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PRE-DISPUTE MANDATORY ARBITRATION CLAUSES IN CONSUMER FINANCIAL PRODUCTS: THE CFPB’S PROPOSED REGULATION AND ITS CONSISTENCY WITH THE ARBITRATION STUDY

I. INTRODUCTION

“At all events, arbitration is more rational, just, and humane than the resort to the sword.”¹

Richard Cobden (1804-1865)

Such simple times are no more. Though long after Mr. Cobden’s time, the debate over pre-dispute arbitration clauses has waged for decades.² Since the implementation of arbitration clauses in consumer contracts, financial services institutions (“FIs”)³ and consumer advocates have been at odds over the vices and virtues of binding customers to resolving disputes outside of the courtroom.⁴ In 2010, Congress initiated new fodder for the debate.⁵ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), which created the Consumer Financial Protection Bureau (“CFPB”), mandates that the CFPB conduct a study of pre-dispute mandatory arbitration clauses in

1. RICHARD COBDEN, *SPEECHES ON QUESTIONS OF PUBLIC POLICY*, VOL. 2, at 170 (John Bright & James E. Thorold Rogers, eds., 1870).

2. *See, e.g.*, Jean R. Sternlight, *Panacea of Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637, 642 (1996) (questioning the use of arbitration in consumer contexts).

3. Throughout this Note “FI” refers to financial services institutions that serve consumers and are subject to the CFPB rulemaking authority. *See infra* note 40 and accompanying text.

4. *Compare* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 318 (1995) (twenty year-old article on the vices of pre-dispute arbitration), *with* William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING. L. 213, 216 (1998) (articulating why banks should implement pre-dispute arbitration clauses).

5. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028(a), 12 U.S.C. § 5518(a) (2012).

consumer financial products.⁶ Dodd-Frank grants the CFPB the authority to limit or ban such clauses if it “is in the public interest and for the protection of consumers,” but requires that the “[f]indings in such rule shall be consistent with the [Arbitration Study].”⁷

In March 2015, the CFPB published the Arbitration Study (“Arbitration Study”) called for in the statute, adding new fuel to the seemingly endless and irreconcilable debate.⁸ The CFPB, in October 2015, took the “first step in the process of a potential rulemaking”⁹ and presented a proposed regulation before a Small Business Review Panel (the “Panel”).¹⁰ The proposed regulation bans class action waivers in pre-dispute arbitration clauses and conditions the use of pre-dispute arbitration clauses on the submission of arbitral claims and awards to the CFPB.¹¹ The CFPB is also considering publishing the submitted data to the CFPB website.¹² The CFPB proposal relies on the Arbitration Study, a 728-page report unparalleled by any research on pre-dispute arbitration clauses to date—but will all this data resolve the pre-dispute arbitration debate and support the CFPB’s proposed regulation?¹³

6. Dodd-Frank §§ 1011, 1028(a), 12 U.S.C. §§ 5491, 5518(a).

7. Dodd-Frank § 1028(a), 12 U.S.C. § 5518(b). Dodd-Frank also grants the U.S. Securities and Exchange Commission (“SEC”) the authority to limit or ban pre-dispute arbitration clauses in investment contracts, Dodd-Frank § 921(a), 15 U.S.C. § 78o(o), however, the SEC has yet to take any regulatory action in this area, George Friedman, *CFPB Issues Final Report on Arbitration, Telegraphing a Ban or Limits on Arbitration*, SEC. ARBITRATION ADMIN. (Mar. 16, 2015), <http://www.sacarbitration.com/blog/cfpb-issues-final-report-arbitration-telegraphing-ban-limits-arbitration-sec-follow-suit/>; Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 NYU J. L. & BUS. 793, 796 (SPECIAL ISSUE) 4 (2015).

8. CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS* (2015) [hereinafter *ARBITRATION STUDY*].

9. CONSUMER FIN. PROT. BUREAU, *CFPB Considers Proposal to Ban Arbitration Clauses the Allow Companies to Avoid Accountability to Their Customers* (Oct. 7, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/>.

10. CONSUMER FIN. PROT. BUREAU, *SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS*, 1, 5 (2015) [hereinafter *SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING*], http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf; see also *infra* Part II, B.

11. *SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING*, *supra* note 10, at 13–14.

12. *Id.* at 1, 13–14.

13. CONSUMER FIN. PROT. BUREAU, *Newark, NJ – Field Hearing on Arbitration*, LIVESTREAM, (Mar. 10, 2015), <http://www.consumerfinance.gov/blog/2015/03/page/2/> (showing debate between consumer advocates and FI industry representatives when Arbitration Study was released); see also Sharee Eriks & Baker Donelson, *The CFPB’s*

This Note examines the CFPB's proposed regulation and whether it satisfies the statutory standards set forth in Dodd-Frank. Part II of this Note addresses Congress' mandate to the CFPB to conduct a study of pre-dispute arbitration clauses and the CFPB's process in conducting the Arbitration Study.¹⁴ Part II also addresses the CFPB's authority under Dodd-Frank to limit or ban pre-dispute arbitration clauses, and describes the Panel process and the proposed regulation.¹⁵ Part III evaluates the proposed regulation under the statutory standards of public interest, protection of consumers, and consistency with the Arbitration Study.¹⁶ Part IV addresses potential challenges to the proposed regulation.¹⁷ Part V suggests alternative regulation that is consistent with the Arbitration Study, and challenges FIs to consider an opt-in pre-dispute arbitration clause.¹⁸ Part VI concludes that only parts of the CFPB's proposed regulation should be adopted: first, the ban on class action waivers should not be adopted; second, the proposed regulation conditioning the use of pre-dispute arbitration clauses on the submission of data should be adopted; and, third, publication to the CFPB website should not be adopted.¹⁹

II. DODD-FRANK MANDATE TO CONDUCT A STUDY AND THE CFPB'S AUTHORITY TO MAKE A RULE

A. *The Arbitration Study*

The Arbitration Study is a product of the legislation that stemmed from the 2008 financial crisis.²⁰ Section 1028(a) of Dodd-Frank mandates that the CFPB conduct a study of pre-dispute mandatory arbitration clauses in consumer financial products.²¹

Arbitration Study Sparks Vigorous Debate Over Next Steps in Regulating Mandatory Arbitration Clauses, JD SUPRA BUS. ADVISOR (Sep. 28, 2015), <http://www.jdsupra.com/legalnews/flaws-and-all-cfpb-s-arbitration-study-76436/>.

14. See *infra* Part II.

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. See *infra* Part V.

19. See *infra* Part VI.

20. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1028(a), 12 U.S.C. § 5518(a) (2012).

21. Dodd-Frank §§ 1011, 1028(a), 12 U.S.C. §§ 5491, 5518(a).

The Arbitration Study ordered in Dodd-Frank resulted in an extensive report spanning 728 pages and incorporating findings from the CFPB's 2013 Preliminary Study of pre-dispute arbitration agreements.²² The Arbitration Study focused on six consumer financial markets: credit cards, checking accounts, prepaid cards, private student loans, payday loans, and mobile wireless third-party billing.²³ The CFPB gathered and examined data on arbitrations filed with the American Arbitration Association ("AAA"),²⁴ individual lawsuits filed in federal court, class action lawsuits filed in federal and some state courts, and class action settlements.²⁵ The bulk of the data for the Arbitration Study gathered was from January 1, 2010, through December 31, 2012, and was limited to these six consumer financial markets.²⁶

Beyond the arbitrations, federal individual lawsuits, class action suits, and class action settlements, the CFPB also studied the features of pre-dispute arbitration clauses and the degree of consumer knowledge of such clauses.²⁷ The CFPB studied the prevalence of these clauses in each market, the length and complexity of each clause, and other clause features.²⁸ Via a telephone survey, the CFPB gauged consumer

22. ARBITRATION STUDY, *supra* note 8, § 1.3, at 9 (noting that the Arbitration Study expands and updates some findings in the December 2013 Preliminary Study and that the whole Preliminary Study is appended to the Arbitration Study as Appendix A).

23. *Id.* § 1.3, at 7.

24. The Arbitration Study focused on arbitration filings with the AAA, because the AAA is the predominant consumer arbitration firm for financial products. *Id.* § 1.4.1, at 10. A majority of arbitration clauses in financial products specify AAA as the arbitration administrator. *Id.* § 2.5.3, at 35 ("Counting clauses in which the AAA was listed as at least an option yields 83.3% of credit card arbitration clauses, 91.8% of checking account arbitration clauses, 94.1% of prepaid card arbitration clauses, 88.7% of storefront payday loan arbitration clauses, 66.7% of private student loan arbitration clauses, and 85.7% of mobile wireless arbitration clauses."). Two other arbitration administrators were mentioned in the Arbitration Study—JAMS, Inc., formerly known as Judicial Arbitration and Mediation Services, *id.* at App. A, at 168, and National Arbitration Forum ("NAF")—both prominent arbitration firms, but neither a source of arbitration data for the Arbitration Study. *Id.* § 2.5.3, at 35.

25. *Id.* § 1.3, at 8.

26. *Id.* § 1.3, at 7. There are a few exceptions in the time-frame and in the markets included in the study, first, data regarding individual federal lawsuits was narrowed to five financial markets: checking accounts/debit cards, payday loans, prepaid cards, and private student loans. *Id.* § 6.4, at 11. Second, data regarding class actions filed included class actions over automobile loans. *Id.* Third, the class action settlement dataset was expanded to include all consumer financial markets and the time period was increased to five years, from January 1, 2008, through December 31, 2012. *Id.* § 8.3, at 8.

27. *Id.* § 2, at 3.

