THE FINANCIAL SERVICES ROUNDTABLE

June 22, 2012

Submitted via http://www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Comments on Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements (Docket No. CFPB-2012-0017)

Dear Ms. Jackson:

The American Bankers Association ("ABA"),[1] the Consumer Bankers Association ("CBA")[2] and The Financial Services Roundtable ("Roundtable")[3] (collectively, the

[1] ABA is the principal national trade association of the banking industry in the United States. It represents banks and holding companies of all sizes in each of the fifty states and the District of Columbia, including community, regional and money center banks. ABA also represents savings associations, trust companies and savings banks. ABA members hold an overwhelming majority -- approximately 95% -- of the domestic assets of the U.S. banking industry. ABA frequently appears in litigation, either as a party or *amicus curiae*, in order to protect and promote the interests of the banking industry and its members.

[2] CBA is the only national financial trade group focused exclusively on retail banking and personal financial services -- banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[3] The Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine and account directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

"Associations") appreciate the opportunity to provide comments in response to the Consumer Financial Protection Bureau's (the "Bureau's") Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements (the "Request"). We thank the Bureau and its staff for their work on this important preliminary phase of the arbitration Study.

I. INTRODUCTION

Many of the Associations' members, constituent organizations and affiliates (collectively, "Members") have adopted a wide variety of formal and informal alternative dispute resolution procedures in an effort to resolve consumer complaints in an efficient and cost-effective manner and maintain customer goodwill. Such procedures range from providing a toll-free telephone number or a website "contact us" link for customer complaints to providing written contractual provisions for the resolution of disputes by arbitration. Businesses that offer arbitration do so because it is a faster, more efficient and more cost-effective method of resolving disputes than court litigation, it minimizes the disruption and loss of good will that often results from litigation and it reduces litigation costs.

The Bureau's Study takes place against a rich historical backdrop. The Federal Arbitration Act ("FAA") was enacted in 1925 to overcome a long-entrenched judicial hostility towards arbitration, and it established a liberal federal policy favoring arbitration that is applicable in both federal and state courts. Notably, "Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind …. [T]he Act, by avoiding 'the delay and expense of litigation,' will appeal 'to big business and little business alike, corporate interests [and] individuals.' Indeed, arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[4] The importance of arbitration as an alternative to court litigation for resolving disputes, including disputes between a consumer and a company, is reflected in hundreds of judicial opinions that define and refine the role played by arbitration in American society.[5]

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[4] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (citations omitted).

[5] The Supreme Court alone has issued more than 30 significant opinions dealing with arbitration. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *14 Penn Plaza LLC v. Pyett* (2009); *Vaden v. Discover Bank*, 556 U.S. 49 (2009); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); *PacifiCare Health Sys. v. Book*, 538 U.S. 401 (2003); *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *First Options v. Kaplan*, 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, *supra*; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468 (1989); *Perry v. Thomas*, 482 U.S. 483 (1987); *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors*

(continued...)

Thus, in studying consumer arbitration, the Bureau is not writing on a blank slate. Over the course of time, consumer arbitration agreements have evolved from short provisions to detailed agreements filled with consumer-friendly features. The Associations firmly believe that arbitration offers consumers and covered persons greater benefits than either individual or class action litigation, and that those benefits -- which include streamlined proceedings, informality, reduced cost and speed[6] as well as ease of access -- have never been more important than they are in today's economy.

Many studies of consumer arbitration have previously been published. Some of the more significant ones are referenced in the Attachments to this letter. Nevertheless, given the evolution of consumer arbitration agreements that has occurred over time, as well as the recent emergence of the American Arbitration Association ("AAA") and JAMS as the leading third-party consumer arbitration administrators,[7] the Bureau may conclude that some prior research is outdated and fresh research is needed to illuminate the issues posed in the Request.

In particular, there is a need for current "apples to apples" empirical research comparing the benefits that consumers derive from individual arbitration to the benefits they derive from both individual litigation and class action litigation. We urge the Bureau to assess consumer arbitration in those dual contexts -- that is, as an alternative to individual and class action litigation.

Parts II and III of this letter contain our suggestions relating to scope and process. They are also incorporated into Part IV, which addresses each of the specific questions posed in the Request.

Executive Summary

Scope:

- The Bureau should study the benefits to consumers of individual arbitration as compared with individual litigation, with specific reference to: (a) outcomes, duration, costs, ease of access and consumer satisfaction; and (b) the extent to which consumers resolve their disputes with businesses informally, without resort to arbitration or litigation.

- The Bureau should study the benefits to consumers of individual arbitration as compared with consumer class action litigation, in particular with respect to: (a)

(...continued)
Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957); *Wilko v. Swan*, 346 U.S. 427 (1953).

6 *Concepcion*, 131 S. Ct. at 1749.

7 The National Arbitration Forum ("NAF") ceased administering consumer arbitrations in July 2009.

whether class actions provide meaningful benefits to the individual class members as compared with individual arbitration in terms of outcomes, duration, costs, ease of access and consumer satisfaction; (b) the costs and impact of class action lawsuits, including frivolous or nuisance class action lawsuits, on consumers, businesses and the courts; and (c) whether class actions are an efficient and cost-effective mechanism to ensure compliance with the law given the range of enforcement powers afforded to the Bureau and other state and federal enforcement authorities.

Process:

We applaud the Bureau's commitment to engage in empirically based and statistically sound research and urge the Bureau to continue to follow an open and transparent process in designing and conducting the Study

II. SCOPE OF THE STUDY

Section 1028 of the Dodd-Frank Act requires the Bureau to "conduct a study of, and to provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services." Section 1028 goes on to provide that the Bureau "by regulation, may prohibit or impose conditions or limitations on the use of [such] an agreement" if the Bureau "finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."

