New York Office
40 Rector Street, 5th Floor
New York, NY 10006-1738

T 212.965.2200
F 212.226.7592

www.naacpldf.org

LDF
DEFEND EDUCATE EMPOWER

Washington, D.C. Office
1444 Eye Street, NW, 10th Floor
Washington, D.C. 20005

T 202.682.1300
F 202.682.1312

August 22, 2016

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

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51 (Forced Arbitration Clauses and Class Action Bans)

Dear Director Cordray:

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") writes in strong support of the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") Proposed Rule on pre-dispute or "forced" arbitration clauses in certain consumer finance products and services, which would strengthen and protect consumers' class action rights. Class treatment of claims alleging pervasive and systemic discrimination is often the best, and sometimes the only, way to ensure effective redress for civil rights violations.

Founded by Thurgood Marshall in 1940, LDF is the nation's oldest civil rights legal organization. In litigation before the Supreme Court and other federal and state courts, LDF has focused particularly upon class actions because of their effectiveness in facilitating collective action to secure systemic change.[1] LDF has also appeared as a party and as an amicus before the Supreme Court in cases involving arbitration issues.[2]

Given our broad experience with respect to both class actions and arbitration, LDF welcomes the opportunity to comment on the CFPB's

---

[1] *See*, *e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867 (1984); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968).
[2] *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

Proposed Rule on pre-dispute or forced arbitration clauses. Section I of this comment letter discusses why the Proposed Rule is in the public interest and protects consumers: there is a strong public interest in the private enforcement of civil rights and consumer protection statutes, and class actions are particularly necessary to protect communities of color from lending discrimination, fraudulent practices, and other forms of unfair treatment. Section II provides recommendations on how to improve specific provisions in the Proposed Rule, including the expansion of the coverage of the rule and the data collection requirements.

I. The Proposed Rule is in the Public Interest and Protects Consumers.

Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorizes the CFPB to issue regulations that would prohibit or impose conditions or limitations on the use of arbitration clauses in consumer financial products or services if doing so "is in the public interest and for the protection of consumers." LDF believes that the Bureau's Proposed Rule is consistent with the CFPB's comprehensive empirical study[3] of arbitration and fulfills these statutory requirements. First, the Proposed Rule is in the public interest because it effectuates private enforcement of civil rights and consumer protection statutes on a class-wide basis. Additionally, the elimination of class action bans in consumer finance contracts will protect consumers from discrimination and other unfair treatment.

A. The Proposed Rule Advances the Public Interest in Private Enforcement of Civil Rights and Consumer Protection Statutes.

LDF strongly agrees with the Bureau's preliminary conclusion that it is in the public interest to preclude covered providers of certain consumer financial products and services from blocking consumer class actions through

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

the use of arbitration agreements. Our long experience in enforcing civil rights before the Supreme Court and in courts across the country confirms that class actions brought by private plaintiffs are a particularly effective tool in securing systemic change and redressing specific wrongs. The class action vehicle was created to "vindicat[e] the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."[4] The "impact of class suits in civil rights cases is substantial."[5] Because it broadens "the number of complainants, the class action triggers inquiry about institutional and organizational sources of harm and encourages development of solutions aimed at systemic reform."[6] Further, class proceedings allow victims to obtain and present the evidence necessary to prove broad-based discrimination, either intentional patterns and practices or disparate impact. An individual "is unlikely to have or make available the up-front costs needed to prosecute" a complex lawsuit requiring experts, sophisticated statistical analyses, and extensive discovery.[7] Class actions increase the efficiency of litigation by pooling and coordinating common claims and resolving them in a consistent, orderly, and streamlined fashion.

While public enforcement of civil rights and consumer protection statutes is critical, it does not obviate the need for a private class action mechanism. As demonstrated by the CFPB's thorough study on arbitration, private class actions typically complement, rather than duplicate, public enforcement actions.[8] Government agencies are unlikely to have the resources to uncover all instances of unlawful conduct and can be subject to political pressures and limitations by the executive or legislative branches of government.[9] Public regulatory bodies may also be geographically distant from sites of harm and generally have access to less information about

---

[4] *Sykes v. Mel S. Harris & Assocs., LLC*, 780 F.3d 70, 81 (2d Cir. 2015).
[5] Hon. Jack B. Weinstein et al., *Some Reflections on the "Abusiveness" of Class Actions*, 58 F.R.D. 299, 304 (1973).
[6] Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 Fordham L. Rev. 659, 678 (2003).
[7] *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-55 (1st Cir. 2006).
[8] CFPB Study, *supra* n.3, § 9 at 4.
[9] Jason Rathod and Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, Univ. of N.H. Law Rev. at 309 (2015), https://law.unh.edu/sites/default/files/media/rathod_-_final_may_1.pdf.

unlawful conduct as compared to private litigants.[10] Further, research has found that private enforcement generates significant deterrence of socially harmful behavior,[11] providing a clear and consistent signal that violations will prosecuted.[12] Private plaintiffs may advance more aggressive legal theories and seek more substantial remedies as compared to government agencies.[13] And, as noted by the Bureau, class actions are the only means by which affected individuals can enforce their rights for some types of claims, such as violations of the common law affecting consumers.[14] Further, private enforcement actions have been found to contribute to a form of active and direct citizen participation, constituting a valuable and important facet of democratic life and giving individuals a "personal role and stake in the administration of justice."[15]

B. Class Actions Are Necessary to Protect Consumers of Color from Lending Discrimination, Fraudulent Practices, and Other Unfair Treatment.

