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August 18, 2016

Director Richard Cordray
Consumer Financial Protection Bureau
1275 First Street NE
Washington, DC 20002

RE: Arbitration Agreements Proposed Rule with Request for Public Comment; CFPB Docket No. CFPB-2016-0020

Via Electronic Submission

Dear Director Cordray,

The Pew Charitable Trusts is dedicated to data-driven research on consumer financial products. Pew raises awareness, builds partnerships with industry, and advocates for policies that reduce risks and allow Americans to manage their financial activities responsibly.

The Dodd-Frank Wall Street Reform and Consumer Protection Act allows the Consumer Financial Protection Bureau (CFPB) to limit or prohibit pre-dispute arbitration clauses if doing so is for the protection of consumers and in the public interest.[1] Pew supports the CFPB's proposed rule, which prohibits the use of pre-dispute arbitration agreements as a means to avoid class action lawsuits and allows the CFPB to collect data on arbitration proceedings that take place between consumers and financial providers. Class actions are often the only viable remedy for consumers who are treated unlawfully. The widespread use of pre-dispute arbitration agreements with class action bans makes this rule vital for the protection of consumers and the promotion of a fair and level playing field.

In addition to the key points below, Pew's responses to a number of specific questions in the proposed rule can be found in the appendix.

Pew supports the proposal to prohibit the use of pre-dispute arbitration agreements that prevent consumers from bringing or joining class action lawsuits.

Arbitration clauses that act to take away class action as a means of settling disputes are nearly universal in large consumer financial products and services markets.[2] Almost all consumers are opposed to this practice.[3] Pew's research, along with the research of the CFPB, shows that consumers' only practical redress for small financial harms is often through class action lawsuits.

Pew research has shown that a large majority of checking account agreements offered by the largest banks and general purpose reloadable prepaid cards offered online through Visa, MasterCard, and

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518.
[2] Consumer Financial Protection Bureau, "Arbitration Study," § 2 (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[3] The Pew Charitable Trusts, "Consumers Want the Right to Resolve Bank Disputes in Court," 2 (Aug. 2016), http://www.pewtrusts.org/~/media/assets/2016/08/consumerswanttherighttoresolvebankdisputesincourt.pdf.

American Express websites contain pre-dispute arbitration clauses and class action bans.[4] These clauses have become so common that it is difficult for consumers to avoid them.[5] Further, it is standard practice for financial contracts to contain clauses allowing the provider to change the terms of the agreement at any time, so a company that does not originally include a pre-dispute arbitration clause could attach one at any time.[6] Pew also conducted a nationally representative study of checking account holders which found that consumers are concerned about mandatory arbitration and want the choice to go to court if a dispute arises between them and their financial institution. Pew's report outlining these data, *Consumers Want the Right to Resolve Bank Disputes in Court*, is attached.

Market Research

As shown below, large banks are increasingly using pre-dispute arbitration agreements and class action bans.

Pew recently collected checking account agreements from 44 of the largest 50 banks and found that 70 percent of them contained a pre-dispute arbitration agreement and 73 percent contained a class action ban. Among the 29 banks for which Pew has collected an account agreement each of the last four years, the share deploying pre-dispute arbitration agreements has grown from 59 percent to 72 percent and the share with class action bans has grown from 52 percent to 66 percent.[7]

Pew's research on prepaid cards, which some consumers use as alternatives to traditional checking accounts, shows a similar upward trend. By 2013, 77 percent of the major prepaid cards offered to the public included arbitration agreements, and 76 percent included class action bans (almost every card with a pre-dispute arbitration agreement also included a class action ban).[8]

Almost all pre-dispute arbitration agreements in checking accounts and prepaid cards include a class action ban.[9] This is not surprising in light of an April 2011 Supreme Court decision that determined state laws that might otherwise prevent class action bans from being enforceable do not apply if they are contained in pre-dispute arbitration agreements.[10] Similarly, the CFPB's data show that pre-dispute arbitration agreements are common across many types of consumer financial services. Some products have almost universal adoption of these clauses, while the other products the CFPB studied all showed increases in use over the past few years.[11]

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[4] E.g. The Pew Charitable Trusts, "Checks and Balances: 2015 Update," 18-24 (May 2015), http://www.pewtrusts.org/~/media/assets/2015/05/checks_and_balances_report_final.pdf.; The Pew Charitable Trusts, "Consumers Continue to Load Up on Prepaid Cards," 21, 31, 36-37 (Feb. 2014), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardsstillloadedreportpdf.pdf.

[5] "Consumers Want the Right to Resolve Bank Disputes in Court," 2; "Arbitration Study," § 2.

[6] E.g. "Consumers Continue to Load Up on Prepaid Cards," 21; The Pew Charitable Trusts, "Checks and Balances," (May 2013), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/checksbalancesnewpdf.pdf.

[7] "Consumers Want the Right to Resolve Bank Disputes in Court," 2-3.

[8] "Consumers Continue to Load Up on Prepaid Cards," 21, 37, 49. Pew collected general-purpose reloadable prepaid card (accounts that can be used to make purchases much like a debit card attached to a checking account) agreements that were available through the websites of Visa, MasterCard or American Express, as well as those available at websites of the 50 largest retail banks. These data were not directly comparable to previous Pew research, but the share of prepaid cards that included pre-dispute arbitration agreements rose from 66 percent to 77 percent.

[9] "Checks and Balances: 2015 Update," 23-24; "Consumers Continue to Load Up on Prepaid Cards," 37.

[10] *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

[11] "Arbitration Study," § 2.

