



May 27, 2016

Federal Communications Commission  
445 12th Street, SW, Room TW-A325  
Washington, DC 20554

**RE: Protecting the Privacy of Customers of Broadband and Other  
Telecommunications Services [WC Docket No. 16—106; FCC16-39]**

Dear Chairman Wheeler

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits the organization’s response to the Federal Communications Commission’s (FCC) Notice of Proposed Rulemaking (NPRM) regarding protecting the privacy of customers of broadband and other telecommunications services.<sup>1</sup>

AAJ, with members in United States, Canada and abroad, works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured or ripped off by the negligence or misconduct of others. AAJ members collectively represent millions of consumers who will be affected by this rulemaking. In this capacity, AAJ comments in order to protect access to justice for claims involving broadband privacy. We believe that the FCC should consider the potential impact of forced arbitration on consumers before committing to any arbitration policy. Forced arbitration hurts both consumers and small businesses. It should never be mandated to resolve disputes, whether formal or informal. The FCC’s arbitration policy should protect the right of consumers to choose arbitration after a dispute occurs, it should not allow broadband Internet access service (BIAS) providers to force arbitration on consumers pre-dispute.

**I. Forced Arbitration Clauses Are Detrimental to Consumers**

Buried in the fine print of everything from credit card to nursing facility contracts, forced arbitration clauses allow corporations to eliminate fundamental legal rights of consumers before any harm occurs. One of the most offensive characteristics of forced arbitration is that it is something corporations require consumers to “agree” to pre-dispute (i.e. before any harm occurs). Empirical evidence demonstrates that consumers are rarely aware of the existence of forced

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<sup>1</sup> 79 Fed. Reg. 37447.

arbitration clauses and do not understand that they are surrendering their rights.<sup>2</sup> This highlights the sharp contrast in bargaining power between a consumer and a corporation: instead of being able to bring claims in a court of law, claims are funneled into a corporation's hand-picked dispute mill which is rigged, secretive, and final, with limited ability to appeal. In virtually all forced arbitration proceedings, the arbitration provider is chosen by the corporation. These private arbitration companies operate with no government oversight or standardized rules. Thus, under these circumstances, making a fully informed "agreement" to give up fundamental rights in favor of a complex legal process such as forced arbitration is either exceptionally difficult or impossible. Essentially, consumers are tricked into this rigged system.

The following are characteristics of forced arbitration clauses:

- **Pre-dispute:** The most intrinsic part of forced arbitration is that it is something always presented to customers before any harm occurs, in a pre-dispute situation. The fact that these clauses are entered into before a person has any knowledge of the harm they may suffer makes the "choice" to sign a pre-dispute clause one that is necessarily uninformed. Accordingly, there is little actual choice involved in whether to "agree" to the documents presented. Because of these factors, consumers cannot make a fully informed choice about whether they actually want to waive all of their legal rights for any and all future claims prior to a harm occurring.
- **Secret Proceedings:** A second hallmark of forced arbitration is that it always occurs in secret with no public record of the types of claims filed, what occurs in an arbitration, or an explanation of how the arbitrator makes decisions. Society benefits from an open legal process that exposes systemic neglect and abuse. One of the most important benefits of civil lawsuits is the discovery process, which often discloses shoddy corporate practices. Forced arbitration, on the other hand, restricts customers' ability to get information and keeps harmful business practices hidden from public view. Moreover, confidentiality clauses, which always accompany pre-dispute arbitration clauses, can prevent customers from discussing events with others, including those responsible for oversight, like the FCC. Additionally, because the contents of arbitration proceedings are secret, other customers of the same BIAS providers would be unable to learn of bad practices and take steps to adequately protect themselves.
- **Biased Repeat Players:** The third fundamental component of forced arbitration is the inherently biased nature of the system. First, the drafter of the contract holds the power to choose the arbitrator or arbitration company. Because only the BIAS provider makes this determination, there is an inherent incentive for arbitration companies to market themselves in way that ensures they will be chosen again. Similarly, all arbitrators have at the very least an indirect stake in the arbitration outcome because a favorable outcome for providers is more likely to increase future business. Thus, there exists strong incentives for arbitration companies to favor the provider over the customer. And, there is nothing to stop providers from choosing arbitration companies with a history of previously deciding cases in its favor. Yet, because forced arbitration occurs in secret, and there are no public records of previous arbitration decisions, customers have little chance of uncovering an arbitrator's potential bias.

