



July 14, 2023

Via regulations.gov  
Comment Intake  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552

Re: Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information, Docket No. CFPB–2023-0020

The National Consumer Law Center submits these comments on behalf of its low-income clients. We would like to address another business practice regarding the collection and sale of consumer information: the use of forced arbitration clauses by consumer reporting agencies (CRAs).<sup>1</sup> This comment urges the Consumer Financial Protection Bureau (CFPB), in connection with its rulemaking on consumer reporting issues, to:

Prohibit the inclusion of forced arbitration clauses in agreements offered by any subsidiary or affiliate of a consumer reporting agency (CRA) that covers any claim against the CRA itself under the FCRA or regarding any issue except the product being offered by the subsidiary or affiliate itself.

The CFPB has ample rulemaking authority to issue such a rule, both under the FCRA and under the Consumer Financial Protection Act (CFPA). As we outline in greater detail below, either authority is an independently sufficient basis for this rule. We also urge the CFPB to adopt a broad rule to prohibit pre-dispute arbitration clauses in all consumer financial contracts, but this

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<sup>1</sup> The request for information is posted at <https://www.consumerfinance.gov/rules-policy/notice-opportunities-comment/open-notices/request-for-information-regarding-data-brokers-and-other-business-practices-involving-the-collection-and-sale-of-consumer-information/>, and published at 88 Fed. Reg. 16,951 (March 21, 2023). This comment was written by NCLC attorney Chi Chi Wu and law student intern Alex Emmons. Lauren Saunders of NCLC provided editorial oversight.

comment is limited to consumer reporting issues. The issues discussed below are emblematic of the wide problems with forced arbitration in all consumer markets.

Once again, we thank you for putting the FCRA rulemaking on the CFPB's regulatory agenda. Tens of millions of Americans have suffered from the abuses of nationwide CRAs for far too long. We hope that by ensuring consumers get their day in court, this rule will help hold CRAs accountable for their abuses and will improve the fairness and accuracy of the credit reporting system.

## **I. Credit Monitoring Services Use Forced Arbitration Clauses that Cover All FCRA Claims**

When a consumer purchases or otherwise obtains credit monitoring or other services from an affiliate or subsidiary of a nationwide CRA, it provides that CRA with an opportunity to bind the consumer to terms and conditions, including forced arbitration. This opportunity does not exist when consumers request a free annual file disclosure, because Regulation V prohibits the nationwide CRAs from requiring terms or conditions for annual file disclosures. 12 C.F.R. 1022.136(h).

As a result, credit monitoring services provide nationwide CRAs with one of their best chances to bind consumers to forced arbitration agreements, potentially going far beyond the credit monitoring service. At present, all three nationwide CRAs include a forced arbitration clause in the terms and conditions of their credit monitoring services. The forced arbitration clauses for Equifax and TransUnion cover the credit monitoring product, which is bad enough. Most egregiously, Experian's forced arbitration clause covers not only its credit monitoring product but claims under the FCRA, including accuracy claims under § 1681e(b) and dispute investigation claims under § 1681i(a).

Credit monitoring services are usually sold by subsidiary or affiliate companies under the nationwide CRA's corporate umbrella. Court documents reveal,<sup>2</sup> for example, that Experian "Creditworks" is a credit monitoring service run by ConsumerInfo.com, Inc., or Experian Consumer Services ("ECS"). ECS is an affiliate of Experian. They share the same parent company and are both wholly owned by Experian Holdings, Inc.<sup>3</sup>

Consumers who enroll in Experian Creditworks must agree to "terms of use," which have included an agreement to arbitrate all future "disputes and claims between us arising out of this Agreement directly related to the Services or Websites to the maximum extent permitted by law."<sup>4</sup> Prior to August 13, 2020, ECS had the following carve-out in its forced arbitration clause:

"Any dispute you may have with us arising out of the Fair Credit Reporting Act (FCRA) relating to the information contained in your consumer disclosure or

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<sup>2</sup> *Alvarez v. Experian Info. Sols., Inc.*, 2023 WL 2519249, at \*1 (E.D.N.Y. Mar. 15, 2023)

<sup>3</sup> *Id.*

<sup>4</sup> *Coulter v. Experian Info. Sols., Inc.*, 2021 WL 735726, at \*2 (E.D. Pa. Feb. 25, 2021)

report, including but not limited to claims for alleged inaccuracies, *shall not be governed by this agreement to arbitrate.* (emphasis added)”

