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July 29, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW.
Washington, DC 20552

Re: Bureau of Consumer Financial Protection Proposed Rule on Arbitration
Agreements; Docket No. CFPB-2016-0020; RIN 3170-AA51, Fed. Reg. No. 2016-
10961 (May 24, 2016)

Dear Ms. Jackson:

On behalf of the Section of Dispute Resolution of the American Bar Association (“the Section”), I am submitting comments on the above-referenced proposal by the Consumer Financial Protection Bureau (“CFPB”) to establish 12 CFR Part 1040 which would contain regulations governing two aspects of consumer finance dispute resolution (“Proposed Rule”). The Section’s comments are directed to only one portion of the Proposed Rule, specifically §1040.4(b). The Section writes in strong support of this portion of the Proposed Rule. The views expressed herein are presented on behalf of the Section of Dispute Resolution. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Section consists of attorneys, mediators, arbitrators, other neutrals, and administrators of dispute resolution programs in both the private and public sectors. The Section’s governing Council and substantive committees contain a broad cross-section of dispute resolution professionals representing these segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to uphold the integrity of dispute resolution processes through: 1) the advancement and promotion of fair, prompt, and cost effective dispute resolution and 2) support of innovative research, education, debate, and collaboration on dispute resolution policy and practice.

BACKGROUND

The use of mandatory pre-dispute arbitration agreements in consumer transactions has elicited controversy in the general public, the courts, and the dispute resolution field. As part of the Dodd-Frank Act, Congress specifically authorized the CFPB to issue regulations that would “prohibit or impose conditions or limitations” on mandatory pre-dispute consumer arbitration clauses in contracts for financial products or services as long as the CFPB found that doing so was “in the public interest and for the protection of consumers.”¹ Congress also required the CFPB to conduct a study of mandatory arbitration, and the agency’s regulatory findings had to be consistent with the study.² The CFPB has conducted this empirical study, and in March, 2015, it issued its final report.³ In November, 2015, the CFPB submitted tentative proposed rules to a Small Business Review Panel. On May 5, 2016, the CFPB announced its proposed rules.

The Section's comments are directed to only one portion of the CFPB's Proposed Rule,⁴ specifically §1040.4(b), which would require regulated providers of financial products and services to report to the CFPB regarding their use and the outcomes of arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses ("Arbitration Reporting Proposal"). The CFPB's Arbitration Reporting Proposal requires submission of the following five types of documents, with redaction of individuals' names and other specified information:

- (1) The initial claim (whether filed by a consumer or by the provider) and any counterclaim;
- (2) The pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator;
- (3) The award, if any, issued by the arbitrator or arbitration administrator;
- (4) Any communications from the arbitrator or arbitration administrator with whom the claim was filed relating to a refusal to administer or dismissal of a claim due to the provider's failure to pay required fees; and
- (5) Any communications related to a determination that an arbitration agreement does not comply with the administrator's fairness principles.

The CFPB also proposes to publish these materials on its website in some form, with appropriate redaction or aggregation.⁵

The Section has examined mandatory pre-dispute consumer arbitration at various points over the years.⁶ Due to the importance of the CFPB's Proposed Rule to the dispute resolution field, the Section established a CFPB Review Task Force, composed of experienced and well-respected dispute resolution practitioners and academics knowledgeable regarding mandatory pre-dispute arbitration, and particularly consumer arbitration,⁷ to review the tentative proposals announced in November, 2015 and provide advice to the Section. The Section's deliberations have been informed by the Task Force's advice.

The Section strongly supports the CFPB's Arbitration Reporting Proposal, which would require the reporting of arbitration claim filings, pre-dispute arbitration agreements, awards, and communications regarding compliance with fairness principles and payment requirements, and to make such information public after appropriate aggregation or redaction. As set forth below, the experience of quasi-public dispute resolution organizations, private organizations, and states with the collection and publication of arbitration-related information demonstrates the value of this practice and suggests specific information that should be disclosed. Indeed, the reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration that has been expressed by the Supreme Court.

I. THE SECTION SUPPORTS THE CFPB'S ARBITRATION REPORTING PROPOSAL DUE TO THE CURRENT LACK OF COMPLETE AND CONSISTENT INFORMATION IN THIS AREA

In its March 2015 Report, the CFPB concluded that it had a "reasonably complete picture of the claims that consumers are willing to file in arbitration where arbitration is an available option,"⁸ but then went on to acknowledge that its analysis was subject to limitations. To a large extent, these limitations derived from a paucity of complete and consistent information regarding the numbers, types of claims, outcomes, arbitrators, parties, and party representatives involved in arbitrations conducted pursuant to mandatory pre-dispute consumer arbitration clauses. Indeed, despite the prevalence of mandatory pre-dispute consumer arbitration clauses, the public generally has little information regarding use of the process or its outcomes.