Thanks to landmark class actions litigated by LDF, ranging from *Brown v. Board of Education* to *Griggs*,[16] our nation has made significant

---

[10] J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1153-54 (2012), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3423&context=wmlr.

[11] Rathod, *supra* n.9 at 310, citing Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315, 318 (2011); *see also* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U.L. Rev. 1269, 1271 (2013).

[12] Stephen B. Burbank, Sean Farhang, & Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (and Other Common Law Countries)*, Faculty Scholarship. Paper 347, at 37 (2011), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1346&context=faculty_scholarship.

[13] Rathod, *supra* n.9, at 311, citing Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. Rev. 1401, 1404 (1998); *see also* Burbank, *supra* n.12 at 38 (noting that private enforcement regimes encourage legal innovation).

[14] CFPB, Notice of Proposed Rulemaking, Arbitration Agreements ("Proposed Rule"), 81 Fed. Reg. 32,830, 32,861 (Bureau of Consumer Fin. Prot., proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

[15] Burbank, *supra* n.12, at 40; Glover, *supra* n.10, at 1155-56, citing Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. Chi. L. Rev. 184, 198 (1987).

[16] 347 U.S. 483 (1954); 401 U.S. 424.

progress toward the constitutional aspiration of a "more perfect Union." Yet lending discrimination and fraudulent practices targeting persons of color undeniably persist, highlighting the continued need for class action litigation by private plaintiffs. Under the CFPB's Proposed Rule, class actions would be far more accessible to borrowers and consumers who have been injured by discriminatory practices or other unfair treatment.

African-American and Latino borrowers continue to face barriers in obtaining access to credit and fair loan terms and conditions.[17] Studies that control for income, credit score, and other risk variables consistently show that borrowers of color are disproportionately steered into predatory high-risk loans.[18] A number of factors have been identified as contributing to racial lending disparities: conscious or unconscious racial bias, historically higher unemployment and lower incomes for minorities, thinner credit histories for borrowers of color, and heightened lending standards following the 2008 financial crisis.[19] The recent spate of public enforcement actions by the Department of Justice and CFPB to address discriminatory practices disfavoring African-American, Latino, and Asian/Pacific Islander borrowers in mortgage, auto, credit card, and personal loans demonstrate the unfortunate continued prevalence of lending discrimination against borrowers of color.[20]

---

[17] Robert W. Fairlie, *Entrepreneurship Among Disadvantaged Groups: An Analysis of the Dynamics of Self-Employment by Gender, Race, and Education*, The Life Cycle of Entrepreneurial Ventures, International Handbook Series on Entrepreneurship 437 (Simon Parker ed. 2006).

[18] *See*, *e.g.*, Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L.L. Rev. 375, 399-400 (2010); Carolina Reid & Elizabeth Laderman, *The Untold Costs of Subprime Lending: Examining the Links among Higher-Priced Lending, Foreclosures and Race in California* 7, Inst. for Assets & Soc. Pol'y, Brandeis Univ. (Aug. 6, 2009), https://iasp.brandeis.edu/pdfs/Author/reid-carolina/The%20Untold%20Costs%20of%20Subprime%20Lending%203.pdf.

[19] Jay Fitzgerald, *Black, Latino mortgage rejection rates still high*, The Boston Globe (Dec. 22, 2015) (citing factors enumerated by Jim Campen, economics professor emeritus at the University of Massachusetts Boston).

[20] *See*, *e.g.*, *Consumer Fin. Protection Bureau and United States v. Hudson City Savings Bank*, No. 15-cv-7056 (D.N.J. 2015) (requiring the bank to pay $27 million to address alleged mortgage redlining in African-American and Latino neighborhoods); *United States v. Synchrony Bank, f/k/a GE Capital Retail Bank*, 2:14-cv-00454 (D. Utah 2014) ($169 million settlement addressing credit card discrimination against Latinos); *United States v. Ally*

Discriminatory lending practices also pose substantial obstacles to minority-owned businesses, which are significantly less likely to have loan applications approved as compared to non-minority businesses, even after controlling for industry, credit score, legal form, and human capital.[21] A recent study analyzing marketplace discrimination in banking shows that minority business owners are disproportionately denied credit and treated less favorably by loan officers, in terms of the encouragement and assistance given, compared to their non-minority counterparts.[22] Discriminatory lending practices create a significant deterrent to minority business owners applying for loans who fear likely rejection.[23] This discrimination in credit

