ON WAIVING CLASS ACTION WAIVERS: A CRITIQUE AND DEFENSE OF THE CONSUMER FINANCIAL PROTECTION BUREAU'S PROPOSED REGULATIONS*

I. INTRODUCTION

Consumer protection is a dynamic field with many regulatory players. A recent (and contentious) entrant is the Consumer Financial Protection Bureau (CFPB), created with the passage of Dodd-Frank in 2010.[1] Some view the CFPB as a politically unaccountable agency whose actions will ultimately harm consumers.[2] Consequently, the Bureau's operation has been hindered by congressional attempts to delay confirmation of its director, to defund it or limit its powers, and even to shutter it completely.[3] Others laud the CFPB as an important step in advancing consumer protection.[4]

In spite of strident opposition, the CFPB is steaming ahead with its mandate to protect consumers.[5] Part of the CFPB's congressionally delegated task is the oversight of contracts between consumers and suppliers of financial services and products.[6] Specifically, Congress authorized the CFPB to study and regulate provisions that force consumers to waive their rights to bring individual or class suits against financial service corporations.[7] Such provisions cause sharp disagreement between consumer advocates and financial service corporations.[8]

---

* Nicholas M. Engel, J.D., Temple University Beasley School of Law, 2016. My sincere thanks to the staff of the *Temple Law Review* for their thoughtful and diligent input on this Comment; and to Professor Hosea H. Harvey, who brought this developing issue to my attention and gave me helpful guidance along the way.

1. *See* 12 U.S.C. § 5491 (2012).

2. *See, e.g.*, Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 858–59 (2013).

3. *See* Mike Konczal, *The GOP Doesn't Oppose Richard Cordray. It Opposes His Whole Agency.*, WASH. POST: WONKBLOG (May 25, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/05/25/the-gop-doesnt-oppose-richard-cordray-it-opposes-his-whole-agency/ [https://perma.cc/BA4B-KR8W].

4. *See, e.g.*, Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 56 (2012) ("Because the Bureau is designed so that it is accountable to a wide range of political actors, it just might accomplish the sort of effective consumer protection regulation that eluded earlier regulators.").

5. *See* Laetitia L. Cheltenham, *The Consumer Financial Protection Bureau and Class Action Waivers after* AT&T v. Concepcion, 16 N.C. BANKING INST. 273, 274 (2012); *see also* 12 U.S.C. § 5491 (2012).

6. 12 U.S.C. § 5491(a). Among other powers, the CFPB possesses the authority to regulate a "covered person," which is defined in part as "any person that engages in offering or providing a consumer financial product or service." § 5481(6)(A).

7. *Id.* § 5518(a), (b).

8. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck*

This Comment examines the CFPB's statutory mandate to study such mandatory arbitration clauses and its authority to regulate such agreements. Ultimately, this Comment contends that permitting consumers to proceed as a class is an important component of a robust system of consumer protection and that the CFPB is justified in preventing financial corporations from requiring consumers to waive such rights.

II. OVERVIEW

In recent years, mandatory arbitration clauses have gained widespread usage in multiple industries, effectively preventing many consumers from resolving their disputes in court.[9] This Comment will examine arbitration clauses in contracts between consumers and suppliers of financial services and products. A consumer who obtains a financial service—such as a checking account, credit card, or payday loan—will sign a contract with the supplier. Often these contracts will contain a clause specifying the forum for dispute resolution[10]—most commonly, final and binding arbitration.[11] Thus, if a consumer wishes to resolve a dispute with her financial service provider, she may be limited to private arbitration. By funneling consumers into arbitration, corporations prevent them from bringing individual or class action suits in federal or state courts.[12]

These mandatory arbitration clauses—and the class action suits they prevent—have been the subject of intense debate.[13] In some consumer market segments, Congress has directly limited the ability of corporations to use arbitration clauses.[14] However, in other areas, Congress has instead delegated oversight to regulatory agencies.[15] In passing Dodd-Frank, Congress delegated

---

of Justice, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/H58K-LRFQ] (discussing the frequent inclusion of individual arbitration clauses within consumer contracts).

9. *See id.*

10. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 1.1, at 3 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/722U-S6LS] [hereinafter CFPB STUDY].

11. *Id.* at 3–4.

12. *See* Silver-Greenberg & Gebeloff, *supra* note 8.

13. *See* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 2 [hereinafter Rutledge & Drahozal, *Contract and Choice*]. The CFPB is not the only agency considering increased regulation of arbitration clauses. Currently, both the Department of Education and the National Labor Relations Board are contemplating imposing additional restrictions within their industries. George Calhoun & Jeff Ifrah, *Arbitration Under Fire: Brace Your Company for Less Contract Freedom and More Class Actions*, JDSUPRA BUS. ADVISOR (April 1, 2016), http://www.jdsupra.com/legalnews/arbitration-under-fire-brace-your-74382 [https://perma.cc/P8YH-9H2P].

14. *See* 15 U.S.C. § 1639c(e)(1) (2012) (preventing mandatory arbitration clauses in residential mortgage contracts).

15. *See* 15 U.S.C. § 80b-5(f) (2012) (authorizing the Securities and Exchange Commission to limit or prohibit such clauses "if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.").

such authority for transactions involving consumer financial products and services to the CFPB.[16]

When it vested the CFPB with authority to regulate or proscribe mandatory arbitration clauses, Congress first directed the CFPB to study and provide a report (*CFPB Study* or *Study*) concerning the use of such clauses.[17] Congress conditioned the CFPB's authority by authorizing the CFPB to limit the use of mandatory arbitration clauses in consumer financial contracts only "if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers."[18] This statutory scheme thus places a positive burden on the CFPB to demonstrate that its regulations will be "in the public interest and for the protection of consumers."[19] While the statute does not require the CFPB to draw this conclusion from the *CFPB Study*, it does require that regulations be consistent with the study's findings.[20] Unless the CFPB can articulate why regulations satisfy the statutory "public interest" and "protection" criteria, it risks its regulations being overturned in court.

Pursuant to its statutory mandate, on March 10, 2015, the CFPB completed its study of arbitration clauses in consumer financial contracts and issued a report to Congress.[21] Then, on October 7, 2015, the CFPB released an outline (*CFPB Outline* or *Outline*) of its proposed regulations.[22] In the *CFPB Outline*, the Bureau proposed a prohibition on arbitration agreements that waive a consumer's right to bring a class action and proposed a requirement that arbitration claims and awards be submitted to the CFPB.[23] These proposed regulations were formally issued for public comment on May 3, 2016.[24]

16. 12 U.S.C. § 5518(b) (2012); *see also* Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807, 821–22 (2015) (stating that Dodd-Frank "transferred to the CFPB nearly all of the consumer financial powers" of former regulators).

17. 12 U.S.C. § 5518(a), (b).

18. *Id.* § 5518(b).

19. *Id.*

20. *Id.*

21. CFPB STUDY, *supra* note 10. The *CFPB Study* itself was subject to various criticisms and provoked a variety of responses. *See, e.g.*, Letter from Al Franken et al., Senators & Members, U.S. Congress, to Richard Cordray, Dir., CFPB (May 21, 2015), http://hankjohnson.house.gov/sites/hankjohnson.house.gov/files/documents/CFPB_Letter_Final.pdf [https://perma.cc/8F7E-92S4] (urging the CFPB to use its rulemaking authority to limit mandatory arbitration clauses); Letter from Patrick McHenry et al., Senators & Members, U.S. Congress, to Richard Corday, Dir., CFPB (June 17, 2015), http://mchenry.house.gov/uploadedfiles/mchenry-scott-to-cordray-letter-re-arbitration.pdf [https://perma.cc/V4DY-AL86] (asking the CFPB to reopen the *CFPB Study* due to perceived methodological flaws).

22. CONSUMER FIN. PROT. BUREAU, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (2015), http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf [https://perma.cc/4EMA-EJQR] [hereinafter CFPB OUTLINE].

23. *Id.* at 14–21.

24. *See* Arbitration Agreements, 81 Fed. Reg. 32,829, 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040), http://www.regulations.gov/document?D=CFPB-2016-0020-0001

This Comment examines the *CFPB Study* and analyzes what, if any, limitations on the use of mandatory arbitration clauses to waive consumer access to class action suits are consistent with or justified by the Bureau's data. Part II.A lays out an overview of the modern debate concerning the utility of class action suits. Next, Part II.B summarizes the relevant data presented by the *CFPB Study*. Concluding the discussion, Part II.C examines the *CFPB Outline* and the subsequent proposed rules, including the CFPB's underlying rationale and makes recommendations.

A. The Modern Debate over Class Action Suits

The following discussion examines the various and debated class action considerations that impact whether the CFPB's proposed regulation of class action waivers is consistent with the *CFPB Study* and "in the public interest and for the protection of consumers."[25] First, this Part examines how the Supreme Court has interpreted the Federal Arbitration Act (FAA)[26] as declaring a national policy in favor of arbitration; then, it demonstrates how the Court's current preference for arbitration may affect its interpretation of the CFPB's standard for promulgating regulations. Second, this Part examines the scholarly arguments by both sides of the class action debate. In this debate, the potential benefits of class action suits—deterrence of corporate malfeasance, setting precedent, and providing a remedy for low-value, high-volume wrongs—clash with the potential costs—overdeterrence, spurious or nuisance suits, and increased costs of litigation (passed to consumers via higher borrowing costs or decreased availability of credit). Third, this Part reviews the literature on the complex and often complementary interaction between public and private enforcement of consumer protection law as it has developed in the United States. Finally, this Part briefly discusses the development and deployment of class arbitration as a tool for resolving class disputes.

1. Interaction with Current FAA Jurisprudence

While the CFPB's authorizing statute contains a standard of review by which its subsequent rules are subject to judicial review, the *CFPB Study* has landed in a period of judicial verve concerning arbitration. In recent decades, the Supreme Court has interpreted the FAA as a kind of super-statute, declaring it a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[27]

Applying this interpretation in *AT&T Mobility LLC v. Concepcion*,[28] the Court held that the FAA preempted state case law, which would have

[https://perma.cc
/37QW-5YXH].

25. *Id*. at 32,830.

26. 9 U.S.C. §§ 1–16 (2012) (codifying the enforcement of arbitration agreements).

27. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

28. 563 U.S. 333 (2011).

invalidated a class action waiver.[29] Specifically, the Supreme Court of California had adopted a rule that invalidated mandatory arbitration clauses on unconscionability grounds where the contract was an adhesion contract, the damages alleged were minimal, and the party with inferior bargaining power alleged a deliberate scheme to defraud.[30] The Supreme Court in *Concepcion*, noting that its own precedent had placed it "beyond dispute that the FAA was designed to promote arbitration," held that the California rule interfered with arbitration and was therefore preempted by the FAA.[31]

Expanding the FAA's preemptive reach further still, the Court in *American Express Co. v. Italian Colors Restaurant*[32] refused to find that an antitrust statute demonstrated a "contrary congressional command" sufficient to displace the FAA.[33] The Court upheld the waiver of class proceedings despite the fact that litigants were therefore effectively unable to vindicate their statutory antitrust rights.[34] The Court reasoned that because the clause rendered effective vindication of plaintiffs' statutory rights financially impracticable—as opposed to eliminating those rights altogether—the FAA's mandate superseded the antitrust statute, and thus, it upheld the arbitration clause.[35]

In relation to the CFPB's proposed rules, the impact of the FAA cases is uncertain. On one hand, the Supreme Court indicated in dictum that by authorizing the CFPB to issue rules prohibiting or limiting mandatory arbitration clauses in financial contracts, Congress may have issued a "contrary congressional command" adequate to prevent the application of the FAA.[36] Some commentators have similarly opined that any rules issued by the CFPB would be immune from challenge on FAA grounds because the statute clearly indicates a congressionally created exception to the FAA.[37] Moreover, in passing Dodd-Frank, Congress also banned arbitration clauses in mortgage contracts, which evidences a specific intent to provide exceptions to the FAA in certain circumstances.[38]

However, others scholars opine that the Supreme Court's current predilection for arbitration would affect its construction of the CFPB's statutory

29. *Concepcion*, 563 U.S. at 352.

30. Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005).

31. *Concepcion*, 563 U.S. at 345–46.

32. 133 S. Ct. 2304 (2013).

33. *Italian Colors*, 133 S. Ct. at 2309 (quoting CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668–69 (2012)).

34. *Id.* at 2310.

35. *Id.*

36. *See CompuCredit Corp.*, 132 S. Ct. at 669, 672 (dictum).

37. *See, e.g.*, Louis F. Del Duca, *Consumer Financing Pre-Dispute Mandatory Arbitration: Consumer Financial Protection Bureau (CFPB) Developments*, 46 UCC L.J. 71, 84–85 (2014); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 189 (2015); John E. Villafranco, Christie Thompson & Jalyce Mangum, *Drawing The Battle Lines for Mandatory Arbitration Clauses: The Consumer Financial Protection Bureau Joins the Fight*, ANTITRUST SOURCE, Feb. 2014, at 1, 2–3.

38. *See* 15 U.S.C. § 1639c(e)(1) (2012).

standards.[39] The majority in *Concepcion* viewed individual arbitration as efficient, swift, and generally superior to lengthy class action proceedings.[40] Since the CFPB is only authorized to impose limitations on arbitration agreements that are "in the public interest and for the protection of consumers,"[41] the CFPB may have difficulty convincing the Court that the *CFPB Study* (or other data) supports any level of restriction.[42]

2. Deterrence, Public Protection, and Economic Efficiency

The debate over class action suits has raged in the United States, pitting consumer advocates against businesses.[43] Class action proponents point to the device's value as a deterrent to corporate misconduct, an efficient remedial device for highly similar claims, and an important private enforcement tool to remedy low-value, high-volume injuries.[44] On the other hand, critics of class actions argue that claimants often obtain faster and better results under arbitration than litigation,[45] that successful class actions often primarily benefit lawyers instead of injured parties,[46] and that the enormous litigation costs of class actions push many defendants into settlements for nonmeritorious claims.[47] Critics also argue that increased litigation, especially in the context of financial

39. *See, e.g.*, Janet Cooper Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J. L. REFORM 1203, 1216–17 (2013); Jason Scott Johnston & Todd Zywicki, The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique 8–9 (Aug. 2015) (unpublished working paper), http://mercatus.org/sites/default/files/Johnston-CFPB-Arbitration.pdf [https://perma.cc/PQ2Z-9B35].

40. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011).

41. 12 U.S.C. § 5518(b) (2012).

42. *See* Alexander, *supra* note 39, at 1216–17 (opining that the Court's policy preference towards arbitration may lead it to be skeptical of any regulations limiting a company's ability to insert mandatory arbitration clauses into its contracts); Christine A. Scheuneman, Joseph T. Lynyak, III & Amy L. Pierce, *The CFPB's Arbitration Study—A Warning to Consumer Financial Service Companies*, 68 CONSUMER FIN. L. Q. REP. 32, 34 (2014) (opining that the *Concepcion* line of cases, which reflect a national policy in favor of arbitration, would force the CFPB to "conclusively demonstrate actual consumer harm" for any limiting regulations to be upheld).

43. *See, e.g.*, Thomas J. Stipanowich, *The Third Arbitration Trilogy:* Stolt-Nielsen*,* Rent-A-Center*,* Concepcion *and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 336 (2011); Emanwel Josef Turnbull, *Opting Out of the Procedural Morass: A Solution to the Class Arbitration Problem*, 20 WIDENER L. REV. 43, 49 (2014).

44. *See, e.g.*, Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 119–20 (2012) [hereinafter Sternlight, *Difficult Claims*] (stating that, while individual arbitrations may be cost prohibitive for a given grievance, a class action could make a suit economically feasible).

45. *E.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 564 (2001).

46. *E.g.*, Sternlight, *Difficult Claims*, *supra* note 44, at 91.

47. *E.g.*, Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: What Does the Future Hold After* Concepcion*?*, 8 J. BUS. & TECH. L. 345, 358 n.110 (2013) [hereinafter Kaplinsky & Levin, *After* Concepcion]; *see also, e.g.*, Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1617, 1632 (2006) (stating that Congress regulated class action settlements it "viewed as abusive").

products and services, may actually harm the public because litigation costs will be passed to consumers, thereby reducing the availability of credit and low-cost financial services.[48]

Before delving further into the arguments for and against class proceedings, it is important to recognize the unique role they play in resolving claims. From a practical perspective, it is obvious that certain cases are well suited for resolution on a class basis. Where numerous plaintiffs allege highly similar or identical claims, class proceedings can be far more efficient than individual, sequential resolutions.[49] For example, in *Ting v. AT&T*, [50] where the class size reached eighteen million members, it clearly would have been inefficient, and perhaps impossible, to individually arbitrate each claim.[51]

Even so, one must also consider the problems class actions cause, as well as available alternatives.[52] Therefore, the question of whether class proceedings are "in the public interest" will be context-dependent.[53] In the consumer financial context, the class action debate centers around the dispute resolution options available to parties and the effect that the availability of class proceedings will have on the consumer financial market.[54] As one commentator critical of class actions has argued, the key policy question is whether cases are resolved "more accurately in terms of the substantive merits of the dispute" under individual arbitration (including judgments and settlements) or class actions.[55]

Turning to the specific arguments, some class action critics voice concern that settlements often result from deals struck to avoid the massive discovery costs of class actions.[56] Under this theory, plaintiffs' class action lawyers can blackmail corporations into settlements of frivolous, nonmeritorious claims because it is cheaper for a corporation to settle than to win on the merits.[57] By

48. *See* Cheltenham, *supra* note 5, at 292 (highlighting studies showing that credit card issuers are more likely to use arbitration clauses when, among other things, they issue riskier credit card loans); *see also* Kaplinsky & Levin, *After* Concepcion, *supra* note 47, at 358 (noting that class actions have the potential to increase costs for consumers, businesses, and courts).

49. *See* Adam Raviv, *Too Darn Bad: How the Supreme Court's Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. ON ARB. & MEDIATION 220, 228 (2014); Sternlight, *Difficult Claims*, *supra* note 44, at 119–20.

50. 319 F.3d 1126 (9th Cir. 2003).

51. *See Ting*, 319 F.3d at 1134.

52. Eliminating access to class actions does not necessarily mean lawyers cannot aggregate claims. One firm has developed a particularly amusing way to get around a class action waiver in antitrust law—filing over a thousand nearly identical arbitration claims against AT&T in the hopes of blocking a merger. *See* Daniel Fisher, *AT&T's Arbitration Victory Breeds Swarm of Antitrust Cases*, FORBES (Aug. 18, 2011), http://www.forbes.com/sites/danielfisher/2011/08/18/atts-arbitration-victory-breeds-swarm-of-antitrust-cases/#7565fe74373a [https://perma.cc/PMY9-4F7U].

53. *See* Stipanowich, *supra* note 43, at 422 (noting the growing data on various arbitral processes in different industries and the increasing recognition that data harvested in one context may have little relevance to arbitrations conducted in other contexts).

54. *See* Johnston & Zywicki, *supra* note 39, at 5–6.

55. *See id.* at 6.

56. *Id.*

57. *Id. But cf.* Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 222 (2007) (noting that, despite widespread belief

contrast, arbitration of an individual dispute may, in theory, avoid this problem and have a greater chance of resolving a customer's dispute on the substance of the complaint.[58]

Critics of consumer financial class actions have also argued that arbitration provides a viable, and often superior, dispute resolution forum for consumers.[59] They point to studies showing that litigants are more likely to be satisfied with arbitration outcomes, that arbitrations are far quicker and simpler than litigation, that plaintiffs often obtain favorable outcomes even without hiring legal counsel, and that arbitrations cost less for both parties.[60] It is also worth mentioning that some commentators have emphasized that many consumer disputes are resolved through even more informal channels, such as internal dispute resolution processes and the CFPB's online portal.[61]

On the other side, scholars have noted that arbitration clauses are not always consumer friendly. Such clauses may require dispute resolution in a locality convenient for the corporation, but not the consumer, and may require up-front payment of prohibitive arbitration fees.[62] Others have alleged that arbitration is inherently tilted towards corporate parties because of "repeat player bias."[63] That is, by repeatedly employing specific arbiters, companies incentivize corporate-friendly outcomes.[64] Recent litigation against a large arbitration firm for this very reason cautions that, at minimum, this bias can exist and appropriate safeguards are warranted.[65] A related but broader allegation is

in the existence of nuisance suits, almost no empirical proof of such legal extortion exists).

58. Johnston & Zywicki, *supra* note 39, at 6.

59. *See, e.g.*, Kaplinsky & Levin, *After* Concepcion, *supra* note 47, at 359–60.

60. *E.g.*, Alan S. Kaplinsky & Mark J. Levin, *CFPB Makes Consumer Arbitration a Numbers Game – and the Numbers Overwhelmingly Support Consumer Arbitration*, CONSUMER FIN. SERV. L. REP., Aug. 9, 2015, at 2–5, https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2015/09/article_cfslr1907.pdf [https://perma.cc/4RHL-ZCW4] [hereinafter Kaplinsky & Levin, *Numbers Game*]. *But see* Raviv, *supra* note 49, at 230 (calling attention to international and domestic studies questioning whether arbitration actually reduces costs and time spent to resolve disputes).

61. *E.g.*, Kaplinsky & Levin, *Numbers Game*, *supra* note 60, at 3 (observing that the "vast majority" of consumers resolve their disputes with financial corporations informally, without resorting to litigation or arbitration, and that the CFBP's own online portal for dispute resolution has resolved more than 558,000 consumer complaints over the past three years).

62. *See* Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 339 (2015); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341, 385 n.153 (citing an arbitration agreement that mandated Shanghai, China as the proper venue for any disputes). *But cf.* CFPB STUDY, *supra* note 10, §1.4.1, at 10 (finding that most consumer arbitration clauses capped consumers' up-front arbitration costs and contained provisions requiring arbitration hearings be held in locations close to the consumer's residence).

63. Barnes, *supra* note 62, at 339 ("[A]rbitrators face a powerful incentive to find for the party likely to hire them for future cases—the corporation rather than the consumer.").

