August 22, 2016

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

RE: Docket No. CFPB-2016-0020; RIN 3170-AA51

Dear Ms. Jackson:

The Consumer Data Industry Association ("CDIA") appreciates the opportunity to comment on the Consumer Financial Protection Bureau’s ("CFPB") proposed rule on arbitration agreements.

CDIA is an international trade association with more than 140 corporate members. CDIA’s mission is to educate consumers, media, legislators and regulators about the benefits of the responsible use of consumer data.

CDIA members form the backbone of the U.S. credit reporting system and include the nationwide consumer reporting agencies and other consumer reporting agencies ("CRAs"). Our members provide businesses with the information and analytical tools necessary to manage risk and help ensure fair and safe transactions for consumers and facilitate competition to create opportunities for customers and the economy. CDIA member products are used in more than nine billion transactions each year, expanding consumers’ access to a market which is innovative and focused on their needs.

In addition, CDIA members provide consumers with credit monitoring products to help consumers understand and monitor their credit records and protect themselves from identity theft and its consequences. CDIA members offer these direct-to-consumer ("DTC") credit monitoring products, including identity protection products, on a subscription basis for a monthly fee. CDIA’s comments focus on specific elements of the proposed rule and the consequences of those elements for CRAs and consumers. CDIA is primarily concerned about the application of the proposed rule to credit monitoring products offered by CRAs or their affiliates which provide consumers with consumer reports, credit scores, or information from consumer reports. In particular, CDIA does not believe the CFPB has adequately considered the negative consequences of potentially subjecting such credit monitoring products to class action lawsuits under the Credit Repair Organizations Act ("CROA") and that statute’s disgorgement-based civil liability provision. Further, CDIA is concerned more generally about the application of the proposed rule to CRAs or their affiliates and the consumer reporting market and this letter responds to various CFPB requests for comment on these issues.
I. The CFPB’s Proposed Arbitration Rule and Consumer Reporting Agencies

Pursuant to Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), 12 U.S.C. § 5518(b), the CFPB has proposed regulations restricting mandatory arbitration clauses with class action waivers. See 81 Fed. Reg. 32,830 (May 24, 2016).

The proposed arbitration rule would prohibit providers of certain consumer financial products and services from enforcing a pre-dispute arbitration clause in a lawsuit filed by a consumer, unless and until a court has ruled that the lawsuit may not proceed as a class action. The proposed rule would also require providers to disclose the limits of the pre-dispute arbitration agreement relative to class actions.

In addition, the proposal would require a covered provider that continues to use pre-dispute arbitration clauses and that is involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitration records to the CFPB, so that the CFPB can monitor arbitrations.

Section 1028 of the Dodd-Frank Act requires the CFPB to conduct a study of the use of arbitration clauses in contracts between regulated entities and consumers in connection with the offering or providing of consumer financial products or services. The CFPB published such a study in March 2015 (“Arbitration Study”) that addressed contracts for selected types of consumer financial products or services. Section 1028 also requires that any proposed restriction on the use of arbitration clauses must be based on the findings in the Arbitration Study.

Under the proposed rule, CRAs would be covered providers, and thus subject to the limits on pre-dispute arbitration clauses, when they “provid[e] directly to a consumer a consumer report as defined by the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), a credit score, or other information specific to a consumer from a consumer report.” See Proposed 12 C.F.R. § 1040.3(a)(4). The proposed rule would thus apply to DTC credit monitoring products (including identity protection products), file disclosures, and score disclosures offered or provided by CRAs or their affiliates. See 81 Fed. Reg. at 32,875.

The proposal also seeks comment on whether a broader range of consumer reporting agency activities should be subject to the arbitration rule, including conducting investigations of disputes, opting consumers out of information sharing, placing a fraud alert on a consumer’s report, or placing a security freeze on a consumer’s report. 81 Fed. Reg. at 32,876.
II. The CFPB Lacks Authority to Apply the Arbitration Rule to CRAs, Credit Monitoring Products Offered by CRAs, or Causes of Action Under CROA Based on the Limited Scope and Findings of the CFPB’s Arbitration Study

A. The CFPB Lacks the Legal Authority to Apply the Arbitration Rule to CRAs Offering Credit Monitoring Products Directly to Consumers that Are Potentially Subject to CROA Class Actions

Section 1028(b) of the Dodd-Frank Act vests the CFPB with authority to adopt regulations to prohibit or limit pre-dispute arbitration clauses, but only if the CFPB finds that a regulatory prohibition, condition, or limitation “is in the public interest and for the protection of consumers” and if such findings are “consistent with” the Arbitration Study. 12 U.S.C. §5518(b). Although unusual in consumer financial services law, Congress has occasionally required regulatory agencies to base regulations on studies. 1 Here, the statute clearly provides that the CFPB’s arbitration rules must be “consistent with” the findings of the Arbitration Study. The statute sets a high bar for the CFPB and the CFPB has not met the statutory prerequisite for imposing a regulatory prohibition, condition, or limitation on pre-dispute arbitration clauses used by CRAs or their affiliates in contracts for DTC credit monitoring products.

The CFPB’s Arbitration Study reviewed contracts with pre-dispute arbitration clauses in six product markets: credit cards, checking accounts, general purpose reloadable prepaid cards, payday loans, private student loans, and mobile wireless contracts governing third-party billing services. Arbitration Study at 7; 81 Fed. Reg. at 32,840. The CFPB stated that “the markets assessed in the Study represent lending money (e.g., small dollar open-ended credit, small-dollar closed-ended credit, large-dollar unsecured credit, large-dollar secured credit), storing money (i.e., consumer deposits), and moving or exchanging money.” 81 Fed. Reg. at 32,840 n. 149. The Arbitration Study also covered “debt relief and debt collection disputes arising from” the products covered by the CFPB’s Study. Id.

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1 See Michigan v. Environmental Protection Agency, 135 S. Ct. 2699, 2705 (2015) (noting that Congress established “a unique procedure” by directing the EPA to “perform a study of the hazards to public health reasonably anticipated to occur” as a result of power plant emissions and “[i]f the Agency ‘finds . . . regulation is appropriate and necessary after considering the result of the study,’ it ‘shall regulate [power plants]’ under the Clean Air Act Amendments of 1990); Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency, 344 F.3d 832, 842, 844 (9th Cir. 2003) (noting that the Clean Water Act required the EPA to establish a comprehensive program to regulate stormwater discharges based on studies mandated by the statute and consultation with state and local officials); Environmental Defense Fund, Inc. v. Costle, 578 F.2d 337, 340, 343 (D.C. Cir. 1978) (discussing Safe Drinking Water Act requirement for EPA Administrator to issue regulations setting maximum contaminant levels for drinking water based on a study conducted by the National Academy of Sciences or other independent scientific organization). Even when Congress has not required that a regulation be based on or consistent with a study or its findings, the D.C. Circuit has invalidated an agency rule that ignored, without explanation, evidence and recommendations contained in a report required by statute. See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1141, 1145-46 (D.C. Cir. 2005).
There are critical gaps in the CFPB’s Arbitration Study that deprive the CFPB of the legal authority to apply the proposed arbitration rule to CRAs or their affiliates offering or providing DTC credit monitoring products or to CRAs more generally.

