



June 22, 2012

Monica Jackson  
Office of the Executive Secretary  
Bureau of Consumer Financial Protection  
1700 G Street, NW  
Washington, DC 20552

***Re: Request for Information Regarding Scope, Methods, and Data Sources for  
Conducting Study of Pre-Dispute Arbitration Agreements (Docket No. CFPB-  
2012-0017)***

Dear Ms. Jackson:

The American Financial Services Association (“AFSA”) welcomes the opportunity to respond to the Consumer Financial Protection Bureau’s (“CFPB”) request for information regarding the scope, methods, and data sources for conducting a study of pre-dispute arbitration agreements. AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

It is encouraging that the CFPB is planning to undertake analysis, even if in this case the motivation is a specific requirement of prior legislation, before potentially undertaking any rulemaking in areas that affect the cost and availability of financial products and services to consumers. It is a truism that consumers receive any benefits that accrue from regulations in the consumer area, but they also pay all the costs. Economics shows that these benefits do not “come out of profits” as advocates of more regulation often contend, unless the relevant market is not competitive. That surely is not the case for the consumer financial services market. Rather, in competitive markets buyers pay all the costs of regulation as well as of other product features. Higher regulatory costs certainly cause higher prices and restricted availability of products, even if it is often not possible to measure such effects singly and separately when many other changes are also taking place at the same time in these markets.

The CFPB has requested suggestions from the public to help identify the appropriate scope of the study, sources of data for the study, as well as appropriate methods of study. The study should focus on: (1) the content of pre-dispute arbitration agreements, (2) rules and procedures used in pre-dispute arbitrations, (3) a comparison between pre-dispute arbitrations and litigation, and (4) the broader context of pre-dispute arbitration agreements on financial services. Within the broader context of pre-dispute arbitration agreements on financial services, we ask that the CFPB compare the use of pre-dispute arbitration by covered persons with the use of pre-dispute arbitration by non-covered persons who use arbitration in connection with a broad range of consumer transactions. To execute the study, the CFPB should use the many reports and studies

listed below and collect data from arbitration providers. Where appropriate, the CFPB could survey consumers in a fair and unbiased manner. Also where appropriate, the CFPB could gather input from a panel of industry experts. Before publishing the study, the CFPB should subject it to a “peer review” process. The CFPB should also ask for comments on the completed study.

After completing the study, AFSA asks that the CFPB carefully consider whether further regulation of pre-dispute arbitration agreements is necessary, especially since there are very few complaints about pre-dispute arbitration agreements in the CFPB’s published results of its complaint database.

We hope that the suggestions below will be helpful to the CFPB as it begins to undertake this important study. We have also provided answers to the specific questions the CFPB asks.

## **I. General Observations**

### *1. The CFPB Should Consider Arbitration in Comparison to Litigation*

The CFPB should not analyze arbitration in a vacuum. Whether arbitration ultimately is beneficial or harmful to consumers may be answered only by comparing arbitration to the alternative – litigation.

Consumer initiated litigation may be broken down into two categories – individual litigation and class action litigation. The former is initiated by the consumer and limited to the consumer’s claims, and it is safe to assume that the claim is in the consumer’s perceived best interest. Consequently, the question of whether arbitration is beneficial turns on whether arbitration provides a beneficial forum for dispute resolution compared to litigation. This in turn presents a question of the cost, speed, fairness and so forth of arbitration when compared to litigation.

For class action litigation, most arbitration provisions offered to consumers by financial services companies require the arbitration to be on an individual, non-representative basis. Although class action litigation is beyond the scope of this legislatively mandated study, and should not, therefore, be addressed in this study by the CFPB, we believe it is important to note that as the U.S. Supreme Court has recognized, arbitration is unsuitable for class-wide claims because a “switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>1</sup> Moreover, unlike individual claims, class-wide claims are not initiated by putative class members (aside from named plaintiffs) and have regularly been criticized as more for the benefit of counsel than the putative class.<sup>2</sup> Therefore, the question is not whether arbitration is more effective in a class context, but rather whether class action litigation is beneficial for consumers both generally when compared to individualized arbitration.<sup>3</sup> This is particularly true here, because, under Section 1028 of the Dodd-Frank Act, the CFPB must first find that its rulemaking is in the public interest or to protect consumers.

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<sup>1</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011).

<sup>2</sup> Hensler, *Class Counsel, Self-Interest and Other People's Money*, 35 U. Mem. L. Rev. 53, (2004).

<sup>3</sup> *Cf. Concepcion*, 131 S. Ct. at 1753 (“Indeed, the District Court concluded that the *Concepcions* were better off under their arbitration agreement with AT & T than they would have been as participants in a class action, which

2. *The CFPB should Compare the Use of Arbitration by Covered Persons with the Use of Arbitration by Non-Covered Persons*

AFSA also recommends that the CFPB compare the use of arbitration by covered persons under Title X of the Dodd-Frank Act with the use of arbitration by non-covered persons who use arbitration in connection with a broad range of consumer transactions. This comparison is important because Section 1028(b) authorizes the CFPB to regulate arbitration with respect to only covered persons. Consequently, any contemplated restrictions under Section 1028(b) should consider situations in which non-covered persons outside the CFPB's jurisdiction are using arbitration in a transaction related to a covered person. For example, an insurance company may include an arbitration provision in a policy that is financed using credit extended by a covered person. Restrictions that effectively regulate the conduct of non-covered persons would overstep the CFPB's statutory authority and therefore should be avoided.

3. *The Study Should Be Conducted in Accordance with the APA and Information Quality Act*

Because any future rulemaking that the CFPB initiates on arbitration must follow the process prescribed by the Administrative Procedures Act (APA), AFSA asks that the CFPB conduct the study in accordance with the APA, thereby allowing for public notice and comment on the study. Once the CFPB has decided on the scope, methods, and data sources for conducting the study of pre-dispute arbitration agreements, the CFPB should issue a notice and ask for comment on the study. The CFPB should consider the suggestions made before conducting the study.

Once the study is complete, the CFPB should likewise seek comments on the study itself. Under Information Quality Act and Office of Management and Budget ("OMB") regulations, the CFPB should promulgate guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of CFPB information. The guidelines should include quality standards, a methodology for assuring information quality before dissemination, and appropriate procedural due process, assuring that affected persons have the opportunity to challenge information that fails to meet such guidelines. Given the likelihood that the study may lead to formal rulemaking, the CFPB's methodology should be transparent and open, and its findings reproducible.