Survey Research

Nationally representative survey research shows that large majorities of consumers across all demographic groupings are against banks taking away their rights to go to court by requiring disputes to be settled in arbitration. Specifically, Pew found:

- Eighty-nine percent of consumers want the right to participate in class-action lawsuits involving their banks
- Across all demographic groupings, consumers agree that they should have the ability to go to court, be heard by a judge or jury, and join a class action in a dispute with their banks

However, most consumers also said they would not take individual legal action to challenge relatively minor disputes, such as if a bank charged them a fee that they thought was unfair, because it would not be worth the time or expense. In fact, most said they would not take any further action aside from asking to speak to a manager. This was also true across all demographics, including political affiliation.

Analysis

Pre-dispute arbitration agreements and class action bans are an increasingly common restriction that the vast majority of consumers have to face when they have a dispute with a financial provider. Consumers know that it is not practical to take legal action when the harm against them is relatively small. Aside from possible government enforcement, class action lawsuits are the only useful means of recovering funds that are lost due to illegal actions by consumer services providers. The CFPB's data show that the amount recovered through class action settlements far exceeds awards or settlements in individual arbitrations or litigation.[12]

Most disputes that a consumer might have with a financial institution are for small dollar amounts, which make it unsurprising that so few arbitrations have actually been conducted concerning transaction accounts over the past several years.[13] While individual arbitration proceedings or court cases for small amounts have rarely occurred related to consumer financial services, class-action lawsuits have produced successful recoveries and policy changes. For example, the multidistrict litigation focused on checking account transaction reordering that has been proceeding in federal court in Florida during the past few years and has yielded about $1 billion in settlements.[14] This litigation has provided relief to millions so far and also incentivizes banks to end an unfair practice. In another similar case in California, a large bank lost a class action in court, repaid consumers $203 million dollars, and changed its transaction reordering practice.[15] These recoveries by millions of consumers stand in contrast to the approximately 25 total yearly arbitrations the CFPB found in its study for disputes under $1000.[16]

These results could not happen without class action lawsuits. As Pew's research shows, only 23 percent of consumers believe they would take legal action if they knew they were being charged a fee that they

[12] "Arbitration Study," §§ 5-6, 8.
[13] "Arbitration Study," § 5, p. 10.
[14] E.g. *In Re: Checking Account Overdraft Litigation*, 626 F. Supp. 2d 1333 (J.P.M.L. 2009), et al.; Corkery, Michael, Silver-Greenberg, Jessica, The New York Times, "Overdraft Practices Continue to Gut Bank Accounts and Haunt Customers," (Feb. 2016), http://www.nytimes.com/2016/02/29/business/dealbook/overdraft-practices-continue-to-gut-bank-accounts-and-haunt-customers.html?_r=0.
[15] *Gutierrez v. Wells Fargo Bank*, 589 Fed. Appx. 824 (9th Cir. 2014) (*cert. denied*).
[16] "Arbitration Study," §1, p. 12.

believed was unfair.[17] As Judge Richard Posner famously stated, "Only a lunatic or a fanatic sues over $30."[18]

Pew supports the proposal to collect information related to arbitrations and supports making that information available to the public.

Pew research has found that the public has a number of concerns related to pre-dispute arbitration agreements that go beyond class action bans. Those include:

- Eighty-five percent of checking account holders believe arbitrators should be required to have a legal degree or legal training.
- Eighty-four percent find arbitration unacceptable if the bank and the arbitration company have an existing financial relationship as a result of the bank providing repeat business to the arbitration company.
- Eighty-nine percent dislike that there is very limited judicial review of an arbitrator's decision, even in instances in which the arbitrator misapplied the law.

Pew's research has found some practices related to pre-dispute arbitration agreements that can be beneficial to consumers. Out of 29 large banks that had a pre-dispute arbitration agreement, 12 allowed customers to opt out of the arbitration agreement within a certain amount of time after opening the account and all but five included an exception that allowed customers to take individual claims to small-claims court.[19] On the other hand, some banks include harsh terms such as "loss, cost, and expenses" clauses that attempt to require consumers to pay all costs, including those incurred by the financial institution, whether they won or lost the dispute.[20]

Consumers view many potential aspects of arbitration unfavorably, but because arbitrations are conducted in private and are often subject to confidentiality agreements, the CFPB was not able to gather enough evidence to make a decision about banning them altogether. Moving forward, in order to conclusively evaluate the impact of arbitration practices that continue to take place, the submission of materials related to arbitration proceedings is necessary. Further, this information should be made public.

The pervasive use of pre-dispute arbitration agreements, the uneven terms that are commonly included in them that eliminate the option of pursuing a claim in a court of law, and the overwhelming public desire to have their rights to access the justice system maintained have led Pew to recommend a ban on the use of pre-dispute arbitration agreements.[21] The CFPB determined that the available evidence would only support restricting pre-dispute arbitration agreements so far as they interfered with class action lawsuits, but apparently did not believe that it had enough evidence to support a complete ban on them. The private and often confidential nature of arbitration could surely be a reason for this. An arbitration forum producing decisions that can be viewed and researched by any interested party will educate the public and policy makers to move forward in preventing additional harms and instituting effective rules. Arbitrations conducted with confidentiality agreements that never see the light of day frustrate this purpose.

[17] "Consumers Want the Right to Resolve Bank Disputes in Court," 9.
[18] *Carnagie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004).
[19] "Checks and Balances: 2015 Update," 23-24.
[20] Ibid.
[21] "Checks and Balances," 27-28.

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We thank the CFPB for this opportunity to comment on the proposed arbitration rule and look forward to continuing to work with you as you complete this process. As always, we are available to discuss these comments or any other aspect of our work at any time.

Sincerely,

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Attachments: Consumers Want the Right to Resolve Bank Disputes in Court;
Appendix