Specifically, the CFPB was forced to rely on data from a single source—the American Arbitration Association ("AAA")—that voluntarily provided its case filings to the CFPB pursuant to a

non-disclosure agreement.⁹ There is substantial evidence that the AAA dominates the administration of consumer financial arbitration cases.¹⁰ Nonetheless, the CFPB pointed out that other dispute resolution organizations also administer consumer financial arbitration.¹¹ For example, only 18.3% of storefront payday-loan contracts, 16.7% of private student loan contracts, and 37.3% of prepaid cards studied by the CFPB provided for the AAA as the *sole* administrator while most contracts identified the AAA as *either* the sole administrator or one of the available choices.¹² The CFPB noted that the types of claims handled by other providers might differ from the claims evidenced in the AAA filings, but due to the lack of required reporting, the CFPB had no means to determine whether or not such differences existed. The CFPB also noted that the AAA might not be the dominant administrator of arbitration in consumer financial contexts that were not studied by the CFPB.

The CFPB also acknowledged other difficulties with the data upon which it relied for its report, including: ambiguity in defining what should count as a “win” for a consumer or company; a lack of information regarding the cases in which arbitrators did not make awards or in which the parties settled;¹³ and a lack of information regarding the outcomes of cases that did not proceed to arbitration or did not result in awards.

It is important to acknowledge that some of these difficulties are just as likely to arise in the context of litigated cases as arbitrated cases. However, in contrast to the private arbitrations conducted pursuant to mandatory pre-dispute arbitration clauses, the case filings in state and federal courts generally are public. As a result, information regarding the claims, relief sought, counterclaims, defenses, parties, lawyers, and court judgments is available.

In light of the information provided above and the value of more complete and consistent data in this area, the Section strongly supports the CFPB’s proposal to require the reporting of arbitration filings, awards, agreements and other information and to make such information public, with appropriate redactions.

II. QUASI-PUBLIC AND PRIVATE ORGANIZATIONS’ AND STATES’ EXPERIENCE WITH THE COLLECTION AND PUBLICATION OF ARBITRATION-RELATED INFORMATION DEMONSTRATES INCREASING COMMITMENT TO TRANSPARENCY AND ACCOUNTABILITY AND SUGGESTS SPECIFIC INFORMATION THAT SHOULD BE DISCLOSED

The experience of quasi-public arbitration programs, private dispute resolution organizations and states with the collection and publication of data regarding arbitration proceedings is instructive here. Though some dispute resolution professionals have raised legitimate concerns regarding the costs of compliance and the protection of confidentiality, these programs and states’ regulatory experience with reporting and publication have not compromised the integrity of the arbitration process. Instead, the transparency and accountability offered by such reporting and publication have helped to promote the integrity of the process.

A few instructive examples follow regarding quasi-public and private arbitration programs’ provision for the transparency and accountability of their processes and outcomes by making their awards available and searchable online, much as the CFPB proposes.

A. FINRA: REQUIRED PUBLICATION OF AWARDS AND OTHER AGGREGATE DATA¹⁴

The rules of the Financial Industry Regulatory Authority (“FINRA”), a not-for-profit organization authorized by Congress, require its awards to be made publicly available.¹⁵ The awards are online and searchable through the FINRA Arbitration Awards Online database¹⁶ as well as commercial databases, such as Westlaw. The FINRA database is available without charge, and users can access FINRA

arbitration awards from January 1989 through the present. In addition, users can access of the awards of all arbitration programs absorbed over the years by FINRA (which include the American Stock Exchange, Chicago Board Options Exchange, International Stock Exchange, Philadelphia Stock Exchange, and Municipal Securities Rulemaking Board) and the New York Stock Exchange (“NYSE”) (which includes Pacific Exchange/NYSE ARCA)).

The database provides users with instantaneous access to awards and the ability to search for awards by using multiple criteria, such as by case number, keywords within awards, arbitrator names, party names, date ranges set by the user, and any combination of these features. FINRA also now includes in customer awards information about the panel selection method and panel composition.

In addition, FINRA publishes various statistics online:¹⁷

- The number of cases filed and closed thus far during the current year
- Historical statistics for cases filed and closed
- The top 15 controversy types in customer arbitrations
- The top 15 security types in customer arbitrations
- The top 15 controversy types in intra-industry arbitrations
- How arbitration cases close (e.g., after arbitration hearing; after arbitrators’ review of documents; direct settlement by parties; settled via mediation;¹⁸ withdrawn; all others)
- Results of customer claimant arbitration award cases (e.g., percentage of all customer claimant cases closed that were decided by arbitrators; percentage (and number) of cases where customer awarded damages)
- Results of all-public panels and majority public panels in customer cases
- Arbitrators by type and location
- Mediation statistics thus far during the current year

The resulting disclosures have helped to protect the integrity of the arbitration process by providing parties with information they need to prepare for arbitrations and, more broadly, enabling important empirical research and systemic analysis that otherwise would not be possible.¹⁹

FINRA has continued to examine its procedures to enhance their transparency and legitimacy. Since 2009, for example, FINRA has required its arbitrators to issue an explained award – defined as “a fact-based award stating the general reason(s) for the arbitrators’ decision”– if all parties to the dispute jointly request one.²⁰ However, few parties have jointly requested an explained award since the rule’s enactment. In response, the FINRA Dispute Resolution Task Force recently recommended that FINRA change its rule to require an explained decision unless any party notifies the panel before the initial pre-hearing conference that it is opting out of such requirement.²¹ The Task Force noted that it believed “increased confidence in the fairness of the system would likely flow from th[e] increased transparency.”²²

