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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-2012-0017 – Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements.

Dear Director Cordray:

On behalf of the Office of the Attorney General for the Commonwealth of Massachusetts, (the "Commonwealth"), we respectfully submit the following comments in response to the Consumer Financial Protection Bureau's ("CFPB" or the "Bureau") request for information regarding pre-dispute arbitration agreements.

In general, the Commonwealth believes that further study of the use of pre-dispute arbitration agreements in connection with the offering or providing of consumer financial products or services is worthwhile, and we strongly urge a comprehensive study. In the Commonwealth's experience, consumers have no genuine opportunity to negotiate the terms of most consumer contracts for goods or services, including those for financial products or services. Such contracts routinely include arbitration provisions, which mandate that all claims related to or arising out of the purchase or transaction must be resolved through binding arbitration. Increasingly, those arbitration provisions further provide that the arbitration will resolve the claims between the company and a single consumer and no other party. The Commonwealth has previously considered how an arbitration agreement which prevents multiple consumers from joining in a single litigation can operate to prevent individual consumers from pursuing their claims and therefore can insulate companies from being held accountable for those claims. The Commonwealth raised these concerns as an amicus curiae in a case before the Massachusetts Supreme Judicial Court, see Feeney v. Dell, 454 Mass. 192 (2009), where the Commonwealth argued that in certain circumstances, such arbitration agreements were a violation of public policy. CFPB's study of arbitration agreements is an important

step in further illuminating the impact arbitration agreements have on consumers' abilities to access and obtain appropriate redress for unfair and deceptive conduct.

Given this experience, the Commonwealth appreciates the opportunity to provide comments on CFPB's proposed study. Our comments today, however, are limited to certain of the questions posed in Sections 2 (Use and Impact in Particular Arbitral Proceedings) and 3 (Impact and Use Outside Particular Arbitral Proceedings).

Section 2: Use and Impact in Particular Arbitral Proceedings

The Commonwealth is concerned regarding the potential for pre-dispute arbitration provisions to discourage consumers from pursuing relief to which they may be entitled, or to otherwise limit such available relief. Consequently, the Commonwealth urges the CFPB to seek information as described in *Section 2.A.i-ii* and to discern how frequently consumers bring claims in arbitration and the types of claims raised in an arbitration context. Ideally the resulting data would be compared against the frequency with which consumers bring claims in small claims court or other courts seeking relief for similar types of claims. Such data would lay some of the groundwork for evaluating whether consumers are discouraged from seeking relief by the presence of a pre-dispute arbitration provision. Such data, however, does not measure the full impact of a pre-dispute arbitration provision on consumers. Rather, to build on the significance of this type of data, the Commonwealth believes the answer posed by the Bureau in *Section 2.A.v* should also be yes. In that question, the Bureau asks:

> If the Bureau should address some or all of the issues addressed in 2.a.i-iv above, should the Bureau distinguish between claims that a consumer brings in arbitration: (a) in the first instance; and (b) after a covered person (or third party) successfully invokes the terms of a pre-dispute arbitration agreement to end or limit that consumer's earlier court proceeding? Or should the Bureau consider both forms of arbitration as a single combined category of consumer use?

The issues addressed in *Section 2.A.i-iv* provide a general overview of the number of consumers who avail themselves of a pre-dispute arbitration clause. By distinguishing between claims that a consumer brings in arbitration (a) in the first instance; and (b) after a party successfully invokes the terms of a pre-dispute arbitration agreement to limit the court proceeding, the study may begin to account for any "discouragement factor" encountered by consumers who are faced with an arbitration clause. Particularly by examining the number of instances in which a party pursues arbitration after having attempts at relief via the courts thwarted, the Bureau will be able to develop an understanding as to how many claims are abandoned after a court proceeding is terminated and arbitration is compelled. Data to this end will help inform the Bureau as to the true impact of arbitration provisions on consumers seeking relief and answer the ultimate question – do arbitration provisions unfairly favor businesses by discouraging consumers from seeking relief?

