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August 1, 2016

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

Re: Docket No.: CFPB-2016-0020; Proposed Rule on Class Action Waivers in Forced Arbitration Agreements

Dear Director Cordray:

We write in strong support of the proposed rule to limit class action waivers in forced arbitration clauses.

Forced arbitration clauses and class action waivers are now found in most every financial contract today, stripping people of their basic right to resolve disputes in court. Where a company may have acquired a large financial windfall by violating the rights of large numbers of people, class actions are often the only way for people to gain access to the courts or to challenge this wrongdoing. Without this tool, many cases cannot be brought at all, allowing corporate wrongdoing to completely escape any legal accountability. As Justice Stephen Breyer, writing for four dissenting Justices in *AT&T v. Concepcion*, said, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[1]

Even if it were possible to bring an individual claim against a large bank or lender in arbitration, such a claim can do little to change illegal corporate behavior. In other words, class actions are critically important not only for the victims of corporate law-breaking but also for the deterrence function of the civil justice system to work. Without the class action tool, financial services companies can ignore the law far more easily and operate with impunity.

[1] Quoting Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit in *Carnegie* v. *Household Int'l, Inc*., 376 F. 3d 656, 661 (7th Cir. 2004).
[2] Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

In March 2015, the agency released a comprehensive study about the use of forced arbitration clauses and class action waivers in consumer financial contracts.[2] Some of the study's highlights, which we found particularly persuasive in support of the proposed rule, as follows:

Class actions benefit millions of consumers: The agency found "precise figures or estimates for the class size for 329 of the 419 settlements. There were 350 million total class members in these consumer financial class action settlements for cases reporting such data."[3] Moreover, this figure only reflects 78 percent of settlements where class size or a class size estimate could be identified.[4]

Class actions provide significant relief to consumers.

- Review of 419 federal consumer financial class action settlements revealed that "the total amount of gross relief – defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses was $2.7 billion. This estimate includes cash relief of $2.0 billion and in-kind relief of $644 million. These figures represent a floor. Many settlements had relief, such as provisions in which companies agreed to change company behavior towards consumers, that was not quantified as of final approval."[5]

- "Of the 251 settlements (60% of all settlements) reporting data, $1.1 billion had been or was scheduled to be paid to class members in cash or debt forbearance as of the time of the last document we were able to review."[6] It should be noted that this amount "excludes payment of in-kind relief and, again, it excludes any valuation of behavioral relief."[7]

- "Of 236 settlements reporting data (56% of all settlements), 34 million consumers were guaranteed recovery as of the time of the last document available for review, having made claims (11 million consumers) or participated in an automatic distribution (24 million consumers)."[8]

In 2014, our organization examined a large selection of class actions that have settled over the last decade.[9] We found similar results, with cases clearly illustrating that class actions have not only helped victims of corporate law-breaking but also resulted in injunctive relief that protects

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[2] Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[3] *Id*. at 3 (Section 8: What Is The Value Of Class Action Settlements?)
[4] *Id*. at 16 (Section 1: Introduction And Executive Summary).
[5] *Id*. at 4 (Section 8: What Is The Value of Class Action Settlements?)(citation omitted).
[6] *Ibid*.
[7] *Id*. at 16 (Section 1: Introduction And Executive Summary).
[8] *Id*. at 5 (Section 8: What Is The Value Of Class Action Settlements?)
[9] Center for Justice & Democracy, "First Class Relief: How Class Actions Benefit Those Who Are Injured, Defrauded And Violated" (October 15, 2014), http://centerjd.org/content/national-consumer-group-releases-new-study-about-importance-class-action-lawsuits

us all from a wide array of corporate wrongdoing, particularly by banks and lenders. For example:

AUTO LENDING

As we noted in our study, for many years, African-American and Hispanic customers were systematically charged a "higher markup on auto loans than White borrowers. It is this fact – coupled with federal laws outlawing discrimination in credit markets – that led to a series of lawsuits against auto lending institutions."[10]