The Request states that comments are to be limited to the appropriate scope of the Study, as well as appropriate methods and sources of data for conducting the Study. It further states that the Bureau is not seeking comments at this time on whether it should exercise its rulemaking authority or whether any regulations would serve to protect consumers or be in the public interest.

The Request asks for comments on four main topics dealing with the scope, methodology and data sources of the Study: (1) the prevalence of pre-dispute arbitration agreements in consumer financial services products (other than credit card agreements, on which the Bureau already has data); (2) claims brought by consumers against financial services companies in arbitration; (3) claims brought by financial services companies against consumers in arbitration; and (4) the impact of pre-dispute arbitration agreements on consumers outside particular arbitral proceedings.

The Associations urge the Bureau not to limit itself to the specific questions posed in the Request and, instead, study consumer arbitration as it occurs to consumers in their daily lives -- that is, as part of the continuum of interaction with covered persons. Specifically, the Bureau should examine and measure the benefits and costs to consumers, businesses and society as a whole of individual arbitration as compared with both individual litigation and class action litigation. Although the Request does not specifically mention "class actions," in our view they cannot be divorced from an examination of consumer arbitration. In addition, the Bureau should take into account the many types of informal dispute resolution processes, including those error

and dispute resolution procedures provided by federal and state law,[8] those maintained internally by businesses and those offered by regulatory agencies (including the Bureau) and private organizations (such as the Better Business Bureau). In the lives of consumers and in the marketplace, all of these alternative dispute resolution procedures are inextricably intertwined and provide a necessary context for the study of consumer arbitration.

In addition, as noted below, the Study should be based on empirical data and should quantify the impact of arbitration agreements and any potential limitations on or prohibitions of mandatory arbitration and consider the "benefits and costs" to consumers and covered persons.

The Bureau should not limit itself to a review of existing studies on consumer arbitration. Where it determines that there are gaps in the existing studies, or that existing studies are outdated or do not respond fully to the issues that are the subject of the Request, the Bureau should update the existing studies, undertake its own research and permit the public to submit data.

A. Individual Arbitration Versus Individual Litigation (Generally Responsive to Questions 1 and 2.A of the Request)

The Bureau should study whether, in markets for consumer financial products or services, consumers fare at least as well in individual arbitration as they do in individual litigation in terms of outcomes, duration, costs and ease of access, and whether they are pleased with individual arbitration as a process as compared with court litigation.

1. Arbitration Processes and Outcomes

The Bureau should examine the rules and fee schedules that the current leading third-party administrators of consumer arbitrations, the AAA and JAMS, have adopted to promote the economical, efficient and expeditious conduct of consumer arbitrations.[9] For example, under the AAA Rules, if the claim or counterclaim does not exceed $10,000, the consumer is responsible for only one-half of the arbitrator's fees up to a maximum of $125, while the business must pay a $200 case service fee, a $775 administrative fee, and the remainder of the arbitrator's fees beyond the claimant's initial payment.[10] JAMS requires a consumer claimant to pay a $250 administrative fee. The business has to pay an administrative fee of $250 and is also responsible for 100% of the arbitrator's fee. Both the AAA fees and the

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[8] *See, e.g.*, Fair Credit Billing Act, 15 U.S.C. §§1666(a)-(d).

[9] The AAA's Supplementary Rules for use in arbitrations between consumers and businesses are set forth at http://www.adr.org/sp.asp?id=22014. JAMS' Streamlined Rules are set forth at http://www.jamsadr.com/rules-streamlined-arbitration.

[10] U.S. Supreme Court Justice Ruth Bader Ginsburg characterized this provision as a "model[] for fair cost and fee allocation." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 95 (2000) (Ginsburg, J., concurring).

JAMS fees for consumers are substantially less than the $350 filing fee for federal district courts and less than many state court filing fees. Moreover, both the AAA and JAMS have procedures whereby a consumer can request a waiver of even the $125 or $250 fees.

In addition, both the AAA and JAMS have adopted due process standards that must be complied with by companies that wish to retain them to administer an arbitration.[11] Numerous consumer advocates and governmental groups were members of the Advisory Committee that formulated the AAA's Consumer Due Process Protocol. The Protocol was adopted by the AAA in April 1998 to ensure that arbitration agreements between consumers and the companies they deal with are endowed with "fundamental fairness." These due process procedures have evolved over time for the benefit of consumers and currently provide, *inter alia*: that consumers be permitted to pursue their claims in small claims court; that the arbitrator apply applicable substantive law; that the arbitration hearing will take place at a location reasonably convenient for the consumer; and that the remedies available at law remain available in arbitration.[12]

There are a number of existing empirical studies and data sources that address consumer arbitration that the Bureau should review. For convenience, we identify and discuss those studies and data sources in Attachment A to this letter. Although these studies and data sources are informative, the Bureau may conclude that some of them are outdated given the evolution of consumer arbitration agreements over time and the withdrawal of the NAF from the consumer arbitration market. Therefore, where appropriate, the Bureau should update the existing studies of consumer arbitration and/or undertake new empirical research. In particular, we think it important that the Bureau focus on "apples to apples" comparisons of the outcomes, duration, costs and ease of access of individual arbitration as compared with the outcomes, duration, costs and ease of access of individual litigation for similar types of claims, as well as on consumer attitudes towards arbitration as compared with litigation.

2. Ability of Consumers to Resolve Disputes with Businesses without Arbitration or Litigation

To put data concerning the use of individual consumer arbitration and individual consumer litigation in context, the Bureau should also study the extent to which consumers

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[11] The AAA's Consumer Due Process Protocol is set forth at http://www.adr. org/sp.asp?id=22019. JAMS' Minimum Standards of Procedural Fairness for consumer arbitrations are set forth at http://www.jamsadr.com/rules-consumer-minimum-standards.