First, the consumer reporting market was not one of the markets examined by the CFPB’s Arbitration Study, except to count credit reporting class action settlements in compiling data on class actions. 2 Thus, the CFPB did not consider arbitration clauses used by or arbitrations invoked by CRAs, their affiliates, or other participants in the consumer reporting market, nor did it consider individual actions or small claims court actions involving CRAs or their affiliates. As the CFPB concedes, the Arbitration Study did not provide a complete analysis of pre-dispute arbitration clauses in the consumer reporting context. And although the CFPB found that credit reporting constituted one of the four largest product areas for class action relief, see Arbitration Study at Section 8.3.3 at 24-25, it did not define the scope of credit reporting class actions—we assume the category consists primarily of FCRA class actions against CRAs, furnishers, or users—-or indicate whether it counted class actions concerning credit monitoring products as credit reporting class actions.

Second, the CFPB’s Arbitration Study did not consider credit monitoring products, whether offered by CRAs or other entities, in any of its product categories. The CFPB has acknowledged that “credit scoring and credit monitoring were not included in the[ ] product categories” addressed in the Arbitration Study. 81 Fed. Reg. at 32,840 n.149. Nonetheless, the CFPB did count class action settlements regarding credit scoring and credit monitoring products in the Arbitration Study’s analysis of class action settlements and in the analysis of the overlap between public enforcement actions and private class actions. Id. In fact, the Arbitration Study mentions credit monitoring products only twice, both times in the context of credit monitoring as a form of in-kind relief provided as remediation in certain class action lawsuits, suggesting that credit monitoring provides positive consumer benefits. See Arbitration Study at Section 8.1, at 4 n. 6 and Section 8.3.3, at 24 n. 43.

Finally, the CFPB’s Arbitration Study did not address the use of pre-dispute arbitration clauses in the context of causes of action arising under the Credit Repair Organizations Act, or CROA. The importance of these clauses in the CROA context cannot have escaped the CFPB, given that one of the most recent arbitration cases decided by the Supreme Court involved claims under CROA. 3 The CFPB’s failure to consider such actions in its Arbitration Study means that the CFPB cannot make a “finding” that application of the arbitration rule to credit monitoring products potentially subject to CROA class actions is “in the public interest” and is “consistent with” the Arbitration Study. As a result, the CFPB lacks the legal authority to apply its proposed arbitration rule in the context of CROA class actions.

2 The CFPB specifically noted one extremely large class action settlement against a nationwide CRA involved 190 million class members, while all other class action settlements studied by the CFPB had only 160 million class members combined. 81 Fed. Reg. 32,849 & n. 299. The disproportionate size of this class relative to other class actions should have prompted the CFPB to examine the particular risks faced by CRAs in class action lawsuits, but the CFPB has failed to undertake or document any such inquiry.

In sum, the CFPB’s arbitration rule, by statute, must be based on “findings” that prohibitions, conditions, or limitations on pre-dispute arbitration clauses are “in the public interest” and are “consistent with” the Arbitration Study. The CFPB did not consider in its Arbitration Study the use of pre-dispute arbitration clauses by CRAs or their affiliates, by participants in the consumer reporting market, in the context of credit monitoring products, or in the context of CROA class actions. Therefore, the CFPB has not made—and cannot make—the “findings” necessary to apply the proposed arbitration rule to CRAs or their affiliates, the consumer reporting market, credit monitoring products, or CROA class actions. These gaps in the Arbitration Study legally preclude the CFPB from applying the proposed arbitration rule to CRAs, the consumer reporting market, credit monitoring products, or CROA class actions based on the specific requirement in Section 1028(b) of the Dodd-Frank Act that any prohibition, condition, or limitation on pre-dispute arbitration clauses adopted by the CFPB must be based on “findings” that are “consistent with the study.” Since the CFPB has not made—and cannot make—findings about entities, markets, products, or causes of action that it did not address in its Arbitration Study, the CFPB lacks the legal authority to apply the arbitration rule to those entities, markets, products, or causes of action.

B. Other Deficiencies of the CFPB’s Arbitration Study

In addition to the gaps in the CFPB’s Arbitration Study discussed in Section II.A. above, the findings in the CFPB’s Arbitration Study are also deficient in other respects. Although the CFPB cannot lawfully adopt regulations restricting arbitration clauses for entities, markets, products, or causes of action that it did not address in the Arbitration Study, the CFPB justified its proposed rule by pointing to its findings regarding the total amounts recovered by consumers in class actions. However, the Arbitration Study did not adequately assess the net costs and benefits to consumers of such recoveries. For example, the study pays relatively little attention to the costs of class action litigation – for consumers and financial firms – and gives no consideration to the costs of class actions that result in no recovery for the class.

The Arbitration Study is also inadequate because it fails to assess the merits and efficiency of different dispute resolution mechanisms. For example, Arbitration Study failed to consider the merits of those class action lawsuits it included in its study or to calculate any actual injury to consumers belonging to a class. The study simply assumes that settlements—which routinely do not include any finding of wrongdoing—reflect redress for legal violations. The Arbitration Study treated each and every class action settlement that resulted in some recovery to consumers as presumptively valid and meritorious. The CFPB did not assess the merits of the class action lawsuits it considered, particularly those suits which resulted in small, nuisance-value settlements. For class actions to be deemed an efficient dispute resolution mechanism, consumers should not obtain redress where there has been no violation of law and no harm; redress in such cases represents an unjustified windfall.

Most significantly, the Arbitration Study does not support the factual findings upon which the CFPB based its proposed rule. Specifically, the data in the CFPB’s Arbitration Study shows that consumers, on average, receive more redress in arbitration than in court—and receive it faster and with less expense. In arbitrations where arbitrators resolved disputes on the merits (32.2% of
all arbitrations), arbitrators provided relief in favor of consumers’ affirmative claims in 32 disputes (20.3% of cases), and the average affirmative relief to consumers, in cases where the consumer prevailed, was about $5,400. Arbitrators also provided debt forbearance relief to consumers in 46 disputes (19.2% of cases), and the average forbearance, in cases where the consumer obtained relief, was $4,100. This relief does not include settlements between the consumer and the financial services provider reached prior to the arbitration since the CFPB did not have data on settlements. Arbitration decisions generally were issued within five to eight months after the case was filed and, where a settlement was reached, the median time to settlement was 155 days. Arbitration Study at Section 1.4, at 12, and Section 5, at 11-15 and 39-43.

By contrast, in class action litigation, more than 60% of class actions do not result in consumer class relief; consumers, on average, recover only about $32 in class settlements; very few consumers participate by making a claims with a median claims rate of just 8%; class actions take an average of 690 days or a median of 560 days to reach final settlement; and about $424 million out of $2.0 billion in cash relief went to plaintiffs’ attorneys. Arbitration Study at Section 1.4, at 16-17, and Section 8, at 3-4 and 8-39.

The CFPB’s conclusion that consumers do not invoke arbitration similarly finds no support in the CFPB’s Arbitration Study or the supplementary information to the proposed rule. The proposed arbitration rule reports that consumers initiated about 411 arbitrations per year with the American Arbitration Association regarding the consumer financial products studied by the CFPB, while consumers initiated about 187 class actions per year in Federal court and selected state courts regarding those same products. 83 Fed. Reg. at 32,845, 32,846. The CFPB, however, counts the inclusion of passive, uninvolved class members, most of whom never obtain relief, as tipping the balance heavily in favor of class actions.

III. The CFPB Should Exempt from its Arbitration Rule Class Actions Claims Against Providers of Credit Monitoring Products Arising under CROA Because Class Actions Would Not Serve the Public Interest or the Public Good Given CROA’s Civil Liability Provisions

If the CFPB were to conclude that it has the legal authority to apply its arbitration rule to CRAs that provide consumers with consumer reports, credit scores, or information derived from consumer reports, the CFPB should nonetheless exempt from the arbitration rule class action claims related to such products arising under the Credit Repair Organizations Act (“CROA”). CDIA and its members believe that restricting pre-dispute arbitration clauses for the DTC credit monitoring products they offer to consumers would not serve the public interest or promote the public good based on CROA’s extraordinary and draconian civil liability provisions.