4. *The CFPB Should Define the "Public Interest" Standard*

Section 1028(b) of the Dodd-Frank Act establishes a new legal standard for arbitration, allowing the CFPB to prohibit, or impose conditions or limitations, on the use of pre-dispute arbitration agreements if the CFPB finds that such prohibitions, conditions, or limitations are in the "public interest and for the protection of consumers."

We ask that the CFPB defer collection data for this study until the CFPB clarifies the meaning of this standard because the information is necessary to identify the data that will determine

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'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.'") (quoting *Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at \*12 (S.D. Cal. Aug. 11, 2008)).

whether pre-dispute arbitration agreements pass or fail the “public interest” test. For example, is the test a balancing test that is satisfied by evidence that arbitration provides net benefits to society, even if some consumers report being unsatisfied with the result of an arbitration? Or is anecdotal evidence of harm to a few consumers enough to establish that the public interest is not being served? Alternatively, does the CFPB need to find pre-dispute arbitration clauses to be unfair, deceptive, or abusive in order to determine that they are not in the public interest? Without answering questions like these, neither the CFPB nor the public can know what data is needed.

## **II. Scope**

The CFPB’s study on pre-dispute arbitration should be limited to: (1) the content of pre-dispute arbitration agreements, (2) rules and procedures used in pre-dispute arbitrations, (3) a comparison between pre-dispute arbitrations and litigation, and (4) the broader context of pre-dispute arbitration agreements on financial services. We will address each of these areas of study and suggest sources of data and/or previous studies that the CFPB could use as it conducts its own study.

### *1. The Content of Pre-Dispute Arbitration Agreements*

The CFPB’s study should include an examination of current pre-dispute arbitration agreements. AFSA would be happy to provide the CFPB with examples of pre-dispute arbitration agreements and we believe the CFPB would benefit from examining examples of pre-dispute arbitration agreements from non-covered persons as well. In addition, we are interested in working with the CFPB to develop a model pre-dispute arbitration agreement.

### *2. Rules and Procedures Used in Pre-Dispute Arbitration*

Information on how arbitration proceedings work is available from the American Arbitration Association (“AAA”).<sup>4</sup> The AAA’s webpage provides a full explanation of the rules, codes, and protocols used in arbitration. JAMS also has its own consumer protection standards available online.<sup>5</sup>

### *3. Comparison Between Pre-Dispute Arbitration and Litigation*

The focus of the CFPB’s study should be on whether pre-dispute arbitration or litigation better provides consumers a chance to tell their stories in front of a fair decision maker, which is ultimately what consumers want.<sup>6</sup> To determine which forum better provides consumers with the

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<sup>4</sup> American Arbitration Association, *Consumer Due Process Protocol*, [www.adr.org](http://www.adr.org).

<sup>5</sup> JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (Jul. 15, 2009), [www.jamsadr.com](http://www.jamsadr.com)

<sup>6</sup> [www.eeoc.gov/federal/adr/facts.cfm](http://www.eeoc.gov/federal/adr/facts.cfm). In fact, the Equal Opportunity Employment Commission (“EEOC”) states: “Agencies and complainants have realized that utilizing [alternative dispute resolution or] ADR during the EEO process has many advantages. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually-satisfactory fashion. Rather than receiving a decision from an unknown third party, such as an administrative judge, the parties have the opportunity to write their own agreement in a manner which satisfies both of their needs. Not only does ADR provide a Win-Win resolution for the parties, but it also usually costs less and

opportunity to tell their stories in front of a fair decision maker, the CFPB should carefully study and compare: (a) the costs of pre-dispute arbitration with the costs of litigation, and (b) the speed with which a decision is reached in pre-dispute arbitration with the speed with which a decision is reached in litigation. The CFPB should avoid drawing adverse conclusions based merely on an examination of the outcome of pre-dispute arbitrations compared with the outcome of court cases.

AFSA offers the following suggestions for data sources that the CFPB could use to gather information on the costs of pre-dispute arbitration and litigation. Litigation costs may be obtained from court costs, legal hours, and procedural fees obtained from the relevant legal groups. Specifically, statistics on the length and cost of civil lawsuits can be found at [www.courtstatistics.org](http://www.courtstatistics.org). Case processing time standards in different states are available at [www.ncsc.org/cpts](http://www.ncsc.org/cpts). Costs for pre-dispute arbitration are available at in the AAA's Consumer-Related Disputes Supplementary Procedures.<sup>7</sup> Data is also available in the Searle Preliminary Report.<sup>8</sup> AFSA notes that the costs of litigation will need to be compared with the kinds and sizes of pre-dispute arbitrations in order for the comparisons to be valid. For instance, arbitration costs of large disputes will need to be compared to legal costs of finalizing the same sorts of disputes. Likewise, small arbitration cases must be compared to small legal cases for validity of the comparison. There are also other relevant variables that must be taken into account (e.g. disputes involving mortgages versus auto loans, secured versus unsecured credit, etc.).

Data on the speed with which a resolution is reached in litigation is available on the U.S. Court's website<sup>9</sup> and from the Bureau of Justice statistics.<sup>10</sup> Data on the speed with which a resolution is reached in pre-dispute arbitration is available from the AAA's.<sup>11</sup>

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uses fewer resources than traditional administrative or adjudicative processes. For example, complainants could avoid costly attorney's fees and the agency could minimize the use of investigators, legal staff, official time, and court reporter fees. Moreover, since the parties are using ADR during the earliest stages of the EEO process, a resolution will avoid numerous years of litigation in administrative and court proceedings. As a result, the complainant's working relationship can improve rather than deteriorate due to ongoing legal battles, and the overall employee morale can be enhanced when the agency is viewed as open-minded and cooperative in seeking to resolve EEO disputes."

<sup>7</sup> [www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFgQFjAA&url=http%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FidcService%3DGET\\_FILE%26dDocName%3DADRSTG\\_005021%26RevisionSelectionMethod%3DLatestReleased&ei=0sPDT\\_yMCofp0Gx8bzbCg&usg=AFQjCNGTzLjDCrelZ\\_CmX0yjZSK6NZ1Akg&sig2=aebQuUpOPO12PvOn8-ItgA](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFgQFjAA&url=http%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FidcService%3DGET_FILE%26dDocName%3DADRSTG_005021%26RevisionSelectionMethod%3DLatestReleased&ei=0sPDT_yMCofp0Gx8bzbCg&usg=AFQjCNGTzLjDCrelZ_CmX0yjZSK6NZ1Akg&sig2=aebQuUpOPO12PvOn8-ItgA). The data provided by the AAA shows that consumers may file and pursue arbitration at a minimal cost. Under the AAA's consumer procedures, consumers cannot be asked to pay more than \$125 in total arbitration costs, if the claim for actual damages does not exceed \$10,000.

