

SEC Reverses Course on Arbitration Clauses, Potentially Opening the Door to Their More Widespread Adoption

Skadden

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One Manhattan West
New York, NY 10001
212.735.3000

Executive Summary

- **What's new:** The SEC has reversed a longstanding position and said that the existence of a mandatory arbitration clause in an issuer's governing documents covering federal securities law claims will not affect the agency's decision whether to accelerate the effectiveness of a registration statement. Instead, its staff will focus on the adequacy of the registration statement's disclosures, including those regarding the mandatory arbitration provision.
- **Why it matters:** If mandatory arbitration provisions are adopted more widely and enforced by courts, it could transform how federal securities law claims are adjudicated and have wide-ranging implications for companies and shareholders alike.
- **What to do next:** The reversal eliminates one of the obstacles that has prevented public companies from adopting mandatory arbitration provisions. Companies planning to go public, as well as those already public, may now want to reconsider whether to adopt such provisions. But there are advantages and disadvantages to these provisions that will need to be weighed.

Background

In a September 17, 2025, policy statement (Policy Statement), the Securities and Exchange Commission (SEC) announced that the presence of a mandatory arbitration provision in a company's governing documents will not impact decisions regarding whether to accelerate the effectiveness of a registration statement under the Securities Act of 1933 (Securities Act).¹

The SEC further clarified that it would also apply this conclusion to decisions regarding whether to:

- accelerate the effectiveness of registration statements filed under the Securities Exchange Act of 1934 (Exchange Act) (e.g., Form 10 registration statements for corporate spin-off transactions);
- declare effective post-effective amendments to registration statements; and
- qualify an offering statement or a post-qualification amendment under Regulation A.

The SEC took no position on whether companies should — or should not — adopt mandatory arbitration provisions.

The SEC's decision represents a sharp break with past practice. For decades, the SEC held to the view that mandatory arbitration clauses could potentially violate the anti-waiver provisions of the federal securities laws by foreclosing a judicial forum and unduly impeding private investors' ability to vindicate their rights under federal securities laws by precluding class actions in the courts.

The SEC has now jettisoned this position. Citing longstanding Supreme Court precedent, the SEC concluded that the anti-waiver provisions of the Exchange Act and Securities Act do not guarantee the right to pursue claims in court or on a classwide

¹ Mandatory arbitration provisions also may be contained in indentures, limited partnership agreements, declarations of trust or trust agreements.

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basis. Rather, those provisions apply only to safeguard substantive obligations under the securities laws — *i.e.*, the right to pursue an action in a proceeding in which due process rights are protected. The SEC also rejected the notion that mandatory arbitration provisions would violate federal law by diminishing, or even eliminating, the economic incentive for some investors to bring private claims under the federal securities laws.

The SEC's decision, made via policy statement rather than formal rule, was hailed by SEC Chairman Paul S. Atkins as one step towards delivering on his goal to "make IPOs great again." The decision, however, met with criticism from Democratic Commissioner Caroline Crenshaw. She cautioned that allowing mandatory arbitration provisions could weaken investor rights by making dispute resolution prohibitively expensive for smaller investors and less accessible than class actions. (These are arguments that the Supreme Court considered and rejected in its landmark decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and in numerous subsequent decisions upholding arbitration agreements with class action waivers.)

By increasing the burden to pursue private claims, Crenshaw argued, the onus would be on the SEC to bring enforcement actions at a time when agency resources are shrinking. Crenshaw further warned that the SEC's new policy would result in markets that are "under-policed," thereby undermining deterrence, transparency and integrity.

Questions Raised by the Policy Statement

Some are predicting that the SEC's decision will serve as a catalyst for more companies to consider adopting mandatory arbitration provisions. Such an analysis raises a host of significant questions, including:

Does state law permit a mandatory arbitration agreement?