B. ICANN: REQUIRED PUBLICATION OF AWARDS

The Internet Corporation for Assigned Names and Numbers (“ICANN”), a not-for-profit public benefit corporation, similarly requires its approved dispute resolution service providers to make Uniform Domain-Name Dispute-Resolution Policy (“UDRP”) decisions publicly available online,²³ thus providing the public, parties and arbitrators with easy access to arbitrators’ decisions and their reasoning.²⁴ Publication of neutrals’ decisions is understood as necessary to enhance the legitimacy and predictability²⁵ of the system. In addition, as a result of such publication, the ICANN system has

permitted patterns of decision making and institutions' repeat appointments of arbitrators to be highlighted. Such transparency assists the integrity of the dispute resolution system.²⁶

C. INTERNATIONAL ARBITRATION: INCREASED VOLUNTARY PUBLICATION OF AWARDS

In the context of investor-state arbitration, international dispute resolution providers regularly make information regarding their proceedings and awards public. The World Trade Organization ("WTO") provides a searchable, online database of trade disputes brought to the WTO for resolution pursuant to the Dispute Settlement Understanding.²⁷ The International Center for Settlement of Investment Disputes ("ICSID") similarly offers an online, searchable list of cases and arbitral awards.²⁸ ICSID only publishes awards with the consent of the parties. However, even without the parties' consent, ICSID publishes excerpts of the arbitral panel's legal reasoning.²⁹ This information has been useful for the parties directly involved in investor-state disputes and for those conducting systemic, empirical analysis.³⁰

Even though international commercial arbitration awards are not required to be published, there are indications that such awards are being published voluntarily with greater frequency. In the past, only a selective group of lawyers and law firms were likely to know about and use international commercial arbitrators' decisions. Now, however, international commercial arbitral institutions are advocating for increased publication, "with some institutions even shifting to a presumption in favor of redacted awards in the absence of party objection."³¹ Some commentators acknowledge this trend toward transparency (especially in the investor-state arbitration context as described above), but they also note that "most if not all" international commercial arbitral institutions continue to publish only selected awards and then only in redacted form and that such awards "are not always easy to search or find."³² Access to such awards also is not necessarily free.

Other commentators, however, perceive an increasingly transparent body of non-binding but persuasive precedent that is being produced by international commercial arbitration.³³ In addition, online initiatives have arisen that are devoted to increasing the availability of arbitration awards and information regarding international arbitrators.³⁴

D. LABOR ARBITRATION: REQUIRED AND VOLUNTARY PUBLICATION OF AWARDS

Labor arbitration provides another model for the publication of information regarding the process and its results. Many state providers of labor arbitration make their awards available online.³⁵ Some states also make public the results of grievance arbitrations with public sector unions.³⁶

In other settings, labor arbitration awards are not required to be published. However, those that are published generally are accompanied by reasoned opinions that provide parties with valuable information.³⁷ Parties can access searchable online databases of these labor arbitration awards through various private providers (e.g., Bloomberg BNA, CCH, and Thomson West's LAIS). Bloomberg BNA's Arbitration Award Navigator, for example, allows users to access a collection of at least 20,000 arbitration awards to assess trends, evaluate arbitrators, and pinpoint awards. Users can search awards by case name, arbitrator, topic, union, employer, industry, classification outline number and several other criteria.

E. CONSUMER ARBITRATION AND CALIFORNIA, DISTRICT OF COLUMBIA, MAINE AND MARYLAND: REQUIRED DISCLOSURES

There is also substantial state (and District of Columbia) experience with the required submission and publication of data, specifically regarding consumer arbitration. Again, such disclosures have enabled vital empirical research and systemic analysis.³⁸

Unlike the quasi-public and private organizations described above, the states have not provided for the disclosure and publication of awards. Instead, they have required dispute resolution providers to collect and disclose specific pieces of information. In some respects, the resulting data provides less information than would be available from a review of arbitration filings and awards; in other respects, the resulting data exceeds what would be available from such a review.

California is the leader in requiring disclosures regarding consumer arbitration. Effective January 1, 2003, California Civil Procedure Code Section 1281.96 began requiring dispute resolution providers to collect, publish at least quarterly,³⁹ and make available to the public on the provider's website (and on paper upon request) a report containing information about the provider's consumer arbitrations within the preceding five years.⁴⁰ The statute also requires the report's format to be searchable and sortable by members of the public using "readily available software" and to be accessible from a "conspicuously displayed link" that is identified as "'consumer case information.'"⁴¹

The statute, which was amended in 2014, currently requires publication of the following pieces of information:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

(3) The nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment⁴²; or other. . . .

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, "prevailing party" includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.

(7) Whether the consumer party was represented by an attorney and, if so, the name of the attorney and the full name of the law firm that employs the attorney, if any.

(8) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing. If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.

(10) The amount of the claim, whether equitable relief was requested or awarded, the amount of any monetary award, the amount of any attorney's fees awarded, and any other relief granted, if any.

(11) The name of the arbitrator, his or her total fee for the case, the percentage of the arbitrator's fee allocated to each party, whether a waiver of any fees was granted, and, if so, the amount of the waiver.⁴³

It is particularly notable that California's statute requires disclosure of a non-consumer's prior mediation experience with a dispute resolution provider, as well as prior arbitration experience. Meanwhile, the statute does not require disclosure of the name of the consumer, the specific legal claims involved, the basis for an arbitral award, or the terms of any settlement. The statute also does not provide for any mechanism to enforce its requirements.

