The Heritage Foundation

ISSUE BRIEF

No. 4742 | JULY 25, 2017

# Congress Should Use the Congressional Review Act to Nullify the CFPB's New Anti-Consumer Rule

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The Consumer Financial Protection Bureau (CFPB) Arbitration Agreements rule would effectively ban consumers of all sorts of financial products from using a clearly consumer friendly dispute-resolution process.[1] The final rule is based on a flawed study that does not support banning pre-dispute arbitration agreements, even though the Dodd–Frank Act requires such empirical support.

Arbitration is a fair and effective alternative for resolving disputes, particularly small claims between businesses and consumers. A wealth of experience indicates the CFPB's arbitration rule will harm consumers.[2] Congress appears ready to nullify this damaging rule through the Congressional Review Act (CRA).[3] It should waste no time in doing so to protect consumers from the CFPB.

## Arbitration Under Attack

In 1925, Congress passed the Federal Arbitration Act (FAA) to establish a strong federal policy in favor of arbitration.[4] Arbitration is an alternative method for resolving legal disputes, with no meaningful impact on the claims that it can resolve.[5] The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6] The law clearly does not provide a legal shield for companies that commit fraud, although some Members of Congress have claimed just that.[7]

Arbitration lowers litigation costs and has proven to be an effective way to resolve legal disputes. For instance, claims filed in court by individuals against businesses take, on average, 15 months to resolve, more than twice as long as the average resolution in arbitration cases.[8] In Section 8 of the CFBP's arbitration study, the sample of class-action cases took, on average, 23 months to settle.[9] A 1982 House of Representatives Report described arbitration as follows:

> The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.[10]

Naturally, these benefits—particularly lower litigation costs—coincide with lower revenue for others, such as trial lawyers. Thus, the success of arbitration has created a rent-seeking opportunity for those who lose money, because of its increased use and effectiveness.

During the past few years, Members of Congress have introduced a series of bills to curb the use of arbitration.[11] Although none of these bills were enacted into law, the Dodd–Frank Act banned pre-dispute mandatory arbitration clauses in residential-mortgage and home-equity-loan contracts.[12] The current controversy is the result of Section 1028 of Dodd–Frank, which made it possible for a regu-

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latory agency to effectively nullify the intent of the FAA in consumer financial markets.

## CFPB Study Does Not Support the CFPB's New Rule

Section 1028 of Dodd–Frank authorized the CFPB to prohibit or limit arbitration agreements, provided that its (statutorily required) study supported such actions.[13] Only a complete misreading of the CFPB's study could justify the CFPB's final rule.

The rule bans arbitration agreements that block groups of consumers from bringing class-action lawsuits in a wide range of consumer financial services, from checking accounts and credit cards to remittances and debt collection. Yet, the CFPB's report does not provide a detailed empirical analysis of arbitration settlements versus class-action litigation settlements in these markets.[14]

Perhaps the most comprehensive and relevant portion of the CFPB's study deals with arbitration agreements in credit card contracts. Here, too, the study undercuts the rule. In a survey, the CFPB asked consumers what they would do if their card company refused to remove fees after wrongly assessing those fees. A clear majority, 57.2 percent, of consumers said that they would cancel their card, while only 1.4 percent of respondents said that they would seek legal advice.[15]

At minimum, this finding strongly suggests that consumers are simply not concerned with this issue to the same extent as are regulators. Combined with the fact that arbitration is more cost-effective than using the courts, and that there has been no push by consumers to stop companies from using these arbitration agreements, it is incredibly difficult to argue that banning arbitration clauses would benefit consumers. Experience shows that arbitration agreements are a consumer friendly alternative for resolving the majority of financial disputes of the type the CFPB rule addresses.[16]

