated, any false or misleading representations relating to the posting order of debit-card purchases in its customer bank accounts." Order Awarding Fees, Expenses, and Incentive Awards, *Gutierrez v. Wells Fargo Bank, N.A.*, C.A. No. 07-05923, Dkt. No. 682, at 3, (N.D. Cal. May 21, 2015). Wells Fargo "acknowledged that since 2010, its posting practices changed nationwide, in part, because of the injunction." *Id.* at 12.

¹⁶ See Brent Hunsberger, *Umpqua Bank To Stop Controversial Overdraft Practice*, THE OREGONIAN, Sept. 20, 2010, available at http://blog.oregonlive.com/finance/2010/09/umpqua_bank_to_stop_controvers.html. Although the letter from Umpqua Bank to its consumers does not state why the bank changed its overdraft policies, the influence of the *Wells Fargo* case can be inferred. See also Letter from Umpqua Bank to the FDIC, Re: Overdraft Payment Programs and Consumer Protection, FIL-47-2010, Sept. 27, 2010, available at https://www.fdic.gov/regulations/laws/publiccomments/overdraft_comments/2010-09-27-carey.pdf (Umpqua's Executive Vice President of Community Banking notes that it is "one of the first banks to restructure posting order" as part of an effort to "dynamically manage the consumer protection, regulatory, safety and soundness risks associated with [its] overdraft protection services.").

¹⁷ See, e.g., Final Judgment, *Pappas v. Naked Juice Co. of Glendora Inc., et al.*, C.A. No. 11-08276, Dkt. No. 188 (C.D. Cal. Jan. 22, 2014); Order on Motion for Settlement, *Trammell v. Barbara's Bakery, Inc., et al.*, C.A. No. 12-

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In November 2015, in response to a number of class actions in which federal judges stayed the cases in deference to the agency's determination of the definition of "natural,"¹⁸ the U.S. Food and Drug Administration ("FDA") announced that it is considering rulemaking on the meaning and use of the term on food labels and solicited information and comments in connection with that rulemaking.¹⁹ This rulemaking, in turn, prompted Congress to introduce the Food Labeling Modernization Act of 2015 which, if passed, would require the Secretary of Health and Human Services to promulgate a final rule on the meaning and use of the label "natural" on food.²⁰ These regulatory and legislative responses aim to increase protection for consumers who pay a premium for "All Natural" products, believing they are buying a product that is healthier than one without the label. Meanwhile, the industry has taken note, with many companies dropping or altering the label from their food products in order to avoid litigation, or replacing synthetic ingredients with natural substitutes.²¹

As these cases demonstrate, restoring the right of consumers with common claims to pursue redress through class actions will provide a valuable check against corporate misconduct. The current legal landscape allows financial institutions to use arbitration clauses to suppress consumer claims. In the short time since *Concepcion* was decided, numerous consumer and employee class actions have been dismissed as a result of arbitration clauses, preventing companies from being held accountable for purportedly unlawful business practices.²² See, e.g.,

02664, Dkt. No. 70 (N.D. Cal. Nov. 8, 2013). See also Jill M. Manning, "All Natural" Class Actions: A Plaintiff Perspective, 23 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 151, 156-57 (2014).

¹⁸ See, e.g., Order on Motion for Summary Judgment, *Bevans v. General Mills, Inc.*, C.A. No. 12-00249, Dkt. No. 205 (D.N.J. Jun. 13, 2016) (stayed pending outcome of FDA's rulemaking announcement and request for comments); Order Dismissing Case, *Cox v. Gruma Corp.*, C.A. No. 12-6502, Dkt. No. 104 (N.D. Cal. Jul. 25, 2014) (ultimately dismissed after no specific guidance received from FDA); Stipulation to Dismiss Entire Action, *Barnes v. Campbell Soup Co.*, C.A. No. 12-05185, Dkt. No. 63 (N.D. Cal. Apr. 1, 2014) (same).

¹⁹ See *Request for Information and Comments, Use of the Term "Natural" in the Labeling of Human Food Products*, Food and Drug Administration, FDA-2014-N-1207-0001 (Nov. 10, 2015).