64. *See id.*

65. *Id.* After a complaint was filed against the National Arbitration Forum (NAF) alleging various improper ties to creditors and collection agencies, NAF entered into a consent judgment that barred it from arbitrating credit card and consumer disputes. Swanson v. Nat'l Arbitration Forum,

that corporations will benefit from a "repeat player" effect in arbitration forums, further disadvantaging consumers.[66]

Despite the benefits of arbitration, scholars have noted that it is not a panacea for all types of claims, nor can it provide identical benefits to class actions in all settings.[67] For example, consumer advocates assert that the availability of class actions restrains corporate misconduct by imposing an ominous cloud of potential retribution over boardroom decisions.[68] To support this, scholars have identified certain types of claims that corporations would be able to suppress if consumers could not proceed as a class.[69] Such claims include those that are individually low in value but have a high number of potential claimants, such as low-dollar fraud carried out on a wide scale or small violations of wage and hour regulations by large employers.[70] Other types of claims particularly susceptible to corporate abuse include cases where consumers are unlikely to discover they have been wronged, where consumers do not know that a legal remedy exists, or where the remedy is injunctive or otherwise nonpecuniary.[71]

Some argue that class action waivers suppress low-value, high-volume claims primarily by destroying an individual's economic incentive to assert them.[72] As the value of a claim decreases, so does the incentive to pursue a remedy.[73] In many situations, the cost of pursuing a claim may exceed the expected recovery, thus extinguishing a potential plaintiff's economic rationale to pursue the claim individually.[74] Class actions have classically solved this

Inc., No. 27-cv-09-18550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009); Barnes, *supra* note 62, at 339.

66. *See* ALL. FOR JUSTICE, ARBITRATION ACTIVISM: HOW THE CORPORATE COURT HELPS BUSINESS EVADE OUR CIVIL JUSTICE SYSTEM, 4 (2013), www.afj.org/wp-content/uploads/2013/12/Arbitration-Activism-Report-12162013.pdf [https://perma.cc/4WNL-FZHS] ("Because major corporations create millions of dollars in business, a firm and its arbitrators have an incentive to keep corporate clients happy or risk losing business.").

67. *E.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 677–80 (1996).

68. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 (2005).

69. *E.g.*, David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 242 (2012).

70. *Id.*

71. *See* Sternlight, *Difficult Claims*, *supra* note 44, at 115–16 (noting ineffectiveness of arbitration hearings in settling "procedurally difficult claims").

72. *See* Koenig & Rustad, *supra* note 62, at 410–11 (arguing that social networking sites rushed to create consumer-unfriendly arbitration clauses in the wake of *Concepcion* and *Italian Colors*); Schwartz, *supra* note 69, at 242.

73. *See* Barnes, *supra* note 62, at 333 ("Without the ability to aggregate these wrongdoings, many individuals cannot afford to bring their own case or find legal representation to do so.").

74. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV.

dilemma by permitting the aggregation of claims in a single case and allowing a designated litigator to pursue the claim on behalf of all involved.[75] For these low-value, high-volume claims, consumer advocates assert that the claimed benefits of arbitration—for example, reducing costs by streamlining and simplifying the process for consumers—are merely smokescreens to disguise the true purpose of mandatory arbitration—suppressing or eliminating claims.[76] Some have even argued that the *majority* of mandatory arbitration clauses are meant to achieve maximum claim suppression.[77]

In response to the concern that nonmeritorious claims are leading to extortionate settlements, there is reason to believe that nuisance suits are less of a threat in class actions than in individual litigation. Two distinguishing features of class action suits illustrate how the potential for frivolous or nuisance suits is less concerning than in individual suits. First, the amount of resources necessary to properly litigate a class claim can be enormous.[78] Therefore, a plaintiffs' firm's willingness to invest its services often demonstrates its belief that the underlying claims are viable.[79] Of course, as potential liability rises, there will always be plaintiffs' lawyers willing to file high-risk, high-reward cases, but this willingness may be tempered by the amount of up-front investment required.[80] Further, the corporate incentive to settle nuisance claims (i.e., to save money by avoiding high discovery costs) decreases as settlement amounts rise because it becomes cheaper to defend nonmeritorious claims than settle them.[81]

703, 723 (2012) ("[E]mploying such waivers may reduce the value of aggregatable claims to zero, as many claims are not worth pursuing except as part of a class action.").

75. *See* Jeffrey I. Shinder, *In Praise of Class Actions*, NAT'L L.J., Apr. 5, 2010, at 39, LNSDUID-ALM-NTLAWJ-1202447314200 (discussing how small consumers aggregated their claims against credit card companies).

76. *See* Muhammad v. Cty. Bank, 912 A.2d 88, 101 (N.J. 2006) ("One could speculate that class-arbitration waivers are viewed as more efficient because of the likelihood that fewer individual consumers would seek redress than those who would be included as part of a class."); Bryon Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 247–48 (2008) ("[W]ithout access to the class procedure, many individuals would not pursue vindication of their claims due to the 'prohibitively high' costs of doing so.").

77. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871, 876 (2008); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV., 1, 8–9 (2000) [hereinafter Sternlight, *Will Class Action Survive?*]. *But see* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 474–76 (2010) (criticizing empirical studies for using an inadequate sample size and mischaracterizing results, and arguing that the evidence does not support the conclusion that businesses adopt class action waivers to prevent class liability).

78. *See* McMillian, *supra* note 57, at 248–51 (pointing out that it is plaintiff's burden to establish class certification and notify potential class members—requirements that often incur substantial up-front costs).

79. *Id.*

80. *Id.* at 251–53.

81. *See id.* at 252 ("Companies are not in the habit of willingly turning over millions of dollars just because somebody sues them.").

In class cases, a corporation's willingness to settle may be better explained by a desire to avoid uncertainty.[82] Since jury verdicts are unpredictable—and in large class cases could reach staggering, break-the-company amounts—corporations may opt to settle potentially meritorious claims.[83] Therefore, in class cases, the concern over nuisance, nonmeritorious suits may be mitigated by plaintiffs' up-front costs, but corporations may still face heavy incentives to settle *potentially* meritorious class claims as the potential payment rises.

Other consumer advocates who oppose mandatory arbitration have noted the importance of establishing standards through judicial precedent.[84] Judicial opinions are generally public documents containing an explanation of why the specific conduct was or was not a violation of the law, and this assists litigants in assessing the legality of future conduct.[85] Not only can consumers use this information to inform their decisions whether or not to challenge the legality of a corporation's actions, but precedent signals other corporations that specific conduct is unlawful.[86] By contrast, arbitration decisions are generally private, require no public filings or explanation of the arbitrator's decision, and have no bearing on future decisions.[87] Further, because arbitrators, unlike courts, are not bound by *stare decisis*, their decisions may be completely inconsistent.[88] And due to the limited scope of judicial review of arbitration decisions under the FAA, reversal through judicial appeal is highly unlikely.[89]

Thus, in theory, class actions serve as an important remedial tool to recover damages for victims of low-value, high-volume corporate fraud. Further, litigation may elucidate the bounds of legal conduct through precedent. But as critics have pointed out, permitting class action suits entails certain risks—increased litigation costs being passed onto consumers, potential for abusive

82. *Id.* at 252–53.

83. *See* McMillian, *supra* note 57, at 252–53 (arguing that potentially high verdicts drive high settlements).

84. *See, e.g.*, Barnes, *supra* note 62, at 338–39 ("[T]he fact remains that arbitration is a private adjudication, requiring no public filings, no legal record of the proceedings, and no explanation from the arbitrator for his or her ruling. And arbitral decisions have no bearing or preclusive effect on each other as arbitrators need not abide by the principles of *stare decisis*." (footnote omitted)).

85. *Id.*; Andrew F. Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183–84 (2012) ("The force of a clear judicial determination of liability is undeniable. Similarly situated entities assess such findings and either reconfigure their action or behavior (a deterrent response) or choose not to do so and, thereby, risk downstream liability.").

86. *See* Barnes, *supra* note 62, at 338–39. However, due to the general dearth of large class action cases that make it to trial, class actions may do little to establish guiding precedent. *See* CFPB STUDY, *supra* note 10, § 1.4.4, at 14 (noting that during two years of studying financial class actions, none went to trial).

87. *See* Myriam Gilles, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*, *in* POUND CIV. JUST. INST., FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE? 7, 17 (2015), http://www.poundinstitute.org/sites/default/files/2014PoundReport.pdf [https://perma.cc/7549-BXSV] [hereinafter Gilles, *The Demise of Deterrence*].

88. *See* Barnes, *supra* note 62, at 338.

89. *See* 9 U.S.C. § 10(a) (2012); Gilles, *The Demise of Deterrence*, *supra* note 87, at 17.

settlements, and reduced availability of credit.[90]

3. Enforcement by Public or Private Actors

Various commentators have noted the interconnectedness of public and private enforcement modes, which have developed concurrently in the United States.[91] Those who argue the sufficiency of public enforcement stress that government agencies—as opposed to private, for-profit attorneys—are best suited to determine the optimal level of enforcement in their regulatory fields.[92] Proponents of class actions note that public enforcement agencies are often underequipped to carry out the full range of enforcement actions necessary for optimal deterrence and recovery and thus argue that class actions remain an essential feature in consumer protection.[93]

From an economic standpoint, the primary concern regarding overregulation is that it may decrease the supply of goods and services available to consumers.[94] Some studies have shown that credit card companies that issue riskier loans are more likely to use arbitration clauses in their contracts.[95] If the level of private litigation increases, thereby exposing credit card companies to greater liability, they may respond by reducing the level of higher-risk credit card loans or increasing the cost of such borrowing.[96] In either case, the result would be a reduction of available credit to higher-risk borrowers and could result in higher borrowing costs across the board.[97]

Since class action plaintiffs' lawyers will initiate actions only where it will benefit them personally, the level of enforcement obtained through private class action enforcement is not tied to public welfare.[98] As a result, excessive levels of private enforcement—for instance, from frivolous or nuisance suits—could result

90. Cheltenham, *supra* note 5, at 292.

91. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 661–63 (2012) (explaining the development, scope, and limitations on the use of state attorney general *parens patriae* authority to enforce laws on behalf of the public); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1145–46 (2012) (noting that, unlike most European countries, the unique structure of regulation in the United States allows easy market entry, primarily due to ex post regulation of market participant conduct); Sternlight, *Difficult Claims*, *supra* note 44, at 123 (observing that the United States has evolved a dual model of enforcement, empowering both public and private actors to press claims against violators).

92. *See* Kaplinsky & Levin, *After* Concepcion, *supra* note 47, at 359 n.112.

93. *See* Glover, *supra* note 91, at 1155–57 (arguing that consumer protection uniquely benefits from private enforcement in light of the existing protections consumer protection agencies provide).

94. Cheltenham, *supra* note 5, at 292.

95. *Id.*

96. *Id.*

97. *Id.*; Peter B. Rutledge & Christopher R. Drahozal, *Arbitration and Consumer Credit* 22 (Univ. of Ga. Sch. of Law, Working Paper No. 80, 2012), http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1079&context=fac_wp [https://perma.cc/6MB2-UJS8].

98. *See* Johnston & Zywicki, *supra* note 39, at 13 (opining that class action lawyers occasionally bring nuisance suits to obtain outsized payments, rather than to further the cause of justice and obtain relief for true harms).

in an increased public cost of access to credit.[99] In other words, at some point, the social costs of increased private enforcement litigation may outweigh the social benefits of recovery for victims and necessary deterrence against illegal behavior.

A regime of pure public enforcement, by contrast, would tailor a level of enforcement that would result in maximum social welfare. Generally speaking, public enforcement agencies do not have a financial incentive to bring abusive or fraudulent suits that would ultimately harm the public.[100] On the contrary, such agencies have special obligations to act in the public interest.[101] If one could build a perfect system of enforcement from the ground up, entrusting the vast majority of enforcement power to public agencies would be ideal, at least in theory.[102]

However, there is a general recognition that, as our dual system of public/private enforcement has evolved, a symbiotic relationship has developed between the two enforcement bodies.[103] Consumer financial protection may benefit from private parties having increased knowledge of potential violations because of suits by public parties and vice versa.[104] Since the two modes of enforcement often overlap, it can be difficult to determine whether public or private actors are "riding the coattails" of the other.[105] Some commentators have claimed that public enforcement can sometimes alert the plaintiffs' class action bar to fertile ground for private litigation, which allows attorneys to swoop in and collect an easy payday.[106] But others have noted that private class actions can actually lead the way in ferreting out misconduct, such that public enforcement agencies may follow private suits with their own.[107]

Despite the fact that a public entity would theoretically always act in the public interest by selecting the level of enforcement most beneficial to

99. *Id.* at 55 ("In the context of consumer financial products, such [frivolous class action] lawsuits drive up the cost of doing business, and those costs are passed on to consumers in the form of higher interest rates and restricted credit availability.").

