



January 25, 2021

The Honorable Chuck Schumer  
Majority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
Washington, D.C. 20510

The Honorable Nancy Pelosi  
Speaker of the U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Kevin McCarthy  
Minority Leader, U.S. House of Representatives  
Washington, D.C. 20515

Re: Consumer protection in the 117<sup>th</sup> Congress

Dear Senators Schumer and McConnell and Representatives Pelosi and McCarthy:

As the 117<sup>th</sup> session of Congress undertakes its work to address serious matters facing the country, the National Association of Consumer Advocates (NACA) writes to share our views on issues impacting millions of American families. NACA is a national non-profit organization actively engaged in promoting a fair and open marketplace for all consumers, particularly those of modest means. In light of the health and economic effects of the COVID-19 pandemic, we believe our mission is more critical than ever.

Unfair and deceptive corporate conduct and even fraud are permeating the marketplace and harming vulnerable people. We strongly urge new and returning members to prioritize the well-being of individuals and families during the ongoing crisis and to take decisive action to protect consumers from predatory practices. NACA urges Congress to (1) remove obstacles that block legal accountability for harmful practices, (2) ensure the tax system does not penalize harmed consumers who stand up for themselves, (3) encourage an active regulatory system that adequately safeguards consumers, and (4) strengthen consumer remedies and protections in critical consumer laws.

Since the pandemic hit in March 2020, American consumers have seen a major downturn in their household finances. A quarter of Americans, including 46% of lower-income adults report having trouble paying their household bills<sup>1</sup> and the unemployment rate remains nearly double what it was before the pandemic.<sup>2</sup> This downturn and prolonged economic insecurity has left consumers vulnerable to being taken advantage of by bad market actors.

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<sup>1</sup> Kim Parker, et al., *Economic Fallout From COVID-19 Continues to Hit Lower-Income Americans the Hardest*, Pew Research Center, Sept. 24, 2020, <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/>.

<sup>2</sup> Catherine Thorbecke, *Unemployment rate remains at 6.7%, employers cut 140,000 jobs last month*, ABC News, Jan. 8, 2021, <https://abcnews.go.com/Business/unemployment-rate-remains-67-employers-cut-140000-jobs/story?id=75109266>.

## **Every American should be able to access remedies when harmed. End forced arbitration.**

Allowing individuals who have been harmed to seek redress before a judge and jury is a fundamental part of the American justice system. However, the proliferation of prohibitive terms in corporate contracts, namely forced arbitration clauses, has shut an untold number of consumers, workers, and small businesses out of court.

Forced arbitration clauses are found in most consumer and worker contracts today. These corporate get-out-of-jail-free cards allow bad market actors to sidestep accountability for their actions by forcing claims out of a public court and into secretive arbitration proceedings with a private judge. Especially egregious are forced arbitration provisions that also bar participation in class actions, one of the most effective tools for leveling the playing field between individuals and powerful corporations and addressing widespread, systemic harm.

At a time when bad business practices have continued to abound and millions of people are in precarious financial waters, ensuring the courthouse doors remain open should be a necessary part of our country's recovery from COVID-19's ill effects. Wronged consumers must be able to access the remedies they deserve and companies that break the law and contribute to the economic crisis should be publicly scrutinized and held accountable for their misconduct.

In the last Congress, the U.S. House passed the Forced Arbitration Injustice Repeal (FAIR) Act to end the use of forced arbitration in consumer and worker contracts.<sup>3</sup> Under the FAIR Act, consumers and workers are given a meaningful choice as to how to pursue their claims after they arise. We strongly recommend that Congress pass legislation to end forced arbitration as quickly as possible to ensure harmed consumers and workers can have their claims heard.

