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Client Insight: SEC Opens the Door to Mandatory Shareholder Arbitration

Posted in: SEC
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New policy statement and corresponding technical amendments to Rules of Practice reverse SEC's longstanding opposition to the presence of mandatory arbitration provisions in corporate governance documents, providing public companies greater flexibility to require arbitration of federal securities law claims as an alternative to costly shareholder class action litigation, though potential enforceability and reputational risks require careful navigation

Key Takeaways

- The SEC will no longer refuse to accelerate the effectiveness of registration statements solely due to the presence of a mandatory arbitration provision for federal securities law claims.
- In reviewing registration statements, the SEC will instead focus on the completeness and accuracy of the mandatory arbitration provision disclosures, including material risks to investors.
- The new SEC policy is applicable to all companies considering adopting mandatory arbitration provisions, whether they are preparing for an IPO or are already public.
- A company's state of incorporation will matter. For example, Delaware corporate law currently prohibits mandatory arbitration provisions for federal securities law claims while the corporate laws of Texas and Nevada do not.

- Mandatory arbitration provisions are likely to be subject to future litigation, including whether such provisions are enforceable under the Federal Arbitration Act or relevant state corporate law.
- Investors generally oppose the use of mandatory arbitration provisions.

Companies considering including a mandatory arbitration provision in their governing documents should contact any member of the firm's Public Companies/Public Offerings team or their regular Gunderson attorney.

Overview

On September 17, 2025, the U.S. Securities and Exchange Commission (SEC or Commission) voted 3-1 along party lines to reverse its decades-long (but unwritten) practice of not accelerating the effectiveness of registration statements for U.S. companies seeking to go public if their governing documents contained provisions requiring investors to resolve their claims arising under the federal securities laws exclusively through arbitration with the company rather than through litigation in court (issuer-investor mandatory arbitration provisions, or MAPs), thereby effectively blocking the companies' ability to proceed with their planned initial public offerings (IPOs).

MAPs in corporate organizational documents have long been controversial and a focal point of intense legal debate. Proponents argue that such provisions can reduce frivolous and reputation-damaging class action lawsuits and encourage more private companies to go public, while critics contend that arbitration removes important investor protections and weakens the deterrent value of class action litigation.

The Commission's policy reversal is a significant development and represents the opening salvo in SEC Chair Paul Atkins's ambitious campaign to "make IPOs great again"—his signature rallying cry for reinvigorating the nation's public markets. The deregulatory offensive aims to dismantle barriers that, in his view, have deterred companies from going and staying public by "eliminating compliance requirements that yield no meaningful investor protections, minimizing regulatory uncertainty, and reducing legal complexities throughout the SEC's rulebook."

This initial move sets the stage for a broader pro-business campaign expected to advance through additional reforms designed to enhance accommodations for newly public and smaller companies, expand capital-raising flexibility for established public companies, streamline disclosure requirements for executive compensation and other topics to focus on material information—including potential relief from quarterly reporting cycles—and modernize the outdated shareholder proposal process. Chair

Atkins has stated that the staff is currently preparing recommendations for each of these initiatives.

In a strongly worded dissent, Commissioner Caroline Crenshaw denounced the SEC's about-face as deregulatory overreach that eviscerates fundamental investor protections—"another way to stack the deck against investors"—observing that the SEC has never, either expressly or implicitly, granted permission to a public company to force their shareholders into mandatory arbitration. Beyond condemning the substance, she rebuked the agency for implementing such a "seismic policy shift" absent a public and deliberative rulemaking process, warning that these changes threaten to "open the floodgates" to compulsory arbitration and propel "our descent into a world where investors are unable to effectively vindicate the rights Congress promised them in our nation's securities laws."

