The Leadership Conference
on Civil and Human Rights

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Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
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Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States, we write to express our strong support for the Consumer Financial Protection Bureau (CFPB)'s proposed rule to restrict the use of forced arbitration in consumer finance contracts. As it moves towards a final rule, we urge the CFPB to consider the civil rights implications of mandatory arbitration, including whether the increasing use of these clauses affects the ability of victims of discriminatory lending practices to seek redress. We offer three points for your consideration, addressing: (1) the critical role private class actions play in protecting civil rights; (2) the inadequacy of individual private arbitration in vindicating rights; and (3) the role that private enforcement plays in supplementing public enforcement.

I. Private class actions are critical to protect civil rights in the financial sphere.

In its comprehensive arbitration study, pursuant to Section 1028(a) of the Dodd-Frank Act**,** the CFPB found that mandatory arbitration clauses are very common in consumer contracts for credit cards, checking accounts, and other financial services.[i] Particularly troubling is its finding that almost all such clauses prohibit a consumer from banding together with others in class action litigation or arbitration. The prevalence of these class actions bans suggests that consumer financial services is approaching a norm in which victims of discriminatory lending will be unable to effectively pursue civil rights claims through class litigation.

Private class actions have been and continue to be critical to protect civil rights in the financial sphere. In situations where individuals cannot pursue claims on their own, whether because of lack of timely notice of discrimination, insufficient resources, low individual damages, or fear of retaliation, the class action device provides a vehicle for relief. In cases where an individual victim's damages are relatively low, it would not be economical for an attorney to take the case on an individual basis. The class action provides the solution to that problem.

Class actions are generally brought to allege widespread, systemic violations. Importantly, civil rights consumer class actions provide relief beyond the named plaintiff by remedying and deterring civil rights violations and systemic discrimination. Moreover, there is a public value in bringing discrimination into the light of day through consumer civil rights class actions. "[C]lass actions alert potential plaintiffs who otherwise may never realize that the unfair outcomes they experienced were due to a violation of civil rights statutes or other laws, much less that these outcomes were part of a broader pattern including similar infractions of the rights of others."[ii]

There are numerous examples of important consumer benefits achieved by civil rights class actions. For example, class actions helped expose and remedy "redlining" by businesses that refuse to provide loans within minority neighborhoods,[iii] deceptive practices by for-profit schools targeting African-American and low-income students for enrollment,[iv] and discriminatory policies and practices in home financing.[v]

Consumer civil rights class actions have proved especially valuable in the areas of auto lending and payday loans. Class actions exposed financial arrangements between vehicle financing companies and car dealers that resulted in systematically higher costs for financing for African-American and Hispanic purchasers, began to hold lenders accountable, and provided compensation for some of those harmed.[vi] Spurred in part by these private class actions, federal officials then took action. The Department of Justice (DOJ) and the CFPB reached large settlements with auto lenders last year and provided guidance on fair lending for the benefit of future car buyers.[vii] As the CFPB is well aware, concerns surround the payday loan industry regarding issues of usurious interest rates, unlawful debt collection practices, and high and hidden fees. Evidence suggests that minorities are disproportionately hurt by abusive practices in the payday loan industry.[viii] A series of class actions provided relief for thousands of people in North Carolina who were charged interest by payday lenders far above what was legally allowed in that state and spurred state officials to intervene.[ix]

The systematic harm of discriminatory or illegal lending affecting large groups of people can only be combatted by class actions. Indeed, the Supreme Court has long recognized that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."[x] Class actions offer the opportunity to achieve broad, systemic changes to a bank or industry's discriminatory policies and practices through injunctive relief.