100. *See* Glover, *supra* note 91, at 1204 (noting that, if anything, regulatory agencies are most often criticized for not doing enough).

101. Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 24 (2000).

102. *See* Gilles & Friedman, *supra* note 91, at 660–75 (noting that enforcement by attorneys general could supplant enforcement traditionally accomplished through class action).

103. *See* Glover, *supra* note 91, at 1145–53.

104. *See* CFPB STUDY, *supra* note 10, § 9.2, at 4 (noting that, while there is an extensive body of work on the interaction between government and private action generally, little work has been done to illuminate that relationship in the area of consumer financial protection).

105. *Id.* at 4–5 (pointing to studies examining the public/private enforcement relationship in antitrust and securities law, but noting that these may be of little relevance in the consumer financial protection context); Erichson, *supra* note 101, at 2 (describing the common pattern of private actors riding "government coattails" in many types of litigation).

106. *See, e.g.*, Samuel Issacharoff, *Class Actions and State Authority*, 44 LOYOLA UNIV. CHI. L.J. 369, 380 n.44 (2012) (highlighting that in antitrust, private litigants sometimes lobby government agencies to bring cases, thereby benefitting from the government's discovery).

107. *See* CFPB STUDY, *supra* note 10, § 9, at 3.

consumers, it remains true in practice that the systems depend on each other.[108] The current dual system may be the product of historical accident, but both players have shaped its contours.[109] Thus, public agencies may depend on private enforcement to supplement their own enforcement actions and uncover corporate malfeasance, particularly where an agency is underfunded.[110] The determination of whether private enforcement is appropriate, then, may best be determined by the agency tasked with enforcement.[111]

Some scholars have suggested that in the wake of *Concepcion* and *Italian Colors*, the vacuum of class action enforcement should be filled by state attorneys general exercising their *parens patriae* authority.[112] Some commentators have suggested that attorneys general could increase public enforcement, then subcontract the excess workload to private class action firms.[113] Since these firms have expertise in class action discovery and litigation, the argument goes, they would provide efficient and effective service, while linked to the objectives of a public official who would initiate litigation only where it served the public interest.[114] While acknowledging that this solution is technically possible, other scholars have questioned its viability in practice.[115] Increasing public enforcement requires additional funds, which cash-strapped states may not have readily available.[116] Further, in many states, the attorney general is an elected official. Corporations may gain more control over the level of enforcement by virtue of campaign contributions and influence under this model, leading to less total enforcement, not more.[117]

In the end, the level of public enforcement entails a cost-benefit analysis.[118] Allowing additional public enforcement through private suits could increase deterrence of corporate malfeasance and supplement underfunded agency

108. *See* Glover, *supra* note 91, at 1145–53 (detailing the history of the United States' dual public/private enforcement regimen and how the two now are essentially complimentary systems of enforcement); Issacharoff, *supra* note 106, at 384–85 (discussing the interconnectedness of the two enforcement agents and some of the advantages of that relationship).

109. Glover, *supra* note 91, at 1145–53.

110. Issacharoff, *supra* note 106, at 385 (opining that, in consumer law, private enforcement overcomes some problems inherent in public enforcement, including "insufficient resources, the risk of regulatory capture, and the proclivity toward rigidity of formal regulation in markets that require innovation and speed of change").

111. *See* Glover, *supra* note 91, at 1178 (stating that while, for other reasons, the logical locus of enforcement should be the regulatory agency, private enforcement is warranted where the agency is unable to bring the proper level of enforcement).

112. *See* Gilles & Friedman, *supra* note 91, at 660; Sternlight, *Difficult Claims*, *supra* note 44, at 123–24. *Parens patriae* is latin for "parent of the country." *See Parens Patriae*, MERRIAM-WEBSTER, http://www.merriam-webster.com/legal/parens%20patriae [https://perma.cc/2J82-8QY6].

113. *See* Gilles & Friedman, *supra* note 91, at 669–70.

114. *See id.*

115. *See* Sternlight, *Difficult Claims*, *supra* note 44, at 123–24.

116. *See id.*

117. *See* Glover, *supra* note 91, at 1155–56 (opining that private enforcement remains an important counterweight to the danger that public regulatory bodies could be subject to regulatory capture by special interest groups).

118. *See* Issacharoff, *supra* note 106, at 387.

enforcement actions.[119] However, the costs of additional private enforcement could include a reduced supply of goods and services, less political control of enforcement measures, and a potential for abusive class action settlements.[120]

4. Class Arbitrations

Class arbitrations are an alternative method for resolving class disputes.[121] In practice, class arbitrations somewhat mirror class action suits, as arbitration providers have fashioned rules similar to the Federal Rules of Civil Procedure governing class actions.[122] Currently, class arbitrations remain largely unused in certain sectors, and commentators have noted that class arbitration proceedings are somewhat undeveloped.[123] But class arbitrations do retain the most utile and basic feature of resolving highly similar complaints: the ability to proceed on a class basis.[124]

Class arbitration's current informality, lack of development, and lack of meaningful judicial review—at least as currently structured under the FAA[125]—may prevent widespread acceptance in the business community.[126] Many arbitration clauses contain antiseverability clauses, such that if a court finds the class action waiver unenforceable, the rest of the mandatory arbitration clause is similarly unenforceable.[127] This could indicate that businesses are wary of resolving potentially massive class claims through arbitrations, preferring the formal nature of judicial class actions if they must resolve disputes on a class

119. *See* Glover, *supra* note 91, at 1155–58.

120. *See* Cheltenham*,* supra note 5, at 292.

121. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2887–88 (2015) (explaining that in 2003, class arbitrations gained some currency after the Supreme Court decided that the arbitrator and not the courts would decide the question of whether an arbitration contract permitted class arbitrations).

122. *See* AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS 2 (2011), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf /mda0/~edisp/adrstg_004129.pdf [https://perma.cc/T8GK-Y52Y]; JAMS, JAMS CLASS ACTION PROCEDURES 2 (2009), http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf [https://perma.cc/E8KJ-EABB]; Resnick, *supra* note 121, at 2888.

123. *See* Resnik, *supra* note 121, at 2888–89 (observing that while some market segments seemed to embrace class arbitration, others rushed to prevent being forced into class arbitration via these antiseverability clauses).

124. *See* Raviv, *supra* note 49, at 229 (arguing that class arbitration should at least be as expedient as class actions for the same type of claim).

125. *See* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008). The Court held that the statutory grounds for vacatur and modification of an arbitration award under the FAA were exclusive. *Id.*; *see* 9 U.S.C. § 10(a) (2012) (specifying particular grounds for which a court may vacate an arbitration award, including fraud, arbitrator partiality or misconduct, and where an arbitrator exceeded her power). In other words, parties may not vary the standard of judicial review of arbitration awards, even by contract. *Mattel*, 552 U.S. at 588–89.

126. *See* Eisenberg, Miller & Sherwin, *supra* note 77, at 889 (reporting that, in their empirical study sample group, each of the consumer contracts that provided for mandatory arbitration waived class-wide arbitration).

127. *See* Resnik, *supra* note 121, at 2888–89.

basis.[128] Writing for the majority in *Concepcion*, Justice Scalia echoed this sentiment, stating that "[a]rbitration is poorly suited to the higher stakes of class litigation."[129] Because of this higher level of risk coupled with a lack of error-correcting judicial review, Justice Scalia asserted that—magnifying the danger present in class action suits—"defendants [would] be pressured into settling questionable claims."[130]

Other scholars, while recognizing that class arbitrations are not ideal, nevertheless believe that they strike a sufficient middle ground between barring arbitration and barring class-wide relief.[131] And some businesses may actually prefer to resolve class claims through arbitration. In some cases, choosing class arbitration over a class action could benefit defendants by limiting discovery and lowering litigation costs.[132]

The CFPB could reasonably find that in light of the potential costs and benefits mentioned above, and considering its alternatives,[133] class arbitrations provide a workable balance between class action suits and individual arbitrations.

B. The 2015 CFPB Study

When Congress passed Dodd-Frank, it tasked the newly created CFPB with conducting a study of consumer financial arbitration agreements.[134] On December 12, 2013, the CFPB released its *Arbitration Study Preliminary Results*.[135] Therein, the CFPB published data relating to the "front end" of consumer disputes, such as mandatory arbitration clause incidence and features, the incidence and typology of consumer arbitration filings, and small claims court data.[136] Despite the CFPB cautioning readers not to interpret the preliminary report as signaling their assessment of the data,[137] commentators

128. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).

129. *See id.* (arguing that, although the small stakes in individual arbitrations are an acceptable trade-off for the risk of error and lack of appellate review, class arbitration presents potential for "devastating loss," and the risk of error becomes "unacceptable").

130. *Id.*

131. *E.g.*, Sternlight, *Will Class Action Survive?*, *supra* note 77, at 38–39. *But see* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiffs-Appellants at 2, Marriott Ownership Resorts, Inc. v. Sterman, No. 15-10627 (11th Cir. Apr. 1, 2015) ("Class arbitration is a worst-of-all-worlds Frankenstein's monster: It combines the enormous stakes, formality and expense of litigation . . . with exceedingly limited judicial review of the arbitrators' decisions.").

132. *See* Raviv, *supra* note 49, at 234.

133. *See* Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd in part sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1984) ("Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.").

134. 12 U.S.C. § 5518(a) (2012).

135. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS (Dec. 12, 2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/GD7A-7VXY] [hereinafter CFPB PRELIMINARY RESULTS].

136. *Id.* at 10.

137. *Id.* at 11.

presciently read the study as evidence of the CFPB's intention to ban or severely limit the use of mandatory arbitration clauses in consumer finance.[138]

In March 2015, the CFPB released its final, over 400-page *CFPB Study*.[139] This Part will summarize the key findings as they relate to this Comment. It will then summarize the CFPB's recently proposed regulations and will analyze whether the data justifies them.[140]

1. The Prevalence and Features of Arbitration Clauses

The CFPB found that tens of millions of financial customers are subject to mandatory arbitration clauses.[141] Mandatory arbitration clauses were much more common for larger providers of credit cards and checking accounts than for smaller providers.[142] Providers included arbitration clauses in nearly all of the contracts sampled across several markets—the prepaid card, payday loan, private student loan, and mobile wireless third-party billing markets.[143] And the vast majority of contracts included provisions waiving the consumer's right to proceed as a class.[144]

Nearly all of the contracts studied explicitly precluded class arbitration or class action suits.[145] Many also included antiseverability provisions, such that "if the no-class arbitration provisions were to be held unenforceable, the entire arbitration clause should be deemed unenforceable as well."[146] Concerning arbitration providers, the *CFPB Study* found that the American Arbitration Association (AAA) was the "predominant arbitration administrator" for the consumer financial industry.[147] Most clauses studied also contained provisions limiting the consumer's fees to initiate a filing and requiring hearing locations near the consumer's place of residence.[148]

2. Consumer Understanding of Dispute Resolution Systems

The *CFPB Study* demonstrated that the average consumer knows very little about the provisions of their consumer financial contracts.[149] Consumers were "generally unaware whether their credit card contracts include[d] arbitration clauses," and most consumers whose contracts waived rights to participate in class actions "wrongly believe[d] that they could take part in class

138. *See* Scheuneman, Lynyak & Pierce, *supra* note 44, at 33.

