



KATHLEEN M. MURPHY  
PRESIDENT & CEO

November 7, 2018

Chairman Gary Gensler  
Maryland Financial Consumer Protection Commission  
3 East Senate Office Building  
Annapolis, Maryland 21401

Re: Arbitration

Dear Chairman Gensler and Commission Members:

This letter is sent on behalf of the Maryland Bankers Association (the "Association") regarding the issue of arbitration which was presented to the Commission on October 10, 2018. The Maryland Bankers Association is the only Maryland based trade group representing banks in the State. The approximately 87 banks operating in Maryland hold in excess of \$143 billion dollars in FDIC insured deposits in approximately 1,540 branches across the State. The Association's members include banks of all sizes and charter types. Maryland banks employ nearly 29,000 people in Maryland.

While I could not attend the October 10 Commission meeting, I have watched the video of the meeting and reviewed the letters from proponents urging the Commission to recommend to the Maryland General Assembly that legislation be adopted as set forth in Title I of the National Consumer Law Center's ("NCLC") Model State Consumer & Employee Justice Enforcement Act (the "Act"). I would note that, although the proponents at the meeting did not discuss it, there was a suggestion that Title IV of the Model Act be adopted as well. This is an extremely important issue to the Association's members. A number of our members have consumer contracts with clauses that allow either party to cause a dispute to be arbitrated. Our members are vehemently opposed to the adoption of this "Model" Act or any Title thereof. Unfortunately, our general counsel, Robert Enten, who attended the Commission's October 10 meeting and was prepared to discuss the industry's position on this issue, did not have the opportunity to respond in any detail or answer any questions. Mr. Enten and I would welcome the opportunity to discuss the industry's opposition and answer questions Commission members may have.

I would point out that no state in the country has adopted any part of this “Model” Act. Bills have been introduced in a number of states and have, in each instance, failed. To our knowledge, this “Model” Act was prepared exclusively by the NCLC without engaging in any conversation with the wide range of affected persons. This proposed Act, which is contained in a 55 page single spaced document, is designed to do one thing - to have states enact legislation that attempts to do an end run around the long standing Federal Arbitration Act (the “FAA”). The FAA embodies a national policy favoring arbitration. Numerous courts at both the state level, including Maryland, and the federal level, including the Supreme Court, have made it clear that legislative attempts to void provisions allowing contracting parties to have disputes settled through arbitration are preempted by the FAA. Even letters of advice from our own Attorney General have made it clear that such legislative attempts are preempted. While there have been some federal statutory and administrative limitations on such provisions, the FAA remains in full force and effect. Attempts to obstruct federal preemption of arbitration provisions will only result in prolonged litigation, all of which has been unsuccessful to date.

The argument is made that Maryland should adopt Title I of the “Model” Act because consumers need protection. In fact, Maryland already has one of the most far reaching laws for the protection of consumers in the country, the Maryland Consumer Protection Act (the “CPA”), which, for many years, has enabled the Maryland Attorney General to vigorously protect the interests of consumers. The CPA, which governs every conceivable consumer contract, provides a robust open and fair process for consumers to make complaints, have those complaints investigated, and have the Attorney General take whatever steps are necessary to address any violation. The CPA provides a procedure for swift enforcement of its protections and significant penalties for its violation. For example, Commercial Law § 13-401 **requires** the Attorney General’s Consumer Protection Division (the Division”) to investigate **every** complaint that is filed. The Division is also required, if appropriate, to refer a complaint to the Federal Trade Commission. Commercial Law § 13-402 lays out a detailed framework for the Division to seek conciliation between the parties. It allows the Division to seek injunctions, both ex parte and interlocutory, without first attempting conciliation. It authorizes the Division to enter into a written agreement with the person who is the subject of the complaint and includes a long list of conditions that the agreement may contain, including restitution to the consumer and payment of damages. The CPA sets out detailed provisions for allowing the Division to hold public hearings, make findings, issue orders, etc. The statute provides for subpoena powers, the seeking of injunctions, and the imposition of both civil and criminal penalties.

