Submitted Via Regulations.gov

November 20, 2023

Rulemaking Petitions Docket
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Re: Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services (CFPB-2023-0047-0001).

Dear Director Chopra:

On behalf of the Association of Credit and Collection Professionals ("ACA International" or "Association"), I am writing in response to the Petition to Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services. ACA International represents approximately 1,700 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates, in an industry that employs more than 125,000 people worldwide. Most ACA International member debt collection companies are small businesses. The debt collection workforce is ethnically diverse, and 70% of employees are women. According to recent ACA member data, 35% of ACA members are 10 employees or fewer, 56% of ACA members are 25 employees or fewer, and 70% of ACA members are 100 employees or fewer.

I. Background about ACA International:

ACA International members play a critical role in protecting both consumers and lenders. ACA International members work with consumers to resolve consumers' debts, which in turn saves every American household, on average, more than $700, year after year. The accounts receivable management ("ARM") industry is instrumental in keeping America's credit-based economy functioning with access to credit at the lowest possible cost, thereby protecting one of the safety nets of the most vulnerable consumers in society from unplanned expenses. For example, in 2018 the ARM

industry returned over $90 billion to creditors for goods and services they had provided to their customers. And in turn, the ARM industry's collections benefit all consumers by lowering the costs of goods and services—especially when rising prices are impacting consumers' quality of life throughout the country.

ACA International members also follow comprehensive compliance policies and high ethical standards to ensure consumers are treated fairly. The Association contributes to this end goal by providing timely industry-sponsored education as well as compliance certifications. In short, ACA International members are committed to assisting consumers as they work together to resolve their financial obligations, all in accord with the Collector's Pledge[1] that all consumers are treated with dignity and respect.

II. The Petition Seeks to Limit Arbitration in Contravention of Judicial Precedent and the Congressional Review Act.

On September 14, 2023, the American Association for Justice (AAJ), the National Association of Consumer Advocates (NACA), Public Citizen, Public Justice, the National Consumer Law Center (on behalf of our low income clients), Consumer Federation of America (CFA), the UC Berkeley Center for Consumer Law & Economic Justice, Americans for Financial Reform, and Better Markets, Inc. petitioned the Consumer Financial Protection Bureau (CFPB) to issue a rule "that would allow the consumer to make a meaningful choice on whether to use arbitration after a dispute arises." In addition to this Petition, the CFPB also proposed a Notice of Proposed Rulemaking (NPRM) to require certain supervised nonbank covered entities that use form contract provisions that effect a waiver or limitation of certain consumer rights with respect to the offering or provision of consumer financial products and services to report information about their use of such contract terms and conditions to a publicly available Bureau registry.

Both of these suggested actions seek to impose a chilling effect on private sector utilization of arbitration agreements, despite the fact that (i) the U.S Supreme Court (the "Supreme Court") has established a clear precedent permitting arbitration between individuals and/or entities, and in doing so, favoring an individual or entity's autonomy to enter into such agreements over State laws that restrict the use of arbitration,[2] and (ii) Congress has repeatedly indicated through bipartisan actions its intention of supporting an individual and/or entity's autonomy to enter into arbitration agreements, including, most notably, when Congress disapproved of the CFPB's 2017 arbitration rule in accordance with the Administrative Procedure Act. Banning the use of arbitration would circumvent established Supreme Court precedent as well as congressional intent, and in doing so, violate the separation of powers, among other constitutional concerns.

The Supreme Court has long recognized the value of arbitration as a medium for dispute resolution, and through its jurisprudence, has held that States and localities must treat arbitration agreements or

[1] Collectors Pledge states that ACA members • believe every person has worth as an individual. • believe every person should be treated with dignity and respect. • will make it their responsibility to help consumers find ways to pay their just debts. • will be professional and ethical. • will commit to honoring this pledge.
[2] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

clauses no different than other contracts.[3] In fact, Section 2 of the Federal Arbitration Act (the "FAA") provides that arbitration agreements are "valid, irrevocable, and enforceable,."[4] Specifically, Section 2 of the FAA sets forth (i) an enforcement mandate whereby "agreements to arbitrate [between two or more parties are deemed] enforceable as a matter of federal law", and (ii) a savings clause that allows for the "invalidation of arbitration clauses on grounds applicable to any contract".[5] Taken together, the Supreme Court has interpreted this framework to prohibit the invalidation of arbitration agreements pursuant to "legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[6] In applying this principle towards instances where State laws have sought to limit the use or constitutionality of arbitration clauses in valid contracts, the Supreme Court has affirmed the validity of arbitration agreements in accordance with the terms and conditions contained therein, and in doing so, prohibited or otherwise restricted State laws that seek to infringe on private parties' use of arbitration agreements.[7]