Forced arbitration is the highlight of an established problem with one-sided consumer contract terms that deserve scrutiny and potential reform. Most businesses now, from credit card issuers to cell service providers, use non-negotiable boilerplate contracts with extensive fine print to govern their transactions with consumers. Corporations take advantage of the fact that it is virtually impossible for consumers to read or understand the onerous and non-negotiable fine print that includes terms that would a consumer's waive statutory protections, and other gross restrictions on their rights and remedies under the contract.<sup>4</sup>

This is especially problematic in the digital age when consumers encounter clickwrap agreements on nearly every website they visit and smartphone app they use. These digital contracts have been found to be written at the same reading level as academic papers and many are so long that reading the average American's digital contracts in their entirety would take around 250 hours a year.<sup>5</sup> Consumers have little choice but to agree to these unfair contract terms if they want to access necessary goods and services.

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<sup>3</sup> Forced Arbitration Injustice Repeal Act (FAIR Act), H.R. 1423, 116th Cong. § 1 (2019).

<sup>4</sup> See e.g., Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 *Boston College Law Review* 2255 (2019); Jeff Sovern et al., *'Whimsy Little Contracts' with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 *MARYLAND LAW REVIEW* 1 (2015).

<sup>5</sup> See Benoliel, *supra* 3; David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, *The Guardian*, Mar. 3, 2017, <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print>.

**Make the system fair for ordinary taxpayers.** When harmed consumers take their claims to court and win, they are punished by the tax system for their success.

Most consumer protection laws include provisions that allow consumers to recover their legal expenses from the other side if their claim is successful. These provisions help consumers to afford legal help when bringing cases against corporations that break the law, which in turn encourages continued private enforcement of important protections such as those against debt collection abuses, lending violations, and grossly inaccurate credit reporting that affects personal finances. Unfortunately, the U.S. Tax Code currently considers the recovered legal expenses to be taxable income for the consumer even though the funds are actually paid to the consumer's attorney.

This treatment of reimbursed legal fees can result in some consumers actually losing money after they bring a winning claim. The risk of financial loss has been especially high since the passage of the Tax Cut and Jobs Act of 2017, which eliminated a deduction that consumers could rely on to ease this unfair tax burden.

To ensure consumers can continue to fight back against injustice, Congress should amend the tax code so reimbursed legal fees are no longer considered taxable income to consumers with successful claims. During the previous session, members of the House and Senate introduced the End Double Taxation of Successful Consumer Claims Act which would have done just that.<sup>6</sup> The new Congress should reintroduce and pass this bill at the first opportunity.

Polling data shows that 81% of voters favor changing the tax code so harmed consumers are not taxed on funds reimbursed to their attorneys after they hold wrongdoers accountable. Congress should listen to their constituents needs during this time of crisis.

**Support the missions of federal agencies charged with consumer protection.** During its first six years, the **Consumer Financial Protection Bureau** was an active and vigorous regulator that returned \$12 billion in relief to over 29 million consumers. However, since 2017, the agency's output has seemingly turned away from its statutory duties of overseeing the financial markets and safeguarding consumers. The CFPB's recent ineffectiveness has been especially apparent during the months of the pandemic.

One of the Bureau's first major actions during the pandemic was an April guidance relaxing statutory deadlines under the Fair Credit Reporting Act for consumer credit bureaus to investigate consumer disputes.<sup>7</sup> While the guidance has been in place, consumer complaints to the CFPB, particularly complaints about credit reporting issues, have soared to record heights.<sup>8</sup>

During the months that followed, the CFPB also moved forward with non-essential activities that would harm consumers such as finalizing a rollback of its 2017 payday loan rule that would gut essential protections and continuing the work of an illegitimate Taskforce on Federal Consumer

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<sup>6</sup> End Double Taxation of Successful Consumer Claims Act, S.3913 and H.R.7171, 116th Cong. § 1 (2020)

<sup>7</sup> Consumer Fin. Protection Bureau, *CFPB Issues Credit Reporting Guidance During COVID-19 Pandemic*, Apr. 1, 2020, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-credit-reporting-guidance-during-covid-19-pandemic/>.