28. *Id.* § 2, at 1. The clause features the CFPB studied included: opt-out option, small claims court carve out, administrators and arbitrators, delegation, class action terms, relief

awareness and understanding of arbitration clauses by inquiring whether consumers understood their dispute resolution options and to what extent dispute resolution options play into consumers' choices between financial products.²⁹

B. CFPB Authority Under Dodd-Frank and the Rulemaking Process

Section 1028(b) of Dodd-Frank grants the CFPB the authority to limit or ban pre-dispute mandatory arbitration clauses provided the limit or ban satisfies three statutory standards.³⁰ The CFPB must find that such a rule is “in the public interest and for the protection of consumers,” and is “consistent with the [Arbitration Study].”³¹ Acting on Dodd-Frank’s grant of authority, the CFPB has taken the first step towards rulemaking by submitting an outline of regulatory proposals to the Panel.³² The Panel, which convened pursuant to the Small Business Regulatory Enforcement and Fairness Act (“SBREFA”),³³ consists of representatives of the CFPB, the Small Business Administration, and the Office of Management and Budget, who meet with a selection of small business entity representatives (“SERs”) potentially affected by the proposed rule.³⁴

The SBREFA consultation process allows the CFPB to determine the impact of a proposal on SERs early in the rulemaking process.³⁵ SERs provide the Panel with feedback regarding the economic impact of complying with the proposed regulation, alternatives to the regulation,³⁶

limits, time limits, confidentiality and nondisclosure, hearing location, costs, contingent minimum recovery provisions, disclosures, and arbitral appeals process. *Id.*

29. *Id.* § 3, at 2.

30. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028(b), 12 U.S.C. § 5518(b) (2012).

31. *Id.*

32. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 5.

33. Small Business Regulatory Enforcement and Fairness Act of 1996 § 244, 5 U.S.C. 609(b) (2012) (addressing the impact of laws and regulations on small businesses that are designed for larger businesses; not exclusive to CFPB rulemaking process).

34. 5 U.S.C. 609(b); SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 12–13.

35. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 10, 12.

36. *Id.* at 13. A list of discussion issues posed to SERs can be found at: http://files.consumerfinance.gov/f/201510_cfpb_small-business-representatives-providing-

and, pursuant to Dodd-Frank, whether the regulation will increase the cost of credit to SERs.³⁷ Once the Panel has convened, the Panel reports to the CFPB within 60 days regarding how the proposed regulations may impact small businesses.³⁸ The CFPB will review the Panel report and the feedback from the SERs before publishing the proposed regulation and opening the public comment period.³⁹

C. *The CFPB's Proposed Regulation*

The CFPB's proposed regulation encompasses "consumer financial products and services that the [CFPB] oversees, including credit cards, checking and deposit accounts, certain auto loans, small-dollar or payday loans, private student loans, and some other products and services as well."⁴⁰ If finalized, the effective date of the rule would likely be 210 days after publication,⁴¹ as the CFPB is considering adding an additional thirty days to the 180-day period set by Section 1028(d) of Dodd-Frank.⁴² The effective date will depend on feedback the CFPB receives from the

feedback-to-the-small-business-review-panel.pdf.

37. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 1100G(a), 5 U.S.C. § 603(d) (2012).

38. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 13.

39. *Id.*

40. Richard Cordray, CONSUMER FIN. PROT. BUREAU, (Oct. 22, 2015) [hereinafter Cordray 1], <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-meeting-of-the-consumer-advisory-board/>. The businesses potentially affected are defined by Dodd-Frank in Section 1002 and limited by Sections 1027 and 1029 and include "but is not limited to banks, credit unions, credit card issuers, certain auto lenders, small-dollar or payday lenders, auto title lenders, installment and open-end lenders, private student lenders, providers of other credit in certain other contexts, loan originators that are not creditors, providers of credit in the form of deferred third-party billing services, providers of certain auto leases for at least 90 days, servicers of covered credit and auto leases, remittance transfer providers, providers of domestic money transfer services or currency exchange, general-purpose reloadable prepaid card issuers, certain providers of virtual currency products and services, check cashing providers, credit service/repair organizations, debt settlement firms, providers of credit monitoring services, and debt buyers." SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 23; Dodd-Frank §§ 1002, 1027, 1029, 12 U.S.C. §§ 5481, 5517, 5519 (2012).

41. SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 22. Critics of the proposed regulation are suggesting to FIs to include an arbitration agreements now to avoid those contracts from being subject to the regulation. *See, e.g.*, Joseph L. Olson, et al., *CFPB Takes Aim at Class Action Waivers*, NAT. L. REV. (Oct. 26, 2015), <http://www.natlawreview.com/article/consumer-finance-protection-bureau-takes-aim-class-action-waivers>.

42. SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 17; Dodd-Frank § 1028, 12 U.S.C. § 5518(d).

Panel regarding ability to and speed with which small businesses can comply.⁴³

The CFPB's proposed regulation proceeds in two parts.⁴⁴ The first part precludes "pre-dispute arbitration agreements" from applying to "class litigation."⁴⁵ This part of the regulation requires an FI to use explicit language within an arbitration clause stating the clause does not apply to cases filed on behalf of a class unless a court has denied class certification or the class claims have been dismissed.⁴⁶ In introducing the regulation, the CFPB cited to securities industry precedent noting that the Financial Industry Regulatory Authority ("FINRA") requires arbitration clauses used by broker-dealers to disclaim the application of the clause to class litigation.⁴⁷ The CFPB further explained that, to ease compliance, standard language would be created that FIs could adopt to meet this requirement.⁴⁸

The second part of the proposed regulation conditions the use of pre-dispute arbitration clauses on the submission of arbitral data to the CFPB.⁴⁹ The requirement specifies that both initial claim filings and written awards be submitted to the CFPB, so that it can understand and monitor consumer arbitration awards.⁵⁰ The CFPB noted that compliance would not require any change in the conduct of arbitration proceedings or the content of written awards.⁵¹

Also under consideration is whether the CFPB should publish submitted arbitral data on its website.⁵² The CFPB noted that the publication of arbitral data, like the ban on class action waivers, is not unprecedented.⁵³ Though, AAA and JAMs do not generally publish claims or awards, California law requires arbitration administrators to publish data on arbitrations involving consumer financial products and

43. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 22.

44. *Id.* at 13–14.

45. *Id.* at 17.

46. *Id.*

47. *Id.* FINRA has prohibited the application of arbitration clauses to class cases since 1992. *Id.* FINRA also serves as the arbitrator of broker-dealer arbitrations. *Id.*

48. *Id.*

49. *Id.* at 5.

50. *Id.* at 5, 20.

51. *Id.*

52. *Id.* at 19–20.

53. *Id.* at 20–21.

services.⁵⁴ Furthermore, FINRA publishes “awards in disputes between customers and broker-dealers” to its website, and AAA requires the publication of awards in employment arbitrations and awards and filings of any class arbitrations.⁵⁵

III. AN EVALUATION OF THE PROPOSED REGULATION

Dodd-Frank requires the CFPB’s proposed regulation of pre-dispute mandatory arbitration clauses to be supported by a finding that such limitation “is in the public interest and for the protection of consumers” and that the findings are “consistent with” the Arbitration Study.⁵⁶ Applying the statutory standard to the first part of the proposed regulation, the ban on class action waivers does not satisfy the statutory requirement because the proposal is not consistent with the Arbitration Study.⁵⁷ Applying the statutory standard to the second part of the proposed regulation, the requirement that FIs using pre-dispute arbitration agreements submit arbitral data to the CFPB likely satisfies all three of the statutory requirements, while the suggestion to publish such data to the CFPB’s website is likely not in the public interest.⁵⁸

A. *Banning Class Action Waivers in Pre-Dispute Arbitration Agreements*

To consumer advocates, class action lawsuits are generally viewed as a necessary tool to protect consumers,⁵⁹ leveling the playing field for individual consumers who may not have the means to engage an attorney and likely do not have a claim large enough to allow an attorney to take the case on contingency.⁶⁰ To FIs, however, class actions do not level the playing field, but rather give consumers a bigger stick.⁶¹

54. *Id.*

55. *Id.* at 21.

56. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028, 12 U.S.C. § 5518(b) (2012).

57. *See infra* Part III.A.

58. *See infra* Part III.B, C.

59. Lauren G. Barnes, *Congress Must Come to the Defense of Class Actions*, LAW360 (August 21, 2015, 11:21 AM), <https://lawlibproxy2.unc.edu:2147/aritcles/693335/congress-must-come-to-the-defense-of-class-actions>.

60. *Id.*

61. Conrad Anderson IV & Gregory Cook, *CFPB Arbitration Study May Be First Step*

Industry representatives point out that “[t]he cost to defend the most frivolous [class action] complaint is overshadowed by the potential exposure where these otherwise ‘minimal amounts’ are aggregated.”⁶² Accordingly, FIs settle class action cases rather than litigate even unmeritorious claims to avoid discovery costs.⁶³ In fact, not even one of the class action cases in the Arbitration Study went to trial.⁶⁴

1. Meeting the Statutory Standard: In the Public Interest and for the Protection of Consumers

In consumer financial products and services, the use of pre-dispute arbitration clauses to ban class action lawsuits is widespread.⁶⁵ The Arbitration Study found that tens of millions of consumers are subject to pre-dispute arbitration clauses⁶⁶ and roughly 90% of those clauses preclude a claim from moving forward on a class basis.⁶⁷ Most consumers are subject to arbitration clauses through their credit card or checking account agreements—products with the highest penetration in the consumer financial market.⁶⁸ The Arbitration Study found that while many FIs do not include pre-dispute arbitration clauses in their consumer agreements,⁶⁹ the FIs that do are larger institutions with a greater share of

in *Unlocking Floodgates of Consumer Class-Actions*, JD SUPRA BUS. ADVISOR (Aug. 20, 2015), <http://www.jdsupra.com/legalnews/cfpb-arbitration-study-may-be-first-49159/>.

62. *Id.*

63. *Do Class Actions Benefit Class Members?*, MAYER BROWN LLP 2–3, <https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf> (citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting)); JASON SCOTT JOHNSTON & TODD ZYWICKI, *THE CONSUMER FINANCIAL PROTECTION BUREAU’S ARBITRATION STUDY: A SUMMARY AND CRITIQUE* 6, 48 (Mercatus Center 2015), <http://mercatus.org/publication/consumer-financial-protection-bureau-arbitration-study-summary-critique>.

