May 21, 2015

The Honorable Richard Cordray
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, DC 20552

Dear Director Cordray:

We urge the Bureau to solicit public comment on its recently-issued arbitration study before deciding whether to initiate a rulemaking proceeding pursuant to Section 1028(b) of the Dodd-Frank Act. Representatives of several of our organizations have made this request to Bureau staff members during meetings initiated by the Bureau to seek reaction to the study; we are writing to formalize our request that the Bureau solicit public comment.

A formal comment period is essential for five reasons:

First, the Bureau's study is 729 pages. It is impossible for anyone—regardless of point of view—to provide anything other than generalized reactions regarding the study during the one to two hour roundtable sessions that the Bureau has convened to obtain comment, particularly because these sessions seek input from multiple parties at the same time. Written comments are the only realistic way for the Bureau to obtain substantive comment regarding its study.

Second, the Bureau's limited outreach regarding its study has been, by definition, highly selective: the Bureau has chosen particular organizations, companies, and individuals to invite to its meetings soliciting reactions to the study. But there are many businesses and consumers who would be affected by a rule regulating arbitration whose views have not been solicited by the Bureau. And there are many academics who have studied these issues who similarly have not been asked for comment on the Bureau's study. A public notice soliciting comment from *all* interested persons and identifying the time by which comments may be submitted in order to be considered by the Bureau would remedy this serious deficiency.

Third, soliciting public comment now would at least start the process of compensating for the extreme lack of transparency and refusal to solicit public participation that characterized the Bureau's study process.

The Bureau issued only one Request for Information—in April 2012—which sought public comment on the topics that it should address in the arbitration study.[1] The Bureau never informed the public of the topics it had decided to study and sought public comment on them—even though a number of commenters suggested that the Bureau utilize that procedure. The Bureau never convened public roundtable discussions on key issues, as many other agencies routinely do. And the Bureau never sought public input on its tentative findings.

Indeed, the Bureau provided more transparency regarding its public opinion survey, which made up one relatively minor element of the study, than it did regarding the study itself. That, of course, is because the Paperwork Reduction Act mandated that public participation.[2]

By issuing a request for comment now, the Bureau would allow all interested parties to review and comment on the study, thereby providing a valuable opportunity for the Bureau to receive additional analysis and empirical information that it refused to solicit during the study process.[3] In addition, interested parties would be permitted to review each of the written comments that are submitted, a step that will further encourage public participation.

Fourth, soliciting comment now would allow the Bureau to inform itself of the significant defects in the study's analysis—defects that otherwise will fatally taint any proposed rule that the Bureau might propose based on the study.

For example, the report addresses a very limited data set of arbitrations in the consumer financial services context to see how arbitration in general functions; the Bureau would benefit from the wider range of data evidencing the outcomes for

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[1] *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, 77 Fed. Reg. 25,148 (Apr. 27, 2012).

[2] *See Agency Information Collection Activities; Comment Request*, 78 Fed. Reg. 34,352 (June 7, 2013); *Agency Information Collection Activities: Submission for OMB Review; Comment Request*, 79 Fed. Reg. 30,825 (May 29, 2014); *see also* 44 U.S.C. § 3508; 5 C.F.R. § 1320.5.

[3] Issuing a request for public comment also would bring the Bureau in line with other federal agencies that have solicited public comment on their studies and analyses. *See, e.g.*, *Notice of Opportunity To Comment on an Analysis of the Greenhouse Gas Emissions Attributable to Production and Transport of Brassica Carinata Oil for Use in Biofuel Production*, 80 Fed. Reg. 22996 (April 24, 2015) (request for public comment by the Environmental Protection Agency).

consumers in arbitration more broadly. In the same vein, the Bureau should examine more recent arbitrations—rather than the time frame before and immediately after the Supreme Court decided *AT&T Mobility LLC v. Concepcion*—i.e., when arbitration agreements were, in the main, not being enforced in the context of consumer class actions. Moreover, the premises underlying the Bureau's analysis of the cost savings associated with arbitration have been rejected by those who study law and economics,[4] and the Bureau's methodology and conclusions should, therefore, be subjected to meaningful expert review.

The shortcomings in the data studied by the Bureau have consequences for any regulation that the Bureau would promulgate. The report simply does not address whether consumers will have a realistic opportunity to pursue and receive relief for the disputes typically resolved in arbitration as compared to the alternatives to which claimants would be relegated if arbitration is limited or regulated. For example, the Bureau claimed to be unable to provide a "cents-on-the dollar" analysis of the value of class action litigation, even though the Bureau offered that very same analysis for arbitrations. Leaving aside whether the latter calculation is flawed, it is clear that the Bureau could have undertaken to make a calculation (or at least a reasonable estimate) of the "cents-on-the-dollar" value of class actions, and such a comparison would be highly relevant to the Bureau's assessment of whether limitations on arbitration are in "the public interest." External review and comment on the study would likely furnish the Bureau with appropriate tools to make that comparison.

Fifth, soliciting public input before embarking on a major rulemaking is consistent with the Bureau's approach in other contexts—where the Bureau has issued advance notices of proposed rulemaking in order to gather interested parties' views in advance of proposing a rule.[5] Given the importance of the issue and the absence of any meaningful opportunity for public comment during the study process, that approach is particularly appropriate here.

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[4] *See* Stephen J. Ware, The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration Of Class Actions and Arbitration Fees, 5 *J. Am. Arbitration* 251, 254-57 (2006) (emphasis added; footnotes omitted; citing, *inter alia*, Richard Posner, *Economic Analysis of Law* (6th ed. 2003)).

[5] *See, e.g., Advance Notice of Proposed Rulemaking, Debt Collection (Regulation F)*, 78 Fed. Reg. 67848 (Nov. 12, 2013); *Advance Notice of Proposed Rulemaking, Electronic Funds Transfers (Regulation E)*, 77 Fed. Reg. 30923 (May 24, 2012) (pertaining to prepaid cards).

In sum, there are extremely strong reasons why the Bureau should provide interested parties with a sixty-day period to comment on its study. And it is not clear why the Bureau would decline to offer this opportunity. Some Bureau employees suggested during the meetings held after issuance of the study that written comments would be considered if submitted—offering that opportunity as an alternative to issuance by the Bureau of a notice soliciting comment from all interested persons and providing a deadline for consideration of comments. But such an *ad hoc* process is unfair to interested parties not informed of that opportunity, allows the Bureau to arbitrarily disregard unwanted or challenging comments on the ground that they were received "too late" because no public deadline is ever set, and discourages the submission of comments by interested parties who are reluctant to invest the resources in preparing comments that might arrive after the Bureau's undisclosed, informal deadline for considering them.

Moreover, requesting public comment will not delay any future rulemaking process because the Bureau must comply with the small business protection provisions of the Small Business Regulatory Enforcement Fairness Act before it initiates a rulemaking. The Bureau's compliance with those requirements could occur in parallel with the sixty-day comment period.

Thank you for your consideration of this request.

Sincerely,

American Bankers Association
American Financial Services Association
Consumer Data Industry Association
Financial Services Roundtable
U.S. Chamber of Commerce