Congress of the United States
Washington, DC 20510

April 12, 2024

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C. 20552

Dear Director Chopra:

We write to express our grave concern that the Consumer Financial Protection Bureau (CFPB) has proposed regulations that clearly subvert past Congressional action and intent[1] and may be preparing to do so once more. Specifically, any CFPB regulatory efforts regarding the use of pre-dispute arbitration provisions in contracts for consumer financial services – presumably in coordination with influence campaigns such as the recent petition for rulemaking[2] (hereafter, 'the petition') and a supporting partisan letter from one side of the aisle in Congress[3] – would represent a significant abuse of the CFPB's power and rulemaking process.

We strongly urge the CFPB to oppose the recent rulemaking petitions for the following reasons.

First, Congress clearly restricted the CFPB's authority to limit use of arbitration when it rejected the agency's prior anti-arbitration rule under the Congressional Review Act (CRA).[4] As you know, the CRA provides that a rule may not be issued in "substantially the same form" as the disapproved rule unless specifically authorized by a subsequent law. The CRA invalidated[5] the CFPB's prior anti-arbitration rule and the proposed rulemaking in the petition falls squarely within that prohibition.

Congress overturned the prior CFPB rule because it would have effectively invalidated virtually every existing pre-dispute arbitration agreement and because it failed to adequately consider the

[1] *See* "Registry of Supervised Nonbanks That Use Form Contracts To Impose Terms and Conditions That Seek To Waive or Limit Consumer Legal Protections," *available at* https://www.federalregister.gov/documents/2023/02/01/2023-00704/registry-of-supervised-nonbanks-that-use-form-contracts-to-impose-terms-and-conditions-that-seek-to.
[2] *See* "Petition To Require Meaningful Consumer Consent Regarding the Use of Arbitration to Resolve Disputes Involving Consumer Financial Products and Services," *available at* https://www.regulations.gov/document/CFPB-2023-0047-0001 ("Petition").
[3] *See* Letter from Sen. Warren et. al to the Hon. Rohit Chopra (Dec. 13, 2023) ("Letter").
[4] Public Law No: 115-74, 131 Stat. 1243 (approved Nov. 1, 2017).
[5] 5 U.S.C. § 801(b).

lack of relief that class actions provide to consumers when compared to far better outcomes provided by arbitration. The rule accomplished that result by targeting arbitration agreements providing for individualized decision-making and prohibiting class proceedings. As the Supreme Court has recognized, "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration"[6] and virtually every arbitration agreement therefore prohibits class proceedings.

The new rulemaking in the petition proposal would accomplish that very same result directly by invalidating all pre-dispute arbitration agreements in substantially the same form as in the prior rule that the CRA invalidated.

The American People's elected representatives—the House of Representatives, the Senate, and the President—together determined that the prior CFPB rule would harm consumers. Multiple Members of Congress made that clear during the CRA debate.[7] The Executive Branch's Statement of Administration Policy supporting the CRA joint resolution explained that the CFPB rule would "harm consumers by denying them the full benefits and efficiencies of arbitration; and hurt financial institutions by increasing litigation expenses and compliance costs (particularly for community and mid-sized institutions). In many cases, these increased costs would be borne, not by the financial institutions, but by their consumers."[8]

Despite this clear display of Congressional action and intent, the petition proposes a rule that would reverse the careful determination made by Congress and the President. Instituting a proceeding to adopt such a rule would be an affront to Congress, and a clear violation of the CRA, and a blatant disregard of fundamental separation-of-powers principles.

Second, even apart from the prohibition imposed by the CRA, the petition's proposed rule would exceed the CFPB's limited authority over arbitration agreements conferred by the Dodd-Frank Act. Section 1028 of that statute requires the CFPB to conduct a study before attempting to regulate pre-dispute arbitration, and the CFPB must demonstrate that any regulation that it proposes is both "consistent with the study" and "in the public interest and for the protection of consumers."[9]

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[6] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

[7] *See, e.g.*, 163 Cong. Rec. S6746 (Oct. 24, 2017) (statement of Sen. Crapo) (explaining that the CFPB's rule "could result in less effective consumer protection and fewer remedies while simply enriching class action lawyers" and "potentially decrease the products offered to consumers while increasing their costs"); 163 Cong. Rec. H6269 (July 25, 2017) (statement of Rep. Hensarling) (explaining that the CFPB threatened to "deprive consumers of a low-cost, easy way to resolve legal disputes" through arbitration); 163 Cong. Rec. H6270 (July 25, 2017) (statement of Rep. Rothfus) (explaining that "consumers get meaningful relief" in arbitration, yet "the CFPB has finalized a rule that would effectively get rid of arbitration and promote class actions as the preferred dispute resolution process"); 163 Cong. Rec. H6271 (July 25, 2017) (statement of Rep. Luetkemeyer) (explaining that "[t]he Bureau's own study" demonstrates "that arbitration helps consumers and that the alternatives are far less successful").

[8] Statement of Administration Policy, H.J. Res. 111 – Disapproving the Rule, submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule (July 24, 2017), *available at* https://trumpwhitehouse.archives.gov/briefings-statements/h-j-res-111-disapproving-rule-submitted-consumer-financial-protection-bureau-known-arbitration-agreements-rule/.

[9] 12 U.S.C. § 5518(b).

The petition proposes that the CFPB knowingly skip Dodd-Frank's study requirement and rely on the CFPB's prior study from 2015 (which itself is based on data that is now more than a decade old). This violates the limitations and clear direction Congress placed on the CFPB through Section 1028, which requires the CFPB to regulate based on current facts and data.

Third, our Democrat colleagues suggest that the use of arbitration is harmful to consumers. However, robust empirical evidence shows that consumers who assert claims in arbitration fare better than or at least as well as consumers who assert claims in court.[10] The sole report cited by our colleagues – which was produced by the plaintiffs' lawyer trade association[11] – distorts reality by treating every settlement or informal resolution of a consumer's claim as a loss to the consumer, even though by definition those consumers' disputes were resolved to their satisfaction.

As such, our colleagues' characterization of arbitration as an "unfair playing field" for consumers is wrong. In fact, courts provide oversight and invalidate arbitration agreements that contain unfair provisions.

Lastly, there is no merit to our colleagues' suggestion that consumers do not understand arbitration clauses.[12] The study they cite tested participants' memory, not their understanding of contract terms: it asked participants questions about a contract only after taking that contract away.[13] That is not how the real-world works. Consumers are not subject to a memory test, but instead can read their contracts, which are usually available online, if they have questions about the terms or if a dispute arises.

For all these reasons, a proposed rule, as requested by the petition, would not only violate the CRA and Section 1028 of the Dodd-Frank Act, but also the Administrative Procedure Act, because it would result in arbitrary, capricious, and irrational agency action. The CFPB is obligated to comply with Congress's mandates. It therefore must deny the petition for rulemaking.

Sincerely,

Andy Barr
Member of Congress

Thom Tillis
United States Senator

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[10] *See* Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* (Mar. 2022), *available at* https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf.

[11] *See* Letter at 3 n.14 (citing American Association for Justice, "Forced Arbitration and Big Banks: When Consumers Pay to Be Ripped Off" (Sept. 2022)).

[12] *See* Letter at 3.

[13] *See* Sommers, Roseanna, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* 12 (July 25, 2023), *available at* https://ssrn.com/abstract=4521064.