64. ARBITRATION STUDY, *supra* note 8, § 1.4.4, at 14.

65. *Id.* §§ 1.4.1, 2.5.5.

66. *Id.* § 1.4.1.

67. *Id.* § 2.5.5 (noting that “93.9% of credit card arbitration clauses, 88.5% of the checking account arbitration clauses, 97.9% of the prepaid card arbitration clauses, 88.7% of the storefront payday loan arbitration clauses, 100.0% of the private student loan arbitration clause, and 85.7% of the mobile wireless arbitration clauses in [the CFPB’s] sample contained terms that expressly did not allow arbitration to proceed on a class basis.”) (footnote omitted).

68. CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: FACTSHEET* (2015) [hereinafter *FACTSHEET*], http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf.

69. ARBITRATION STUDY, *supra* note 8, § 2.3, at 7 (noting only 15.8% of credit card

the market.⁷⁰ This explains why the number of consumers subject to mandatory arbitration and prevented from participating in a class action is still quite high.⁷¹ See Appendix A for the percentage of FIs that use pre-dispute arbitration agreements listed by market and Appendix C for the percentage of pre-dispute arbitration clauses that include class action waivers.

The CFPB also found consumer comprehension of pre-dispute arbitration clauses lacking or erroneous.⁷² The Arbitration Study showed consumers do not consider dispute resolution when choosing between different financial products or services.⁷³ When surveyed, 54% of consumers whose credit card agreements included a pre-dispute mandatory arbitration clause did not know whether they could take their credit card issuer to court or not.⁷⁴ Thirty-eight percent of consumers erroneously believed they could adjudicate their disputes in a court of law either individually or as a class.⁷⁵ Additionally, the CFPB found that consumers are more likely to cancel a credit card or switch banks than try to take the company to court (or arbitration) when a dispute arises or is not otherwise resolved.⁷⁶

In support of the proposed regulation, the CFPB highlighted the prevalence of pre-dispute arbitration clauses that contain class action waivers, the lack of consumer awareness and comprehension of the terms of such clauses, and the low number of complaints that consumers have filed against FIs.⁷⁷ The CFPB maintains that class action waivers limit

issuers include pre-dispute arbitration clauses in their card holder contracts).

70. *Id.*

71. *Id.*

72. *Id.* § 3.1, at 3–4.

73. *Id.* § 3.4.1, at 15. When surveyed, no consumer mentioned dispute resolution as an influencing factor in his or her choice of credit card. *Id.* However, when the surveyor listed potential factors and asked whether or not a factor influenced the respondent's choice of credit card, 31% of respondents agreed affirmatively that dispute resolution did influence his or her choice. *Id.* The Arbitration Study noted that there was a high chance of acquiescence response bias error in that percentage. *Id.* §3.4.1 at 15 n.37 (“Acquiescence response bias is ‘the tendency for survey respondents to agree with statements regardless of their content’ and is particularly problematic with ‘agree-disagree’ questions.”) (citing Paul J. Lavrakas, *Encyclopedia of Survey Research Methods*, 2008.)

74. ARBITRATION STUDY, *supra* note 8, § 3.1, at 3. The Arbitration Study focused its inquiry on credit cards, because credit cards have the highest penetration in the consumer-financial market. *Id.* § 3, at 2.

75. *Id.* § 3.1, at 3.

76. *Id.* § 1.4.2, at 11.

77. Richard Cordray, CONSUMER FIN. PROT. BUREAU (Oct. 7, 2015) [hereinafter Cordray

consumer relief and increase FI wrongdoing without lowering consumer prices.⁷⁸ To the CFPB, the proposed ban is in the public interest and for the protection of consumers because it protects a consumer's "day in court" and empowers "private attorneys general" to fight against FIs violating consumer protection laws.⁷⁹

Critics of the proposed ban, however, believe that banning class action waivers does not protect consumers.⁸⁰ The real beneficiary of class actions, according to FIs, is not the consumer who can bring the "minimal amount[]" claim, but the attorney who is often paid 20% or more of the class action settlement.⁸¹ In the wake of the proposed regulation, one especially passionate attorney redubbed the CFPB the "Plaintiffs' Lawyer Protection Bureau," accusing the CFPB of prioritizing the needs of plaintiffs' lawyers over the needs of consumers.⁸²

FI representatives, asserting the benefits of arbitration over class action litigation, believe the proposed ban will limit consumers' access to arbitration.⁸³ The proposal is being considered a "*de facto* ban" on all arbitration clauses⁸⁴ because FIs will "abandon" arbitration clauses if class action waivers are prohibited.⁸⁵ To FIs, the ban on class action waivers is neither in the public interest nor for the protection of

2], <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/>; see also *infra* Appendix D listing the consumer-FI individual filings in arbitration with the AAA, in federal court, and putative class action cases filed in federal and some state courts.

78. *Id.*

79. *Id.*; see also Barr, *supra* note 7, at 812–813 (noting the "traditional use of private litigation to enforce individual rights in the United States has become increasingly supplemented with public enforcement").

80. See, e.g., Joe Adler, *Fierce Battle Ahead for the CFPB Arbitration Plan*, AM. BANKER, at 2, Oct. 8, 2015 (noting the head of the Consumer Bankers Association, Richard Hunt, is "disappointed" with the CFPB for siding with trial attorneys).

81. Anderson, *supra* note 61. During the five-year span of the CFPB's study of class actions, the CFPB found that consumers were awarded \$2.7 billion in relief and 18% of that relief went to their attorneys. FACTSHEET, *supra* note 68; see also ARBITRATION STUDY, *supra* note 8, § 1.4.7.

82. Andrew Pincus, *The Plaintiffs' Lawyer Protection Bureau*, INSIDEARM (Oct. 9, 2015, 12:40 PM), <http://www.insidearm.com/daily/credit-card-accounts-receivable/credit-card-receivables/the-plaintiffs-lawyer-protection-bureau/>.

83. Alan Kaplinsky, *Our Thoughts on Director Cordray's Comments to the CFPB Consumer Advisory Board*, BALLARD SPAHR CONSUMER FIN. SERVS. GROUP: CFPB MONITOR (Oct. 22, 2015), <https://www.cfpbmonitor.com/2015/10/22/our-thoughts-on-director-cordrays-arbitration-comments-to-the-cfpbs-consumer-advisory-board/>.

84. *Id.*

85. Adler, *supra* note 80.

consumers because it effectively robs consumers of a “quick, efficient and inexpensive” means of dispute resolution.⁸⁶ Furthermore, FI representatives find no need for the ban when consumers who would prefer no limitations in their dispute resolution options may select a product or service that does not include a pre-dispute arbitration clause.⁸⁷

FI representatives further critique the CFPB’s claim that class action waivers increase FI wrongdoing—dismissing the belief that FIs get a free pass when they are subject to “unprecedented regulation.”⁸⁸ FI representative Alan Kaplinsky “chided” Director Cordray for using the term “free pass,” because he found the term “inflammatory and misleading.”⁸⁹

If taken at face value, the CFPB’s reasoning demonstrates that the proposed ban satisfies the first and second statutory standards set forth in Dodd-Frank: if class action waivers increase FI wrongdoing and prevent consumer relief, then banning class action waivers is in the public interest and for the protection of consumers.⁹⁰ However, FIs would argue that the ban is not in the public interest and for the protection of consumers, because it would increase consumer prices or effectively eliminate an efficient dispute resolution process for consumers, while benefiting class action lawyers.⁹¹

In arriving at such diametrically opposed conclusions, both FIs and the CFPB rely on the Arbitration Study.⁹² However, just because the CFPB is relying on the Arbitration Study does not mean that the proposed regulation is “consistent” with the Arbitration Study, as the third statutory

86. Kaplinsky, *supra* note 83.

87. ARBITRATION STUDY, *supra* note 8, § 2.3, at 7 (noting only 15.8% of credit card issuers include pre-dispute arbitration clauses in their card holder contracts).

88. Rob Berger, *The CFPB Declares War on Arbitration*, FORBES (Oct. 18, 2015), <http://www.forbes.com/sites/robertberger/2015/10/18/the-cfpb-declares-war-on-arbitration/3/>.

89. Tim Bauer, *No Surprises At the CFPB’s Arbitration Hearing*, INSIDEARM (Oct. 8, 2015), <http://www.insidearm.com/opinion/no-surprises-at-cfpbs-arbitration-field-hearing/>.

90. Cordray 2, *supra* note 77.

91. See, e.g., Tina Orem, *CFPB Proposal Could Strike Credit Unions*, CREDIT UNION TIMES (Oct. 24, 2015), <http://www.cutimes.com/2015/10/24/cfpb-proposal-could-strike-credit-unions>.

92. Letter from Alan Kaplinsky on behalf of Am. Bankers Ass’n, Consumer Bankers Ass’n, and Fin. Services Roundtable, to Richard Cordray, Director of the Consumer Fin. Prot. Bureau, 3 (July 13, 2015), <http://op.bna.com/bar.nsf/r?Open=jbar-9ydsbc>; Cordray 2, *supra* note 77.

standard requires.⁹³

2. Meeting the Statutory Standard: The Findings of Such Rule Shall Be Consistent with the Arbitration Study

While the CFPB promoted the proposed regulation as consistent with the Arbitration Study, FIs disagree.⁹⁴ In the CFPB's view, the major finding of the Arbitration Study—and point of contention with FIs—is that pre-dispute mandatory arbitration clauses “restrict consumer relief in disputes with financial companies by limiting class actions that provide millions of dollars in redress [to consumers] each year.”⁹⁵ In contrast, FI representatives believe that the Arbitration Study demonstrates that “[a]rbitration is faster, less expensive, and more effective than litigation, including class action litigation, and [consumers] are far more likely to obtain a decision on the merits and [receive] more meaningful relief.”⁹⁶

Although the amount that FIs spend in class action settlements and the number of “eligible” class members⁹⁷ is high, perhaps these numbers should not be accepted at face value.⁹⁸ A factsheet published alongside the Arbitration Study (“the Factsheet”)⁹⁹ highlights that, from 2008 to 2012, 32 million consumers were eligible for relief in class action

93. See *infra* Part III.A.2; Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028, 12 U.S.C. § 5518(b) (2012).

94. Compare Cordray 2, *supra* note 77, with Kaplinsky, *supra* note 83.

95. CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers, CONSUMER FIN. PROT. BUREAU: NEWSROOM (Mar. 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>.