The Policy Statement observes that state law might bear on whether a mandatory arbitration provision in a corporation's charter or bylaws is enforceable. Specifically, the SEC noted some potential uncertainty regarding the intersection of the Federal Arbitration Act and state corporate law that could impact a company's ability adopt a mandatory arbitration provision. The SEC emphasized that it was taking no position on the issue. Nonetheless, companies should consider whether their bylaw provisions comply with applicable state law.

Would a mandatory arbitration provision violate federal law?

Corporations will also want to examine whether a mandatory arbitration provision would comply with federal law. As the

Policy Statement notes, the Supreme Court has held that the anti-waiver provisions of the Securities Act and Exchange Act do not prohibit enforcement of arbitration provisions in customer agreements, because agreeing to arbitrate does not undermine investors' substantive rights afforded by the Acts.²

Nonetheless, we could see legal challenges. Commissioner Crenshaw, for instance, suggested that such provisions, if sufficiently draconian (for example, if they eliminate claims, remedies or shorten limitations periods), might be unlawful under the Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987). And some within the plaintiffs' bar have already opined that companies adopting mandatory arbitration provisions would be "buying a lawsuit."³ For this reason, corporations will want to consider whether the specific language of any proposed mandatory arbitration might be viewed as placing undue constraints on shareholder rights.

Would the advantages of a mandatory arbitration provision outweigh its disadvantages?

Companies will want to carefully evaluate whether the potential benefits of a mandatory arbitration provision outweigh its potential disadvantages. The answer will invariably turn on an array of factors.

As an initial matter, public companies must take into consideration the reaction of investors and, in certain cases, proxy advisory firms. For example, CalPERS has already expressed its opposition to the change in policy and to mandatory arbitration provisions.

Arbitration agreements with class action waivers requiring shareholders to pursue claims in individualized proceedings prevent plaintiffs' lawyers from using class actions as a device for coercion — a potentially significant advantage to companies. As Congress and courts have acknowledged, issuers faced with securities claims are often pressured to enter into classwide settlements because of the substantial expense to defend the claims in drawn-out court proceedings and the extraordinary exposure class actions present, however unlikely the claims are to prevail.

On the other hand, there are procedural and other benefits to proceeding in court. Judges are experienced at adjudicating federal securities law claims and applying a developed body of precedent. And courts presiding over securities class actions have in recent years granted motions to dismiss in full (either with or

² *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 238 (1987); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 485-86 (1989).

³ Jessica Corso, Law360, *Arbitration Clauses Won't Protect IPOs From Investor Suits* (Sept. 18, 2025).

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without prejudice) 61% of the time.⁴ Absent a provision in the arbitration agreement, an arbitrator's decisions, unlike judicial decisions, are not appealable. Put simply, companies will want to consider if they would fare better or worse in an arbitral forum.

Finally, companies should also consider whether a mandatory arbitration provision might apply to other statutory defendants. Depending on applicable state law, a provision could be enforced by or against non-signatories, including directors and officers, auditors and underwriters.

⁴ National Economic Research Associates, Inc., *Recent Trends in Securities Class Action Litigation: 2024 Full-Year Review*, at 17.

Contacts

Brian V. Breheny

Partner / Washington, D.C.
202.371.7180
brian.breheny@skadden.com

Jay B. Kasner

Partner / New York
212.735.2628
jay.kasner@skadden.com

Edward B. Micheletti

Partner / Wilmington
302.651.3220
edward.micheletti@skadden.com

Scott D. Musoff

Partner / New York
212.735.7852
scott.musoff@skadden.com

Susan L. Saltzstein

Partner / New York
212.735.4132
susan.saltzstein@skadden.com

Andrew J. Brady

Of Counsel / Washington, D.C.
202.371.7513
andrew.brady@skadden.com

William J. O'Brien III

Counsel / New York
212.735.4128
william.obrien@skadden.com

Shaud G. Tavakoli

Counsel / New York
212.735.3546
shaud.tavakoli@skadden.com