[12] A recent empirical study of the AAA's enforcement of its Consumer Due Process Protocol found that "the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations" and concluded, "Our findings support the proposition that private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses. Any consideration of the need for future legislative action should take into account the effectiveness of this private regulation." *See* Christopher R. Drahozal and Samantha Zyontz, *Private Regulation of Consumer Arbitration* (August 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract _id=1904545.

resolve their disputes with businesses through informal alternative procedures, without resort to either arbitration or litigation. Such procedures include error and dispute resolution procedures provided by federal and state law, customer complaint mechanisms maintained internally by businesses, such as toll-free customer complaint telephone numbers and website "contact us" links, as well as procedures offered by regulatory agencies, including the Bureau, numerous state agencies and private organizations such as the Better Business Bureau to help consumers resolve disputes with businesses. *See also* Part II.B.5 *infra*. We are not aware of existing studies that fully quantify the use of these more informal procedures to resolve disputes. However, the Bureau and other government and private agencies do keep some statistics on how often their procedures are invoked, and how many disputes are resolved.[13]

The Bureau should also study the extent to which consumers resolve their disputes with businesses through online dispute resolution, which uses technology to facilitate the resolution of disputes between parties. *See generally* David A. Larson, *"Brother Can You Spare a Dime?" Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes*, 11 Nev. L.J. 523 (2011) (discussing effect of "technology revolution" on alternative dispute resolution). Understanding the extent to which consumers resolve disputes through online dispute resolution services will help to place more traditional consumer arbitration services and other alternative dispute resolution procedures in the proper context.

3. Possible Benefits from Debt Collection Arbitrations Commenced by Businesses (Generally Responsive to Question 2.B of the Request)

There is a gap in the research on this issue because since July 2009, arbitration has not been used on a large scale for consumer debt collections initiated by companies. However, the Bureau could study whether consumers, businesses and the courts could benefit from having debt collection disputes resolved in arbitration instead of court.[14]

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[13] The Bureau provides statistics on consumer complaints in its Annual Report. The Report for the year ending 12/31/11 states that the Bureau began accepting customer complaints relating to credit cards on July 21, 2011. It did not begin receiving complaints relating to bank products and services and consumer loans until March 1, 2012, so those complaints are not covered in the Report but presumably will be included in the 2012 Report. As for credit cards, the report states that between 7/21/11 and 12/31/11 the Bureau received 9,307 credit card complaints, of which 7,463 were sent to the credit card companies for review. The report states that 64.1% of those complaints were reported closed with relief, and an additional 6.7% were still under review by the company.

The Better Business Bureau for the Mid-Atlantic Region (encompassing Eastern Pennsylvania and Metro Washington, D.C.) provides annual statistics. For 2011, it received 187,353 inquiries and 2,051 complaints relating to "financial services." *See* http://dc-easternpa.bbb.org/about-us/annual-statistics/.

[14] *See generally* AAA Consumer Debt Collection Due Process Protocol (October 2010) (available at http://www.odrandconsumers2010.org/agenda/).

B. Individual Arbitration Versus Class Action Litigation (Generally Responsive to Question 3 of the Request)

The Bureau should also study the benefits to consumers of individual arbitration as compared with class action litigation, in particular: (a) whether class actions provide meaningful benefits to individual consumers as compared with individual arbitration in terms of outcomes, duration, costs, ease of access and consumer satisfaction; (b) the costs and impact of class action lawsuits, including frivolous or nuisance class action lawsuits, on consumers, businesses and the courts; and (c) whether class actions are an efficient, cost-effective mechanism to ensure compliance with the law given the range of enforcement powers afforded to the Bureau and other state and federal enforcement authorities.

We believe that these are areas that are of critical importance in comparing consumer arbitration with class action litigation. There have been limited efforts to study these areas empirically. For convenience, some of these studies are identified and discussed in Attachment B to this letter. Nevertheless, there does not appear to be a sufficient amount of broad-based, up-to-date empirical data of the type that would be needed for the Bureau's Study. *See, e.g.*, Nicholas M. Pace and William B. Rubenstein, *How Transparent Are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data*, Rand Institute for Civil Justice (Working Paper) (July 2008) (explaining why such data has not been readily available to private researchers); Christopher R. Drahozal, *Statement Before the House Judiciary Subcommittee on Commercial and Administrative Law, Hearing on the Federal Arbitration Act*, at 8 (May 5, 2009) ("much more research remains to be done in order to evaluate in a meaningful way the relationship between arbitration and class actions"). Accordingly, these are important areas where additional research would be necessary.

We note that some of the economic impacts of class actions on businesses might be difficult, if not impossible, to calculate because most businesses do not track such costs separately. However, a metric that might be informative, and that is more easily obtainable, is the amounts paid by businesses to plaintiffs' lawyers in class actions that have settled or that have resulted in a final judgment in favor of the plaintiff. Those are costs to businesses that do not directly benefit the individual consumer class members even though they are often a substantial part of any settlement or judgment.[15] The data also should be ascertainable since in the federal system and in many state court systems, the amounts paid to plaintiffs' class action lawyers can be obtained from court filings on public record portals such as PACER. The subject of class action attorneys' fees has also been studied. *See, e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, Vanderbilt Law School, Journal of Empirical Legal Studies, Vol. 7 (2010) (studying amounts paid in federal class action settlements during 2006 and 2007).

Additional topics for research by the Bureau in the area of class actions may include:

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[15] In *Gaylor v. Comala Credit Union*, No. 10cv725 (M.D. Ala. June 6, 2012), an Electronic Funds Transfer Act case, the court approved a class action settlement and awarded attorneys' fees to the plaintiff's counsel even though no person besides the named plaintiff filed a settlement claim.