139. CFPB STUDY, *supra* note 10.

140. For a critique of the CFPB STUDY and the methodology it employs in various segments, see Johnston & Zywicki, *supra* note 39, at 5–6.

141. CFPB STUDY, *supra* note 10, § 1.4.1, at 9.

142. *Id.* at 9–10.

143. *Id.* at 10.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See Id.* § 1.4.2, at 11.

proceedings."[150] When asked whether they would consider bringing a formal action in response to seeing incorrectly assessed fees on their credit card bills, consumers demonstrated little proclivity to act—even if informal channels, such as contacting customer service, were fully exhausted.[151]

3. Arbitration Incidence and Outcomes

The prevalence and results of consumer financial arbitrations could reveal the relative utility of mandatory arbitration clauses to consumers and businesses. Thus, the CFPB examined arbitration data to determine how consumers and businesses used arbitration and what results they obtained. It found that "[f]rom 2010 to 2012, an average of 616 individual AAA arbitration cases were filed per year."[152] Of these, however, only an average of 411 per year were filed by consumers.[153] The rest were either filed by financial service companies against consumers or were filed jointly by both parties to the arbitration.[154] Forty percent of the arbitration filings were related to debt owed by the consumer to the company.[155]

Concerning amounts in dispute, the average debt was nearly $16,000, with a median of approximately $11,000.[156] Across all product markets studied, only about eight cases per year involved debts of $1000 or less.[157] On the other hand, when consumers affirmatively filed claims against companies, the average amount in dispute was around $27,000, with a median of about $11,500.[158] Consumers rarely filed claims totaling less than $1000—averaging only about twenty-five claims per year.[159] Consumers chose to be represented by counsel "in roughly 60% of the cases," while companies were almost always represented.[160]

Arbitrators handed down decisions in under 33% of the cases.[161] An additional 25% were settled, while the rest of the cases studied were either pending and dormant or resolved in an unknown manner.[162] For the 341 cases in which an arbitrator reached a decision, consumers obtained relief in only thirty-two cases and debt forbearance in forty-six cases (five of which also included affirmative relief).[163] For the subset of fifty-two consumer claims filed for less than $1000, arbitrators reached a decision in nineteen and granted relief to

150. *Id.*
151. *Id.*
152. *Id.* § 1.4.3, at 11.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 12.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

customers in four.[164] Total relief granted to consumers in all 341 cases totaled \$172,433, and debt forbearance totaled \$189,107.[165]

On the other side, however, corporations fared much better. Of the 244 arbitration cases in which corporations made claims or counterclaims against consumers, corporations obtained a favorable judgment in 227 cases.[166] Relief granted to corporations totaled \$2,017,486.[167]

For cases that were settled or finally decided by an arbitrator, the time from filing to resolution was within five months.[168] Where hearings were held, consumers "generally traveled" about fifteen miles.[169] Arbitration fees were also generally low compared to court filing fees. Consumers paid an average fee of \$206 and a median fee of \$125 per dispute.[170]

Between 2010 and 2012, there were only two class arbitrations filed in the product markets studied.[171] One case was pending on a motion to dismiss, and the other case file had insufficient information to determine its current status.[172] Appeals of arbitration decisions were also exceedingly rare during this time period.[173] Out of the four appeals filed by consumers, three were dismissed for the appellant's failure to pay the required fee, and one case was upheld against the consumer by a three-arbitrator panel.[174]

4. Class Litigation Incidence and Outcomes

To determine the value of class actions to financial consumers, the CFPB also studied the prevalence and results of consumer financial class litigation. From 2010 to 2012, the CFPB identified 187 putative class cases filed on behalf of consumers.[175] In other words, these 187 cases were filed in state or federal court by individuals attempting to sue on behalf of a class.[176] About 25% of these cases were "resolved through individual settlements," with another 35% resolved by plaintiff withdrawal or "dismissal for failure to prosecute or serve."[177] However, around 15% of these cases had reached final class settlement approval by August 2014, with another 2% pending approval.[178] No

---

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* (excluding sixty cases in which the company advanced fees and obtained \$2,806,662 in awards without the consumer's participation following notice by the AAA).

168. *Id.* § 1.4.3, at 13.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See id.*

174. *Id.*

175. *Id.* § 1.4.4, at 13.

176. *Id.*

177. *Id.* at 13–14. The CFPB opined that this failure of cases to proceed to trial may indicate that a non-class settlement was reached. *Id.* at 14.

178. *Id.* at 14.

class cases filed during this 2010 to 2012 period went to trial.[179]

In nearly 17% of the putative class cases filed, the company moved to compel arbitration, although the *CFPB Study* did not determine the percentage based on arbitration clauses.[180] Courts granted theses motions to compel arbitration in whole or part in 49% of the cases studied.[181] Federal class cases filed in 2010 and 2011 closed in a median of about 215 days, with transferred cases or multidistrict litigation (MDL) proceedings moving at a much slower pace: a median of 758 days for such cases filed in 2010 and 538 days for 2011.[182] State class action cases were also slower than federal cases in 2010 and 2011, with median closing times of 407 and 255 days, respectively.[183]

5. Individual Litigation Incidence and Outcomes

The CFPB also studied individual litigation proceedings initiated by financial consumers. In five of the six markets studied, consumers filed an average of just over 1150 consumer financial cases in federal court from 2010 to 2012.[184] Nearly all consumers were represented by counsel, and almost half of the individual cases resulted in an identified settlement.[185] Slightly more than 40% of the cases exhibited an "outcome that was consistent with a settlement," but which the CFPB could not conclusively deem a settlement.[186] Excluding cases that were transferred to MDL proceedings, these cases closed in a median of 127 days from time of filing.[187]

6. Small Claims Court Actions

A significant majority of arbitration clauses examined by the *CFPB Study* contained small claims court carve-outs, meaning that most consumers could litigate small claims cases against credit card companies.[188] However, the data revealed that in 2012, consumers made less than 870 small claims court credit card claims.[189] By contrast, credit card issuers were far more likely to sue consumers. In 2012 alone, credit card companies representing about 80% of the

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* § 1.4.5, at 15 (noting that the sixth market, auto purchase loans, was separately analyzed).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* § 1.4.6, at 15–16. The CFPB limited its study of small claims actions to the ten biggest credit card issuers due to the painstaking nature of collecting large volumes of small claims court data. *Id.* § 7.1, at 2, § 7.2, at 5.

189. *Id.* § 1.4.6, at 15–16. Due to uncertainty in the data, the CFPB estimated that the true number of consumers filing claims against financial corporations in small claims court was much less. *See id.*

market filed over 41,000 cases against consumers.[190]

7. Class Action Settlements

The CFPB also studied class action settlement metrics to determine their impact on consumers and providers. The *CFPB Study* revealed that 422 class action settlements were approved between 2008 and 2012—an average of just under eighty-five per year.[191] Of the cases in which the agency was able to identify or estimate class size (around 78%), the estimated class membership across all five years was 350 million people.[192] Settlements from these class actions were quite large, coming to an annual average of nearly $540 million over the five-year period.[193] This totals more than $2 billion in cash relief and more than $600 million in in-kind relief.[194] Moreover, these amounts do not include nonquantifiable relief. For example, many of the settlements included behavioral relief—agreements requiring the companies to change their business practices.[195] The value of actual cash payments to consumer settlement beneficiaries—which excluded in-kind and behavioral relief—came to $1.1 billion, which is only based on 60% of settlements from which such data could be extracted.[196]

The *CFPB Study* also noted that, in about 55% of the settlements, they were able to estimate the "number of class members who were guaranteed cash payments."[197] The estimate could be made because either the class members had submitted a claim or they were part of a class for which payments were to be made automatically.[198] Using the available data, around thirty-four million class members "had received or were scheduled to receive" payment from the settlement.[199]

Claims rates—the percentage of claims-eligible class members who received some kind of monetary distribution—could be calculated in only 105 of the 422 settled class actions.[200] The average claims rate for these cases was 21%, while the median was 8%, but the CFPB noted that the rates would likely climb over time as more people submitted claims.[201] Further, these numbers omitted automatic payments made to class members; such payments were present in 130

190. *Id.* at 16.

191. *Id.* § 1.4.7, at 16.

192. *Id.*

193. *Id.*

194. *Id.* "In-kind relief" refers to a settlement's provision of free or discounted access to a service for affected consumers. *Id.* § 8.1, at 4 n. 6.

195. *Id.* § 1.4.7, at 16.

196. *Id.* The CFPB noted that payment information—as opposed to nominal settlement amounts—is difficult to obtain because such information is not always made public. *Id.* § 8.3, at 26.

197. *Id.* § 1.4.7, at 17.

198. *Id.*

199. *Id.*

200. *Id.* Due to limitations in identifying class claimants, the CFPB noted that actual claims rates may be higher than indicated. *Id.* § 8.3, at 30.

201. *Id.* § 1.4.7, at 17.

of the 422 settlements reviewed by the study.[202]

The CFPB also gathered data on attorney's fees for all the class action settlements it studied.[203] For cases that reported cash and in-kind relief, fee rates were 21% of cash relief and 16% of cash and in-kind relief.[204] Of the cases in which a comparison of fees to actual cash relief payments was possible (251, or 60% of cases), attorney's fees constituted 24% of the total cash relief payments.[205] For class action settlements, the median time to approval of final settlement "was 560 days, and the average time was 690 days."[206]

8. The Relationship Between Public Enforcement and Consumer Class Actions

To examine connections between enforcement actions by regulatory agencies and class action suits by private parties, the *CFPB Study* analyzed data on both practices. Between 2008 and 2012, the CFPB identified 740 enforcement actions by state regulators and 410 cases by federal regulators against financial firms.[207] However, in 88% of those actions, there were no apparent overlapping class action complaints.[208] The *CFPB Study* also examined top class action firms and found that of 114 identified consumer financial class action proceedings filed during the same period, 66% did not overlap with public enforcement proceedings.[209] Significantly, the *CFPB Study* demonstrated that where public and private actions did overlap, class action suits preceded the public enforcement actions approximately 62% to 71% of the time.[210]

9. Price and Supply Effects of Arbitration Provisions

As a result of a class action antitrust settlements against a number of large credit card issuers, those companies eliminated arbitration clauses from their consumer credit card contracts.[211] Thanks to this natural experiment, the CFPB could examine the effect of the elimination of arbitration clauses on those credit card companies' prices and on their supply of credit to the market. In both cases, a difference-in-differences analysis was unable to identify any statistically significant impact.[212] Relative to other credit card providers, the numbers demonstrated that removing mandatory arbitration clauses from credit card contracts did not statistically increase the price of credit card services, nor did it

202. *See id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* § 1.4.8, at 17.
208. *Id.*
209. *Id.* at 17–18.
210. *Id.* at 18.
211. *Id.* at § 1.4.9, at 18.
212. *Id.* A difference-in-differences analysis is a type of regression analysis. *See id.* at § 10.2.1, at 9.

cause them to contract the supply of credit for consumers.[213]

C. The CFPB's Outline and Proposed Regulations

The CFPB formally proposed regulations for public comment on May 24, 2016.[214] Less than a year prior, on October 7, 2015, the CFPB released its *Outline*, where it declared its preliminary interpretation and analysis of the data presented in its *Study*. [215] The CFPB's primary contention, as expressed in the *Outline* and subsequently proposed rules, is that "a regulation that would prohibit the application of predispute arbitration agreements to class litigation in court would protect consumers, serve the public interest, and be consistent with the Study."[216] This Part will analyze the CFPB's position by examining its reasoning and highlighting the data upon which it relies.

