

OCTOBER 7, 2015

**SMALL BUSINESS ADVISORY REVIEW PANEL FOR
POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS**

DISCUSSION ISSUES FOR SMALL ENTITY REPRESENTATIVES

To help frame discussion of issues and cost of credit matters in the upcoming Small Business Review Panel (Panel) meeting, we are providing this list of questions on which the Consumer Financial Protection Bureau (Bureau) seeks your advice, input, and recommendations. As you think about these questions, it would be helpful to refer to the “Outline of Proposals Under Consideration and Alternatives Considered” (Outline) enclosed with this document.¹

The questions are designed identify the type of information that may help you to participate effectively in the discussion with the Panel and other small entity representatives. Some questions may not apply to you or your business. When a topic is relevant to you, please be prepared to discuss it based on your experience or knowledge of the experience of other small entities in your line(s) of business. It would also be useful to the discussion to provide specific examples of issues that have arisen in your business activities.

The Panel would like to understand the potential economic impacts of the proposals under consideration discussed in the Outline. The Panel’s understanding would be enhanced if you provide a sense of the type and amount of any costs of complying with existing requirements, if any, as well as estimates of costs for the proposals under consideration. Some of the questions suggest ways in which you might want to consider these costs as you prepare for the general discussion. The Bureau welcomes any quantitative information you may choose to provide in response to these questions, but these questions should not be treated as data requests. While company-specific information can help the discussion, we understand that you may wish to frame your response in a manner that protects your company’s proprietary information, as your responses may be included in a public report. Please note that when we ask about costs or other quantitative information, we are only looking for approximations, to the best of your knowledge; we do not need you to send us documentation. We also understand that some potentially relevant events may have occurred too long ago for you to recall, or to recall details.

A. Experience using arbitration agreements² and in arbitration proceedings

1. If your business includes arbitration agreements in any of its contracts for consumer financial products or services, please answer the questions a-f below. (If not, proceed to question 3, or if your business is a debt collector or debt buyer, proceed to question 2.):
 - a. Which product(s) or service(s) first included an arbitration agreement and when?

¹ For background on the SBREFA process, visit http://content.consumerfinance.gov/f/201510_cfpb_fact-sheet-small-business-review-panel-process.pdf.

² Unless otherwise noted, we use the phrase “arbitration agreement” to refer agreements entered into with a consumer before a dispute arises.

- b. For what reasons did your business begin including arbitration agreements in its contracts for consumer financial products or services. Do any reasons no longer apply? Are there other reasons for continuing to include arbitration agreements?
 - c. Do any of your arbitration agreements allow for class arbitration (as described in the Outline)? If any of your arbitration agreements do not, or is silent on the topic of class arbitration, please explain the reason for this.
 - d. For each product or service with an arbitration agreement, please indicate each method of drafting these agreements and, if known, the cost of drafting.
 - i. Used employees (a lawyer or a non-lawyer or both)
 - ii. Consulted outside counsel such as a law firm
 - iii. Obtained standard contract language from one or more of the following (please identify each source): (1) a search on the Internet; (2) a form provider; (3) a trade association; or (4) another source.
 - e. Do you sell consumer accounts to third parties or use third parties to collect debts? If so, do any third parties ask that these accounts include arbitration agreements or seek to only buy debts on accounts with arbitration agreements?
 - f. Do you provide products or services to consumers that are not financial in nature? If so, what are these products or services, and do you provide them under the same contract that you use to provide financial products or services?
2. If your business is a debt collector or a debt buyer: Does the presence (or absence) of an arbitration agreement in a consumer credit agreement affect which accounts you collect or purchase or how you structure your services? Does it affect your charge for collecting, or the price for purchasing, accounts? If so, how? If not, why not?
3. If your business does not include arbitration agreements in any of its contracts for consumer financial products or services, has this been a deliberate choice? If so, please explain why it does not do so, including any benefits or costs from not doing so.
4. Would the proposals under consideration on class actions or individual arbitration change your business's decision to include (or not include) arbitration agreements in contracts for consumer financial products or services? Why/why not? If so, how?
5. Do you have views or data on how often your competitors include arbitration agreements in the types of consumer financial products or services that your business provides? If so, please elaborate, and note the products or services for which you have views or data.
6. How often does your business review or update terms and conditions in its contracts generally, and terms and conditions of any arbitration agreements specifically? Please describe the process and cost involved. Do you use employees, outside counsel, or standard contract language? How do you distribute these changes to consumers?

7. Has your business ever agreed to arbitrate a dispute with a consumer after the dispute arose, when there was no arbitration agreement in place before the dispute arose?
8. As far as you are aware, has your business brought a claim against a consumer in arbitration or been named as a respondent in an arbitration filed by a consumer, relating to any consumer financial products or services you provide?
9. If you answered yes to the above question, please discuss how many arbitrations there have been and provide more information about these proceedings, such as whether the case began in court, the arbitration administrator(s) used, the fees your business was asked to pay, the fees it actually paid, any other expenses incurred, how long the arbitration took (from filing through conclusion), whether the arbitrator rendered an award on the merits, and whether the award was filed publicly in a court proceeding (such as to enforce or review the award) or otherwise made public.

B. Experience with class litigation

The questions in this section ask about your business's class action lawsuit experience.