Background

In the IPO setting, the SEC has delegated authority to the Division of Corporation Finance (CorpFin) to accelerate the effective date of registration statements, declaring that a company is clear to sell its shares to the public. CorpFin historically has taken the position that, in the context of a registered IPO of a U.S. company, mandatory arbitration of federal securities law claims is inconsistent with "the public interest and the protection of investors," as required to allow the registration statement to become effective pursuant to Section 8(a) of the Securities Act of 1933 (Securities Act) in light of, among other things, the "anti-waiver" provision in Section 14 of that Act, which declares void any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the Securities Act. Accordingly, CorpFin would decline to exercise its delegated authority to declare the registration statement effective and instead refer the matter to the Commission. CorpFin's practice of refusing to accelerate registration statements amounted to a Commission prohibition on MAPs, because companies were deterred from including them in their governing documents.

This issue last arose in the context of an IPO of a U.S. company in 2012, when private equity fund The Carlyle Group attempted to include a comprehensive MAP in its IPO registration statement that would have required all shareholder disputes, including federal securities law claims, to be resolved through confidential arbitration rather than in court, with class actions explicitly prohibited. CorpFin declined to declare Carlyle's registration statement effective with the presence of such a provision and advised the company that the Commission would need to make any decision on a request for acceleration. Faced with regulatory opposition and

significant pushback from Congress and investor advocacy groups, Carlyle ultimately withdrew the proposed MAP and proceeded with its IPO.

Policy Statement Concerning Mandatory Shareholder Arbitration

A new Policy Statement, effective September 19, 2025, serves to clarify and formalize the SEC's updated view that—based on the Supreme Court's current interpretation and application of the Federal Arbitration Act of 1925 (FAA), which establishes a "liberal Federal policy favoring [enforcement of] arbitration agreements"—**MAPs are not inconsistent with the federal securities laws and their inclusion in a company's bylaws or other organizational documents will not factor into SEC staff decisions whether to accelerate the effectiveness of a registration statement. When considering acceleration requests pursuant to Securities Act Section 8(a) and Rule 461, the staff will instead focus on the adequacy of the registration statement's disclosures to investors, including disclosure of material information regarding any MAP** (e.g., its scope; potential enforceability, reputational and other risks; arbitration mechanics). In other words, the completeness and adequacy of the disclosure will be the primary consideration in declaring registration statements effective.

In addition to Securities Act registration statements, the presence of a MAP will similarly not impact staff decisions whether to (i) accelerate the effectiveness of registration statements filed under the Securities Exchange Act of 1934 (Exchange Act); (ii) declare effective post-effective amendments to registration statements; and (iii) qualify Regulation A offering statements or post-qualification amendments thereto.

Exchange Act Reporting Companies

The Policy Statement explicitly notes that **the SEC's conclusion that MAPs do not conflict with the federal securities laws extends to established public companies and would apply, for example, if an Exchange Act reporting issuer were to modify its existing bylaws or seek shareholder approval of a charter amendment to include a MAP** (assuming the applicable state law allows for the enforceability of such a provision), provided the MAP is adequately disclosed to investors.

No Position on Policy Merits; Focus on Disclosure

The Policy Statement makes clear that it takes no position on whether companies should or should not adopt a MAP: "Nothing in this statement should be understood to express any views on the specific terms of an arbitration provision, or whether

arbitration provisions are appropriate or optimal for issuers or investors." In his remarks supporting the Policy Statement, Chair Atkins underscored that the SEC is not a merit regulator that decides whether a company's particular method of resolving disputes with its shareholders is "good" or "bad," and should not participate in a debate on whether MAPs are "good" or "bad" for companies and their investors. Rather, "the Commission's role in this debate is to provide clarity that such provisions are not inconsistent with the federal securities laws," and the SEC staff will be focused on "ensuring complete and adequate disclosure of material information [in the registration statement] concerning a company's [MAP], if one exists."

Federal and State Law Considerations

The enforceability of a particular MAP requires careful consideration of both federal and state law.