II. Individual private arbitration is a poor forum in which to vindicate civil rights claims.

In finalizing the rule, we encourage the CFPB to consider specifically how civil rights cases fare in arbitration and litigation. Individual private arbitration is a poor forum in which to vindicate civil rights claims, especially because victims of discriminatory lending often do not know they have been harmed. Individuals who suspect they have been discriminated against may not know the amount of damages they have suffered and may be discouraged from investing the time and resources to pursue individual claims in arbitration.[xi]

In addition, bringing a fair lending or Equal Credit Opportunity Act (ECOA) claim often requires statistical analysis of a large amount of loans or financial data. Courts have noted that "[f]ederal policy

favors broad discovery in civil rights actions."[xii] The discovery process, which serves an important role in many types of civil litigation, is especially vital in civil rights claims. At the start of litigation, plaintiffs are typically not in possession of the information needed to fully substantiate their allegations. Most, if not all, of the pertinent information is within the control of the defendant financial institution. This "information asymmetry" between civil rights plaintiffs and defendants make broad discovery essential for vindicating a claim. In order for plaintiffs to prove a pervasive pattern and practice of discrimination, they must have access to records, documents, and statistics within the control of the lender.

Arbitration does not allow for broad discovery, especially in individual cases. While defendant institutions often tout limited discovery allowed in private arbitration as a benefit,[xiii] civil rights claimants recognize the danger of this approach.[xiv] Limited discovery presents a barrier for civil rights plaintiffs to have access to the very information that will allow them to vindicate their claims. Moreover, statistical analysis is often expensive. In private individual arbitration, the claimant must shoulder all of the cost (in contrast to spreading the costs over a class).

III. Public enforcement is not enough; civil rights class actions are a necessary supplement to public enforcement.

Lastly, we urge the CFPB to consider that the nation's fair lending laws themselves assume vigorous private enforcement and to consider the perspectives of civil rights litigators, both private and public. Private class actions are a necessary supplement to public enforcement in the areas of fair lending and equal credit. This was the view of Congress in passing the nation's fair lending laws. The Fair Housing Act was originally designed to be enforced primarily by private plaintiffs.[xv] The legislation history for ECOA similarly shows clear intent.[xvi]

Allowing private financial institutions to impose ubiquitous mandatory arbitration clauses with class action bans would effectively allow them to repeal the private enforcement right Congress intended, leaving limited public enforcement. This would be an unacceptable and perilous result.

Not only did Congress intend there to be private enforcement, but resource limitations on public offices make private enforcement necessary. Government regulators lack the resources to pursue the vast majority of cases brought to them. For example, fair lending violations have been underpoliced, despite strong evidence of ongoing discrimination in access to credit, especially in recent years.[xvii] From 2001 to 2009, federal banking regulators referred only 41 cases alleging a pattern and practice of race or national origin discrimination in lending to DOJ, and none of the referrals was from the Office of the Comptroller of the Currency (OCC), which supervises national banks.[xviii]

Private class actions also serve an important role in exposing wrongdoing and spurring public enforcement efforts. For example, private class actions exposed widespread racial discrimination in the pricing of burial insurance policies, and led public actors to investigate. Ultimately, African-American customers received millions of dollars in restitution and the insurance companies agreed to equalized pricing of policies.[xix]

The Leadership Conference

IV. Conclusion

In sum, the CFPB is to be applauded for the substantive work of the Section 1028 Arbitration Study, and for proposing a rule to restrict the use of mandatory arbitration based on the study's overwhelming evidence that this practice harms consumers. As the CFPB finalizes the rule, we urge a special focus on the impact of mandatory arbitration clauses on the ability of individuals to vindicate their rights to a financial marketplace free of discrimination. Please contact Lisa Bornstein, Legal Director and Senior Legal Advisor, at bornstein@civilrights.org or 202-466-3311 with any questions regarding these comments.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

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[i] Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[ii] Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents, *AT&T Mobility LLC v. Concepcion*, No. 09-893, 2010 WL 3934619, at *16 (Oct. 6, 2010) (citations omitted).

[iii] *See, e.g., Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 325-28 (N.D. Ill. 1995).

