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Credit Union Association

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October 29, 2018

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

Dear Chairman Gensler and Members of the Commission:

On behalf of the members of the MD| DC Credit Union Association and the 84 Credit Unions and their 1.9 million members that we represent, we appreciate the opportunity to provide our thoughts on the fiduciary rule and mandatory arbitration.

<u>Fiduciary Rule</u>

Since 1909 Credit Unions have strived to provide financial security to the members and communities we serve. We embrace the credit union philosophy of "people helping people" in all that we offer. Over the last several decades, the landscape of the private sector retirement system has changed and the growing reliance on retirement plans and IRAs for retirement income has increased. Consequently, the need for individuals to receive appropriate products, education and advice has also increased. It is important to protect Americans by acting in investors' best interests through transparency and disclosure while also creating rules that that encourage and promote retirement savings rather than potentially chill the ability of credit unions, or other financial institutions, to provide these products and services. We thank you for taking the time to consider our comments.

States should refrain from creating their own fiduciary rule standards.
We appreciate the State of Maryland's interest in undertaking this task, but we believe that this is more appropriate for the federal government to handle. A patchwork of potentially contradictory state laws will make compliance unnecessarily difficult for credit unions, and other financial institutions, while also creating a confusing situation for investors. Due to the timing, this rule may also conflict with the forthcoming Securities and Exchange Commission (SEC) rule. The SEC has indicated that they will be releasing their final rule for heightened standard of care for broker dealers in September 2019. For the State to create a rule that could potentially take effect the month after the SEC rule is finalized, that may also be materially different than what neighboring states may create, would only add to potential confusion.

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Credit Unions Put Members First.

Credit unions offering investment services to their members aim to help American families of all means receive information about saving for retirement and planning for their future. While many large investment firms seek high net-worth clients, credit unions seek to provide services to their members in all financial situations and to make it easier for these individuals to map out financial plans. It is very important for credit unions to be able to have broad conversations with their members about financial education and provide general information about opportunities to invest and save. Any rule that impinges on the ability to conduct these informative conversations only harms the member.

If the State moves forward with a proposal, Credit Unions should be exempt.

Although it would be hard to determine until a draft rule is issued, there could be a number of compliance burdens that may be associated with a fiduciary rule that would be inappropriate for financial institutions, such as member-owned credit unions, which are seeking to provide a wide variety of products and services to consumers of all means to help with planning and saving for the future. Credit Unions are well known for creating specialized products for the communities that they serve rather than one-size-fits all products for the masses. If this rule causes any uncertainty due to ambiguous language, it could force credit unions to reconsider offering these specialized products. A rule that makes it more difficult to provide credit union members with these options is counter-productive to the intent behind the rule.

Arbitration

Credit Unions are member-owned financial cooperatives; as such, consumer protection is our top-priority because our consumers (members) are the only thing that keeps our movement alive. Among the many consumer protections associated with the mission of credit unions is the high-quality service they provide to their members. Our mission has prompted a successful system for quickly and amicably resolving disputes in the limited instances where they arise. Due to our intimate knowledge of our members, we have been very successful in protecting our members without the need of class action legal intervention. While many Credit Unions believe that arbitration clauses are important in the financial marketplace because they limit the worry of class action litigation, they are rarely enforced. Credit Unions work go to great lengths to work with their members to resolve and disputes that may arise.

Due to the unique mission, size and structure of credit unions, class action litigation is far from the most efficient and effective way to resolve a dispute since it essentially puts member-owners in a position of having to sue themselves. In the rare situation that a group of credit union members feels a credit union is in the wrong, the group, as member-owners, already have direct recourse through their voting power to set policies and procedures. Class action litigation is a win for the lawyers but could leave the consumer with almost no relief. Protecting credit unions from threats, such as frivolous class action litigation, is synonymous with consumer protection

The Bureau of Consumer Financial Protection (BCFP) conducted a study[1] which was published in March 2015 to determine the "the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services."[2] The BCFP's study found that only 12.3 percent of the 562 class actions studied produced any settlement benefits to the class members and the average payment was $32. Suffice it to say that the lawyers took home much more than $32. On the other hand, the average arbitration award for a prevailing consumer was $5,389. Not only were the payouts higher for arbitration, but the costs paid by the consumer where lower in arbitration than and the time in which they received an award was much quicker.