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<sup>2</sup> Bureau of Consumer Fin. Prot., "Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)" section 3 (2015), *available* at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

- **Disincentive to Follow the Law:** Pre-dispute arbitration is forced even when a corporation breaks the law. Furthermore, since the results of forced arbitration final and generally not reviewable by a court of law, consumers are left without recourse even if an arbitrator wrongly concludes that a corporation's actions were legal. This allows corporations to get away with illegal and unscrupulous practices at the expense of their customers. However, when customers have access to the civil justice system, it deters such behaviors and provides a powerful incentive to follow the law. Unlike forced arbitration, civil actions expose wrongdoing and make violations of the law public record. But, without the threat of accountability or exposure, bad actors can put monetary gain over legal protections for consumers, leading to systematic abuses such as the improper use and sharing of customer information.
- **Costly:** Unlike the civil justice system, where the government covers most of the costs of administrative fees and judicial salaries, arbitration is a private system where the parties must pay for everything. This includes filing fees and arbitrators' costs, which can amount to tens of thousands of dollars, or higher. Also, arbitrators are paid hourly, so, depending on the nature and complexity of the case, the parties may be subjected to hidden or extra fees that were not disclosed at the outset. In the court system, however, judges are paid regardless of how many hours are spent on a particular claim. While, the upfront costs and ongoing fees are alone cost prohibitive for customers, the provider is often allowed to choose the location of the arbitration, adding on travel expenses for both the parties and the arbitrator, making it even more costly. This greatly favors providers, the party with access to greater resources, over customers, because when customers lack the resources to cover these costs, they will not bring claims at all. Similarly, those who do bring claims are less likely to receive a favorable outcome, and their awards, if any, are substantially lower than they would have received in court. In fact, they are oftentimes insufficient to even cover the costs they incurred.
- **Hinders Development of the Law:** Since arbitration decisions are not official court proceedings, they also hinder the ability of the law itself. The growth of a body of law in the common law system requires the evolution of case law. However, instead of contributing to the doctrine of *stare decisis*, arbitration is akin to a dead end in that future judicial decisions cannot rely on arbitration outcomes, regardless of the factual or policy similarities between cases. In this newly developing space, where many of the legal implications surrounding the use, collection and security of customer data are still being worked out, the need for continued growth in case law is clear. Accordingly, permitting forced arbitration in service contracts will impede the development of the law itself and create unnecessary uncertainty, inconsistency and potential misapplication of important legal principles necessary to implement consumer protections for broadband Internet users.

#### a. Other Federal Agencies are Considering Banning or Limiting Arbitration

Since the early 2000's, corporations, banks and other types of businesses began quietly stripping Americans of their rights through the use of forced arbitration. However, the tide is turning. In the face of mounting data showing how forced arbitration lets corporations off the hook for breaking the law, many federal agencies are taking vital steps to curb the use of forced arbitration clauses.

### **i. The Department of Defense (DoD) Acts to Protect Service Members from Forced Arbitration**

Just last year, in a historic move to restore the rights of service members and their families, the Department of Defense (DoD) finalized rules to strengthen and broaden the scope of the Military Lending Act (MLA). The MLA is designed to protect members of the military from predatory loans and other financial scams. The DoD rule expanded the definition of “consumer credit” under the MLA and, by doing so, it broadened the law’s limitation on forced arbitration to a larger scope of financial contracts, including credit cards and other consumer financial services and products. In recognition of harm forced arbitration causes to our service members, DoD went so far as to make it a *misdemeanor* crime for any creditor to force a service member to arbitrate under the MLA’s new broadened scope. The rule recognizes the importance of restoring our service members’ rights under consumer protection laws and ending the abusive practice of forced arbitration against our military men and women.

