

April 29, 2015

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

Re: The Bureau's Process for Determining Whether To Utilize Its
Authority Under Dodd-Frank Section 1028(b) To Regulate Arbitration

Dear Director Cordray:

When the Bureau issued its report on arbitration last month, you stated: “[n]ow that our study has been completed, we will consider what next steps are appropriate.” Presumably, that means that the Bureau is considering whether to utilize its authority under Section 1028(b) of the Dodd-Frank Act to issue regulations imposing conditions or limitations on the use of arbitration agreements—and has not yet made any decisions regarding that question.

We are writing to bring to your attention the importance of complying with the small business protection provisions of the Small Business Regulatory Enforcement Fairness Act (“SBREFA”) in connection with your decision whether and, if so, how, to regulate in this area. In particular, we urge you to initiate the Small Business Review Panel process as soon as possible, so that the concerns of small businesses will be heard as you and your colleagues are in the process of assessing the potential impact of various policy decisions.

As you know, SBREFA requires that a small business panel be convened *before* a regulation is proposed, because the information generated by the panel process must be taken into account in the Bureau’s initial regulatory flexibility analysis, which is published with the proposed rule.¹ And the statute specifies detailed procedures that must be followed to obtain the required information regarding potential impacts on small business.

¹ See 5 U.S.C. §§ 603& 609(b).

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While we believe that as a matter of policy, the CFPB should conduct a small business panel before initiating any rulemaking, the standard governing SBREFA's applicability—when it is considering a proposed rule that *could have* a significant economic impact on a substantial number of small entities"²—is clearly satisfied by a proposed rule regulating arbitration agreements. Any such rule would have a number of significant effects on small businesses, including the following:

- A regulation could, either as a matter of law or as a matter of inevitable practical effect, eliminate the availability of arbitration for resolving disputes between small entities and their credit providers—because small businesses frequently use consumer credit to finance their operations. That could significantly increase the cost to small entities of vindicating their rights, and in some circumstances make it practically impossible for them to do so.
- Limiting or prohibiting the use of pre-dispute arbitration agreements would also increase the costs and other burdens of small entities subject to the Bureau's jurisdiction that today include such provisions in their consumer agreements or might do so in the future. Many companies turn to arbitration out of frustration with the long delays and high transaction costs associated with litigation in court—delays and costs that impede access to justice for companies and their customers alike. By significantly reducing transaction costs, arbitration decreases the amount of money consumed by legal fees (for both defense and plaintiffs' lawyers) and directs a greater percentage of funds to injured, or potentially injured, customers. .
- SBREFA specifically requires the Bureau to assess and minimize the impact on the "cost of the credit for small entities."³ The Bureau accordingly must seek information regarding the impact on cost and availability of credit that would result from banning or regulating pre-dispute arbitration agreements.

² CFPB, Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle Title, and Similar Loans 5 (Mar. 26, 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_outline-of-the-proposals-from-small-business-review-panel.pdf (emphasis added); *see also* 5 U.S.C. § 605(b) (requirements apply unless "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities").

³ 5 U.S.C. §§ 603(d)(1).

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The Bureau's arbitration study did not address these questions regarding potential adverse effects on small entities. It therefore is essential that the Bureau initiate the SBREFA process in order to comply with its statutory obligations and inform itself about these and other potential adverse effects on small entities before the Bureau decides whether to engage in regulation under Section 1028(b).

Sincerely,

American Bankers Association

American Financial Services Association

Consumer Data Industry Association

National Small Business Association

U.S. Chamber of Commerce

The **American Bankers Association** is the voice of the nation's \$14 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$11 trillion in deposits and extend nearly \$8 trillion in loans. As of year-end 2014, the median asset size of ABA members is \$216 million.

The **American Financial Services Association** is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers. Some of AFSA's members meet the Small Business Administration's definition of a small business.

The **Consumer Data Industry Association** is an international trade association of more than 130 corporate members. Its mission is to enable consumers, media, legislators and regulators to understand the benefits of the responsible use of consumer data which creates opportunities for consumers and the economy. CDIA members provide businesses with the data and analytical tools necessary to manage

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risk. They help ensure fair and safe transactions for consumers, facilitate competition and expand consumers' access to a market which is innovative and focused on their needs. CDIA member products are used in more than nine billion transactions each year.

Celebrating its 75th Anniversary in 2012, **NSBA** continues to advocate on behalf of America's entrepreneurs. A staunchly nonpartisan organization, NSBA's 65,000 members represent every state and every industry in the U.S. We are proud to be the nation's first small-business advocacy organization.

The **U.S. Chamber of Commerce** is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector and region.