For example, in *Concepcion*, customers brought a class action lawsuit against AT&T Mobility LLC in federal district court, following which AT&T Mobility LLC moved to compel arbitration based on the arbitration clause contained within the applicable provider-customer contract.[8] The lower court held that (i) the arbitration clause was unconscionable, and therefore, unenforceable under California law, and (ii) the FAA did not preempt California law governing unconscionability.[9] On appeal, the Supreme Court reversed this order by holding that the FAA preempts "State-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[10] Time and time again, the Supreme Court has found that in enacting the FAA, Congress expressly enacted a framework designed to permit parties to enter into arbitrations as an alternative to litigation, and therefore, courts were bound by "the FAA's command to place [arbitration] agreements on an equal footing with all other contracts".[11]

Further, Congress has taken several legislative actions favoring the use of arbitration agreements in the ordinary course of business, or in certain situations, has enacted specific carve-outs where use thereof would be prohibited. The FAA, as originally enacted by Congress, included specific carve-outs for contracts of the employment of seamen, railroad employees, or other classes of workers engaged in foreign or interstate commerce.[12] Most notably, in 2017, Congress invoked its statutory authority under the Congressional Review Act to disapprove of the CFPB's rule that prohibited arbitration clauses in consumer finance contracts that barred class actions, among other things.[13] In addition, in 2022, Congress passed and President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which rendered invalid and unenforceable, at the claimant's option,

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[3] *Concepcion*, 563 U.S. at 344; *Volt Info. Scis., Inc*. v. *Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)
[4] 9 U.S.C. § 2
[5] *See Viking River Cruises, Inc. v. Moriana,* 142 S. Ct. 1906, 1917 (2022) (citing 9 U.S.C. § 2).
[6] *Kindred Nursing Ctrs. Ltd. v. Clark,* 137 S. Ct. 1421, 1426 (2017)
[7] *Concepcion,* 563 U.S. at 344*; Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).
[8] *See id.* at 344-345.
[9] *See Id.*
[10] *See Id.*
[11] *Kindred Nursing Ctrs*., 137 S. Ct. at 1429.
[12] 9 U.S.C. § 2.
[13] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''

arbitration agreements with respect to a case related to a sexual assault or sexual harassment dispute, among other things.[14] This legislative history indicates that Congress, over decades, has consistently favored the use of arbitration agreements in various contracts, and in the event certain situation arise in which Congress has found that exceptions should be made to the FAA, it has passed legislation doing so in accordance with the legislative process. Importantly, when given the opportunity to do so by the CFPB, it declined.

Despite clear Supreme Court jurisprudence and congressional intent that has favored the use of arbitration agreements and expressly found that arbitration agreements should be treated by courts and legislatures on equal footing as other valid contract provisions, the CFPB's NPRM and the recent Petition seek to circumvent both judicial scrutiny and legislative procedure by requiring a registry of terms and conditions that will have the effect of inviting significant scrutiny to the entities using such terms and conditions, and therefore, disincentive them from continuing to use such provisions in form contracts utilized in the ordinary course of business. In fact, the CFPB admitted that forcing entities to engage in policy shifts with respect to the use of arbitration agreements and other covered terms and conditions is a key rationale behind issuance of the NPRM. Its NPRM notes, "Depending on the competitive environment that firms face, they may choose to adjust their use of such terms and conditions, weighing the cost associated with a risk of losing trust with their customers or potential customers against the value they believe those terms and conditions to provide."[15] Because Congress and the Supreme Court have uniformly found in favor of the use of arbitration agreements, and expressly found that state laws restricting the use of arbitration agreements are preempted by the FAA, the CFPB does not have the statutory authority to use its regulatory power to force entities to engage in significant policy shifts.

That power lies with Congress, and Congress has already spoken on this issue.

III. The Congressional Review Act Prohibits the CFPB from Issuing a Substantially Similar Rule

As noted above, Congress expressly spoke on this issue in 2017 when it passed a joint resolution under the Congressional Review Act disapproving of the CFPB's rule that placed restrictions on the use of arbitration agreements.[16] Under the Congressional Review Act, a federal agency is prohibited from issuing a new rule that is substantially the same as the disapproved rule unless Congress thereafter specifically authorizes the new rule.[17] There is significant evidence indicating that the provisions of the Petition and the CFPB's NPRM are substantially similar to that of the CFPB's 2017 rule regarding arbitration such that the NPRM would be in violation of the Congressional Review Act. In the Petition there is no mention of the 2017 disapproval. Specifically, it in no way addresses how the CFPB could legally move forward in again seeking to ban arbitration by relying on an outdated study from 2015 that Congress already voted against. Furthermore, it in no way addresses how the CFPB could overcome the fact that this action is substantially similar to the previous arbitration final rule, which was already struck down.

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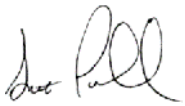
[14] 9 U.S.C. § 402.
[15] NPRM at 6962.
[16] Joint resolution (H.J. Res. 111) providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by Bureau of Consumer Financial Protection relating to ''Arbitration Agreements.''
[17] 5 USC § 801(b).

As such, the CFPB should not move forward with this Petition or its NPRM. Thank you for your attention and due consideration. Please let me know if you have any questions.



Scott Purcell
Chief Executive Officer
On behalf of ACA International