Council of Institutional Investors®
The voice of corporate governance

Via Email

January 9, 2020

Brad Smith
Executive Chairman
Intuit Inc.

Suzanne Nora Johnson
Lead Independent Director
Intuit Inc.

c/o Kerry J. McLean
Senior Vice President, General Counsel and Corporate Secretary
Intuit Inc.
2700 Coast Avenue
Mountain View, CA 94043

Dear Mr. Smith and Ms. Johnson:

I am writing to thank you and your board for opposing the shareholder proposal at your annual meeting to take steps to adopt a mandatory arbitration bylaw (Proposal No. 4 at your Jan. 23, 2020, annual meeting). We ask that you share this letter with other board members.

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of U.S. asset owners, primarily pension funds, state and local entities charged with investing public assets and endowments and foundations, with combined assets of approximately $4 trillion. Our associate members include non-U.S. asset owners with more than $4 trillion in assets, and a range of asset managers with more than $35 trillion in assets under management. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. CII members also share a commitment to healthy public capital markets and strong corporate governance.[1]

CII strongly opposes mandatory shareowner arbitration clauses between U.S. public companies and investors. Our long-standing membership approved policy addressing this issue states: "[C]ompanies [should not] attempt to bar shareowners from the courts through the introduction of forced arbitration clauses."[2]

[1] For more information about the Council of Institutional Investors ("CII"), including its board and members, see http://www.cii.org.
[2] CII, Corporate Governance Policies § 1.9 Judicial Forum (updated Sept. 17, 2019), https://www.cii.org/files/ciicorporategovernancepolicies/09_17_19_corp_gov_policies.pdf.

Our policy is based on the view that mandatory shareowner arbitration clauses in public company governing documents 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.[3] More specifically, among the many problems that our members have identified with shareowner arbitration clauses is the fact that disputes that go to arbitration rather than the court system generally do not become part of the public record and, thereby, may lose their deterrent effect.[4] An article published last year entitled "Mandatory Arbitration and the Market for Reputation" by Roy Shapira of the IDC Herzliya Radzyner Law School explains:

> Those in favor of market arbitration often base their argument on the notion that ending shareholder litigation as we came to know it is not a bad thing. They cite evidence on how shareholder litigation fares badly in compensating victims and amounts to little more than a transfer of wealth from investors to lawyers. Yet compensation is not the only measuring stick, or even the most important one. When evaluating a proposed shift from litigation to arbitration, we should also consider deterrence. The critical question is whether litigation has a salutary effect on corporate behavior. Litigation will have such a salutary effect whenever it makes defendants internalize the costs of their misbehavior. Importantly, litigation can make defendants behave better not just by threatening them with legal sanctions, but also indirectly, by threatening them with non-legal sanctions. Litigation can facilitate reputational penalties: the risk of having damning information about how you behaved become public, thereby reducing the willingness of outside observers to trust and do business with you going forward.[5]

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[3] *See, e.g.*, Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission et al. 1 (Dec. 11, 2013), https://www.cii.org/files/issues_and_advocacy/correspondence/2013/12_11_13_CII_letter_to_SEC_forced_arbitration.pdf ("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"); *cf.* Letter from State Financial Officers Foundation to Chairman Clayton 1 (Nov. 13, 2018), https://secureoursavings.com/wp-content/uploads/2018/11/SFOF-Letter-to-SEC-Chairman-Clayton-1.pdf (setting forth four "specific concerns in allowing companies to impose forced arbitration clauses that limit class action claims on investors").

[4] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 8 (Aug. 23, 2017), https://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf ("Our policy is based, in part, on the fact that disputes that go to arbitration rather than to the court system generally do not become part of the public record and, thereby, may lose their deterrent effect.").

[5] Roy Shapira, Mandatory Arbitration and the Market for Reputation, May 16, 2019, Harv. L. Sch. F. on Corp. Governance & Fin. Reg., May 16, 2019, https://corpgov.law.harvard.edu/2019/05/16/mandatory-arbitration-and-the-market-for-reputation/; *see* Cydney S. Posner, Notes from House Financial Services Committee Hearing, Sept. 29, 2019, Harv. L. Sch. F. on Corp. Governance & Fin. Reg., https://corpgov.law.harvard.edu/2019/09/29/notes-from-house-financial-services-committee-hearing/ ("In response to the question as to whether there was a benefit to enforcement of the securities laws by individuals in private litigation, [Securities and Exchange Commission Commissioner (SEC) Robert J. Jackson, Jr.] . . . agreed that it served as a valuable deterrent that would likely not result from undisclosed arbitration . . . ."); Dave Michaels, Johnson & Johnson Drafted Into Fight Over Shareholder Lawsuits, Wall St. J., Dec. 13, 2018 (on file with CII) (quoting Hillary Sale a law professor at Georgetown University: ["Because arbitration is private,] '[w]e won't have a good understanding of when companies are committing fraud or in fact behaving in an above-board manner'"); *see also* N. Peter Rasmussen, Corporate Transactions Blog, Mandatory Arbitration Proposal Creates Strange Bedfellows, Bloomberg L. (Jan. 8, 2019) (on file with CII) (quoting SEC Commissioner Jackson that "as compared to closed-door arbitration proceedings, 'a