---

Financial Inc. and Ally Bank, No. 2-13-cv-15180 (E.D. Mich. 2013) ($98 million settlement addressing auto loan pricing discrimination against African-American, Latino, and Asian/Pacific Islander borrowers); *United States v. Wells Fargo Bank, N.A.*, 1:12-cv-01150 (D.D.C. 2012) ($234.3 million settlement resolving allegations of mortgage loan steering and pricing against African-American and Latino borrowers); *United States v. Nixon State Bank*, 5:11-cv-00488 (W.D. Tex. 2011) (requiring the bank to pay nearly $100,000 to address discrimination against Latinos in personal loans). As stated in its 2015 report to Congress, the Department of Justice obtained more than $1.4 billion in monetary relief for affected persons and communities in cases filed pursuant to the Equal Credit Opportunity Act, Fair Housing Act, and the Servicemembers Civil Relief Act between 2010 and 2015. *See* The Attorney General's 2015 Annual Report to Congress Pursuant to the Equal Credit Opportunity Act, 2 (August 2016) ("2015 ECOA Report"), https://www.justice.gov/crt/file/882481/download.

[21] Alicia Robb, *Access to Capital Among Young Firms, Minority-Owned Firms, Women-Owned Firms, and High-Tech Firms*, 31 (Marin Consulting, LLC, Apr. 2013), https://www.sba.gov/sites/default/files/files/rs403tot%282%29.pdf; Christine Kymn, *Access to Capital for Women- and Minority-Owned Businesses: Revisiting Key Variables*, at 1, SBA Office of Advocacy Issue Brief (Jan. 29, 2014), https://www.sba.gov/sites/default/files/Issue%20Brief%203%20Access%20to%20Capital.pdf.

[22] Sterling A. Bone, Glenn L. Christensen & Jerome D. Williams, *Rejected, Shackled, and Alone: The Impact of Systematic Restricted Choice on Minority Consumers' Construction of Self*, 41 J. Consumer Res. 455, 451-474 (Aug. 1, 2014) (finding that non-minority testers were more frequently provided product information on loan terms (52.2 percent) than minority testers (27.5 percent) and more frequently offered help completing loan application (59.1 percent) than minority testers (18.2 percent)).

[23] David G. Blanchflower, Phillip B. Levine & David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85 R. Econ. & Stat. 930, at 933-34 (MIT Press, 2003) (finding African American- (40 percent) and Hispanic-owned (23 percent) firms are more likely to withhold an application for fear of denial than white-owned firms); Robert Fairlie, Alicia Robb & David T. Robinson, *Black and White: Access to Capital Among Minority-Owned Startups* at 12 (Sep. 25, 2015), http://people.ucsc.edu/~rfairlie/papers/rfr_v19_KFS.pdf (finding that "black business owners are about three times more likely to not apply for loans because of fear of rejection than white business owners" and "[b]lack business owners whose credit scores are above the 75th percentile for the entire sample were still more than twice as

access is particularly problematic for minority entrepreneurs, who face ongoing difficulties in their ability to acquire the assets needed as collateral for low-cost start-up financing and thus often face stark repercussions: they simply "will not be able to start businesses" without access to credit.[24]

Furthermore, certain commercial banks, venture capitalists, and capital markets continue to engage in overtly discriminatory lending practices that have hampered the ability of minorities to obtain business capital.[25] This is especially troubling given that the largest single factor explaining racial disparities in business-creation rates is the difference in asset levels.[26] As a result, minority businesses rely disproportionately on owner equity investments and less on debt from outside sources, such as banks, as compared to non-minority businesses.[27]

---

likely as white business owners of similar creditworthiness to not apply for a loan for fear of having their loan application denied.").

[24] *See* Robert W. Fairlie & Alicia M. Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, U.S. Dep't of Commerce, 18 (Jan. 2010), http://www.mbda.gov/sites/default/files/DisparitiesinCapitalAccessReport.pdf.

[25] *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. On Fin. Insts. Supervision, Regulation & Deposit Ins. of the H. Comm. On Banking, Fin. & Urb. Affs.,* 103d Cong. 19-20 (1994) (statement of M. Harrison Boyd, President/CEO, HBA Management Services Group) (stating that white bank employees "have been and are continually, programmed to perceive minority business loans as bad business, and/or at a minimum, risky and less desirable"); *see also The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the S. Comm. on Env't & Pub. Works*, 99th Cong. 363 (1985) (statement of James K. Laducer, Director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center) (stating that North Dakota banks "refuse to lend money to minority businesses from nearby Indian communities"); Nat'l Asian Pacific Am. Legal Consortium, *Asian Pacific Americans and Public Contracting*, at 43-44 (finding that one-fifth of Asian-American venders and just under one-fifth of Asian-American professional services firm owners reported that they experience discrimination in financial transactions such as applying for commercial loans).