A. Background on the Credit Repair Organizations Act (“CROA”)

The Credit Repair Organizations Act, or CROA, was enacted by Congress in 1996 with strong support from CDIA and its members. The purposes of CROA are to: (1) ensure that prospective buyers of services from credit repair organizations receive the information necessary to make an informed decision about the purchase of such services; and (2) protect the public from unfair or deceptive advertising and business practices by credit repair organizations. 15 U.S.C. § 1679(b).
CDIA members supported CROA because many credit repair organizations persistently engaged in fraudulent tactics designed to have accurate, current, and verified information removed from consumer reports and promised consumers results they could not deliver.

The legislative history of CROA describes how credit repair organizations would abuse the credit reporting system by “inundating consumer reporting agencies with so many challenges to consumer reports that the reinvestigation system breaks down, and the adverse, but accurate, information is deleted,” and by “having accurate information deleted from the consumer’s report often . . . by abusing the reinvestigation system, lodging protest after protest until the agency is unable to verify the information.” CROA’s legislative history also indicates that CRAs were among the intended beneficiaries, not the targets, of the legislation.

CROA’s substantive provisions include:

- A prohibition on making, or advising any consumer to make, any untrue or misleading statement about any consumer’s credit worthiness, credit standing, or credit capacity to any consumer reporting agency, creditor, or prospective creditor, 15 U.S.C. § 1679b(a)(1);
- A prohibition on making, or advising any consumer to make, any statement to any consumer reporting agency, creditor, or prospective creditor intended to alter the consumer’s identification to prevent the display of the consumer’s credit record, history, or rating for the purpose of concealing adverse information that is accurate and not obsolete, 15 U.S.C. § 1679b(a)(2);
- A prohibition on credit repair organizations charging or receiving advance payments for the performance of any agreed services for any consumer before such service is fully performed, 15 U.S.C. § 1679b(b);
- A requirement that credit repair organizations make certain disclosures to consumers, 15 U.S.C. § 1679c;
- A prohibition on credit repair organizations providing any services for any consumer unless a written and dated contract has been signed by the consumer or before the end of the three-business-day period beginning on the date the contract is signed, 15 U.S.C. § 1679d(a); and

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6 See 140 Cong. Rec. E1247-01 (1994) (Statement by Sen. Kennedy) (“This legislation does not only benefit consumers. It also benefits credit bureaus and credit grantors.”); 140 Cong. Rec. S5028–02 (1994) (Statement by Sen. Riegle) (noting that credit repair organizations “cause[e] credit bureaus to waste time and money on spurious disputes.”); Federal Trade Commission Reauthorization, Hearing Before the Subcommittee on Consumer of the Senate Commerce, Science and Transportation Committee, 103rd Cong. 24 (1993) (prepared statement of FTC Comm. Steiger) (stating that fraudulent credit repair organizations “have bilked consumers of millions of dollars in the past several years, have caused consumer reporting agencies to waste time and money reinvestigating spurious disputes, and have been the focus of numerous enforcement actions by the Commission.”).
A right of any consumer to cancel any contract with any credit repair organization without penalty or obligation before midnight of the third business day which begins after the date on which the contract between the consumer and the credit repair organization is executed or would otherwise become enforceable, 15 U.S.C. § 1679e(a).

Although a number of CROA’s substantive provisions distinguish between credit repair organizations and consumer reporting agencies, CROA’s definition of “credit repair organization” is quite broad and means:

[A]ny person who uses any instrumentality of interstate commerce or the mails to sell, provide or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of--

(i) improving any consumer’s credit record, credit history, or credit rating; or
(ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i).

15 U.S.C. § 1679a(3)(A). The definition expressly excludes: (a) any tax-exempt section 501(c)(3) nonprofit organization; (b) any creditor that is assisting the consumer to restructure any debt the consumer owes to the creditor; and (c) any depository institution, Federal or State credit union, or any affiliate or subsidiary of those entities. 15 U.S.C. § 1679a(3)(B). The definition of “credit repair organization” does not, however, expressly exclude CRAs.

There is a split of authority with respect to whether CROA applies to FCRA-regulated products offered by consumer reporting agencies and their affiliates. Based on the legal uncertainty created by the split in the case law discussed below, CDIA members rely on pre-dispute arbitration clauses in their contracts for DTC credit monitoring products to avoid the potential application of CROA liability in class action lawsuits.

More than 10 years ago, the first class actions were filed against consumer reporting agencies and their affiliates alleging violations of CROA. Initially, courts interpreted CROA’s definition of “credit repair organization” as applying to companies that performed services or represented that they could retroactively fix or improve a consumer’s past or historical credit record: “Congress did not intend for the definition of a credit repair organization to sweep in services that offer only prospective credit advice to consumers or provide information to consumers so that they can take steps to improve their credit in the future.”

The Federal Trade Commission agreed. In a letter to Congressman Edward R. Royce, dated July 1, 2005, and attached to this Comment Letter as Attachment A, the FTC recognized that “some parties have interpreted CROA to cover companies that offer credit monitoring and other educational products based on consumers’ credit files” and the FTC was “aware that private

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lawsuits have been filed under CROA to challenge practices relating to the sale of credit monitoring products.”

The FTC letter further stated:

As a matter of policy, the Commission sees little basis on which to subject the sale of credit monitoring and similar educational products and services to CROA’s specific prohibitions and requirements, which were intended to rein in fraudulent credit repair. In contrast, credit monitoring services—if promoted and sold in a truthful manner—can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft.

More recently, some courts have rejected this analysis and have read CROA’s definition of “credit repair organization” as being broad enough to encompass “credit counseling aimed at improving future creditworthy behavior” and, arguably, credit monitoring services. These courts have expressly rejected the distinction between the retrospective fixing of historical credit reports and prospective advice and information to consumers about ways they can improve their future credit reports.

CDIA vigorously disagrees with these decisions because we do not believe that Congress ever intended for CROA to apply to CRAs and their affiliates. Moreover, the FTC, which enforces CROA, has never applied CROA to CRAs or their affiliates and has stated publicly that it sees little basis for subjecting credit monitoring and similar products to CROA’s prohibitions and requirements. That said these more recent CROA decisions potentially subject DTC credit monitoring products to CROA and its civil liability provision.

CROA’s civil liability provision was designed to be extraordinarily punitive as it was intended to target bad actors. Consequently, CROA’s civil liability provision provides for actual damages equal to the greater of actual damages incurred or any amount paid by the person to the credit repair organization, in addition to punitive damages and attorneys’ fees. 15 U.S.C. § 1679g(a).

8 Id. at 514 (quoting FTC Letter to Rep. Royce).

9 Stout v. Freescore, LLC, 743 F.3d 680, 686 (9th Cir. 2014) (offering “services aimed at improving future creditworthy behavior with prospective promises of improved credit” falls within CROA); Zimmerman v. Puccio, 613 F.3d 60, 72 (1st Cir. 2011) (“[C]redit counseling aimed at improving future creditworthy behavior is the quintessential credit repair service.”).

10 Stout, 743 F.3d at 687 (stating that “the plain language of the CROA is at odds with” the decision in Hillis); Zimmerman, 613 F.3d at 72 (finding the distinction drawn by the Hillis court “unsupported”).