<sup>8</sup> Searle Civil Justice Institute. *Consumer Arbitration Before the American Arbitration Association's Preliminary Report* (2009). In cases with claims seeking less than \$10,000, consumer claimants paid an average of \$96.

<sup>9</sup> *U.S. District Court—Judicial Caseload Profile* (2009). [www.uscourts.gov/cgi-bin/cmsd2009.pl](http://www.uscourts.gov/cgi-bin/cmsd2009.pl). A civil case filed in a federal district court faces, on average, a delay of over two years before reaching trial.

<sup>10</sup> Bureau of Justice Statistics, *Contract Trials and Verdicts in Large Counties, 2001*, at 2 (Jan. 2005) [www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc01.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/ctvlc01.pdf).

<sup>11</sup> [www.adr.org/aaa/ShowPDF;jsessionid=kbxxPbvFTQmmP8cycYdvLLjfxmgYV4dLDBNsfxj1gH347bx1GqLL!-1786312740?doc=ADRSTG\\_004325](http://www.adr.org/aaa/ShowPDF;jsessionid=kbxxPbvFTQmmP8cycYdvLLjfxmgYV4dLDBNsfxj1gH347bx1GqLL!-1786312740?doc=ADRSTG_004325). The AAA's analysis shows that approximately 60 percent of its consumer arbitrations settle or are withdrawn from administration, and consumers prevail in almost half of the remaining consumer-initiated arbitrations. AAA's analysis also shows that arbitration is much quicker than bringing a lawsuit in the crowded and overburdened federal and state court systems. Consumer arbitrations administered by the AAA proceed to an award in an average of four to six months.

The CFPB should exercise caution in conducting any study that engages in a comparison between the outcomes of pre-dispute arbitrations and litigation. If the CFPB compares the results of pre-dispute arbitrations and litigation, the CFPB should first be very careful that it is comparing similar cases. Of course, an arbitrator or a court who decides in favor of a creditor, has not necessarily issued a wrong decision.

The reason that AFSA recommends caution in a comparison of outcomes is excellently described in the Searle Institute's Preliminary Report:

An important subject of empirical research is how consumers fare in arbitration. Several ways to measure outcomes have been used – the win-rate; the amount of damages recovered; and the amount of damages recovered as a percentage of the amount claimed. Two points of particular interest are how arbitration outcomes compare to outcomes in court, which is beyond the scope of this Report; and whether outcomes are biased in favor of repeat players.

*Win-Rates.* Studies have most commonly looked at the win-rate in arbitration – i.e., the percentage of cases won by the consumer or the business. But the absolute win-rate itself is not a particularly meaningful number. Instead, the absolute win-rate must be compared to some sort of baseline. Some commentators have focused on fifty percent as that baseline; others have suggested that an extremely high business win-rate shows a process that is unfair to consumers. Neither view necessarily is correct.

At least two possible approaches are available for coming up with a baseline for comparison. One possible approach is to use a theoretical model of case settlement, which generates predictions about expected outcomes. Some models lead to predictions of a fifty percent win-rate, providing some support for using that figure as a baseline. Other models, based on different assumptions, lead to predictions of extremely high (or low, depending on the perspective) win-rates.

A second approach is to compare outcomes in arbitration to outcomes in litigation. A business win-rate of over ninety percent in arbitration does not show arbitration is unfair if the win-rate for comparable cases in court is similar. But doing a proper comparison can be difficult. Certainly, care must be taken to ensure that the types of cases are reasonably comparable, as well as to control for other differences between arbitration and litigation, such as the much greater use of summary judgment and other dispositive motions in litigation...

*Monetary Recoveries.* A frequent criticism of studies of win-rates in arbitration (and litigation) is that the usual measure of party wins is too simplistic. In many studies, a claimant “win” is defined to include any case in which the claimant was awarded some amount of money, while a respondent “win” is defined to include only cases in which the respondent is held liable for zero damages. Such an approach may understate the number of respondent wins and overstate the number of claimant wins because a claimant with a strong claim for a large amount is treated as “winning” even when it is awarded an amount that is far less than its claim is worth.

But it is difficult to value claims for purposes of empirical research. Ordinarily, researchers do not have complete information about the claims, and, even if they did, it would be extremely difficult to evaluate objectively how much a claim is worth at the time it is brought. As a result, some studies have used the amount sought by the claimant as a proxy for the value of the claim, calculating the amount recovered as a percentage of the amount claimed.

Even that approach is difficult to implement. First, plaintiffs in court often do not demand a specific amount in any court filing; they may simply plead that the minimum jurisdictional amount is satisfied. Arbitration would seem to be less subject to this problem because arbitration fees typically are based on the amount of compensatory damages sought. But even in arbitration, as discussed below, determining a single dollar amount claimed can be difficult.

Second, in both settings, merely because a party claims an amount does not mean that the claim is worth that amount. Plaintiffs may seek amounts of damages that they have only a small likelihood of recovering. The fact that they do not recover such amounts thus can mean the process is working properly, not that the process failed. Third, the incentives of the parties to claim damages differ between courts and arbitration. In court, subject to credibility constraints, the plaintiff's incentive is to claim higher rather than lower damages amounts. Court filing fees are a flat amount that do not increase with the amount claimed. Meanwhile, claiming higher damages amounts may increase the amount the plaintiff recovers. Laboratory studies have found that the amount sought by a plaintiff – even if ridiculously large – can act as an anchor and increase the amount of damages awarded by a mock jury. By comparison, because of the way arbitration fees are structured, the claimant in arbitration often has to pay more to claim more. As a result, amounts claimed in arbitration may be more realistic than amounts claimed in court. If so, this complicates comparisons between arbitration and litigation, because a higher percentage recovery in arbitration may be due to more realistic amounts claimed rather than any difference in the amount awarded.<sup>12</sup>

The difficulty in comparing pre-dispute arbitration and litigation outcomes is not just in the way to measure outcomes, but in determining whether the outcome is fair. Although the Searle study concluded that consumers won some relief in 53.3% of the cases filed and recovered an average of \$19,255 (52.1% of the amount claimed),<sup>13</sup> other studies claim that creditors prevail more often in arbitration.<sup>14</sup> None of these studies analyze whether the outcome of each case was fairly decided. If a creditor prevails in a pre-dispute arbitration, this fact alone does not suggest, standing alone, that the decision was *unfairly* reached. It would be nearly, if not completely, impossible for the CFPB to examine whether each case it examines in its study was fairly decided. In order to do so, the CFPB would need to study all of the facts in each case.