The negative effects of forced arbitration on service members and their families are so widespread that a 2006 DoD report concluded the following: “Service members should maintain full legal recourse against unscrupulous lenders. Loan contracts to Service members should not include mandatory arbitration clauses or onerous notice provisions, and should not require the Service member to waive his or her right of recourse, such as the right to participate in a plaintiff class. Waiver isn’t a matter of ‘choice’ in take-it-or-leave-it contracts of adhesion.”<sup>3</sup>

### **ii. The Center for Medicare and Medicaid Services (CMS) Acts to Protect Nursing Home Residents from Forced Arbitration**

The Center for Medicare and Medicaid Services (CMS) is currently engaged in a broad rulemaking to update the requirements of participation for nursing homes receiving federal funding through Medicare and Medicaid. Nursing homes are an important part of the long term care system, with approximately 1.4 million people living in more than 15,000 facilities nationwide. Unfortunately, forced arbitration provisions contained in the fine print of nursing facility admission forms allow facilities to eliminate residents’ rights by stating that should any harm to the resident occur—even intentional abuse, sexual assault or injury resulting in death—those claims must be brought in forced arbitration. Rather than a resident or a resident’s family being able to file a claim in court, their claims are funneled into a nursing facility’s hand-picked arbitration dispute mill which is rigged, secretive, and final, with limited or no ability to appeal. In its proposed rule, CMS proposed to limit the use of forced arbitration clauses in nursing facility admission contracts; a final rule is expected in September of 2016.

### **iii. The Department of Education (ED) Acts to Protect Students from Forced Arbitration used by For-Profit Schools**

The Department of Education (ED) is currently set to issue a proposed rule within the borrower’s defense negotiated rulemaking. As part of the rulemaking, ED proposed to put limits

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<sup>3</sup> Department of Defense, “Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents,” p.6-7, August 9, 2006.

on for-profit institutions’ particularly abusive use of forced arbitration clauses against students. Forced arbitration clauses, buried in the fine print of for-profit college admission forms and course catalogues, force students’ claims into arbitration – a rigged system where the for-profit college picks the arbitration provider, the right to bring a class claim is excluded, there’s almost no chance of appeal, the process is completely secret, and the right to seek justice for all types of claims is routinely denied. A proposed ED rule is expected in May of 2016.

#### **iv. The Department of Labor (DOL) Acts to Protect Workers and Investors from Forced Arbitration**

On July 31 2014, President Obama issued a landmark Executive Order (E.O.) aimed at ensuring safe workplaces and fair pay for American workers by delineating new requirements on government contractors.<sup>4</sup> As part of the E.O., the Department of Labor (DOL) was granted to authority to prohibit companies with federal contracts of \$1 million or more from mandating that their employees enter into forced arbitration clauses for any disputes arising out of Title VII of the Civil Rights Act, or from torts related to sexual assault or harassment.

On April 8 of 2016, DOL issued a rule to require retirement advisers to abide by a “fiduciary” standard, putting their clients’ best interests before their own profits.<sup>5</sup> The rule includes limitations on the use of forced arbitration by requiring that financial advisors who enter into contracts with their clients, give those clients the right to bring a class action lawsuit. DOL also placed limitations on the use of individual forced arbitration including that it may not be in a distant venue or otherwise unreasonably affect the ability of an investor to assert a claim.