1. *Federal Register*, Vol. 82, No. 137 (July 19, 2017), pp. 33210–33434.
2. See Hans A. von Spakovsky, "The Unfair Attack on Arbitration: Harming Consumers by Eliminating a Proven Dispute Resolution System," Heritage Foundation *Legal Memorandum* No. 97, July 17, 2013, http://www.heritage.org/report/the-unfair-attack-arbitration-harming-consumers-eliminating-proven-dispute-resolution-system, and Andrew Kloster, "Why Congress and the Courts Must Respect Citizens' Rights to Arbitration," Heritage Foundation *Backgrounder* No. 2784, March 27, 2013, http://www.heritage.org/courts/report/why-congress-and-the-courts-must-respect-citizens-rights-arbitration#_ftn1.
3. Norbert J. Michel, "House and Senate Set to Protect Consumers From an Overreaching Federal Agency," The Daily Signal, July 20, 2017, http://dailysignal.com/2017/07/20/house-senate-set-protect-consumers-overreaching-federal-agency/.
4. 9 U.S. Code §§ 1–16.
5. See von Spakovsky, "The Unfair Attack on Arbitration," and Kloster, "Why Congress and the Courts Must Respect Citizens' Rights to Arbitration."
6. 9 U.S. Code § 2.
7. Ian McKendry and Kate Berry, "GOP Efforts to Repeal CFPB Arbitration Rule Off to Rocky Start," American Banker, July 20, 2017, https://www.americanbanker.com/news/gop-efforts-to-repeal-cfpb-arbitration-rule-off-to-rocky-start (accessed July 21, 2017).
8. See Mark Fellows, "The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes," Metropolitan Corporate Counsel, July 2006, http://www.metrocorpcounsel.com/pdf/2006/July/32.pdf (accessed July 21, 2017), and Christopher Drahozal and Samantha Zyontz, "An Empirical Study of AAA Consumer Arbitrations," *Ohio State Journal on Dispute Resolution*, Vol. 25, No. 4 (2010), https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2014/11/25OhioStJonDispResol843.pdf (accessed July 21, 2017).
9. Consumer Financial Protection Bureau, "Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act §1028(a)," March 2015, § 8, p. 5, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (accessed July 21, 2017).
10. *Patent and Trademark Authorization*, H. Rep. No. 97–542, 97th Cong., 2nd Sess., May 17, 1982, p. 13.
11. von Spakovsky, "The Unfair Attack on Arbitration."
12. The Dodd–Frank Act of 2010, Public Law 111–203, § 1414.
13. Dodd–Frank Act, § 1028(a) and § 1028(b), and 12 U.S. Code § 5518(a) and § 5518(b).
14. Consumer Financial Protection Bureau, "Arbitration Study."
15. Consumer Financial Protection Bureau, "Arbitration Study," § 3, p. 3.
16. The CFPB study has many other problems, such as a failure to adequately acknowledge the fact that class actions in some areas have a very poor record of paying any award to consumers. See Jason Scott Johnson and Todd Zywicki, "The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique," Mercatus Working Paper, August 2015, https://www.mercatus.org/system/files/Johnston-CFPB-Arbitration.pdf (accessed July 21, 2017).

## Using the CRA to Rein in the CFPB

The Dodd–Frank Act granted the CFPB unparalleled rulemaking, supervisory, and enforcement powers over virtually every consumer financial product and service. The Act is built upon the flawed premise that regulators, rather than consumers themselves, know how to best satisfy consumers' wants and needs. In effect, the CFPB was designed to dictate the types of financial products and services available to consumers instead of allowing those consumers to exercise choice.[17] Thus, the Bureau's new rule unsurprisingly would ban arbitration agreements even though they clearly benefit consumers in many cases.

Congress has limited options to rein in the CFPB. However, it can nullify the arbitration rule by using the Congressional Review Act.[18] The CRA allows Congress to invalidate an agency rule via a joint resolution of disapproval signed by the president. It gives Congress a limited period—60 days after the rule is received by Congress—to nullify the rule, and the resolution only need pass by a simple majority in both chambers of Congress. Nullifying the arbitration rule with the CRA would also bar the CFPB from later adopting any substantially similar rule absent a new act of Congress.[19]

## Conclusion

Regulations should not override well-established preferences without rigorous empirical evidence showing that the override will increase the welfare of the general public. However, the CFPB was not designed to follow such principles, as reflected in its new arbitration rule.

Both chambers of Congress have now introduced CRA resolutions that would protect consumers from the CFPB by nullifying the new rule. Congress should waste no time in nullifying the arbitration rule and then move on to adopting such CFPB reforms as listed in the Financial CHOICE Act.

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17. Diane Katz and Norbert Michel, "Consumer Protection Predates the Consumer Financial Protection Bureau," Heritage Foundation *Backgrounder* No. 3214, May 11, 2017, http://www.heritage.org/government-regulation/report/consumer-protection-predates-the-consumer-financial-protection-bureau.
18. Congress can permanently fix the CFPB through the budget reconciliation process, as outlined in the CHOICE Act. See Norbert Michel, "America Waits on the Senate for Financial Reforms," *Forbes*, June 13, 2017, https://www.forbes.com/sites/norbertmichel/2017/06/13/america-waits-on-the-senate-for-financial-reforms/#54ed6d4425df (accessed July 21, 2017).
19. Paul J. Larkin Jr., "The Reach of the Congressional Review Act," Heritage Foundation *Legal Memorandum* No. 201, February 8, 2017, http://www.heritage.org/government-regulation/report/the-reach-the-congressional-review-act.