Instead of examining the facts of each case, the CFPB should study whether consumers are fairly treated in both forums. The CFPB can do this by reviewing the qualifications of arbiters,<sup>15</sup> and the procedures followed in pre-dispute arbitrations. The CFPB can then compare this to the process followed in courts.

#### 4. *The Broader Context of Pre-Dispute Arbitration Agreements*

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<sup>12</sup> Searle Civil Justice Institute's Preliminary Report. (2009) p. 9 – 12. ("Searle Report").

<sup>13</sup> Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. on Disp. Resol. 843 (2010), *citing* Searle Report.

<sup>14</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) and Ernest & Young's 2004 study, *Outcomes of Arbitration, an Empirical Study of Consumer Lending Cases*. In fact, some studies show that consumers are more successful in arbitration than in court. (Although many critics of arbitration argue that the high win rate of business claimants shows that arbitration is biased in favor of business, such a comparison is false. The differing win rates for business claimants and consumer claimants appear to result from two factors, neither of which are evidence of bias. The first is that the types of claims that business bring in arbitration tend to differ from the types of claims that consumers bring. Second, business claims are much more likely than consumer claims to be resolved on an ex parte basis. The proper basis for comparison is to cases in court.) The Supreme Court noted, in an opinion joined by Justices Stevens, Breyer, Souter, and Ginsburg, that without arbitration, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."

<sup>15</sup> The AAA's National Roster of Arbitrators and Mediators consists of highly accomplished and respected experts from the legal and business communities who offer diverse experiences across a wide range of fields. Former federal and state judges, attorneys with exceptional subject-matter expertise, and business owners who understand the essence of the dispute are trained in a comprehensive program by the AAA to manage the dispute resolution process with fairness and skill, and an eye towards time- and cost-efficiency. These neutrals are bound by AAA established standards of behavior and ethics to be fair and unbiased.

AFSA recommends that the CFPB consider arbitration in the overall context of how consumers address disputes with consumer financial services companies. Even where all consumer financial services contracts of an institution contain an arbitration provision, consumers typically have substantial opportunity to seek relief outside of arbitration. First, many claims are resolved either in the customer complaint process or when a consumer makes a demand as a precursor to arbitration or litigation. Second, many arbitration agreements will allow consumers to bring claims otherwise subject to arbitration in small claims court. Thus, for smaller claims, consumers frequently have a choice between arbitration and small claims court. This context is important in order to understand the dynamics of the claims that are (and are not) asserted in arbitration versus other methods of resolving disputes between consumers and covered persons.

### **III. Data Sources Regarding the Effectiveness of Arbitration**

Because pre-dispute arbitrations are privately managed procedures, data regarding the prevalence of pre-dispute arbitrations, types of claims, the cost and speed of pre-dispute arbitration proceedings, and the outcome of such proceedings, can be difficult to gather. Clear and reliable data is essential to the study of the fairness and integrity of consumer arbitration proceedings. Therefore, the CFPB should work with arbitration service providers, such as the AAA, to gather a reliable data set. Data provided by consumers or companies would be anecdotal and neither accurate nor impartial. Data from arbitration providers would meet both of these criteria. In addition, arbitration service providers would be able to provide a much larger data set which would lead to more accurate study results.

The CFPB should also examine the consumer complaints it has received over the past year. Only a small percentage of the complaints relate to arbitration. Looking into the details of the complaints might provide insight as to whether consumers are complaining about the results of arbitrations or something else (e.g., the consumer was not aware that a card agreement had an arbitration clause). This information might inform the CFPB as to whether pre-dispute arbitration agreements need to be restricted or could be improved, possibly by more explicit disclosures.

### **IV. Study Methods**

AFSA believes that consumer surveys are inappropriate to the goals of this study. Nonetheless, should the CFPB decide to use consumer surveys in its study, AFSA has no doubt that the CFPB will do its best to ensure that the surveys will be fair and that any questions the CFPB includes in a survey will be open and not aim for a particular answer. We are also confident that the CFPB will rely on data gathered from the suggestions listed above, not anecdotal evidence, which can be misleading.

Because of the broad ramifications of this study, AFSA respectfully suggests that the CFPB arrange for both the study methods and study results to be independently reviewed.

### **V. Questions**

1. Prevalence of Use – The Dodd-Frank Act requires the Bureau to study the “use” of pre-dispute arbitration agreements. The Bureau believes that obligation encompasses, at a

minimum, a study of the prevalence of such agreements. As a result, the Bureau seeks information in response to the following questions.

- i. *Other than with respect to credit card agreements, how should the Bureau determine the prevalence of pre-dispute arbitration agreements in different consumer financial services markets?*

Information on the prevalence of pre-dispute arbitration agreements may logically be obtained only from consumer finance industry sources. Nonetheless, AFSA does not believe that the CFPB should attempt to obtain this information directly from industry participants. AFSA recommends that the CFPB identify the major industry trade associations and ask those associations to poll their members on the prevalence of the use of pre-dispute arbitration agreements. AFSA suggests that the polling questions identify: (1) industry segment; (2) companies polled; (3) number of companies that responded; and (4) of those that responded, how many utilize pre-dispute arbitration agreements in their consumer transaction contracts.

- ii. *Should the Bureau focus on particular markets for consumer financial products and services in reviewing prevalence?*

Although the CFPB should not focus on the *prevalence* of particular terms in pre-dispute arbitration agreements, the CFPB should be aware of the many provisions commonly found in pre-dispute arbitration agreements that are favorable to consumers. These include provisions that: (1) grant arbitrators the right to award the consumer same relief available from a court; (2) shift many, most or all costs and fees to the lender or retailer; (3) carve out small claims to allow consumers to choose small claims court where the amount in controversy is small, thereby allowing the consumer to avoid the expense of outside counsel; and (4) ensure that any arbitration will be held in a location convenient to the consumer. The fairness of an arbitration provision does not change based on the product in question. In fact, in order for its study to be truly relevant, the CFPB should not even be limited to just arbitration in the context of consumer financial services. If arbitration is a good method for the resolution of consumer disputes as AFSA believe the study will ultimately show, it is a good method in all contexts. Therefore, notwithstanding that the CFPB's authority to promulgate regulations is limited to the context of consumer financial services, this study need not be, and it should not be, so limited.