In the 1990s and early 2000s, class action lawsuits were filed against several auto lenders and financial institutions. The lawsuits alleged that these mark up policies had a disparate impact on African-American and Hispanic borrowers, which violated the Equal Credit Opportunity Act and other laws. By 2006, settlements were reached in lawsuits involving six captives and five financial institutions. And while this problem has not yet been eradicated[11] with some lenders still violating the law,[12] one commentator observed, "Stepping back, there is a strong likelihood that this litigation has reshaped loan pricing throughout the industry…. Before the class action suit was filed, many of the lenders (including Ford Motor Credit and GMAC) placed no limits on the amount by which dealerships could mark up some of their loans."[13]

PAYDAY LOANS

Class actions have been particularly helpful in stopping abusive payday lending. Some states have passed consumer protection laws to shield individuals from the devastating effects of payday loans. However, "[s]till, among the 50 states, expensive lending persists due to loopholes and out-of-state lenders' ability to occasionally evade restrictions. … Even with these efforts, the reality is that the majority of already vulnerable individuals and their families live in states and localities in which there are minimal or no checks on payday lending."[14]

That is where class actions can help. For example, in the case of *Edwards v. Geneva-Roth Capital Inc.,* (2013), Case No. 49C01-1003-PL-013084 (Cir. Ct. Ind.), payday lender Geneva-Roth was accused of violating Indiana usury and lending laws by charging up to 1,000 percent APR on payday loans to people in serious financial distress. The company also allegedly renewed loans automatically, which resulted in thousands of dollars in loan repayment amounts

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[10] Mark A. Cohen, "Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation," Vanderbilt Law and Economics Research Paper No. 07-01 (December 14, 2006) at 1, http://ssrn.com/abstract=951827.

[11] The Center for Responsible Lending and civil rights groups continue to make this a priority issue. See, e.g., http://www.responsiblelending.org/media-center/press-releases/archives/Capitol-Hill-Briefing-to-Address-Abuses-in-Auto-Lending.html

[12] http://www.consumerfinance.gov/newsroom/cfpb-proposes-new-federal-oversight-of-nonbank-auto-finance-companies/

[13] Ian Ayres, "Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Justified," 95 *Cal. L. Rev.* 669, 714-5 (2007), http://digitalcommons.law.yale.edu/fss_papers/1168.

[14] Alyssa Peterson, "Predatory Payday Lending: Its Effects and How to Stop It," *Center for American Progress*, August 20, 2013, http://www.americanprogress.org/issues/economy/report/2013/08/20/72591/predatory-payday-lending/.

due in a few months for consumer loans originally taken out for $200 to $300. Geneva-Roth repeatedly tried to force this class action lawsuit into individual arbitration. After losing this attempt (before the Supreme Court decision in *AT&T v. Concepcion*[15]) and exhausting all further avenues of appeal, it agreed to settle for $1.35 million in cash, $5 million in cancellations of money owed from outstanding loans and pledged future compliance with Indiana's Small Loans Act.[16]

OVERDRAFT FEES

The charging of excessive overdraft fees has been one of the banking industry's most pernicious practices. It has been the subject of numerous class action lawsuits, which have helped consumers and led to better regulation of this practice. In addition to the CFPB's regulatory efforts, class action lawsuits have been critical to help keep these practices in check. One example is *In Re: Checking Account Overdraft Litigation*, (2011), 1:09-MD-02036-JLK (Bank Of America Settlement). In that case, Bank of America ("BoA") agreed to a $410 million settlement with current and former BoA customers over the bank's overdraft fee policies, which was arranging customers' debit card transactions from highest to lowest dollar amount instead of declining transactions where customers had insufficient funds for a transaction.