<sup>8</sup> U.S. PIRG, *Consumer Complaints Break Records*, Jul. 2020, [https://uspigedfund.org/sites/pirg/files/reports/CFPB%20Database%20Report%20July2020%20Final\\_0.pdf](https://uspigedfund.org/sites/pirg/files/reports/CFPB%20Database%20Report%20July2020%20Final_0.pdf).

Financial Law. The Taskforce, formed entirely with pro-industry members, took up agency resources at a time when struggling consumers needed the Bureau's full attention.

As the only federal agency focused entirely on protecting consumers in the financial marketplace, the CFPB has an important role to play during the long road ahead to economic recovery, but it must exercise its powers to fullest extent possible. Bipartisan polling data shows that the majority of Americans agree strong consumer protection is necessary: 83% of voters support the CFPB and its work while 75% believe there should be more regulation of financial companies like banks, mortgage lenders, payday lenders, debt collectors, and credit card companies.<sup>9</sup> We are encouraged that the CFPB will return to its statutory mandate and fulfill consumers' needs.

The **Federal Trade Commission (FTC)** is also essential to maintaining a fair and open marketplace for consumers. With scams, fraud, and other unscrupulous business activities running high due to COVID-19, Congress must press upon the FTC to continue actively exercising its powers to support consumers.

In particular, the FTC has jurisdiction over industry actors in the auto market including dealers, finance companies, and manufacturers. Fairness in the auto market is important to consumer welfare. Cars are usually a household's second-largest expense, only behind a home, and many Americans depend on their vehicles to travel to work and school and access their daily necessities.

Unfortunately, consumers experience rampant mistreatment and deception in the auto market. For example, dealers and financiers routinely misrepresent the vehicles they sell deceive consumers about financing term.<sup>10</sup> The FTC is well-positioned to use its authority to combat these anti-consumer practices.

Similar to the CFPB, the FTC's regulatory activities have declined in recent years.<sup>11</sup> Part of the reason may be the ongoing threat on the Commission's enforcement powers, and specifically court decisions that appear to limit the FTC's ability to seek redress for consumers harmed by illegal corporate conduct. We strongly support the FTC Commissioners' request to Congress to clarify the agency's enforcement powers under Section 13(b) of the Federal Trade Commission Act.<sup>12</sup> Congress should ensure that the Commission has the full authority to seek refunds on behalf of consumers in its enforcement actions.

**Congress should revise the federal Fair Debt Collection Practices Act (FDCPA) to make it more effective for the 21<sup>st</sup> century.** With COVID-19's impact on household finances, we anticipate an incoming wave of debt collection activity after pandemic-related protections expire.

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<sup>9</sup> Lake Research Partners, New Data Shows Continuing Strong Public Support for Consumer Protections and Financial Regulation, Sept. 29, 2020, <https://ourfinancialsecurity.org/2020/09/voters-support-strong-2020/>.

<sup>10</sup> Christine Hines, *Online Survey: Consumer Harms in Auto Transactions Today*, January 2021, [https://www.consumeradvocates.org/sites/default/files/naca\\_survey\\_report\\_autotransactions\\_012021.pdf](https://www.consumeradvocates.org/sites/default/files/naca_survey_report_autotransactions_012021.pdf); Fact Sheet, Consumers Face Harm During Every Stage of Auto Transactions, [https://www.consumeradvocates.org/sites/default/files/auto\\_transactions\\_survey\\_factsheet\\_0.pdf](https://www.consumeradvocates.org/sites/default/files/auto_transactions_survey_factsheet_0.pdf).

<sup>11</sup> Public Citizen, *Consumer Carnage: How Federal Enforcement of Consumer-Protection Laws Has Declined Under Trump*, Mar. 13, 2019, <https://www.citizen.org/wp-content/uploads/migration/consumeragencies.pdf>.

<sup>12</sup> Letter from the Commissioners of the Federal Trade Commission, Joseph J. Simons Chairman, Rohit Chopra, Christine S. Wilson, Noah Joshua Phillips, and Rebecca Kelly Slaughter) to the U.S. Committee on Energy and Commerce and the Senate Committee on Commerce, Science, and Transportation, Oct. 22, 2020.