- iii. *Should the Bureau focus on the prevalence of particular terms in pre-dispute arbitration agreements?*

No, the CFPB should not focus on the prevalence of particular terms in pre-dispute arbitration agreements. We ask that the CFPB look at arbitration agreements as a whole and in a balanced manner. If it would be helpful, AFSA would be happy to provide the CFPB with sample arbitration agreements.

- iv. *Should the Bureau address how the prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time?*

No, the CFPB should not address how the prevalence of pre-dispute arbitration agreements and the prevalence of particular terms within them have changed over time. AFSA believes that addressing how pre-dispute arbitration agreements have changed over time would be excessively onerous and that any information uncovered would yield little value to the CFPB or consumers. It is not clear how the CFPB could even attempt such a feat. In addition, we question what the CFPB means by “prevalence.” Without a definition, it is too difficult to determine what, exactly, the CFPB is asking in this question.

Instead, as mentioned above, we believe it would be more beneficial to consumers to work on a model form.

- v. *To address the questions above, what new data, if any, should the Bureau seek and from which entities? What existing studies or sources of empirical data should the Bureau rely upon to address any of the above questions?*

Although there are not many studies examining the use of consumer arbitration, AFSA recommends that the CFPB review those that exist, as well as studies dealing with employment arbitration and studies of arbitration in other contexts, including:

- 1) The Financial Industry Regulatory Authority’s (“FINRA”) dispute resolution statistics;<sup>16</sup>
- 2) *Creditor Claims in Arbitration and in Court*, The Searle Civil Justice Institute’s (“SCJI”) Preliminary Report (March 2009) and Interim Report No. 1 (November 2009) on consumer arbitration;<sup>17</sup>
- 3) Sarah R. Cole's and Kristen M. Blankley's study, *Empirical Research on Consumer Arbitration: What the Data Reveals (2009)*, which is a reviews another study done on pre-dispute arbitration;
- 4) Ernest & Young’s 2004 study, *Outcomes of Arbitration, an Empirical Study of Consumer Lending Cases*;<sup>18</sup>

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<sup>16</sup> [www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/](http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/) which demonstrate that in 2011, approximately 74 percent of customer claimant cases resulted, through settlements or awards, in monetary or non-monetary recovery for the consumer.

<sup>17</sup> The study concluded that consumers won some relief in arbitration cases as often, or more often, than in court cases, even after controlling for differences among the types of cases and the venue in which they were brought. The study also concluded that prevailing consumers were awarded as high a percentage, or a higher percentage, of what they sought in arbitration, rather than in court cases. Moreover, the study found that arbitration was cheaper and faster for consumers.

<sup>18</sup> The study concluded that consumers prevailed more often than businesses in cases that went to an arbitration hearing. The study also showed that consumers obtained favorable results in close to 80 percent of the cases that were reviewed.

- 5) AAA's analysis of its own caseload;
- 6) The AAA's Consumer-Related Disputes Supplementary Procedures;<sup>19</sup>
- 7) Elizabeth Hill's *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*;<sup>20</sup>
- 8) Harris Interactive, Arbitration: Simpler, Cheaper and Faster Than Litigation, <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (Apr. 2005);<sup>21</sup>
- 9) Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998);<sup>22</sup>
- 10) Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Active Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369, 378 (1995);<sup>23</sup>
- 11) *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure*, CAL. DISP. RESOL. INST. 25 (Aug. 2004), [www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf);<sup>24</sup>
- 12) Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003 – Jan. 2004, at 56, 57;<sup>25</sup>
- 13) Christopher R. Drahozal & Samantha Zyontz's *An Empirical Study of AAA Consumer Arbitration*, 25 Ohio St. J. on Disp. Resol. 843 (2010);<sup>26</sup> and

<sup>19</sup> [www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CGIQFjAA&url=http%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FidcService%3DGET\\_FILE%26dDocName%3DADRSTG\\_005021%26RevisionSelectionMethod%3DLatestReleased&ei=F42qT8b\\_Gqbs6gHYstH1BA&usg=AFQjCNGTzLjDCrelZ\\_CmX0yjZSK6NZ1Akg&sig2=d9tIZI1cFo5pxz-KX6sxDw](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CGIQFjAA&url=http%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FidcService%3DGET_FILE%26dDocName%3DADRSTG_005021%26RevisionSelectionMethod%3DLatestReleased&ei=F42qT8b_Gqbs6gHYstH1BA&usg=AFQjCNGTzLjDCrelZ_CmX0yjZSK6NZ1Akg&sig2=d9tIZI1cFo5pxz-KX6sxDw)

<sup>20</sup> Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003).

<sup>21</sup> This study demonstrates strong satisfaction with arbitration results and process, including speed and simplicity.

<sup>22</sup> The director of ACLU's National Task Force on Civil Liberties in the Workplace concludes that employees collectively receive 10.4% of their demand in litigation, compared with 18% in arbitration, and "arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history."

<sup>23</sup> Employees won 73% of the arbitrations they initiated and 64% of all employment arbitrations, including those initiated by employers, in AAA employment arbitrations.

<sup>24</sup> Consumers prevailed 71% of the time in arbitrations.

<sup>25</sup> Employees prevailed 33.6% of the time in court versus 46% of the time in arbitration in employment discrimination cases, received higher median damages awards, and took less time.

<sup>26</sup> This article concludes that arbitration is inexpensive and expeditious. It also found that there was no statistically significant repeat-player effect.

14) Christopher R. Drahozal & Samantha Zyontz's *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77 (2011).<sup>27</sup>

## 2. Use and Impact in Particular Arbitral Proceedings

A. Claims That Consumers Bring in Arbitration – Pre-dispute arbitration agreements generally provide that the consumer may or must bring claims in arbitration. The Bureau seeks information responsive to the following questions about claims that consumers bring in arbitration.

AFSA believes that in addition to the questions asked by the CFPB in the Notice and Request for Information, the CFPB should also ask: (a) What disclosures were made to consumers who elected arbitration versus those made to consumers who did not elect arbitration? (b) Are there similarities among arbitration clauses when consumers elected to arbitrate, or not arbitrate? And (c) Why consumers may be against arbitration?

i. *Should the Bureau determine how often consumers bring claims in arbitration?*

Yes, the CFPB should determine how often consumers are taking advantage of the option that pre-dispute arbitrations provide for a relatively quick and inexpensive resolution of their claims. In doing so, however, the CFPB should define what it means by “often.” Is “often” a percentage of affirmative consumer claims subject to an arbitration clause where arbitration is actually chosen?