11 Many states have adopted state credit repair laws modeled after CROA with disgorgement-based damages provisions. Although some of these state laws expressly exempt consumer reporting agencies from their scope, see, e.g., Fla. Stat. § 817.7001, et seq., and Tex. Fin. Code § 393.001, et seq., while other state laws follow the CROA exemptions and do not expressly exempt consumer reporting agencies, see, e.g., Cal. Civ. Code § 1789.10 et seq.; N.Y. Gen. Bus. Law Ch. 20, Art. 28-BB, § 458-a, et seq., we are not aware of case law in any state holding that a consumer reporting agency is a credit repair organization or “credit services organization,” the term used in some state statutes.
disgorgement-based liability provisions and the uncertainty created by the case law discussed above, CDIA members rely on pre-dispute arbitration clauses in their contracts for DTC credit monitoring products to avoid the potential application of CROA’s extraordinary liability provisions in class action lawsuits.

B. The CFPB’s Proposed Arbitration Rule Exposes CRAs to Unmanageable Class Action Liability that Could Result in Full Disgorgement of Revenues

As proposed, the CFPB’s arbitration rule would apply to DTC credit monitoring products that directly provide consumers with their consumer reports, credit scores, or information derived from consumer reports. The proposed rule thus would apply to CRAs, their affiliates, and others that offer such DTC credit monitoring products. Application of the CFPB’s proposed arbitration rule to CRAs and their affiliates in this context is extremely problematic because such a rule could make CROA’s disgorgement-based liability provision potentially applicable to CRAs offering credit monitoring products directly to consumers. This risk is not speculative, but is based on court decisions holding that CROA’s definition of “credit repair organization” is broad enough to apply to “credit counseling” and other products or services designed to educate consumers about how to improve prospectively their future credit records.12

Absent the ability to rely on pre-dispute arbitration clauses in contracts for DTC credit monitoring products, CRAs and their affiliates face the prospect of class action CROA lawsuits that could subject them to CROA’s draconian, disgorgement-based liability provisions for offering valuable credit monitoring products. CROA’s disgorgement-based civil liability provision differs markedly from the civil liability provisions of other consumer protection statutes to which the CFPB rule would apply, which generally impose caps on class action liability.13 Indeed, the CFPB acknowledges the existence of class action damage caps in a number of consumer financial protection laws. 81 Fed. Reg. at 32,860-61 & n. 395& 395. Covered providers subject to the Truth in Lending Act, Electronic Fund Transfer Act, Equal Credit Opportunity Act, and similar consumer financial protection statute that cap class action damage awards have the ability to anticipate and price their products and services for potential class action risk.

By contrast, CROA’s highly unusual disgorgement-based liability provision makes it impossible for CRAs or their affiliates to price credit monitoring products for class action risk because any violation of CROA, including technical violations that produce no consumer harm, results actual damages equal to in full disgorgement of all amounts paid by users of the product or service.

12 Stout, 743 F.3d at 685-87; Zimmerman, 613 F.3d at 71-72.

13 See 15 U.S.C. § 1640(a)(2)(B) (capping Truth in Lending Act class action liability at the lesser of $1 million or 1 percent of the net worth of the creditor); 15 U.S.C. § 1693m(a)(2)(B) (capping Electronic Fund Transfer Act class action liability at the lesser of $500,000 or 1 percent of the net worth of the defendant); 15 U.S.C. § 1691e(b) (capping Equal Credit Opportunity Act class action liability at the lesser of $500,000 or 1 percent of the net worth of the creditor); 12 U.S.C. § 2605(f)(2) (capping Real Estate Settlement Procedures Act class action liability for servicing violations to actual damages plus additional damages not to exceed the lesser of $1 million or 1 percent of the net worth of the servicer).
We note that CRA’s offering DTC credit monitoring products would remain subject to class action lawsuits for truly harmful practices, such as misleading representations or nonfulfillment of contracted services, under theories of unfair, deceptive, or abusive acts or practices. The unique nature of CROA is that its disgorgement-based liability provisions have been interpreted to apply not only to harmful conduct, but also to technical violations. It is this aspect of CROA liability that makes it infeasible for CRAs to market DTC credit monitoring products that benefit the public without assurance that CROA class action liability does not apply.

This inability for CRAs to price their DTC credit monitoring products for CROA class action litigation risk may have the unintended effect of reducing the availability of those products and the amount of information that is provided or made available to consumers regarding their consumer reports or credit scores. By undercutting the viability of DTC credit monitoring products, the CFPB’s arbitration rule could limit the availability of and consumer access to important and valuable tools consumers use to learn about their credit histories, consumer reports, and credit scores and protect themselves from identity theft. Reducing the availability of and access to credit monitoring products reduces the transparency of consumer reports and credit scores, which conflicts with the CFPB’s oft-stated goal of enhancing the transparency of consumer reports and credit scores.14

The alternative of CRAs complying with CROA’s restrictions is likely not feasible for the following reasons. First, as noted above, CROA provides that no services may be provided to a consumer unless a written and dated contract for those services has been signed by the consumer. 15 U.S.C. § 1679d(a). In addition, the contract must include, among other things, a full and detailed description of the services to be performed, including all guarantees of performance and an estimate of the date by which the performance of the services will be complete or the length of the period necessary to perform such services. 15 U.S.C. § 1679d(b). Credit monitoring products do not, by their nature, have a fixed completion date or fixed time period for achieving specific performance objectives. Rather, DTC credit monitoring products provide ongoing, recurring benefits to consumers who subscribe to them. Therefore, it is very doubtful whether CRAs can craft CROA-compliant contracts, with the required time estimates, for ongoing credit monitoring products.

Second, CROA provides that no services may be provided to a consumer before the end of the three-business-day period beginning on the date the contract is signed. 15 U.S.C. § 1679d(a).

14 See, e.g., CFPB Press Release, http://www.consumerfinance.gov/about-us/newsroom/cfpb-calls-on-top-credit-card-companies-to-make-credit-scores-available-to-consumers/ (Feb. 27, 2014) (public statements by the CFPB and Director Cordray encouraging credit card issuers to provide consumers with free credit scores as a public good); CFPB Press Release, http://www.consumerfinance.gov/about-us/newsroom/cfpb-reports-that-more-than-50-million-credit-card-consumers-have-access-to-free-credit-scores/ (Feb. 19, 2015) (reporting that more than 50 million consumers had access to free credit scores through their credit card statements); Consumer voices on credit reports and scores at 10 (Feb. 2015) (noting that consumers who proactively obtained credit reports or credit scores did so primarily online through AnnualCreditReport.com, through other sites that provide free credit reports and/or scores, or through subscriptions to credit monitoring services), available at http://files.consumerfinance.gov/f/201502_cfpb_report_consumer-voices-on-credit-reports-and-scores.pdf.
Some CDIA members have tested a three-business-day waiting period, but found that products structured with such a waiting period could not succeed in the marketplace. There is good reason why this is the case. When consumers seek credit monitoring products, they often do so with some urgency, such as when they believe they have been victims of identity theft. A three-day waiting period is incompatible with the immediate need consumers quite often are trying to address.

C. The CFPB Should Expressly Exempt Providers of Credit Monitoring Products Potentially Subject to CROA Causes of Action from the Arbitration Rule Based on Consideration of the Public Interest Standard

1. Background

The CFPB did not propose any exemptions to the proposed arbitration rule for statutes such as CROA which provide for disproportionate, disgorgement-based class action damages.

