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United States Bureau of Consumer Financial Protection
Attn: Monica Jackson, Office of the Executive Secretary
1700 G Street, N.W.
Washington, D.C. 20552

RE: Docket No. CFPB-2016-002; RIN 3170-AA51
CFPB Proposed Rule Regarding Arbitration Agreements

Ladies and Gentlemen:

The Alabama Consumer Finance Association ("ACFA")[1] appreciates the opportunity to comment on the Bureau of Consumer Financial Protection ("CFPB") proposal to establish regulations to be codified at 12 CFR Part 1040 which would prohibit class action waivers in consumer finance related contracts and require companies involved in the consumer finance industry to submit various arbitration related materials to the CFPB (the "Proposed Rule"), which was published at 81 Fed. Reg. 32830 (May 24, 2016).

The members of ACFA generally utilize arbitration agreements containing class action waivers in their consumer finance installment loan contracts. We note that our members typically extend credit to consumers on a face-to-face basis from storefront locations operated by our members in small and large cities across Alabama, particularly in smaller towns and suburban locations. The loans our members make are typically unsecured or secured by personal property,

[1] ACFA is a preeminent trade association in Alabama representing the interests of licensed Alabama Consumer Credit Act (Mini-Code) and Alabama Small Loan Act lenders in the State of Alabama. ACFA has more than 176 state licensed members located throughout Alabama. ACFA membership does not include companies engaged in payday lending, deferred presentment or title loan activities, and ACFA has been a long-time and consistent advocate for further stronger regulation of those businesses. For more information, visit www.alabamaconsumerfinanceassociation.com.

such as automobiles, and are rarely secured through a mortgage. Typical maturities range from 90 days to three years.

ACFA's comments focus on the (i) substantial costs which encouraging class actions will cause and which may threaten the viability of many of our members, which are small businesses; (ii) the significant administrative burden of reporting arbitral information to the CFPB; (iii) the creation of a treasure chest of information for predatory plaintiff lawyers in such materials submitted to and published by the CFPB, and (iv) the unintended consequence of likely encouraging the likely removal of pre-dispute arbitration as a cost effective means for consumers to seek redress in individual cases. For all these reasons, and others, we believe that the CFPB should defer implementation of this proposal until it reconsiders the far ranging impact of its proposal, particularly on small businesses.

Costs of Class Action Litigation

A. Encouraging class action litigation in a highly regulated industry is like deputizing "privateers" to enforce technical compliance with regulations which are otherwise causing no material injury; this should instead be a matter for the regulatory process.

B. The costs of a single class action, even if dismissed at an early stage, can be ruinous to a small business which cannot insure against that risk. Thus, it leaves only big business able to participate in the consumer finance arena, which is bad for consumer choice and communities.

C. Class action litigation is an unfair playing field because the plaintiffs can recover their attorney's fees, but defendants cannot.

D. The specter of new, often vague, regulations offers a myriad of opportunities for "strike suits" for which "ransom" must be paid if a small business cannot afford to lose even one.

Significant Administrative Burden of Reporting Arbitral Information

A. This provision will require our members, which are not "larger participants" and are otherwise generally not subject to routine examination by the CFPB, to have direct links with it, thus creating another reporting channel for which policies must be created and monitored.

B. This obligation itself will likely set up the possibility of class action claims and each arbitral matter would appear to require at least a half dozen filings.

C. The redaction requirement will involve significant manual effort and be subject to ordinary errors (which again may subject providers to class action lawsuits).

The Arbitral Information Published by the CFPB Will Be A Substantial Resource for Plaintiff Lawyers

The CFPB has not detailed how it will publish the information it receives. But, the broad ranging nature of the information will provide ready-made resources for class action plaintiff lawyers without a client to search both for clients and claims. For example, class action lawyers will be able to scour arbitration agreements to find wording that does not exactly match that required by proposed Section 1040.4(a)(2)(i). Further, a description of the claims will provide ready-made bases for class claims. The publication of this information would appear to have its only justification as furthering the interests of plaintiff lawyers. If there is information in what is received by the CFPB that deserves follow-up, the CFPB can do that without publishing the information.

