

August 21, 2018

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

Dear Chairman Clayton:

The 133 under-signed organizations work on behalf of middle income, working Americans, many of whom turn to our nation's capital markets to save for retirement and other long-term goals. These investors are the primary, and often unknowing, beneficiaries of system that allows shareholders to band together to enforce securities law violations through private class action lawsuits. Even if they personally never bring a claim, these investors nevertheless benefit from the crucial role shareholder lawsuits play in deterring financial fraud and protecting the integrity of U.S. capital markets. We are writing on their behalf to urge you to ensure that the Securities and Exchange Commission (SEC), under your leadership, will not strip investors of these vital protections.

The SEC, Congress, and the courts have long recognized the important role that private lawsuits play in both deterring fraud and compensating defrauded investors without always having to rely upon government action.¹ Forcing defrauded investors to arbitrate their claims individually would effectively eliminate both the deterrent effect of class action shareholder lawsuits and the opportunity for these defrauded investors to recover their losses. That is because the issues in a typical case of financial fraud are too complex, and the costs of discovery and expert testimony are too high, for these claims to be dealt with effectively through individual arbitration.

That would leave government enforcement actions as the only means for defrauded investors to recover their losses. But it is not realistic to think that SEC resources would or could be increased sufficiently to enable it to fill that gap. Recent high-profile examples of securities fraud illustrate the devastating effect this would have. In enforcement actions against Enron, WorldCom, Tyco, Bank of America and Global Crossing, for example, the SEC recovered penalties and fees totaling \$1.8 billion, while private securities class actions were able to recover \$19.4 billion for defrauded shareholders – more than ten times as much.

Eliminating investors' right to pursue private lawsuits would therefore not only effectively eliminate their ability to recover their losses, it would also seriously erode their confidence in the

¹ See, e.g., H.R. Conf. Rept. No. 104-369, pg. 31 (1995) ("Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely on government action.) See, also, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 308 (2007) (the Court notes that it "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).")

integrity of the capital markets. Simple economics, and past experience, tell us that when investor confidence goes down, the cost of capital goes up. Thus, the notion that permitting forced arbitration clauses will somehow promote capital formation is misguided. As the Financial Times reported earlier this year, “Class actions are not the reason IPOs are scarce. To the extent they underpin investor confidence, they actually support the market.”²

Shareholder class actions help to ensure that publicly held companies provide the accurate and reliable financial information on which our markets depend. Foreign investors hold more than \$6.2 trillion in stock in U.S. corporations, in no small part because American markets have traditionally been particularly well policed compared with those in many other countries. The ability of shareholders to enforce their rights with the full protections of our legal system is crucial to investor confidence, both domestic and foreign.

We recognize that whether this issue comes before the Commission is outside your control. As you have previously indicated, if a company seeks to register an IPO with the Commission that includes a forced arbitration clause, the Commission will have to consider that request. We appreciate the assurance you provided in your April 24 letter to Rep. Carolyn Maloney that, should this occur, the Commission itself, rather than staff, would deal with the issue and would do so in “a measured and deliberative manner.”

However, this assurance, welcome as it is, falls short of what is needed to lay this issue to rest.

- Ideally, you would simply reaffirm the SEC’s longstanding position that forced arbitration provisions that prevent investors from bringing or participating in class actions violate Section 29(A) of the Exchange Act, because arbitration in this context is insufficient to protect investor rights.³ Instead, your April 24 letter suggests that, since the Commission last decided the issue in the IPO context, “federal case law regarding mandatory arbitration continues to evolve.”
- Short of reaffirming past policy, you could issue a clear public statement pledging that the SEC will not change this policy without first going through a full and transparent review process that includes an opportunity for public comment on whether such a change ought to be adopted and an economic analysis of the likely impact on investor protection, market integrity, and the cost of capital. The promise of a “measured and deliberative” process fails to provide that assurance.

While your letter to Rep. Maloney sends a welcome message that any company challenging this policy should not expect a speedy resolution, taking either of these additional actions would do even more to dissuade companies who might otherwise consider challenging the policy. Commissioner Hester Peirce’s recent public endorsement of forced arbitration clauses being added to companies’ charters heightens the urgent need for SEC leadership to affirm that investors will retain these crucial rights.⁴

² “SEC Reform: Class Acts, Lawsuits are not putting companies off going public,” Financial Times, March 4, 2018 <https://www.ft.com/content/18130b8a-1bdf-11e8-aaca-4574d7dabfb6>

³ See, e.g., Thomas L. Riesenber, *Arbitration and Corporate Governance: A Reply to Carl Schneider*, 4 *Insights* 8 (1990). See, also, *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

⁴ “Question and Answer with SEC Commissioner Hester Peirce,” Politico Pro, August 2, 2018 <https://subscriber.politicopro.com/financial-services/article/2018/08/politico-pro-q-a-sec-commissioner-hester-peirce-716143>

Investors rely on the SEC to promote market integrity and deter and detect fraud. But the SEC cannot fulfill this role on its own. Private shareholder lawsuits serve as an essential supplement to Commission action. We look forward to working with you and your fellow commissioners to ensure that this important element of the investor protection arsenal is preserved.