On August 13, 2020, Experian published an updated terms of use agreement which removed the FCRA carve-out while keeping other broad provisions intact.<sup>5</sup> ECS’s forced arbitration clause also explicitly applies not just to claims against ECS, but to claims against all Experian entities, providing that “references to ‘ECS,’ ‘you,’ and ‘us’ shall include our respective parent entities, subsidiaries, affiliates ..., agents, employees, predecessors in interest, successors and assigns,” among other entities.<sup>6</sup> As a result, consumers who sign up for Experian’s credit monitoring service agree to forced arbitration for *any* future FCRA claims against Experian.

Credit monitoring services are widespread and heavily promoted by the nationwide CRAs, including Experian, which claims to have *added* 11 million new members in the preceding year,<sup>7</sup> meaning tens of millions of consumers are likely subscribed. As the CFPB found,<sup>8</sup> only a small percentage of consumers are aware of forced arbitration clauses when they exist, so these tens of millions of consumers probably unknowingly signed away their right to go to court over credit reporting errors and abuses.

Experian’s strategy has been largely effective. Numerous federal courts have granted Experian’s motions to compel arbitration for FCRA claims brought under § 1681e(b) and § 1681i(a) using the forced arbitration provision in ECS’s Creditworks agreement. The following are a few of the numerous examples:<sup>9</sup>

**Debt Parking and Re-Aging: Elettra Meeks v. Experian (9th Cir.)<sup>10</sup>**

Elettra Meeks and other plaintiffs alleged<sup>11</sup> that they were the recipients of illegal “tribal” payday loans, and that their accounts had been reported on their credit reports by Midwest Recovery Systems. In 2020, Midwest was the subject of an enforcement action by the FTC alleging that they had “parked fake or questionable debts on people’s credit

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<sup>5</sup> *Id.*

<sup>6</sup> *Sauer v. Experian Info. Sols., Inc.*, 2022 WL 2163016, 1 (C.D. Cal. May 12, 2022).

<sup>7</sup> Experian Annual Report 2022 - Year ended 31 March 2022, at 39, June 2022, [www.experianplc.com/media/4480/experian\\_ar2022\\_web.pdf](http://www.experianplc.com/media/4480/experian_ar2022_web.pdf).

<sup>8</sup> Cons. Fin. Prot. Bureau. Arbitration Study: Report to Congress 2015. Accessible at <https://www.consumerfinance.gov>.

<sup>9</sup> In addition to the cases below, see also, *Yates v. Experian Info. Sols., Inc.*, 2023 WL 4355045 (S.D. Tex. July 5, 2023), *Kinkle v. Experian Info. Sols., Inc.*, 2023 WL 4105804 (S.D. Ind. June 21, 2023); *Salazar v. Experian Info. Sols., Inc.*, 2023 WL 3529635 (W.D. Mo. May 15, 2023); *Capps v. JPMorgan Chase Bank, N.A.*, 2023 WL 3030990 (E.D. Cal. Apr. 21, 2023); *Levy v. Credit Plus, Inc.*, 2023 WL 2644352 (S.D.N.Y. Mar. 27, 2023); *Alvarez v. Experian Info. Sols., Inc.*, 2023 WL 2519249 (E.D.N.Y. Mar. 15, 2023); *Cimillo v. Experian Info. Sols., Inc.*, 2023 WL 2473403 (S.D.N.Y. Mar. 13, 2023); *Stephens v. Experian Info. Sols., Inc.*, 614 F. Supp. 3d 735 (D. Haw. 2022); *Chong v. Bank of Am., N.A.*, 2022 WL 16832742 (D. Haw. Nov. 8, 2022); *Solis v. Experian Info. Sols., Inc.*, 2022 WL 4376077 (C.D. Cal. Sept. 21, 2022); *Sauer v. Experian Info. Sols., Inc.*, 2022 WL 2163016 (C.D. Cal. May 12, 2022); *Roberson v. Experian Info. Sols., Inc.*, 2022 WL 62270 (W.D. Tex. Jan. 5, 2022); *Coulter v. Experian Info. Sols., Inc.*, 2021 WL 735726 (E.D. Pa. Feb. 25, 2021).