96. Letter from Alan Kaplinsky, *supra* note 92, at 3; see JAMES R. MCGUIRE & NANCY R. THOMAS, ELIMINATING ARBITRATION CLAUSES TO BENEFIT CONSUMERS, MORRISON FORRESTER (Oct. 20, 2015), <http://www.mofo.com/~media/Files/ClientAlert/2015/10/151020CFPBArbitrationRulemaking.pdf> (discussing how the CFPB's report seems to show the benefits to arbitration over litigation).

97. An eligible class member will not necessarily recover. ARBITRATION STUDY, *supra* note 8, § 8.3.3, at 27, 28 n. 46. Generally, an eligible class member is sent notification then must make a claim for relief, though sometimes class members are identified and payments are automatic. *Id.* Data on the claims rate in consumer financial class action settlements is not easily accessible or documented in one place. *Id.* § 8.3.4, at 30. One class action settlement administrator indicated claims rate was 5% while a different class action settlement administrator had a higher rate of 40% or 50% of eligible class members claiming their relief. *Id.* § 8.3.4, 30–31.

98. Compare FACTSHEET, *supra* note 68, with JOHNSTON & ZYWICKI, *supra* note 63, at 7.

99. FACTSHEET, *supra* note 68.

settlements in federal court each year.¹⁰⁰ Over the five-year period, 160 million consumers were eligible for relief, and settlement relief totaled \$2.7 billion.¹⁰¹ The factsheet also highlighted the unmeasured additional relief that *may* have resulted from FIs changing their behavior.¹⁰² Notably, the \$2.7 billion in total relief encompasses cash relief, in kind relief, *cy pres* relief,¹⁰³ and references the gross amount, before attorneys' fees and costs are subtracted.¹⁰⁴ Furthermore, FI representatives argue that these numbers are not predictive of future class settlement payouts.¹⁰⁵ The class settlement data included a handful of extra-large class action cases that skewed the data by substantially increasing the number of eligible class members and the amount of recovery.¹⁰⁶

When considering the benefits of class action settlements to consumers, the Arbitration Study highlighted that 60% of class actions brought are settled with the individual claimant, providing no relief to the other class members.¹⁰⁷ Where class members did recover, FI representatives highlight the low amount of individual recovery, especially when compared to individual recovery in arbitration.¹⁰⁸ The Arbitration Study showed that cash payments in class action settlements equaled \$1.1 billion¹⁰⁹ which, divided between 34 million class members, reflects an average individual recovery of \$32.35.¹¹⁰ By comparison, the

100. *Id.* at 2 (emphasis added). This number is based on the class settlement data, which included all consumer financial class settlements, not just the six markets, and thus is perhaps not a helpful or equal comparison. ARBITRATION STUDY, *supra* note 8, § 8, at 2. This number seems to have no bearing on whether those “eligible” consumers had agreed to arbitration clauses. *Id.*

101. FACTSHEET, *supra* note 68.

102. *Id.* (emphasis added).

103. *Cy pres* relief is relief paid to charitable organizations on behalf of class members. *Do Class Actions Benefit Class Members?*, *supra* note 63, at 6.

104. ARBITRATION STUDY, *supra* note 8, § 8.1, at 4, § 8.3.5, at 32.

105. JOHNSTON & ZYWICKI, *supra* note 63, at 7.

106. *Id.*; ARBITRATION STUDY, *supra* note 8, § 8.3.2, at 15, n.36.

107. Letter from Alan Kaplinsky, *supra* note 92, at 3.

108. *Id.* at 4.

109. ARBITRATION STUDY, *supra* note 8, § 8.1, at 4, n.5. Total relief, which include cash, in-kind, *cy pres*, and attorneys' fees. FACTSHEET, *supra* note 68. Cash relief “includes cash payments to class members, debt forbearance for class members, and class expenses and fees paid for by defendants as part of the settlement. ARBITRATION STUDY, *supra* note 8, § 8.1, at 4, n.5. For 28 settlements that provided for a *cy pres* payment for the benefit of class members but no payment directly to class members, cash relief also includes the amount of the *cy pres* payment. *Id.* In kind relief refers to FIs giving free or discounted access to a service, such as credit monitoring. *Id.*

110. Letter from Alan Kaplinsky, *supra* note 92, at 4.

average individual recovery in arbitration was \$5,389.¹¹¹

In order to conclude that class actions provide superior relief to consumers over arbitration, the CFPB did not compare average individual recovery, but instead compared overall class settlement recovery to the arbitration data.¹¹² However, such arbitration data is based solely on arbitral *awards*—decisions made by an arbitrator on the merits—as opposed settlements agreed upon between parties.¹¹³ During the three-year time period of the Arbitration Study, 1,847 arbitrations were filed.¹¹⁴ Only 32% of those arbitration cases ended in an arbitral award with a decision on the merits.¹¹⁵ Less than 25% of the arbitrations settled and the remainder were not clearly resolved—either deemed dormant or perpetually pending.¹¹⁶ In cases where the arbitration reached a decision on the merits, consumers recovered just under \$400,000,¹¹⁷ far less than the \$2.8 million in arbitral awards recovered by FIs.¹¹⁸ However, these amounts do not include consumer relief in up to 66% of arbitrations that settled.¹¹⁹ Furthermore, the Arbitration Study noted that the low amount

111. *Id.*

112. Richard Cordray, CONSUMER FIN. PROT. BUREAU (Mar. 10, 2015) [hereinafter Cordray 3], <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/>; FACTSHEET, *supra* note 68; *see also* ARBITRATION STUDY, *supra* note 8, § 5.6, at 32, § 8 (addressing the outcome of arbitrations studied and the value of class settlements respectively).

113. FACTSHEET, *supra* note 68.

114. ARBITRATION STUDY, *supra* note 8, § 5.2.1, at 9. This number includes arbitrations filed by the consumer, the FI, or mutually submitted. *Id.*; *see also infra* Appendix D.

115. ARBITRATION STUDY, *supra* note 8, § 5.2.1, at 9.

116. *Id.* The Arbitration Study noted that 34% of the arbitrations not clearly resolved showed signs consistent with settlement, raising the likely percentage of settled arbitrations to 66%. *Id.* § 5.2.2, at 11.

117. *Id.* (“The total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107.”).

118. *Id.* § 1.4.3, at 12; FACTSHEET, *supra* note 68. The amount of arbitral awards to consumers compared to the amount of arbitral awards to FIs may not be so astounding when the type of dispute is considered. ARBITRATION STUDY, *supra* note 8, § 1.4.3, at 12. In 227 of the 244 of the cases where FIs made claims or counterclaims, arbitrators awarded relief to the FIs for a total of \$2.8 million. *Id.* However, 40% of all of the arbitrations filed were disputes over debts, *id.*, and the cases where FIs were awarded \$2.8 million were “predominantly for disputed debts.” FACTSHEET, *supra* note 68. The question then remains, is it so surprising that the outcome over such disputes is consumers having to pay what they owe? ARBITRATION STUDY, *supra* note 8, § 1.4.3. Perhaps still troubling is the percentage of wins FIs have over consumers in these cases, but that issue raises a worrisome allegation that the AAA is not a neutral arbitrator, which is not a light accusation nor supported by the Arbitration Study data or incorporated in the CFPB finding. *See* Cordray 3, *supra* note 111 (emphasizing the difference in recovery).

119. ARBITRATION STUDY, *supra* note 8, § 5.2.2, at 11, 13.

of consumer recovery in arbitral awards likely reflects FI settlement strategy.¹²⁰ Since an FI is more likely to settle a claim where the consumer has a strong chance of winning, the arbitral award data is not indicative of total consumer recovery.¹²¹ Thus, looking at arbitral awards versus class action settlements is an apples-to-oranges comparison,¹²² which fails to establish that the ban on class action waivers is “consistent” with the Arbitration Study.¹²³

The CFPB also reasoned that pre-dispute arbitration clauses that ban class action waivers do not lower consumer prices.¹²⁴ However, the Arbitration Study established that proving a correlation between arbitration clauses and pricing is near impossible.¹²⁵ The Arbitration Study noted that arbitration provides cost saving to FIs.¹²⁶ Whether by reducing court costs and attorneys’ fees inherent in extensive discovery and litigation, or by limiting an FI’s exposure to aggregated claims, pre-dispute arbitration clauses likely save FIs money.¹²⁷ The CFPB looked to whether these cost savings are passed through to consumers—attempting to probe the argument that consumers benefit from pre-dispute arbitration clauses even when consumers are unaware of the clauses’ existence.¹²⁸ The CFPB recognized the difficulty in proving the “pass-through” effect because so many factors affect pricing.¹²⁹ Moreover, even if a correlation between lower prices and pre-dispute arbitration clauses were found, it would not be dispositive of a relation between the two because of the multitude of factors affecting pricing.¹³⁰

Lastly, the CFPB’s proposal to ban class action waivers is likely not consistent with the Arbitration Study because it relies on conclusions

120. *Id.* § 5.1, at 6. The CFPB recognized the limitation in its data by noting that “[b]ecause [its] ability to review substantive outcomes is generally limited to arbitration decisions on the merits, the substantive outcomes of most consumer financial arbitration disputes are unknown and largely unknowable to reviewers.” *Id.*

121. *Id.*

122. JOHNSTON & ZYWICKI, *supra* note 63, at 7.

123. MCGUIRE & THOMAS, *supra* note 96, at 2.

124. Cordray 2, *supra* note 77.

125. ARBITRATION STUDY, *supra* note 8, § 10, at 2.

126. *Id.*

127. *Id.*

128. *Id.* § 10, at 3–4.

