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Federal Communications Commission
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Comments Responding to Commissioner Mignon Clyburn's #Solutions2020 Call to Action Plan

Our organizations are pleased to submit comments to Federal Communications Commission (FCC) Commissioner Mignon Clyburn's *#Solutions2020 Call to Action Plan* (Action Plan) on communications policy solutions. We commend Commissioner Clyburn for seeking to act on the widespread and harmful use of fine-print ripoff clauses that prohibit consumers from taking legal complaints to court and require them to resolve disputes with providers, often on an individual basis, in forced arbitration proceedings. Specifically, we support the proposal in the Action Plan to eliminate the use of predispute binding mandatory arbitration (or forced arbitration) clauses in the consumer contracts of FCC-regulated entities. As the plan acknowledges, restoring consumers' right to seek remedies when harmed is a critical component of enhancing consumer protection in the communications landscape. Forced arbitration is a biased, secretive and lawless process that does not protect consumers.

Forced arbitration clauses are prevalent in customer contracts with providers of communications services, including broadband and telecommunications, cellular service, cable and satellite. In the communications marketplace, customers have few or no options to obtain services and products free of these oppressive terms. Communications providers dictate the rules for arbitration proceedings, while hired arbitrators are tasked with interpreting contract and consumer protection laws and rendering decisions that are rarely appealable. Arbitration proceedings are not public. Arbitrators also have a financial incentive to rule for companies that bring them repeat business. Therefore, corporations are at a clear advantage when they can operate within a secret "dispute resolution" system

that they created, while their customers are deprived of participating in the public court system.

Forced arbitration clauses in communications contracts also have resulted in the wiping away of group claims against telecommunications and other providers due to terms that bar their customers from banding together in class actions to pursue claims. Class action bans, notoriously pervasive in this sector, are perhaps the most harmful and consequential aspect of forced arbitration clauses in consumer contracts.

Commissioner Clyburn astutely described the ill effects of forced arbitration clauses and class action bans in an opinion-editorial she co-authored with U.S. Sen. Al Franken of Minnesota in October 2016.¹ In it, they illustrate the impact of these terms that prohibit consumers from banding together to seek remedies when they are wronged. Corporations escape accountability for systemic harms such as adding “mysterious” fees and charges on monthly bills. It is impractical for most consumers to pursue these claims because each claim would be too low for consumers to reasonably pursue on an individual basis. Without the ability to participate in class actions, consumers cannot seek and ensure changes to address poor services that individual customer service cannot cure, such as for privacy violations, identity theft, predatory fees and charges, fraudulent sales tactics and other problems that impact all or groups of customers.

The Commission, on the whole, also has begun to scrutinize forced arbitration. In its 2016 proposal to protect the privacy of customers of broadband and other telecommunications services, the Commission requested feedback on whether it should prohibit broadband Internet providers from using forced arbitration clauses in their contracts with broadband customers. In detailed comments (attached), many of our groups urged the Commission to eliminate forced arbitration in the privacy context and for all other communications services.² While the FCC declined to address forced arbitration in its final broadband privacy rule, we welcomed Chairman Tom Wheeler’s reported announcement that the agency had begun an internal process to produce a Notice of Proposed Rulemaking to address forced arbitration.³

The harms of forced arbitration are well-supported by the evidence,⁴ including in a comprehensive, data-driven study conducted by the Consumer Financial Protection Bureau. In its examination, the bureau uncovered widespread use of forced arbitration and systematic suppression of consumer claims alleging corporate misconduct. Meanwhile, the data demonstrated that risky corporate practices are better addressed when consumers can band together. The CFPB’s findings of forced arbitration in consumer finance also

¹ *Al Franken and Mignon Clyburn: How Your Internet Provider Restricts Your Rights*, TIME, Oct. 23, 2016, <http://time.com/4541176/al-franken-arbitration-clauses/>.

² <https://ecfsapi.fcc.gov/file/60002065044.pdf>.

³ Jon Brodtkin, *FCC imposes ISP privacy rules and takes aim at mandatory arbitration*, ARS TECHNICA, <http://arstechnica.com/information-technology/2016/10/isps-will-soon-have-to-ask-you-before-sharing-private-data-with-advertisers/>.

⁴ Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES, Oct. 31, 2015, <http://nyti.ms/1RjOpoz>. (Beware the Fine Print: “the first installment in a three-part series examining how clauses buried in tens of millions of contracts have deprived Americans of one of their most fundamental constitutional rights: their day in court.”)

⁵ Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015*, <http://1.usa.gov/iscU6hJ>.

include consumer experiences in the communications sector. Indeed, the CFPB study showed that forced arbitration clauses and class action bans were ubiquitous in contracts for wireless services, covering 99.9% of wireless subscribers in the marketplace.⁵

The FCC has the evidence it needs to act in the public interest and for the benefit of millions of consumers that use communications services. It should eliminate forced arbitration clauses from customer contracts for all consumer services under its jurisdiction, including for mobile services, cable and other multichannel video services, and common carriers under the Communications Act. Arbitration should be voluntary and chosen by customers only after disputes arise.

Commissioner Clyburn is right to challenge the current use and status of forced arbitration. We look forward to working with her and the FCC as they take steps to restore consumers' rights and choice in the marketplace.

Please contact Christine@consumeradvocates.org with any questions or comments.

⁵ CFPB Arbitration Study, Section 2, at 45.