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Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51 (forced arbitration clauses and class action bans)

Dear Ms. Jackson:

Kentucky Equal Justice Center is submitting these comments in response to the CFPB's proposed rule to prohibit clauses in contracts for consumer financial products and services that include forced arbitration clauses with class action bans, and to enable the CFPB to get information on forced individual arbitrations.

Kentucky Equal Justice Center (KEJC) is a small, statewide civil legal aid program. We work closely with the four civil legal aid organizations in Kentucky and with other community partners across the state, focusing on all issues that affect low-income Kentuckians. These issues include health, public benefits, housing, immigration, workers' rights and consumer issues.

KEJC strongly supports the proposed rule that would restore consumers' ability to band together to protect their rights in class actions and would increase transparency in the use of forced arbitration in individual cases.

Forced arbitration clauses are a get-out-of-jail-free card that deny consumers justice.

In most cases, forced arbitration is not an alternative dispute resolution forum; it prevents consumers from getting relief at all. Attorneys frequently will not represent consumers if a contract has an arbitration clause that cannot be defeated. Or, after a case is sent to arbitration, consumers are forced to accept weaker settlements -- with no relief for absent class members -- because their attorneys either will not handle a case in arbitration or do not have confidence in the fairness of the arbitration forum. Forced arbitration clauses also make it difficult to obtain evidence to prove corporate wrongdoing.

One consumer lawyer in Louisville told me his office routinely turns down cases when the contract contains an arbitration clause. He states that when consumers find out they have agreed to waive their right to their day in court they are both surprised (because they didn't know they were doing that) and disappointed. While this attorney does occasionally take cases that will require arbitration, he is far more likely to take a case if it will not have to be arbitrated.

Challenging an arbitration clause is costly and often unsuccessful. In one recent case, in which a car salesman lied about whether a car had been in an accident, the car buyers' attorneys sued and argued that the arbitration clause was unenforceable because it was not included or incorporated by reference in the retail installment sales contract, as required under state law. They also argued that the agreement was unconscionable because it really only limited the car buyer. The dealer was still permitted to repossess the car, yet the buyer could not challenge a wrongful repossession in court. The court was unsympathetic and the plaintiffs were required to proceed with arbitration. Parties are in the process of negotiating a settlement which their attorneys expect to be much less than they could have obtained in punitive and other damages in a jury trial.

In another case, a finance company sued a couple allegedly in default on a mobile home secured loan. The defendants countersued for violations of the Fair Debt Collection Practices Act. The finance company claimed it could proceed to court in lieu of arbitration, but the borrower could not. After litigating for 3-4 months in court (answer and counterclaim filed, discovery answered, settlement negotiations conducted), the finance company moved to compel arbitration only on defendant's counterclaim. The motion to compel arbitration was ultimately unsuccessful, but not before many motions, briefs, an appeal and numerous hours were spent by the borrowers' counsel, who is a legal aid attorney. While ultimately the borrower obtained a very favorable settlement, in most cases an individual's attorney will not be able to spend so much effort on a small case, nor will a consumer be able to afford such a challenge.

Class actions are a critical vehicle to address widespread wrongdoing.

Class actions allow consumers that have experienced relatively small harm to band together and find an attorney, without spending the resources needed to bring a case individually. Class actions also allow courts to order the wrongdoer to repay all of its victims. Class actions are particularly important for low-income and vulnerable consumers, who may not realize that they have been the victim of unlawful predatory practices. The public nature of class actions provides an important deterrent effect against wrongdoing.

While our office has not filed any consumer class actions, we successfully challenged a change in Medicaid long term care rules in a class action that would have resulted in more than 3000 individuals losing nursing home or home-based care. Legal aid attorneys were representing the clients in their individual administrative appeals, in which they would not have been able to obtain an order finding the rule change in violation of the Medicaid Act, at least not an order that would have been applicable to all other affected individuals. The CFPB very correctly recognizes the important role that class actions have in providing relief to large numbers of individuals, who might not have any other means to obtain relief.

The proposed rule is strong, but it should be improved.

- **The CFPB should prohibit forced individual arbitration.** Forced arbitration is a problem in individual cases as well as in class actions. In our program, we have seen problems arise from forced arbitration clauses in a variety of consumer contracts. I have seen a particular problem with this in payday lending contracts. We had an individual client who only had the option of resolving her issues in arbitration. We were attempting to get an order clarifying that back-to-back contracts were the same as prohibited roll-overs. The arbitrator would not look beyond the plain words in the contract or beyond the financial regulatory agency's interpretation of the law. We felt we would have been better able to have this issue fairly considered in a court.
- **Companies should report on *all* uses of forced arbitration, not just cases that result in an arbitration proceeding.** Consumers are often forced to dismiss their case or settle on weak terms after the court compels arbitration. The CFPB should require companies to provide data on all instances in which a forced arbitration clause resulted in a denial of justice.
- **All companies supervised by the CFPB should disclose their arbitration clauses,** so the CFPB can understand the full impact of these clauses and arbitration practices. Some clauses may be so punitive that they even deter consumers from filing lawsuits.
- **Credit cards and bank accounts should be subject to the rule if the agreement is amended after the effective date.** Consumers may have a credit card or bank account for decades -- even their entire life. Yet banks claim the unilateral right to amend the contract at any time, including raising the price. Any agreement that is amended should be covered in order to prevent companies from avoiding the rule for decades.

- **Credit reporting, credit repair, lead generators, and personal finance apps should be fully covered.** The credit bureaus are the top subject of CFPB complaints, and much information furnished to them is inaccurate. Credit repair scams are widespread. Lead generators pose numerous problems and should be covered not only in the credit area. Consumers are exposed to data breaches and unauthorized charges when personal finance apps access their sensitive bank and credit account data. These products are partially left out of the rule but need the rule's protection because they can cause consumer harm.

Thank you for your efforts to protect consumers and for the opportunity to submit these comments.

Sincerely,

Anne Marie Regan
Senior Staff Attorney