1. Whether class action lawsuits that were terminated by enforcement of an arbitration agreement, rather than through adjudication or settlement, should be included in the Study. Many courts have enforced class action waivers in consumer arbitration agreements and compelled the named plaintiff to arbitrate his or her claims on an individual basis. Although the outcomes of those individual arbitrations might provide useful empirical data, the Bureau should study whether any conclusions can be drawn concerning the effect of compelling individual arbitration on the putative class members. For example, the Bureau should bear in mind that if class litigation had been allowed to proceed, the named plaintiff would have likely faced pretrial defense motions (such as a motion to dismiss and a motion for summary judgment), opposition to the class certification motion and defenses on the merits at trial -- all over the course of many years. Alternatively, the case might have settled on a class or individual basis. Moreover, even if one assumes that putative class members would have received some measurable economic benefit through adjudication or settlement, there would be a question of how that benefit compared to the benefit the consumer could receive in an individual arbitration.[16] The Bureau should consider whether any conclusions about the potential benefits of class litigation to putative class members in cases where individual arbitration was compelled are too speculative and hypothetical to include in the Study.

2. Whether weight should be given to data concerning class action lawsuits that have settled. In comparing the benefits of class action litigation to individual arbitration, the Bureau should evaluate the weight, if any, that should be given to monetary payments to putative class members resulting from class action settlements. Many authorities have commented that class action settlements often occur because of the *in terrorem* threat of costly and drawn-out litigation. The Bureau should consider whether settlement payments in what might be

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[16] *See, e.g.*, *Parrish v. Blazer Fin. Servs., Inc.*, 2003 Ala. LEXIS 168 (Ala. May 30, 2003) (Alabama Supreme Court affirmed trial court's decertification of Truth in Lending Act ("TILA") class because, *inter alia*, even if the largest possible class recovery of $500,000 were obtained, each of the thousands of class members would receive less than $1, whereas individuals seeking to vindicate their own rights under TILA could potentially recover as much as $1,000 plus attorneys' fees and costs); *Sonmore v. CheckRite Recovery Services, Inc.*, 206 F.R.D. 257 (D. Minn. 2001) (court denied class certification for alleged FDCPA violation because class members might have received as little as 15 cents each). *See also* John H. Beisner, *Class Action "Cops": Public Servants Or Private Entrepreneurs*?, 57 Stan. L. Rev. 1441, 1447 (2005) (some class actions "effectively amount to a transfer of wealth from a company to a class action lawyer, with no real work accomplished by the plaintiffs' lawyer and no real benefit to the consumers on whose behalf the suit was supposedly brought"); Steven B. Hantler and Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 Geo. J. Legal Ethics 1343, 1346-48 (2005) (discussing cases in which putative class members received only low-value coupons in settlement, while their attorneys received substantial fee awards); S. Rep. No. 109-14 at 15 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 16 (noting the "numerous class action settlements approved by state courts in which most -- if not all -- of the monetary benefits went to the class counsel, rather than the class members those attorneys were supposed to be representing"); Thomas B. Leary, *The FTC and Class Actions* (June 26, 2003) (noting the FTC's concern "about settlements that do not adequately compensate injured consumers, either because they only provide class members with largely worthless discount coupons or because the class action lawyers are awarded a too generous share of the proceeds") (available at http://www.ftc.gov/speeches/ leary/classactionsummit.shtm).

considered nuisance suits are a proper measure of "benefits" that accrue to consumers from class action litigation.

3. Whether class actions are necessary in order for consumers to vindicate their statutory rights. In studying this issue the Bureau should examine, *inter alia*, data showing that over the past decade, 93% to 98% of all TILA claims brought in the federal courts were brought as individual actions, rather than class actions, even though TILA expressly permits class actions to be brought:

Year	**TILA Individual Actions**	**TILA Class Actions**
2002	539 (94% of total)	37 (6% of total)
2003	474 (93% of total)	39 (7% of total)
2004	554 (97% of total)	20 (3% of total)
2005	473 (97% of total)	19 (3% of total)
2006	671 (98% of total)	17 (2% of total)
2007	665 (95% of total)	40 (5% of total)
2008	733 (94% of total)	51 (6% of total)
2009	1,320 (97% of total)	40 (3% of total)
2010	928 (98% of total)	17 (2% of total)
2011	539 (98% of total)	15 (2% of total)

Source: LexisNexis CourtLink® database.

The Bureau should also study whether individual actions have been pursued because TILA permits a successful plaintiff to recover his or her attorneys' fees and costs, 15 U.S.C. §1640(a), and thereby provides an incentive for an attorney to represent the plaintiff in an individual action even in small dollar cases.[17] (Since most consumer arbitration agreements in use today, and the leading arbitration administrators, require applicable substantive law to be applied in consumer

[17] Other federal consumer protection statutes also allow a prevailing plaintiff to recover attorneys' fees and should be studied by the Bureau. *See, e.g.*, Electronic Funds Transfer Act, 15 U.S.C. § 1693m(a); Fair Credit Billing Act, 15 U.S.C. § 1640(a); Credit Repair Organizations Act, 15 U.S.C. § 1679g(a); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n and 1681o; Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d).

arbitrations, such an attorney incentive would also apply to TILA and similar claims resolved through individual arbitrations rather than individual court proceedings).

4. Whether the ability of the Bureau and other agencies to handle aggregated small dollar claims is more effective than class actions in deterring corporate conduct. The Bureau should study the effect of actual and threatened governmental action by the Bureau, the FTC, the Department of Justice and state attorneys general and other enforcement agencies on corporate behavior and whether it reduces the alleged need for class actions to encourage compliance with the law. In addition, the Bureau should study whether the interests of consumers are better protected through actions brought by governmental agencies, as opposed to private class action lawyers, since the former act in the public interest while the latter have an economic stake in the case, and whether governmental agencies do a better job than the private bar at determining and prioritizing which actions should be pursued in order to further the "public interest."

