Economic Policy Institute
POLICY CENTER

October 2, 2017

Senator Michael Crapo
Chairman
Senate Banking Committee
538 Dirksen Senate Office Building
Washington, D.C. 20510

Senator Sherrod Brown
Ranking Member
Senate Banking Committee
538 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Crapo and Ranking Member Brown:

On behalf of the Economic Policy Institute Policy Center (EPI-PC), we write to share important new data about Wells Fargo's use of arbitration in its consumer disputes, in anticipation of CEO Tim Sloan's scheduled testimony to the Committee. The Economic Policy Institute (EPI) is a nonprofit, nonpartisan think tank created in 1986 to include the needs of low- and middle-income workers in economic policy discussions.

Many financial institutions use forced arbitration clauses in their contracts to block consumers with disputes from banding together in court, instead requiring each consumer to argue their case separately in private arbitration proceedings. Wells Fargo has made headlines by embracing the practice to avoid offering class-wide relief for its fraudulent account scandal,[1] among other allegations of illegal conduct—including ongoing litigation over illegal overdraft practices.[2]

Important new data helps illuminate why these banks—and Wells Fargo in particular—prefer forced arbitration to class action lawsuits. While Wells Fargo touts forced arbitration as "less expensive" for consumers,[3] a deeper examination of publicly available data reveals that the average consumer that arbitrates with their bank or lender is saddled with significant costs.

In July 2017, the Consumer Financial Protection Bureau (CFPB) issued a rule to restore consumers' ability to join together in class action lawsuits against financial institutions.[4] Based

[1] http://www.latimes.com/business/hiltzik/la-fi-hiltzik-wells-settlement-20170331-story.html
[2] http://www.latimes.com/business/la-fi-wells-fargo-20170824-story.html
[3] https://www.warren.senate.gov/files/documents/2017_09_12_Responses_to_Arb_Letter.pdf
[4] Consumer Financial Protection Bureau, "New Protections against Mandatory Arbitration," web page accessed July 31, 2017

on five years of careful study, the final rule stems from a congressional directive instructing the agency to study forced arbitration and restrict or ban the practice if it harms consumers. The Senate is currently considering a resolution to repeal the CFPB rule and take away consumers' newly restored right to band together in court, S.J. Res. 47.

Opponents of the CFPB rule have suggested that the bureau's own findings show consumers on average receive greater relief in arbitration ($5,389) than class action lawsuits ($32).[5] These figures are enormously misleading. While the average consumer who wins a claim in arbitration recovers $5,389, this is far from a typical consumer outcome, as consumers win just 9 percent of their claims.[6]

Our recent publication, "Correcting the record," considered the total amount awarded across claims in the CFPB study to find the average outcome between a consumer and their financial institution, rather than the average award in the sixteen claims consumers won.[7] Contrary to the suggestion that consumers receive more money in arbitration than class action lawsuits, EPI found the vast majority of consumers lose money in arbitration. Indeed, on average, consumers are ordered to pay their bank or lender $7,725 in arbitration.[8]

A recent report released by the nonprofit Level Playing Field offers a more narrow examination of Wells Fargo's use of arbitration in consumer claims.[9] Compiling publicly-reported data from the American Arbitration Association (AAA) and JAMS (initially named Judicial Arbitration and Mediation Services, Inc.), the report found that just 250 consumers arbitrated claims with Wells Fargo between 2009 and the first half of 2017—a period that spans the prime years of the bank's fraudulent account scandal.

Forced arbitration seems to be significantly more lucrative for Wells Fargo than other financial institutions. As one might suspect based on the CFPB data, Wells Fargo was awarded more money in arbitration than it was ordered to pay consumers between 2009 and the first half of 2017, despite creating 3.5 million fraudulent accounts during that same period. The average consumer that arbitrated with Wells Fargo was ordered to pay the bank nearly $11,000.[10] A mean of $10,826 was awarded to the bank across all publicly available claims.

In contrast, the CFPB study found that class action lawsuits return at least $440 million, after deducting all attorneys' fees and court costs, to 6.8 million consumers in an average year.[11] Thus, banning consumer class actions lets financial institutions keep hundreds of millions of dollars that would otherwise go back to harmed consumers—and there is little doubt that Wells Fargo has harmed huge numbers of consumers in recent years.

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[5] http://www.mydaytondailynews.com/news/state--regional-govt--politics/consumer-protection-rule-latest-battle-with-cordray-led-agency/OyuXSpSJRbffKmucdbK68L/
[6] http://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/
[7] http://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/
[8] http://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/
[9] http://www.fairarbitrationnow.org/wp-content/uploads/LPF-Wells-Fargo-Report-September-2017-Update.pdf
[10] Heidi Shierholz, "Forced arbitration is bad for consumers," Economic Policy Institute, October 2, 2017.
[11] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, 2015.

Opponents of the CFPB's arbitration rule additionally claim that allowing consumers to join together in court will increase consumer costs and decrease available credit. Most recently, the Office of the Comptroller of the Currency (OCC) claimed restoring consumers' right to join together in court could cause interest rates to rise as much as 25 percent.[12]

However, examining the OCC's study, it appears the agency merely duplicated the conclusion reached by the CFPB and based its 25 percent estimate solely on results it admits are "statistically insignificant at the 95 percent (and 90 percent) confidence level."[13] In its 2015 study, the CFPB considered this same data and accurately assessed that there was no "statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses."[14]

Perhaps more importantly, claims that the arbitration rule will increase cost are contradicted by real-life experience. Consumers saw no increase in price after Bank of America, JPMorgan Chase, Capital One, and HSBC dropped their arbitration clauses as a result of court-approved settlements, and mortgage rates did not increase after Congress banned forced arbitration in the mortgage market.[15] Furthermore, it is not unreasonable that banks like Wells Fargo bear any cost associated with making consumers whole for egregious misconduct.

We encourage you to seek clarification from Mr. Sloan on Wells Fargo's claim that arbitration is less expensive for consumers in light of this new evidence that the customers paid the bank nearly $11,000 on average when forced into arbitration. Because data clearly shows that class action lawsuits return hundreds of millions every year in relief to consumers, while forced arbitration is lucrative for lawbreakers like Wells Fargo, we also urge you to oppose S.J. Res. 47 and support the CFPB's arbitration rule.

For any questions regarding this letter, please contact Heidi Shierholz at hshierholz@epi.org.

Sincerely,

Heidi Shierholz
Director of Policy, Perkins Project on Worker Rights and Wages
Economic Policy Institute Policy Center

[12] https://www.washingtonpost.com/news/business/wp/2017/09/29/u-s-chamber-of-commerce-suing-to-block-rule-allowing-consumers-to-sue-their-banks/?utm_term=.276dce8b8c8e
[13] http://blog.ourfinancialsecurity.org/wp-content/uploads/2017/09/OCC-arbitration-study.pdf
[14] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, 2015
[15] Adam J. Levitin, "Mandatory Arbitration Offers Bargain-Basement Justice,' *American Banker BankThink* (blog), May 13, 2014.