

Congress of the United States
Washington, DC 20515

March 12, 2018

The Honorable Jay Clayton
Chair
The Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Clayton:

We are writing regarding a recent report that the Securities and Exchange Commission (SEC) is “laying the groundwork” for allowing public companies to include forced arbitration provisions in their corporate governance documents.¹ We strongly oppose any effort to reverse the Commission’s longstanding position that such forced arbitration provisions violate Federal securities law.

The Commission should continue to prohibit public companies from requiring shareholders to individually arbitrate their claims against the company, including Federal securities law claims, both as a matter of public policy and as a matter of law.

First, as a matter of public policy, there is a strong public interest in ensuring that shareholders have access to the courts to resolve their claims. This includes the ability to participate in securities class action lawsuits.² In 1995, Congress explicitly recognized the importance of private enforcement of the securities laws through litigation, stating that “[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action.”³ In addition, the Supreme Court “has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC).”⁴ Forcing shareholders to individually arbitrate their Federal securities claims, however, would effectively eliminate private securities litigation as a meaningful supplement to Commission enforcement of the securities laws, thereby undermining the comprehensive scheme of enforcement that Congress envisioned.

¹ Benjamin Bain, “SEC Weighs a Big Gift to Companies: Blocking Investor Lawsuits,” *Bloomberg* (January 26, 2018), available at <https://www.bloomberg.com/news/articles/2018-01-26/trump-s-sec-mulls-big-gift-to-companies-blocking-investor-suits>.

² Securities class action lawsuits have time and again proven effective in compensating shareholders for corporate frauds. See e.g., *In re Tyco International, Ltd.*, Securities Litigation, U.S. District Court, District of New Hampshire, No. 02-266 (\$3.2 billion settlement); *In re Enron Corporation*, Securities Litigation, U.S. District Court, Southern District of Texas, No. 01-3624 (\$7.2 billion settlement); *In re WorldCom, Inc.*, Securities Litigation, U.S. District Court, Southern District of New York, No. 02-3288 (\$6.1 billion settlement).

³ H.R. Conf. Rep. No. 104-369, p. 31 (1995).

⁴ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 308 (2007).

Forced arbitration of Federal securities claims would also devastate investor confidence in the U.S. capital markets. Investors' ability to hold companies that commit securities fraud accountable through private litigation is critical to their confidence that their rights will be respected when they invest in U.S. companies. The ability to participate in class action lawsuits is particularly important in claims for securities fraud, where the victims are dispersed throughout the country, the factual and legal issues are extremely complex, and there is a substantial information asymmetry between the shareholders and the company.

Moreover, the Commission's position has long been that forced arbitration of Federal securities claims should not be allowed as a matter of public policy. In 1990, the Commission's then-Assistant General Counsel, Thomas L. Riesenberg, wrote that "it would be contrary to the public interest to require investors who want to participate in the nation's equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such a waiver is made through a corporate charter rather than through an individual investor's decision."⁵

Second, allowing public companies to include forced arbitration provisions in their corporate governance documents violates the anti-waiver provisions of the Federal securities laws. It is well settled that shareholders may bring private lawsuits for securities fraud under section 10(b) of the Securities Exchange Act of 1934.⁶ Section 29(a) of the Exchange Act provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter ... shall be void."⁷

The Supreme Court has stated that a provision will run afoul of the anti-waiver language of section 29(a) where the agreement "weakens [investors'] ability to recover under the Exchange Act."⁸ A provision waiving an investor's right to sue in court will violate section 29(a) "where arbitration is inadequate to protect the substantive rights at issue."⁹

The Commission has long taken the view that including forced arbitration provisions in the corporate governance provisions of public companies violates section 29(a) of the Exchange Act because arbitration is inadequate to protect investors' rights. In an amicus brief urging the Supreme Court to uphold an arbitration agreement only where the arbitration procedure was subject to the Commission's strict Section 19 oversight for self-regulatory organizations, the Commission stated that its argument "would not apply" where the arbitration procedure was not subject to the Commission's Section 19 oversight — and for public companies generally, such arbitration procedures would not be subject to the Commission's Section 19 oversight.¹⁰

Mr. Riesenberg, the Commission's then-Assistant General Counsel, later stated the Commission's position that there were four separate grounds for finding forced arbitration

⁵ Thomas L. Riesenberg, *Arbitration and Corporate Governance: A Reply to Carl Schneider*, 4 Insights 8 (1990).

