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September 27, 2017

Dear Senator:

On behalf of our nearly 38 million members and all Americans age 50 and older, AARP<sup>1</sup> writes to express our support for the safeguards established on July 19, 2017 by the Consumer Financial Protection Bureau's ("CFPB") rule (rule) limiting the use of forced arbitration clauses in certain financial contracts. AARP supports banning predispute mandatory arbitration, which eliminates accountability for unlawful practices and limits consumer access to remedies when they are injured by such practices. AARP writes today to urge you to oppose S.J. Res. 47, which seeks to repeal this rule.

Over the years, AARP has elaborated in numerous comments filed with the CFPB that predispute mandatory arbitration harms consumers.<sup>2</sup> The CFPB's rule makes significant progress in restoring consumers' access to remedies that had been restricted by the widespread use of forced arbitration clauses in contracts over which consumers have no ability to negotiate or protect themselves.

**I. AARP supports the rule, which helps to mitigate the negative consequences of the imposition of predispute mandatory binding arbitration.**

AARP is concerned that predispute arbitration is limiting the effectiveness of consumer protection statutes that were designed and enacted to be enforced primarily through private litigation brought by injured consumers, rather than by taxpayer-funded government enforcement mechanisms. Meaningful protection of consumers in the marketplace therefore requires access to effective redress through private litigation, both to provide a remedy and to create a disincentive to fraudulent, unfair, illegal, unreasonable, or deceptive practices. Many fraudulent, deceptive, and unfair practices

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<sup>1</sup> AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment.

<sup>2</sup> See *AARP Comments submitted in response to Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, Bureau of Consumer Financial Protection, Docket No. CFPB-2012-0017 (June 22, 2012).

have a disproportionate impact on older people. They may be more vulnerable to such practices and typically have fixed incomes and limited earning potential, making it more difficult for them to recover from a financial setback. AARP supports the availability of the full range of enforcement tools to prevent threats to the financial security of older people posed by such unfair and illegal practices, including the right to bring and participate in class action litigation.

AARP agreed with the conclusion of the CFPB's arbitration study that pre-dispute arbitration clauses and class action bans embedded in arbitration clauses harm consumers of financial services and products.<sup>3</sup> Predispute arbitration is particularly pernicious when combined with class action waivers. When both are present, no class claims can be made because arbitration is for individual claims and not class claims. In the financial services context, the lack of class claims can be difficult because the individual financial harms may be limited. Thus, AARP supports the rule's ban of predispute arbitration provisions that also ban class actions. Pre-dispute arbitration clauses that ban class actions hinder consumer enforcement designed to remedy and prevent harmful practices, especially important where the provider has engaged in an illegal pattern or practice affecting a large number of consumers.

**II. Class certification requires a rigorous examination by the courts and businesses have used predispute arbitration provisions with class action bans to insulate themselves from accountability for consumer harm.**

It is important to point out that class certification is not a simple process. In order to bring a class action, injured consumers first must have knowledge of the pattern and practice of the conduct of the provider causing them harm. Then, potential class members must request a court to certify the class. The court must first determine that the class members have common legal claims and the class members must provide rigorous proof of that commonality.

Furthermore, many consumer protection statutes were designed to be enforced primarily through private litigation brought by injured consumers, rather than by taxpayer-funded government enforcement agencies. To achieve the level and type of protection that such laws were intended to provide, consumers must have meaningful access to redress their claims through private litigation. Such laws have become less effective as forced arbitration and class action bans have become increasingly prevalent. Many businesses have used predispute arbitration provisions with class action bans to insulate themselves from accountability for consumer harm.

Forced arbitration clauses along with class action bans do not provide a net benefit to consumers. Opponents argue that these clauses lower the cost of providing consumer products and services. This claim has not been supported with any credible economic data or studies. Even if such claims were true, there is no evidence to suggest that any

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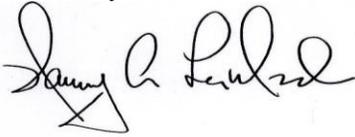
<sup>3</sup> See *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act*, § 1028(a), Consumer Fin. Prot. Bur. (March, 2015).

such cost savings have been passed on to consumers. Alternatively, there may be situations where arbitration could possibly benefit consumers if offered as an option after the harm occurs, not as a blanket requirement in advance of any harm occurring.

### **III. Conclusion**

AARP urges Congress to vote no on S.J. Res. 47 and oppose efforts designed to restrict the ability of the CFPB to protect the public from fraudulent, deceptive, and unfair practices. If you have questions or need additional information on AARP's position on S.J. Res. 47, please feel free to call me, or have your staff contact Jasmine Vasquez at 202-434-3711 or [jvasquez@aarp.org](mailto:jvasquez@aarp.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy A. LeaMond". The signature is fluid and cursive, with a large initial "N" and "L".

Nancy A. LeaMond  
Executive Vice President and Chief Advocacy and Engagement Officer