Moreover, the filing of a complaint by a consumer with the Division does not prevent the consumer from exercising any remedy for which the consumer might otherwise be entitled or from filing a complaint with any other agency or court. Commercial Law § 13-408 provides a framework for consumers to bring their own actions to recover for injury or loss and specifically permits the court to award reasonable attorney fees. The Attorney General is entitled to recover its costs and impose

finer. Pursuant to last year's Commission-related legislation, **finer against persons who violate the CPA increased from \$1,000 for each violation to \$10,000 for each violation and from \$5,000 for each subsequent violation to \$25,000 for any subsequent violation.** Moreover, pursuant to last year's Commission-related legislation, the types of activities that violate the CPA were **expanded to include not only unfair or deceptive but also abusive practices,** giving the Division the authority to determine what constitutes abusive practices. In addition, any person who violates the CPA is guilty of a misdemeanor and on conviction is subject to a fine not exceeding \$1,000 or imprisonment not exceeding 1 year or both. There is no evidence whatsoever that the Attorney General's Consumer Protection Division is not actively engaged in investigating, conciliating, and assessing penalties where merited. In fact, pursuant to last year's legislation, the Governor must include an appropriation of at least \$700,000 in general funds in the State budget for the Office of the Attorney General to enforce financial consumer protection laws. That same legislation, requires an appropriation of at least \$300,000 be made for the Commissioner of Financial Regulation to enforce those laws as well. The Maryland Bankers Association raised no opposition to the increased penalties or the increase in funding for enforcement.

The "Model" Act goes to great lengths to denigrate the arbitration process as did the witnesses who testified at the October 10 Commission meeting. However, for every negative article, study, or speech regarding arbitration of consumer disputes, there is an article, study, or speech pointing out the benefits of having these disputes dealt with through arbitration. Justia is an American web site specializing in legal information retrieval. It was founded in 2003 and is one of the largest online databases of legal cases. It contains articles that explain the significant benefits of having conflicts resolved through arbitration and mediation. See <https://www.justia.com/trials-litigation/arbitration-mediation/>. Other articles include Christopher R. Drahozal, et al., "An Empirical Study of AAA Consumer Arbitration", 25 Ohio St. J. on Disp. Resol. 843 (2010); Joanna Shepherd, "An Empirical Study of No-Injury Class Actions", Feb. 1, 2016, available at <https://papers.ssrn.com>. There are dozens of law firm websites that review in detail why arbitration is preferred.

Generally, proponents of the use of arbitration find that it avoids hostility, is usually less expensive and faster than litigation, and more flexible with simplified rules of evidence and procedure. **However, regardless of the pros and cons of arbitration versus litigation, the courts have made it crystal clear that attempts by states to void arbitration clauses are preempted.**

The proposal set forth in Title I of the "Model" Act would allow individuals to place themselves in the role of "Private Attorneys General" and institute litigation based on unnamed consumer laws. To our knowledge, this use of what are known as *qui tam* proceedings for such a purpose is completely unprecedented. As recognized by the NCLC itself, the entire purpose of *qui tam* in this context is to circumvent the arbitration provisions in consumer contracts in a manner hoped to avoid violating the FAA. The use of *qui tam* is extremely limited in the State of Maryland and in other states. It arises almost exclusively in the context of "whistle blowers" who allege they are

aware that a person has knowingly made a false or fraudulent claim for payment from or approval by a government entity. It is inappropriate for use in the fashion described in the “Model” Act and would adversely impact the balanced and carefully conceived approach to protect consumers found in the CPA. There is absolutely no evidence whatsoever that the Attorney General is not vigorously and effectively enforcing the CPA and protecting consumers. Once again, use of *qui tam* in the manner proposed is unheard of at the state or federal level.

Title I of the “Model” Act provides that “in initiating an action under this Title, a person may allege multiple violations that have affected different consumers as long as those violations are of a substantially similar kind that can be efficiently managed in a single action.” It would allow any person to bring the cause of action regardless of whether they were a party to the contract and receive up to 25% of the total monetary recovery even though that person did not suffer any loss whatsoever. Of course, the attorneys representing the “Private Attorneys General” would recover their fees out of the award as well. The result is that class action damages can be recovered with no monies going to the class whatsoever. As stated previously, the CPA already contains a robust and time – tested process for the assertion and adjudication of violations of consumer laws in this State.

Maryland’s banking industry strongly urges the Commission to reject the proposal to codify as Maryland law any portion of this one sided “Model” Act. We believe such legislation would negatively impact the financial services industry in the State, would adversely affect all parties to consumer contracts, and would not be beneficial to Maryland consumers. Thank you for considering our views. Once again, Mr. Enten and I would be happy to speak to these issues should the Commission so desire.

Sincerely,



Kathleen M. Murphy  
President & CEO  
Maryland Bankers Association

cc: Members, Maryland Consumer Financial Protection Commission  
Tami Burt  
Eric Pierce  
D. Robert Enten, Esq.