



November 16, 2021

The Honorable Maxine Waters, Chairwoman
The Honorable Patrick McHenry, Ranking Member
Committee on Financial Services
United States House of Representatives
Washington DC, 20515

Dear Chairwoman Waters, Ranking Member McHenry, and Members of the Committee:

The National Association of Consumer Advocates (NACA) writes in strong support of H.R. 2620, the Investor Choice Act of 2021, which would restore investors' rights to choose where they bring claims when they are harmed by broker-dealers, investment advisors, or securities issuers. NACA is a national non-profit organization of attorneys and advocates actively engaged in promoting a fair and open marketplace that forcefully protects the rights of all consumers.

Currently, most investors are subject to forced arbitration clauses buried in the fine print of non-negotiable brokerage and advisor contracts that prohibit them from seeking justice in courts and instead force them to submit to private, secretive arbitration proceedings. H.R. 2620 would prohibit the use of forced arbitration clauses in brokerage and investment advisory contracts, as well as in the governing documents of a securities issuer such as a publicly traded company.

Since 1987, when the Supreme Court upheld the validity of forced arbitration clauses in investor contracts, consumers seeking to build wealth and financial stability increasingly have had no choice but to give up their right to be heard by a judge and jury in order to open brokerage accounts and access investment advice.¹ Currently, investors harmed through practices including churning, material misrepresentations or omissions, and breach of fiduciary duty, are almost always required to bring their claims to arbitration proceedings administrated by the Financial Industry Regulatory Authority (FINRA), an industry-run regulatory body, while those harmed by investment advisors are forced into various other private arbitration forums instead of being allowed to go to court if they choose.

Forced arbitration has been shown repeatedly to harm investors, consumers, small businesses and workers by blocking their access to justice and shielding bad actors from accountability. Private arbitration lacks the due process protections that are guaranteed in courts such as the right of discovery to obtain key evidence from the other side. Arbitration proceedings are also usually kept secret and the decisions are typically not appealable even if the arbitrator makes an egregious error or incorrectly applies the law. This allows wrongdoers to keep their misconduct hidden from the public eye while denying a fair hearing to wronged individuals.

The Investor Choice Act would not prevent investors from going to FINRA arbitration or another arbitration forum to resolve complaints. Instead it would ensure that arbitration is voluntary, improving

¹ *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

investor confidence in their ability to seek justice in a fair forum. Investor confidence in the integrity of the market is key to the continued health and stability of the economy.

Recognizing the inherent unfairness of forced arbitration, state regulators, such as the Virginia State Corporation Commission (VSCC), have attempted to curtail the use of forced arbitration against investors. In 2019, the VSCC amended state securities regulations governing investment advisers to classify using forced arbitration clauses as a dishonest and unethical practice.² The VSCC noted that using forced arbitration directly went against investment advisor's duties to act in the best interest of their clients. However, the Federal Arbitration Act preempts many state regulations on forced arbitration, necessitating federal action on the issue.

Congress has also long expressed concern over forced arbitration clauses to investors. Section 921 of the Dodd-Frank Wall Street Reform and Consumer Protection Act addressed it by granting the Securities and Exchange Commission (SEC) rulemaking authority to limit or prohibit the use of forced arbitration clauses if it would protect investors and be in the public interest. The SEC has yet to exercise this authority. The Investor Choice Act is a viable statutory solution to an increasingly pressing issue facing investors.

Since 2020, the number of retail investors participating in the securities market has grown significantly, fueled in part by the COVID-19 pandemic and the rising popularity of streamlined, low-cost, consumer-facing trading platforms such as Robinhood. Approximately 10 million investors opened new brokerage accounts in 2020 with over half using Robinhood and an additional 7.8 million new investors entering the market in the first two months of 2021.³ With this surge of new and active investors, Congress should act quickly to protect investors' trust by restoring their choice in resolving disputes.

Prohibiting securities issuers from using forced arbitration to evade shareholder class actions would also bolster investor confidence and provide the necessary clarity for a well-functioning market. Although corporations so far have been prevented from using class action bans against their investors, there have been a number of unsuccessful attempts to do so. Shareholder class actions are an invaluable part of the securities enforcement framework to hold companies accountable for systemic wrongdoing and for returning money to defrauded investors.

Since Dodd-Frank was enacted 11 years ago to rein in the corporate abuses that led to the financial crisis, investors still need action to restore their right to choose how they seek justice, whether in a court, arbitration, or some other forum. In order to preserve investor confidence moving forward, Congress must act quickly on this important legislation.

Thank you for your time and consideration of our views.

Sincerely,

Christine Hines
Legislative Director

Sophia Huang
Advocacy & Outreach Associate

² 21 VAC5-80-200 (F).

³ Maggie Fitzgerald, *A large chunk of the retail investing crowd started during the pandemic, Schwab survey shows*, CNBC, Apr. 8 2021, <https://www.cnbc.com/2021/04/08/a-large-chunk-of-the-retail-investing-crowd-got-their-start-during-the-pandemic-schwab-survey-shows.html>