#### **v. The Consumer Financial Protection Bureau (CFPB) Acts to Protect Financial Consumers from Forced Arbitration**

Forced arbitration clauses, buried in the fine print of most financial contracts, deprive Americans of the right to hold big banks accountable for breaking the law. Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 authorizes the Consumer Financial Protection Bureau (CFPB) to study the use of forced arbitration clauses in consumer financial products or services contracts, and to limit the practice if it finds it is in the best interest of consumers to do so. In March 2015, the CFPB released its final report to Congress on the use of forced arbitration clauses in disputes between consumers and providers of consumer financial products. The study confirmed what consumer advocates have long known: millions of individuals are denied relief through forced arbitration.<sup>6</sup> Following a Small Business Regulatory Enforcement Fairness Act (SBREFA) review process that concluded last December, the CFPB proposed to limit class action waivers and put additional limitations on the use of individual forced arbitration. The CFPB released its proposed rule on May 5, 2016. It noted that limiting forced arbitration clauses containing class action bans has a powerful deterrent effect, resulting in companies changing practices in ways that benefit consumers as a whole.<sup>7</sup>

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<sup>4</sup> 80 FR 30573.

<sup>5</sup> 81 FR 20945.

<sup>6</sup> Study, *supra* note 2.

<sup>7</sup> *See* 81 FR at 32864.

## **b. The FCC Has The Authority to Restrict Forced Arbitration in Broadband Privacy Claims**

### **i. Authority Under the Communications Act**

The FCC has clear legal authority to limit the use of forced arbitration in broadband privacy claims. The Communications Act (the “Act”) gives the FCC the authority to prescribe rules that may be necessary in the public interest to carry out the Act.<sup>8</sup> We agree with the FCC that § 222 of the Act, which provides a duty for providers of communications services to protect both the privacy and security of information about their customers, also provides the FCC with the authority to adopt rules that are necessary to implement this obligation.<sup>9</sup> Yet the FCC cannot do this alone. As such, the guarantee of a private enforcement mechanism is necessary to supplement these regulations and ensure that customers are protected.

The FCC also has authority to limit forced arbitration under § 201 of the Act, which requires all practices in connection with communications service to be reasonable, and that any practice that is unjust or unreasonable is prohibited.<sup>10</sup> It further gives the FCC authority to prescribe regulations that are necessary in the public interest to carry out such provisions. There are many examples of how the use of forced arbitration clauses is inherently unreasonable and unjust, and that prohibiting its use in this context would be in the public interest. It is therefore undoubtedly within the purview of the FCC’s authority to limit the abusive practice of forced arbitration. It would also promote the principles of transparency and choice, which the FCC notes are key components of the § 222 framework.

Finally, under the Communications Act, it is clear that Congress contemplated a private enforcement mechanism of violations in §§ 206 and 207.<sup>11</sup> Including a limitation on forced arbitration clauses in contracts between BIAS providers and their customers would be in line with Congressional intent under the Act.

### **ii. The Federal Arbitration Act is Inapplicable**

The FCC is not precluded from banning forced arbitration clauses by the Federal Arbitration Act (the “FAA”) because the FAA legal analysis isn’t triggered in the absence of a forced arbitration clause. The FAA simply supports the enforcement of written arbitration provisions in contracts. It does not, however, preclude laws or regulations that prevent a party from placing such provisions in their contracts in the first place. Indeed, nothing in the FAA or its progeny of cases confers a right to utilize forced arbitration; the FAA confers only the right to arbitrate as provided for in the parties’ agreement, but there is no free-standing legal right or entitlement to insert arbitration provisions into contracts.<sup>12</sup> As such, the FCC is within its legal authority to limit forced arbitration in broadband privacy claims.

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<sup>8</sup> See e.g. 47 U.S.C.A. § 201. Service and charges.

<sup>9</sup> See 81 FR at 23396-7.

<sup>10</sup> 47 U.S.C.A. § 202. Discriminations and preferences.

<sup>11</sup> See 47 U.S.C.A. § 206. Carriers’ liability for damages.

<sup>12</sup> See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (“[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement”); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (The FAA “does not confer a right to

## II. Data Breach Notification Requirements Must Protect Customers

Americans rely on companies to exercise good cyber hygiene because we share our personally identifiable information (PII) so frequently. BIAS providers are key hubs in a web of interconnected devices and third parties, allowing customers to make purchases around the world, stream data instantly, and manage our information online. In this modern structure, data is the new currency in both legitimate and illegitimate markets, and companies that capitalize on our data must be responsible for protecting it from outside parties. BIAS providers therefore hold great responsibility to keep customer information safe. As such, when breaches occur, customers deserve the greatest practicable protections and speedy notification available.