129. *Id.*

130. *Id.* § 10, at 2.

never addressed in the Arbitration Study.¹³¹ The Arbitration Study found that many consumers do not resort to arbitration or litigation when a dispute arises with an FI, but did not address why this is the case.¹³² The CFPB has drawn the conclusion that consumers are not filing individual suits or arbitration claims against their FIs either because consumers think their claims are too small to be worthwhile or because the harm imposed on consumers by FIs is going undetected.¹³³ There could be truth in the CFPB's speculation, but theorizing why claims are not being filed may not give the CFPB the authority to ban class action waivers—just because the Arbitration Study is not inconsistent does not necessarily render it consistent.¹³⁴ For the proposed ban on class action waivers to be consistent with the Arbitration Study, further research must be done to definitively establish the CFPB's conclusions.¹³⁵ At this point, the proposed ban should not be adopted.¹³⁶

B. Conditioning the Use of Pre-Dispute Arbitration Agreements on the Submission of Arbitral Claims and Awards to the CFPB

Conditioning the use of pre-dispute arbitration agreements on the submission of arbitral claims and awards to the CFPB satisfies the first and second statutory requirements set forth in Dodd-Frank.¹³⁷ It is in the public interest and for the protection of consumers to collect further data regarding consumer arbitration based on the prevalence of pre-dispute arbitration clauses and the lack of consumer awareness and comprehension of the terms of such clauses.¹³⁸ By requiring companies to provide data on arbitral claims and awards, the CFPB believes it can monitor individual arbitration for unfairness.¹³⁹ Even FIs agree that the

131. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 14; *see also* MCGUIRE & THOMAS, *supra* note 96, at 2 (“Nor does the [Arbitration Study] seem to support its conclusion that consumers benefit from class litigation any more than they do from individual arbitration.”).

132. ARBITRATION STUDY, *supra* note 8, § 1.4.2, at 11.

133. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 14.

134. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028(a), 12 U.S.C. § 5518(b) (2012).

135. Letter from Alan Kaplinsky, *supra* note 92, at 4.

136. *Id.*

137. Dodd-Frank § 1028, 12 U.S.C. § 5518(b).

138. ARBITRATION STUDY, *supra* note 8, § 1.4.1, at 3.

139. Cordray 2, *supra* note 77. In support of the need to monitor arbitration for potential unfairness to consumers, the CFPB and consumer advocates make reference to the

CFPB should conduct further research.¹⁴⁰ The submission of arbitral claims and awards is less research than FIs desire, but it is a move toward filling the gaps in the Arbitration Study.¹⁴¹ Critics may argue that the proposed regulation would increase consumer prices because the cost of the proposed regulation may be passed through to consumers; however, since the CFPB is not requiring any change in the arbitral proceeding or written rewards the cost is likely limited.¹⁴²

Additionally, this section of the proposed regulation likely

controversial history of the National Arbitration Forum (“NAF”). See SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 19; CONSUMER FIN. PROT. BUREAU, LIVESTREAM, *supra* note 13 (warning against repeat NAF debacle). NAF was accused of being overly FI-friendly, resulting in unfair arbitral results for consumers. *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. (July 22, 2009) (statement of F. Paul Bland, Jr., Staff Attorney, Public Justice) (“NAF pursued the business of debt collection arbitrations by cultivating relationships with and the favor of creditors, fundamentally to the detriment of consumers.”). Previously a significant consumer arbitration firm, NAF stopped arbitrating consumer disputes. Matthew R. Salzwedel & Devona Wells, *National Arbitration Forum Settlement with Minnesota Attorney General*, 1 ST. AG TRACKER, 4 (2009). “[NAF’s] decision to end its consumer-arbitration business resulted from a settlement it reached with the State of Minnesota less than a week after the [State] Attorney General [] sued the company . . . accusing the company of violating Minnesota’s consumer-fraud, deceptive-trade-practices, and false advertising statutes.” *Id.*; see also SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 19 (noting the allegations arose from the firm’s common ownership with a number of FIs involved in the arbitration).

140. Letter from Alan Kaplinsky, *supra* note 92, at 3. Some of the areas FI representatives requested the CFPB investigate further include customer satisfaction with arbitration, cash awards to individual members of a class, the economic consequences to customers and companies if pre-dispute mandatory arbitration clauses are banned, whether recent United States Supreme Court cases which make it harder to receive class certification limit the amount of relief class actions could potentially provide, the impact of the CFPB’s own enforcement actions, and customer experience with arbitration in areas where arbitration has had the chance to develop further, such as employment. *Id.* There is also a potential for unfairness when arbitrators are chosen for their specialty in the field; connection to the industry tends towards finding in favor of the industry. See Barr, *supra* note 7, at 811. A recent study showed that arbitrators chosen for their specialty in securities had a “significant impact” on the arbitral award. *Id.* (citing Stephen J. Choi et al., *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43 (2014)).

141. Letter from Alan Kaplinsky, *supra* note 92, at 3.

142. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 20. A reevaluation may be required after the Panel process, as such a limited cost may still prove too great for some small businesses, and undermine the public interest of this section of the proposed regulation. See James H. Carter & John V. H. Pierce, *Have Class Arbitration Found New Life?* NY L. J., Nov. 16, 2015, <http://www.newyorklawjournal.com/id=1202742253268/Have-Class-Arbitrations-Found-New-Life?mcode=0&curindex=0&curpage=ALL> (noting arbitral data submission may prove “significant expense for small businesses”).

satisfies the third statutory requirement.¹⁴³ Though the absence of data does not render the ban on class actions waivers consistent with the Arbitration Study, less data or missing data is consistent with the proposal to collect more data.

C. *Publishing Arbitral Claims and Awards to the CFPB Website*

The CFPB couched the possibility of publicizing arbitral data to its website in the second part of the proposed regulation—it did not introduce it as a separate and distinct proposal.¹⁴⁴ However, the finding for this part of the regulation is different and likely does not meet the second or third statutory requirement of Dodd-Frank.¹⁴⁵

The CFPB maintains that publication will add an extra layer of consumer protection by shedding “the sunlight of public scrutiny” on FI-consumer arbitration.¹⁴⁶ Citing its current practice of publishing consumer complaints on its website, the CFPB reasons that “greater transparency of information” improves customer service and helps “identify patterns in the treatment of consumers, leading to stronger compliance mechanisms.”¹⁴⁷ Despite this benefit to consumers, publishing arbitral claims on the CFPB’s website may not be in the public interest and for the protection of consumers.¹⁴⁸

A cited benefit to arbitration is the private nature of the process.¹⁴⁹ While the CFPB and others see this as a negative,¹⁵⁰ suggesting it allows FIs to conceal wrongdoing,¹⁵¹ the element of confidentiality may well be in the public interest because it protects an FI’s reputation against

143. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028, 12 U.S.C. § 5518(b) (2012).

144. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 19.

145. Dodd-Frank § 1028(a), 12 U.S.C. § 5518(a).

146. Cordray 2, *supra* note 77.

147. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 20, n.57.

148. See Amy Schmitz, *Assuming Silence In Arbitration*, 268 N.J. LAWYER 16, 17 (2011) (noting one potential benefit of privacy in arbitration is to prevent public embarrassment or humiliation).

149. See, e.g., *Stolt-Nielsen S.A. v. Animalfeeds Int. Corp.*, 559 U.S. 662, 686 (2010) (noting that a class arbitration proceeding eradicates the benefit of privacy in arbitration).

150. See e.g., Barr, *supra* note 7, at 809 (noting that the lack of transparency in arbitration is problematic, because consumers have a harder time understanding why the arbitrator arrived at a decision or proving that the arbitrator misapplied the law).

151. Cordray 2, *supra* note 77; Barr, *supra* note 7, at 810.

potentially baseless accusations. Where data regarding disputes concerns a depository institution, the FI's reputation may affect consumer confidence, which could in turn affect a consumer's choice to deposit with that institution.¹⁵² The CFPB would argue that this "public spotlight" is a positive outcome because it keeps FIs in line,¹⁵³ but not all juicy headlines are indicative of actual FI behavior and the continued erosion of consumer confidence in FIs may not be in the public interest.

FIs would argue further that publicizing arbitral data is less for the protection of consumers and more for the protection of plaintiffs' attorneys.¹⁵⁴ Providing easy access to arbitral claims would likely increase the number of class actions brought against FIs.¹⁵⁵ Anyone looking to bring a claim need only pull up the CFPB website and see what claims are hot right now.¹⁵⁶ This part of the regulation adds support to the FI representatives' position that the proposed regulation benefits plaintiffs' attorneys—and not consumers—and, therefore, should not be adopted.

IV. POTENTIAL CHALLENGES TO THE PROPOSED REGULATION

Critics of the proposed regulation speculate that the CFPB lacks the authority to ban class action waivers in pre-dispute arbitration clauses, not because of a failure to satisfy the statutory standards, but because the Federal Arbitration Act of 1925 ("FAA") prevents it from doing so.¹⁵⁷ Without a congressional amendment to the FAA, critics insist the CFPB's

152. See, e.g., Vincent Di Lorenzo, *Public Confidence and The Banking System*, 35 AM. U. L. REV. 647, 667 (Spring 1986) (arguing for the continued separation of commercial and investment banking, but noting the connection between consumer confidence and health of depository institutions).

153. Cordray 1, *supra* note 40, at 2.

154. Adler, *supra* note 80.

155. See ANTHONY E. DiRESTA, BRIAN J. GOODRICH, RACHEL E. MUELLER, HOLLAND & KNIGHT LLP, CLIENT ALERT: CFPB PROPOSES LIMITS ON COMPANIES' USE OF ARBITRATION CLAUSES (2015), <https://m.hklaw.com/publications/cfpb-proposes-limits-on-companies-use-of-arbitration-clauses-10-22-2015/> (recommending companies "consider their new exposure to class action litigation").