In its *Outline* and subsequent proposed rules, the CFPB reported that the data clearly showed a need for class action lawsuits.[217] In support of this proposition, the CFPB rested on five preliminary conclusions. It first noted that "the evidence [wa]s inconclusive" as to whether individual litigation was "superior or inferior" to individual arbitration in terms of remedying financial consumer harm.[218] With respect to the data harvested by the *Study*, the CFPB was unable to determine whether individual arbitration was more or less fair or efficient than proceeding individually before a court.[219] While the CFPB noted evidence that some individual arbitrations proceeded relatively expeditiously and with modest cost to the consumer, it expressed concern that the private nature of the proceedings could give rise to institutional conflicts of interest.[220]

Second, the CFPB preliminarily concluded that "individual dispute resolution mechanisms are an insufficient means of ensuring that consumer financial protection laws and consumer financial contracts are enforced."[221] It observed that a vast majority of financial consumers had contracts containing mandatory arbitration clauses and that consumers brought few formal actions against financial service providers.[222] To explain this lack of consumer action, the CFPB flatly rejected the proposition that consumers simply did not have disputes with their financial service providers.[223] Rather, it found that consumers brought few formal actions because (1) the consumer never learned of the harm—either

213. *Id.*

214. *See* Arbitration Agreements, *supra* note 24.

215. *See* CFPB OUTLINE, *supra* note 22.

216. *Id.* at 4; *see also* Arbitration Agreements, *supra* note 24, at 32,855 (concluding that individual dispute resolution mechanisms are insufficient to ensure that consumer financial protection laws and contracts are enforced).

217. Arbitration Agreements, *supra* note 24, at 32,855; CFPB OUTLINE, *supra* note 22, at 4.

218. Arbitration Agreements, *supra* note 24, at 32,855.

219. *Id.*

220. *Id.* (referencing NAF's shutdown by the Minnesota Attorney General for such concerns).

221. *Id.*

222. *Id.* at 32,855–56 (noting the dearth of consumer actions in federal courts, small claims courts, and individual arbitrations); CFPB OUTLINE, *supra* note 22, at 3.

223. *See* CFPB OUTLINE, *supra* note 22, at 3.

because the harm was practically undetectable or because consumers lacked the legal training to realize they had been harmed, or (2) the amount in controversy was so small that the consumer did not have an adequate incentive to pursue a remedy.[224]

The CFPB acknowledged that corporations have an incentive to resolve customer disputes informally—including granting appropriate relief and reversing practices—because it preserves their customer relationships.[225] However, it asserted that these venues only provide a remedy to consumers who discover that they have been harmed, and therefore, there is no legal compulsion for corporations to change practices that harm consumers who do not raise complaints.[226] For those consumers who do file informal complaints, the CFPB observed that a provider may choose to resolve similar complaints differently and noted that some financial institutions had a history of tailoring adjustments to complaints on the basis of the complaining customer's profitability score.[227] Further, the CFPB argued that informal dispute resolution and arbitration proceedings lack publicity and therefore do not have the same deterrent effect as public class action suits.[228]

Third, the CFPB preliminarily concluded that class actions provide an effective means of remedying consumer harm and deterring illegal corporate activity.[229] In support of this conclusion, the CFPB pointed to the significant level of cash, in-kind, and behavioral relief that consumers had obtained through class action suits—benefits that would not have accrued to consumers absent a class action forum for relief.[230] It also noted that the set of consumers who benefit from class action settlements can greatly exceed the number of putative plaintiffs, as behavioral relief benefits present and future customers by eliminating illegal practices.[231] In response to commentator concerns over data showing that three-fifths of class cases filed are resolved on individual bases, the CFPB maintained that the effectiveness of class actions should be measured by the absolute scope of relief provided—not the proportion of class claims that result in consumer relief.[232]

Fourth, the CFPB concluded that companies used mandatory arbitration

224. Arbitration Agreements, *supra* note 24, at 32,856.

225. *Id.* at 32,857.

226. CFPB OUTLINE*, supra* note 22, at 14–15 (pointing to the *CFPB Study*, which found that for at least one class settlement, informal dispute resolution methods did not provide monetary relief to harmed consumers).

227. *Id.* In other words, consumers who bring in the most revenue are the most likely to receive higher adjustments upon filing an informal complaint. *Id.*

228. *See* CFPB OUTLINE, *supra* note 22, at 16 (noting that class action lawsuits "arguably affect or influence the business practices of companies more broadly" than arbitration).

229. Arbitration Agreements, *supra* note 24, at 32,858.

230. *Id.*

231. *Id.* The CFPB did not attempt to quantify the value of such behavioral changes to consumers but stated that it believed it is significant. *Id.* at 32,859.

232. *Id.*

clauses to block and prevent consumer financial class action suits.[233] It noted that arbitration agreements prohibit consumers from participating in class suits, which, when combined with clauses that preclude class arbitration, effectively bar consumers from any class proceedings.[234] Moreover, the CFPB opined that financial corporations have used mandatory arbitration clauses for the very purpose of shielding themselves from class liability.[235] The CFPB pointed to its *Study*, finding that in at least 100 examples, mandatory arbitration clauses had been used to dismiss or stay consumer financial class action suits.[236] Therefore, these mandatory arbitration clauses were used to indirectly prevent consumers from obtaining legitimate relief for illegal conduct.[237]

For consumers locked out of class proceedings, the CFPB found that very few who would have constituted the putative class actually pursued any kind of individual actions.[238] For example, only twelve of forty-six consumers filed arbitration claims after successful motions to compel arbitration in class action suits.[239] In addition, the CFPB found that mandatory arbitration agreements inhibited the filing of many more potential class action suits; evidence demonstrated that lawyers would frequently decline otherwise meritorious cases—both individual and class—when an arbitration agreement was present.[240]

Finally, the CFPB preliminarily concluded that public enforcement is not itself sufficient to enforce consumer protection laws and consumer finance contracts.[241] The CFPB noted that several federal statutes explicitly acknowledge the importance of private class action suits in consumer financial markets by including class remedies in their statutory enforcement schemes.[242]

While the CFPB recognized the role it and other regulatory agencies play in their supervisory and enforcement capacities, it found that such entities were unable to deliver the necessary level of protection to consumers.[243] For example, it noted that present consumer protection agencies have limited resources and often have other mandates to heed.[244] Therefore, the CFPB concluded that consumers were better protected—and firms better deterred from unlawful

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *See* CFPB OUTLINE, *supra* note 22, at 16 (stating that "[a]rbitration agreements can be and are used to dismiss class cases that consumers file in court" and "consumers rarely choose to file individual arbitrations instead.").

238. *See* Arbitration Agreements, *supra* note 24, at 32,860.

239. *Id.*

240. *Id.*

241. *Id.*

242. *See id.*; CFPB OUTLINE, *supra* note 22, at 15 n.46 (referencing examples such as "the Electronic Fund Transfer Act, 15 U.S.C. [§] 1693f(e); the Fair Debt Collection Practices Act, 15 U.S.C. [§] 1692k(a)(2)(B); the Truth in Lending Act (including the Consumer Leasing Act and the Fair Credit Billing Act), 15 U.S.C. [§] 1640(a)(2)(B); and the Equal Credit Opportunity Act, 15 U.S.C. [§] 1691e(b)").

243. Arbitration Agreements, *supra* note 24, at 32,861.

244. *Id.*

business practices—if consumers could proceed in class suits.[245]

Nonetheless, the CFPB acknowledged that class actions have been criticized with regard to their cost and unwieldiness, and that many of the costs of increased exposure to class actions may be passed onto consumers.[246] Still, for the reasons noted above, the CFPB stated that consumers were significantly more protected from harm by financial service providers when they were able to aggregate claims and proceed on a class basis.[247] With regard to the imperfections of class action suits, the CFPB argued that Congress, state legislatures, and the courts all have mechanisms to mitigate these flaws.[248]

The CFPB also concluded that prohibiting class action waivers in the context of arbitration agreements was "in the public interest and for the protection of consumers."[249] First, the CFPB argued that access to class action suits would enhance corporate compliance with consumer protection laws through increased deterrence and would provide more access to meaningful consumer relief.[250] The CFPB also reiterated its position that behavioral relief, though impossible to quantify, would provide significant protective value to consumers.[251] Second, the CFPB argued that enhanced deterrence through private class action enforcement was in the public interest because it would result in more stable financial markets.[252] Specifically, it reasoned that such a regime would prevent "races to the bottom" in the consumer financial market by discouraging firms from engaging in illegal but profitable practices.[253]

Along with its proposed rules, the CFPB responded to criticisms. It stated that it did not believe the expenses resulting from increased exposure to class action suits would have a noticeable impact on the supply of consumer financial products or services.[254] With respect to innovation, the CFPB argued that its proposed rules would not hinder innovation designed to benefit consumers and mitigate financial risk, but would protect consumers by deterring innovation that would further illegal practices.[255] The CFPB stated that it was not aware of any evidence suggesting that firms routinely settled class action claims for more than their expected values, and that, therefore, the concern over nonmeritorious settlements was unfounded.[256] Lastly, the CFPB argued that firms would continue to maintain informal dispute resolution mechanisms regardless of

245. CFPB OUTLINE, *supra* note 22, at 16.

246. Arbitration Agreements, *supra* note 24, at 32,861.

247. *Id.*

248. CFPB OUTLINE, *supra* note 22, at 16.

249. Arbitration Agreements, *supra* note 24, at 32,861.

250. *Id.* at 32,861–64 (noting various examples of class action exposure altering corporate behavior and increasing compliance efforts).

251. *Id.* at 32,865.

252. *Id.*

253. *Id.* at 32,865 n.424.

254. *Id.* at 32,866.

255. *Id.* at 32,866–67.

256. *Id.* at 32,867 (noting that Congress and the courts continue to calibrate class action procedures to discourage frivolous suits).

whether the CFPB's proposed rules were adopted.[257]

It is also worth noting that the CFPB did consider a rule permitting mandatory arbitration clauses to block class action suits so long as they permitted class arbitration.[258] However, since the *CFPB Study* found that class arbitrations are rarely used in the context of consumer financial dispute resolution and that most consumer financial contracts contain arbitration clauses that prevent a court from mandating class arbitration, the CFPB concluded that companies would choose not to resolve such disputes in class arbitration.[259] The CFPB noted that while its proposed regulation would prevent arbitration clauses from denying consumers access to class action suits, it would not prohibit a corporation and consumers from agreeing to class arbitration.[260]

III. DISCUSSION

This Discussion will prospectively examine whether the CFPB's proposed rules, in light of its interpretation of relevant data, would hold up to judicial scrutiny. Many commentators have opined that, based on the current data, no substantive limitations on mandatory arbitration clauses are legally justifiable.[261] Others, including the CFPB, view the data as justifying a limit or ban on arbitration clauses that prevent class action suits in consumer financial contracts.[262]

This Section analyzes the CFPB's proposed regulations alongside the *Study*'s findings to examine whether banning class action waivers is "in the public interest and for the protection of consumers."[263] First, it argues that courts should construe the CFPB's authorizing statute as a "contrary congressional command," such that it bypasses the preemptive reach of the FAA.[264] Second, this Section argues that a ban on arbitration agreements that prevents customers from bringing any class proceedings is justified under the statutory standard. The *CFPB Study* has shown—albeit imperfectly—that consumers benefit broadly from the availability of private enforcement through class actions.[265] Finally, this Section argues that the *CFPB Study* does not support a conclusion that access to class suits—as opposed to class arbitrations—is required for adequate consumer protection.[266] Class arbitrations may prove to be an undesirable or imperfect

257. *Id.* at 32,867–68.