When a data breach occurs, it is important to notify consumers regardless of the intent. Whether a data breach was intentional or inadvertent has no bearing on the severity of the breach or the amount of information that is compromised. Therefore, there should not be an intent requirement in the definition of “data breach.”

Nor should FCC promulgate a standard that focuses on the likely result of the breach. Instead, the FCC should require notification for every data breach where data is accessed. This “every data breach” standard is crucial, as it is frequently impossible for a BIAS provider encountering a data breach to determine when access translates to acquisition and when acquisition leads to misuse. Standards based upon subjective view of harm to consumers ignore this opaque step in a data breach incident, leading inevitably to inadequate notification and extended harm to consumers.

Requiring customer notification in every case also has the dual benefit of increasing BIAS provider security and allowing consumers to enhance their personal protections in advance of fraud. This will create an incentive for data possessors to build up cybersecurity in order to avoid such notification. For customers, an increased notification requirement will mean they have more information to make choices about whether to mitigate future harms by switching providers or to invest in credit monitoring and similar personal information protection.

Even if the FCC adopts a standardized approach to BIAS providers’ privacy notices, this should not include a voluntary safe harbor provision for timely notice, unless an entity can establish that the disclosure was in good faith.

Additionally, the FCC must impose a duty on the parties in the best position to prevent the harm from occurring in the first place—the providers. Customers must be able to hold providers responsible for third-party data breaches to incentivize maximum PII protection. The providers’ partners, third party providers, and contractors are often the gateway for data breaches of PII.<sup>13</sup> Allowing the primary source to escape culpability by transferring blame to subcontractors or other

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compel arbitration of any dispute at any time”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.”).

<sup>13</sup> The Target and Home Depot data breaches both involved third party payment contractors. Hackers used the outside parties as back doors to infiltrate the financial systems. Available at: <https://www.fas.org/sgp/crs/misc/R43496.pdf>.

third-parties waters down incentives by making the responsibility for the data breach avoidable. When companies cannot be held responsible for unsafe cyber behaviors, they have no incentive to invest in stronger, safer and more-expensive software, resulting in more breaches overall.

Similarly, protections for the use and access of customer data should also be the responsibility of the BIAS providers, and not the customer. The use of aggregate, non-identifiable consumer information, as suggested by the FCC, is a fair approach to the treatment of aggregate customer proprietary information (PI). BIAS providers should be responsible for removal of PII from aggregate consumer PI. Use of any aggregate data based upon the content of communications is not proper, as it should be untouchable.

Furthermore, when customers are seeking access to their own PI, robust protections are needed. As proposed by FCC, multi-factor authentication should be required to obtain online access to such information. This imposes a minimal burden for BIAS providers, but has a substantial security benefit for customers. Otherwise, customer PI would be vulnerable to data breach.

### **III. Conclusion**

AAJ understands and appreciates the challenges faced by the FCC as it crafts these rules. The ability to access broadband Internet service has become an essential part of Americans' daily lives. As a result, BIAS providers are now privy to an extensive amount of personal information about their customers. The importance of ensuring this information is adequately protected and properly collected cannot be understated. It is therefore imperative that BIAS providers are held to the highest of standards when it comes to the use, collection and security of their customers' information. Without robust, legally binding, and enforceable principles, customers' personal information is simply too vulnerable to improper use. As such, AAJ urges the FCC to limit the use of forced arbitration clauses in contracts between BIAS providers and their customers. This is a necessary step in building a framework designed to protect consumers and achieve the core privacy principles of transparency, choice and security.

AAJ appreciates this opportunity to submit comments in response to the FCC's proposed rule regarding the protection of broadband customer's privacy. If you have any questions or comments, please contact Zoë Oreck, AAJ's Regulatory Counsel at (202) 944-2869.

Sincerely,



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President  
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