<sup>10</sup> *Meeks v. Experian Info. Servs., Inc.*, 2022 WL 17958634 (9th Cir. Dec. 27, 2022).

<sup>11</sup> Complaint, *Meeks v. Experian Info. Servs., Inc.*

reports then waited for them to notice the damage.”<sup>12</sup> The settlement required Midwest to contact nationwide CRAs and request all debts reported by the company be deleted from consumers’ reports. Plaintiffs allege that Midwest had not done so, and in addition, had deceptively “re-aged” the debt to falsely make it appear that the debt was new. After unsuccessful attempts to resolve the issues, plaintiffs filed suit under the FCRA. Experian moved to compel arbitration. The District court denied the motion on the grounds that Experian is not a party to ECS’s arbitration clause. The Ninth Circuit reversed in December 2022 and held that arbitration should be compelled.

**Listed as Deceased: Lul Abukar v. Experian**<sup>13</sup>

Ms. Abukar applied for a credit card in November 2021. American Express denied her application after her credit report erroneously listed her as deceased. After disputing her claim with Experian to no avail, Ms. Abukar filed suit under the FCRA. Experian moved to compel arbitration, claiming that she had enrolled in CreditWorks’s credit monitoring and was bound to its terms of use. The court granted Experian’s motion to compel arbitration in April 2023.

**Previously Settled Debt: Michael and Jennifer Morgan v. Experian**<sup>14</sup>

After Michael and Jennifer Morgan missed payments on a Hilton timeshare, they reached a settlement with Hilton where they surrendered their timeshare interest in exchange for eliminating the outstanding debt. But instead of removing the obligation from their credit reports, Experian continued to list more than \$10,000 as past due and inaccurately noted that the timeshare was in foreclosure. As a result, the Morgans were unable to refinance their VA mortgage and had difficulty obtaining loans. After multiple failed disputes with Experian, they filed suit under the FCRA. However, after they began disputing their credit reports, the Morgans had signed up for a paid account with Experian that they used to monitor their credit score. Experian moved to compel arbitration, and the court granted the motion in March 2022.

These cases and others<sup>15</sup> demonstrate how consumers who merely desired to check their credit reports and scores through credit monitoring services ended up forfeiting their day in court to address egregious credit reporting errors. Because tens of millions of Americans access their credit reports and reports through credit monitoring products, overbroad forced arbitration clauses threaten to deny meaningful review of FCRA claims by the courts.

The CFPB has found that forced arbitration clauses limit relief to consumers and bar their ability to seek relief on a class-wide basis.<sup>16</sup> The Bureau’s study of credit card agreements also found

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<sup>12</sup> *Press release, Fed. Tr. Comm’n, FTC Stops Debt Collector’s Alleged “Debt Parking” Scheme, Requires it to Delete Debts it Placed on Consumers’ Credit Reports* (Nov. 30, 2020), available at: <https://www.ftc.gov/news-events/news/press-releases/2020/11/ftc-stops-debt-collectors-alleged-debt-parking-scheme-requires-it-delete-debts-it-placed-consumers>

<sup>13</sup> *Abukar v. Experian Info. Sols. Inc.*, 2023 WL 3394827 (E.D. Wis. Apr. 11, 2023)

<sup>14</sup> *Morgan v. Experian Info. Sols., Inc.*, 2022 WL 681359 (W.D. Wash. Mar. 4, 2022)

<sup>15</sup> See Note 9, *supra*.

<sup>16</sup> Cons. Fin. Prot. Bureau. Arbitration Study: Report to Congress 2015. Accessible at <https://www.consumerfinance.gov>.

that consumers were generally unaware of whether their contracts include arbitration clauses<sup>17</sup> and fewer than 7% of consumers whose agreements included forced arbitration clauses understood that they could not sue the companies.<sup>18</sup> Undoubtedly the results would be no better for credit monitoring agreements. Additionally, arbitration is secretive and limits consumers' procedural rights, like discovery.<sup>19</sup>

FCRA claims brought in open court are an essential backstop to ensuring the fairness and accuracy of the credit reporting system. The CFPB itself has documented the difficulties that consumers face resolving disputes through FCRA dispute resolution procedures.<sup>20</sup> To address limitations of this process, the FCRA lays out a system of judicial review, providing a private right of action to consumers and conferring jurisdiction on federal District Courts or any other court of competent jurisdiction. 15 U.S.C § 1681p. Forced arbitration undermines the FCRA's system of judicial review by allowing CRAs to avoid federal and state court litigation on a mass scale, including avoiding class-wide relief. Preventing the secretive and one-sided arbitration of FCRA claims would help hold CRAs accountable for their abuses, and help correct errors where the ordinary dispute resolution system fails.