MORTGAGE LENDING AND SERVICE ABUSE

Class actions have greatly helped consumers who are victims of excessive fees and other predatory lending and service practices. For example, in *Sonoda v. Amerisave Mortgage Corporation*, (2012), Case No. C 11-01803 EMC N (N.D. Cal.), Amerisave Mortgage Corporation ("Amerisave") customers alleged several abuses, including that the company advertised that it could provide low mortgage interest rates and would lock in these low rates for its customers. The company made these claims on its website. However, this operation turned out to be "a classic bait and switch, updated for the Internet era."[17] Once applicants applied with Amerisave, the company then charged them property appraisal fees before providing them with a "good faith estimate" of all fees and loan costs, as required by law. Amerisave then either failed to lock the advertised low rate, let the rate lock period expire or broke its commitment to applicants to secure mortgage loan approvals.[18] If applicants then decided to pull out of the application process, Amerisave charged a significant cancellation fee.[19]

On September 4, 2012, Amerisave agreed to settle for $3.1 million. Each class member received a refund of 13.573 percent of their alleged overpayment to Amerisave. In addition, Amerisave made significant changes to its business practices. For example, instead of telling customers that

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[15] 131 S. Ct. 1740, 1748 (2011).
[16] *Edwards v. Geneva-Roth Capital, Inc.*, Cause No. 49C01-1003-PL-013084 (Marion Cty Cir. Ct., Ind.)(Order Granting Final Approval to Class Action Settlement Agreement, December 19, 2013) , http://media.ibj.com/Lawyer/websites/opinions/index.php?pdf=2013/december/Payday.pdf; *Geneva-Roth Capital, Inc. v. Edwards*, 956 N.E.2d 1195 (Ind. Ct. App. 2011), *trans. denied* 969 N.E.2d87 (Ind. 2012), *cert. denied* 133 S. Ct. 650 (U.S. 2012).
[17] Amended Complaint, *Sonoda v. Amerisave Mortgage Corporation*, Case No. C 11-01803 EMC (August 8, 2011).
[18] *Ibid.*
[19] *Ibid.*

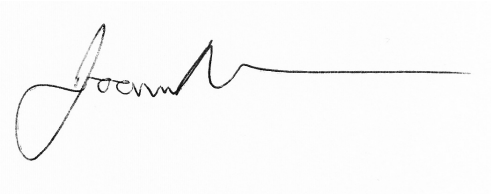
they must "pay for an appraisal," Amerisave now tells customers that they must "authorize payment" for an appraisal, while informing the customer that s/he will be charged only after Amerisave receives a "good faith estimate" of fees and costs of the loan.[20]

CREDIT CARD ABUSES

Class actions have worked to stop many credit card abuses in the past, and will continue to be a critical supplementary enforcement mechanism when the new rule is implemented. See, for example, excessive APR cases including *In Re: Chase Bank USA, N.A.*, (2012), MLD Number 2032; Case No. 3:09-md-2032 (MMC)(JSC) (N.D. Cal.) and *Lopez et al. v. American Express Bank FSB et al.*, (2014), Case No. 2:09-cv-07335 (C.D. Cal.), as well as payment protection cases. One such case was *Spinelli v. Capital One Ban*k, (USA), N.A., (2010), Case No. 8:08-CV-132-T-33EAJ (M.D. Fla.), which resulted in a $60 million settlement for customers.[21] According to attorneys involved in the case, *Spinelli* helped provide the basis for subsequent public enforcement actions not only by the CFPB but also by the Attorneys General of Hawaii, Mississippi, and New Mexico.

In sum, banning class action waivers would greatly help both consumers and law-enforcement, and would help prevent future corporate law-breaking. We strongly urge adoption of this rule. Thank you for your time and attention to this matter.

Very sincerely,



Joanne Doroshow
Executive Director

[20] Settlement Agreement, *Sonoda v. Amerisave Mortgage Corporation*, at 25, Case No. C 11-01803 EMC (September 4, 2012).

[21] http://golombhonik.com/class-action-against-hsbc-settles-for-23-5-mil.html (viewed October 6, 2014); http://fl.findacase.com/research/wfrmDocViewer.aspx/xq/fac.20131025_0002534.MFL.htm/qx.