

Americans for Financial Reform * Center for Justice and Democracy * Consumer Action *
Consumer Federation of America * Consumers for Auto Reliability and Safety * Citizen
Works * D.C. Consumer Rights Coalition * Homeowners Against Deficient Dwellings *
National Association of Consumer Advocates * National Consumer Law Center (on behalf of
its low income clients) * National Consumers League * Public Citizen * U.S. PIRG *
Workplace Fairness

August 6, 2013

Consumer Financial Protection Bureau
Attention: PRA Office
1700 G Street NW,
Washington, DC 20552
Via: <http://www.regulations.gov>

**Comments to the Consumer Financial Protection Bureau on the Proposed
Information Collection, “Telephone Survey Exploring Consumer Awareness of and
Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements,”
Docket ID: CFPB-2013-0016**

Introduction

The undersigned public interest organizations appreciate the opportunity to offer comments concerning the Consumer Financial Protection Bureau’s (Bureau) proposed national telephone survey of 1,000 credit card holders as part of its study of predispute binding mandatory (or forced) arbitration, required under Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Our organizations have long known and demonstrated through published studies and reports that pre-dispute binding mandatory (or forced) arbitration clauses in consumer and employment contracts are unfair, and that most consumers and employees are unaware of the existence and impact of the clauses. Nevertheless, we strongly support the CFPB’s study of the use of forced arbitration in contracts for consumer financial services and products, and more specifically its investigation of consumers’ awareness of, and perceptions relating to forced arbitration. We anticipate that the findings should lead the Bureau to promulgate rulemaking to ban forced arbitration in contracts for consumer financial services and products.

Background

In its supporting statement for this proposed information collection, the Bureau cited to prior surveys that had examined consumer awareness and interactions with forced arbitration in various sectors. One of these was a 2009 survey commissioned by the

Employee Rights Advocacy Institute and Public Citizen, which addressed consumer attitudes on forced arbitration. One of the findings in that survey found that “[r]oughly two-thirds cannot remember reading about a forced arbitration provision in Terms of Employment or in Terms of Agreement for goods and services.”¹ The survey also concluded that majorities of consumers believed that they have a right to sue should they be harmed or have a major dispute arise with an employer or company.

These findings along with consumers’ strong negative reactions to forced arbitration, which the survey also uncovered once the concept was defined and explained,² have added to the growing evidence that the practice is detrimental to providing a free and fair marketplace for consumers and employees.

The Bureau Survey Will Offer New Data

We support the Bureau’s efforts to conduct a consumer survey in connection with its study on the use of forced arbitration in consumer financial services and contracts. The survey will provide an opportunity for the Bureau to determine independently whether consumers are generally unaware of the existence and impact of arbitration clauses and thus whether their prevalence fails to reflect free contractual choices. We also expect that the data, together with other research, will support a finding that consumers do not plan for disputes when they enter into a contract and that the dispute resolution process is not a meaningful aspect of the shopping experience that better disclosure can address.

An investigation of consumer awareness and perception will add important context to the Bureau’s understanding of the use of arbitration clauses in consumer financial contracts. Consumers are already in a vulnerable position when entering into financial transactions because they typically lack meaningful bargaining power, having no input into the terms of financial services contracts, and are unable to revise the take-it-or-leave-it terms even if they try.

Further, forced arbitration is commonly used in various sectors of the financial services industry, so there is little choice for consumers as to whether to accept contract terms should they seek to conduct financial transactions with businesses. Even to the extent that they have choices, consumers are not thinking about or shopping for the ability to bring a lawsuit when they enter into consumer financial contracts. A general finding that consumers lack awareness of forced arbitration and do not understand it or pay attention to it before a dispute arises would further bolster the reasons for the Bureau to act quickly to ban forced arbitration clauses.

¹ Lake Research Partners, National Study of Public Attitudes on Forced Arbitration, April 2009, <http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf>.

² National Study of Public Attitudes on Forced Arbitration, at 4-9.

In litigation over whether to enforce a contract provision that requires arbitration, it is not uncommon for a consumer to allege or for a court to conclude that the consumer in the case was unaware of the existence or meaning of the arbitration clause.³ As a legal matter, a consumer's lack of awareness or understanding of an arbitration clause typically cannot by itself prevent its enforcement. As a policy matter, however, consumers' awareness and perception of arbitration are important reasons to drive changes in applicable laws and regulations.

Indeed, one of the findings of a proposed bill, the Arbitration Fairness Act, which would restore consumer choice in how to resolve disputes with businesses after those disputes arise, notes that "[o]ften, consumers and employees are not even aware that they have given up their rights" at the time that they entered into a contract.⁴ Similarly, a finding by the Bureau that consumers generally do not know of or understand the terms, or pay attention to them when shopping, should support efforts to ensure that consumers have choices when disputes arise.

The Proposed Consumer Survey Can Be Improved

The following are general observations and suggestions regarding the survey and its proposed script and questions:

- The proposed survey is prepared for credit card holders only. The Bureau should be mindful that the general concerns over consumer awareness and perceptions of forced arbitration apply across all sectors of consumer financial transactions that use non-negotiable contracts.
- The proposed survey focuses on awareness but should also address salience at the time consumers enter into a financial services contract. The survey should include a question about whether consumers believe that they should be able to choose a dispute resolution procedure at the time a concrete dispute arises.
- According to the "general instructions" section of the proposed script, the interviewer would state: "The Consumer Financial Protection Bureau is conducting an anonymous study..." Most consumers are probably unaware of the Bureau's existence, and reasonably could become suspicious if an interviewer then immediately proceeds to ask questions about their credit cards without providing proper context. While the Bureau has noted that the questioner will provide the participant with verification information, including the

³ E.g. *Yarbarough v. Regions Nat. Bank & Trust, Co.*, 3:10CV161-HTW-FKB, 2012 WL 4596181 (S.D. Miss. Sept. 4, 2012) report and recommendation adopted, 3:10-CV-161HTW-FKB, 2012 WL 4595046 (S.D. Miss. Sept. 29, 2012). *Wallace v. Red Bull Distrib. Co.*, 5:12-CV-02431, 2013 WL 3823130 (N.D. Ohio July 23, 2013).

⁴ S. 878, H.R. 1844, 113th Cong. (2013).

website address, once prompted, the Bureau should include more information in the opening statements about the Bureau to assure participants that the survey is legitimate.

- We are pleased that the survey will be conducted in English and Spanish and will include both residential landlines and mobile telephones. Similarly, the Bureau should seek to ensure geographic, racial, gender, and income diversity of its participants. The population of prospective survey participants should be complete and well-defined.
- Many of the questions involve lengthy hypotheticals. The Bureau should determine whether the questions can be simplified to articulate each inquiry in a brief but clear manner. The Bureau should be mindful of the commitment and attention span of its audience.
- The Bureau should review the wording of questions to determine whether the format is easily understandable to potential survey participants. For example, the Bureau should clarify whether the hypotheticals relate to the respective participant's credit card or to credit cards, in general.
- The Bureau should conduct adequate survey pretesting to address possible misinterpretations and misunderstandings in questions, as well as to identify deficiencies with the procedures to carry out and analyze the survey.
- The Bureau should publicly release the survey data in a downloadable, searchable format and in a timely manner. It should also provide reasonable safeguards to secure participants' private information.

Conclusion

We support the Bureau's effort to conduct a telephone survey on consumers' awareness and perceptions of issues surrounding forced arbitration. If conducted properly, the survey promises to deliver important insights on a key characteristic related to the practice.

Sincerely,

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