[26] Fairlie, *supra* n.17 at 437; David G. Blachflower, *Report on the City of Chicago's MWBE Program* (June 10, 2009) at 35, http://www.dartmouth.edu/~blnchflr/papers/chicago%20sunset%20final%20report%20june%2010th%202009-0.pdf (finding that "black/white disparity in startup capital is the largest single factor contributing to racial disparities in closure rates, profits, employment, and sales").

[27] Robb, *Access to Capital Among Young Firms, Minority-Owned Firms, Women-Owned Firms, and High-Tech Firms*, *supra* n.21 at 31.

Certain consumers of color are also often targeted for fraudulent consumer practices. As part of a recent, Congressionally-directed study, the Federal Trade Commission (FTC) found that "[b]oth African American and Hispanic consumers were more likely than non-Hispanic whites to report having been victims of the surveyed frauds."[28] In particular, the FTC noted the "disproportionate effect" of debt-related abuse and fraud, such as abusive credit repair products, debt relief, mortgage relief, and advance fee loans, which "African Americans were more than three times as likely, and Hispanics 2.5 times as likely, to have experienced."[29] The FTC also highlighted racial disparities in income-related fraud, such as "work-at-home programs, business opportunities, pyramid schemes, and government job offers."[30] For these types of abuses, "African Americans were also 2.75 times as likely to have been a victim" and Hispanics were affected "at a rate almost 50 percent higher than the rate for non-Hispanic whites."[31] These staggeringly disproportionate rates of harm are notwithstanding a general dilemma of underreporting of fraud and abuse from African-American and Latino communities.[32]

Some of these harmful practices and scams "particularly affecting African-American and Latino communities . . . prey on the need for financial stability . . . ."[33] Others engage in targeted advertising campaigns by which "many deceptive claims about otherwise legitimate products are disseminated in diverse marketing campaigns that broadly reach African-American and Latino audiences," which is "most clearly observable in bilingual marketing campaigns."[34] The skewed impact on communities of color is amplified by the fact that African-American families suffered substantially and disproportionately in the financial crisis of 2008 and many still do not have

---

[28] Federal Trade Commission, *Combating Fraud in African American & Latino Communities: The FTC's Comprehensive Strategic Plan* at 1 (June 15, 2016), https://www.ftc.gov/system/files/documents/reports/combating-fraud-african-american-latino-communities-ftcs-comprehensive-strategic-plan-federal-trade/160615fraudreport.pdf.
[29] *Id.* at 2.
[30] *Id.* at 2 n.13.
[31] *Id.* at 2.
[32] *Id.* at 4.
[33] *Id.* at 12.
[34] *Id.* at 13.

access to a bank account.[35] These troubling trends are further compounded by enduring wealth and income inequality for African-American households, which have only widened in recent years.[36]

Class actions have proven to be essential in rooting out discriminatory practices that disproportionately harm African Americans and other communities of color. For example, between 2007 and 2009, during a period in which the federal government was relatively inactive in fair lending enforcement,[37] a group of private counsel filed fair lending class actions against a number of major mortgage lenders, alleging discriminatory mortgage pricing in violation of the Equal Credit Opportunity Act and the Fair Housing Act.[38] Similarly, private class actions were essential to exposing financial arrangements between major vehicle financing companies and car dealerships that resulted in systematically higher mark-ups on financing for African-American and Latino purchasers than for similarly situated whites.[39] These actions led to industry-wide reforms, including caps

---

[35] U.S. Department of the Treasury Fact Sheet, *The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits African Americans* (Oct. 2010), https://www.treasury.gov/initiatives/Documents/Fact%20Sheet%20-%20The%20Dodd-Frank%20Wall%20Street%20Reform%20and%20Consumer%20Protection%20Act%20Benefits%20African%20Americans,%20Oct%202010%20FINAL.pdf.

[36] *See generally* Rakesh Kochhar & Richard Fry, *Wealth inequality has widened along racial, ethnic lines since end of Great Recession*, Pew Research Center (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/; Amy Traub & Catherine Ruetschlin, *The Racial Wealth Gap: Why Policy Matters*, Demos (2015), http://www.demos.org/publication/racial-wealth-gap-why-policy-matters.

[37] Under the Equal Credit Opportunity Act, the federal bank regulatory agencies are required to refer matters to the Department of Justice when they have reason to believe a lender has engaged in a pattern or practice of discrimination. From 2009 through 2015, the bank regulatory agencies referred a total of 182 matters involving a potential pattern or practice of lending discrimination to the Justice Department. Ninety-eight of those referrals involved race or national origin discrimination. In striking contrast, during the preceding six-year period, from 2003 through 2008, the Division received only 22 race and national origin discrimination referrals. 2015 ECOA Report, *supra* n.20, at 15.