It is imperative that Congress act quickly to ensure abusive debt collectors are held accountable for their actions.

The FDCPA was enacted in 1977 to protect consumers from widespread abuse and deception by debt collectors. However, the landscape has changed significantly in the past several decades, necessitating the need for updates to the FDCPA.

To that end, the CFPB released a final rule on debt collection practices with a view, it said, to modernize the FDCPA. The rule lacks the necessary protections to shield consumers from the pandemic's aftershocks or to rein in an industry that disproportionately targets communities of color.<sup>13</sup> Under the rule, collectors will be able to harass consumers through text messages, emails, and social media messages, and will remain able to pursue consumers for old, expired debt.

Congress has the ability to update the FDCPA in meaningful ways that will actually strengthen consumer protection, including modernizing consumer remedies awarded for collectors' violations of the statute. This provision has not been updated in over 40 years. Stagnant remedies devalue the harm suffered by consumers and makes violating the law an increasingly trivial matter for unscrupulous debt collectors.

**Preserve state consumer laws amid the rise of financial technology to ensure the continued safety of consumers and our financial system.** Amid pandemic shutdowns and related financial insecurity, consumers have turned in large numbers to "fintech" products such as mobile banks and payment apps to meet their financial needs.<sup>14</sup> Congress must be vigilant in its response to developments that could put consumers at risk as fintech becomes the new norm. Most importantly, while we support federal protections as a minimum standard, stronger state consumer laws must be maintained and preserved.

Along with innovation, fintech brings with it new and established consumer protection problems. For instance, many fintech firms collect, analyze, and transmit massive amounts of consumer data. Without proper safeguards, big data can pose serious threats to consumer privacy and well-being such as identity theft, discriminatory algorithms, fraudulent transactions, as well as partnerships between online lenders and banks to skirt state usury laws<sup>15</sup> and disguised high-cost loans as innovation.<sup>16</sup> Importantly, we have also observed some fintech companies using their terms and conditions to shield themselves from legal responsibility when their risky practices hurt their consumer users.

The new Congress must continue to apply scrutiny both to fintech firms as well as the regulators responsible for overseeing them, including the CFPB, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation. Congress should ensure that fintech

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<sup>13</sup> Paul Kiel & Annie Waldman, ProPublica, *The Color of Debt: How Collection Suits Squeeze Black Neighborhoods*, Oct. 8, 2015, <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>.

<sup>14</sup> Gene Teare, Crunchbase News, *Survey Says: Fintech on the Rise During COVID*, Sept. 15, 2020, <https://news.crunchbase.com/news/survey-says-fintech-on-the-rise-during-covid/>.

<sup>15</sup> Consumer Fed. Of America, *Stop Predatory Rent-a-Bank Lending Schemes*, <https://consumerfed.org/wp-content/uploads/2020/09/HCL-RentABank-OnePager.pdf>.

<sup>16</sup> Tara Siegel Bernard, New York Times, *Apps Will Get You Paid Early, for a Price*, Oct. 2, 2020, <https://www.nytimes.com/2020/10/02/your-money/cash-advance-apps-paychecks.html>.

products do not jeopardize consumer welfare and that they cannot evade consumer protection measures, especially stronger state laws.

At this moment of profound financial distress for millions of Americans, we urge the members of the 117<sup>th</sup> Congress to actively support consumer protection. Congress should: (1) bring back legal accountability for harmful practices, (2) ensure the tax system does not penalize those who stand up for themselves, (3) encourage an active regulatory system that adequately safeguards consumers, (4) update consumer remedies and protections, and (5) ensure that state and federal consumer protections are maintained with the use of newer consumer products and services.

We appreciate your consideration of our views, please contact me at [christine@consumeradvocates.org](mailto:christine@consumeradvocates.org) with any questions or to discuss these issues further.

Sincerely,

Christine Hines  
Legislative Director