Interplay Between FAA and Federal Securities Statutes

The Policy Statement presents a detailed review of Supreme Court jurisprudence interpreting the FAA and concludes that, when it comes to the enforceability of a MAP, the federal securities statutes—including the anti-waiver provisions found in Securities Act Section 14 and Exchange Act Section 29(a)—do not override the FAA's policy favoring arbitration of claims under federal laws. As such, the existence of a MAP may not be considered under Securities Act Section 8(a)'s public interest and investor protection standard for accelerating registration statements and will not impact SEC staff determinations whether to accelerate a registration statement's effective date.

In the past, the federal securities statutes were thought to potentially displace the FAA because MAPs could be viewed as inconsistent with these statutes in at least two respects: (i) MAPs could violate the anti-waiver provisions of the federal securities statutes by foreclosing a judicial forum; and (ii) MAPs could unduly impede the ability of investors to bring private actions to vindicate their rights under the federal securities laws by foreclosing class action litigation in courts. Drawing on Supreme Court case law, the Policy Statement rebuts both legal theories.

Judicial Forum

With respect to a judicial forum, the SEC cites a pair of Supreme Court decisions in the late 1980s that held that arbitration clauses in brokerage agreements did not violate the anti-waiver provisions of the Securities Act and the Exchange Act because only waiver of the statutes' *substantive obligations*, and not their jurisdictional or procedural provisions, is prohibited.

“Once the outmoded presumption of disfavoring arbitration proceedings is set to one side,” the Supreme Court wrote in the case arising under the Securities Act, “it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that [section] 14 is properly construed to bar any waiver of these provisions.” The Supreme Court further concluded that “resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act.”

The SEC acknowledges that these two cases involved mandatory arbitration agreements not between issuers and investors but between broker-dealers and their customers where the arbitration process was subject to SEC oversight but “discern[s] no reason to believe that any different result should follow. Accordingly, we believe that the inability to proceed in a judicial forum as a result of an issuer-investor mandatory arbitration provision would not violate the anti-waiver provisions of the Federal securities statutes.”

Moreover, the Policy Statement discusses how the Supreme Court in subsequent decisions has noted that, in any federal statute enacted after the FAA (which would include both the Securities Act and the Exchange Act), there must be a “clearly expressed congressional intention” to override the FAA’s policy favoring enforcement of arbitration agreements. The intention must be “clear and manifest,” the Court has explained, and “when Congress does not displace the FAA using unambiguous statutory language, there is a ‘strong presumption’ that the FAA applies exclusively to any issues regarding the enforceability of the arbitration agreement, and the other Federal statute that gives rise to the underlying substantive claims has no relevance to any arbitration issues.” The SEC maintains it “can discern nothing in the Federal securities statutes that demonstrates a clear and manifest congressional intention to displace the FAA in the context of [MAPs].”

Class Actions

The Policy Statement also rejects the argument that MAPs, which are presumed to be bilateral in nature, could unduly impede the ability of investors to bring private actions to vindicate their rights under the federal securities laws by foreclosing class action litigation in courts. The SEC analogizes from a 2013 Supreme Court case involving private claims under the federal antitrust statutes to assert that:

> “[N]o provision in the Federal securities statutes ‘guarantee[s] an affordable procedural path to the vindication of every claim.’ Further, like the Federal antitrust statutes, the Federal securities statutes do not expressly include a right to proceed through class actions or collective actions. Finally, because the Securities Act and the Exchange Act…were enacted before class-action

proceedings were permitted [1938], it stands to reason that 'the individual suit' based on claims under those acts that was considered adequate and consistent at the time those statutes were enacted remains so notwithstanding the advent of class-action litigation. Accordingly, the potential for an issuer-investor mandatory arbitration provision to diminish, or even eliminate, the economic incentive for some investors to bring private claims under the Federal securities laws is not a sufficient basis to conclude that the Federal securities statutes displace the [FAA's] mandate."

