Written Statement of

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Before the
U.S. Senate Committee on Banking, Housing, and Urban Affairs

"Assessing the Effects of Consumer Finance Regulations"

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Chairman Shelby, Ranking Member Brown, and Members of the Committee:

The National Association of Consumer Advocates (NACA) is a nonprofit association whose members are private and public sector attorneys, legal services attorneys, law professors, and law students committed to representing consumers' interests. NACA is actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. Supporting reasonable safeguards against unfair and deceptive business practices, and ensuring that corporations comply with state and federal consumer protection laws are continuing priorities.

For the hearing titled, "Assessing the Effects of Consumer Finance Regulations," we write to commend the ongoing efforts of the Consumer Financial Protection Bureau to curb predatory practices in the financial sector, as a general matter, and specifically, the Bureau's announced intention to promulgate rulemaking to address corporations' use of pre-dispute binding mandatory (or "forced") arbitration against American consumers.

Over the last six years, the Bureau has engaged in multiple pursuits to monitor the financial marketplace and enforce laws under its jurisdiction. These activities include its rigorous collection and analysis of data; its supervision and examination of financial services providers and their systemic practices and conduct; and its enforcement actions against financial institutions that violate critical consumer financial protection laws. The CFPB's work has resulted in billions of dollars returned to consumers and consequential changes to predatory industry practices. Through these and other actions the Bureau has identified and addressed some of the worst unfair, abusive and deceptive practices in debt collection, credit reporting, student loans, payday loans, back accounts, and other products and services.

For example, for debt collection alone, which recently surpassed mortgages as the most complained-about product on the Bureau's complaint database,[1] CFPB's law enforcement actions in 2015 involving debt collection practices have resulted in over $360 million in consumer relief.[2] The enforcement actions and examinations also have spurred some changes in industry conduct that will help to alleviate consumer harm from abusive debt collection.

We also support the Bureau's rulemaking agenda and its work to set appropriate standards and practices in lending and other financial products. We expect to review upcoming proposed rulemaking for payday loans, debt collection practices, and prepaid cards. We are especially looking forward to the Bureau's exercise of its explicit authority to regulate the use of forced arbitration terms in corporate-written financial contracts that require consumers to resolve disputes in private, individual arbitration proceedings instead of in open court. We have long condemned these provisions as a serious

[1] CFPB, Monthly Complaint Report, Vol. 9, March 2016, http://1.usa.gov/1S41VeB.
[2] Fair Debt Collection Practices Act CFPB Annual Report 2016, at 27, http://1.usa.gov/25GtXXQ.
[2] Fair Debt Collection Practices Act CFPB Annual Report 2016, at 27, http://1.usa.gov/25GtXXQ.

imposition on consumers' rights and freedom, and a damaging tool that corporate entities use to avoid responsibility for harmful conduct.

A Comprehensive Data-Driven Study on the Use of Forced Arbitration

The Dodd-Frank Wall Street Reform and Consumer Protection Act[3] required the CFPB to study the use of predispute arbitration clauses in consumer financial products or services, and to provide a report to Congress. It also authorized the CFPB to write a rule consistent with the study to prohibit or limit the use of forced arbitration clauses in consumer financial products or services if it is in the public interest and for the protection of consumers.

In 2012, the CFPB launched a study on arbitration and spent the next three years compiling and analyzing data and collecting stakeholder feedback. The study presented data on the prevalence of the practice, including the use of terms that prohibit consumers' participation in class actions, litigation outcomes, and arbitration outcomes. The effort resulted in the most comprehensive and evidence-based examination ever of forced arbitration in consumer contracts.