[iv] *See, e.g., Mary Morgan et al., v. Richmond School of Health and Technology, Inc*; Case No 3:12-cv-00373-JAG, Dkt #78-1 (D.D.C. July 25, 2013) (alleging violations of the Equal Credit Opportunity Act, Title VI of the Civil Rights Act of 1964, the Virginia Consumer Protection Act and other state law claims after some students were told they would become eligible for a community home health license, only to learn that there is no such license in the state). The for-profit college agreed to a $5 million settlement, which also included significant injunctive relief for the benefit of future students. *See also* discussion of case at http://www.relmanlaw.com/civil-rights-litigation/cases/RSHTsettlement.php.

[v] *See, e.g., Suyapa Allen, et al. v. Decision One Mortgage, et al*; Case No 1:07-CV-11669-GAO, Dkt. #87 (D. Mass. May 13, 2010) (alleging that Decision One Mortgage Company, HSBC Finance, and other HSBC companies violated the Federal Fair Housing Act, the Civil Rights Act, and the Equal Credit Opportunity Act by discriminating African-American and Hispanic homeowners in their home financing policies and practices); *Ramirez v. Greenpoint Mortgage Funding, Inc.*, No. 3:08-cv-369, 2010 WL 2867068, at *1 (N.D. Cal. July 20, 2010) (alleging that mortgage lender GreenPoint violated the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA) "by giving its authorized brokers discretion to mark up the price of wholesale mortgage loans, a policy that led minority borrowers to be charged disproportionately high rates compared to similarly situated whites").

[vi] *See, e.g., Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330 (S.D.N.Y. June 5, 2006) (approving class settlement); *Jones v. Ford Motor Credit Co.*, No. 1:00-cv-8330, 2002 WL 88431 (S.D.N.Y. Jan. 22, 2002) (denying company's motion to dismiss); *Smith v. Daimler-Chrysler Servs. N. Am., LLC*, No. 2:00-6003, 2005 WL 2739213 (D.N.J. Oct. 24, 2005) (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, No. 3:98-cv-211 (M.D. Tenn.

The Leadership Conference

Mar. 29, 2004) (approving class settlement); *Coleman v. Gen. Motors Acceptance Corp.*, 220 F.R.D. 64 (M.D. Tenn. 2004) (certifying nationwide class action); *Thompson v. WFS Financial.*, No. 3-02-0570 (M.D. Tenn.); *Pakeman v. American Honda Finance Corporation*, No. 3-02-0490 (M.D. Tenn.); *Herra v. Toyota Motor Credit Corporation*, No. CGC 03-419 230 (San Francisco Supr. Ct.); Kenneth J. Rojc & Sara B. Robertson, *Dealer Rate Participation Class Action Settlements: Impact on Automotive Financing*, 61 Bus. Law. 819, 820-26 (2006) (describing settlements).

[vii] Justice Department and Consumer Financial Protection Bureau Reach $98 Million Settlement to Resolve Allegations of Auto Lending Discrimination by Ally, Dec. 20, 2103, http://www.justice.gov/opa/pr/2013/December/13-crt-1349.html; CFPB to Hold Auto Lenders Accountable for Illegal Discriminatory Markup, Mar. 21, 2013, http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-to-hold-auto-lenders-accountable-for-illegal-discriminatory-markup/.

[viii] *See, e.g.*, Wei Li et al., Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California, (Center for Responsible Lending 2009), http:// www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf (noting that African Americans and Latinos make up a disproportionate share of payday loan borrowers).

[ix] Emily Bazelon, *How Payday Lenders Prey Upon the Poor — and the Courts Don't Help*, The New York Times, April 18, 2014, http://www.nytimes.com/2014/04/20/magazine/how-payday-lenders-prey-upon-the-poor-and-the-courts-dont-help.html.

[x] *E. Tex. Motor Freight Motor Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977).