5. Whether the number of arbitrations commenced by consumers is a proper measure of the effectiveness of arbitration for consumers. The Bureau should study what influences consumers (and their lawyers) to choose arbitration *versus* litigation and whether existing disclosures about arbitration in consumer contracts are adequate to educate consumers about the existence of the arbitration agreement and the benefits of arbitration as an alternative to litigation. The Bureau should also study the extent to which consumer claims are resolved at a pre-arbitration (or pre-litigation) stage by a company resolving a consumer's complaint informally, either by a consumer receiving satisfaction after submitting a customer complaint directly to the company or by a consumer complaint being resolved with the assistance of a governmental entity (such as the Bureau or a state agency) or private organization (for example, the Better Business Bureau) that has received a request for assistance from the consumer.

6. Whether class actions are necessary to make consumers aware of the existence of a claim. The Bureau should study the role played in modern society by the internet and social media in alerting consumers to alleged corporate misconduct. It should examine the impact of internet "gripe sites" frequented by consumers and the capacity of alleged corporate wrongdoing to go "viral" on the internet and become known immediately to consumers. It should also study the extent to which websites and databases maintained by government enforcement agencies (including the Bureau) that encourage consumers to "tell their story" and submit complaints help educate other consumers to particular issues and potential claims.

7. Whether consumers are disadvantaged by the fact that many arbitrations are private and confidential and the results are not available to the public. If it studies this issue, the Bureau may wish to consider that some states, such as California and Maryland, do require certain arbitration statistics to be publically disclosed by administrators. The Bureau should study whether it should require at the federal level that arbitration administrators make publically available certain statistical information about the arbitrations they administer.

8. Whether arbitration is less beneficial to consumers than litigation because it does not contribute to the development of legal precedent. If it studies this issue, the Bureau may wish to examine the number of arbitration awards that are appealed to courts for post-award review, thus reentering the judicial mainstream. The Bureau might also study the number of

"precedential" opinions being issued by appellate courts as compared with the number of "non-precedential" opinions, in order to determine whether this issue is entitled to weight.[18]

III. PROCESS FOR CONDUCTING THE STUDY

Under Section 1028 of the Dodd-Frank Act, any future rulemaking on arbitration must be consistent with the Study the Bureau is undertaking. Since this Study may be the basis of a future rulemaking, the Bureau should continue to follow an open and transparent process in connection with subsequent phases of the Study.[19] In performing the Study, the Bureau should examine all relevant data and provide explanations for any findings or suggestions made in the Study. The Study should not be based on speculation or assumptions that are not supported by data. In addition, the process should be transparent, with disclosure of the empirical research being undertaken, the research standards being utilized, and the persons and/or entities conducting the research.[20]

IV. RESPONSES TO SPECIFIC QUESTIONS POSED IN THE REQUEST

We incorporate herein by reference Parts II and III of this letter. In addition to those comments, we have the following responses to the Bureau's specific questions:

1. Prevalence of Use

i. Other than with respect to credit card agreements, how should the Bureau determine the prevalence of pre-dispute arbitration agreements in different consumer financial services markets?

Response

The Bureau might determine the prevalence of pre-dispute arbitration agreements by surveying all competing market segments for covered financial products. For example, for a given financial product, the survey might include a representative sample of all bank and non-bank providers of the product. In the case of banks, the survey might include a representative sample of large, mid-size and small banks (in addition to a representative sample of non-bank providers of the product, such as credit unions, mortgage companies, finance companies and merchants).

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[18] For example, according to statistics maintained by the Administrative Office of the United States Courts, in the 12-month period ending September 30, 2011, 85% of federal courts of appeals opinions were "unpublished." *See* "Judicial Business of the United States Courts," 2011 Annual Report, at 38 (Office of the United States Courts).

[19] *See* Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

[20] *See* Information Quality Act, 44 U.S.C. § 3516 note, and the OMB regulations, 67 Fed. Reg. 8452 (Feb. 22, 2002).

Although credit card agreements have been omitted from the study of prevalence (but not from the study of the other issues enumerated in the Request), we note that one recent empirical analysis concluded that "[c]onsumers who wish to obtain a credit card that is not subject to an arbitration clause may have more options for doing so than is commonly believed …." Christopher R. Drahozal and Peter B. Rutledge, *Arbitration and Consumer Credit*, at 3.[21]

ii. Should the Bureau focus on particular markets for consumer financial products and services in reviewing prevalence?

Response

See response to question 1.i. No particular product segment or market segment should be singled out for study. Because pre-dispute arbitration agreements reduce the costs of resolving disputes, there would be a danger of market distortion if a segment of the financial services industry were singled out for regulation based on the results of the Study. As operating costs increased for providers operating within that segment, they would be put at a competitive disadvantage *versus* providers operating in other segments. Likewise, if individual product types were singled out for regulation, costs for those providers would increase, resulting in a competitive disadvantage *versus* other providers that did not offer that product type.

iii. Should the Bureau focus on the prevalence of particular terms in pre-dispute arbitration agreements?

Response

Under Section 1028 of the Dodd-Frank Act, any rulemaking by the Bureau in the area of pre-dispute arbitration agreements must be based on the Bureau's finding that the rulemaking is in the public interest or to protect consumers. It follows, therefore, that provisions that benefit consumers should be known to the Bureau before embarking on rulemaking in this area. Such provisions include, for example, the due process standards formulated by the major third-party arbitration administrators, discussed above, that have evolved over time and that we expect will continue to evolve for the benefit of consumers.

iv. Should the Bureau address how the prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time?