258. *See* CFPB OUTLINE, *supra* note 22, at 17–18.

259. *See id.* (reporting that some industry groups expressly preferred class litigation to class arbitration).

260. *Id.* at 18.

261. *See, e.g.*, Kaplinsky & Levin, *Numbers Game*, *supra* note 60, at 2–5; Rutledge & Drahozal, *Contract and Choice*, *supra* note 14, at 8, 57–60; Calhoun & Ifra, *supra* note 14.

262. *See, e.g.*, CFPB OUTLINE, *supra* note 22, at 4; Turnbull, *supra* note 43, at 57–58.

263. 12 U.S.C. § 5518(b) (2012). See *supra* notes 18–22 and accompanying text for a discussion of the statutory standards for imposing substantive regulations.

264. *See infra* Part III.A.

265. *See infra* Part III.B.

266. *See infra* Part III.C.

substitute for class action suits in the future, but the present data only demonstrates the need for consumers to proceed in class form.

A. *The FAA Does Not Impose a Higher Level of Scrutiny on CFPB Regulations Issued Pursuant to § 5518(b)*

As noted in Part II.A, the Supreme Court has in recent decades interpreted the FAA as embodying a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[267] Extending this construction, the Court has interpreted the FAA to preempt state laws that would invalidate class action waivers.[268] The Court has even held that a federal antitrust statute did not demonstrate a "contrary congressional command" sufficient to displace a mandatory arbitration clause, despite the necessity of class actions to effectively vindicate the consumer rights created by the statute.[269]

However, here there is abundant reason to believe that Congress has issued such a "contrary congressional command." Through § 5518(b), Congress expressly conferred authority on the CFPB to ban such arbitration clauses.[270] Short of a direct statutory ban on arbitration clauses or explicit language indicating that the FAA shall not apply, § 5518(b) is the strongest possible evidence that Congress intended to circumvent the strictures of the FAA. Moreover, in passing Dodd-Frank, Congress also banned arbitration clauses in mortgage contracts.[271] Given the similarity of consumer interests in mortgage and other financial contracts, it is reasonable to assume that Dodd-Frank expressed a congressional intent to bypass the FAA as part of its overall consumer protection scheme. In light of these facts, it is unsurprising that the Supreme Court itself used § 5518(b) as an example of a statute by which Congress may have intended to circumvent the FAA.[272] Accordingly, reviewing courts should hold that § 5518(b) evidences a clear "contrary congressional command."

Further, reviewing courts should not consider the FAA's "liberal federal policy favoring arbitration agreements"[273] when interpreting the requirement that CFPB regulations be "in the public interest and for the protection of consumers."[274] Since Congress has clearly placed CFPB regulations outside the scope of the FAA, the policy concerns applicable in FAA cases should not spill into a court's construction of § 5518(b).[275] Despite the Supreme Court's expressed view that arbitration is

267. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

268. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011).

269. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

270. 12 U.S.C. § 5518(b) (2012).

271. *See* 15 U.S.C. § 1639c(e)(1) (2012).

272. *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 672 (2012).

273. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

274. 12 U.S.C. § 5518(b).

275. *But see* Johnston & Zywicki, *supra* note 39, at 9 ("Before regulation overrides such a well-

efficient, swift, and generally superior to lengthy class proceedings,[276] courts should not displace the considered judgment of the CFPB where Congress has specifically vested the CFPB with authority. In accord with traditional *Chevron* deference for administrative agency interpretations of governing statutes,[277] courts should afford the CFPB wide latitude in determining whether regulations limiting mandatory arbitration clauses are "in the public interest and for the protection of consumers."[278] As written, § 5518(b) contains the only statutory standard by which promulgated regulations should be assessed, and the FAA's policy should not affect construction of those standards.[279]

B. The CFPB's Proposed Ban on Class Proceeding Waivers Is Justified by the Study

As explained in Parts II.A.2–3, the availability of class action suits can engender both costs and benefits to consumers. This Comment argues that the benefits outweigh the costs. On one hand, access to class action suits may deter corporate misconduct, increase efficiency by aggregating similar claims, and provide a remedy for low-value, high-volume injuries.[280] Further, if the CFPB is not able to pursue an optimal amount of enforcement due to limited resources, private enforcement through class actions could provide a valuable and necessary supplement.[281]

On the other hand, class action suits can primarily benefit class action lawyers instead of injured parties, reduce consumer welfare through excessive enforcement and overdeterrence, and create a danger of nuisance suits where nonmeritorious claims are settled to avoid the high costs of litigation.[282] Additionally, there is a concern that increased corporate exposure to class action liability will result in increased prices of consumer financial services and a decreased supply of credit to high-risk borrowers—ultimately harming consumers on the whole.[283]

It is also worth noting that the language of the statutory standard, though

established policy, substantial and rigorous evidence must show that arbitration is significantly worse for consumers than are the existing institutional alternatives.").

276. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348–49 (2011).

277. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984) (holding that where a statute is ambiguous, courts should defer to an agency's interpretation of that statute so long as the interpretation is reasonable).

278. 12 U.S.C. § 5518(b).

279. *See id.*

280. See *supra* Part II.A.2 for the arguments in favor of permitting class actions.

281. See *supra* Part II.A.3 for a discussion of the interconnectedness of public and private enforcement mechanisms.

282. See *supra* Part II.A.2 for a discussion of the dangers inherent in permitting class actions.

283. *See* Karen Webster, *Does The CFPB Really Help Consumers?*, PYMNTS.COM (Oct. 12, 2015), http://www.pymnts.com/in-depth/2015/does-the-cfpb-really-help-consumers/ [https://perma.cc/DVC7-5ATD] (opining that the CFPB's enforcement actions thus far have produced a range of harmful unintended consequences for consumers and that meddling with arbitration clauses could produce more of the same).

vague, does seem to place the burden of proof on the CFPB. That is, the statute authorizes the CFPB to prohibit such mandatory arbitration clauses *if* the CFPB finds that such a prohibition would benefit consumers.[284] While the CFPB should be afforded deference given its expertise in consumer financial matters, a reviewing court would likely view the statute as requiring an affirmative showing of public interest before any limitations may be imposed upon the consumer financial industry.

Accordingly, since § 5518(b) conditions the CFPB's regulatory authority on such a finding, it is imperative to the survival of its rules that the *CFPB Study*'s data demonstrate that the costs of class action suits do not outweigh the benefits of restricting mandatory arbitration clauses. Taking these costs and benefits into account, the *CFPB Study* data show that the net benefits of class action suits to financial consumers would outweigh the net costs and are thus legally justified.

1. The Costs of Access to Consumer Financial Class Actions

So, how do the *CFPB Study*'s findings fare more generally against the backdrop of class action criticisms? Contrary to the criticism that class action lawsuits primarily benefit attorneys, not consumers, the *CFPB Study* data indicate that only a modest amount is being paid in attorney's fees.[285] Of quantifiable recovery amounts, attorney's fees amounted to a maximum of 24% of recovery totals and were sometimes as low as 16% when in-kind relief was taken into consideration.[286] But even if 24% of settlement awards were being paid to lawyers, the vast majority (76%) of cash relief would be flowing to consumers.[287] Moreover, the CFPB correctly noted that 76% underestimated the true percentage of relief that consumers actually received in class action settlements.[288] These calculations necessarily exclude nonquantifiable behavioral relief, such as settlement terms dictating new business practices.[289] Since the administrative cost of class actions (as measured by attorney's fees) is relatively modest, the return on investment, in terms of both recovery for specific consumers and increased overall consumer protection, is positive. Thus, the availability of class actions in the consumer financial context does not seem to breed a litigation environment where attorneys—rather than their consumer clients—are the primary beneficiaries.[290]

Another important concern is whether class action settlements represent

284. 12 U.S.C. § 5518(b).

285. See *supra* Part II.B.7 for a discussion of the *CFPB Study*'s analysis of attorney's fees awarded in class action settlements.

286. CFPB STUDY, *supra* note 10, § 1.4.7, at 17.

287. *See id.*

288. *See id.* § 1.4.7, at 16 (noting that relief estimates "represent a floor because a number of settlements also required companies to change business practices").

289. *Id.*

290. *See id*. § 1.4.7, at 16–17. Of course, eliminating class action waivers could alter these attorney's fee statistics. As the *Study* noted, tens of millions of financial consumers are currently subject to class action waivers. *Id.* § 1.4.1, at 9–10. Similar percentages may not result for the new set of class actions initiated in areas where they were previously barred.

just resolutions of meritorious claims or in terrorem settlements.[291] Scholars have often expressed concern that lawyers initiate spurious class action suits where it would be cheaper for a corporation to settle than to defend against the nuisance claim—effectively gaming the system.[292] Here, the *CFPB Study* makes no attempt to analyze the settlement outcomes obtained in individual class actions in relation to the merits of the underlying claims. Despite the importance of the issue, it is difficult (if not impossible) to empirically research.[293] Considering some of the massive settlement amounts listed in the *CFPB Study*,[294] corporate settlements based upon specious claims seem unlikely.[295] The *Study*'s finding that 10% of class cases were dismissed either on a motion for summary judgment or a motion to dismiss further supports this hypothesis[296] and indicates that corporations can and do fight off nonmeritorious claims.[297] Additionally, given the enormous up-front investment that plaintiffs' firms must bear to properly litigate class claims, it is unlikely that firms will initiate nuisance suits.[298]

The criticism of class suits that warrants the most serious attention is the possibility that potentially meritorious claims combined with potentially high jury verdicts can unduly pressure corporations to settle.[299] However, the actual incidence of this dynamic would be incredibly difficult to empirically study, and the existence of an unproven potentiality should not weigh against the CFPB's proposed ban. Moreover, assuming the parties have sufficient information to analyze the merits of a case, any settlement amount would reflect the likelihood of a successful suit and the potential range of verdicts. While perhaps imperfect, this dynamic is commonplace in litigation and certainly does not support a conclusion that class action suits are unfair or not in the public interest.

Professors Johnston and Zywicki maintain that individual arbitrations, when properly assessed, provide a high level of value for consumers. They argue that the *CFPB Study* invites an apples-to-oranges comparison of class action

291. *See* Johnston & Zywicki, *supra* note 39, at 6 (discussing in terrorem settlements, or "deal[s] struck by defendants to avoid massive discovery costs threatened in lawsuits of questionable substantive merit").

292. *See id.*

293. *See* McMillian, *supra* note 57, at 222, 233–248 (noting the lack of empirical evidence of the prevalence of frivolous suits, and exploring the difficulties inherent in constructing a study that would be able to identify such suits).

294. *See* CFPB STUDY, *supra* note 10, § 1.4.7, at 16 (finding 422 class actions settlements resulting in $2.6 billion in relief).

295. *See* McMillian, *supra* note 59, at 252 ("Companies are not in the habit of willingly turning over millions of dollars just because somebody sues them.").