²⁰ See H.R. 4061, 114th Cong. § 4 (2015); S. 2301, 114th Cong. § 4 (2015). The Bill has recently garnered additional co-sponsors and awaits committee scheduling for a vote. See also Press Release, Congressional Office of Senator Richard Blumenthal, *Sens. Blumenthal, Markey, Reps. Pallone, DeLauro Introduce Legislation to Modernize Food Labeling* (Nov. 23, 2015), available at <https://www.blumenthal.senate.gov/newsroom/press/release/sens-blumenthal-markey-reps-pallone-delauro-introduce-legislation-to-modernize-food-labeling>

²¹ *The Wall Street Journal* reported that, in 2013, only 22.1% of food products and 34% of beverage products in the United States claimed to be "natural" at first launch. This is a decrease from 30.4% and 45.5%, respectively. See Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, THE WALL STREET JOURNAL, Nov. 6, 2013, available at <http://www.wsj.com/articles/SB10001424052702304470504579163933732367084>. Companies threatened with prospective class action suits, such as Cadbury Schweppes and Kraft Foods, have responded by altering their respective product labels to omit claims of "All Natural." See Nathan A. Beaver, "Natural" Claims: The Current Legal and Regulatory Landscape, Recent Developments in Food and Drug Law, 2013 Ed., 2012 WL 4971935 (Nov. 2012). Snapple has halted its use of high fructose corn syrup in all of its beverages, opting for sugar instead, in order to justify its use of "natural" on its beverage labels. See *id.*

²² Consumer interest groups Public Citizen and the National Association of Consumer Advocates ("NACA") have identified 67 cases in just the three year period since *Concepcion* was decided (from April 2011 to April 2014)

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Leyna Novak v. Santander Consumer USA, et al., Dkt. No. 2:13-cv-1240-RBS (E.D. Pa. March 7, 2013) (plaintiff who was charged undisclosed fees ranging from \$10 to \$15 for telephonic or on-line auto loan payments was precluded from bringing a class action against financial institutions for violating Pennsylvania law requiring all finance charges related to a car loan to be disclosed in a single finance contract because of the arbitration clause and class action waiver in her auto loan agreement); *Johnson v. CarMax Auto Superstores, Inc.*, Dkt. No. 3:10-CV-213, 2010 WL 2802478 (E.D. Va. July 14, 2010) (employment contract clauses prevented class action by former employees against CarMax for allegedly failing to pay them earned wages for the full amount of time they worked in violation of Section 16(b) of the Fair Labor Standards Act).

The presence of mandatory pre-dispute arbitration clauses in contracts means that many serious violations of law will go undetected, undeterred, and unremedied, either because arbitrations will never be brought or because the evidence presented and decisions rendered in the private arbitration proceedings are not made public, have no binding precedential effect, and do little to discourage others from committing similar violations.

While consumers have no realistic or meaningful redress to combat abusive business practices, those same businesses are not so similarly limited in their legal options when it comes to pursuing claims against consumers. Financial institutions, for example, regularly bring debt collection actions – in court – against consumers.²³ Consumers are relegated to unequal bargaining power and unequal access to justice, whereas financial institutions hold the pen that writes the terms of their relationship with consumers, reserving the absolute discretion to use access to the court system as a sword and a shield – utilizing litigation in court when it suits them and protecting themselves from being held accountable in that forum when it does not. This inequity is deeply concerning, particularly in the financial marketplace where consumers are dependent upon financial institutions for such essential services as bank accounts, credit cards, and loan products.

affecting thousands of consumers and employees in which a court enforced an arbitration clause and barred the claimants from participating in class actions. *See Cases That Would Have Been: Three Years After AT&T Mobility v. Concepcion, Claims of Corporate Wrongdoing Continue to Pile Up* (Public Citizen and NACA), April 2014, available at <http://www.citizen.org/documents/concepcion-third-anniversary-corporate-wrongdoing-forced-arbitration-report.pdf>. The report only discusses and collects cases in which the contractual arbitration clause explicitly included a class action waiver. It does not include the many cases in which an arbitration clause was silent as to class actions, but courts nevertheless enforced the arbitration clause and did not permit the consumers/employees to pursue their claims as a class.

²³ A recent *New York Times* article highlighted this unfortunate phenomenon whereby “debt buyers are using the courts to sue consumers and collect debt, then preventing those same consumers from using the courts to challenge the companies’ tactics.” *See* Jessica Silver-Greenberg and Michael Corkery, *Sued Over Old Debt, and Blocked From Suing Back*, N.Y. TIMES, Dec. 22, 2015, available at <http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html>.

