ELECTRONIC TRANSACTIONS ASSOCIATION
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January 5, 2018

Chairman Joseph R. Lentol
LOB 632
Albany, NY 12248
518-455-4477

Re: Assembly Bill No. 8784 (Prohibiting Mandatory Arbitration Clauses)

Dear Chairman Lentol:

The Electronic Transactions Association ("ETA") opposes the bill A 8784 because prohibitions of arbitration clauses by state laws are preempted by the Federal Arbitration Act ("FAA"). If enacted, A 8784 would negatively impact consumers and the financial services industry with unnecessary litigation to establish that it is preempted under the FAA.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA's members include all parts of the electronic payments ecosystem including financial institutions, acquiring banks, merchant service providers and payment processors, and payment card networks. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, secure, and rewarding payment solutions.

A 8784 is Preempted Under the FAA

On May 16, 2017, the United States Supreme Court struck down a Kentucky decision that invalidated an arbitration agreement with a nursing home that was executed by family members who had a power of attorney for the patient in *Kindred Nursing Centers Ltd. Partnership v. Clark, 2017 WL 2039160*. The Kentucky court determined that arbitration was such a significant issue that, in order for the agreement to be valid, the power of attorney form must specifically allow the individual to agree to arbitration on behalf of the principal or, in this case, the patient. In a 7 to 1 decision written by Justice Elena Kagan, the Court rejected this decision. In the opinion, the Court reemphasized that ***"The FAA preempts any state rule discriminating on its face against arbitration – for example, a 'law prohibit[ing] the arbitration of a particular type of claim***." (emphasis added); *See also DIRECTV v. Imburgia, 136 S.Ct. 463 (2015); Marmet Health Care Center, Inc. v. Brown, 132 S. Ct. 1021 (2012); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011); Doctor's Associates, Inc. v. Cassarotto, 517 U.S. 681 (1996).*

A 8784 would very likely have the same result. On its face, A 8784 prohibits the arbitration of specific claims – i.e., those arising from a "contract for any financial product or service." As indicated in *Kindred Nursing Centers, supra,* a state law that seeks to limit arbitration in this manner is preempted by the FAA. The opinion in *Kindred Nursing Centers* also emphasizes that "[t]he Act's key provision, once again, states that an arbitration agreement must ordinarily be treated as 'valid, irrevocable, and enforceable.'…"

If passed employers would be required to challenge the constitutionality of this law and that would create unnecessary litigation. *The Kindred Nursing Centers* case took approximately eight years to finally be resolved by the Supreme Court. Requiring New York businesses to exhaust financial resources and time in costly litigation to establish that A 8784 is similarly preempted is unnecessary and would only harm these businesses ability to thrive in New York.

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ETA thanks you for the opportunity to submit comments on this important issue. If you have any additional comments, please contact me or ETA Senior Vice President of Government Affairs, Scott Talbott at Stalbott@electran.org.

Respectfully submitted,

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