Some commentators and scholars report that despite the value of the information that is disclosed pursuant to California's requirements, many dispute resolution providers are not in compliance.⁴⁴ The AAA has been particularly conscientious in complying with the state's requirements and, as noted, also cooperated with the CFPB in providing data for the study required by the Dodd-Frank Act. Recently, however, Professor Judith Resnik reported deficiencies in even the AAA's disclosures⁴⁵ and concluded that the available information was "spotty."⁴⁶ To the Section's knowledge, no dispute resolution provider has suffered any negative consequence as a result of failing to make the disclosures required by California.⁴⁷

Three other jurisdictions have also enacted arbitration disclosure requirements: Maine,⁴⁸ Maryland⁴⁹ and the District of Columbia.⁵⁰ All are patterned after California's 2003 statute, although they also include variations.

The District of Columbia's reporting requirements, which became effective in 2008, look very much like those in California.⁵¹ However, the District of Columbia specifically provides for enforcement by permitting any person or entity affected by a violation of the provisions to seek an injunction against, and appropriate restitution from, the allegedly violating arbitration organization. If the person or entity bringing the action prevails, or if the arbitration organization voluntarily complies after the commencement of the action, the arbitration organization can be held liable for the person or entity's attorney's fees and costs.⁵²

In addition, the District of Columbia requires each dispute resolution provider to disclose any financial interests that the provider has in a party or the legal representation of a party, as well as any financial interests that a party has in the provider.⁵³ This additional requirement is consistent with the recommendations of scholars and the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR⁵⁴ and addresses important concerns regarding the potential for conflicts of interest. Such concerns were heightened after the Minnesota Attorney General brought a highly-publicized suit against the National Arbitration Forum ("NAF"), a dispute resolution provider that conducted consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses. The Attorney General alleged that NAF and its operations had become financially entangled with lawyers and other actors involved in debt collection matters subject to arbitration.⁵⁵ NAF subsequently entered into a settlement with the Attorney General and discontinued its provision of consumer arbitrations pursuant to mandatory pre-dispute arbitration clauses.

Maine also requires a disclosure regarding financial interests that could represent a conflict of interest. In addition, the consumer protection division of Maine's Office of the Attorney General is directly involved in publicizing dispute resolution providers' disclosures to consumers. Specifically, each dispute resolution provider must notify the Attorney General of the website where its disclosures are posted (and must provide notification of the discontinuation of the use of such website), and the Attorney General is required to include links on its own publicly accessible website.⁵⁶

Maryland varies from both California and Maine in additionally requiring disclosure of the address where a consumer arbitration was conducted.⁵⁷

CONCLUSION

The obvious benefits of required reporting and publication are three-fold. First, the availability of this information should equalize to some degree the knowledge of “one shot” users of consumer arbitration in comparison to “repeat players.” Such knowledge should assist these “one shot” users as they consider whether to pursue arbitration, which arbitrators to select, and how to prepare for their arbitration proceedings.⁵⁸ Second, the availability of this information should permit public oversight and enable an overall, systemic picture of the consumer arbitration process’ operation and effects. For example, to the extent that some type of systematic frequency or lack of frequency of appointment of certain arbitrators and the outcomes of those cases can be evaluated, required reporting and publication provide a means for the CFPB and other public entities to engage in oversight and assessment. Third, the fact of disclosure will make it less likely that dispute resolution providers will engage in behaviors or relationships that raise doubts regarding their impartiality or legitimacy, and transparency should assure parties and the public of such impartiality and legitimacy. Ultimately, the reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration that has been expressed by the Supreme Court.

It is not unreasonable for dispute resolution organizations or parties to worry about the scrutiny to which the disclosures proposed by the CFPB may subject them, but that scrutiny should be welcomed in the public interest. Transparency will enable analysis, improvement and comprehension⁵⁹ of a consumer arbitration system that is largely opaque. In addition, access to “well-reasoned decisions [will] create confidence in the dispute resolution body and educate the users of the system about how the body would be likely to rule in the future.”⁶⁰ Finally, transparency is particularly important when, as here, one of the parties to a dispute is imposing a dispute resolution process upon the other party and the courts may be asked to enforce—and thus lend their coercive power and legitimacy to—the award produced by the process. These characteristics of mandatory pre-dispute consumer arbitration in the context of financial services and products are particularly important to the Section as it assesses the likelihood that the CFPB’s proposal will assist with achieving fairness, efficiency, accountability and good governance.⁶¹

In sum, the Section strongly supports the CFPB’s proposal to require regulated entities to submit arbitration claim filings, awards and other documents to the CFPB and to publicize such information. The Section urges the CFPB to consider how quasi-public and private organizations have structured their databases to ensure easy access, searchability, and an overall sense of the dispute resolution system and its outcomes. The Section is particularly struck by FINRA’s provision of both an online searchable database of individual awards and useful aggregated data (including data regarding mediation and different types of arbitral panels).

As noted above, it is also important that parties and the public know that individual arbitrators and dispute resolution providers offer an effective and impartial forum. Regarding impartiality, a searchable database of claim filings and awards will reveal the number of times that a regulated entity has been a party in an arbitration filed with or administered by a dispute resolution provider. Such a database also will reveal the number of times that a regulated entity’s arbitration has been conducted by a particular arbitrator. Similarly, a searchable database will reveal the number of times that particular lawyers have represented clients in such arbitrations and before particular arbitrators.