156. See *id.* (noting publication of arbitral awards on the CFPB website highlights "prohibited business practices").

157. *Id.*; Federal Arbitration Act of 1925 ("FAA"), 9 U.S.C. § 2 (2012); Jessica Karmasek, *The Legality of CFPB's Plan for Proposed Ban on Arbitration Clauses in Question*, LEGAL NEWS LINE (Dec. 4, 2015) <http://legalnewsline.com/stories/510649484-legality-of-cfpb-s-plan-for-proposed-ban-on-arbitration-clauses-in-question>.

proposed regulation would contravene the statute.¹⁵⁸ The FAA specifies that “[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵⁹

The response to the contravention challenge is that Dodd-Frank supersedes the FAA and is the congressional amendment critics demand.¹⁶⁰ Section 1028(b) of Dodd-Frank explicitly provides that the CFPB “may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties.”¹⁶¹ A court determining the validity of the CFPB’s proposed regulation of pre-dispute arbitration agreements would look to Dodd-Frank, not the FAA, as Dodd-Frank is an act of Congress subsequent to the FAA and explicitly addresses arbitration.¹⁶²

Critics may argue that Congress’ grant of authority to the CFPB regarding arbitration is “an unlawful delegation of legislative authority to an agency.”¹⁶³ The argument being that it is impermissible for Congress “to transfer to others the essential legislative function with which it is thus vested”¹⁶⁴—in this case, the power to amend the FAA.¹⁶⁵ The standard

158. Karmesek, *supra* note 157.

159. FAA, 9 U.S.C. § 2.

160. Jeff Sovern, *Experts Disagree Over Whether the Earth is Flat and CFPB Has the Authority to Regulate Arbitration Clauses*, PUB. CITIZEN: CONSUMER L. & POL’Y BLOG (Oct. 19, 2015), <http://pubcit.typepad.com/clpblog/2015/10/experts-disagree-over-whether-earth-is-flat-and-cfpb-has-power-to-regulate-arbitration-clauses.html>.

161. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028(b), 12 U.S.C. § 5518(b) (2012).

162. Sovern, *supra* note 160; *see also* Barr, *supra* note 7, at 817.

163. Alan S. Kaplinsky, *Responding to Professor Sovern: How Dodd-Frank Section 1028 limits the CFPB’s Power to Regulate Arbitration Agreements*, BALLARD SPAHR LLP: CFPB MONITOR (Oct. 22, 2016), <https://www.cfpbmonitor.com/2015/10/22/responding-to-professor-sovern-how-dodd-frank-section-1028-limits-the-cfpbs-power-to-regulate-arbitration-agreements/>; Marc James Ayers, *Can the CFPB Really Prohibit Pre-dispute Arbitration Agreements?* BRADLEY ARANT BOULT CUMMINGS LLP: FINANCIAL SERVICES PERSPECTIVES (Mar. 26, 2015) <https://www.financialservicesperspectives.com/2015/03/can-the-cfpb-really-prohibit-pre-dispute-arbitration-agreements/> (raising the unconstitutional delegation of power argument regarding a total ban of arbitration, before the October 2015 rule was proposed).

164. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

165. *See* Ayers, *supra* note 163 (describing a potential ban on consumer-financial arbitration clauses as a repeal of the FAA).

for evaluating a delegation challenge is whether, in delegating its power, Congress guided the agency's discretion with "intelligible principles."¹⁶⁶ This is a very permissive standard.¹⁶⁷ Since the inception of the intelligible principle standard in the New Deal era, when the Supreme Court invoked the standard to strike down three laws in three cases, the Supreme Court has yet to find any other laws that fail to provide an intelligible principle.¹⁶⁸ Facing such a permissive standard, the unlawful delegation argument seems unlikely to gain traction.¹⁶⁹

Both sides recognize, however, that the current Supreme Court favors arbitration.¹⁷⁰ In *AT&T Mobility LLC v. Concepcion*,¹⁷¹ the Supreme Court enforced the arbitration clause by holding that the FAA preempted a California doctrine that found certain arbitration clauses that contain class actions waivers unconscionable.¹⁷² Most recently, in *Direct TV Inc. v. Imburgia*,¹⁷³ the Court reemphasized its holding in *Concepcion* and held that even where the terms of the arbitration clause rely on the "laws of your state," those laws, and the validity of the arbitration clause, are still subject to the FAA and federal preemption.¹⁷⁴ Furthermore, between *Concepcion* and *Imburgia*, in *American Express Co. v. Italian Colors Restaurant*,¹⁷⁵ the Court held an arbitration clause containing a

166. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 335 (4th ed. 2011) (citing *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974)).

167. *See id.* ("In more than 60 years since . . . *Schechter*, not a single federal law has been declared an impermissible delegation of legislative power.").

168. Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 16 n.100 (1998) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 310–12 (1936); *Schechter*, 295 U.S. at 529–42; *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 414–30 (1935)).

169. *See* CHERMERINSKY, *supra* note 166 at 336 (noting the "strong consensus over the last half century in favor of allowing broad delegations of legislative power to administrative and regulatory agencies of all types") (footnote omitted); Jeff Sovern, *Will the Industry Attack the Constitutionality of the CFPB's Power to Regulate Arbitration Clauses?*, PUB. CITIZEN: CONSUMER L. & POL'Y BLOG (Apr. 16, 2015), <http://pubcit.typepad.com/clpblog/2015/04/will-the-industry-attack-the-constitutionality-of-the-cfpbs-power-to-regulate-arbitration-clauses.html> (asserting a lack of expertise in constitutional law, but finding little weight in the argument that the CFPB lacks the power to regulate).

170. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (enforced arbitration clause); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311–12 (2013) (enforced arbitration clause).

171. *Concepcion*, 563 U.S. 333.

172. *Id.* at 1752.

173. *Direct TV Inc. v. Imburgia*, No. 14-462, slip op (U.S. Dec. 14, 2015).

174. *Imburgia*, slip op at 10-11.

175. *Italian Colors*, 133 S. Ct. 2304.

class action waiver as valid and enforceable under FAA notwithstanding a showing of financial hardship on the plaintiff.¹⁷⁶

Despite the Court's favorable treatment of arbitration clauses, the predicted FAA challenge¹⁷⁷ and the unlawful delegation argument will likely not prevail.¹⁷⁸ By granting the CFPB the authority to limit or ban pre-dispute arbitration clauses, Congress shifted its previous stance and created an exception to the FAA's general enforcement of arbitration clauses.¹⁷⁹ Unlike *Concepcion* or *Imburgia*, the challenge is not of state law but federal regulation.¹⁸⁰ Based on history, the unlawful delegation argument will have little bite.¹⁸¹

V. ALTERNATIVES

The Arbitration Study data window—January 1, 2010, through December 31, 2012—is especially interesting, because *Concepcion* was decided in 2011.¹⁸² Dismayed at the holding, consumer advocates worried that *Concepcion* would result in the inclusion of a pre-dispute mandatory arbitration clause in every consumer contract because FAA preempted state law regarding arbitration.¹⁸³ However, based on the data gathered from 2012 and 2013 in the Arbitration Study, the *Concepcion* holding has been just a ripple in the rise of arbitration clauses, compared to the tidal wave consumer advocates feared.¹⁸⁴

Concepcion, however, did leave its mark.¹⁸⁵ Many of the consumer-friendly features of current pre-dispute arbitration clauses are attributed to *Concepcion*.¹⁸⁶ The commercial response to the *Concepcion*

176. *Id.* at 2311–12. The plaintiff failed to convince the Court that he should be able to bring a class action claim when the cost of “individually arbitrating a federal statutory claim” would cost him more than he could possibly recover. *Id.* at 2307, 2312.

177. Adler, *supra* note 80.

178. Sovern, *supra* note 160.

179. *Id.*

180. AT&T Mobility LLC. v. *Concepcion*, 563 U.S. 333, 352 (2011); Direct TV Inc., v. *Imburgia*, No. 14-462, slip op (U.S. Dec. 14, 2015).

181. CHEMERINSKY, *supra* note 166, at 336

182. *Concepcion*, 563 U.S. at 333.

183. Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 844–48 (2012).

184. ARBITRATION STUDY, *supra* note 8, § 2.3.1.

185. Gilles, *supra* note 183, at 844–46.

186. *Concepcion*, 563 U.S. 333; Gilles, *supra* note 183, at 825.

Court's praise of the consumer-friendly features—such as covering filing fees and providing cash bounties—was to add these features to their own arbitration clauses *sua sponte* to mirror the arbitration clause upheld in *Concepcion*.¹⁸⁷

A. *Alternative Regulation*

Despite the post-*Concepcion* increase of consumer-friendliness, the Arbitration Study demonstrates that improvement is still needed in reducing the complexity and increasing consumer awareness and comprehension of pre-dispute arbitration clauses.¹⁸⁸ Clause complexity, length, and features vary across the six consumer financial markets.¹⁸⁹ Generally, arbitration clauses tend to be more complex and require a higher grade level of education to understand than the rest of the contract.¹⁹⁰ For example, the average Flesch Kincaid grade level¹⁹¹ for arbitration clauses in credit card agreements is 15.6 while the rest of the contract is 11.8.¹⁹² Interestingly, larger FIs' arbitration clauses are longer but less complex (average Flesch Kincaid grade level: 14.7) than smaller FIs' arbitration clauses, which are shorter but more difficult to comprehend (average Flesch Kincaid grade level: 15.7).¹⁹³

One of the common arbitration clause features identified in the Arbitration Study, besides the class action waiver, is the opt-out option.¹⁹⁴ Twenty-five percent or more (depending on the market) included an opt-out feature in the arbitration clause.¹⁹⁵ Typically, an opt-out option allows a consumer thirty days to choose not to be subject to the arbitration clause by mailing a signed document to the issuer stating the choice to

187. Gilles, *supra* note 183, at 844–46.

188. See ARBITRATION STUDY, *supra* note 8, §§ 2.4, 3.1 (noting the complexity and lack of consumer awareness respectively).

189. *Id.*; see also *infra* Appendix B and C (chart of clause features).

190. ARBITRATION STUDY, *supra* note 8, § 2.4, at 28; see also *infra* Appendix B (listing the Flesch Kincaid grade levels for each markets' contracts and arbitration clauses).