State Corporate Law

In addition to federal law, the Policy Statement emphasizes that, when analyzing whether MAPs are valid, companies must also consider relevant state corporation law. For example, the most recent amendments to the Delaware General Corporation Law (DGCL) may prohibit Delaware companies from including MAPs in their charters or bylaws. But other states may take different approaches on this issue.

Specifically, new paragraph (c) in DGCL Section 115, effective August 1, 2025, permits the certificate of incorporation or bylaws to prescribe a forum or venue for certain claims that are not internal corporate claims (e.g., federal securities law claims) but only if a stockholder may bring such claims in at least one *court* in the state of Delaware that has jurisdiction over such claims, suggesting the claim must be heard specifically in a *judicial* rather than arbitral forum.

The SEC notes, however, that potential uncertainty exists regarding the intersection of state law and the FAA, which provides a presumption in favor of arbitration. Under Supreme Court precedent, for example, "a state law that 'target[s] the enforceability of [mandatory] arbitration agreements either by name or by more subtle methods, such as by "interfering with fundamental attributes of arbitration"' may be preempted by the [FAA]."

The Policy Statement expressly refrains from expressing any view on whether Delaware's statutory provision or any other state law provision is consistent with the FAA, which the SEC considers to be outside its purview. In his supporting remarks, Chair Atkins reaffirmed this position, stating that "[n]either the Commission nor its staff has the expertise to address a [MAP's] enforceability under state law and any preemption concerns raised by the [FAA] with respect to state law."

Other Considerations

Companies should anticipate that proxy advisory firms, institutional investors and other stakeholders may view MAPs unfavorably or as harmful to investor interests. At

the end of the Policy Statement, the SEC notes that "it is difficult to estimate how many issuers are likely to adopt [MAPs], or the ultimate economic impact of any such provisions, if adopted. Some issuers may choose not to include such provisions due to potential state law considerations or concern about potential negative reactions from shareholders and other investors. Actions or potential actions by others, including proxy voting advice businesses, stock exchanges, and institutional investors, can be expected to influence the number of issuers who adopt arbitration of issuer-investor claims arising under the Federal securities laws."

Amendments to Rule 431 of the SEC's Rules of Practice

In conjunction with approval of the Policy Statement, the SEC adopted technical changes to Rule 431 of its Rules of Practice, also effective September 19, 2025, relating to procedures governing Commission-level review of contested staff actions made pursuant to delegated authority. When the SEC acts via delegated authority, any aggrieved person or any individual Commissioner may ask the full Commission to review that action. Subject to limited exceptions, a request for review automatically stays the delegated action until the Commission orders otherwise.

Previously, declaring a registration statement effective was not among the exceptions to the automatic stay, meaning an offering pursuant to an effective registration statement could be halted after the fact. However, because stays of a registration statement after effectiveness may be highly disruptive to the market (e.g., interruption of the sales process), **the SEC is amending Rule 431(e) to expand the limited list of delegated actions for which there will no longer be an automatic stay while under Commission review to include determinations of the effectiveness of registration statements and post-effective amendments thereto** as well as determinations of the qualification of Regulation A offering statements and post-qualification amendments thereto. Instead, with respect to such effectiveness or qualification decisions, the Commission will consider on a case-by-case basis whether a stay is warranted.

The SEC believes these amendments will provide market participants raising capital with greater predictability and certainty in the registration and qualification processes. The adopting release notes that, even though the automatic stay is being eliminated in this context, the SEC will continue to have the ability to issue an order preventing a registration statement from becoming effective under Securities Act Section 8(b) and to issue a stop order to suspend the effectiveness of a registration statement under Securities Act Section 8(d).

Key Documents

- Press Release
- Fact Sheet
- Policy Statement
- Amendments to the Commission’s Rules of Practice
- Chair Atkins Statement
- Commissioner Peirce Statement
- Commissioner Crenshaw Statement
- Commissioner Uyeda Statement

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