However, such a database will not reveal either prior mediation experience with a particular dispute resolution organization or neutral, or the financial interests that might exist among dispute resolution organizations, parties and legal representatives. Required disclosure regarding such prior experience and relationships also will assist with protecting the impartiality, effectiveness and integrity of

arbitration. The Section therefore also urges the CFPB to consider the experience of the states in requiring disclosures regarding prior mediations⁶² and financial interests that may represent conflicts of interest.

Finally, the Section urges the CFPB to consider the mechanisms it will use to enforce its reporting requirements.

The Section appreciates this opportunity to provide its comments to the CFPB.

Respectfully,

A handwritten signature in black ink, appearing to read 'N. Welsh', written in a cursive style.

Nancy A. Welsh
Chair-Elect, ABA Section of Dispute Resolution

¹ 12 U.S.C. §5518 (2012).

² See CONSUMER FINANCIAL PROTECTION BUREAU [hereinafter CFPB], SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED (Oct. 7, 2015), http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

³ See CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT SEC. 1028(A) (March 2015) [hereinafter CFPB REPORT], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

⁴ The CFPB has also proposed to bar class action waivers in mandatory pre-dispute consumer arbitration clauses contained in contracts for the provision of financial services and products. The Section's proposed comments to the CFPB do not address this proposal.

⁵ See Arbitration Agreements, 81 Fed. Reg. 32830-01 at 32868-69 (proposed May 24, 2016) (to be codified at 12 C.R.F. pt. 1040); see also CFPB, SMALL BUSINESS ADVISORY REVIEW PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS at 13-14 (Oct. 7, 2015) (proposing to "require covered entities that use arbitration agreements in their contracts with consumers to submit initial claim filings and written awards in consumer finance arbitration proceedings to the Bureau through a process the Bureau would expect to establish as part of this rulemaking. The Bureau is also considering whether to publish the claims or awards to its website, making them available to the public. Before collecting or publishing any arbitral claims or awards, the Bureau would ensure that these activities comply with privacy considerations." *Id.* at 20. The CFPB anticipates that regulated entities would be required to submit to the Bureau "an electronic file with documents that the entity already possesses" that may also be redacted. *Id.* at 25).

⁶ See e.g., Herbert M. Kritzer, *To Regulate or Not to Regulate, or (Better Still) When to Regulate*, 19 DISP. RESOL. MAG. 12 (2013) (part of a themed issue entitled "Considering Regulation of ADR"); Thomas Stipanowich, Nancy Welsh, Lisa Bingham & Larry Mills, *National Roundtable on Consumer and Employment Dispute Resolution: Consumer Arbitration Roundtable Summary Report* (Apr. 17, 2012) http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/roundtable2012.authcheckdam.pdf; *Report of the Discussion of the Consumer Arbitration Study Group*, 2010 A.B.A. SEC. DISP. RESOL. http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/consumerarbitrationreport.authcheckdam.pdf.

⁷ The CFPB Review Task Force consisted of: Nancy Welsh (Chair), Lisa Amsler, Louis Burke, Ben Davis, Homer Larue, Bruce Meyerson, Lawrence Mills, Peter Phillips, Colin Rule, Jean Sternlight, Thomas Stipanowich, and Beth Trent.

⁸ CFPB REPORT, *supra* note 3, § 5-1, at 4.

⁹ *Id.*

¹⁰ *Id.* at n. 5 ("[T]he AAA is specified as at least one potential choice of contractually-specified arbitration administrators in 98.5% of the credit card market we studied; 98.9% of the checking account market we studied; 100% of the GPR prepaid card market we studied; 85.5% of the storefront payday loan market we studied; and 66.7% of the private student loan agreements we reviewed. The AAA is specified as the *sole* choice in 17.9% of the GPR prepaid card market that we studied; 44.6% of the checking account market we studied; and one of the private student loan agreements we reviewed. With that said...when we reviewed the court records of class cases in which parties moved to compel arbitration, we found five records indicating a subsequent filing with the AAA and four indicating a filing in JAMS.")

¹¹ The CFPB specifically named JAMS Inc., but it is very likely that there are also other dispute resolution providers handling these cases.

¹² CFPB REPORT, *supra* note 3, § 2-5-3, at 35-39.

¹³ *Id.* at § 5-1, at 5-6 (and observing that most state and federal courts also do not require reporting regarding settlements).

¹⁴ See Financial Industry Regulatory Authority [hereinafter FINRA], *The Financial Industry Regulatory Authority's Dispute Resolution Activities*, at 19 (Revised April 4, 2016). The Section thanks FINRA's Office of Dispute Resolution for providing this information.

¹⁵ See FINRA Manual Rule 12904(h) ("All awards shall be made publicly available.") http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192.

¹⁶ See <http://www.finra.org/arbitration-and-mediation/arbitration-awards>; <http://finraawardsonline.finra.org/>.

¹⁷ See <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.

¹⁸ FINRA also offers mediation.

¹⁹ See e.g., Stephen J. Choi & Theodore Eisenberg, *Punitive Damages in Securities Arbitration: An Empirical Study*, 39 J. LEGAL STUD. 497 (2010).