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[21] Available at http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1079&context=fac_wp&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Ddrahozal%2520credit%2520cards%26source%3Dweb%26cd%3D1%26ved%3D0CKMBEBYwAA%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.uga.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1079%2526context%253Dfac_wp%26ei%3DR4XHT4yVCIiy8QSdkbmoDw%26usg%3DAFQjCNFtoLzFu7EJviqLlxo_j7E9rZjHNw#search=%22drahozal%20credit%20cards%22.

Response

Were the Bureau to undertake a review in this area, it should include an analysis of how the terms of pre-dispute arbitration agreements have evolved over time to benefit consumers. Over time many financial services providers have added to their arbitration agreements consumer-friendly features and have incorporated the due process standards of the AAA and JAMS, which we expect to continue to evolve for the benefit of consumers. In addition to substantive terms, the Bureau should assess the evolution of procedural safeguards for pre-dispute arbitration agreements. For example, many providers now use capital letters and bold face type to ensure that consumers are aware that an arbitration agreement is included in the contract. Consumers benefit from such disclosures, which are actually more than the law requires. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (FAA preempted Montana statute requiring that arbitration provision had to be typed in underlined capital letters on first page of contract). Another example is a separate signature line some providers now require for consumers to acknowledge the arbitration provision, thus avoiding any inference that the provision was "buried in the fine print." As discussed in Part II.B.5 above, the Bureau should study whether such disclosures adequately educate consumers on the benefits of arbitration so they can take advantage of this alternative to litigation.

v. To address the questions above, what new data, if any, should the Bureau seek and from which entities? What existing studies or sources of empirical data should the Bureau rely upon to address any of the above questions?

Response

The Bureau might survey financial services providers in the manner described in our response to question 1.i, as we are not aware of any existing studies in the non-credit card context that take a comprehensive view of pre-dispute arbitration agreement prevalence or terms. Any study conducted by the Bureau should compare the benefits consumers obtain with pre-dispute arbitration agreements compared to the absence of such agreements including, as discussed in Part II.B.2 of this letter, not just settlements and court decisions, but also "payoffs" of nuisance suits. The frequency with which consumers obtain a recovery in arbitration and the average amount of the recovery should be compared to the frequency and average amount of recoveries by consumers in individual and class action litigation. Some existing studies are summarized in the Attachments to this letter.

2. Use and Impact in Particular Arbitral Proceedings

A. *Claims That Consumers Bring in Arbitration*

i. Should the Bureau determine how often consumers bring claims in arbitration?

Response

Yes, but the number of arbitrations commenced by consumers should not be studied in isolation. Data concerning individual arbitrations should be compared to data

concerning the benefits that consumers receive in individual and class action litigation. Also, as discussed at Parts II.A.2 and II.B.5 above, the Bureau should consider that many consumer complaints may be resolved prior to arbitration through informal dispute resolution procedures.

ii. Should the Bureau analyze the types of claims that consumers bring in arbitration?

Response

Yes, this might disclose useful information on consumer attitudes regarding arbitration.

iii. For claims that consumers bring in arbitration, should the Bureau seek to analyze: (a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes?

Response

Yes. As discussed in Part II.A.1, in response to question 1.v above and the Attachments to this letter, this has been the topic of several studies, but the Bureau may conclude that it should update those studies and conduct additional research on how the outcomes, duration, costs and ease of access of individual arbitration compare with the outcomes, duration, costs and ease of access of both individual and class action litigation. The Bureau should also study consumer satisfaction with the class action litigation process, including recoveries and the role of lawyers in the initiation, prosecution and settlement of class action suits.

iv. For consumers who bring claims in arbitration, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting dispute resolution process? Should the Bureau seek to determine the factors that impact consumer understanding and satisfaction?

Response

Yes. *See* responses to questions 2.A.ii-iii.

v. 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?

Response

We think the latter, since once the arbitration proceeding is commenced, it should not matter how the consumer got there. However, we see no harm in making the distinction, since the data may show that consumers who initially resisted arbitration were ultimately satisfied with the process and the outcome.

vi. If the Bureau should address some or all of the issues identified in 2.A.i-v above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?

Response

There are several studies on the use of pre-dispute consumer arbitration agreements that the Bureau should consider. *See* Part II.A.1-3 above and the Attachments to this letter. The Bureau may conclude that those studies should be updated with more current data. In our view, any research should also focus on "apples to apples" comparisons between individual arbitration and individual litigation in terms of outcomes, duration, costs, ease of access and consumer satisfaction. The Bureau may seek data that the major arbitration administrators (the AAA and JAMS) are in a position to disclose. We do not think that research concerning the impact to arbitral proceedings of particular terms in arbitration agreements would be fruitful since a wide range of variables interact to affect and produce arbitral outcomes.

B. *Claims That Covered Persons Bring in Arbitration*

i. The Bureau is not aware of recent practice by covered persons to bring claims against consumers in arbitration. Do such arbitrations, in fact, exist at this point? If there are such arbitrations, should the Bureau determine their frequency? If there are no longer such arbitrations, should the Bureau analyze whether covered persons will, in the future, return to bringing claims against consumers in arbitration?

Response

As discussed in Part II.A.3 above, since July 2009 arbitration has not been used on a large scale for consumer debt collections initiated by companies However, the Bureau could study whether consumers, businesses and the courts could benefit from having debt collection disputes resolved in arbitration instead of court.

With respect to matters other than debt collection, there are also many reasons having nothing to do with arbitration that could explain why businesses do not bring arbitrations against consumers in a widespread manner -- *e.g.*, the desire of businesses to maintain goodwill with their customers and/or the informal resolution of disputes at a pre-arbitration stage. *See* Part II.B.5 above.

ii. Should the Bureau analyze the types of claims that covered persons bring in arbitration? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?

Response

Yes, *see* response to question 2.B.1 and Part II.A.3 of this letter.

iii. For claims that covered persons have brought in arbitration, should the Bureau seek to analyze: (a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer these questions for a period in which they did?

