December 4, 2014

Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: Study of Pre-Dispute Arbitration Mandated by Dodd-Frank Act §1028(a)

Dear Director Cordray:

The American Financial Services Association ("AFSA")[1] is submitting these comments in response to a letter sent to you on November 19, 2014 from Delaware Attorney General Beau Biden and 15 other state attorneys general calling for regulation limiting the use of pre-dispute arbitration in agreements for consumer financial products or services (the "Biden Letter").[2]

We believe the Biden Letter mischaracterizes how arbitration is used in practice and fails to consider the benefits consumers receive from resolving disputes without the expense of protracted legal actions.

The Federal Arbitration Act Was Intended to Apply to Individuals

The Biden Letter states that "the Federal Arbitration Act ("FAA") as conceived in 1925 was intended to facilitate arbitration of disputes between commercial entities of similar sophistication and bargaining power." This is simply not the case. Congress specifically intended that the FAA apply to individuals. Justice Breyer put it this way:

> We agree that Congress, when enacting this law, *had the needs of consumers*, as well as others, in mind. See S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the 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*. (emphasis added)[3]

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[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry protecting access to credit and consumer choice. Our 350 members include consumer and commercial finance companies, auto finance and leasing companies, mortgage lenders, credit card issuers, industrial banks and industry suppliers. These companies are licensed and comprehensively regulated by state laws—many of which have been in place for over a century and predate the enactment of most federal banking laws.

[2] AFSA notes that the Biden Letter represents less than one third of the nation's attorneys general and that no Republican attorneys general signed on.

[3] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995)

Arbitration Benefits Consumers

The Biden Letter further claims, "Mandatory pre-dispute arbitration is procedurally unfair to consumers, and jeopardizes one of the fundamental rights of Americans; the right to be heard and seek judicial redress for our claims." Again, Justice Breyer explains the benefits of arbitration:

> See, *e. g.*, H. R. Rep. No. 97-542, p. 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . ."[4]

The Biden Letter, along with other critics of arbitration, suggests that overburdened courts, with their accompanying lawyers' fees and often arcane rules, somehow provide a better avenue for consumer redress in cases involving financial products or services which generally have relatively small amounts in controversy. Given the workload of the overburdened state civil courts, this conclusion is inconceivable.

For example, a study funded by U.S. Department of Justice's Bureau of Justice Statistics calculated civil cases accounted for over 18 percent of the 103.5 million incoming cases processed in state trial courts in 2010. [5] The study further found that in 25 states, their clearance rate was below the rate of incoming cases "indicating that they are likely adding to their pending caseloads." [6]

How then would consumers benefit if they lost access to arbitration? How much longer would a consumer seeking redress that might lift his or her credit score have to wait to receive judicial relief? How much would it cost them to "lawyer up?"

Next, the Biden Letter implicates the honesty of arbitrators claiming they suffer from "repeat player bias" wherein arbitrators are incented to find for corporations since they may get future cases from that corporation.

To support this, it cites both the Minnesota Attorney General's action against the National Arbitration Forum (NAF) and a 2002 Study by Public Citizen. In the former, it should be noted that NAF withdrew from providing arbitration in consumer debt collection cases in 2009 and, in the latter, the Public Citizen Study has been largely discredited in an analysis by Professor Peter Rutledge of the University of Georgia Law School which found Public Citizen largely ignored existing research which showed that arbitration generally provides results that are superior or comparable from the civil justice system; and that it relied on an unusual and atypical data set—

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[4] *Id.*
[5] *See*: R. LaFountain, R. Schauffler, S. Strickland & K. Holt: *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (National Center for State Courts 2012) at Page 16.
[6] *Id.*, 18

consumer debt collection actions—that did not permit any meaningful lessons to be drawn about arbitration in general. [7]

In the case of the "repeat player" trope, the study found the empirical record was mixed and most researchers concluded that it is most likely due to companies' settlement decisions rather than arbitrator bias.

Further, the Biden Letter alleges that arbitration is costly for consumers. In reality, unlike civil litigation where a consumer would face uncertain timing, discovery and total of attorney fees, arbitration fees are modest and disclosed. The two largest providers, the American Arbitration Association ("AAA") and JAMS (formerly known as Judicial Arbitration and Mediation Services) also provide that a needy consumer may seek a waiver of fees.

In case of the AAA, if the amount in controversy does not exceed $10,000, the consumer is responsible for only one-half the fee with a maximum of $125, while the corporation must pay $975 in fees as well as the balance of the consumer's fees.

Class Actions

The Biden Letter notes that arbitration forestalls class actions — a laudable result in light of the pittances consumers receive in settlements while class action lawyers reap financial windfalls. While the Biden Letter notes that the world has changed since the enactment of FAA in 1925, its authors are untroubled that class actions, although dating from the promulgation of Equity Rule 48 in 1833, really began with the publication of Rule 23 of the Federal Rules of Civil Procedure in 1938.

In light of the Consumer Financial Protection Bureau's ("CFPB") broadly employed restitution powers (powers granted by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), we believe class action lawsuits have taken a back seat as a mechanism to recompense injured consumers or to ensure compliance by regulated industries. Consumers compensated by CFPB enforcement and consent orders do not share their compensation with lawyers, and those consumers who are not fully compensated through CFPB enforcement and consent orders are better off with speedy and effective resolutions of their cases through arbitration.

The Dodd-Frank Act also gives state attorneys general additional enforcement authority. While attorneys general receive notice of class action settlements that are subject to the Class Action Fairness Act, this is hardly the most potent weapon in a state attorney general's consumer protection arsenal. Attorneys general can use their authority under the Dodd-Frank Act to bring civil actions for unfair, deceptive or abusive acts or practices.

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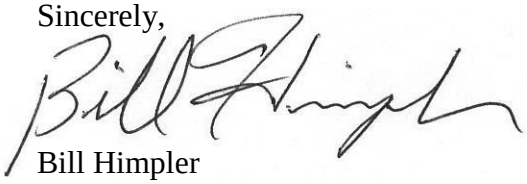
[7] *See*: Peter B. Rutledge, *Arbitration – A Good Deal for Consumers: A Response to Public Citizen* (U.S. Chamber Institute for Legal Reform April 2008)

AFSA recognizes that your staff is working diligently to fulfill the Dodd-Frank Act's mandate to study pre-dispute arbitration. We hope that our comments provide balance and help inform the CFPB's ultimate recommendation. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
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