²⁰ See FINRA Manual Rule 12904(g).

²¹ See FINRA DISPUTE RESOLUTION TASK FORCE, FINAL REPORT AND RECOMMENDATIONS OF THE FINRA DISPUTE RESOLUTION TASK FORCE, at 22-23 (Dec. 16, 2015), <https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>.

²² *Id.* at 22.

²³ See *Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN at Rule 16(b) (“Except if the Panel determines otherwise [per Paragraph 4(j) of the Policy, “when an Administrative Panel determines in an exceptional case to redact portions of its decision”], the Provider shall publish the full decision and the date of its implementation on a publicly accessible web site. In any event, the portion of any decision determining a complaint to have been brought in bad faith (see Paragraph 15(e) of these Rules) shall be published.”), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

²⁴ The list of approved dispute resolution service providers, including links to their databases of proceedings and decisions, is available at <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>.

²⁵ See WORLD INTELLECTUAL PROP. ORG., FINAL REPORT OF THE WIPO INTERNET DOMAIN NAME PROCESS, ¶ 219 (April 30, 1999).

²⁶ See Michael Geist, *Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, 27 BROOK. J. INT’L. L. 903-38 (2002); Benjamin G. Davis, *Une Magouille Planetaire: The UDRP Is an International Scam, An Independent Assessment of the Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 72 MISS. L. J. 815-863 (2002); Benjamin G. Davis, *The New New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 3 J. WORLD INTELL. PROP. 525 (2000) (Updated version); Benjamin G. Davis, *The New New Thing: Uniform Domain Name Dispute Resolution Policy of the Internet Corporation for Assigned Names and Numbers*, 17 J. INT’L ARB., June 2000, at 116. *Uniform Domain Name Dispute Resolution Policy*, ICANN, <https://www.icann.org/resources/pages/policy-2012-02-25-en>; *Domain Name Dispute Resolution Policies*, ICANN, <https://www.icann.org/resources/pages/dndr-2012-02-25-en> (provides other domain name dispute resolution policies).

²⁷ See Dispute Settlement Archive, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes.

²⁸ See ICSID Award Database, WORLD BANK, <https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx>.

²⁹ See ICSID Arbitration Rules, Rule 48(4) (“The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal”).

³⁰ See e.g., Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459 (2015); Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-The-Art*, 46 GEO. J. INT’L. L. 363 (2015); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007).

³¹ Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 UNIV. KAN. L. REV. 1301, 1319-20 (2006).

³² Ank Santens & Romain Zamour, *Dreaded Dearth of Precedent in the Wake of International Arbitration: Could the Cause Also Bring the Cure?*, 7 Y.B. ON ARB. & MEDIATION 73, 78 (2015) (citing S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. OF INT’L ARB. 119 (2009)).

³³ See Rogers, *supra* note 31, at 1319-20.

³⁴ See e.g., ARBITRATOR INTELLIGENCE, <http://www.arbitratorintelligence.org/contribute-award>. The same trend is occurring for international commercial mediation; see e.g., *Certified Mediators*, INT’L MEDIATION INST., <https://imimediation.org/certified-mediator-search>.

³⁵ See e.g., *Arbitration Awards*, ST. OF MINN. BUREAU OF MEDIATION SERV., <http://mn.gov/admin/bms/arbitration/awards/>; *Interest Arbitration Awards*, WASH. ST. PUB. EMP. RELATIONS COMM’N, <http://perc.wa.gov/interest-arbitration-awards/>.

³⁶ See e.g., *Grievance Arbitration Decisions*, WASH. OFF. OF FIN. MGMT., <http://www.ofm.wa.gov/labor/arbitration/grievance/decisions.asp>.

³⁷ The benefits of arbitrator opinion writing are many and varied. See Sarah R. Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL F. 271 (2013). First, opinion writing improves the

quality of arbitral decision making. The process of writing an opinion encourages the arbitrator to carefully consider her decision. In addition, opinion writing assists parties in selecting an arbitrator because it provides them with better information about a particular arbitrator's decision-making process and potential biases. The opinion writing requirement also improves the hearing process (because the arbitrator will need to make sure he or she understands all of the issues presented) and provides a greater sense of resolution to the parties, who will now have a deeper understanding of the reasons they won or lost. Moreover, this relatively inexpensive process change would have a significant impact on parties' and the public's perception of arbitration as a fair and legitimate forum for the resolution of disputes. *See also* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L. J. 1283 (2008).

³⁸ *See e.g.*, Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RTS. & EMP. POL'Y J. 405 (2007). The AAA has been most conscientious in complying with California's disclosure requirements. Access to the AAA data first indicated both the presence of a "repeat player" effect in employment arbitration and the improvement in employees' success rates after the AAA began enforcing the Employment Due Process Protocol. *See* Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303 (Samuel Estreicher & David Sherwyn eds., 2004).

³⁹ Certain providers that handle fewer than 50 consumer arbitrations are required to report only semiannually.