10. If your business has been named as a defendant in any class actions filed by or settled with consumers related to the products or services provided to consumers, please identify each such case of which you are aware and note the product or service involved.
11. Do you believe that any of these class actions lacked any basis in fact or law or otherwise should not have been brought? If so, please explain why.
12. Did your business file a motion with the court, based on an arbitration agreement, to compel arbitration of any of these cases? Why or why not?
13. If the product or service in these cases did not have an arbitration agreement at the time of the case, did you adopt one later? If so, why?
14. In recent years, has your business at any point been *threatened* with a class action over its consumer financial products or services? If so, please describe your experience. Did your business refer to an arbitration agreement in response to a letter threatening suit?
15. If you know, has the presence/absence of an arbitration agreement affected whether your business has faced class actions or a threat of class actions?
16. What were the impacts to your business in dealing with such litigation or the threat of it, including staff and managerial time discussing the threat and any third-party expenses (e.g., attorney's fees, court costs, expert witness fees, discovery costs, etc.)? Do you believe the presence or absence of an arbitration agreement affected this? Why?

17. Do you have any data you wish to provide on the cost your business pays, or has been quoted, for insuring against defense costs or legal liabilities involving claims that might be brought by your customers? This could be general commercial liability insurance or specialized insurance that may cover some costs incurred in class actions.
18. In your experience, has the price of any insurance your business has obtained, or been quoted, varied based on whether you have an arbitration agreement?
19. Do you have any observations on our preliminary analyses of the legal costs discussion in the Outline (at pp. 27-29)?

C. Investment in compliance with consumer protection laws

The questions in this section ask about your business's costs to ensure compliance with consumer protection laws. By "consumer protection laws," we mean statutes and regulations administered by the Bureau and other federal and state laws, whether they are specific to the financial products or services your business provides, or generally applicable to consumer financial products or services such as laws on unfair and deceptive practices, fraud, torts, and contracts. By "compliance investments," we are referring broadly to the operating costs your business incurs in performing activities reasonably necessary to comply and demonstrate compliance with consumer protection laws. These costs may come in a variety of forms, such as preparing policies, procedures, and forms for consumers or personnel; researching legal requirements; consulting or hiring compliance professionals; assigning compliance duties to existing personnel; training personnel; establishing a complaint procedure and responding to consumer complaints; conducting compliance audits or reviews; or other activities.³

20. If your contracts for consumer financial products or services include arbitration agreements, please compare, if possible, your business's investment in compliance with consumer protection laws now with its investment in compliance before it used arbitration agreements.
 - a. Did including an arbitration agreement change your business's investment in compliance with consumer protection laws?
 - b. Does the arbitration agreement save your business money? If so, how? Does it affect your investment in compliance? If so, how?
21. Would the proposal under consideration change your business's investments in compliance? If so, why and how? When answering this question, please keep in mind all types of potential investment in compliance, such as additional staff time, additional managerial time, additional training time, time for additional rounds of review of documents or products, and any monetary expenses for third-party services.

³ For other examples, you may wish to consult the discussion of compliance costs in the Outline (at pp. 29-31) or the Bureau's 2013 study on cost of compliance with certain Bureau regulations of deposit products, available at http://files.consumerfinance.gov/f/201311_cfpb_report_findings-relative-costs.pdf.

D. Alternatives considered

22. As noted in the Outline (at p. 15), one of the goals of the class proposal is to ensure compliance with consumer protection laws. Do you have views on alternatives for the Bureau to achieve this goal, such as prohibiting arbitration agreements, allowing a business to block class litigation with an arbitration agreement that makes class arbitration available (discussed in the Outline at pp. 17-18), or any other alternatives?
23. As noted in the Outline (at pp. 14-15), one of the goals of the class proposal is to ensure consumers have a way to group together to seek relief for smaller claims that typically are not pursued individually. Do you have views on alternatives for the Bureau to achieve this goal, such as prohibiting arbitration agreements, allowing a business to block class litigation with an arbitration agreement that makes class arbitration available (discussed in the Outline at pp. 17-18), or any other alternatives?
24. Do you have any observations about the alternative the Bureau has considered, as described in the Outline (at pp. 17-18 and pp. 21-22), such as prohibiting arbitration agreements in individual cases or adopting procedural rules for individual arbitration.

E. Cost of credit to small entities

25. When your business borrows money, does it use consumer products as a source of financing? For example, do personnel use a personal credit card for business expenses? Do personnel take out other types of consumer loans for business expenses? If so, please describe the types of credit used, the types of expenses funded by these loans, and generally the amount of your business's expenses that is funded by consumer loans.
26. If your business sells consumer goods or services that are not financial in nature, what amount and proportion of these sales allow the consumer to defer payment? What amount and proportion of the consumer debts in these transactions are pledged as collateral for a business loan or sold to a third party (*e.g.*, factoring)?

F. Other issues for discussion

27. Is your business subject to any other regulations that may overlap, duplicate, or conflict with the proposals under consideration? For example, are any of your financial products or services subject to Military Lending Act regulations that prohibit arbitration agreements in certain credit products provided to service members, or to Dodd-Frank Act regulations that prohibit arbitration agreements in mortgage credit agreements?
28. What would it cost your business to submit arbitration claims and awards to the Bureau, as described in the Outline (at p. 25)? Would you expect to rely on an arbitration administrator to provide this service for you? What costs would your business incur if it were required to redact consumers' personal information from arbitration filings and awards before sending them to the Bureau?