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NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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March 8, 2022

The Honorable Sherrod Brown  
Chairman  
Senate Committee on Banking, Housing,  
and Urban Affairs  
534 Dirksen Senate Office Building  
Washington, D.C. 20510

The Honorable Patrick J. Toomey  
Ranking Member  
Senate Committee on Banking, Housing,  
and Urban Affairs  
534 Dirksen Senate Office Building  
Washington, D.C. 20510

Re: Mandatory Arbitration Agreements in Our Capital Markets

Dear Chairman Brown and Ranking Member Toomey:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),<sup>1</sup> I am writing to commend the U.S. Senate Committee on Banking, Housing, and Urban Affairs for scheduling a hearing to examine mandatory arbitration in financial services products. In addition, I am writing to urge you and your colleagues to consider certain key points that have emerged from NASAA’s study of mandatory arbitration agreements and then act on a swift, bipartisan basis to ban these anti-investor choice instruments.<sup>2</sup>

At NASAA, we believe in prioritizing investor protection, encouraging responsible capital formation, and supporting inclusion and innovation in our capital markets. We have ample experience and expertise in the difficult work of maintaining an even playing field in our capital markets for investors and all types of investment products, professionals, practices, and technologies, new and old. During the last 35 years, we have witnessed the proliferation of mandatory arbitration agreements. At each juncture, we have grown more concerned and outspoken about the fact that these agreements are a net-negative for investor protection and responsible capital formation.

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<sup>1</sup> Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grassroots investor protection and responsible capital formation.

<sup>2</sup> State securities regulators have testified numerous times, engaged with peers at the SEC, FINRA, and the CFPB, and continued to advocate for legislative action that returns investor choice to dispute resolution. *See, e.g.,* [NASAA Letter to HFSC Leadership Regarding the Investor Choice Act of 2021](#) (Nov. 15, 2021); [Putting Investors First: Reviewing Proposals to Hold Executives Accountable](#), Written Testimony of Melanie Senter Lubin Board Member, NASAA and Maryland Commissioner of Securities (Apr. 3, 2019); [The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?](#), Written Statement of Mike Rothman, Commissioner of the Minnesota Department of Commerce on behalf of NASAA (Dec. 17, 2013); [Mandatory Binding Arbitration: Is It Fair and Voluntary?](#), Written Statement of the NASAA (Sept. 15, 2009); [NASAA Voices Support for Arbitration Fairness Act of 2009 \(S. 931, H.R. 1020\)](#) (May 21, 2009); [NASAA Statement on FINRA Arbitration Pilot Program](#) (July 24, 2008).

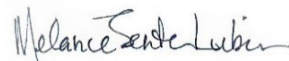
As you know, broker-dealers, investment advisers, and securities issuers use mandatory arbitration as part of their business models. Nearly all FINRA members, as well as many investment advisers, now require their clients to agree to mandatory arbitration. In addition, it appears that many securities issuers use mandatory arbitration clauses in their governance documents and offering documents, thereby eliminating or complicating the ability of investors to bring securities class actions.<sup>3</sup> As a practical matter, mandatory arbitration requirements have reduced the extent of investor choice in dispute resolution significantly.

Meanwhile, investors continue to want choice. According to a 2019 national poll, 83% of investor-respondents said they want the choice to pursue a dispute in court or in arbitration.<sup>4</sup> Put differently, they oppose a system that expects them to make time that they do not have to review copious, lengthy documents for the possible inclusion of a mandatory arbitration provision. Instead, they want an easy system that gives them a choice in the unlikely event a dispute arises.

NASAA believes Congress should act now on a swift, bipartisan basis to empower investors and give them a choice when it comes to resolving disputes with securities firms and professionals. Unfortunately, the SEC has failed to use the rulemaking authority that Congress gave it in 2010 to prohibit, condition, or limit the use of mandatory arbitration agreements by broker-dealers and investment advisers. This failure has occurred notwithstanding efforts by state securities regulators and many others to urge action.<sup>5</sup> Moreover, the authority that Congress gave the SEC in 2010 would not prohibit or restrict mandatory arbitration provisions in the governing documents and offering documents of securities issuers.<sup>6</sup>

Thank you for your consideration of NASAA's comments. Should you have any questions, please do not hesitate to contact Kristen Hutchens, NASAA's Director of Policy and Government Affairs, and Policy Counsel, at [khutchens@nasaa.org](mailto:khutchens@nasaa.org).

Sincerely,



Melanie Senter Lubin  
NASAA President  
Maryland Securities Commissioner

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<sup>3</sup> Securities class actions are necessary to ensure that investors continue to view our capital markets as fair and equitable. Presently, they are the primary means in the United States of upholding securities disclosure standards. While the SEC and state securities regulators make significant contributions to these efforts, the government lacks the resources to pursue every alleged violation of federal and state securities laws.

<sup>4</sup> In early 2019, Engine, a national opinion firm based in New York, conducted a national opinion poll of investors that included 1,000 investors.

<sup>5</sup> See, e.g., [Letter from NASAA President Heath Abshire of Arkansas to the SEC](#) (May 3, 2013); [Letter from the Massachusetts Securities Division to the SEC](#) (Feb. 12, 2013) (urging the SEC to use its authority under Section 921 of the Dodd-Frank Act); Massachusetts Securities Division, [Report on Massachusetts Investment Advisers' Use of Mandatory Pre-Dispute Arbitration Clauses in Investment Advisory Contracts](#) (Feb. 11, 2013).

<sup>6</sup> See, e.g., [NASAA Letter to HFSC Leadership Regarding the Investor Choice Act of 2021](#) (Nov. 15, 2021); SEC Commissioner Rob Jackson, [Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration](#) (Feb. 26, 2018); SEC Investor Advocate Rick Fleming, [Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders](#) (Feb. 24, 2018).