[38] *See*, *e.g.*, *Guerra v. GMAC LLC*, No. 08-1297 (E.D. Pa. 2008); *Payares v. JP Morgan Chase & Co.*, No. 07-5540 (C.D. Cal. 2007); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, No. 08-0369 (N.D. Cal. 2008); *Zamudio v. HSBC N. Am. Holdings, Inc.*, No. 07-4315 (N.D. Ill. 2007); *Garcia v. Countrywide Fin. Corp., et al.,* No. 07-1161 (C.D. Cal. 2007).

[39] *See*, *e.g.*, Caroline E. Mayer, *Car-Loan Rates Marked Up More for Blacks, Report Says*, Wash. Post, Oct. 1, 2003, at E01 (reporting study findings that "African Americans were almost three times as likely as whites to be charged markups on loans financed by General

on dealer mark-ups, as well as pre-approved financing for minority customers and consumer education initiatives.[40] Further, these private actions helped lay the groundwork for cases filed a decade later by the CFPB and DOJ addressing discriminatory pricing in indirect auto loans.[41] If "forced" arbitration clauses had ruled the day, foreclosing class actions, these reforms and results may never have been achieved.

Class actions have also spurred industry-wide changes in the insurance field. Nearly a decade ago, a district court recognized the "substantial and beneficial" results of a nationwide class action on behalf of approximately five million African-American and Latino customers of a leading insurance company that charged minority policyholders higher premiums for automobile and homeowners' insurance than it charged similarly situated white policyholders.[42] The class settlement included not only monetary relief but also a "change in the [company's] credit scoring formula, an educational outreach program, multi-cultural marketing, [and] an improved appeals process."[43] Other class actions have brought relief to thousands of individuals adversely affected by the previously widespread practice in the life insurance industry of targeting African Americans for

---

Motors Acceptance Corp." and that this disparity could not be explained by creditworthiness or other legitimate business factors).

[40] *See, e.g.*, Final Judgment and Order, *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330 (S.D.N.Y. June 5, 2006), ECF No. 182 (approving class settlement); *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330, 2002 WL 88431 (S.D.N.Y. Jan. 22, 2002) (denying company's motion to dismiss); *Smith v. Daimler-Chrysler Servs. N. Am., LLC*, Civ. A. No. 2:00-cv-6003, 2005 WL 2739213 (D.N.J. Oct. 24, 2005) (approving class settlement); Final Judgment and Order of Dismissal with Prejudice, *Coleman v. Gen. Motors Acceptance Corp.*, No. 3:98-cv-211 (M.D. Tenn. Mar. 29, 2004), ECF 680 (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004) (certifying nationwide class action); Kenneth J. Rojc & Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Automotive Financing*, 61 Bus. Law. 819, 820-26 (2006) (describing settlements).

[41] *See, e.g.*, *United States v. Toyota Motor Credit Corp.*, No. 16-cv-00725 (C.D. Cal. Feb. 2, 2016).

[42] *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 275, 331 (W.D. Tex. 2007).

[43] *Id.* at 330-31; *see also DeHoyos v. Allstate Corp.*, 345 F.3d 290 (5th Cir. 2003) (affirming denial of the insurer's motion to dismiss).

policies with higher premiums and lower benefits than those offered to white customers.[44]

Conversely, as documented in the CFPB's study and in concerns raised by consumer advocates and state officials, contractual class action bans harm consumers and can severely impede efforts to eradicate persistent discrimination.[45] The CFPB's analysis showed that banning class actions effectively extinguishes claims entirely. During the three-year period it studied, the Bureau found that, out of tens of millions of consumers who were subject to forced arbitration clauses, only 411 brought individual arbitration claims each year.[46] By contrast, class actions provided 34 million consumers with cash relief over a five-year period, in addition to settlements requiring companies to change business practices.[47]

Moreover, consumers that do pursue arbitration outside of the class context are placed at an enormous disadvantage relative to corporate defendants. Arbitration clauses were originally created to resolve disputes among equally sophisticated parties. But, because of a series of judicial decisions favoring arbitration over consumer protection laws designed to level the playing field, companies now use arbitration clauses in ordinary

---

[44] *See*, *e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411-13 (5th Cir. 2004) (reversing denial of class certification); *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1211-12 (11th Cir. 2001) (affirming denial of insurer's motion for judgment on the pleadings); *Norflet v. John Hancock Life Ins. Co.*, 658 F. Supp. 2d 350, 353 (D. Conn. 2009) (approving class settlement); *Thompson v. Metro. Life Ins. Co.*, 149 F. Supp. 2d 38, 40-41 (S.D.N.Y. 2001) (denying insurer's summary judgment motion).
[45] The CFPB Study found that arbitration agreements limit relief for consumers. *See* Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers ("CFPB Fact Sheet"), http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf (2015); *see also* Letter from Joseph Biden, Delaware Attorney General *et al.* to Richard Cordray, Director of the CFPB (Nov. 19, 2014), http://www.mass.gov/ago/docs/press/2014/cfpb-letter-11-19-2014.pdf (urging the CFPB to regulate use of pre-dispute mandatory arbitration clauses to protect consumers' rights).
[46] CFPB Study, *supra* n.3, § 1.4.3.
[47] *Id.*, § 1.4.7.

