February 3, 2012

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: Carlyle Group, L.P.'s January 10, 2012 Amendment to Registration Statement

Dear Chairman Schapiro:

The undersigned organizations are deeply concerned about the forced arbitration provision in the recent registration statement that the Carlyle Group, L.P., filed with the U.S. Securities and Exchange Commission ("SEC" or the "Commission").[1] The company seeks to quash a basic and critical right of a firm's owners, whether shareholders, partners, or "unitholders": the right to sue over wrongful acts by management.

The Carlyle Group in January filed an amendment to its registration statement regarding its initial public offering. The amendment announced that the partnership agreement would require individual arbitration of disputes between unitholders and the company. The amendment forbids any claims, including those arising under U.S. federal securities laws, from being heard in court or "as part of any representative or class proceeding," and requires that arbitration be heard on an individual basis in Wilmington, Delaware. Like a number of recent offerings, the Carlyle proposal also imposes severe restrictions on shareholders' rights, including their right to elect directors and to remove the general partner. Carlyle's IPO would also eliminate the directors' fiduciary duties to their shareholders and limit shareholder remedies for breaches of the general partner's duties. Carlyle is another example of recent corporate efforts to remove managements' legal obligations to protect their investors.[2] Forced arbitration is an added element that would further harm shareholder protections.

The SEC previously has rejected a company's attempt to insert an arbitration clause in its contracts with shareholders. Indeed, at the time, a former SEC assistant general counsel concluded that companies forcing their shareholders into private arbitration would be "contrary to the public interest."[3] Our organizations have long observed the harmful impact of this practice on consumers and investors in securities and other sectors and unequivocally agree with this assessment. We urge the Commission to maintain its position and reject the Carlyle Group's registration filing unless the arbitration provisions are removed.

Approval of the Carlyle proposal would severely weaken investor protections under federal securities law, as well as SEC oversight.

If the SEC approves Carlyle's amendment filing with the arbitration provisions, the action could set a precedent leading to widespread adoption of forced arbitration between companies and their

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[1] The Carlyle Group L.P. Amendment No. 2 to Form S-1 Registration Statement Under The Securities Act of 1933 with the U.S. Securities and Exchange Commission, January 10, 2012, available at http://www.sec.gov/Archives/edgar/data/1527166/000095012312000638/w83442a2sv1za.htm#204.

[2] See, e.g. Letter from American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) to Investor, regarding the initial public offering of The Blackstone Group L.P., June 19, 2007.

[3] Thomas L. Riesenberg. *Commentary, Arbitration and Corporate Governance: A Reply to Carly Schneider*, Insights, Vol. 4, No. 8, at 2, August 1990.

shareholders, as companies seek to further insulate themselves from scrutiny and accountability.[4] These clauses would interfere with investors' well-established private rights of action under the securities laws, including implied causes of action under Rule 10(b) and 10b-5 of the 1934 Securities Act.[5]

Forced arbitration would enable companies to violate federal securities laws with near-impunity. Serious claims, such as those related to breach of fiduciary duty, fraud, self-dealing, waste of corporate assets, insider trading, accounting scams, and inflated or false financial statements, would be forced into private forums orchestrated by Carlyle and others. Due to the secrecy inherent in private arbitration and the fact that companies write the rules for these proceedings, corporate misconduct likely will escape adequate punishment, public scrutiny and the SEC's enforcement or oversight authority. In addition, a principal goal of forced arbitration is to eliminate class actions, which for many claims are the only feasible avenue for pursuing relief. Forced arbitration effectively eliminates these claims, shielding firms from accountability for harms they conduct on a mass scale, particularly when each harm is too small for most individuals to pursue on their own. Indeed, because Carlyle proposes to force arbitration on the arbitrability of claims, even that basic issue will not be decided in court.

Forcing shareholders into arbitration would dismiss decades of securities jurisprudence, and prevent its further development.[6] Arbitrators would be granted virtually unchecked discretion in their decision making. They would not be obliged to apply substantive securities law or adhere to legal precedent and principles. They would not even be required to follow their own rules of procedure. Arbitrators typically do not issue findings of fact or conclusions of law, nor are juries present to determine issues of fact. Moreover, unjust or unlawful decisions would not be corrected because judicial review of binding arbitration is exceedingly narrow.

Industry observers have noted that securities claims are not merely "private quarrels" between parties; they often have serious, widespread implications for the integrity of the securities markets and the U.S. economy.[7] These observers contend that the recent history of corporate scandals, including the recent financial crisis and the accounting scandals that led to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002, were precipitated in part by corporate leaders' ability to shield themselves from accountability. Corporations and partnerships under the Commission's oversight employ millions of Americans and are owned or invested in by millions more. It is imperative that critical corporate activities remain subject to scrutiny by shareholders and the courts, and not insulated by clandestine, corporate-run arbitration proceedings.

