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The SEC's New Policy Statement Regarding Effectiveness of Registration Statements With Issuer-Investor Mandatory Arbitration Provisions

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Summary Overview

- On September 17, 2025, the SEC by a vote of 3-1 issued a policy statement (the "Policy Statement") announcing that the inclusion in a registration statement of provisions requiring mandatory arbitration of investor claims arising under the federal securities laws ("Mandatory Arbitration Provisions") will no longer impact the Commission's decision as to whether to accelerate the effectiveness of such registration statement.[1]
- The Policy Statement also noted that this new policy would not be limited to registration statements filed under the Securities Act but would apply equally "if an Exchange Act reporting issuer were to amend its bylaws or corporate charter to adopt an issuer-investor mandatory arbitration provision."[2]
- In a companion rulemaking, an aggrieved party's request for review will no longer result in an automatic stay of a registration statement's effectiveness pending review by the full Commission. This means that issuers seeking to include Mandatory Arbitration Provisions in a registration statement do not risk an automatic stay that might interrupt sales or create uncertainty among market participants.
- Although the SEC staff will consider the completeness and adequacy of a registration statement's disclosures of material information when evaluating an acceleration request, including disclosures regarding Mandatory Arbitration Provisions, it will not consider the inclusion of the provisions themselves.
- The Policy Statement does not alter the permissibility of Mandatory Arbitration Provisions under state corporate and contract law, which may limit or prohibit the use of such provisions. In particular, recently enacted provisions of the Delaware General Corporation Law ("DGCL") generally prohibit Mandatory Arbitration Provisions in a Delaware corporation's governance documents.[3]

[1] *Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions*, Rel. Nos. 33-11389, 34-103988 (Sept. 17, 2025), https://www.sec.gov/files/rules/policy/33-11389.pdf.
[2] *Id.* at 4 n.8.
[3] *See* Del. Gen. Corp. L. § 115(c).

Views of the Commission

The majority of the Commission appears to have strongly-held views about offering issuers the ability to use Mandatory Arbitration Provisions. That majority, comprised of Chairman Paul Atkins and Commissioners Hester Peirce and Mark Uyeda, characterized the issuance of the policy statement as a move to bring the SEC's policies in line with the proper scope of the Commission's authority. The majority emphasized that it does not view the Commission's role as extending to weighing the merits of offerings, a decision better left to investors, with Chairman Atkins observing that "the Commission is not a merit regulator that decides whether a company's particular method of resolving disputes with its shareholders is 'good' or 'bad.'"[4] Nor does the majority view the Commission as an appropriate arbiter of questions of enforceability under the FAA.[5] The Policy Statement also reflects the majority's interpretation of judicial precedents across the last decade, which it says demonstrate that the FAA's policy favoring enforcement of arbitration agreements is not inconsistent with the federal securities laws.[6]

More broadly, the Commission's majority signaled its interest in expanding or revitalizing the market for initial public offerings ("IPOs") and reducing regulation of the relationship between issuers and investors. Chairman Atkins described the policy statement and rule change as "among the first steps of [his] goal to make IPOs great again," by "eliminating compliance requirements that yield no meaningful investor protections, minimizing regulatory uncertainty, and reducing legal complexities throughout the SEC's rulebook."[7] And the broad scope of the Policy Statement indicates that this goal may extend beyond just IPOs to corporate governance more generally. But the Chairman also cautioned that the Policy Statement does not settle the question of whether issuers may require investors to arbitrate claims, noting that state laws – including recently enacted provisions of the DGCL – may prohibit the inclusion of mandatory arbitration provisions in governance documents.[8]

Commissioner Caroline Crenshaw, the lone dissenter, argued that the Policy Statement will result in harm to investors, particularly in the retail market, and took issue with the Commission's policymaking process.[9] Commissioner Crenshaw argued that the changes will stack the deck against retail investors, and that while they may reduce costs to companies, they will raise investor costs, undermine deterrence, and reduce market transparency and investor choice. She added that, in her view, the policy action did not address a real problem, and that by issuing a policy statement – rather than engaging in notice-and-comment rulemaking – the SEC had avoided considering guardrails or addressing challenges to the new policies.

Key Takeaways

- The Policy Statement and changes to the rules of practice open the door to more frequent use of Mandatory Arbitration Provisions. But the SEC's action is not the last word in the space, which is also governed by state laws that may prohibit such provisions. Mandatory Arbitration Provisions may not be available to Delaware corporations, for example, under DGCL Section 115(c). Outside of Delaware,

[4] Paul S. Atkins, *Policy Statement Concerning Mandatory Arbitration* (Sept. 17, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431 ("Atkins Statement"); Hester M. Peirce, *Staying in Our Lane: Statement on Two Recommendations from the Division of Corporation Finance* (Sept. 17, 2025), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-recommendations-division-corporation-finance-091725; Mark T. Uyeda, *Open Commission Meeting Remarks on Commission Policy Statement and Amendments to the Rules of Practice* (Sept. 17, 2025), https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-open-commission-meeting-remarks-on-commission-policy-statement-and-amendments-to-the-rules-of-practice-091725.
[5] *See* Policy Statement, Section II.B.
[6] *Id.* at Section II.C; *see also* Atkins Statement.
[7] Atkins Statement.
[8] *Id.*
[9] Caroline A. Crenshaw, *Mandatory Dis-Agreements: The Commission's Policy of Quietly Shutting the Door on Investors* (Sept. 17, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-mandatory-dis-agreements-the-commissions-policy-of-quietly-shutting-the-door-on-investors-091725.

state corporate and contract law varies or may not address the permissibility of these provisions. Issuers seeking to introduce Mandatory Arbitration Provisions should carefully consider the intersection of state and federal law before including such provisions in registration statements or corporate charters, by-laws, or stockholder agreements.

- When drafting Mandatory Arbitration Provisions, issuers should be sure to consider other elements of the arbitral process, including arbitral forum, scope of provision, other litigation strategy considerations, and overall corporate governance profile. Issuers should also consider investor sentiment, as some institutional investors have historically been skeptical of Mandatory Arbitration Provisions, and proxy advisors may issue adverse voting recommendations for provisions perceived as restricting stockholder rights.
- The Policy Statement signals a sea change in longstanding SEC policy that had disfavored Mandatory Arbitration Provisions, and may lead in the long-term to more frequent use of such provisions by issuers. More broadly, the majority's strong support for the policy action and the Chairman's statement unambiguously reflect the SEC's desire to reduce regulation of the issuer-investor relationship. And there may be more to come.
- The Chairman has signaled that this policy is the first step of an "ambitious project [that] will make being a public company an attractive proposition … by eliminating compliance requirements …, minimizing regulatory uncertainty, and reducing legal complexities throughout the SEC's rulebook." As such, the Policy Statement may be followed by additional changes affecting issuers' access to public markets, disclosure requirements, and the shareholder proposal process.

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