(A) *The Study Process*. The Bureau's multi-year study process included the following:

The CFPB officially launched its study with a public request for information. It received comments from public interest organizations, industry trade associations, law firms and individuals. Afterward, the CFPB scheduled meetings with stakeholders.[4] In June 2013, the CFPB launched a telephone survey to study consumer awareness and perception of arbitration clauses with a Federal Register notice and invited public comment.[5]

The CFPB released preliminary results from the study in December 2013.[6] The Bureau held a public field hearing to discuss the findings, inviting participation from industry and consumer interests. It also announced that it would hold stakeholder meetings.[7]

The CFPB issued a second Federal Register notice on its proposed telephone survey on consumer awareness, inviting public comment.[8] The Office of Management and Budget approved the CFPB's request to proceed with the consumer awareness survey.

The CFPB released the final arbitration report in March 2015. It held a second field

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[3] 12 U.S. Code § 5518 (a).
[4] *Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, CFPB-2012-0017-0001, April 27, 2012, http://1.usa.gov/1N59nVB.
[5] *Agency Information Collection Activities; Proposals, Submissions, and Approvals*, CFPB-2013-0016-0001, June 7, 2013, http://1.usa.gov/23bhxVx.
[6] *CFPB Arbitration Study Preliminary Results*, Dec. 2013, http://1.usa.gov/18WUWEy.
[7] CFPB, *Live From Dallas!,* Dec. 12, 2013, http://1.usa.gov/1XcG0X1,
[8] *Agency Information Collection Activities; Proposals, Submissions, and Approvals*, CFPB-2014-0011-0002, May 29, 2014, http://1.usa.gov/1W6dlEy.

hearing and announced that it would hold roundtables with stakeholders.[9] In October 2015, the CFPB released an initial proposal for its arbitration rulemaking prepared for a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel review.[10] The Bureau held a third public field hearing on arbitration, inviting public feedback from business and consumer interests.[11]

*(B) Key Study Findings***.** Forced arbitration clauses are unfair and everywhere:

The Bureau found that tens of millions of consumers that use financial services and products are subject to forced arbitration clauses and class action bans, including in their credit cards, bank accounts, prepaid cards, credit reporting services, and student loans. For example, almost all [98.5%] of licensed payday loan storefronts that the CFPB studied in California and Texas used contract terms with forced arbitration clauses, while only 1.5% did not use forced arbitration clauses.

• Almost all forced arbitration clauses in financial services and products also prohibit consumer participation in class actions: 93.9% of credit card arbitration clauses; 88.5% of checking account arbitration clauses; 97.9% of prepaid card arbitration clauses; 88.7% of storefront payday loan arbitration clauses; 100% of private student loan arbitration clauses; and 85.7% of mobile wireless arbitration clauses.

• The Bureau's data revealed that very few consumers can vindicate their rights in arbitration on an individual basis, especially for small-dollar losses. In its study, the Bureau identified only on average about 8 cases per year involving a debt dispute of $1,000 or less, and only about 25 cases per year involving an affirmative consumer claim of $1,000 or less.

• Its examination of class action in financial services makes clear that consumers receive remedies in class actions for harm in financial services: Across consumer finance markets, at least 160 million class members were eligible for relief over a five-year period. The settlements totaled $2.7 billion in cash, in-kind relief, and attorney's fees and expenses – [roughly 18 percent went to expenses and attorneys' fees].

• Based on data from its consumer telephone survey, the Bureau concluded that consumers are not aware of and do not understand the impact of arbitration clauses. Consumers are unaware of whether their credit card contracts include arbitration clauses. Consumers' beliefs about dispute resolution rights bears little to no relation to the actual contract terms. Despite provisions that restrict their rights, most believe that they can sue in court for wrongdoing and participate in class actions. Fewer than 7 percent recognized that they could not sue their credit card company in court.

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[9] CFPB, *Arbitration Study: Report to Congress 2015*, http://1.usa.gov/1EPG8nT and Live From Newark!, http://1.usa.gov/18xSGDQ.
[10] CFPB, *Small Business Advisory Review Panel For Potential Rulemaking On Arbitration Agreements; Outline Of Proposals Under Consideration And Alternatives Considered*, Oct. 7, 2015, http://1.usa.gov/1MpoIPr.
[11] CFPB, *Live From Denver*!, http://1.usa.gov/226ymhW.