Some AFSA members have seen a trend where consumers will respond to collection lawsuits with a demand for arbitration, presumably in an effort to take advantage of the JAMS and AAA rules that require that in a dispute between a company and a consumer, the company must pay all but a small portion of the arbitral forum’s administrative costs and fees. Consequently, the CFPB may wish to consider whether arbitration is more advantageous to consumers when the rules of the most often utilized arbitral forums require that as between a company and a consumer the company must pay all but a small portion of the arbitral forum’s administrative costs - thus allowing consumers to shift costs to the creditor in a way they would not otherwise be able to do in litigation.

The CFPB should also study why consumers may be passing on available arbitration options. For example, the CFPB should examine how well-informed consumers are as to the benefits of a fairly designed and administered arbitration program. As part of that examination, the CFPB may want to look into whether consumer advocates are discouraging the use of arbitration or whether the relative cost efficiency of arbitration is a disincentive to plaintiffs’ attorneys who are often compensated through fee awards based on the lodestar method, which focuses not on the risks taken and results obtained but, instead, on the hours billed by the attorneys.

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<sup>27</sup> This article found that consumers prevailed more often in arbitrations than in court.

- ii. *Should the Bureau analyze the types of claims that consumers bring in arbitration?*

Yes, the CFPB should analyze the types of claims that consumers bring in arbitration. Determining the types of claims that consumers bring in arbitration could help identify those areas of consumer interaction where better education and outreach could improve consumers' access to the tools of arbitration.

- iii. *For claims that consumers bring in arbitration, should the Bureau seek to analyze: (a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes?*

As to part (a) of this question, yes, the CFPB should seek to analyze the cost and speed of dispute resolution and the outcome of disputes. But more importantly, the CFPB should compare the cost and speed of similar dispute resolutions in arbitration versus the cost and speed of dispute resolutions in court. These are indeed key factors in any comparison with conventional litigation.

At the same time, we ask that the CFPB study whether the flexibility of the arbitration process benefits consumers. Arbitrations may be conducted more informally, and possibly with greater convenience, than litigation. For example, arbitration may be conducted over the phone or via e-mail.

As to part (b), no. As discussed above, merely looking at a scoreboard of wins and losses provides no information whatsoever as to whether the outcome was correct, whether the process was fair or whether one dispute resolution procedure is better or worse than a different dispute resolution procedure. Without completely re-litigating or re-arbitrating each individual dispute, win-loss comparisons are completely irrelevant to a determination of the fairness of a procedure.

- iv. *For consumers who bring claims in arbitration, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting dispute resolution process? Should the Bureau seek to determine the factors that impact consumer understanding and satisfaction?*

While inherently subjective and difficult to quantify, consumer satisfaction may well be among the most valuable benefits of a well designed and implemented arbitration process. The more intangible benefits include those deriving from the relative speed, simplicity and finality of the process. As importantly, consumers find arbitration proceedings less intimidating, and have a far better chance to "tell their story" in straightforward and direct way.

The CFPB may want to compare arbitration with *pro se* (without benefit of counsel) court appearances. In a study by the American Bar Association Coalition for Justice, undertaken to determine the effect of the economic downturn, sixty percent of the judges stated that fewer parties were being represented by counsel. When asked how the lack of representation impacts the parties, 62 percent of all judges said that

outcomes were worse.<sup>28</sup> We suggest that the CFPB study whether arbitration, with its more informal setting and expectations, would have a less detrimental impact on capable *pro se* representation, but with the same cost savings. For example, the CFPB could try to determine if: (1) procedural errors are less likely in arbitration procedures, (2) the arbitration process is more easily accessible and easier to explain, (3) failure to object to evidence properly and the proper introduction of evidence less of a concern in arbitration, and (4) issues concerning the provision of an enforceable order or judgment alleviated because the parties do not generally need to present an order or judgment.

Nonetheless, as valuable as a study of consumer satisfaction with the process of arbitration versus litigation might be, the risks that any such study would be unduly biased by the individual results of the dispute resolution necessitate extreme care. The consumer who “won” in arbitration may express great satisfaction with a process that was objectively unfair just as the consumer who lost in litigation may express dissatisfaction with a process that was objectively fair. Therefore, any effort to assess consumer satisfaction or dissatisfaction with any dispute resolution process must carefully guard against becoming just a measure of wins and losses.

- v. *If the Bureau should address some or all of the issues addressed in 2.A.i-iv above, should the Bureau distinguish between claims that a consumer brings in arbitration: (a) in the first instance; and (b) after a covered person (or third party) successfully invokes the terms of a pre-dispute arbitration agreement to end or limit that consumer's earlier court proceeding? Or should the Bureau consider both forms of arbitration as a single, combined category of consumer use?*

Because the goal of this study should be to determine whether arbitration is a fair method of resolving consumer disputes, the CFPB should consider both forms of arbitration as a single, combined category of consumer use. However, to the extent that the arbitration was “imposed” by Court order (often over the strenuous objections of attorneys claiming that arbitration is unfair, “unconscionable”, etc.), common sense suggests a careful effort to understand the data obtained.

- vi. *If the Bureau should address some or all of the issues identified in 2.A.i-v above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?*

We will answer each of the questions above individually.

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<sup>28</sup> American Bar Association Coalition for Justice, *Report on the Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts* (Preliminary) (Jul. 12, 2010), [new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf](http://new.abanet.org/JusticeCenter/PublicDocuments/CoalitionforJusticeSurveyReport.pdf).

*What methods of study should the Bureau use?* The CFPB should use both primary and secondary data in its study. To gather primary data, the CFPB should use the survey method. The CFPB should use a large sample size, open-ended and non-biased questions, and questions that have been tested in its survey. The CFPB should gather secondary data from AAA or other such sources.

AFSA does not recommend the use of focus groups or anecdotal evidence. Results obtained from focus groups are not valid. Participants in focus groups may either hold back and/or try to answer the moderator's questions with answers that the participants believe the moderator wants to hear. Participants may also be influenced by other participants in the group. Douglas Rushkoff, the well-known media-theorist, argues that focus groups are often useless and frequently cause more trouble than they are intended to solve, with focus groups often aiming to please rather than offering their own opinions or evaluations, and with data often cherry picked to support a foregone conclusion.<sup>29</sup>

Again, we strongly recommend a "peer review" process whereby any studies conducted are subjected to an impartial critical analysis by qualified, independent evaluators.