consumer contracts, where they have an unfair advantage in setting the terms and conditions for settling disputes.[48]

Moreover, the sophistication gap between consumers and commercial entities calls into question the soundness of the consumer agreements that include "forced" arbitration clauses and the arbitration proceedings themselves. The CFPB study found that the vast majority of consumers are unaware that they have signed an arbitration clause, and even fewer understand that they have forfeited the right to bring a lawsuit in court.[49] Once in arbitration, consumers are not provided many of the due process protections that are guaranteed in judicial proceedings. The Rules of Evidence and Civil Procedure do not apply, and the ability to obtain discovery is limited. What's more, companies, which already have more sophisticated legal counsel, knowledge, and resources, benefit from being repeat players in the arbitration system and before individual arbitrators.[50] Finally, arbitration is typically conducted in secret, so that even when companies lose in individual arbitration, the public remains unaware of the unlawful conduct that may harm other consumers.[51] Consequently, when average consumers

---

[48] Lauren Garth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 Harv. L. & Pol'y Rev. 329, 347-48 (2015) (noting the harm to consumers and public in the wake of the Supreme Court's rulings in *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)); Forum for State Appellate Court Judges: Forced Arbitration and the Fate of the 7th Amendment, Pound Civil Justice Instit.,14-15 (2014), http://www.poundinstitute.org/sites/default/files/2014PoundReport.pdf; CFPB Study, *supra* n.3, at § 1.1 (recognizing contentious nature of *Concepcion* decision and its impact on consumer rights).

[49] CFPB Fact Sheet, *supra* n.45, at 4 (stating three out of four consumers surveyed were unaware if their credit card contract contained an arbitration clause and that fewer than seven percent of surveyed consumers with arbitration clauses in contracts were aware that they could not sue if a dispute arose).

[50] The CFPB Study found that pre-dispute arbitration clauses govern tens of millions of consumers nationwide in credit card, check account, prepaid cards, payday loans, private student loans, and mobile wireless contracts. CFPB Study, *supra* n.3, § 1.4.1. Unlike consumers, corporate representatives benefit from being repeat players in these proceedings, which allows them to navigate these proceedings with more familiarity. Corporations generally have legal counsel, while consumers only have counsel in 60 percent of arbitration proceedings. *See* Barnes, *supra* n.48 at 334-335.

[51] Barnes, *supra* n.48 at 347-48; Forum for State Appellate Court Judges: Forced Arbitration and the Fate of the 7th Amendment, Pound Civil Justice Instit.,14-15 (2014), http://www.poundinstitute.org/sites/default/files/2014PoundReport.pdf; CFPB Study, *supra*

are barred from pursuing class actions and are instead forced into arbitration, they have few safeguards to protect themselves, hold companies accountable, or negotiate for more favorable settlement terms.[52]

For these many reasons, LDF strongly agrees that it is in the public interest and the interest of consumer protection for the Bureau to prohibit or strictly curtail the use of forced arbitration clauses in consumer financial contracts. Below, LDF offers comments on a number of provisions of the CFPB's Proposed Rule.

II. Comments on Specific Provisions of Proposed Rule

LDF strongly supports the Proposed Rule and offers comments on ways to ensure its efficacy. Below, we address aspects of the rule that are of particular importance for African-American consumers. First, LDF commends the broad coverage of the Proposed Rule, while noting certain ways that the Bureau should ensure that the Final Rule covers a sufficiently broad range of consumer financial products and services. Second, LDF notes the importance of data collection for recognizing racial inequities in arbitration agreements, suggesting measures to improve such data collection.

---

n.3, at § 1.1 (recognizing contentious nature of *Concepcion* decision and its impact on consumer rights).

[52] Judicial proceedings offer safeguards including civil procedural standards, evidentiary standards, attorney fee awards, and expanded discovery. *See* Barnes, *supra* n.48, at 335-336 (noting how mandatory arbitration agreements along with prohibitions on class proceedings effectively insulate companies by diminishing consumer bargaining power and fundamental protections guaranteed in the judicial system); Alan Gilbert, *Remarks on Forum for State Appellate Court Judges: Forced Arbitration and the Fate of the 7th Amendment*, Pound Civil Justice Instit., 42-44 (2014) (recognizing unequal bargaining power due to degree of consumer ignorance in regards to what arbitration means and pervasiveness of arbitration clauses in consumer agreements in the fine print of contracts); CFPB Fact Sheet, *supra* n.45, at 4 (stating three out of four consumers surveyed were unaware if their credit card contract contained an arbitration clause and that fewer than seven percent of surveyed consumers with arbitration clauses in contracts were aware that they could not sue if a dispute arose).