191. As described in the Arbitration Study, the Flesch Kincaid grade level takes into account total words, total sentence, and total syllables and based on the readability, determines what level of education a reader would need to understand the clause. ARBITRATION STUDY, *supra* note 8, § 2.4, at 28 n.79.

192. *Id.* § 2.4, at 28.

193. *Id.* at Appendix A, at 28 (defining large FIs as the twenty largest issuers).

194. *Id.* § 2.5.1, at 31.

195. *Id.*

opt out.¹⁹⁶ Despite the prevalence of the opt-out option, the CFPB found most consumers are unaware of its existence,¹⁹⁷ a fact that renders the consumer-friendly provision relatively toothless. See Appendix C for a chart of the common features and their prevalence in pre-dispute arbitration clauses by market.

Instead of banning class action waivers, the CFPB should create a standard pre-dispute arbitration clause that is easier to understand and includes the following features: (i) an opt-out option, and, where hardship is demonstrated, (ii) a provision that FIs will cover arbitration costs.¹⁹⁸ Furthermore, the standard clause should protect the judicial oversight of class actions by containing an anti-severability provision in the class action waiver, which would prevent a case from moving forward as a class arbitration.¹⁹⁹ The benefit of each of these features will be discussed in turn.

1. Consumer-Friendly Pre-Dispute Arbitration Clause

i. Opt-Out Option

An opt-out option should be included in every mandatory pre-dispute arbitration clause²⁰⁰ and the consumer should be able to opt out online or via telephone.²⁰¹ The provision should allow that a consumer

196. *Id.*

197. *Id.* § 3.1, at 4. The CFPB encountered only one consumer (out of the 1,007 survey respondents, *id.* at §3.3, 9) who had been made aware of his ability to opt out, and who, despite his awareness, chose not to opt out. *Id.* § 3.4.3, 21 n.44.

198. There are more consumer-friendly features that FIs could adopt and some have already adopted including: choice of arbitrator, minimum contingent recovery, and small claims court carve outs. *Id.* at § 2. The importance of allowing a consumer to select the arbitrator helps avoid potential bias toward FIs. See Barr, *supra* note 7, at 811 (noting the existence of bias when the arbitrator has a background in the industry of the dispute).

199. *Id.* § 2, at 46. The proposed regulation does not prevent a consumer from choosing to move forward on a class basis through arbitration instead of through the court. SMALL BUSINESS REVIEW PANEL FOR POTENTIAL RULEMAKING, *supra* note 10, at 18. The CFPB could investigate additional judicial oversight feature, namely, an anti-delegation clause, requiring the enforceability of an arbitration clause to be determined by a judge not an arbitrator. See ARBITRATION STUDY, *supra* note 8, § 2.5.4 (addressing anti-delegation). The intricacies of such a proposal would require another Note to explore.

200. See Barr, *supra* note 7, at 817 (noting disclosure and an opt-out option in arbitration agreements as necessary to protect consumers, but further that the CFPB and the SEC should also protect consumers' ability to seek collective relief).

201. See ARBITRATION STUDY, *supra* note 8, §§ 2.4, § 3.4.3, at 21, n.44 (noting the current use of opt-out options in pre-dispute arbitration clauses and the lack of consumers that opt

has a minimum of thirty days to opt-out, which the FI may increase at its discretion.²⁰² While this may increase an FI's exposure to class actions, it ameliorates the lack of negotiation power on the part of the consumer.²⁰³ Since the Arbitration Study did not find a single person who opted-out of the arbitration clause, the effectiveness of the opt-out option should go hand-in-hand with increasing consumer awareness and understanding of arbitration clauses.²⁰⁴ In reality, and as demonstrated by the Arbitration Study, most consumers will likely choose the default option rather than opt out; thus, the exposure to FIs and the benefit to consumers would both be quite limited.²⁰⁵ To decrease the number of consumers who do not opt out because of inertia, the opt-out provision should allow consumers to either opt out online or via telephone.²⁰⁶

ii. FI Covers Arbitration Costs

The CFPB should require FIs to cover the filing costs of arbitration when a consumer shows financial hardship. The Arbitration Study demonstrates a wide variation in cost allocation.²⁰⁷ Some pre-dispute arbitration clauses provide that the FI will cover the initial filing fees, while others provide that the FI may cover filing fees upon request, under special circumstances, or if the arbitration administrator has been asked and has refused to waive the initial filing fee.²⁰⁸ Other clauses provide that the losing party will pay all of the arbitration costs of the

out).

202. *Id.* § 2.5.1, at 31 (noting that current opt-out windows range from 30 to 90 days).

203. *See id.* § 3.2, at 7–8 (noting the lack of understanding and awareness consumers have of their credit card agreements).

204. *Id.* § 3.1, at 4. For an alternative that addresses the toothlessness issue of an opt-out option see *supra* Part IV.B, suggesting an opt-in option.

205. ARBITRATION STUDY, *supra* note 8, § 2.4; Steve Lohr, *The Default Choice, So Hard to Resist*, NY TIMES, Oct. 16, 2011, BU5 (citing RICHARD THALER & CASS SUNSTEIN, NUDGE (2008)); Michael S. Barr, et al., *Behaviorally Informed Financial Services Regulation*, NEW AM. FOUND. 9, 13 (Oct. 2008) http://scholar.harvard.edu/files/sendhil/files/behaviorally_informed_financial_services_regulation.pdf (exploring opt-out options in different services and products within the financial services industry).

206. Requiring the opt out option to be online or by telephone is based on the Author's personal experience with extra steps usually adding to consumer inertia and an increased likelihood that consumers will "choose" the default option if opting out is too difficult. *See* THALER & SUNSTEIN, *supra* note 205, at 87–89 (highlighting the power of the default option).

207. ARBITRATION STUDY, *supra* note 8, § 2.5.10.

208. *Id.*

prevailing party.²⁰⁹

The low cost of arbitration is, arguably, a benefit to both consumers and FIs.²¹⁰ The cost is lower than litigation because in arbitration counsel is not required,²¹¹ parties are not battling with the “crowded court dockets,” and, generally, discovery and motions practice are of shorter duration.²¹² Where, however, a consumer is unable to afford even the lower cost of arbitration and is bound by a pre-dispute arbitration clause, the FI should have to cover the costs of arbitration. Because class actions provide consumers an upfront cost-free option to bring claims against FIs, equity requires consumers bound to arbitration also have the ability to resolve their disputes even when they do not have the economic means.²¹³

2. Opportunity for Judicial Review: Anti-Severability Provision

To avoid a case moving forward as a class arbitration, the CFPB should condition the use of arbitration agreements on the inclusion of an anti-severability provision in the class action waiver.²¹⁴ The anti-severability provision would specify that if a court deems the class action waiver in an arbitration clause unconscionable or otherwise unenforceable, then the whole arbitration clause is stricken from the contract and parties can move forward as a class in court.²¹⁵ Were a court allowed to strike just the class action waiver of an arbitration clause, then the class could move forward as a class in arbitration.²¹⁶

The reasons to avoid class arbitration were articulated by the

209. *Id.*

210. Letter from Alan Kaplinsky, *supra* note 92, at 3.

211. ARBITRATION STUDY, *supra* note 8, § 2.5.10. Though representation is not required in arbitration the Arbitration Study showed on average 62% of consumers were represented by counsel. *Id.* § 5.5.3, at 29. Some critics of arbitration argue that the low cost benefit is lost when the parties hire representation. Barr, *supra* note 7, at 809.

212. See, e.g., Alan Freeman, *Litigation: Arbitration v. Litigation*, INSIDE COUNSEL (Apr. 19, 2012), <http://www.insidecounsel.com/2012/04/19/litigation-arbitration-v-litigation> (noting that speed, the collegial nature, and confidentiality are also benefits of arbitration).

213. See, e.g., Barnes, *supra* note 59 (articulating that class actions even the playing field to consumers without the economic means).

214. *Id.* § 2.5.5, at 46 (explaining the commonness and use of anti-severability provisions in pre-dispute arbitration clauses).

215. *Id.*

216. *Id.*

Supreme Court in *Concepcion*.²¹⁷ Class arbitration is nearly an oxymoron, because it so thoroughly negates the benefits of arbitration.²¹⁸ Because of the number of parties in a class arbitration, the process is inevitably slower, less efficient, and less private than individual arbitration.²¹⁹ Furthermore, the *Concepcion* Court highlighted that arbitration is a poor forum in which to deal with the complexity of class certification.²²⁰ Arbitration lacks the appellate review process that protects the high stakes of the parties—whether high in number of class members or high in exposure to an FI.²²¹ Therefore, conditioning the use of arbitration clauses on the incorporation of an anti-severability provision to the class waiver keeps class actions in the courtroom and out of arbitration.²²²

3. Use of A Standard Clause Would Decrease Complexity

Finally, the Arbitration Study highlights that pre-dispute arbitration clauses are more complex than the rest of the contract in most consumer financial products.²²³ This should be addressed and could be mended with the creation of a standard clause, similar to the standard forms and clauses the CFPB has already promulgated for other activities in the consumer financial services industry.²²⁴ Without addressing the understanding and awareness issues, consumer-friendly conditions suggested (like the inclusion of an opt-out option) would remain as toothless as the status quo.²²⁵

217. AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 352 (2011).

218. *Id.* at 352.

219. *Id.*

220. *Id.* at 352–53.

221. *Id.*

222. See ARBITRATION STUDY, *supra* note 8, § 2.5.5, at 46 (noting the effect of an anti-severability provision).

223. *Id.* § 2.4.

224. *E.g.*, G–1–Balance Computation Methods Model Clauses (Home–Equity Plans), 12 C.F.R. 1026, App. G (2012).

225. ARBITRATION STUDY, *supra* note 8, § 1.4.2. Even though approximately a quarter of arbitration clauses contain an opt-out option, the CFPB only found one consumer who had been made aware of his option to opt out and who opted not to. *Id.* § 3.4.3, 21 n. 44.

4. The Alternative Regulation Under the Statutory Standards Set Forth in Dodd-Frank

The incorporation of features that increase consumer-friendliness and opportunity for judicial review as a condition to the use of pre-dispute arbitration clauses is in line with the statutory standards set forth in Dodd-Frank. The standard clause with these added features is in the public interest and for the protection of consumers, because it allows FIs to continue to limit exposure to meritless class actions but not without certain checks to insure fairness to consumers. The consumer may opt out or, if the consumer did not opt out, pursue arbitration even if he or she cannot afford the costs. Arguably, these measures would increase costs to FIs, which may in turn raise prices for consumers. However, compared to the potential exposure of banning class action waivers the costs would be limited.²²⁶

Conditioning the use of pre-dispute arbitration agreements is also consistent with the Arbitration Study. The Arbitration Study highlighted pre-dispute arbitration clause complexity and a need to improve consumer awareness and comprehension.²²⁷ The Arbitration Study also established that consumers have a choice.²²⁸ Despite the extensive use of arbitration clauses in consumer financial contracts, there are a significant number of FIs that do not include pre-dispute arbitration clauses in their consumer contracts.²²⁹ Furthermore, the Arbitration Study demonstrated that, on average, individual consumers recover more in arbitration than in class actions.²³⁰ Thus, conditioning the use of pre-dispute arbitration on these protective features, instead of banning class action waivers, is consistent with the Arbitration Study.

B. *Proactive FI Alternative: Voluntary Opt-In Pre-Dispute Arbitration Clause*

There is one final suggestion that would be most daring for FIs,

226. See, e.g., Orem, *supra* note 91 (recognizing the increased costs for credit unions in defending against class action cases if the proposal is adopted).

227. ARBITRATION STUDY, *supra* note 8, § 2.4.

228. *Id.* § 2.3.

229. *Id.*

230. See *supra* Part III.A.iii.

and that is to include the arbitration clause as an opt-in option.²³¹ Offering an opt-in option would prove the strongest display of the FI's belief in the benefits of arbitration to consumers and ultimately be an end-run on the CFPB's proposal. By necessity, opt-in arbitration clauses would be consumer-friendly to entice consumers to agree pre-dispute to arbitration. To be an enforceable contract, the clause would have to provide consideration, which could be, *inter alia*, a partial rebate on the price paid for the product, a lower interest rate, a promise to pay dispute resolution costs (arbitration costs), or a contingent minimum recovery.²³² Since consumers most typically choose the default option, the enticement to get consumers to opt in would need to be high.²³³ However, the benefit would spread beyond the increased consumer-friendly arbitration clause. By default, an opt-in arbitration clause would alleviate the lack of consumer awareness and understanding, while continuing to recognize the benefits of arbitration.

VI. CONCLUSION

In the wake of the proposed regulation—and to some degree prior to it—anti-arbitration arguments have gained public traction.²³⁴ However, public sentiment is not sufficient support for an agency regulation. Further, parts of the proposed regulation fail to satisfy the statutory standards set forth in Dodd-Frank.²³⁵ The proposed regulation to ban class action waivers in pre-dispute arbitration clauses is not consistent with the Arbitration Study.²³⁶ Publishing the arbitral data to the CFPB website is likely not in the public interest or for the protection of consumers.²³⁷ Conditioning the use of pre-dispute arbitration

231. See CONSUMER FIN. PROT. BUREAU, LIVESTREAM, *supra* note 13 (streaming Alan Kaplinsky's argument that arbitration is beneficial consumers).

232. If an arbitrator decides for the consumer in an award higher than the FI's last settlement offer, the contingent minimum recovery guarantees a consumer a certain set amount of money. ARBITRATION STUDY, *supra* note 8, § 2.5.11. In the arbitration clause at issue in *Concepcion*, the contingent minimum recovery to the consumer was \$10,000. *Id.* (citing *Concepcion*, 563 U.S. 333, 337 n.3 (2011)).

233. THALER & SUNSTEIN, *supra* note 205, at 87–89.

234. See, e.g., Jessica Silver-Greenberg & Robert Gebelhoff, *Arbitration Everywhere, Stacking the Deck of Justice*, NY TIMES, Nov. 1, 2015, A1 (presenting a view against arbitration).

235. See *supra* Part III.A., C.

236. See *supra* Part III.A.

237. See *supra* Part III.C.

agreements on the submission of arbitral claims and awards, however, satisfies the statutory standards, and should be adopted as a rule.²³⁸ Instead of banning class action waivers, the CFPB should create a comprehensible, standard, consumer-friendly pre-dispute arbitration clause.²³⁹ In the event that the proposed regulation to ban class action waivers is adopted, an FAA contravention challenge will most likely be raised.²⁴⁰ However, a court addressing the validity of the regulation will likely turn to Dodd-Frank, not the FAA, which will provide an intelligible principle to the CFPB and not be an unlawful delegation of legislative power.²⁴¹

Ultimately, the consumer-FI relationship is mutually beneficial, despite how starkly FIs and consumer advocates disagree on the topic of pre-dispute mandatory arbitration.²⁴² As a final suggestion, FIs could choose to be proactive instead of resisting the CFPB, and create their own solution, even if it may sound like an oxymoron—a voluntary pre-dispute arbitration clause.²⁴³

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238. *See supra* Part III.B.

239. *See supra* Part V.

240. *See supra* Part IV.

241. *See supra* Part IV.

242. *See supra* Part III.

243. *See supra* Part V.

APPENDIX A

PREVALENCE OF ARBITRATION CLAUSES

MARKET	% of AGREEMENTS WITH PRE-DISPUTE ARBITRATION CLAUSES
Credit Card Agreements ²⁴⁴	53%
Checking Account Agreements	44%
Prepaid Card Agreements	92%
Private Student Loan Agreements ²⁴⁵	86%
Payday Loan Agreements ²⁴⁶	99%
Mobile Wireless Contracts	88%

244. ARBITRATION STUDY, *supra* note 8, § 2.3, n.21.

Four defendants [Bank of America, Capital One, Chase, and HSBC,] in the *Ross* antitrust litigation settled claims by agreeing not to use arbitration clauses in their credit card contracts for three and one-half years. 05-Civ. 7116 (Southern District of New York). The credit card loans outstanding of the *Ross* settlers constituted 86.4% of the outstandings not subject to arbitration clauses. If the settling defendants in *Ross* had continued to use arbitration clauses, 93.6% of credit card loans outstanding would be subject to arbitration clauses. None of the *Ross* settlers has resumed using arbitration clauses as of February 2015.

Id. § 2.3, n.21.

245. FACTSHEET, *supra* note 68 (noting the Arbitration Study focused on the “largest” student loan lenders—not all).

246. This percentage is based on payday lenders in California and Texas, seemingly the only places where the CFPB was able to gather data on payday loans. FACTSHEET, *supra* note 68.

APPENDIX B²⁴⁷

FLESCH KINCAID GRADE LEVELS

MARKET	AVERAGE FLESCH KINCAID GRADE LEVEL FOR ARBITRATION CLAUSE	AVERAGE FLESCH KINCAID GRADE LEVEL FOR REST OF THE CONTRACT
Credit Card	15.6	11.6
Checking Account	—	—
Prepaid Card	15.0	11.8
Private Student Loan	—	—
Payday Loan	15.4	13.0
Mobile Wireless	—	—

APPENDIX C²⁴⁸

ARBITRATION CLAUSE FEATURES

MARKET	include class arbitration waiver	INCLUDE OPT-OUT OPTION	INCLUDE SMALL CLAIMS COURT CARVE OUT	Includes ANTI - DELEGATION clause	INCLUDE FI WILL COVER SOME OR ALL FILING FEES
Credit Cards	99.9%	26%	99%	42%	43%
Checking Accounts	97%	38%	91%	22%	16%
Prepaid Cards	100%	26%	94%	26%	31%
Private Students	98%	84%	99%	28%	29%
Payday Loans	—	—	—	—	—
Mobile Wireless Contracts	99%	14%	99%	15%	0%

247. ARBITRATION STUDY, *supra* note 8, § 2.4 (location of data regarding Flesch Kincaid grade level).

248. *Id.* § 2 (location of data for Appendix C).

APPENDIX D

COMPARING ARBITRATIONS AND LAWSUITS

TYPE OF CASE	Total filed 2010-2012	DECIDED ON MERITS	SETTLED	UNKNOWN	AVERAGE INDIVIDUAL CONSUMER RECOVERY	AVERAGE FI RECOVERY	TOTAL CONSUMER RECOVERY From decision on the merits	TOTAL FI RECOVERY From decision on the merits
Arbitration 249	1,847	32%	25%	57%	\$5,400 250	\$12,500	\$361,540	\$2,806,662
Individual Federal Lawsuits 251	3,462	82 cases—only 1 went through trial	48% 252	42% 253	— 254	— 255	— 256	— 257
Class actions 258	562 259	0	25%	35% 260	\$32.35 261	—	n/a	n/a

249. *Id.* § 5.2.2.

250. *Id.* (location of data regarding arbitrations filed and resolutions). The recovery averages are based solely on the cases where a decision was reached on the merits by an arbitrator, however, they are even further limited because not all of the decisions detailed the awards. *Id.*

251. *Id.* § 6.5.2 (location of data regarding federal individual cases).

252. *Id.* § 6.2.2. The data regarding outcomes and claim amounts is based only 1,250 suits—not all of the individual federal lawsuits filed. *Id.*

253. The CFPB noted that though the outcome was unknown, it was consistent with settlement, so these cases likely settled. *Id.*

254. The majority of individual federal cases settled and did not detail recovery. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at § 6.5.1 (location of data regarding class action cases).

259. 470 class actions filed in federal court plus 92 class actions filed in state courts selected for the study. *Id.*

260. Data indicates these cases were individually settled. *Id.* § 1.4.4.

261. This figure is from FI representatives. Letter from Alan Kaplinsky, *supra* note 92, at 4. The CFPB's method used to determine class member recovery was an aggregation that was then divided, there is not data regarding actual recovery by individual class members. ARBITRATION STUDY, *supra* note 8, § 8.3.3.