[xi] Civil rights claims fit sqaurely within multiple categories of "procedurally difficult" claims that are unsuited for arbitration, as outlined by Professor Jean Stearnlight's research. See Comments of Professor Jean R. Sternlight re: "Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements (CFPB 2012-0017)".

[xii] *Inmates of Unit 14 v. Rebideau*, 102 F.R.D. 122, 128 (N.D.N.Y. 1984). *See also King v. Conde*, 121 F.R.D. 180, 195 (E.D.N.Y. 1988) ("The interest that without doubt looms largest in these cases is the public interest in giving force to the federal civil rights laws. … The great weight of the policy in favor of discovery in civil rights actions supplements the normal presumption in favor of broad discovery….").

[xiii] One law firm that defends large financial institutions from consumer lawsuits noted, "Few practicing attorneys understand the scope and or limitations on the availability of discovery in advance of or in aid of arbitration … One of the primary ways in which arbitration is less costly, both in terms of time and money, is that it normally has less extensive discovery than traditional litigation." Joesph L. Forstadt, *Discovery in Arbitration* (Stroock & Stroock & Lavan LLP 2006). *See also Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) (citations omitted) ("An arbitration hearing is not a court of law. When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial. … [T]he limited discovery provisions during arbitration … are in keeping with the policy underpinnings of arbitration speed, efficiency, and reduction of litigation expenses."); Thomas H. Oehmke, and Joan M. Brovins, Arbitrability Disputes: Proving What Facts to Whom, American Jurisprudence Proof of Facts 3d, § 64. Discovery (Originally published in 2006, updated April 2014) ("In arbitration, there is often some discovery available under rules which the parties may adopt to guide the process, or by order of the arbitrator, However, that only limited discovery is available in arbitration raises no question of arbitrability for a court to assess, even where such limited discovery may prevent parties from vindicating their statutory rights. Rather any dispute over discovery is procedural and, therefore, left for an arbitrator to resolve.")

[xiv] *See, e.g., Arbitration Activism* at p. 13, Alliance for Justice, 2011 ("In individual arbitration, the limited discovery often makes it difficult, if not impossible, to prove reverse redlining claims, which require evidence of broad patterns of discrimination. Forced arbitration in this area of law is also problematic because the few courts that have heard 'reverse redlining' cases have applied different legal standards, and taking more cases out of public courts creates less precedent and leaves the law unclear at a time when certainty is needed to help recover from the financial crisis.").

[xv] *See* 42 U.S.C. § 3601 *et seq.; Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972).

[xvi] "Since discrimination is inherently insidious, almost presumptively intentional, yet often difficult to detect and ferret out, the Committee believes that strong enforcement of this Act is essential to accomplish its purposes. …

The Leadership Conference

The entrusting of enforcement responsibility to the Attorney General is premised on the assumption that that office's experience in the enforcement of other civil rights legislation can be effectively expanded and built on to achieve maximum compliance with the antidiscrimination policies of the Equal Credit Opportunity Act. The chief enforcement tool, however, will continue to be private actions for actual and punitive damages." S. REP. 94-589, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 403, 415.

[xvii] U.S. Gen. Accounting Office, No. GAO-09-704, *Fair Lending: Data Limitations and the Fragmented U.S. Financial Regulatory Structure Challenge Federal Oversight and Enforcement Efforts* (2009); Binyamin Appelbaum, *Fed Held Back as Evidence Mounted on Subprime Loan Abuses*, Washington Post, Sept. 27, 2009, at A01.

[xviii] Nat'l Fair Housing Alliance, *A Step in the Right Direction: 2010 Fair Housing Trends Report* 14-15 (2010)

[xix] See discussion of Discriminatory Insurance Policies in *Private Actions, Public Benefits; Private Litigation Aids Public Enforcement of Consumer Protection Laws*, Public Citizen at 9-10, Sept. 20, 2013, http://www.citizen.org/documents/private-litigation-public-enforcement-consumer-protection-report.pdf.