Carlyle's filing is the wrong direction on forced arbitration.

Past experience with forced arbitration of securities-related disputes suggests that the practice should be banned, not expanded. Investor disputes against broker-dealers are subject to mandatory arbitration before the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization. Studies and surveys reveal that in FINRA arbitration, despite SEC supervision, biases in favor of the corporate entity and against weaker investors often prevail during the dispute

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[4] *See* Jennifer J. Johnson and Edward Brunet, *Arbitration of Shareholder Claims: Why Change is Not Always a Measure of Progress*, Lewis & Clark Law School Legal Research Paper Series Paper No. 2008 - 11, at 30.
[5] Johnson and Brunet.
[6] *See* Riesenberg, at 30.
[7] *See* Johnson and Brunet, at 35; and Charles W. Murdock, *Sarbanes-Oxley Five Years Later: Hero or Villain*, at 2 (2008).

resolution process.[8] Unlike FINRA arbitration, the Commission would have no oversight over shareholder arbitration proceedings. Arbitration outcomes for shareholders under Carlyle's proposal would likely be significantly worse where there is no SEC involvement. In addition, FINRA has a firm policy against arbitration of class claims. That is appropriate, as class claims are often the only feasible means for investors to pursue their legal rights. Carlyle's effort, in contrast, is intended to eliminate class actions.

Carlyle's ban on shareholder collective or class actions would eliminate a long-recognized tool for vindicating investor rights and tackling extensive wrongdoing, such as massive fraud and antitrust violations. Class actions have inspired significant corporate governance reforms such as better disclosure practices and more independent corporate boards and audit committees to reduce misconduct.[9]

In recent years, the harms of forced arbitration have gained wide recognition, and Congress and other federal agencies have begun to investigate and eliminate the practice. These efforts are ongoing. Recently, Congress has passed laws to protect the following groups from forced arbitration:

- auto dealers in their transactions with manufacturers;
- livestock and poultry growers;
- military members with respect to payday loans, vehicle title loans, and tax refund anticipation loans;
- consumers with respect to residential mortgages; and
- employees of government defense contractors with Title VII and sexual assault tort claims.[10]

Congress also has granted the Commission authority to ban forced arbitration for investor claims against broker-dealers and investment advisors, and has ordered the Consumer Financial Protection Bureau (CFPB) to study forced arbitration within its jurisdiction.[11] As in the case of the Commission, Congress also granted the CFPB authority to ban the practice.

Most recently, the National Labor Relations Board has limited class action bans in arbitration clauses within employment contracts. The NLRB ruled in January that a provision in an employment contract that requires individual arbitration of disputes as a condition of employment and bars "joint, class, or collective claims for wages, hours and other working conditions against the employer" unlawfully restricts employees' statutory rights under the National Labor Relations Act, notwithstanding the Federal Arbitration Act.[12]

Given these recent actions to address the practice, permitting Carlyle's filing would be a major step in the wrong direction. The SEC is charged with protecting investors and enforcing the securities laws, which includes safeguarding investors' well-established private rights of action. Carlyle's

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[8] *See* Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1594 (April 2005); Barbara Black & Jill Gross, *Perceptions Of Fairness Of Securities Arbitration: An Empirical Study*, University of Cincinnati College of Law Public Law & Legal Theory Research Paper Series No. 08-01 (February 15, 2008).

[9] *See* Glen DeValerio, *Securities Litigation: An Investor's Best Tool for Boardroom Reform*, available at http://www.nasra.org/resources/Berman%20Securities%20Litigation.pdf.

[10] Motor Vehicle Franchise Contract Arbitration Fairness Act (2002), Pub. L. 107-273; Food, Conservation, and Energy Act (2008), Pub. L. 110-234; Military Lending Act, 10 U.S.C. 987(e)(3) and (f)(4); Department of Defense Appropriations Act, 2010, Sec. 8116, Pub. L. No. 111-118; Dodd-Frank Wall Street Reform and Consumer Protection Act, Sec. 1414(e), Public Law 111 – 203.

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111 – 203, Sections 921 and 1028.

[12] D.R. Horton, Inc. and Michael Cuda, National Labor Relations Board, Case 12-CA-25764 (Jan. 2012).

proposal would harm investors, weaken SEC oversight, and decrease transparency and stability in the financial system. The SEC should reject it.

Sincerely,

Public Citizen
AFSCME
American Association for Justice
American Federation of Labor-Congress of Industrial Organizations (AFL-CIO)
Americans for Financial Reform
Consumer Federation of America
The Leadership Conference on Civil and Human Rights
National Association of Consumer Advocates
U.S. Public Interest Research Group (U.S. PIRG)