*What new data, if any should the Bureau seek and from which entities?* The CFPB should survey consumers to determine: (a) what advice was given to consumers who elected arbitration versus that advice given to consumers who did not elect arbitration, (b) who provided the advice, (c) whether there are similarities among arbitration clauses when consumers elected to arbitrate, or not arbitrate, and (d) why consumers may be against arbitration.

*What existing studies or empirical data, if any, should the Bureau use?* The CFPB should use the studies listed in the answer to Question 1.v. above.

*Should the Bureau focus on particular product markets?* No, since the Federal Arbitration Act ("FAA") does not refer to particular product markets, the CFPB should not focus on particular product markets.

*Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?*

The CFPB should focus on all terms in pre-dispute arbitration agreements. It may be virtually impossible to determine the "impact" of particular terms on the fairness, speed, efficiency, and economy of arbitration as compared with litigation or on overall consumer satisfaction with arbitration. It may, at a later date, be useful to inquire as to the impact of various terms on the consumer's trust in the process and likelihood of opting for arbitration.

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<sup>29</sup> Rushkoff, Douglas. *Get Back in the Box: Innovation from the Inside Out*, New York : Collins, 2005

B. Claims That Covered Persons Bring in Arbitration – Pre-dispute arbitration agreements also generally provide that a covered person may or must bring claims in arbitration. As a result, covered persons have brought claims—in particular, debt-collection claims—in arbitration. The Bureau seeks information responsive to the following questions about such covered person or third-party claims.

i. *The Bureau is not aware of recent practice by covered persons to bring claims against consumers in arbitration. Do such arbitrations, in fact, exist at this point? If there are such arbitrations, should the Bureau determine their frequency? If there are no longer such arbitrations, should the Bureau analyze whether covered persons will, in the future, return to bringing claims against consumers in arbitration?*

It is definitely the case that resort by covered persons to arbitration as a means of enforcing consumer financial services contract has decreased markedly as a result of many years of energetic challenges. For years, the effort to implement even the most even-handed arbitration programs was met with hostility and litigation. However, given recent Supreme Court and other jurisprudence, fairly designed and administered consumer arbitration programs now appear once again to be a viable option. Given the benefits of cost efficiency, finality and simplicity associated with arbitration, the CFPB should assume that covered persons would likely utilize any arbitration tool recognized as fair and broadly enforceable for this purpose.

Although there are some consumer arbitrations being conducted, and there is a renewed interest among covered persons in creating fair and credible arbitration programs, JAMS and the AAA currently have a moratorium on consumer debt collection arbitration. As a result of that moratorium, many financial services companies are not initiating such arbitration disputes.

AFSA believes that this study should focus primarily on the use of arbitration to resolve claims by consumers against consumer financial service providers.

ii. *Should the Bureau analyze the types of claims that covered persons bring in arbitration? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?*

AFSA assumes the CFPB means “covered persons initiate in arbitration.” Given that, AFSA does not believe that this should require extensive analysis. If arbitration is available, covered persons should be permitted to use it to enforce basic contract rights (e.g., establishing a debt or deficiency amount on a consumer finance contract.)

iii. *For claims that covered persons have brought in arbitration, should the Bureau seek to analyze: (a) the cost and speed of dispute resolution; and/or (b) the outcome of disputes? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer these questions for a period in which they did?*

Yes, the CFPB should seek to analyze the cost and speed of dispute resolution, which are key factors in any comparison with conventional litigation. As discussed above, however, any study of outcomes should be recognized as being irrelevant to the question of fairness of the process.

- iv. *For consumers involved in any such cases, should the Bureau seek to assess their understanding of, and satisfaction with, the resulting arbitration process? If covered persons no longer bring claims in arbitration, should the Bureau seek to answer this question for a period in which they did?*

Inquiries to consumers about arbitration initiated by covered persons in the consumer financial services industry could be very helpful to the CFPB in grasping the consumer's understanding of the arbitration tool and in debunking myths which have been used to attack arbitration (e.g., that companies "own" arbitrators, that companies never lose in arbitration, etc.). However, such inquiries should be done via proper survey methods (i.e. large sample, non-biased questions, previously tested questions, etc.) The CFPB should not use anecdotal evidence, win-loss comparisons, or focus groups. Any results should be compared with information gathered from consumers who went through litigation.

The CFPB should phrase questions carefully when surveying consumers. The consumer may be satisfied with the process, but not with the result. Alternatively, if the consumer is unsatisfied with the result, the consumer may hold the process responsible. This is important, especially because satisfaction is subjective. Thus, the questions should be limited to the process of arbitration or litigation.

In reviewing results from surveys, the CFPB should note that in most debt collection cases, the amount of money owed is not in dispute. The items in dispute are mitigating factors. Conversely, in arbitrations initiated by the consumer, the validity of the consumer's claim is the disputed matter.

- v. *If the Bureau should address some or all of the issues identified in 2.B.i-iv above, what methods of study should it use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?*

We will answer each of the questions above individually.

*What methods of study should the CFPB use?* As noted above, the CFPB should use both primary and secondary data in its study. To gather primary data, the CFPB should use the survey method. The CFPB should use a large sample size, open-ended and non-biased questions, and questions that have been tested in its survey. The CFPB should gather secondary data from AAA or other such sources. AFSA does not recommend the use of focus groups or anecdotal evidence. AFSA also asks that

because of the potential impact of the study, the CFPB have its study peer-reviewed. Alternatively, we suggest that the CFPB use a panel of industry experts to conduct the study.

*What new data, if any, should the Bureau seek and from which entities?* The CFPB should seek data on consumer's satisfaction with the arbitration process compared with litigation. The CFPB could also compare consumer's satisfaction with arbitration brought by covered persons with consumer's satisfaction with arbitration brought by non-covered persons, such as hospitals. If arbitration is used fairly in non-financial contexts, it can be used fairly by covered persons as well.

*What existing studies or empirical data, if any, should the Bureau use?* The CFPB should use the studies listed in the answer to Question 1.v. above.

The CFPB should also study whether or not consumers benefit from litigation. We suggest that the CFPB review *Class Action Dilemmas: Pursuing Public Goals for Private Gain* by Deborah R. Hensler et al. (RAND Institute for Civil Justice 2000).

