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SEC Changes Course on Mandatory Issuer-Investor Arbitration Clauses


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On September 17, 2025, the U.S. Securities and Exchange Commission (SEC) issued a policy statement potentially paving the way for the adoption of mandatory arbitration by issuers. According to the policy statement, "the presence of an issuer-investor mandatory arbitration provision will not . . . impact decisions whether to accelerate the effectiveness of a registration statement." This development may have significant implications for public companies, investors, and the securities litigation landscape.

Background

Historically, the SEC has been unwilling to accelerate the effectiveness of registration statements of companies with issuer-investor mandatory arbitration clauses in their organizational documents, citing concerns about the protection of investor rights and the potential for such clauses to limit access to the courts.

In an example cited by the SEC in its September 17, 2025 policy statement, the Carlyle Group L.P. included a mandatory arbitration clause in proposed amendments to its post-IPO limited partnership agreement (the "Proposed LPA") (and made corresponding disclosure in its Registration Statement on Form S-1 in connection with the Carlyle Group's planned IPO).[1] At the time, both the Carlyle Group and the SEC faced pressure from investors and regulators over the mandatory arbitration provision, which would have prohibited the Carlyle Group's shareholders from filing class-action lawsuits and precluded them from seeking redress from federal or state courts. Numerous stakeholders, including former SEC officials and lawmakers, urged then-Chair of the SEC, Mary L. Schapiro, to block the offering unless the mandatory arbitration clause was removed from the Carlyle Group's Proposed LPA. In response, the SEC issued comments on the Carlyle Group's amended S-1, specifically noting that "the Division of Corporation Finance does not anticipate that it will exercise its delegated authority to accelerate the effective date of [the Carlyle Group's] registration statement if [the] limited partnership agreement includes" a mandatory arbitration provision. While other commentators have criticized the SEC's use of its authority to withhold acceleration (thereby denying a company timely access to capital markets and providing the SEC an ability to delay and interfere with a planned public offering), the Carlyle Group did not challenge the SEC and quickly responded that it had removed the issuer-investor mandatory arbitration clause from its Proposed LPA and filed an additional amendment to its S-1.

Since the Carlyle Group's highly-publicized removal of an issuer-investor mandatory arbitration clause from its organizational documents, the SEC has continued to comment on, and caused companies pursuing an IPO to abandon their mandatory arbitration and mediation provisions as they pertain to claims arising under U.S. federal securities laws.

The September 17, 2025 policy statement represents a change in course, with the SEC announcing that it would no longer object to or deny the acceleration of a registration statement *solely* because an issuer's organizational documents contain

a provision requiring mandatory arbitration of investor claims arising under federal securities laws.

Key Implications

While issuers may increasingly consider and include mandatory arbitration clauses in their governing documents, potentially limiting the ability of investors to bring class action lawsuits under federal securities laws to the court system, the SEC's policy statement has already raised several key implications in respect of federal and state law.

Federal law implications:

- The Federal Arbitration Act (FAA) governs arbitration agreements in the United States and reflects federal policy in favoring arbitration, which aims to provide an efficient and streamlined process for resolving disputes. In 2011's *AT&T Mobility LLC v. Conception*, the United States Supreme Court reaffirmed the FAA's presumption in favor of arbitration, holding that the FAA preempts state laws that discriminate against arbitration agreements, looking to prior United States Supreme Court decisions in 1987's *Shearson/American Express, Inc. v. McMahon* and others.

- Prior to the policy statement, the federal securities laws were thought to potentially override the FAA, including the anti-waiver provisions of the Securities Act of 1933 and the Exchange Act of 1934 (each of which provide that any provision binding a person acquiring any security to waive compliance with any provision of the act or the rules of the SEC shall be void). In its recent policy statement, the SEC noted that it has considered United States Supreme Court jurisprudence, including 2018's *Epic Systems Corp. v. Lewis* (which found that for any federal statute enacted after the FAA–which would include the Securities Act and Exchange Act–"there must be a 'clearly expressed congressional intention' to override the [FAA]") and analyzed case-law developments involving the intersection of the FAA and other federal statutes. Based on this review, the SEC concluded that, at least in the context of issuer-investor mandatory arbitration provisions, the federal securities laws do not override the FAA. "Nothing in the text of the anti-waiver provisions or any other provisions of the federal securities statutes could be construed as a clearly expressed congressional intention that the Arbitration Act would not apply to federal securities laws claims."