## **II. The CFPB Has Ample Authority to Issue Such a Rule**

The CFPB has two sources of statutory authority to issue a rule prohibiting provisions in credit monitoring contracts that force consumers into arbitration for FCRA claims. Either one of these sources would provide sufficient authorization for this rulemaking.

First, the CFPB has authority under the FCRA to “prescribe regulations as may be necessary or appropriate to administer and carry out the purposes and objectives of this subchapter, and to prevent evasions thereof or to facilitate compliance therewith.” 15 U.S.C. § 1681s(e). This recommendation would carry out the purposes of the FCRA by helping ensure credit reporting is “fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevant, and proper utilization of such information...” *Id.* at § 1681(b). When consumers are deprived of their day in court over errors in their credit reports, often egregious and uncorrected after multiple disputes, credit reporting is neither fair nor equitable. Forcing consumers into binding arbitration when they seek justice for errors and unreasonable dispute handling acts to undermine the accuracy of credit reports and undermines compliance with the FCRA.

Second, the CFPB has rulemaking authority under the CFPA to “prohibit or impose conditions or limitations on the use of an agreement...for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the [CFPB] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.” 12 U.S.C. § 5518(b). It is strongly in the

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<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> NCLC Consumer Arbitration Manual, 2022. Seligman, David, et. Al. Section 1.4, *Why Arbitration Agreements Unfairly Harm Consumers*. Accessible at <https://library.nclc.org/book/consumer-arbitration-agreements>.

<sup>20</sup> Cons. Fin. Prot. Bureau. Annual Report of Credit and Consumer Reporting Complaints. January 2023. Accessible at <https://www.consumerfinance.gov>.

public interest to help ensure consumers with FCRA claims get their day in court. Additionally, it protects consumers by giving them the full range of procedural rights they would have in court, and makes class-wide relief available.

Finally, limitations arising from the 2017 passage of House Joint Resolution 111, 5 U.S.C. 801 et seq., do not apply to this proposed rule. Following the 2017 resolution, which nullified the CFPB's 2017 final rule (the "2017 Rule") on arbitration, the CFPB cannot issue regulations that are "substantially similar" to the 2017 Rule.<sup>21</sup> However, this limitation on rulemaking authority does not apply, because the proposed rule is dissimilar to the 2017 Rule in two key respects.

The 2017 Rule had two predominant requirements for providers of covered financial goods or services. First, they could not use forced arbitration clauses that prohibit filing or participating in class actions. 12 C.F.R. § 1040.4(a)(1), (removed 2017). Second, providers involved in arbitration had to submit certain records to the CFPB. 12 C.F.R. § 1040.4(b), (removed 2017). The proposed rule does not contain any requirements similar to the two requirements of the 2017 Rule. This proposed rule would not prevent arbitration agreements from explicitly precluding class-wide relief. Nor does this proposed rule place any reporting requirements on providers of financial products or services.

Additionally, the 2017 Rule applied to all "consumer financial products and services," as defined within the Rule. *Id.* at § 1040.1(b) (removed 2017). Rather than applying to a broad swath of financial products, this proposed rule is narrowly tailored to FCRA claims against CRAs. (Although, as noted above, we strongly urge the Bureau to adopt a separate rule addressing forced arbitration for all consumer financial products.)

The rule proposed here is not "substantially similar" to the CFPB's 2017 Rule, and so this rule would not fall into the exception created by Congress 2017. CFPB therefore has broad authority to issue it.

## **CONCLUSION**

We urge the CFPB to use its authority to prevent CRAs from using forced arbitration provisions in credit monitoring contracts to immunize themselves against FCRA claims. Thank you again for your strong efforts to protect consumers, including addressing abuses in credit reporting. If you have questions about this letter, please contact Chi Chi Wu at [cwu@nclc.org](mailto:cwu@nclc.org) or 617-542-8010.

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<sup>21</sup> The rule was removed from the Code of Federal Regulations but can be viewed here: <https://www.ecfr.gov/on/2017-09-18/title-12/chapter-X/part-1040>