



CENTER FOR CAPITAL MARKETS

COMPETITIVENESS

DAVID T. HIRSCHMANN
PRESIDENT AND CHIEF EXECUTIVE OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5609 | (202) 463-3129 FAX

May 2, 2016

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Director Cordray:

Thank you for extending the invitation to the U.S. Chamber of Commerce (the “Chamber”) to present at the Consumer Financial Protection Bureau’s (the “Bureau”) field hearing on arbitration to be held later this week in Albuquerque.¹ We believe that an open, transparent rulemaking process in which all stakeholders can provide well informed commentary is important to smart regulation that benefits consumers and the businesses that serve them. We look forward to participating and continuing our dialogue with the Bureau on this important topic.

The field hearing presents a chance for the public to hear important pieces of information about the Bureau’s views on arbitration, particularly because those views will inform the Bureau’s consideration of its proposed arbitration rule. Notwithstanding the Bureau’s 2015 arbitration study and prior field hearings, however, stakeholders still do not have the critical information they need in order to offer constructive suggestions on the arbitration rule during the comment period. Accordingly, we respectfully suggest that you consider addressing the Bureau’s views on the following issues in your prepared remarks at the hearing to help better inform the public about the anticipated arbitration rule.

First, it would be helpful if, in your remarks, you would provide the Bureau’s views on whether a rule prohibiting class action waivers will have the practical effect of eliminating consumer arbitration from the financial services marketplace. The Bureau’s 2015 arbitration study very clearly points out the comparative benefits of

¹ The Chamber is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region.

The Honorable Richard Cordray

May 2, 2016

Page 2

arbitration over individual litigation: arbitration is cheaper, faster, and more effective at delivering relief to consumers. The study thus demonstrates that it is in the public interest to preserve arbitration as a dispute resolution system that serves as an alternative to overcrowded courtrooms, where consumers have to pay hundreds of dollars just to be heard and can wait years for a decision. The demonstrable benefits of arbitration over individual litigation are probably why the Bureau is not proposing to ban pre-dispute arbitration agreements directly.

Yet at least since last autumn, when the Bureau published its SBREFA materials foreshadowing a ban on class action waivers, critics of that potential rule have wondered whether the Bureau has taken into account that the practical effect of such a rule will be eliminating consumer arbitration from the financial services market altogether. Such an analysis is not present in the 2015 arbitration study, nor are we aware of any other Bureau-endorsed literature on the topic. Thursday's hearing presents the opportunity for the Bureau to respond to this criticism and highlight the Bureau's thinking on this fundamental question.

Second, the public would benefit if your remarks were to include a discussion of how a consumers with a small claim based on unique circumstances would be able to vindicate those legal claims if companies, faced with the need to reserve millions of dollars for class action defense, were to cease subsidizing consumer arbitration programs. Under the current class action litigation rules, many small claims that involve issues that customers actually care about, such as alleged overcharges or the failure to credit a deposit on time, are unlikely to be classable because they are individualized disputes. For these claims, consumers will therefore have virtually no economically rational options for seeking redress: arbitration (in which most companies pay for consumers to bring claims against them, making it free to the consumer) will be gone; class action litigation will not be available; and rational consumers are not going to pay a \$400 filing fee to pursue a \$25 claim in court. Taking the opportunity to highlight how consumers will obtain redress for these types of claims would be very helpful in advancing the discussion.

Third, we respectfully request that you consider discussing any alternatives to the proposed rule that the Bureau considered. For example, did the Bureau consider publishing a set of "best practices" for arbitration agreements, as it has done in other areas of consumer financial protection policy? Did the Bureau explore ways to improve consumer education and financial literacy about arbitration programs or to

The Honorable Richard Cordray

May 2, 2016

Page 3

require companies to improve disclosure? It is not clear to us whether the Bureau, which published a study showing the benefits of consumer arbitration, considered ways to preserve those benefits for consumers. Thursday's hearing is an opportunity for the Bureau to explain why a sweeping rule that will effectively spell the end of consumer arbitration in the financial services context is preferable to a more "middle of the road" approach to advance the cause of consumer protection.

Finally, we would respectfully request that you explain the Bureau's assessment of its own ability to survey the large pools of data collected through its supervision program, consumer complaint database, and other means to detect and root out widespread violations of consumer financial protection law. The Bureau's unique ability to identify trends in the data and respond to them—a far greater ability than a class action trial lawyer's—appears to cut against the Bureau's assertion that class action litigation is necessary to accomplish the very same end as the Bureau's enforcement authority. It would be most helpful if you could please describe how the Bureau assesses the real-world benefits of class actions (which, according to the Bureau's own data, do a poor job of delivering benefits to consumers) in light of its own ability to survey troves of data, as well as whether the Bureau believes the benefits of class actions outweigh the costs consumers would incur if they lost the ability to arbitrate claims.

Again, thank you for the opportunity for the Chamber to testify at the hearing. We hope to have continued discussions with the Bureau throughout the development of this rule. We make these suggestions sincerely and constructively. We hope that they help make Thursday's event even more successful in furthering the transparency and accountability of the rulemaking process.

Regards,

A handwritten signature in black ink that reads "David Hirschmann". The signature is written in a cursive, slightly slanted style.

David Hirschmann
President and CEO

Center for Capital Markets Competitiveness