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OFFICE OF CONSUMER CREDIT REGULATION
35 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0035

Exhibit 2

WILLIAM N. LUND
DIRECTOR

April 19, 2007

Senator Nancy B. Sullivan, Chair
Representative John Brautigam, Chair
Joint Standing Committee on Insurance and Financial Services
100 State House Station
Augusta, ME 04333-0100

Re: Position neither for nor against LD 1489, "An Act to Enhance Fairness in Arbitration"

Dear Senator Sullivan, Representative Brautigam and Members of the Committee:

I am writing in my capacity as Director of the Office of Consumer Credit Regulation and on behalf of the financial services agencies within the Department of Professional and Financial Regulation to express a position neither for nor against Senator Bowman's bill, LD 1489, "An Act to Enhance Fairness in Arbitration," but to provide information to the Committee.

Various agencies within the Department have a strong interest in LD 1489, since mandatory arbitration clauses are common in financial services contracts. For example, my office encounters such clauses in reviewing loan contracts, including certain mortgage contracts. Similarly, the Office of Securities is familiar with arbitration clauses since such clauses have been included in broker-dealer contracts with investors for many years. The Bureau of Insurance also has an interest in this legislation, because the last section of the bill would amend Title 24-A, the Insurance Code, and would prevent insurance customers from being required to sign arbitration clauses.

With respect to consumer loan and credit card contracts, for many years my office has tried to educate consumers about mandatory arbitration clauses. Some of the first such clauses we saw about 10 years ago were patently unfair to consumers. One of these clauses, for example, would have required Maine consumers to travel to Chicago in order to have their cases heard.

In the years since that time, court rulings have provided a better sense of which arbitration provisions are permitted and which are not. Today, for instance, arbitration clauses generally cannot require consumers to travel out of their judicial districts to defend or prosecute a case. The clauses cannot require consumers to pay a high cost up front. And in reaching a determination in an arbitration proceeding, the arbitrator must, in general terms, apply the substantive laws that would otherwise apply to the case if it were in court.

My office has focused on consumer education, teaching consumers to be aware that they are giving up certain rights if they agree to arbitration clauses, and if they are troubled by the wording in an arbitration clause, that they can seek credit services from another company whose contract does not contain such a clause.



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Letter to Senator Nancy B. Sullivan, Chair
Representative John Brautigam, Chair
Joint Standing Committee on Insurance and Financial Services

April 19, 2007

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I am aware that this Committee has heard a great deal of discussion this session about the concept of federal preemption, but on the issue of arbitration it is important for you to know that preemption plays a large role in any debate about a state's efforts to restrict or limit arbitration. That is because a federal law in existence for more than 40 years, called the Federal Arbitration Act (FAA), contains provisions preempting states' abilities to restrict arbitration clauses.

Consumer advocates argue that when the FAA was first enacted, the drafters probably had in mind applying it solely to business-to-business transactions. However, since that time courts have applied much of the FAA to consumer arbitrations, subject to the reasonable guidelines set forth above.

Federal courts have upheld arbitration clauses in the securities industry. In fact, the U.S. Supreme Court, in a case titled *Shearson/American Express, Inc., et al. v. McMahon, et al.*, the court stated that a party challenging such a clause would have to show that Congress specifically intended to omit claims under a certain other laws (in this case, the anti-racketeering laws). Absent such a finding, the FAA required adherence to contracted-for arbitration clauses.

Subsequently, regulators in Massachusetts drafted a rule that prohibited securities broker-dealers from requiring customers to sign a mandatory pre-dispute arbitration agreement. In 1988, the First Circuit Court of Appeals, in the case of *Securities Industry Association, et al. v. Connolly, et al.*, found that those securities arbitration regulations were preempted by the FAA.

Regardless of these court decisions, I do believe that it is within the rights of a state to ensure that arbitration proceedings are conducted fairly. For example, Massachusetts and other states have addressed mandatory arbitration in their anti-predatory mortgage lending laws or rules. In fact, Maine's Legislature also placed reasonable restrictions on certain mandatory arbitrations last year specifically prohibiting sellers of automobile extended warranties from requiring Maine consumers to travel out of state in order to prosecute or defend arbitration cases brought under the provision of those extended service contracts.

I have also spoken with regulators at the Bureau of Insurance regarding LD 1489, and that agency urges the Committee to review this proposal carefully to avoid what it termed unintended consequences. While the Bureau generally prohibits mandatory pre-dispute arbitration clauses in insurance policies, there are certain areas, such as external reviews of health insurance claims and appraisal clauses in standard fire insurance policies, in which use of such clauses has historically provided benefits to consumers. .

Thank you for permitting me to explain our Department's interest in this bill. We look forward to considering the testimony presented by other parties, and I offer our Department's assistance in answering questions on this topic now or at the upcoming work session.

Sincerely,



William N. Lund
Director