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The attempts of some businesses to use arbitration clauses to thwart meritorious claims are alarming.²⁴ Recently, defendants in actions brought by civil law enforcement authorities have even attempted to use arbitration clauses in consumer contracts to avoid judicial review of claims by *states* for violations of undisputedly applicable consumer protection laws. In *New Mexico v. ITT Educational Services, Inc., et al.*, the New Mexico Attorney General brought suit against ITT Technical Institute, a for-profit school, alleging violations of New Mexico's Unfair Practices Act in connection with the advertising, marketing, and selling of its unaccredited nursing degree program.²⁵ In addition to injunctive terms and civil penalties, the Attorney General's complaint seeks restitution for impacted New Mexico students. ITT Tech sought to compel the State of New Mexico to arbitrate its claims for restitution *in a series of individual student-by-student arbitrations* based on an arbitration provision contained in students' enrollment agreements – agreements to which the State is not even a party. The District Court denied ITT Tech's motion, but the school has appealed.²⁶

We also strongly support the Proposed Rules' effort to increase transparency in the arbitration process by requiring covered entities to submit initial claim filings and written awards in arbitration proceedings to the Bureau. We encourage the Bureau to publish this valuable information on its website, making it available to the public, so that both government enforcement agencies and consumers can analyze and benefit from the results. We suggest that the Bureau enact and enforce timing obligations for the reporting of this information, and to implement strict penalties against entities that fail to comply with these requirements, including fines and loss of arbitration privileges.

The Proposed Rules, if enacted, will significantly improve the ability of consumers to adjudicate their claims against consumer financial service providers in a court of law. For this reason, we support their speedy promulgation. If we can provide any further information or assistance related to any of our common objectives, please do not hesitate to contact us.

²⁴ Not only have courts upheld pre-dispute arbitration clauses where consumers are unaware that the contracts they signed contained such clauses and class action waivers, but they have also held that consumers may bind themselves to an arbitration agreement containing a class action waiver without signing any document at all. *See Clookey v. Citibank, N.A.*, C.A. No. 8:14-cv-1318, 2015 WL 8484514 (N.D.N.Y. Dec. 9, 2015) (finding that consumer was bound to credit card agreement even though he did not recall receiving it simply by using his credit card, and dismissing consumer's class action lawsuit against Citibank for obtaining his credit report despite representations that they would not do so because individual arbitration was mandated by the agreement).

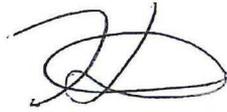
²⁵ *See* Complaint for Violations of the New Mexico Unfair Practices Act, New Mexico Common Law, and the New Mexico Postsecondary Education Institution Act for Restitution and Civil Penalties and for Declaratory and Injunctive Relief, *New Mexico v. ITT Educational Services, Inc., et al.*, Bernalillo County District Court C.A. No. D-202-CV-2014-01604 (Feb. 26, 2014), available at https://www.insidehighered.com/sites/default/server_files/files/New%20Mexico%20ITT%20complaint.pdf.

²⁶ *See* Order on Defendant's Motion to Compel Arbitration, *New Mexico v. ITT Educational Services, Inc., et al.*, Bernalillo County District Court C.A. No. D-202-CV-2014-01604 (Dec. 8, 2015), available at <http://www.republicreport.org/wp-content/uploads/2016/03/2015-12-08-Ord-Denying-Mtn-Compel-Arb.pdf>.

Respectfully submitted,



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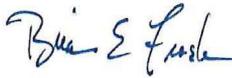
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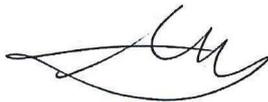
Ellen F. Rosenblum
Oregon Attorney General



William H. Sorrell
Vermont Attorney General



Thomas Miller
Iowa Attorney General



Joseph Foster
New Hampshire Attorney General



Bob Ferguson
Washington State Attorney General



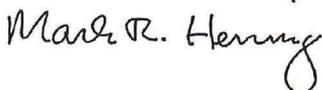
Douglas S. Chin
Hawaii Attorney General



Stephen H. Levins
Executive Director
State of Hawaii
Office of Consumer Protection



Peter F. Kilmartin
Rhode Island Attorney General



Mark R. Herring
Virginia Attorney General