⁶ 15 U.S.C. § 78j(b); see also *Tellabs, Inc.*, 551 U.S. at 318; *Central Bank of Denver v. First Nat'l. Bank of Denver*, 511 U.S. 164, 171 (1994).

⁷ 15 U.S.C. § 78cc(a); see also 15 U.S.C. § 77n (identical anti-waiver provision in the Securities Act of 1933).

⁸ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) (internal alterations omitted).

⁹ *Id.* at 229.

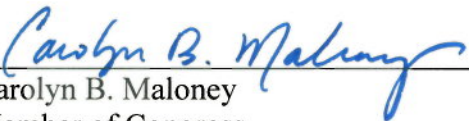
¹⁰ Brief for the Securities and Exchange Commission at 20, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (No. 86-44).


provisions in corporate governance documents violated Federal securities laws.¹¹ Mr. Riesenberg reasoned that such forced arbitration provisions violate section 29(a)'s anti-waiver language because the Commission oversight over the arbitration procedures was wholly inadequate to protect investors' substantive rights.¹² More recently, the Commission staff affirmed the view that a shareholder proposal to amend a company's bylaws to require arbitration of securities claims "would cause the company to violate the federal securities laws."¹³


Further, because of the long-standing public position of the SEC, and the significant impact such a monumental shift in policy would have on American investors, any examination of this issue should be done in a transparent manner — one in which the public is fully informed and able to participate. Investors, shareholders, and other stakeholders should have their voices heard through a formal and public process. Anything less will be seen as a stealth attempt by the Commission to circumvent U.S. securities laws and the fundamental rights of shareholders. As such, we would expect a swift and negative response from Congress and the public.


Accordingly, we respectfully request that the Commission reaffirm its longstanding position that forced arbitration provisions in the corporate governance documents of public companies harms the public interest and violates the anti-waiver provisions of the Federal securities laws.


Sincerely,



Carolyn B. Maloney
Member of Congress


Maxine Waters
Member of Congress


Michael E. Capuano
Member of Congress


John K. Delaney
Member of Congress


Gwen Moore
Member of Congress

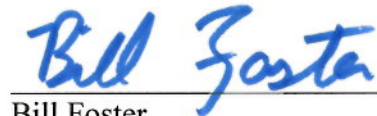

Nydia M. Velázquez
Member of Congress

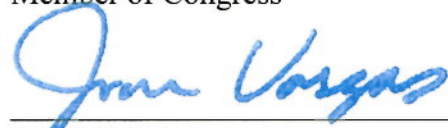
¹¹ See Riesenberg, *supra* note 5.


¹² *Id.* at 30.


¹³ Gannett Co., Inc., SEC No-Action Letter (February 22, 2012).



Joyce Beatty
Member of Congress


Bill Foster
Member of Congress


Juan Vargas
Member of Congress

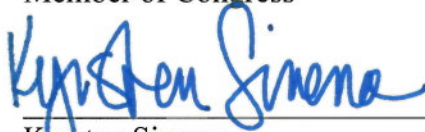

Emanuel Cleaver
Member of Congress



Daniel T. Kildee
Member of Congress



Ruben J. Kihuen
Member of Congress

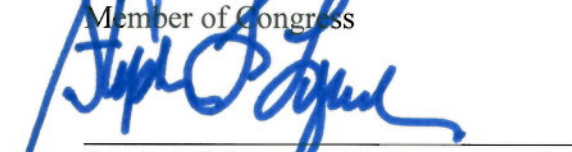

Keith Ellison
Member of Congress



Brad Sherman
Member of Congress



Kyrsten Sinema
Member of Congress

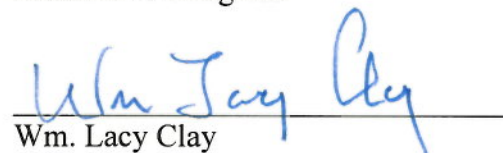

Gregory W. Meeks
Member of Congress


James A. Himes
Member of Congress



Stephen F. Lynch
Member of Congress


Charlie Crist
Member of Congress


Ed Perlmutter
Member of Congress


Wm. Lacy Clay
Member of Congress

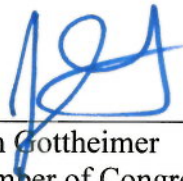

Denny Heck
Member of Congress


Vicente Gonzalez
Member of Congress


David Scott
Member of Congress



Al Green
Member of Congress



Josh Gottheimer
Member of Congress