Council of Institutional Investors®
The voice of corporate governance

Via Hand Delivery

January 29, 2018

William H. Hinman
Director
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE.,
Washington, DC 20549

Re: Forced arbitration provisions in public company governing documents

Dear Mr. Hinman:

I am writing on behalf of the Council of Institutional Investors, a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $3.5 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[1]

The purpose of this letter is to share with you our concerns about last week's Bloomberg article by Benjamin Bain indicating that the "SEC is laying the groundwork for a possible policy shift" to allow initial public offerings to include forced arbitration provisions in their articles or bylaws.[2] As you may recall from your participation at our fall 2017 conference in San Diego, our membership strongly opposes the introduction of forced arbitration clauses between U.S. public companies and investors.[3]

Our policy is based on the view that forced arbitration provisions 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.[4] More specifically, among the many problems that shareowners have with forced arbitration provisions is the fact that

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[1] For more information about the Council of Institutional Investors ("CII"), including its members, please visit CII's website at http://www.cii.org/members.
[2] Benjamin Bain, "SEC Weighs a Big Gift to Companies: Blocking Investor Lawsuits," BloombergPolitics, Jan. 26, 2018, at 2, https://www.bloomberg.com/news/articles/2018-01-26/trump-s-sec-mulls-big-gift-to-companies-blocking-investor-suits.
[3] CII, Corporate Governance Policies § 1.9 Judicial Forum (updated Sept. 15, 2017) ("Companies should not attempt to . . . bar shareowners from the courts through the introduction of forced arbitration clauses."), http://www.cii.org/files/policies/09_15_17_corp_gov_policies.pdf.
[4] *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), http://www.cii.org/files/issues_and_advocacy/correspondence/2013/12_11_13_CII_letter_to_SEC_forced_arbitration.pdf.

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.[5] As Professor Jennifer H. Arlen, the founder and director of the Program on Corporate Compliance and Enforcement at New York University School of Law recently explained:

> If you take shareholder suits out of the light of day and put them in a dark closet, you lose the deterrent effect . . . . The very reasons why some corporations would like the ability to require shareholders to arbitrate securities fraud claims are the reasons why *it would be bad public policy to allow them to do so*.[6]

Consistent with our membership approved policy, we would respectfully request, that in the absence of a clear mandate by retail or institutional investors to permit forced arbitration provisions in public company governing documents, the U.S. Securities and Exchange Commission should continue to exercise its well-founded and nearly three decades long opposition to such provisions as being contrary to the anti-waiver provisions of the federal securities laws.[7]

Thank you for your consideration of this important matter. We have recently emailed a request to meet with you again in person to discuss this and other issues of interest to our members. In the meantime, if you have any questions regarding this letter, please feel free to contact me directly at 202-261-7081 or jeff@cii.org.

Sincerely,

Jeffrey P. Mahoney
General Counsel

CC: The Honorable Chairman Jay Clayton, U.S. Securities and Exchange Commission
The Honorable Commissioner Kara M. Stein, U.S. Securities and Exchange Commission
The Honorable Commissioner Michael S. Piwowar, U.S. Securities and Exchange Commission
The Honorable Commissioner Robert J. Jackson, Jr., U.S. Securities and Exchange Commission
The Honorable Commissioner Hester M. Peirce, U.S. Securities and Exchange Commission

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[5] *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), http://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf.

[6] Alison Frankel, "Shareholder Alert: SEC Commissioner Floats Class-Action-Killing Proposal," Reuters, July 18, 2017, at 1 (emphasis added), http://www.reuters.com/article/us-otc-arbitration-idUSKBN1A326T.

[7] *See* Thomas L. Riesenberg, Commentary, "Arbitration and Corporate Governance: A Reply to Carly Schneider," Insights: Corp. & SEC. L. Advisor, 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").