• The CFPB also found no evidence that arbitration clauses led to lower prices for consumers, as corporate representatives often claim. The CFPB compared companies that use arbitration clauses and prohibit class actions with companies that had eliminated forced arbitration from their consumer contracts. It found no statistically significant evidence that the companies that removed the arbitration clauses increased their prices or reduced access to credit.

Restoring Consumer Choice in the Marketplace

Based on its study findings, the Bureau announced that it would undertake a rulemaking to regulate the use of forced arbitration in financial services. Specifically, the Bureau has initially proposed to bar the use of class action bans in financial services contracts and to require reporting of individual arbitration claims and awards, which it would consider releasing to the public.

Although we have long called for the outright elimination of forced arbitration clauses in consumer contracts, we strongly support this step that the Bureau is proposing to take to restrict the use of class action bans, the worst aspect of arbitration clauses. We have been aware and have studied the consequences of forced arbitration on consumers and the markets, but now that the CFPB has collected and examined an unprecedented amount of data, the conclusion is irrefutable: forced arbitration and class action bans unfairly deny consumers' right to seek recourse for financial injuries caused by corporate misconduct.

The data makes clear that class actions bans are an unreasonable burden on consumer rights. Small-dollar claims prevalent in financial services, such as illegal charges and fees and abusive interest rates, are not heard in arbitration or court because most people cannot practically seek remedies for those losses individually. These claims simply are better pursued on a class basis. The Bureau's decision to eliminate class action bans would restore a critical right for consumers in the marketplace. It is in the public interest for consumers to have the freedom to band together to seek remedies and accountability for wrongdoing.

We also agree with the Bureau's findings in its initial proposal that state and federal governments with their limited resources, cannot sufficiently monitor and enforce laws for the entire financial services marketplace on their own. The marketplace benefits from consumers' ability to privately enforce rights and remedies granted to them in consumer protection laws. In 2014, state attorneys general submitted a letter to the Bureau confirming a similar view that private enforcement of laws supplements the work of state officials.[12]

Finally, the Bureau's decision to limit the use of arbitration clause is consistent with recent decisions by Congress and other federal agencies to seek to provide adequate avenues of redress for harmed consumers. For example: (a) the Dodd-Frank Act barred forced arbitration in residential mortgages and lines of credit, and prohibited forced

[12] *Letter from State Attorneys General to Director Richard Cordray*, Nov. 19, 2014, http://1.usa.gov/1xGl6WS.

arbitration of whistleblower claims under the Sarbanes-Oxley Act of 2002; (b) Congress has protected auto dealers from forced arbitration in their transactions with auto manufacturers; (c) employees of government defense contractors with Title VII and sexual assault tort claims are shielded from forced arbitration (the federal government is finalizing an executive order to similarly protect employees of all federal contractors); (d) Military members and their dependents cannot be forced into arbitration for a wide range of high- cost loans (payday, etc.).[13] Currently, the Centers for Medicare and Medicaid Services is considering protections from forced arbitration for nursing home residents,[14] and the Department of Education[15] similarly is reviewing protections for students of colleges and universities.

These actions demonstrate that there is acute concern about the practice and its impact on individuals who participate in the respective sectors and markets. The CFPB's anticipated action for consumer financial services, supported by its evidence-based report, is consistent with the activities of other areas of government that similarly seek to protect the public interest by restoring ordinary Americans' access to remedies.

[13] Pub. L. 107-273, 15 U.S. Code § 1226); 48 CFR 252.222-7006; 10 U.S.C. 987(e)(3) and (f)(4) and 79 Fed. Reg. 58602.

[14] *Medicare and Medicaid Programs: Reform of Requirements for Long-Term Care Facilities*, CMS-2015-0083-0001, July 16, 2015, http://1.usa.gov/1V4XpD4.

[15] *U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions*, March 11, 2016, http://1.usa.gov/1WfKxYc.