A. Coverage of the Rule

1. Section 1040.3

LDF commends the Bureau for recognizing, in proposing broad coverage of the Rule, the large degree to which forced arbitration agreements and class action waivers have infiltrated agreements across a range of consumer financial products. It is particularly important to safeguard class actions against widespread predatory conduct that harms large numbers of consumers and causes high aggregate damages, but that involves relatively small individual transactions. That is often the case when consumers are victimized by products like check-cashing, short-term lending, prepaid cards, and money transfers,[53] many of which are used at higher rates by African Americans.[54] When individual damages cannot justify the cost of pursuing litigation, class actions are the most efficient—and often the only way—for consumers to obtain relief.[55] Further, LDF commends the Bureau for recognizing the importance of preventing debt collectors from availing themselves of class-action waivers, including for the purposes of collecting medical and other debts that do not fall within the Bureau's jurisdiction when initially incurred.[56] Unfair debt collection practices have been shown to disproportionately affect African Americans.[57]

LDF also commends the Bureau for using cross-references to ensure that the coverage of this regulation will remain current with new developments in consumer financial products. Although the explanatory text in the Notice of Proposed Rulemaking makes clear that this is intended to incorporate future changes to those cross-referenced statutes and regulations, we suggest that the final rule's Official Interpretation makes that intent

---

[53] *See* Proposed Rule, *supra* n.14, 81 Fed. Reg. at 32,925 (at proposed subparts (a)(9); (a)(1)(i); and (a)(7), respectively).
[54] *See*, *e.g.*, Pew Charitable Trusts, *Why Americans Use Prepaid Cards,* 3 (Feb. 2014), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2014/prepaidcardssurveyreportpdf.pdf (noting that prepaid card users are more likely to be African-American).
[55] The CFPB found that from 2010 through 2012, only 25 consumers per year brought an individual arbitration claim worth $1,000 or less. CFPB Study, *supra* n.3, § 1.4.3.
[56] *See* Proposed Rule, *supra* n.14, 81 Fed. Reg. at 32,925 (at proposed subpart (a)(10); (a)(10)(ii)).
[57] *See* Paul Kiel and Annie Waldman, *The Color of Debt*, ProPublica, (Oct. 8, 2015), https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods.

clear.[58] This is particularly important for African-American communities, which are often targeted for novel—and too often exploitative—consumer financial products.

LDF urges the Bureau to make clear that this rule, and the cross-referenced regulations, cover certain aspects of the consumer financial product industry. For example, we believe that "lead generators" for credit products meet the definition of "creditor" in Regulation B.[59] As such, lead generators would fall within the purview of this rule as currently drafted. LDF urges the Bureau to make this interpretation clear in its guidance and interpretive documents surrounding the rule.

Another area of particular concern for LDF is the current system of mass incarceration, which disproportionately affects African Americans. In comments to the proposed regulations on prepaid credit cards, other organizations have called the Bureau's attention to the ways in which certain prison contractors exploit incarcerated individuals and their families—for example, through financial products like prison release cards and through transfers to prison commissary accounts.[60] Many of these companies include forced arbitration and class waiver provisions in their terms of service.[61]

---

[58] *See* Proposed Rule, *supra* n.14, 81 Fed. Reg. at 32,872 ("In so doing, the Bureau expects that the coverage of proposed Part 1040 would incorporate relevant future changes, if any, to the enumerated consumer financial protection statutes and their implementing regulations and to provisions of Title X of Dodd-Frank referenced in proposed § 1040.3(a).")

[59] 12 C.F.R. § 1002.2(*l*) ("the term creditor also includes a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors, or selects or offers to select creditors to whom requests for credit may be made").

[60] *See* Rep. Ellison Comment (CFPB-2014-0031-6402), Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77101 (Dec. 23, 2014), corrected, 80 Fed. Reg. 6468 (Feb. 5, 2015), http://www.regulations.gov/document?D=CFPB-2014-0031-6402; *see* Prison Policy Initiative Comment (CFPB-2014-0031-6092), Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77101 (Dec. 23, 2014), corrected, 80 Fed. Reg. 6468 (Feb 5, 2015), http://www.regulations.gov/document?D=CFPB-2014-0031-6092.

[61] *See*, *e.g.*, JPay Payment Terms of Service § 14, https://www.jpay.com/LegalAgreementsOut.aspx; Commissary Deposit Terms of Service § 10, http://www.commissarydeposit.com/Terms.aspx.

LDF urges the Bureau to ensure that incarcerated individuals and their families are fully protected by this rule.

