



December 11, 2013

Keith F. Higgins
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

John Ramsey
Acting Director
Division of Trading and Markets
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Forced Arbitration Clauses In Corporate Bylaws

Dear Messrs. Higgins and Ramsey:

I am writing on behalf of the Council of Institutional Investors (“CII”) to bring to your attention a recent potential trend in corporate governance that may not only impair shareowners’ rights, but also threaten to undermine the integrity of our public markets generally.

CII is a non-profit association of pension funds, other employee benefit funds, endowments and foundations with combined assets that exceed \$3 trillion. Many CII members are long-term shareowners responsible for safeguarding the retirement savings of millions of American workers and retirees.¹

A pair of relatively recent decisions by the United States Supreme Court —*AT&T Mobility v. Concepcion*² and *American Express v. Italian Colors Restaurant*³—appear to generally support the view that the Federal Arbitration Act (“FAA”) requires courts to enforce arbitration provisions that bar class actions with respect to federal and state claims. We are concerned that those decisions could potentially be used in an effort to enable public corporations to avoid liability simply by including a forced arbitration clause in a corporate bylaw.

It is our understanding that some corporations may have already begun to explore forced arbitration provisions in their chartered bylaws as a potential vehicle to limit shareowner rights. Bylaws are considered to establish the “contractual” terms that govern a company’s operations, and some might argue that such provisions are sanctioned by the forced arbitration frameworks created by the above referenced Supreme Court precedents.

As you are well aware, bylaw provisions can be adopted unilaterally by corporate boards without shareowner approval. As a result, forced arbitration provisions in corporate bylaws represent a potential threat to principles of sound corporate governance that balance the rights of shareowners against the responsibility of corporate managers to run the business.

¹ For more information about the Council of Institutional Investors (“CII”) and our members, please visit our website at <http://www.cii.org/members>.

² *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (Apr. 27, 2011), <http://www.supremecourt.gov/opinions/10pdf/09-893.pdf>.

³ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013), http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf.

For example, in the recent case of *Corvex Management LP v. CommonWealth REIT*,⁴ shareowners brought an action on behalf of a real estate investment trust (“REIT”) arguing that the company’s board breached their fiduciary duties by taking unlawful actions designed to prevent or delay a shareowner vote on a takeover bid.⁵ The REIT’s bylaws, however, contains a broad mandatory arbitration provision that bans class actions, including shareowner derivative suits.⁶ Citing Supreme Court precedent, including *AT&T Mobility v. Concepcion*,⁷ a Maryland Circuit Court dismissed the litigation, holding that the shareowners’ claims had to be submitted to arbitration even though the REIT’s board unilaterally adopted the bylaw without shareowner approval.⁸

Perhaps unwittingly, the Delaware Court of Chancery may have set the stage for this further reduction of judicial oversight of corporations. In his 2013 decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,⁹ Chancellor Strine upheld the enforceability of bylaws, unilaterally adopted by two corporate boards, requiring all litigation relating to the internal affairs of the corporations to be conducted in Delaware.¹⁰

Chancellor Strine’s decision in *Boilermakers Local 154 Retirement Fund* may have significant consequences. If, for example, Delaware law allows corporate boards, through the adoption of bylaws, to dictate unilaterally the forum for resolution of all shareowner disputes, directors of Delaware corporations might attempt to dictate arbitration as the mandatory forum for any shareowner disputes, even if Delaware courts are available to hear the case.¹¹

More specifically, if it is established that corporate boards are empowered under state law to designate a forum for the resolution of shareowner disputes, those corporate directors could potentially attempt to rely on federal law—in particular the FAA as interpreted by the Supreme Court—to designate forced arbitration as the only available forum. As one commentator earlier noted this year: “It would be frighteningly ironic if Chancellor Strine’s ruling on corporate by-laws, which seems intended to drive shareowner litigation to Delaware, ended up driving

⁴ *Corvex Management LP v. CommonWealth REIT*, 24-C-13-001111, slip op. (Cir. Ct. Baltimore City, May 8, 2013), http://www.sec.gov/Archives/edgar/data/803649/000110465913039281/a13-11995_1ex99d2.htm.

⁵ *Id.* at 2-3.

⁶ *Id.* at 4.

⁷ *Id.* at 7.

⁸ *Id.* at 27.

⁹ *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 2013 WL 3191981 (Del. Ch. June 25, 2013), http://scholar.google.com/scholar_case?case=953851692202390762&q=Boilermakers+Local+154+Ret.+Fund+v.+Chevron+Corp&hl=en&as_sdt=6,47&as_vis=1.

¹⁰ *Id.* Of note, as of September 30, 2012, three hundred publicly traded companies had adopted some form of provision in their bylaws or governing documents purporting to designate an exclusive forum for the resolution of any claim a shareholder may have against, or on behalf of, the corporation. See Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 *Bus. Law.* 325, 330 (2013).

¹¹ *Cf. Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) (enforcing provision in the charter of a Limited Liability Company to require arbitration derivative claims in California), http://de.findacase.com/research/wfrmDocViewer.aspx/xq/fac.19990406_42099.DE.htm/qx; *Douzinis v. American Bureau of Shipping, Inc.*, 888 A.2d 1146, 1149 (Del. Ch. 2006) (enforcing provision in the operating agreement for a Delaware LLC requiring arbitration under Texas law), http://scholar.google.com/scholar_case?case=4285329806925466829&q=Douzinas+v.+American+Bureau+of+Shipping,+Inc.&hl=en&as_sdt=6,47&as_vis=1.

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corporations to arbitration instead of litigation in any forum.”¹² We note that such a result would be in direct conflict with CII’s membership-approved corporate governance best practices which state:

Companies should not attempt to restrict the venue for shareowner claims by adopting charter or bylaw provisions that seek to establish an exclusive forum. Nor should companies attempt to bar shareowners from the courts through the introduction of forced arbitration clauses.¹³

Consistent with our membership approved policy, we would respectfully request that, in the absence of a clear Congressional mandate to permit the forced arbitration of shareowner disputes, the Securities and Exchange Commission continue to remain vigilant in exercising its well-founded and long-held opposition to such provisions as being contrary to the anti-waiver provisions of the federal securities laws.¹⁴

Thank you for consideration of this important matter. If you have any questions regarding this letter, please feel free to contact me directly at 202-261-7081 or jeff@cii.org.

Sincerely,



Jeff Mahoney
General Counsel

Cc: John H. Stout, Chair, Corporate Governance Committee, Business Law Section,
American Bar Association (via email)

¹²Alison Frankel, Wake up Shareholders! Your Right to Sue Corporations May Be in Danger, Reuters, June 25, 2013, at 2; <http://blogs.reuters.com/alison-frankel/2013/06/25/wake-up-shareholders-your-right-to-sue-corporations-may-be-in-danger/>.

¹³ CII, Policies on Corporate Governance § 1.9 Judicial Forum (updated Sept. 27, 2013), http://www.cii.org/corp_gov_policies#intro.

¹⁴ See Thomas L. Riesenberg. *Commentary, Arbitration and Corporate Governance: A Reply to Carly Schneider*, Insights, Vol. 4, No. 8, Aug.1990, at 2 (“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 waiver is made through a corporate charter rather than an individual investor’s decision”).