Impact of the Rule on Individual Arbitration

We believe that it is likely that the provisions banning class action waivers will cause consumer finance industry participants to abandon arbitration clauses altogether. This is because arbitration, since it is not taxpayer supported, as the courts are, tends to have more upfront costs of which industry participants have, as a matter of fairness for many years, paid a disproportionate amount. While perhaps not the focus of the CFPB, most adversarial matters between a lender and its borrower arise out of the failure of the borrower to abide by the borrower's promises to make timely payments. This results in collection actions where, in a substantial portion of the cases, the borrower fails to respond. Without the benefit of the class action waiver, many lenders will find it easier simply to take these matters to small claims court or other appropriate courts and obtain default judgments. In those forums, if the borrower does have a legitimate defense or grievance, they will almost certainly be required, in order to effectively present those, to engage a lawyer, if they can do so (remember that the most likely reason they are in this circumstance is because they could not pay their debt in the first instance). In contrast, if arbitration were available, because of its more informal nature and flexible proceedings, the borrower has a much better opportunity to present their case, particularly on equitable bases, without the assistance of unaffordable professional advisors. It merits reflection whether the CFPB may, as a policy matter, wish to do away with arbitration altogether, but does not find the support in its empirical study to do so, but has instead, through its approach to class action waivers, sought to obtain much the same impact through market forces. We believe that this is unfortunate and not in the interest of consumers.

Specific Comments on Proposed Language

If the CFPB is unwilling to reconsider adoption of the proposal as a whole, we do suggest the following changes to the proposed language of the regulation.

1. Section 1040.4(a)(2)(i) should have, after the phrase "ensure that the agreement contains", the phrase "in substance". Without this, the parties will find it necessary to literally follow the language which may not otherwise conform, with its pronouns or reference to "agreement", to other language contained in the myriad of documents in which this will have to appear. Such flexibility will also forestall the inevitable class action lawsuits which could focus on things as small as

typographical errors. Similar changes should be made in Sections 1040.4(a)(2)(ii), 1040.4(a)(3)(A) and (B).

2. The Proposal at Section 1040.4(b)(1) should be more specific about how records will be required to be submitted so that affected providers may better gauge the administrative burden of complying with this. For instance, will the CFPB require special software or indexing or file protocols with respect to how the documents are provided? What if such does not work or it out of service? It would appear likely that administrative burdens with respect to this incredibly large process involving millions of documents will be pushed from the CFPB to providers.

3. In Section 1040.4(b)(2), there should be a good cause exception which includes natural disaster, unforeseen technical issues, or good faith errors. Otherwise, this is almost certainly an area for more class actions.

4. In Section 1040.4(b)(1)(a), this should be limited to "the substance of" the initial claim and any counterclaim. Otherwise, because many such claims and counterclaims made by individual borrowers are poorly organized and often consist of clipped together papers of various types, providers will find it necessary to simply remit all such documents. Further increasing providers' burden, many of those assorted papers will contain substantial information that has to be redacted.

Thank you for your consideration of these comments. If you have questions regarding this letter, please contact the undersigned Mark Duncan by mail at Columbus Finance Company, P.O. Box 43 Alpine AL 35014; by phone (256) 419-1312; or by email mkduncan@bellsouth.net; or our counsel of record, J. Paul Compton, Jr., Bradley Arant Boult Cummings LLP, 1819 Fifth Avenue North, Birmingham, AL 35203; by phone (205) 521-8381; or by email at pcompton@bradley.com.

Very truly yours,

Mark Duncan
President

cc: Scott Corscadden, Supervisor
Alabama Bureau of Loans

J. Paul Compton, Jr.