You may hear that forced arbitration will hurt Marylanders because it infringes upon due process and allows companies to avoid the law. This simply is not true. Arbitration proceedings are highly regulated by both Federal and Maryland laws and are used in common practice in various industries. Arguments related to arbitration agreements in many differing factual scenarios have made their way to the Supreme Court which has consistently found arbitration agreements to be constitutionally sound. The Federal Arbitration Agreement and Maryland Uniform Arbitration Agreement both make it clear that reasonable arbitration provisions are valid and enforceable under basic contract principles.[3] An excerpt from a rare Justice Scalia majority opinion makes this very clear:

> This text reflects the overarching principle that arbitration is a matter of contract. *See Rent-A-Center, West, Inc. v. Jackson, 561 U. S. ___, ___ (2010) (slip op., at 3).* And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd, 470 U. S. 213, 221 (1985),* including terms that "specify with whom [the parties] choose to arbitrate their disputes," *Stolt-Nielsen, supra, at 683*, and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U. S. 468, 479 (1989).* That holds true for claims that allege a violation of a federal statute unless the FAA's mandate has been "'overridden by a contrary congressional command.'" *CompuCredit Corp. v.*

[1] Named Consumer Financial Protection Bureau (CFPB) at the time of publishing the study
[2] https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf
[3] Md. Code Ann. Cts. & Jud. Proc. § 3-206 (2013); Federal Arbitration Act, 9 U.S.C. §2.

> *Greenwood, 565 U. S. ___, ___ (2012) (slip op., at 2–3) (quoting Shearson/American Express Inc. v. McMahon, 482 U. S. 220, 226 (1987)).*[4]

Any attempt to undermine this process would be contrary to the work of Congress and the Maryland General Assembly.[5]

There have been recommendations for the State to adopt provisions of the National Consumer Law Center's ("NCLC") Model State Consumer & Employee Justice Enforcement Act (the "Act"). No other state has adopted this act or any part of it because the act is flawed, grossly overreaches and is contrary to case law and statute. A careful reading of the act and its stated reasoning show how carefully the NCLC is attempting to dance around the FAA. It is important to first take notice that the bulk of the claims and enforcement provisions in the Act,[6] specifically the *qui tam* provisions, are modeled in part on the California "Labor Code Private Attorneys General Act of 2004" (PAGA)[7], an Act which Maryland does not have an equivalent to and whose provisions have been hotly contested since its enactment. This creates several issues that are difficult to navigate.

1. As an initial point of clarification, PAGA which is the baseline for the NCLC consumer protection act, is a labor law statute, not a consumer protection statute. Even California has not expanded this employment law arbitration statute to an all-encompassing business law/financial institutions arbitration statute. Employer/Employee relations have a very different history and legal framework relating to arbitration and dispute resolution than the general consumer industry.
2. The State of Maryland does have limited *qui tam* provisions in the Maryland False Claims Act (MFCA) but they are materially different than those in PAGA.[8] In short, a *qui tam* action allows a private citizen to bring a lawsuit on behalf of themselves and the State at the same time. Under MFCA if the State decides not to intervene in the matter, the court must dismiss the matter. Under PAGA (already recognizing that it is a completely different subject of law) an employee may bring an action without intervention from the State. Unless the State of

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[4] American Express Co v. Italian Colors Restaurant, 570 US 228 (2013)

[5] Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University, 489 U.S. 477-478 (1989). "But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law - that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz, 312 U.S. 52, 67 (1941)."*

[6] Referring mostly to Title I: Delegation of State Enforcement Authority

[7] California Labor Code §§2698 – 2699.5 (West)

[8] Md. Code Ann. Gen. Prov. § 8-101, et seq (2015)

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Maryland wants to allow private citizens to unilaterally bring lawsuits on behalf of the State, adoption of these provisions simply can't happen.

Finally, in general, the arbitration process has proven to be less confrontational and far less costly than litigation. Why a consumer advocacy group would rather subject Marylanders to years of litigation rather than an arbitration proceeding is a question that we cannot answer. Adoption of this act would be a win for litigators, not consumers Adoption of any provisions of this Act would almost definitely cause confusion and unnecessary burdens for all parties. The Maryland's Consumer Protection Act sufficiently protects Maryland citizens who have reported treatment that they think is inappropriate and we have no need to complicate the process.[9]

The MD|DC Credit Union Association strongly recommends that the State not move forward with either of these proposals and let the Federal Government handle these issues. We appreciate the opportunity to comment and look forward to continued discussions.

Sincerely,

John Bratsakis
President/CEO MD|DC Credit Union Association

[9] MD Code, Commercial Law, § 13-301 – 13-320