Response

Yes, *see* response to question 2.B.1 and Part II.A.3 of this letter.

iv. For consumers involved in any such cases, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting arbitration process? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?

Response

Yes, *see* response to question 2.B.1 and Part II.A.3 of this letter

v. If the Bureau should address some or all of the issues identified in 2.B.i-iv above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?

Response

See response to question 2.B.1 and Part II.A.3 of this letter We do not believe that any particular product segment or market segment should be singled out for study.

3. Impact and Use Outside Particular Arbitral Proceedings

Independent of their role in particular arbitral proceedings, pre-dispute arbitration agreements may impact consumers and/or covered persons in other ways. Thus, academics and other parties have claimed that the existence of pre-dispute arbitration agreements may impact:

- **The incidence and nature of consumer claims against covered persons;**
- **The price and availability of financial services products to consumers;**
- **Compliance with consumer financial protection laws;**

- **Consumer awareness of potential legal claims against covered persons;**

- **Consumer awareness and understanding of how potential legal claims against covered persons may be resolved; and**

- **The development, interpretation, and application of the rule of law.**

i. Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in one or more of these ways?

Response

As set forth at length in Parts II.A.1-3 and II.B.1-8 of this letter, which are incorporated by reference, we believe that a study of these areas is important to a study of consumer arbitration. Indeed, if the Bureau is to evaluate the non-arbitral impacts of arbitration, it should compare those impacts to the alternative, which is a dispute resolution system that is limited to individual and class action litigation. In this regard, the Bureau should compare the benefits to consumers of individual arbitration as compared with individual and class action litigation and the numerous related subjects and issues identified in Parts II.A and II.B of this letter.

ii. Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in any other ways that are independent of their role in particular arbitral proceedings?

Response

Yes. *See* answer to question 3.i and Parts II.A.1-3 and II.B.1-8 of this letter.

iii. If so, and in either case, what methods of study should the Bureau use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact of particular terms in predispute arbitration agreements?

Response

See answer to question 3.i and Parts II.A.1-3 and II.B.1-8 of this letter. No particular product segment or market segment should be singled out for study.

V. CONCLUSION

We appreciate the opportunity to submit these comments to the Bureau and look forward to the opportunity to submit additional comments during subsequent phases of the Study. Thank you for your consideration.

Respectfully,

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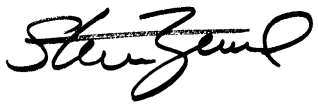

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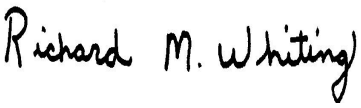

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ATTACHMENT A
(Studies and Data Sources on Consumer Arbitration)

1. **Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. on Disp. Resol. 843 (2010).** This article discusses the results of the March 2009 study of AAA consumer arbitrations undertaken by the Searle Civil Justice Institute, Northwestern University School of Law. The study was based on a review of 301 AAA consumer arbitrations (240 brought by consumers, 61 brought by businesses) that were closed by award between April and December 2007. It reached the following conclusions:

- The upfront cost of arbitration for consumer claimants is quite low (an average of $96 for claims less than $10,000 and $219 for claims between $10,000 and $75,000). These amounts are below the levels specified in the AAA fee schedule for low-cost arbitrations and are the result of arbitrators reallocating consumer costs to businesses.

- AAA consumer arbitration is an expeditious way to resolve disputes (an average of 6.9 months).

- Consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed).

- No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.

- Arbitrators awarded attorneys' fees to prevailing consumers in 63.1% of cases in which the consumer sought such an award and the average attorneys' fee award was $14,574.

2. **Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J.77 (2011).** This article discusses the results of the November 2009 study of consumer debt collection arbitrations undertaken by the Searle Civil Justice Institute, Northwestern University School of Law. The study compared the outcomes of debt collection cases brought by creditors in AAA arbitrations to the outcomes of debt collection cases brought in court. Key findings were that:

- creditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court;

- creditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court;

- the consumer response rates in the arbitrations studied did not appear to differ systematically from consumer response rates in court; and

- the rate of other case dispositions (e.g., dismissals and settlements) did not appear to differ systematically between the arbitration and court cases studied.

3. **Sarah R. Cole & Kristen M. Blakeley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 Penn St. L. Rev. 1051 (2009).** This study, based upon an analysis of data derived from NAF collection arbitrations commenced by creditors, concluded that "the consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system."

4. **Harris Interactive, *Survey of Arbitration Participant*s (April 2005)**, available at http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf. This survey of arbitration participants sponsored by the U.S. Chamber's Institute for Legal Reform was conducted online among 609 adults who had participated in a binding arbitration that culminated in a decision. The major findings were that:

- arbitration was widely seen as faster (74%), simpler (63%) and cheaper (51%) than going to court;
- two-thirds (66%) of the participants said they would be likely to use arbitration again, with nearly half (48%) saying they were extremely likely to do so;
- even among those who lost, one-third said they were at least somewhat likely to use arbitration again; and
- most participants were very satisfied with the arbitrator's performance, the confidentiality of the process and its length.

5. **RoperASW, *2003 Legal Dispute Study* (Apr. 2003)**. This survey, conducted by telephone of a random cross-section of 1,036 adult Americans, ages 18 and older, concluded that 64% of individuals would choose arbitration over court litigation and 67% believe court litigation takes too long.

6. ***Effective and Affordable Access to Justice by Consumers -- Empirical Studies & Survey Results* (2004)**. This is a synopsis of independent studies and surveys by third-parties concerning pre-dispute consumer arbitration compiled by the NAF. The results were summarized as follows:

- seventy-eight percent of trial attorneys find arbitration faster than lawsuits;
- eighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits;
- seventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits;
- eighty-three percent of business attorneys find arbitration to be equally or more fair than lawsuits;
- individuals prevail at least slightly more often in arbitration than through lawsuits;
- monetary relief for individuals is slightly higher in arbitration than in lawsuits;

- arbitration is approximately 36% faster than a lawsuit;
- ninety-three percent of consumers using arbitration find it to be fair;
- consumers prevail 20% more often in arbitration than in court; and
- in securities cases, consumers prevail in arbitration 16% more often than in court.