Before the CFPB issued the proposed arbitration rule, small entity representatives (“SERs”) in the Small Business Review Panel (“SBREFA Panel”) raised concerns regarding the unlimited damages available under the Telephone Communications Privacy Act (“TCPA”), which the SERs argued small entities could not absorb. 81 Fed. Reg. at 32,888. Subsequently, CDIA met with CFPB staff prior to the publication of the proposal to raise distinct concerns about applying the arbitration rule to DTC credit monitoring products offered by CRAs in light of CROA’s unique, disgorgement-based liability provisions, and the split among courts as to whether CROA applies to CRAs. Even if the CFPB does not create an exemption for the TCPA, an exemption for CROA is warranted because CROA is a strict liability statute with no per violation limit on damages and no scienter-based mitigation of damage awards. Suggested language for an exemption or exclusion is attached to this Comment Letter as Attachment B.

2. The Dodd-Frank Act Requires the CFPB to Apply the “Public Interest” Standard

While acknowledging the arguments concerning CROA’s liability provisions, including the prospect of reducing or eliminating the availability of valuable credit monitoring products, 81 Fed. Reg. at 32,921 n. 680, the CFPB stated that it would not act “unless there is considerable evidence that compliance with or the remedial scheme established by a particular statute is against the public good.” Id. at 32,921.

This “against the public good” test articulated by the CFPB, however, misapprehends the requirements of the Dodd Frank Act. It is not incumbent on commenters or others to present evidence that “compliance with the remedial scheme established by a statute is against the public good”; rather, it is the duty of the CFPB to show that the public interest – including a consideration of “benefits and costs to consumers and firms, and general or systemic concerns

15 The TCPA provides for statutory damages of $500 per violation that courts may increase to $1,500 per violation based on the degree of scienter involved with no cap on total statutory damages. 47 U.S.C. § 227(b)(3) and (c)(5).
with respect to the functioning of consumer finance markets, the broader economy, and the promotion of the rule of law and accountability” – will be served by a prohibition on arbitration clauses and class-action waivers. See id. at 32,854. Moreover, the CFPB’s “against the public good” standard may be impossible to meet since Congress presumably adopts all statutes to serve some public good.

CDIA believes that the CFPB is required to follow the statutory “in the public interest” standard set forth in Section 1028(b) of the Dodd-Frank Act, see id., rather than the extra-statutory standard the CFPB made up when it stated that a stakeholder must demonstrate “that compliance with or the remedial scheme established by a particular statute is against the public good” to convince the CFPB to provide relief. Id. at 32,921.

3. Application of the Arbitration Rule to Statutes the CFPB Does Not Administer Usurps Congressional Prerogatives

The CFPB expressly declined to propose exemptions to the proposed arbitration rule for statutes such as CROA and the TCPA that the CFPB does not administer, instead deferring to Congress and the courts. 81 Fed. Reg. at 32,888. CDIA submits that if the CFPB is reluctant to propose exemptions for statutes the CFPB does not administer, common sense dictates that the CFPB should be equally reluctant to apply the proposed arbitration rule to those same statutes.16

For a statute like CROA, where the CFPB has neither regulatory, supervisory, nor enforcement authority, the CFPB should defer to Congress to decide whether to prohibit, condition, or limit the use of pre-dispute arbitration clauses in the context of CROA class actions. Congress could, in its discretion, amend the Federal Arbitration Act to impose such prohibitions, conditions, or limitations, but it has not chosen to do so. Therefore, the CFPB should not usurp Congress’s prerogative to decide whether, or if, arbitration clauses should be prohibited, conditioned, or limited in connection with a statute that is outside the CFPB’s jurisdiction.

Although the CFPB took the position that Congress is better positioned than the CFPB to establish the appropriate level of damages for particular harms under established statutory schemes, and that Congress and the courts are the appropriate institutions to address disproportionate damages awards, particularly for statutes the CFPB does not administer, the CFPB did seek comment on whether there are compelling reasons to exclude particular causes of action from the proposed rule. Id. at 32,888.

4. An Exclusion Would Satisfy the Statute’s “In the Public Interest” Standard in View of CROA’s Disgorgement-Based Damages Provision

In response to the CFPB’s request for comment, CDIA submits that there are compelling reasons to exclude DTC credit monitoring products potentially subject to CROA class actions from the

16 Likewise, the CFPB’s hostility to pre-dispute arbitration provisions in consumer contracts is misplaced since the CFPB itself uses an alternative dispute resolution mechanism—CFPB administrative proceedings—to pursue its enforcement agenda, rather than bringing all enforcement actions in Federal court.
CFPB’s arbitration rule. Such an exclusion would be “in the public interest,” the statutory standard set forth in 12 U.S.C. § 5518(b) that is binding on the CFPB.

The CFPB stated that it intends to consider separately the “in the public interest” standard of Section 1028 of the Dodd-Frank Act, 12 U.S.C. § 5518(b), in a manner that considers “secondary impacts on consumers such as effects on pricing, accessibility, and the availability of innovative products, as well as impacts on providers, markets, the rule of law and accountability, and other general systemic considerations.” 81 Fed. Reg. at 32,853; see also id. at 32,865-868. Specifically, the CFPB proposed “to interpret the phrase ‘in the public interest’ to condition any regulation on a finding that such regulation serves the public good. This inquiry requires the Bureau to consider benefits and costs to consumers and firms, including the more direct consumer protection factors noted above, and general or systemic concerns with respect to the functioning of markets for consumer financial products or services, the broader economy, and the promotion of the rule of law and accountability.” Id. at 32,854.

A fair reading of the CFPB’s “public interest” standard justifies the creation of an exemption to the arbitration rule for DTC credit monitoring products such as those offered by CRAs and their affiliates. Applying the arbitration rule to DTC credit monitoring products would have the following secondary impacts on consumers: (a) increase the price for valuable credit monitoring products, assuming that CDIA members remain willing to offer such products in light of the CROA liability risks; (b) restrict consumer accessibility to valuable credit monitoring products that provide consumers with consumer reports, credit scores, or information derived from consumer reports; and (c) restrict the availability of innovative credit monitoring products that could help educate consumers about their credit histories and records and prevent or mitigate identity theft. The arbitration rule’s application to credit monitoring products would adversely impact CRAs, their affiliates, and other providers of credit monitoring products who could be subject to costly and unpredictable CROA class action litigation. Similarly, the arbitration rule would adversely impact markets and the broader economy by making an important tool for educating consumers about their credit records and for preventing and mitigating identity theft become more costly, less accessible, and less available. Finally, application of the arbitration rule to credit monitoring products offered by CRAs and their affiliates would do nothing to promote the rule of law or promote accountability, but would impose costs on consumers and firms that outweigh any benefits of the proposed regulation.

In declining to adjust the proposed rule to take into consideration the impact of CROA’s disgorgement-based civil liability provisions on CDIA members offering or providing DTC credit monitoring products, the CFPB has failed to follow its statutory mandate to consider whether the proposed arbitration rule is “in the public interest.” The CFPB also has failed to apply the factors it outlined for making an “in the public interest” finding relative to the specific implications of potential CROA liability for CRAs and their affiliates that offer DTC credit monitoring products. Rather than doing what the statute requires and applying the “in the public interest” standard to determine whether the proposed arbitration rule should apply to statutory remediation schemes that provide for disproportionate damages, the CFPB merely deferred questions about statutes with extraordinary damages provisions to Congress and the courts.
The CFPB also opined that economic theory suggests that “the potential for these cases to be filed seeking very large damages also amplifies the incentive to comply with the law . . ., and thus amplifies the benefits to consumer, even if providers pass on some of the costs to consumers in terms of higher prices.” 81 Fed. Reg. at 32,888, 32,921. We disagree with the premise that the prospect of catastrophic damages fosters compliance, particularly in the case of a statute like CROA, where, as described above, compliance may not be possible. Under these circumstances, where a product cannot be offered in a compliant manner, the consequence of catastrophic damages is that the product will not be offered at all, not that it will be offered in a “more compliant” manner.

