

# PUBLICATION

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## Flaws and All, CFPB's Arbitration Study Sparks Vigorous Debate over Next Steps in Regulating Mandatory Arbitration Clauses

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As expected, the reaction to the Consumer Financial Protection Bureau's (CFPB) arbitration study report, released in March 2015, has been vociferous. All sides of this important debate are loudly proclaiming that their arguments for, or against, mandatory arbitration clauses have been vindicated; or alternatively, that the study is unfair, misleading and should not be used to support regulatory action in this area.

The CFPB's arbitration study examined six different consumer finance markets, including credit cards, checking accounts, prepaid cards, payday loans, private student loans and mobile wireless contracts. The report criticizes the use of mandatory, pre-dispute arbitration agreements in financial contracts with consumers. The CFPB found mandatory arbitration clauses to be detrimental to consumers' interests when compared to class action litigation.

After the study was released, 58 members of Congress wrote to CFPB Director Richard Cordray commending the CFPB for completing its study, reiterating the position that mandatory arbitration is "designed to stack the deck against consumers," and urging the CFPB to swiftly start the rulemaking process to eliminate the use of mandatory arbitration clauses in consumer contracts. Not to be outdone, the CFPB also received a letter from 85 Republican members of the House and Senate heavily criticizing the report as lacking in fairness and transparency, and asking the CFPB to reopen the study and allow for public comment.

Prominent consumer finance trade associations, including the American Bankers Association, the Consumer Bankers Association, and the Financial Services Roundtable, share the Republican congress-members' view. The trade associations submitted detailed comments and highlighted some of the CFPB's pro-arbitration findings that contradict the study's final conclusions. The associations advocate that the CFPB must conduct additional research into a number of other issues prior to any rulemaking, including customer satisfaction with the arbitration process, the economic consequences of an arbitration ban, and whether a ban would hurt consumers in light of U.S. Supreme Court case law making it more difficult to obtain class certification.

Many lenders are lauding the empirical critique of the CFPB's study done by George Mason University law professor Todd Zywicki, and University of Virginia law professor Jason Scott Johnston. The professors argue that the CFPB's report does not support adoption of sweeping regulation of mandatory consumer arbitration clauses. According to the professors, the CFPB's data does not allow for meaningful comparisons between arbitration and class actions because the study compares arbitration *awards* (i.e. an award entered by the arbitrator after hearing all the evidence) to class action *settlements*, inviting "a false apples-to-oranges comparison." The professors also fault the study for including data on class action settlements involving lawsuits against debt collection agencies. The CFPB said it was limiting its examination of class settlements to disputes in which an arbitration clause might have applied, but debt collectors are not parties to a consumer's arbitration agreement with a creditor and so these settlements should have been excluded. The professors conclude that more evidence is needed before the CFPB can proclaim consumers are harmed by arbitration and would instead "benefit from unleashing class action litigation more routinely."

There remains significant hurdles for the CFPB to overcome before it can take any rulemaking action on this issue. Now that the report has been finalized, the CFPB has the attention of lawmakers on both sides of the

aisle. Notably, members of the House Appropriations Committee recently approved a measure that will prohibit funding for the CFPB to issue a final rule on the use of arbitration until the CFPB conducts a "thorough" (and likely peer-reviewed) study. It remains to be seen how quickly the CFPB will act on this report, but we all will be watching closely.