CII also agrees with Securities and Exchange Commission (SEC or Commission) Robert J. Jackson, Jr. that the existence of private shareowner actions is a necessary supplement to the Commission's limited enforcement resources.[6] Those actions aid the SEC in identifying and addressing corporate wrongdoing and poor corporate governance practices, and decisions by courts in private actions have developed much of the law governing securities fraud.[7]

Similar views were recently expressed in Congressional testimony by Melanie Senter Lubin, Board Member, North American Securities Administrators Association and Maryland Commissioner of Securities, who stated:

> Forcing investors into mandatory arbitration or otherwise precluding investors from joining class actions is bad policy, as this would harm retail investors and be disruptive to the marketplace. The SEC and state securities regulators have limited resources and cannot combat all securities frauds entirely on their own. The Supreme Court has long recognized that securities class actions are "an essential supplement" to government enforcement powers, which is a point that Congress has also recognized.
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> Securities class actions serve as a deterrent to violative conduct and a primary mechanism by which investors are compensated for the misconduct of fraudsters. While funds recovered by federal and state regulators can be returned to investors, such as through an SEC Fair Fund or a court appointed receiver, these amounts have historically paled in comparison to the amounts recovered directly by investors.[8]

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public hearing gives judges a chance to tell corporate insiders what the law expects of them'"); *cf.* Carol V. Gilden, Partner, Cohen Milstein, A Clear and Present Danger: The Continued Threat of Forced Arbitration, S'holder Advoc. 5 (Winter 2019) https://www.cohenmilstein.com/sites/default/files/A%20Clear%20and%20Present%20Danger.pdf (quoting James D. Cox, Professor of Law, Duke Law School: '"In the classic work, *Democracy in America*, Alexis de Tocqueville wrote nearly 200 years ago that a central strength of the democracy in America was our country's commitment to access to justice through mechanisms such as . . . making the courts available for everyone [and] [m]andated arbitration of investor and shareholder claims would be a grave departure from what makes America exceptional.'").

[6] *See* Cydney S. Posner ("In response to the question as to whether there was a benefit to enforcement of the securities laws by individuals in private litigation, [SEC Commissioner] Jackson agreed that . . . as a result of private litigation, there had been substantial return to investors for losses incurred."); *see also* Brief Amici Curiae of the Council of Institutional Investors et al. at 6, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317 (U.S. 2014) https://www.cii.org/files/issues_and_advocacy/legal_issues/02_05_14_CII_amicus_curiae_brief_halliburton.pdf (quoting SEC Chairman Arthur Levitt, Jr. that '"private rights of action are not only fundamental to the success of our securities markets, they are an *essential complement* to the SEC's own enforcement program'").

[7] *See, e.g.*, Letter from Michael Pieciak, NASAA President, Commissioner, Vermont Department of Financial Regulation to the U.S. Securities and Exchange Commission 4 (Jan. 30, 2019) ("Class action litigation . . . contributes materially to the development of the common law.") (on file with CII).

[8] Putting Investors First: Reviewing Proposals to Hold Executives Accountable: Hearing Before the H. Subcomm. on Inv'r Prot., Entrepreneurship, & Capital Mkts. of the FSC, 116th Cong. (Apr. 3, 2019) (Written Testimony of Melanie Senter Lubin, Board Member, North American Securities Administrators Association and Maryland Commissioner of Securities at 5-6), https://financialservices.house.gov/uploadedfiles/hhrg-116-ba16-wstate-lubinm-20190403.pdf (footnotes omitted).

Again, thank you and the entire board for opposing the shareholder proposal on mandatory arbitration and supporting the preservation of the rights of Intuit Inc. shareowners. If we can answer any questions or provide additional information that would be helpful to you, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,

Jeffrey P. Mahoney
General Counsel