296. CFPB STUDY, *supra* note 10, § 6.6.1, at 38.

297. The fact that 24.4% and 36.7% of class cases resulted in either individual settlements or potential nonclass settlements (typically by a plaintiff's claim withdrawal) may also indicate that corporations are successful in their attempts to eliminate nonmeritorious class claims. *Id.* at 37.

298. *See* McMillian, *supra* note 57, at 251 (arguing that willingness to commit to class cases with high investment costs "tends to demonstrate a lack of nuisance intent").

299. *See id.* at 252–53.

settlements to arbitration *judgments*.[300] They assert that since the CFPB did not have access to arbitral settlement data, it should have warned that a proper comparison could not be drawn.[301] Professors Johnston and Zywicki also note that, for individual claims, consumers obtained comparable or slightly better results in arbitration than litigation.[302] Both of these observations are correct, but are minimally significant in light of the number of claimants utilizing individual litigation and arbitration. The CFPB obtained raw numbers on the amount of arbitrations initiated by consumers from 2010 to 2012 that showed that consumers only filed an average of 411 individual AAA cases per year in the six financial markets studied.[303] In individual litigation during the same period, the data showed that only 1150 customers filed consumer financial cases in federal court.[304] Therefore, consumer use of individual litigation and arbitration against financial corporations is practically nonexistent when compared to the 41,000 claims credit card companies filed against consumers in small claims court during 2012 alone,[305] or the thirty-four million class members who received actual cash relief during a four-year period.[306]

With regard to the argument that consumers benefit from the rapidity and informality of arbitration, there is evidence from the *CFPB Study* that individual arbitrations are, unsurprisingly, faster than class action litigation. Arbitration cases that were settled or finally decided by an arbiter took around five months.[307] By contrast, federal class action cases (not transferred or filed in multidistrict proceedings) closed in a median of just over 200 days.[308] Class actions filed in state court in 2010 and 2011 closed in a median of 407 and 255 days, respectively.[309] So, although the *CFPB Study* does show that arbitration proceedings are generally faster than class proceedings, the difference is not extreme. Further, as noted above, the number of claimants who benefit from class action suits massively outpaces the handful of financial consumers who file claims in arbitration.[310] Thus, in terms of aggregate benefit, consumers seem to accrue far greater utility from class actions than arbitration, despite the slower pace of litigation.

Finally, the concern that suppliers would increase the cost or reduce the supply of credit to high-risk borrowers in response to exposure to class actions has not panned out. Thanks to a natural experiment, the *CFPB Study* found that

300. Johnston & Zywicki, *supra* note 39, at 6.

301. *Id.*

302. *Id.* at 26–27.

303. CFPB STUDY, *supra* note 10, § 1.4.3, at 11.

304. *Id.* § 1.4.5, at 15.

305. *Id.* § 1.4.6., at 15–16.

306. *Id.* § 1.4.7, at 17.

307. *Id.* § 1.4.3, at 13.

308. *Id.* § 1.4.4, at 14.

309. *Id.*

310. *See id.* § 1.4.7, at 17 (finding that, over four years, approximately thirty-four million people received cash from class action lawsuits); *id.* § 5.5.1, at 19 (finding only 1847 consumer arbitration disputes over two years).

the cost and amount of credit supplied to consumers did not statistically vary because of a company's potential exposure to class action suits.[311] For the credit card companies that agreed to remove mandatory arbitration clauses from their contracts, no statistical evidence of increased prices or reductions in credit resulted.[312] While the *CFPB Study* appropriately noted the difficulty of extracting concrete causal conclusions from its statistics, this was nonetheless an important finding, demonstrating that increased exposure to class actions will not necessarily reduce consumer credit availability or increase the cost of financial services.[313] Thus, while the concern that increased corporate exposure to class liability will adversely affect consumer access to credit may be theoretically plausible, the available evidence suggests that permitting class actions will not result in diminished consumer access to credit or increased costs of borrowing.

2. The Benefits to Consumers from the Availability of Class Action Suits

The *CFPB Study* also demonstrated that consumers receive significant benefits from the availability of consumer financial class actions. First, the CFPB opined that enforcement agencies (including the CFPB itself) are underfunded and therefore unable to provide the level of enforcement needed for effective deterrence.[314] Beyond merely supplying a remedy for injuries, enforcement channels—such as class action suits—protect consumers by deterring corporate misconduct.[315] Since the CFPB, as the regulator, is in the best position to understand the field, including the appropriate level of enforcement, its opinion should be entitled to deference and should factor heavily into an analysis of its proposed regulations.

In addition, the amount of recovery that consumers receive from private class actions provides them with massive cash benefits. Despite somewhat low claims rates in many class action settlements, during the five years of the *CFPB Study*, consumers received actual payments of $1.1 billion—which again excluded the value of behavioral relief.[316] These benefits accrued to some thirty-four million class members, again in sharp contrast with the handful of individual arbitration and litigation beneficiaries.[317]

Assuming that most class claims are legitimate—a reasonable assumption based on the preceding Part's analysis of alleged nuisance class suits—the CFPB's concern that low-value, high-volume wrongs will otherwise go unnoticed and unremedied is substantiated by the data.[318] Given the miniscule number of

311. *Id.* § 1.4.9, at 18.

312. *Id.* §§ 10.1–10.4, at 6–19.

313. For an argument that *CFPB Study* data offers no support for the conclusion that a ban on class action waivers will not affect the cost and availability of credit, see Johnston & Zywicki, *supra* note 39, at 34–35.

314. *See* Arbitration Agreements, *supra* note 24, at 32,861.

315. *Id.*

316. *See* CFPB STUDY, *supra* note 10, § 1.4.7, at 16.

317. *See id.* at 17.

318. See *supra* Part II.A.2 for the arguments in favor of permitting class actions in the consumer

individual claimants compared to the thirty-four million class members, it can be fairly inferred that consumers are generally not discovering low-value claims.[319] Again, this assertion rests on the premise that the class action settlements studied are fair rather than extortionate. But even if critics were to point out the small per-consumer payouts actually realized in most class action settlements, a finding of small recoveries actually supports the CFPB's assertion of a need for such a class-based remedy. Such a recovery may be of small value to individual consumers, but the aggregate cost to a financial supplier is an effective deterrent against low-value, high-volume injuries—for which there would likely by no remedy in the absence of class claims.

Therefore, as the *CFPB Study* demonstrates, consumers greatly benefit from the ability to pursue class action suits.[320] At best, the costs of class actions remain theoretical or empirically unproven, while the *CFPB Study* has demonstrated concrete evidence of consumer benefits.[321] These results amply support the CFPB's contention that consumers will benefit from the availability of class actions, and thus satisfy the statutory standard of § 5518(b).[322]

C. The CFPB's Position on Class Arbitration Is Not Justified by the Study

As discussed briefly in Part III.B.2, the language of the CFPB's authorizing statute imposes a burden of proof on the agency to justify its rules. The CFPB relies on tangential and anecdotal evidence to justify its requirement that mandatory arbitration clauses permit class action *suits*—as opposed to class *arbitrations*.[323] Because neither the data nor other evidence supports this regulatory requirement, it will not likely withstand judicial scrutiny.

The two rationales proffered by the CFPB in its *Outline*, which attempt to justify its stance, are that (1) class arbitrations are rarely used in consumer financial dispute resolution, and (2) there is evidence that companies would prefer to litigate class action disputes in court rather than class arbitration.[324] However, neither observation justifies the CFPB's position that mandatory arbitration clauses must permit class action suits—as opposed to class arbitrations.

---

context.

319. Alternatively, it could be inferred that consumers who discover low-value wrongs simply do not have the economic incentive to initiate an individual action.

320. *See generally* CFPB STUDY, *supra* note 10, § 8.1, at 3–5.

321. *Id.*

322. *See id.* § 1.4.7, at 16–17; 12 U.S.C. § 5518(b) (2012).

323. *See* CFPB OUTLINE, *supra* note 22, at 17–19. While the CFPB discussed (and rejected) permitting consumer financial corporations to bar class suits while permitting class arbitrations in its *Outline*, it did not explicitly discuss its rational for rejecting this approach in its published proposed rules. However, the CFPB does note that its proposed rules do not foreclose the opportunity for consumers to pursue class arbitration, but they do not permit a corporation to force a consumer to choose class arbitrations over class suits. Arbitration Agreements, *supra* note 24, at 32,886.

324. *See* CFPB OUTLINE, *supra* note 22, at 17–19; Arbitration Agreements, *supra* note 24, at 32,839, 32,860 (noting industry criticism of class arbitration and the relatively small number of consumer financial class arbitrations that have been filed).

Class arbitrations are a viable option for several reasons. First, class arbitrations have the essential feature missing from individual arbitrations—the ability to aggregate claims and proceed as a class.[325] Thus, nearly all of the benefits that the CFPB correctly assigns to class action suits also fit class arbitrations. Low-value, high-volume wrongs could be addressed en masse and resolved efficiently, relative to individual actions. Corporate misconduct would be adequately deterred because of the possibility of a large, successful class arbitration claim.[326] Public enforcement could be similarly buttressed by private enforcement regardless of whether the enforcement occurs in court or by arbitration. And there is no evidence that class arbitrations would result in diminished consumer recovery vis-à-vis class action suits.[327]

Second, the fact that class arbitrations are not widely used could easily be the result of their relatively new arrival to the dispute resolution scene.[328] Even if many corporations would prefer class litigation to class arbitration, there may be a small number of consumer financial suppliers with the opposite preference.[329] Further, the fact that a majority of financial suppliers would prefer to litigate class claims in court has nothing to do with whether permitting companies to bar class actions in lieu of class arbitrations is in the public interest.[330] Such a determination should be made on the merits of class arbitration under the statutory standard, not via speculation about company preference.

Accordingly, the CFPB should—at least until further evidence is presented—only prevent corporations from denying financial consumers the ability to proceed in any class form. Doing so would allow the market to develop class arbitration as a viable alternative to class litigation and would be consistent with the statutory mandate. While it is understandable that the CFPB would be wary of such a new and unused class resolution device, the CFPB's concerns do not constitute the type of evidence that § 5518(b) requires to impose limitations on arbitration clauses.[331] Therefore, the CFPB's proposed rule, that mandatory arbitration clauses must permit class action *suits*, is not legally justified.

IV. CONCLUSION

The CFPB's proposed rules are largely consistent with and justified by the data presented in the *CFPB Study*. Although it is not definitive proof, the *Study* amply supports the CFPB's contention that consumers will benefit from regulations barring class waivers in mandatory arbitration clauses.[332] As currently structured, the consumer protection field is more robust with the

325. *See* CFPB OUTLINE, *supra* note 22, at 14.

326. *See* CFPB STUDY*, supra* note 10, § 1.4.7, at 16–17.

327. *See id.* at 17–18.

328. *See* Resnik, *supra* note 121, at 2887–89.

329. See *supra* notes 125–132 and accompanying text for why many view class arbitration (as it is currently structured under the FAA) as an inadequate device for resolving class claims.

330. *See* Eisenberg, Miller & Sherwin, *supra* note 77, at 889.

331. *See* CFPB OUTLINE, *supra* note 22, at 17–18.

332. *See* CFPB STUDY, *supra* note 10, § 8.1, at 3–5.

availability of class proceedings, and the attendant costs appear relatively minimal. However, the *Study* does not support the CFPB's proposed regulation where it would require financial corporations to permit class action suits instead of only class arbitrations. As long as consumers can proceed as a class in arbitration, they will likely receive all the benefits of class action suits and therefore will be adequately protected. Since the available data only supports a narrower restriction of arbitration agreements, only a ban on waivers of all class proceedings is warranted.