This refusal to consider the potential for disproportionate damage awards shows that the CFPB is not serious about considering all aspects of “the public interest.” For these disproportionate damage award situations, the CFPB failed to address secondary impacts to consumers, adverse impacts to providers, adverse impacts to markets and the broader economy, or the impact on the rule of law or accountability. The CFPB also failed to consider whether the costs to consumers and firms from such disproportionate damage awards would outweigh any benefits of the proposed regulation. In other words, the CFPB engaged in no weighing and balancing, which any “public interest” analysis requires, but simply ducked the analysis by shifting responsibility to other branches of government and by relying on a glib assumption from economic theory.

5. Other CFPB Arguments Are Unpersuasive

Finally, CDIA notes that some of the CFPB’s arguments in support of the proposed arbitration rule simply do not withstand unbiased scrutiny. For example, the CFPB maintains that attorneys “may decline to take cases” subject to pre-dispute arbitration agreements that prohibit class-wide relief “if they calculate that they will incur costs with little chance of recouping them,” and noting that attorneys incur costs in preparing and litigating a case. 81 Fed. Reg. at 32,860. Just as class action attorneys need to have some plausible prospect of recovery in order to bring an action, providers of consumer financial products or services also must perceive some reasonable rate of return on their investment. The CFPB needs to recognize that providers of DTC credit monitoring products may not be willing to offer those valuable products to consumers if they calculate that they will incur costs yet face a material risk that CROA liability will result in the disgorgement of all revenue generated from the sale of those products.

Additionally, the CFPB argues that the proposed arbitration rule is justified because it does not have the resources to police all potential violations. 81 Fed. Reg. at 32,860-61. This argument is unpersuasive in the context of CRAs or their affiliates offering credit monitoring products. The CFPB has defined a larger participant rule for consumer reporting market participants that covers approximately 30 consumer reporting entities (only some of which offer DTC credit monitoring products). 77 Fed. Reg. 42,874, 42,889 (July 20, 2012). The CFPB has also established a dedicated examination team for supervising CRAs. Given the small number of CRAs impacted by the proposed arbitration rule and the CFPB’s dedicated resources for CRA supervision, the CFPB cannot seriously claim that it lacks the resources to oversee the offering of DTC credit monitoring products by CRAs or their affiliates. In any event, the CFPB has no authority to police for CROA violations – so there can be no plausible justification to prohibit arbitration clauses in the CROA class action context on the basis of CFPB resource constraints.
CDIA notes that a CROA exemption to the arbitration rule for CRAs offering DTC credit monitoring products to consumers would not immunize CRAs from class action lawsuits or liability for unfair, deceptive, or abusive acts or practices under other laws, including Section 1036(a)(1)(B) of the Dodd-Frank Act, related to the marketing or offering of such products. In addition, an exemption would not preclude the FTC from enforcing CROA as it sees fit.

IV. Application of the Arbitration Rule to Other Credit Monitoring Products

The CFPB requests comment on whether the proposed arbitration rule also should cover products and services that provide or monitor information obtained from sources not regulated under the FCRA, such as a broader suite of identity theft prevention products. 81 Fed. Reg. 32,876. By seeking comment on this issue, the CFPB tacitly admits that it has proposed to apply the arbitration rule in a manner that creates an un-level playing field for different types of credit monitoring products. Specifically, the CFPB’s proposed rule covers those products that rely on FCRA-regulated information, but not those products based on non-FCRA-regulated information.

The CFPB’s discussion of the “in the public interest” standard speaks of “leveling the playing field in markets for consumer financial products and services.” 81 Fed. Reg. at 32,865. However, the proposed arbitration rule would do exactly the opposite in the context of credit monitoring products. What the rule would do is create an un-level playing field between valuable credit monitoring products that provide consumers with access to their consumer reports, credit scores, and information from their consumer reports and less valuable credit monitoring products that do not rely on consumer report information. The CFPB’s proposal to adopt a rule that places the most valuable credit monitoring products at a significant disadvantage compared to less valuable credit monitoring products in terms of susceptibility to class action lawsuits and potential CROA damages constitutes a curious and indefensible perversion of the “in the public interest” standard. CDIA urges the CFPB to avoid creating an un-level playing field and, to ensure that does not happen, to exempt from the arbitration rule CROA class action lawsuits involving DTC credit monitoring products offered by CRAs and other entities that provide consumers with consumer reports, credit scores, or information derived from consumer reports.

V. Coverage of Other Consumer Reporting Activities

As proposed, the CFPB’s arbitration rule would apply to CRAs and their affiliates when they provide directly to a consumer “a consumer report as defined by the Fair Credit Reporting Act, 15 U.S.C. 1681a(d), a credit score, or other information specific to a consumer from a consumer report.” See Proposed 12 C.F.R. § 1040.3(a)(4). The proposed rule would thus apply to DTC credit monitoring products (including identity protection products), file disclosures, and score disclosures offered or provided by CRAs. See 81 Fed. Reg. at 32,875.

The CFPB seeks comment on whether a broader range of consumer reporting agency activities involving direct interaction between the consumer and the consumer reporting agency should be subject to the arbitration rule, including conducting investigations of disputes, opting consumers out of information sharing, placing a fraud alert on a consumer’s report, or placing a security freeze on a consumer’s report.
Application of the rule to certain FCRA-mandated activities such as file disclosures and score disclosures would be unnecessary and unwarranted. As discussed in Section II above, the CFPB’s Arbitration Study did not consider the consumer reporting market in any of its product categories, except to count credit reporting class action settlements in compiling data on class actions. See 81 Fed. Reg. 32,840 & n. 149. Section 1028(b) of the Dodd-Frank Act vests the CFPB with authority to adopt regulations governing pre-dispute arbitration clauses only if it finds that a regulatory prohibition or limitation “is in the public interest and for the protection of consumers” and only if such “findings” are “consistent with” the Arbitration Study. The CFPB did not address in its Arbitration Study CRA activities such as conducting investigations of disputes, opting consumers out of information sharing, placing a fraud alert on a consumer’s report, or placing a security freeze on a consumer’s report, or consider the use of pre-dispute arbitration clauses in those contexts. Therefore, the CFPB has not made the “findings” necessary to support the proposed expansion of the arbitration rule and lacks the legal authority to expand the arbitration rule to such consumer reporting activities.

The FCRA requires CRAs to fulfill a number of statutorily-mandated activities, such as, investigating disputes, opting consumers out of prescreened solicitations, placing a fraud alert or active duty alert on a consumer’s report and/or blocking the reporting of information that results from identity theft, providing file disclosures to consumers, and providing score disclosures to consumers. CRAs engage in these activities to fulfill their statutory duties under the FCRA, and do not or cannot condition the exercise of consumers’ FCRA rights on their consent to pre-dispute arbitration agreements. (Perhaps this explains why the CFPB’s Arbitration Study lists consumer reporting as one of the four largest product areas for class relief. See Arbitration Study at Section 8.3.3 at 24-25.)