Section 3: Impact and Use Outside Particular Arbitral Proceedings

As discussed above, the Commonwealth has concerns regarding the impact a pre-dispute arbitration provision has on the incidence and nature of consumer claims against covered persons. The Commonwealth is also concerned about the impact pre-dispute arbitration clauses have on compliance with consumer financial protection laws. Frequently, such clauses are paired with anti-class action provisions. The Commonwealth believes that public policy strongly favors the aggregation of small consumer claims in the form of class action lawsuits or at least class action arbitrations.

To disallow aggregation creates scenarios where the economics of litigation and arbitration make pursuit of the claims untenable to most consumers. As a result, anti-class action provisions may allow covered persons or businesses to skirt consumer protection laws by dealing only with lone consumers willing to defy the economics of a one-on-one proceeding with a business. Anti-class action provisions paired with pre-dispute arbitration clauses allow businesses to address unfair or deceptive practices only to the extent that they affect that single consumer rather than addressing the practices as a whole. Moreover, such a scenario results in an arbitral setting where there is no precedential value associated with a loss. Therefore, a business could lose to a particular consumer, continue the unfair practices vis a vis others and rely on the prior unsuccessful defenses in other arbitral proceedings with no obligation of alerting the new arbitration panel to the previous result. By reducing the likelihood that large numbers of consumers will challenge a business practice through the combination of a pre-dispute arbitration clause and the prohibition on class action, businesses may be able to consider the occasional arbitral loss as a cost of doing business rather than a mandate for changing unlawful business practices. In light of these concerns, the Commonwealth advocates for the Bureau to not only study the use and impact of pre-dispute arbitration agreements on consumers and the impact that pre-dispute arbitration agreements have on compliance with consumer financial protection laws, but also to further study the link between pre-dispute arbitration clauses and anti-class provisions and the impact the combined provisions have on consumers' ability to stand up for and protect their interests.

As a corollary, the Commonwealth suggests that the Bureau study the value of claims pursued through arbitration. Data as to the value of claims actually pursued in arbitration may further illuminate whether the cost of bringing a claim in arbitration (particularly where class actions are prohibited) limits or discourages the pursuit of relatively low dollar claims. If the data were to show a relative dearth of low dollar claims brought in arbitration which could be compared against the number of similar claims brought in small claims court or other courts (potentially through a class action) where a pre-dispute arbitration clause was not present or not enforced, conclusions may be able to be drawn as to the impact economic feasibility has on consumers enforcing their rights in an arbitration proceeding.

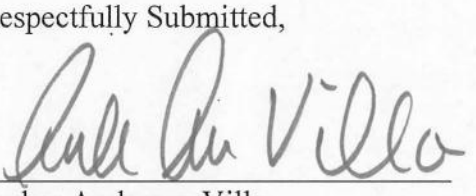
Conclusion

Pre-dispute arbitration clauses, as well as class action prohibitions, raise significant questions for those of us who seek to provide protections to consumers across

a wide variety of industries. The Commonwealth recognizes the difficulty associated with studying the impact of such clauses on consumers' choices and abilities to protect their rights and appreciates the efforts taken by the CFPB to define the parameters of such study. We encourage the CFPB to study this matter broadly. Specifically, the Commonwealth respectfully suggests that the study be conducted to: (1) capture the number of claims abandoned after a court proceeding is terminated and arbitration is compelled in order to capture the "discouragement factor" associated with compelled arbitration; (2) capture the interconnectedness of pre-dispute arbitration clauses and anti-class action provisions to further assess the impact of such clauses on discouraging consumers from protecting their rights and allowing continued violation of consumer protection laws by covered entities; and (3) capture the value of claims pursued in arbitration proceedings versus those pursued in other venues to further assess the impact economic feasibility has on consumers seeking relief in an arbitration proceeding.

If this Office can provide any further information or assistance related to the Bureau's study, or any other of our common objectives, please do not hesitate to contact us.

Respectfully Submitted,

By: 

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