⁴⁰ ANN. CAL. CODE CIV.P. § 1281.96(a) (West 2015). *See generally*, Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 347 (2003); Ruth V. Glick, *California Arbitration Reform: The Aftermath*, 38 UNIV. SAN FRANCISCO L. REV. 119 (2009); Richard Chernick, *Imposed-Arbitration Reforms Threaten To Stifle Strengths of Commercial Arbitration*, 9 DISP. RESOL. MAG., Fall 2002, at 16; Jay Folberg, *Arbitration Ethics: Winds of Reform Blowing from the West?*, 9 DISP. RESOL. MAG., Fall 2002, at 5 (describing reasons underlying establishment of new disclosure requirements for arbitrators in California); Gail Hillebrand, *Should California's Ethics Rules Be Adopted Nationwide?*, 9 DISP. RESOL. MAG., Fall 2002, at 10.

⁴¹ ANN. CAL. CODE CIV. P. § 1281.96(b) (West 2015).

⁴² The Dispute Resolution Section understands that the CFPB's authority does not extend to employment arbitration and, therefore, takes no position on California's definition of employment as a consumer good.

⁴³ CAL. CODE CIV. P. § 1281.96(a) (West 2015).

⁴⁴ *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, 2898 (2015) (citing David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, *Reporting Consumer Arbitration Data in California: An Analysis of Compliance with California Code of Civil Procedure*, 1281.96, 9 PUB. L. RES. INST. 51 (2013)).

⁴⁵ Resnik, *supra* note 44, at 2900 (A research team analyzed the AAA's disclosures regarding claims that had been filed and closed between July 2009 and June 2014 (and thus were governed by the 2003 version of California's disclosure requirements). They found disclosures regarding 7,303 consumer claims, excluding real estate and construction, and the disclosures generally revealed:

...the names of the business entity and of the arbitrators and lawyers (if appearing), as well as whether the claim closed by settlement or award, the amounts sought, the fees, and fee allocations between the disputants. Of the 5,224 claims "terminated by award," about half included a dollar figure.

Resnik, *supra* note 44, at 2899-2900. Resnik also observes, "The information on prevailing parties comes with the caveat that arbitrators are the source; the AAA has not 'reviewed, investigated, or evaluated the accuracy or completeness' of such information." Resnik, *supra* note 44, at 2900.

⁴⁶ Resnik, *supra* note 44, at 2898; *see also* Lisa Blomgren Bingham, Jean R. Sternlight, & John C. Healey, *Arbitration Data Disclosure in California: What We Have and What We Need* (April 2005) (unpublished paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles) (cited in Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, The Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32 (2014) (noting that California data was incomplete, thus precluding systematic analysis of outcomes)).

⁴⁷ CAL. CODE CIV. P. § 1281.96(f) provides: "It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section." However, there is no express provision for enforcement of such obligation. *See e.g.*, Opening Brief of Appellant at 10, *Cross Country Bank v. California*, No. A108572 (Cal. App. 1 Dist. 2005) (observing that in dicta, the trial court in the case had noted that an arbitration agreement naming NAF

as the provider “might be unenforceable” due to NAF’s failure to comply with the California disclosure requirements, but also noting the lack of any express provision for such disqualification).

⁴⁸ 10 ME. REV. STAT. ANN. § 1394 (West 2010).

⁴⁹ MD. CODE COM. LAW, § 14-3903 (West 2011).

⁵⁰ D.C. CODE § 16-4430 (West 2008).

⁵¹ Interestingly, the District of Columbia’s reporting requirements also provide for the waiver of arbitration fees and costs “for any person having a gross monthly income that is less than 300% of the federal poverty guidelines issued annually by the United States Department of Health and Human Services.” D.C. CODE § 16-4430 (d)(1) (West 2008). The District of Columbia’s provision also requires dispute resolution organizations to provide notice to consumers regarding the potential for waiver of fees. D.C. CODE § 16-4430 (f) (West 2008). The District of Columbia also does not permit arbitrators or arbitration organizations to administer consumer arbitrations pursuant to an agreement or rule that requires the non-prevailing consumer to pay the fees and costs of the opposing party. D.C. CODE § 16-4430 (g) (West 2008). *See* Appellate Brief, *Keeton v. Wells Fargo Corp.*, 987 A.2d 1118 (D.C. Mar. 3, 2009) (No. 08-CV-990) in which a consumer argued that an arbitration provision should not be enforced because the arbitration provider refused to provide for a waiver of a fees, despite the requirements of the District of Columbia’s provision. The District of Columbia Court of Appeals ultimately required the trial court to permit discovery and hold an evidentiary hearing to determine the unconscionability of the arbitration agreement.

⁵² D.C. CODE § 16-4430 (i) (West 2008).

⁵³ D.C. CODE § 16-4430 (h) (West 2008). Maine also requires disclosures regarding financial interest. *See* 10 ME. REV. STAT. ANN. § 1394(1)(K) (West 2010).

⁵⁴ In 2002, the CPR-Georgetown Commission on Ethics and Standards in the Practice of ADR published the CPR-Georgetown Principles for ADR Provider Organizations. These principles include the following regarding disclosures:

ADR Provider Organizations should take all reasonable steps to provide clear, accurate and understandable information about the following aspects of their services and operations:

- a. The nature of the ADR Provider Organization’s services, operations, and fees;
- b. The relevant economic, legal, professional or other relationships between the ADR Provider Organization and its affiliated neutrals;
- c. The ADR Provider Organization’s policies relating to confidentiality, organizational and individual conflicts of interests, and ethical standards for neutrals and the Organization;
- d. Training and qualifications requirements for neutrals affiliated with the Organization, as well as other selection criteria for affiliation; and
- e. The method by which neutrals are selected for service. . . .
- f. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including
 - (i) any financial or other interest by the Organization in the outcome;
 - (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a de facto stream of referrals, or a funding relationship between a party and the organization; or
 - (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

Principles for ADR Provider Organizations, INT’L INST. FOR CONFLICT PREVENTION & RES.

