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Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission (SEC)
100 F Street NE
Washington, DC 20549

August 11, 2017

Dear Chairman Clayton,

On behalf of Public Citizen, a non-profit membership organization with more than 400,000 members and supporters nationwide, we are greatly distressed by recent comments of Commissioner Michael Piwowar, in which he offered his support for including forced arbitration clauses in initial public offering (IPO) documents.[1] We strongly urge that you immediately begin the process of prohibiting forced arbitration clauses by entities governed by the SEC.

The SEC should protect investors by banning forced arbitration clauses and bans on class actions ("forced arbitration clauses") because it is difficult for investors to vindicate their rights under federal securities law absent the ability to bring a class action. The SEC's powers to enforce prohibitions on manipulative practices and to enforce the anti-waiver provisions in federal securities law confer ample authority on the SEC to ban these insidious provisions.

Forced arbitration clauses, which use fine-print "take-it-or-leave it" agreements to rig the system, have become ubiquitous in such varied settings as agreements governing bank accounts, student loans, cell phones, employment, and even nursing home admissions. These clauses deprive people of their day in court when they are harmed by violations of the law. Instead, people are forced into biased, secretive arbitration proceedings with no right to appeal if arbitrators ignore the facts or law. When forced arbitration clauses are combined with class action bans, neither judges nor arbitrators can assess or remedy the full scope of wrongdoing that affects multiple victims. The SEC should not allow the use of such agreements to become as commonplace in IPOs as in other contracts where they have proliferated.

[1] Reuters, "U.S. SEC's Piwowar Urges Companies to Pursue Mandatory Arbitration Clauses," *available at* http://www.reuters.com/article/us-usa-sec-arbitration-idUSKBN1A221Y (July 17, 2017).

For most investors, their rights under federal securities law can only be vindicated by banding together because of the expense of bringing individual actions. The critical role of class actions under the securities laws has long been recognized by courts, regulators, and advocates who monitor the financial industry. As one court has put it, "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'"[2] Moreover, section 15 of the Securities Exchange Act of 1934 ('34 Act) includes anti-waiver provisions that nullify a contract that seeks to waive a person's rights,[3] and the SEC has a mandate to protect investors against "manipulative and deceptive" practices.[4]

The Supreme Court has recognized that the Commission has authority under the statutes to regulate the use of arbitration to ensure that it does not prevent the vindication of investors' rights.[5] Forcing investors into a system that would prevent the class remedies that are essential to effective enforcement of investors' rights is clearly manipulative. Thus, even where the SEC has allowed the use of arbitration under the securities laws, most notably in the FINRA rules authorizing use of customer arbitration agreements by broker-dealers, it has acted to ensure that the availability of class actions in court is not impaired.[6]

Allowing the use of forced arbitration and class action prohibitions by issuers would be inconsistent not only with the Commission's statutory investor-protection mandates, but also with the Commission's past actions. In 2012, when the private equity firm Carlyle Group indicated its intention to insert forced arbitration clauses and class action bans into its IPO agreements, a group of United States Senators wrote to then-Chairman Mary Shapiro stating that "private arbitration of shareholder disputes would be contrary to the public interest."[7] Carlye ultimately decided against including such dangerous and anti-investor clauses in their corporate documents. Around that same time, Pfizer shareholders pushed a proposal to include an arbitration clause in proxy materials that were to be distributed by the company in connection with its 2012 shareholders meeting. Pfizer objected to the move, arguing that an arbitration provision would cause the company to violate federal securities laws. The SEC agreed with Pfizer and took no enforcement action against the company.[8]

Allowing issuers to avoid accountability under the securities laws by using arbitration clauses to squelch securities class actions would not only be unprecedented, but would also run counter to the trend of congressional legislation. The Dodd-Frank Wall Street Reform and Consumer

[2] Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) *quoting* Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1969).
[3] *See* 15 U.S.C. §§ 77n and 78cc ("Waiver Provisions").
[4] 15 U.S. Code § 78j.
[5] Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).
[6] *See* Charles Schwab & Co. v. FINRA, 861 F. Supp. 2d 1063, 1068–69 (N.D. Cal. 2012).
[7] Letter from Sens. Al Franken, Richard Blumenthal, and Robert Menendez to Chairman Mary Shapiro (Feb. 23 2012), *available at* https://www.scribd.com/doc/80406909/Senate-Letter-on-Carlyle-I-P-O-Provisions.
[8] *See generally* Pfizer Inc., SEC No-Action Letter, 2012 WL 587597.

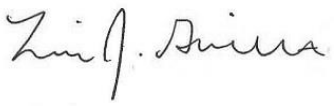
Protection Act was passed in the aftermath of the worst economic crisis since the Great Depression—a crisis largely caused by unnecessary risk taking by the financial industry with other people's money. The law puts in place common sense protections for Americans and their families, and as mentioned above, included in that are the amendments to Section 15 of the'34 Act and Section 205 of the Investment Advisors Act of 1940 ("40 Act") which give the SEC the authority to ban forced arbitration clauses and class action bans used by brokers and dealers and investment advisers.

Likewise, in passing the Private Securities Litigation Reform Act, Congress chose to improve the conduct of class actions, not to ban them, as allowing issuers to use forced arbitration would effectively do. In so doing, Congress acknowledged the importance of private enforcement to protect market forces and to protect investors.[9] The Supreme Court has supported this common sense policy, saying that "implied private actions provide 'a most effective weapon in the enforcement' of the securities law and 'are a necessary supplement to Commission action."[10]

At a time when Members of Congress are proposing legislation to prohibit the use of forced arbitration altogether by entities regulated by the '34 Act and the '40 Act,[11] the SEC should be doing its part to protect investors. The SEC was created to bring transparency to the financial markets and to ensure that investors have clear and accurate information to make sound investment decisions. Forced arbitration clauses and class action bans have the opposite effect by shielding abusive and misleading practices from public scrutiny.

The entire financial industry benefits from a transparent system that protects the hard earned gains of its investors. We urge you to adhere to the longstanding view of protecting investors from forced arbitration at the hands of issuers and to begin the process to formally prohibit forced arbitration clauses by all regulated entities without further delay.

Sincerely,



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[9] H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. (1995)("[P]rivate lawsuits promote public and global confidence in our capital markets and help deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.")
[10] Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) *quoting* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964).
[11] Investor Choice Act of 2017, H.R. 585, 115th Cong. (1st Sess.).

Cc:
The Honorable Michael S. Piwowar
The Honorable Kara M. Stein