Finally, LDF urges the Bureau to include furnishing consumer information to a credit bureau as a consumer financial product or service covered by this rule, to the greatest extent possible within its jurisdiction.[62] Credit reporting and scoring services play an increasingly vital role in the lives of Americans, and erroneously furnished information can have serious consequences for access to financial products and a range of other life activities. It is essential that consumers have full recourse to class mechanisms to protect against systemic errors or falsehoods in credit reporting. Relatedly, we urge the Bureau to make clear that the rule prohibits the use of class-action waivers to prevent litigation against credit reporting agencies in a range of situations.

2. Proposed Comment 4-1.ii.a

The Bureau appears to believe that it lacks authority to prohibit or limit pre-dispute arbitration provisions that were entered into prior to the effective date of the rule.[63] LDF agrees generally with the Bureau's interpretation of the phrase "entered into" to mean "any circumstance in which a person agrees to undertake obligations or gains rights in an agreement."[64]

However, with the proposed comment 4-1.ii.a, the Bureau issues guidance inconsistent with that interpretation. The proposed comment would define "entering into" exceedingly narrowly, in a way that will prevent many consumers from enjoying the benefit of the rule. The proposed comment states that "a provider does not enter into a pre-dispute arbitration agreement" when the party "[m]odifies, amends, or implements the terms of a product or service that is subject to a pre-dispute arbitration agreement that was entered into before the [effective date of the rule]."[65] However, the terms

---

[62] *See* Proposed Rule, *supra* n.14, 81 Fed. Reg. at 32,874 (seeking comment on the inclusion of furnishing information to credit bureaus under the rule).
[63] *See* 12 U.S.C. § 5518(d).
[64] Proposed Rule, *supra* n.14, 81 Fed. Reg. at 32,885.
[65] *Id.* at 32,928.

of a product can be modified or amended so substantially that the provider is essentially offering the consumer a new product—for example by significantly changing the pricing of the product, fees and charges, or other product features. In such a circumstance, it would be appropriate to interpret the consumer and provider as having entered into a new agreement, including the pre-dispute arbitration provisions.

LDF therefore urges the CFPB to remove comment 4-1.ii.a. Enforcement of this rule will commonly occur in circumstances in which a consumer attempts to pursue class action litigation, and the provider seeks to enforce a class waiver that was purportedly entered into before the effective date of this rule. In such a circumstance, a court is well-equipped to determine when the pre-dispute arbitration provisions were actually entered into, including whether a sufficiently substantial alteration to the product or service effectively constituted "entering into" the agreement again. Courts commonly evaluate such questions of contract formation and interpretation, even if the "entering into" language was not clearly defined in Dodd-Frank.[66] A safe harbor interpretation for modifications and amendments to terms of a product or service, as provided in comment 4-1.ii.a, is therefore confusing and unnecessary and should be removed.

B. Data Collection

Information and data collection are essential for effective government enforcement, provider accountability, and future policymaking. With that in mind, LDF urges the Bureau to broaden its data collection program under the rule to include pre-dispute arbitration agreements under which no arbitration claim is filed. Such a requirement would recognize that the most procedurally burdensome agreements are likely to deter the filing of claims, such that no arbitral awards would ever arise. At the least, LDF urges the CFPB not to narrow the proposed scope of data collection. As the Bureau's impact analysis reflects, the submission of arbitral materials by providers will impose a minimal cost on each provider and will provide great public

---

[66] *Id.* at 32,885 ("The phrase 'entered into' is not defined in section 1028 or anywhere else in the Dodd-Frank Act.").

benefit.[67] Further, public disclosure of the collected materials is essential for transparency and accountability of arbitration enforcement, and for advocates to recognize trends in consumer arbitration.

In particular, LDF urges the Bureau to collect sufficient data to evaluate any disparate impact of pre-dispute arbitration agreements on particular racial groups. To this end, it is essential that the final rule excludes city, state, and zip code from redaction.[68] In light of our nation's current pattern of housing segregation, such geographic information can serve as a rough proxy for determining racial impact. LDF further urges the CFPB to consider more extensive measures to gather information on the protected-group status of consumers who are involved in arbitration proceedings. Such measures could include voluntary collection of racial, ethnic, and sex data from participants in arbitration, using a means such that the consumer's protected-group status would not be disclosed inappropriately to the arbitrator.

Conclusion

Overall, LDF strongly supports the Bureau's Proposed Rule, which serves the public interest, protects consumers, and functions as an important and critical tool for safeguarding communities of color against discriminatory, fraudulent, and unfair practices and products. We appreciate your consideration of these comments. If you have any questions, please contact Coty Montag, LDF's Deputy Director of Litigation, at (202) 682-1300 or cmontag@naacpldf.org.

Sincerely,

Janai Nelson, Associate Director-Counsel

Coty Montag, Deputy Director of Litigation

[67] *Id.* at 32,924.
[68] *Id.* at 32,926.

John Paul Schnapper-Casteras, Special Counsel for Supreme Court and Appellate Advocacy

Joshua Rosenthal, Ford Foundation Fellow

Cc: Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau