Consumer Financial Protection Bureau

1700 G Street, N.W., Washington, DC 20552

July 12, 2017

The Honorable Keith A. Noreika
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 Seventh Street SW
Washington, D.C. 20219

Dear Keith:

I am writing in response to your letter of July 10, 2017, in which you suggest that the arbitration rule which the Consumer Financial Protection Bureau issued that day might raise concerns with respect to the safety and soundness of the federal banking system.

I was surprised to receive your letter. As you may be aware, the issuance of the rule marked the conclusion of a multi-year process that included the Bureau's completion in March 2015 of an arbitration study that was required by law.[1] The rulemaking process itself spanned more than two years. Throughout that process, the Bureau consulted repeatedly with representatives of the staff of the Office of the Comptroller of the Currency, as well as the other prudential regulators, precisely to discuss "prudential, market, or systemic objectives administered by such agencies" in accordance with Section 1022 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. At no time during this process did anyone from the OCC express any suggestion that the rule that was under development could threaten the safety and soundness of the banking system. Nor did you express any such concerns to me when we have met or spoken. Indeed, the only recent communication we had received from the OCC on this subject prior to July 10 was an e-mail from your staff on June 26 "confirm[ing] that the OCC has no comments on the draft text and commentary." The points you now raise in your letter were not conveyed until after the Bureau had completed the interagency consultation process, and had already transmitted the final rule to the Office of the Federal Register for publication. Thus they do not satisfy the statutory requirement that an agency "has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States" and has been unable to do so.[2]

Additionally, there is no basis for claiming that the arbitration rule puts the federal banking system at risk. The Bureau found in the final rule that it will create an effective means by which consumers can seek to vindicate their legal rights under federal and state consumer protection laws and under their contracts. There is no question, and considerable past and present experience to

[1] CFPB, "Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)," (2015), available at http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[2] Section 1023(b)(1)(A) of the Dodd-Frank Act.

demonstrate, that U.S. banks are capable of operating safely and soundly in a legal system in which consumers can pursue redress for violations of the law. To the extent the rule makes redress available to consumers, it also will affect the incentives for providers of financial services to conform their conduct to the law. Indeed, the deterrent effect of the rule is designed to prevent exactly the type of unlawful conduct that itself can raise safety and soundness concerns, as it did in the lead-up to the financial crisis.

I have asked Bureau staff to review this issue and they have prepared the attached memorandum for me. To highlight a few key points:

- A majority of depository institutions today operate without arbitration agreements. There is no evidence that these banks and credit unions are less safe and sound than their counterparts with such agreements, and no regulator (including the OCC) has ever indicated that is so.

- The Bureau's final rule estimates an annual cost for additional federal litigation for all covered (bank and non-bank) entities of $523 million per year and a significant but smaller amount for additional state court litigation.[3] These costs would be borne by an industry with trillions of dollars in assets, and in which last year the banks alone earned over $171 billion in profits. In other words, if all of the projected costs were borne by banks (and they are not), the rule would reduce net revenue by .3 percent.

- The mortgage market, the largest consumer financial market (dwarfing the other consumer markets in which banks participate), currently operates with a ban on arbitration agreements and has effectively done so since 2004. That prohibition has not posed any discernable risk to the safety and soundness of the mortgage lending markets that are a key part of the United States' economic, financial, and banking systems, and no regulator (including the OCC) has given any indication to the contrary.

- Similarly, since 2009, banks representing approximately 47% of credit card loans outstanding have operated without arbitration agreements; the rulemaking did not adduce any evidence that this absence impaired the safety and soundness of these institutions. Indeed, when certain major credit card issuers agreed to temporarily eliminate their mandatory arbitration provisions, which they did as a provision in a class action settlement, the OCC received notice pursuant to the Class Action Fairness Act and did not interpose any objection on safety and soundness or other grounds. Nor, so far as we are aware, has the OCC downgraded these institutions – or any other institution which eschews arbitration agreements – in its CAMELS rating, which is a nonpublic indicator of the safety and soundness of the bank, on the basis that these institutions are exposed to class action liability. And none of the banks covered by the settlement has elected to reinstate an arbitration clause after the settlement expired.

I believe these data conclusively put to rest any safety and soundness concerns.

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[3] *See* Final Rule at 671 Table 1.

In your letter you suggest that the Consumer Bureau staff and OCC staff conduct a "shared analysis" of the Bureau's data. This, too, is a more than belated request: as I noted earlier, the Bureau publicly released its arbitration study on which our rule is predicated over two years ago. Furthermore, the Bureau's estimates as to the rule's impacts were set forth in the Notice of Proposed Rulemaking which the Bureau issued over a year ago. Until I received your letter this week, the OCC had not expressed any interest in the data relating to the rule.

With that said, I would be happy to have our staff who worked on the arbitration study and on our cost estimates in the rule take the time to review the study data and our rulemaking analysis with your staff. I am confident that a briefing will prove sufficient to answer any questions and allay any concerns.

Let me conclude by thanking you for your interest in the Bureau's work. We appreciate the concern you stated that institutions supervised by the OCC provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. Please do not hesitate to call me anytime to discuss these matters further.

Sincerely,

Richard

Richard Cordray
Director