The CFPB’s suggestion about potentially expanding application of the arbitration rule to activities such as investigating disputes, opting consumers out of prescreened solicitations, and similar activities would not fit within the CFPB’s current approach of defining the scope of coverage by reference to providing certain information directly to consumers, such as a consumer report, credit score, or information derived from a consumer report. Thus, the CFPB would need to develop a new or expanded test for coverage: a test that would substantially differ from the proposal; a test the CFPB has not articulated; and a test for which the CFPB has not provided stakeholders an opportunity to comment. Any new or expanded test for applying the arbitration rule to a broader range of CRA activities would therefore require a supplemental round of notice and comment to satisfy the Administrative Procedure Act, 5 U.S.C. § 551 et seq.

Finally, CDIA strongly urges the CFPB not to apply the arbitration rule to state security freeze laws. The Federal FCRA does not provide for security freezes. Instead, all fifty states and the District of Columbia have adopted state laws that allow consumers to place a security freeze on their consumer reports. However, all state security freeze laws are not identical. For example, twenty-two states permit a parent, legal guardian, or other representative of a minor to place a

security freeze on a minor’s consumer report, while other state laws contain no such provision.\footnote{18}{See \textit{id}.} The availability of remedies for violations of those state laws, including the decision of whether or not to permit class action lawsuits for violations of state security freeze laws, is properly the prerogative of the state legislatures that enacted the laws. The CFPB should not usurp the authority of state legislatures to establish remedies for state law violations by extending its arbitration rule to security freeze obligations created exclusively under state law. Such an expansion of the arbitration rule would be tantamount to a \textit{de facto} preemption of state law.

VI. Application of the Arbitration Rule to Furnishers

In the supplementary information to the proposed arbitration rule, the CFPB stated that “a common activity performed by creditors and consumer credit servicers is furnishing information to a consumer reporting agency, an activity that is covered by” the FCRA. 81 Fed. Reg. at 32,874. The CFPB solicited comment on “whether such furnishing, by any person covered by proposed § 1040.3(a)(1), should also be separately identified as a covered product or service.” Id. The supplementary information language suggests that the CFPB wants and intends for creditors and consumer credit servicers to be subject to the restrictions on pre-dispute arbitration clauses when they furnish information to CRAs, but is not certain whether the language of 12 C.F.R. § 1040.3(a) is sufficient to accomplish that result.

CDIA urges the CFPB not to extend the proposed arbitration rule to creditors and consumer credit servicers that furnish information to CRAs for the following reasons. First, furnishing information to CRAs is not integral to the extension or servicing of consumer credit. Furnishing is a voluntary activity in which some creditors and servicers choose to participate and in which others, particularly those concerned about the costs and burdens of FCRA compliance, choose not to participate.

Given the voluntary nature of furnishing under the FCRA, CDIA is concerned that subjecting creditors and servicers of consumer credit to class action lawsuits and liability for their activities as furnishers could have a chilling effect on the willingness of some furnishers to continue participating in the credit reporting system and lead some furnishers to stop reporting to CRAs to limit their exposure to class action lawsuits and liability. We further believe that taking regulatory actions that prompt creditors and servicers to reconsider their participation as furnishers of information to CRAs would be detrimental to the U.S. credit reporting system.

Second, Section 623(c) of the FCRA, 15 U.S.C. 1681s-2(c), provides that the civil liability provisions of the FCRA do not apply to most of the requirements furnishers must satisfy under the statute, specifically, the numerous requirements contained in Section 623(a), including any implementing regulations, and the requirements of Section 623(e). Therefore, CDIA does not believe it makes sense for the CFPB to apply the arbitration rule to, and allow class actions against, furnishers that are largely exempt from civil liability under the FCRA.

\footnote{18}{See \textit{id}.}
Finally, CDIA notes that the CFPB’s proposed application of the arbitration rule to furnishers may create an un-level playing field because some creditor-furnishers, such as utilities or telecommunications firms, would not be subject to the arbitration rule.

VII. Disclosures to Consumers About Arbitration Clauses

The CFPB’s proposed arbitration rule would require a covered provider to provide a consumer with a prescribed disclosure when a pre-disclosure arbitration agreement with a class waiver pertains to multiple products or services, only some of which are covered by the rule. 12 C.F.R. § 1040.4(a)(2)(ii). At this time, CDIA does not know whether some of its members may find themselves in a position where a pre-dispute arbitration clause remains effective for some products or services but is limited by the rule with respect to other products or services. Nonetheless, CDIA believes that the disclosure language in proposed section 1040.4(a)(2)(ii) is not helpful to consumers because it does not tell consumers which products or services remain subject to pre-dispute arbitration clauses and which products or services are subject to the arbitration rule’s preference for class action lawsuits. Covered providers should have the option of disclosing which products or services remain subject to pre-dispute arbitration clauses directly or by reference to the contract.

VIII. The CFPB’s Section 1022(b)(2) Cost-Benefit Analysis Is Inadequate

The CFPB’s Section 1022(b)(2) impact analysis identifies three main effects the proposed rule would have on providers with arbitration agreements: (1) increased incentives to comply with the law to avoid class litigation exposure; (2) additional class action litigation exposure and expenses; and (3) the one-time cost of changing contract provisions. 81 Fed. Reg. at 32,902. The CFPB also briefly addresses the impact on access to consumer financial products and services. The CFPB believes that “the expected additional marginal costs due to additional Federal class settlements to providers are likely to be negligible in most markets.” Id. at 32,914 (emphasis added). The CFPB bases its belief on the purported facts that each affected product market has hundreds of competitors or more, affected providers offer hundreds of millions of accounts, and certain numerical cost estimates. Id. Thus, the CFPB concludes that the proposed rule would not noticeably diminish access to consumer financial products or services due to effects on providers’ continuing viability. Id.

The CFPB’s burden analysis is deficient for the same reasons its Arbitration Study is deficient. Specifically, the CFPB has not studied or analyzed the particular market at issue, the market for DTC credit monitoring products offered by CRAs and others that provide consumers with access to their consumer reports, credit scores, or other information derived from consumer reports.

Even if we assume that the CFPB is correct that the additional marginal costs resulting from additional Federal class action settlements may be negligible in most markets, that does not mean that such costs will be negligible in all markets, particularly in the market for DTC credit monitoring products. Because the CFPB did not fully consider this market in its Arbitration Study or in the proposed arbitration rule, it cannot make any credible cost estimates regarding the impact the proposed rule will have on CRAs that offer DTC credit monitoring products. Contrary to one key premise of the CFPB’s conclusions, this market clearly does not have
“hundreds of competitors or more.” The CFPB’s conclusory assertion of no diminished access fails to consider the continued viability of DTC credit monitoring products when CRAs find themselves confronted with the prospect of paying disgorgement-based CROA class action damages or attempting to comply with CROA, a statute designed to regulate fraudulent and abusive credit repair services, not valuable credit monitoring products.

The CFPB’s summary dismissal of arguments that certain statutes that contain especially onerous liability provisions, such as CROA and the TCPA, should be exempt from the prohibition on mandatory arbitration clauses with class action waivers undermines the validity of the CFPB’s Section 1022(b)(2) analysis. As noted above, the sum of the CFPB’s analysis was to recite boilerplate economic theory that the potential for cases seeking very large damages amplifies the incentive to comply with the law and the benefits to consumers, even if providers pass on some of the costs to consumers in the form of higher prices, and to leave it to Congress, state legislatures, and courts to address disproportionate class action damages. Such a paucity of evidence or analysis hardly satisfies the CFPB’s obligations under Section 1022(b)(2).