7. ***Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*** **(Ernst & Young 2004)**. This study examined the outcomes of 226 NAF arbitrations in lending-related, consumer-initiated cases based on data from January 2000 to January 2004, and a telephone survey of a random sample of claimants. It observed that:

- consumers prevailed more often than businesses in cases that went to an arbitration hearing, with 55% of the cases that faced an arbitration decision being resolved in favor of the consumer;
- consumers obtained favorable results (including settlements) in 79% of the cases that were reviewed; and
- 69% of consumers surveyed were satisfied with the arbitration process.

8. **Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, 14 Metropolitan Corp. Counsel 32 (2006).** This study compared "win" rates and case durations from disclosed 2003-2004 NAF consumer arbitration awards from California with publicly available outcome information from the Bureau of Judicial Statistics on litigated contract cases involving individuals in the 75 largest counties in the United States. Consumers who brought arbitration claims against businesses prevailed in 65.5% of cases, while plaintiffs litigating contract claims in court prevailed 61.5% of the time overall. The median duration for arbitrations was 4.35 months, compared with 19.4 months for court lawsuits.

9. **California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the CCP* (2004).** This study reviewed consumer arbitration data from six providers and found that consumers prevailed approximately 70% of the time, and the average arbitration was concluded in approximately 100 days.

10. **Database of approximately 64,000 arbitrations maintained by the AAA on its website, in Excel spreadsheet form**. (The Link to the data is available at http://www.adr.org/aaa/faces/aoe/gc/consumer;jsessionid=SKm1P96CclNLSJSSnhXhsYRQdXYykT1LGJQw6XtbxvTJQbb57Y84!821182694?_afrWindowId=null&_afrLoop=425848121677638&_afrWindowMode=0&_adf.ctrl-state=15i0z2zequ_9#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D425848121677638%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dy2rvbvens_4). The data identifies, where such information is available, the type of dispute, the prevailing party, filing and disposition dates, whether an award was entered or the matter settled, amount of the claim, the fee allocation, and so forth.

11. **The AAA's summary of consumer arbitrations from January to August 2007.** (The link is available at http://www.adr.org/aaa/ShowPDF;jsessionid=kbxxPbvFTQmmP8cycYdvlLjfxmgYV4dLDBNsfjx1gH347bx1GqLL!-1786312740?doc=ADRSTG_004325). At that time the AAA was administering approximately 1,500 consumer cases each year, and arbitrations were completed in approximately four to six months.

12. **New York State Bar Association Dispute Resolution Section, Comments to the Consumer Financial Protection Bureau in Connection with its Review of Arbitration for Consumer Financial Products or Services (April 2011).** These comments discuss data regarding the time it takes to dispose of a case in arbitration as compared with court and the economic impact if consumer arbitration were eliminated.

Other Studies and Data Sources

The Bureau may also find the following studies and data sources useful by analogy:

1. **Dispute resolution data maintained by the Financial Industry Regulatory Authority**. (Available at http://www.finra. org/ArbitrationAndMediation/FINRADispute Resolution / AdditionalResources/ Statistics/). The current report concludes that "[i]n 2011, approximately 74 percent of customer claimant cases resulted, through settlements or awards, in monetary or non-monetary recovery for the investor."

2. **Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Active Cases and Outcomes*, 6 Int'l J. Conflict Management 369, 378 (1995).** This study, dealing with AAA employment arbitration, found that employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations (including those initiated by employers).

3. **Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rights L. Rev. 29, 46-48 (1998).** This study, which compared the results in employment arbitration with the results in federal court during the same period of time, found that 63% of employees won in arbitration compared to 15% of employees who won in federal court. Awards to employees in arbitration were on average 18% of the amount demanded versus 10.4% of the amount demanded in court. The study also noted the shorter duration of arbitration compared to court proceedings.

4. **Michael Delikat and Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J. Nov. 2003 – Jan. 2004, at 56**. This study compared the results of employment discrimination cases filed and resolved between 1997 and 2001 in the S.D.N.Y. versus with the NASD and NYSE. Among other things, employees prevailed 33.6% of the time in court but 46% of the time in arbitration.

ATTACHMENT B
(Studies Regarding Class Action Litigation)

1. **Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice 2000)** (available at http://www.rand.org/pubs/monograph_reports/MR969.html). RAND used a case study methodology to paint a broad-brush picture of the class action landscape thirty years after the adoption of Rule 23, focusing on two case types: consumer class actions involving small individual losses and mass tort class actions involving personal injury and property damage. RAND searched electronic news databases to find evidence of class action activity in the mid-1990s (i.e., news articles on case filings, settlements, and decisions in state and federal courts), and interviewed executives at 15 major corporations and a dozen plaintiff law firms. However, it left open the "great big question" whether class actions, on balance, serve the public well.

2. **F.M Scherer, *Class Actions in the U.S. Experience: An Economist's Perception*, Harvard University, John F. Kennedy School of Government, Working Paper Series (2007).** This article concludes: "The U.S. experience with class action litigation reveals many difficulties that impair the working of the wheels of justice. The possibility of bringing class action suits does not appear to have deterred a substantial number of serious law violations, although increasing the damages multiple for serious offenses might have some deterrent effect. Entrepreneurship by specialist class action law firms often leads to opportunistic cases brought more for purposes of settlement blackmail than in the anticipation that a full trial will reveal the truth. Even when a full trial ensues, the decisions are not always in accord with either truth or justice."