Heartland
Credit Union Association

August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1275 First Street, NE
Washington, DC 20002

Re: Notice of Proposed Rulemaking Arbitration Agreements
Docket No. CFPB-2016-0020; RIN 3170-AA51

www.regulations.gov

Dear Ms. Jackson:

On behalf of the nearly 1.5 million credit union members in Kansas and Missouri, the Heartland Credit Union Association (HCUA) is writing in regards to the Consumer Financial Protection Bureau's (CFPB) proposal to establish regulations (12 CFR Part 1040) governing consumer finance dispute resolution.

HCUA strongly disagrees with the proposed arbitration agreement changes. Having the ability to utilize arbitration agreements allows individual credit union members to seek resolution on disputes using the arbitration process, while still protecting the membership as a whole from potentially frivolous class action litigation.

As written, the proposal would prohibit covered providers from using an arbitration agreement that would protect credit unions, and therefore their members, from class action litigation with respect to the provider's products or services. In addition, the proposal would require the provider to submit specified arbitral records to be published on the CFPB's website. Credit unions are member-owned entities with a one member, one vote membership process. This unique relationship with consumers as member/owners lends itself to consumer protection within the institution. HCUA believes this proposal will promote credit union members to engage in litigation against the very financial institution of which they are owners; and therefore, not acting in the member's best interest.

Arbitration Clauses

The proposed rule would eliminate arbitration clauses that are routinely included in many contracts for consumer financial products, which can protect credit unions from class action lawsuits when requiring arbitration as an alternative dispute resolution process. Under the

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proposed rule, financial institutions could still include arbitration clauses for individual disputes, but not for class actions. The CFPB would provide specific language that must be used in the contract. The proposed rule, if finalized as proposed, would be a seismic change for credit unions providing their members products and services while drastically increasing their legal costs.

In particular, the impact of this ruling on the membership of small credit unions could be extremely harmful if a credit union becomes the target of class action litigation. Small credit unions must follow the same regulations and rules as a larger institution, but the costs and risks are much greater due to the resources available at the smaller credit union. At this time, there are nearly 1,000 credit unions operating in the U.S. with one or fewer full-time equivalent employee, including 21 in Kansas and 20 in Missouri. Nearly one-half of the nation's credit unions operate with just five or fewer full-time equivalent employees. That includes 62 credit unions in Missouri and 49 in Kansas. If a credit union is forced to pay exorbitant attorneys' fees and statutory damages associated with them, or settle them out of court for fear of such fees, the burden may damage a large credit union, and devastate a smaller institution. The ramifications of this proposal are significant and potentially damaging to credit unions who have historically settled disputes in a consumer friendly manner. In the effort to protect consumers, this proposal could lead to the loss of credit unions and therefore, fewer options for consumers in choosing a financial institution.

Adoption of the arbitration proposal as written would lead to even more attempts by lawyers in searching for plaintiffs to create a class action lawsuit, rather than consumers seeking legal assistance after experiencing difficulties that cannot be rectified under current options. Of great concern are the problems created by the Federal Communication Commission's July 2015 Telephone Consumer Protection Act (TCPA) Order-related class action lawsuits. With the growth of these types of lawsuits and acts by plaintiffs' attorneys to capitalize on ambiguities in how to comply with the statute, utilizing arbitration agreements is a needed option for credit unions with limited resources. In the face of growing litigation, even credit unions that may not currently use arbitration agreements are recognizing the growing need to have and utilize this option. In addition, working with third parties that may not be subject to the rule and continue to utilize arbitration agreements may create compliance problems.

Exemption Powers

The mission of credit unions is to provide high quality service to their members, which has led to a successful system for quickly and amicably resolving disputes in the limited instances where they arise. HCUA strongly urges the CFPB to use their exemption powers to help protect credit union members from the many problems associated with eliminating arbitration clauses. Use of the CFPB's exemption authority has been strongly supported by members of Congress, including those in Kansas and Missouri. Letters signed by 399 members of Congress, including

70 members of the U.S. Senate and 329 members of the U.S. House of Representatives were signed by the four U.S. Senators from Kansas and Missouri, and four U.S. Representatives from Kansas and seven U.S. Representatives from Missouri, respectively.

Credit unions are wholly owned and controlled by their members. There are already processes in place to protect credit union members. Their members have the ability to directly impact the setting of policies. Class action litigation against a credit union would not be a reasonable course of action for credit union members since it would put them in a position of essentially having to litigate against themselves as owners. Furthermore, member-owners already have direct recourse as a result of the unique structure of a credit union, in the rare situation that a group of credit union members feels a credit union is in the wrong. Credit union members can vote to remove the credit union's board of directors and management using their one-member, one-vote membership powers. It is also important to understand that when credit unions face class action litigation, their board of directors and other volunteers, who may be there to fulfill a commitment to the mission of credit unions, rather than for any kind of financial gain, could also be directly threatened with liability. In turn, qualified board members may be discouraged from participating in the governance of the credit union.

Collecting and Publishing Data

The second part of the proposal requires companies that use arbitration clauses to submit claims, awards and other related materials to the CFPB for monitoring. The proposal also notes that the CFPB intends to publish these materials on its website in some form, with appropriate redactions or aggregation as warranted, to provide greater transparency into the arbitration of consumer disputes.

Credit unions with more than $10 billion in assets are currently under CFPB's supervision and subject to examinations, while smaller credit unions are under the supervision of the National Credit Union Administration (NCUA) or their state regulator and subject to examinations. The CFPB and the NCUA's systems to accept consumer complaints to track any concerning market trends should be sufficient for monitoring credit union behavior. HCUA does not see how additional data submission would add to the quality of the current database.

Instead, we believe that publishing this information would serve the litigators in formulating more class actions settlements. In addition, a credit union's reputational risk is at stake. Making this information public could negatively damage their reputation when not warranted.

Conclusion

Credit unions can expect to see a growth in consumer class-action litigation as a result of this proposal, as well as additional costs to defend and resolve such claims and to implement any policy and procedure changes that may be negotiated and included in class-action settlements.

The proposed rule also acknowledges that Dodd-Frank requires that any regulations proposed by the CFPB be consistent with its study. There will almost certainly be litigation concerning the question of whether the regulation is warranted given the CFPB's acknowledgement that under its own study, evidence is "inconclusive" on whether individual arbitration is superior or inferior to individual litigation in terms of remediating consumer harm. According to the CPPB's own March 2015 study on this issue:

- The average consumer recovery in arbitration is $5,400.
- The average consumer recovery in class-action lawsuits is $32.
- 60% of class-action suits provide consumers with no financial relief.

Accordingly, we believe it is in the best interest of the credit union and their members to resolve disputes in more cost efficient and timely methods than class action litigation. The cost of class action litigation comes out of the pockets of their member-owners, hurting those consumers. Rather than a blanket elimination of arbitration agreements/clauses, the CFPB should focus its attention on those practices that create the problems and make adjustments to the arbitration process to address any concerns and issues. HCUA strongly urges the CFPB to reconsider whether limiting arbitration clauses is in the consumer's best interest. We believe the CFPB and credit unions should be working together to serve consumers, and any proposals should focus on specifics rather than an overly broad approach. This proposal creates a risk for the consumers served by credit unions, and those that benefit by having credit unions in the marketplace.

Thank you for the opportunity to comment on the arbitration proposal. Should you have any questions or would like to discuss these issues further, please do not hesitate to contact me at bdouglas@heartlandcua.org or 800.392.3074.

Sincerely,

Brad Douglas
President/CEO