



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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Submitted electronically at: <http://www.scc.virginia.gov/case/PublicComments.aspx>

Clerk Joel H. Peck
State Corporation Commission
c/o Document Control Center
P.O. Box 2118
Richmond, Virginia 23218

Re: Case No. SEC-2019-00024, SCC Ex Parte: In the Matter of Adopting a Revision to Rules Governing the Virginia Securities Act

To Whom It May Concern:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the June 27, 2019, Order to Take Notice of the Virginia State Corporation Commission (the “Commission”), Case Number SEC-2019-0024 (the “Proposal”), to amend certain regulations administered by the Virginia Division of Securities and Retail Franchising (the “Division”).²

NASAA applauds the Proposal’s various initiatives related to broker-dealer and investment adviser regulation. The Proposal would institute appropriate amendments to the regulations promulgated under the Virginia Securities Act for the benefit of Virginia investors. NASAA would like to comment on one part of the Proposal in particular: the proposed addition of subparagraph 21VAC5-80-200(F) to prohibit, under the Division’s Dishonest or Unethical Practices rule, Virginia investment advisers from including mandatory arbitration agreements in their account agreements with advisory customers.³

¹ 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 grass-roots investor protection and efficient capital formation.

² The Proposal is available at: <http://www.scc.virginia.gov/case/e-notice/ns190024.pdf>.

³ See Proposal at 54 (“For purposes of the section, any mandatory arbitration provision in an advisory contract shall be prohibited.”).

NASAA has long supported efforts to protect the means by which harmed investors can recover losses from broker-dealers or investment advisers who harm them. This includes advocating for investor choice in dispute resolution forums.⁴ Forced arbitration at the demand of an investment adviser is inimical to the basic fiduciary nature of an investment advisory relationship.

Investors' perception that the securities industry enjoys a material advantage in arbitration is supported by hard evidence. In 2015, the federal Consumer Financial Protection Bureau ("CFPB") issued a report of its extensive survey of mandatory customer arbitration agreements in the issuance of credit cards and consumer financial products.⁵ The CFPB's 700+ page report found retail customers are generally unaware of the existence of mandatory arbitration agreements, ignorant of the potentially serious implications of these provisions, and that to the extent mandatory arbitration generates any net efficiencies versus litigation, these savings inure to the benefit of financial services companies.⁶ Most importantly, though, the CFPB's report confirms that arbitration through commonly recognized venues (such as AAA or JAMS) is not comparable to litigation in court: arbitrators are not required to follow the law, the mechanisms for discovery are limited, and arbitrators' decisions generally are unwritten and unreviewable in court.⁷ The broad conclusion that mandatory arbitration unfairly favors the financial services industry is supported by other studies. For example, the Economic Policy Institute found, in researching mandatory arbitration clauses in employment agreements, that these provisions discourage employees from bringing claims and that "arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages."⁸

Mandatory arbitration agreements in investment adviser contracts are also contrary to the extensive regulatory oversight of investment advisers. Federal and state securities laws routinely include anti-waiver provisions that render null and void any private contract terms that would

⁴ See, e.g., Letter from NASAA President Mike Rothman to Hon. Keith Ellison (Jan. 30, 2017), available at <http://www.nasaa.org/wp-content/uploads/2013/10/NASAA-letter-to-Rep.-Keith-Ellison-Re-Investor-Choice-Act-of-2017.pdf>; Letter from NASAA President William Beatty to Hon. Keith Ellison (Feb. 26, 2015), available at <http://www.nasaa.org/wp-content/uploads/2015/02/NASAA-Letter-in-Support-of-Investor-Choice-Act-of-2015-FINAL-2-26-2015.pdf>. The Proposal's underlying policy aims raise similar concerns for NASAA as do restricting investor choice for broker-dealer customers and investment adviser clients.

⁵ See Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a), Consumer Financial Protection Bureau, March 2015, available at https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

⁶ See generally *id.*

⁷ See *id.*, §§ 4.6 – 4.12.

⁸ See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute (Apr. 6, 2018), available at <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

seek to obviate the legal obligations imposed by the securities statutes.⁹ The Virginia Securities Act includes such a provision at Section 522(F): “Any condition, stipulation or provision binding any person acquiring any security or receiving any investment advice to waive compliance with any provision of this chapter or of any rule or order thereunder shall be void.”¹⁰ Although the issue has not been extensively litigated, a mandatory arbitration provision arguably would require an investment advisory customer to lose substantive rights under the Virginia Securities Act, namely the right to pursue a claim under the Act in state court, rendering the arbitration provision *per se* void under Section 522(F).¹¹

For all these reasons, we support the Proposal – and subparagraph 21VAC5-80-200(F) in particular – and applaud the Division’s efforts on behalf of Virginia investors. If you have any questions about this letter, please contact NASAA’s General Counsel, A. Valerie Mirko, at vm@nasaa.org or (202) 737-0900.

Sincerely,



Michael Pieciak
NASAA President
Commissioner, Vermont Department of
Financial Regulation

⁹ See, e.g., Section 215(a) of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-15(a) (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation or order thereunder shall be void.”).

¹⁰ See Va. Code. Ann. § 13.1-522(F).

¹¹ See, e.g., McEldowney Financial Services, SEC Staff No-Action Letter (Oct. 17, 1986).