June 1, 2018

VIA US FIRST CLASS MAIL

The Honorable Jay Clayton
Chair
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-0213

Re: Forced arbitration provisions in public company governing documents

Dear Chairman Clayton:

I am writing on behalf of the Colorado Public Employees' Retirement Association ("Colorado PERA"). Colorado PERA is the 24th largest public pension plan in the United States with approximately $48 billion in assets and a duty to protect the retirement security of over 587,000 plan participants and beneficiaries. The purpose of this letter is to share our concerns regarding the possible shift in policy of the Securities and Exchange Commission ("Commission") opposing public company adoption of forced arbitration provisions in their governance documents.

While the Commission's regulatory oversight and enforcement proceedings serve a vital role in the safeguarding of the securities laws, private investor actions undoubtedly serve a similar function in ensuring public companies' adherence to the law. Colorado PERA has long recognized the importance of securities litigation, and specifically securities class actions, due to the role it plays in creating a culture of accountability and deterring corporate fraud. Securities class actions help to ensure that publicly held companies provide accurate and reliable financial information on which our markets depend. The right to a judicial forum not only serves as a remedy to harmed investors, but also plays a critical role in deterring fraud and protecting the integrity of the U.S. capital markets.

Arbitration is inapposite when involving public companies and their investors. Colorado PERA supports the position enumerated by the Commission more than 30 years ago in its amicus brief in *Shearson/American Express Inc. v. McMahon*[1]. Specifically, that the correct inquiry in determining whether mandatory arbitration provisions should be permitted is whether arbitration adequately protects statutory rights. We contend that shareholder rights are not adequately protected by mandatory arbitration.

Pursuing an IPO and becoming a public company subjects the company to making information readily available and providing investors with the complete set of facts necessary to make investment decisions. The access to open and transparent proceedings of a company supports

[1] 1986 WL 727882.

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this commitment to transparency. In the context of a securities class action, the discovery processes inherently support this transparency, as does the public nature of the proceedings.

Arbitration, on the other hand, is exactly the opposite. It is private and confidential, preventing investors and the public from having access to the proceeding. In the circumstances where an investor pursues arbitration, the company will be afforded the limited exposure of the individual investor's losses and the protection of a confidential ruling to which other investors will not be privy. The investor community should be able to assess the company throughout the litigation process as it can with class action proceedings in open court. Further, arbitration will virtually eliminate investors' appellate rights whereas in a securities class action, the class members can seek appellate review of the trial court's decisions.

In addition to the issue of lack of transparency of arbitration, smaller investors simply do not have, or cannot justify spending, the financial resources to pursue independent arbitration actions. It is certain that smaller investors will therefore not have the rights through arbitration that they would otherwise have through the class action mechanism. Class actions enable investors of all sizes to aggregate claims, share in the collective costs of the legal action and ensure a proportionate recovery of losses that would otherwise go unrecovered.

Although forced arbitration may on the one hand prevent smaller investors from bringing an action and recovering losses, it may on the other hand increase the individual actions that are brought against a company by larger investors because investors have no other avenue for recovery of their share of the losses suffered as a result of the fraud. As an institutional investor that has a fiduciary duty to its members and beneficiaries, we must ensure that we treat securities claims as assets of the fund and prudently manage the asset. This may require that we bring more of our own individual actions since we would not have the luxury of relying on our membership in the class to recover our proportionate share of any recovery. As a result, we believe that companies may ultimately be defending more actions than they are today with the efficient opt-out class action model currently in place in the United States. In cases of egregious fraud where high losses are suffered, the company will be responsible for defending against a multitude of proceedings that will not end until the applicable limitations and repose periods have passed.

The class action model protects companies from multiple individual actions and allows the company to know that once it resolves the class case, it will likely buy peace and not have to deal with additional costly litigation. Arbitration invites more individual actions and thus seems just as undesirable for companies as it is for investors.

In order to protect our investments and to deter future fraud it is imperative that investors retain our ability to bring suit in court against corporations under the federal securities laws. Colorado PERA respectfully requests that the Commission continue its established opposition to forced arbitration provisions. We were encouraged with your letter in response to Representative Maloney's March 12, 2018 letter expressing your belief that the Commission would be involved in any decision regarding an initial public offering requiring mandatory arbitration. However, we believe that a deliberate public process must take place before the Commission should ever change its long-held position that such provisions violate the anti-wavier provisions the securities laws. We request that you commit to undertake rulemaking on the issue before the Commission considers any change to its position. Further, we remain concerned about the substantive issue and your willingness to consider allowing companies to include mandatory arbitration provisions.

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Thank you for the opportunity to share Colorado PERA's views and for your consideration of this important matter. If you have any questions regarding this letter, please contact me at (303) 863-3738 or afranklin@copera.org.

Sincerely,

Adam L. Franklin
General Counsel

CC: 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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