<http://www.cpradr.org/RulesCaseServices/CPRRules/PrinciplesforADRProviderOrganizations.aspx>. *See also* Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 Sw. L. Rev. 187, 225-26 (2012) (suggesting disclosures of the following in order to understand the operation of any negotiated or facilitated processes that precede arbitration—e.g., written policies (or performance evaluation factors) to guide employees’ decisions regarding the amount of their first and subsequent settlement offers to consumers; the number of times that a consumer must refuse settlement offers in order to be offered the full amount they claim; the length of time that employees wait before the consumer’s selection of an arbitrator to offer the full amount requested by a consumer; also suggesting disclosure of the following regarding arbitration—e.g., how the available pool of arbitrators was selected for these types of cases; how arbitrators are selected for particular cases; the contractual and financial relationship between companies and their arbitral provider(s); the company’s share of

each arbitral provider's gross and net revenues; the potential for the arbitral provider, or individual arbitrators, to receive bonuses for their work for a company and the basis for such bonuses; the information that the company receives about the claims made by consumers, the results of these claims and the arbitrators responsible for deciding the claims; how the company has used this information; whether the company has ever used this information to improve its products or services and if yes, in what way).

⁵⁵ See generally Nancy A. Welsh, *What Is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395, 427-30 (2010); Consent Decree, *Minnesota v. National Arbitration Association, Inc.* (No. 27-CV-07-18550 Minn. Dist. Ct. July 17, 2009) <http://pubcit.typepad.com/files/nafconsentdecree.pdf>; Karen Olsen, *Consent Decree in Minnesota v. NAF*, PUBLIC CITIZEN (July 20, 2009), <http://pubcit.typepad.com/clpblog/2009/07/consent-decree-in-minnesota-v-naf.html> (press release regarding the consent decree).

⁵⁶ 10 ME. REV. STAT. ANN. § 1394(2) (West 2010).

⁵⁷ MD. CODE COM. LAW, § 14-3903(a)(11) (West 2011). Maryland also varies from both California and Maine in not requiring disclosures regarding the arbitration of employment-related disputes or the number of times that a non-consumer has been a party in a mediation conducted by the disclosing dispute resolution organization. MD. CODE COM. LAW, § 14-3903 (a)(2), (a)(5) (West 2011).

⁵⁸ See generally Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-100 (1974) (noting the significant advantages that repeat players enjoy in comparison to one-time players—e.g., experience leading to changes in how the repeat-player structures the next similar transaction; expertise, economies of scale, and access to specialist advocates; informal continuing relationships with institutional incumbents; bargaining reputation and credibility; long-term strategies facilitating risk-taking in appropriate cases; influencing rules through lobbying and other use of resources; playing for precedent and favorable future rules; distinguishing between symbolic and actual defeats; and investing resources in getting rules favorable to them implemented—and contrasting these to disadvantages borne by one-time players—e.g., more at stake in given case; more risk averse; more interested in immediate over long-term gain; less interested in precedent and favorable rules; not able to form continuing relationships with courts or institutional representatives; not able to use experience to structure future similar transactions; limited access to specialist advocates); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 195 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225-27 (1998) (observing that repeat-player employers fare better in arbitration than one-shot employees, that when repeat-player employers lose, damages are lower than for one-time employers, and generally that enforcement of pre-dispute arbitration agreements allows employers to structure the arbitration process to their advantage); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999). Empirical research consistently indicates that repeat players in consumer arbitration are more likely to "win"—but it must be noted that this is also true in litigation. See Welsh, *supra* note 55, at 419-20 (summarizing empirical research examining the occurrence and potential reasons for repeat player bias in consumer arbitration). Recent empirical work indicates that this pattern may have more to do with companies' representation by lawyers who have become extreme repeat players since individual consumers are very unlikely to be represented by lawyers who are extreme repeat players. See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L. J. 57 (2015). There are now suggestions that one-shot players might increase transparency and improve their experience in consumer arbitration if they are trained to identify key procedural elements and then upload these and other information to an online platform that would be widely accessible. See Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, The Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32 (2014).

⁵⁹ Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 613-16 (1998).

⁶⁰ Schneider, *supra* note 59, at 613-16.

⁶¹ See G. A. RES. 69/116, ¶4 (Dec. 10, 2014) (United Nations Convention on Transparency in Treaty-based Investor-State Arbitration) (referencing a belief "that the Rules on Transparency contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance").

⁶² See Menkel-Meadow, *supra* note 58, at 34 (reporting regarding one law firm: "Beyond the use of one ADR firm as a repeat provider, this law firm represented to me that a single mediator had been used over 300 times in one year! The repeat play law firm (by specialty) was able to maximize its use of a single repeat play mediator. So far,

neither ethics regulations nor other rules require the law firm or the mediator to disclose to one-shot litigants that he had performed for this firm before.”).