Appendix for CFPB Arbitration Proposed Rule Request for Comment

P. 32868: *The Bureau seeks comment on its preliminary findings discussed above that the class proposal would be in the public interest and for the protection of consumers.*

One of the examples given in the proposed rule of a class action that has had an effect on the industry is the Gutierrez v. Wells Fargo case. Although Pew's research shows that large banks have used high-to-low reordering of checking account transactions less frequently in the years since that case, many continue to do so, protected from lawsuits by their pre-dispute arbitration agreements. When looking for evidence that class actions might prevent unfair practices, the CFPB should be mindful that the status quo provides protection to financial companies against the risk of litigation. Thus, while it is promising that fewer banks manipulate transactions to increase overdraft fee revenue; the full effect of that deterrence cannot be felt without the implementation of the CFPB's proposed rule., We would also urge the CFPB to keep in mind that class action bans have been used to varying degrees for years. Therefore, the value of class actions as a means of providing relief to consumers has always been stunted because they have not previously been universally available.

P. 32872: *The Bureau seeks comment on whether the Bureau should define or provide additional clarification regarding when an arbitration agreement is "pre-dispute."*

Pew's research has found that consumer contracts of all types very frequently include provisions allowing for the alteration of contracts at any time by the provider. It is also important to note that consumers who are involved in class action lawsuits very frequently are still in a contractual relationship with the defending party. Thus, without a strong anti-evasion structure in the rule, a company could change the terms of a contract after a dispute arises to bind consumers to arbitration for all prior disputes. Any arbitration agreement that is agreed to before a class is certified or a decision is made by a judge to not certify a class, for purposes of this rule, should be considered pre-dispute.

P. 32887: *The Bureau seeks comment on whether, if it were to adopt an exemption, it should monitor exempt entities' reliance on arbitration agreements in class actions . . . .*

If the CFPB were to take any steps to adopt exemptions, it should require exempt providers to submit not only motions to compel arbitration, but any communications with consumers or consumers' attorneys related to the use of pre-dispute arbitration agreements to avoid class action lawsuits. The existence of the agreement in the first place can act to chill consumers from bringing cases.

P. 32892: *The Bureau further seeks comment on known and potential consumer harms in individual arbitration.*

Pew's research has shown extensive consumer concerns with arbitration related to both the availability of dispute resolution forums and their fairness. For example, the public is concerned with the financial relationship between arbitration companies and the banks that use them.[1] This issue, commonly

[1] The Pew Charitable Trusts, "Banking on Arbitration," 7 (Nov. 2012), http://www.pewtrusts.org/~/media/assets/2012/11/27/pew_arbitration_report.pdf.

referred to as the "repeat player" problem, creates bias or the appearance of bias against consumer interests.[2] A bank may have an ongoing financial relationship with an arbitration company that they have used many times. However, most consumers would only use the company once. This creates an incentive for an arbitration company to favor banks over consumers.

In addition, consumers are concerned that the rights that are normally provided to them in court cases do not always apply in arbitration. There is often very little opportunity to appeal a case, even if the law is applied incorrectly. Arbitration also does not generally comply with the rules of discovery, and the arbiter does have to have legal training. All of these factors were concerning to a large majority of consumers in a survey commissioned by Pew.[3]

P. 32897: *[T]he Bureau seeks comment on whether a period of 211 days between publication of a final rule in the Federal Register and the rule's compliance date constitutes sufficient time for providers to comply . . . .*

Pew's research has shown a growing number of banks using arbitration agreements that insulate them from class action lawsuits. Because any pre-dispute arbitration agreements that are currently enforceable will be grandfathered in after the rule goes into effect, it is important for the CFPB to act as quickly as possible to end this practice for future consumer financial services contracts

P. 32898: *The Bureau seeks comment on whether the temporary exception in proposed § 1040.5(b) is needed, and, if so, on the exception as proposed.*

If temporary exceptions are made, it is important that the Bureau ensures that any contract that is entered into after the effective date of the rule does not include an enforceable arbitration agreement that contains a class action ban. A problem could arise with noncompliant agreements for prepaid cards if it is unclear when the contractual agreement between the two parties began. Therefore, the exception should be narrowly crafted and applied only where necessary. As the Bureau itself notes, limiting the exception to agreements that are printed a certain amount of time prior to the rule becoming final would reduce the potential harm.

P. 32920: *The Bureau requests comment on these and other potential alternatives and on their further quantification.*

Pew's research, as well as that of the CFPB, show that for small harms there are almost no disputes that are brought individually, whether in court or through arbitration. No amount of consumer education can make it economically feasible to take a dispute to court or an individual arbitration in order to fight a small mistake or injustice, such as improper imposition of a $35 overdraft penalty fee.

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[2] E.g. Haloush, Haitham A., Malkawi, Bashar H., SMU Science and Technology Law Review, "The Liberty of Participation in Online Alternative Dispute Resolution Schemes," 129-131, http://heinonline.org/HOL/Page?handle=hein.journals/comlrtj11&div=12&g_sent=1&collection=journals.

[3] "Banking on Arbitration," 7-11.