Thank you for the opportunity to share our views. For questions about this letter, please contact Barbara Roper, Director of Investor Protection with Consumer Federation of America, (719) 543-9468, bnroper@comcast.net or Amanda Werner, Campaign Strategist with Public Justice, (202) 861-5252, awerner@publicjustice.net.

Respectfully submitted,

National Signatories

AFL-CIO
Alliance for Justice
Allied Progress
American Association for Justice
American Family Voices
American Federation of State, County and Municipal Employees (AFSCME)
Americans for Financial Reform
Better Markets
Bevis Longstreth – Retired partner, Debevoise & Plimpton; former Commissioner, SEC
Center for American Progress Action Fund
Center for Economic Justice
Center for Justice & Democracy
Center for Popular Democracy
Center for Responsible Lending
Change to Win
Communications Workers of America (CWA)
Congregation of Sisters of St. Agnes
Consumer Action
Consumer Federation of America
Consumers for Auto Reliability and Safety
Consumers Union
Demand Progress Action
Equal Justice Society
Essential Information
Fund Democracy
Homeowners Against Deficient Dwellings
Impact Fund
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW)
Lynn E. Turner – Former Chief Accountant, SEC
NAACP

National Association of Consumer Advocates
National Center for Lesbian Rights
National Conference of Public Employee Retirement Systems
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Latino Farmers & Ranchers Trade Association
National LGBTQ Task Force
National Organization for Women
Priests of the Sacred Heart, U.S. Province
Progressive Congress Action Fund
Protect All Children's Environment
Public Citizen
Public Justice
R.G. Associates, Inc.
RootsAction.org
Service Employees International Union (SEIU)
Shareholder Education and Advocacy of the Sisters of Charity, BVM
Sisters of St. Francis of Philadelphia
State Innovation Exchange (SiX)
U.S. PIRG
United Policyholders
Woodstock Institute
Workplace Fairness

State Signatories

Alaska Public Interest Research Group – AK
Arkansans Against Abusive Payday Lending – AR
Arizona Community Action Association – AZ
Arizona PIRG – AZ
Center for Economic Integrity – AZ and NM
California Resources and Training – CA
CALPIRG – CA
Consumer Attorneys of California – CA
Consumer Federation of California – CA
9to5 Colorado – CO
Colorado Fiscal Institute – CO
COPIRG – CO
The Interfaith Alliance of Colorado – CO
NAACP Colorado State Conference – CO
ConnPIRG – CT
DC Consumer Rights Coalition – DC
Delaware Community Reinvestment Action Council, Inc. – DE
Delaware Manufactured Home Owners Association (DMHOA) – DE

Community Coalition on Homelessness dba Turning Points – FL
Florida Alliance for Consumer Protection – FL
Florida PIRG – FL
Georgia PIRG – GA
Coasap – IA
Iowa PIRG – IA
Illinois PIRG – IL
J.A.S. & Associates – IL
Partners In Community Building, Inc. – IL
Project IRENE – IL
YWCA of the University of Illinois – IL
Indiana PIRG – IN
Consumer Assistance Council, Inc. – MA
Massachusetts Consumers Council – MA
MASSPIRG – MA
The Midas Collaborative – MA
Maryland Consumer Rights Coalition – MD
Maryland PIRG – MD
Green Alliance – ME and NH
Maine Center for Economic Policy – ME
PIRG in Michigan (PIRGIM) – MI
L & C Ministries – MO
Missouri PIRG (MoPIRG) – MO
AFSCME Montana Council 9 – MT
Montana Organizing Project – MT
CCCS of WNC, Inc DBA OnTrack Financial Education & Counseling – NC
Charlotte Center for Legal Advocacy – NC
North Carolina Consumers Council – NC
New Jersey Citizen Action – NJ
NJPIRG – NJ
NMPIRG – NM
Greater New York Labor Religion Coalition – NY
Housing and Family Services of Greater New York, Inc. – NY
JASA/Legal Services for the Elderly in Queens – NY
Keuka Housing Council, Inc. – NY
Make the Road New York – NY
New York Public Interest Research Group (NYPIRG) – NY
Western New York Council on Occupational Safety and Health – NY
Ohio PIRG – OH
Oregon PIRG (OSPIRG) – OR
Bhutanese Community Association of Pittsburgh – PA
Integra Home Counseling, Inc. – PA
Pennsylvania Council of Churches – PA
PennPIRG – PA
The One Less Foundation – PA
RIPIRG – RI

SC Appleseed Legal Justice Center – SC
Tennessee Citizen Action – TN
TexPIRG – TX
Virginia Citizens Consumer Council – VA
Virginia Organizing – VA
Vermont Public Interest Research Group – VT
Northwest Consumer Law Center – WA
SafeWork Washington – WA
WASHPIRG – WA
WISPIRG – WI
Mountain State Justice – WV
WV Citizen Action Group – WV