*Should the Bureau focus on particular product markets?* No, the CFPB should not focus on particular product markets.

*Should the Bureau focus on the impact to arbitral proceedings of particular terms in pre-dispute arbitration agreements?* No, the CFPB should not focus on the impact of particular terms in pre-dispute arbitration agreements.

3. Impact and Use Outside Particular Arbitral Proceedings – Independent of their role in particular arbitral proceedings, pre-dispute arbitration agreements may impact consumers and/or covered persons in other ways. Thus, academics and other parties have claimed that the existence of pre-dispute arbitration agreements may impact:

- The incidence and nature of consumer claims against covered persons;
- The price and availability of financial services products to consumers;
- Compliance with consumer financial protection laws;
- Consumer awareness of potential legal claims against covered persons;
- Consumer awareness and understanding of how potential legal claims against covered persons may be resolved; and
- The development, interpretation, and application of the rule of law.

i. *Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in one or more of these ways?*

The CFPB should seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in one or more of these ways.<sup>30</sup>

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<sup>30</sup>The use of pre-dispute arbitration proceedings reduces the price and increases the availability of financial services products to consumers.

Furthermore, we ask that the CFPB study the impact on the courts if consumer arbitration is shifted to litigation (including whether a shift from arbitration to litigation would cause an increase in costs for covered persons), and whether eliminating consumer arbitration in financial sector transactions reduce U.S. corporations competitiveness in the global arena by increasing their costs. Court congestion is relevant to the CFPB's study as it affects access to courts for the resolution of other disputes. In addition, we suggest that the CFPB study the cutbacks in the funding of the judiciary in light of the budgetary constraints faced by state and local governments.<sup>31</sup>

The CFPB should also seek to evaluate how arbitration impacts consumers in transactions with non-covered persons, such as insurance companies, hospitals, providers of non-financial consumer service providers, and others.

- ii. *Should the Bureau seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons in any other ways that are independent of their role in particular arbitral proceedings?*

The CFPB should seek to evaluate how the use of pre-dispute arbitration agreements impacts consumers and/or covered persons who do not utilize the arbitral proceedings.

- iii. *If so, and in either case, what methods of study should the Bureau use? What new data, if any, should the Bureau seek and from which entities? What existing studies or empirical data, if any, should the Bureau use? Should the Bureau focus on particular product markets? Should the Bureau focus on the impact of particular terms in pre-dispute arbitration agreements?*

We will answer each of the questions individually.

*What methods of study should the Bureau use?* We suggest that the CFPB assemble a panel of experts to review data comparing arbitration and litigation. If sufficient data is not available, we ask that the panel determine the best way to gather additional data.

*What new data, if any, should the Bureau seek and from which entities?* The panel of experts mentioned above should determine if new data would be of use to the CFPB and how the CFPB should gather that data.

*What existing studies or empirical data, if any, should the Bureau use?* In addition to the studies listed in response to Question 1.v., the CFPB should study Stephen J.

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<sup>31</sup> National Center for State Courts, *Budget Shortfalls by State*, available at [www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map.aspx](http://www.ncsc.org/information-and-resources/budget-resource-center/states-activities-map.aspx). States are regularly reporting cutbacks in funding for the judicial branch, with 65 percent of states reporting reductions for fiscal year 2012 and 57 percent of states reporting reductions for fiscal year 2011, with consequent reductions in quick access to justice.

Ware's *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91-93.<sup>32</sup>

The CFPB should also review David S. Clancy & Matthew M.K. Stein's *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 57 (Nov. 2007).<sup>33</sup>

As part of the CFPB's study on the impact of shifting burden of disputes from arbitration to litigation, the CFPB should review B. Roy Weinstein and Stevan Porter's *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court* (Dec. 2009)<sup>34</sup> and The Washington Economics Group, Inc., *The Economic Impacts of Delays in Civil Trials in Florida's State Courts Due to Under-Funding* (Feb. 2009).<sup>35</sup> These studies predict the economic impact of increased duration of litigation due to lost operating capacity driven by the budget constraints.<sup>36</sup>

*Should the Bureau focus on particular product markets?* No, the CFPB should not focus on particular product markets.

*Should the Bureau focus on the impact of particular terms in pre-dispute arbitration agreements?* No, the CFPB should not focus on the impact of particular terms in pre-dispute arbitration agreements.

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<sup>32</sup> The benefits of arbitration are not limited to parties who have disputes. Rather, all contracting parties benefit from the lower dispute resolution costs inherent in arbitration. This is because economic considerations encourage companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration.

<sup>33</sup> In this regard, proponents of the FAA who testified before Congress described arbitration as "face to face" in nature and prompt, inexpensive and procedurally streamlined. One of the leading witnesses characterized arbitration as "something so much cheaper than litigation that . . . its use would reduce the price of consumer goods. . . ." *Id.* Another leading witness advised Congress that arbitration would avoid long delays resulting from court congestion, preliminary motions and other steps taken by litigants.

<sup>34</sup> [www.micromonics.com/articles/LA\\_Courts\\_Economics\\_Impact.pdf](http://www.micromonics.com/articles/LA_Courts_Economics_Impact.pdf)

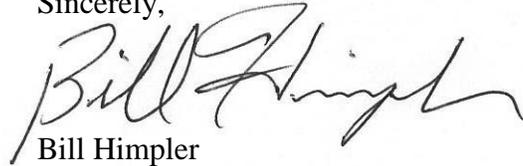
<sup>35</sup> [www.floridabar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/\\$FILE/WashingtonGroup.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf?OpenElement)

<sup>36</sup> The Los Angeles study found that economic losses due to the slower resolution of litigation were projected at \$30 billion in economic output, translating to more than 150,000 jobs and \$1.6 billion in tax revenue. The Florida study found that the total adverse economic impact of the projected increased civil court case delays on the Florida economy would be almost \$17.4 billion annually and lead to an adverse impact on 120,000 jobs.

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AFSA appreciates the opportunity to submit comments on this important subject, and we would be pleased to provide the CFPB with supplemental comments at later phases of the study. Please contact me by phone, 202-466-8616, or e-mail, [bhimpler@afsamail.org](mailto:bhimpler@afsamail.org), with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is fluid and cursive, with the first name "Bill" being larger and more prominent than the last name "Himpler".

Bill Himpler  
Executive Vice President  
American Financial Services Association