IX. Conclusion

CDIA appreciates this opportunity to comment on the CFPB’s proposed arbitration rule. For the foregoing reasons, we request that the CFPB revise the final rule to ensure that all provisions of the rule reflect “findings” that are both “consistent with” the Arbitration Study and “in the public interest.” Specifically, CDIA requests that the CFPB revise the final rule so that it does not apply to CRAs that offer DTC credit monitoring products which provide consumers with consumer reports, credit scores, or information derived from consumer reports to avoid jeopardizing the viability of those products through CROA class action lawsuits and disgorgement-based damages. We also ask the CFPB to limit the scope of the arbitration rule to avoid usurping the prerogatives of Congress and state legislatures to determine appropriate remedial schemes, including the availability of arbitration, for statutes the CFPB does not administer.

Respectfully submitted,

Stuart K. Pratt
President & CEO
United States of America
Federal Trade Commission
Washington, D.C. 20580

Office of the Secretary

July 1, 2005

The Honorable Edward R. Royce
United States House of Representatives
Washington, D.C. 20515

Dear Representative Royce:

Thank you for your letter requesting the Commission’s views on a draft amendment to the Credit Repair Organizations Act (CROA). The amendment would exempt from CROA’s coverage consumer reporting agencies ("CRAs") and a number of entities related to consumer reporting agencies, including any affiliates; subsidiaries; persons who contract with CRAs to resell consumer reports or monitor consumer report information; and persons who advertise, market, or provide or facilitate consumer access to products or services offered by any of the above.

According to your letter, some parties have interpreted CROA to cover companies that offer credit monitoring and other educational products based on consumers’ credit files. We are aware that private lawsuits have been filed under CROA to challenge practices relating to the sale of credit monitoring products.

As a matter of policy, the Commission sees little basis on which to subject the sale of credit monitoring and similar educational products and services to CROA’s specific prohibitions and requirements, which were intended to rein in fraudulent credit repair. In contrast, credit monitoring services— if promoted and sold in a truthful manner— can help consumers maintain an accurate credit file and provide them with valuable information for combating identity theft.

The proposed amendment, however, would exempt CRAs based on their status as CRAs, as well as any entity that affiliates with a CRA or facilitates consumer access to products or services offered by CRAs and their affiliates. The proposed blanket exemption raises two significant issues.

First, the draft amendment could have a discriminatory effect on sellers of credit monitoring services not covered by the exemption, including legitimate companies that sell credit monitoring services but do not yet have contracts with a CRA, or are able to operate without such contracts (e.g., by instructing their consumer clients to obtain their own credit reports). These companies would remain governed by CROA and thus would be at a significant competitive disadvantage. For example, nonexempted companies would be prohibited from accepting
The Honorable Edward R. Royce - Page 2

advance payment for their services and would have to offer customers a three-day cooling-off period.

Second, the breadth of the exemption could allow fraudulent credit repair firms to evade CROA. In enforcing CROA, we have encountered many apparently fraudulent credit repair operations that aggressively find and exploit existing exemptions in an attempt to escape the strictures of the statute. See, e.g., FTC v. ICR Services, Inc., No. 03C 5532 (N.D. Ill. Aug. 8, 2003) (consent decree) (complaint alleged that defendant falsely organized as 501(c)(3) tax-exempt organization to take advantage of CROA exemption for nonprofits); and United States v. Jack Schroll, No. 98-6212-CIV-ZLOCH (S.D. Fla. 1998) (stipulated judgment and order for permanent injunction) (complaint alleged that defendant attempted to circumvent CROA’s prohibition against “credit repair organizations” charging money for services before the services are performed fully). For these reasons, the Commission does not support the proposed exemption as drafted.

Thank you for requesting our views.

By direction of the Commission.

Donald S. Clark
Secretary
Credit Monitoring, Credit Education and Identity Theft Protection Product
Exclusions from Limitations on Class-Action Arbitration Clauses

Alternative #1

We request exclusions from the CFPB’s proposed limitations on mandatory arbitration clauses in relation to class-action litigation for the following consumer financial products or services offered by a covered person:

1. Consumer financial products or services that involve obtaining information from a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or an affiliate or subsidiary of such a consumer reporting agency, for the purpose of monitoring, on behalf of the consumer, the consumer’s credit.

2. Consumer financial education products or services provided to a consumer based on information about that consumer obtained from a consumer reporting agency as defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or an affiliate or subsidiary of such a consumer reporting agency, for the purpose of –

   (a) analyzing or evaluating the consumer’s credit score or other credit report-related information for the consumer or explaining the consumer’s credit score or other credit report-related information to the consumer,

   (b) providing credit-score related tools to the consumer (including the generation of projections and forecasts of the consumer’s potential credit scores under various prospective trends or hypothetical or alternative scenarios), or

   (c) providing analyses, evaluations, explanations or assistance to the consumer regarding the consumer’s credit score based on the projections, forecasts, or other information generated by the credit-score related tools described in subparagraph (b);

   - where the services described in subparagraphs (a), (b), and (c) do not involve advertisement or provision of services to retrospectively remove or alter historical information from a consumer report on the consumer’s behalf unless such information is inaccurate or obsolete.

3. Consumer financial products or services that involve the provision of materials or services to assist a consumer who is or may be a victim of identity theft in preventing, detecting, investigating and remedying the identity theft.

4. As used herein, the term identity theft means a fraud or any other unlawful act committed or attempted using the identifying information of another person without authority. Identifying information shall mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any
(a) Name, social security number, date of birth, official state or government issued
driver's license or identification number, alien registration number, government
passport number, employer or taxpayer identification number;
(b) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other
unique physical representation;
(c) Unique electronic identification number, address, or routing code; or
(d) Telecommunication identifying information or access device (as defined in 18 U.S.C.
1029(e)).

Alternative #2

We request that the CFPB permit mandatory arbitration clauses in agreements between covered
persons and consumers to apply to the following consumer financial products or services offered
by the covered person and that such clauses be permitted to preclude class-action litigation in
actions under the Credit Repair Organizations Act, 15 U.S.C. 1679 et seq.:

1. Consumer financial products or services that involve obtaining information from a consumer
reporting agency, as defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or an
affiliate or subsidiary of such a consumer reporting agency, for the purpose of monitoring,
on behalf of the consumer, the consumer’s credit.

2. Consumer financial education products or services provided to a consumer based on
information about that consumer obtained from a consumer reporting agency, as defined in
the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), or an affiliate or subsidiary of such a
consumer reporting agency, for the purpose of –

   (a) analyzing or evaluating the consumer’s credit score or other credit report-
related information for the consumer or explaining the consumer’s credit score
or other credit report-related information to the consumer,

   (b) providing credit-score related tools to the consumer (including the generation
of projections and forecasts of the consumer’s potential credit scores under
various prospective trends or hypothetical or alternative scenarios), or

   (c) providing analyses, evaluations, explanations or assistance to the consumer
regarding the consumer’s credit score based on the projections, forecasts, or
other information generated by the credit-score related tools described in
subparagraph (b);

- where the services described in subparagraphs (a), (b), and (c) do not involve advertisement or
provision of services to retrospectively remove or alter historical information from a consumer
report on the consumer’s behalf unless such information is inaccurate or obsolete.

3. Consumer financial products or services that involve the provision of materials or
services to assist a consumer who is or may be a victim of identity theft in preventing, detecting,
investigating and remedying the identity theft.
4. As used herein, the term identity theft means a fraud or any other unlawful act committed or attempted using the identifying information of another person without authority. Identifying information shall mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any

(a) Name, social security number, date of birth, official state or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
(b) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
(c) Unique electronic identification number, address, or routing code; or
(d) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).