State law considerations:

- State law has also not been consistent on the enforceability of mandatory arbitration clauses. Whereas some states like Texas permit mandatory arbitration of federal securities law claims,[2] and others like Nevada include statutory provisions the likely permit mandatory arbitration of such claims, [3] Delaware corporate law may not allow for mandatory arbitration of federal securities law claims. The recent SEC policy statement noted expressly that it did not express a view on whether Delaware law, or any other state law provision, is inconsistent with the FAA.

- The Delaware General Corporation Law was amended in June of this year through Senate Bill 95 (SB 95) which, among other amendments, revised Section 115(c) to permit forum selection clauses in Delaware organizational documents; provided that at least one Delaware federal or state court remain available as a forum (a de facto prohibition on mandatory arbitration).

- Paul S. Atkins, the current SEC Chair, delivered a speech in Delaware urging the state to allow mandatory arbitration of federal securities law claims, and citing the negative effects of "litigation costs that abusive lawsuits impose on companies franchised in Delaware."[4] Noting that SB 95 became law prior to the recent SEC policy statement and at a time when the SEC's views on mandatory arbitration may have been different, Atkins asked that, with the added clarity from the SEC, the Delaware legislature revisit its prohibition of mandatory arbitration with respect to federal securities law claims and "help

Delaware be a leader in the reform of securities litigation." Delaware has not yet responded to Atkins' comments, notwithstanding his pointed observation that recent actions suggest that Delaware is "uninterested in reform" and the state seems to embrace "litigation costs that abusive lawsuits impose on companies" in Delaware.

Potential Benefits and Drawbacks

Mandatory arbitration clauses may offer benefits to issuers, including:

- Reduced litigation risk: By limiting the ability of investors to bring class action lawsuits, issuers may be able to reduce their litigation risk and avoid costly and time-consuming litigation. Removing a class action lawsuit from the suite of available remedies may have the broader effect of eliminating the risk of certain types of litigation normally made viable only through class action and the magnitude of aggregated losses.

- Increased efficiency: Arbitration may provide a more efficient and streamlined process for resolving disputes, potentially reducing the time and cost associated with litigation.

However, there are also potential drawbacks to consider, particularly for investors:

- Limited access to recourse: Mandatory arbitration clauses can restrict the ability of investors to seek redress and leave them with limited recourse through arbitration. Mandatory arbitration and the removal of the class action lawsuit would impose additional obstacles on a plaintiff's ability and desire to pursue claims on an individual basis and would impact the willingness to incur legal costs without the prospect of larger damages generally reserved for class settlements and judgments (common in claims for breaches of federal securities laws).

- Lack of transparency: Arbitration proceedings may be confidential, making it difficult for investors to understand the basis for any decisions or to anticipate or rely on prior determinations.

Conclusion

The SEC's policy statement marks a significant shift in the regulatory landscape, potentially paving the way for the increased adoption of issuer-investor mandatory arbitration clauses in issuers' organizational documents. While there are potential benefits to such clauses, there are also concerns about their impact on investor protection and access to recourse.

The public's reaction to the SEC's policy statement has been mixed, with some commentators suggesting a phased implementation that initially applies only to new securities offerings or sunset provisions that allow future reconsideration of the policy. Glass Lewis' 2025 Benchmark Policy Guidelines, which was published before the SEC's policy statement, states that it "may recommend that shareholders vote against the chair of the governance committee, or the entire committee, where the board has amended the company's governing documents to reduce or remove important shareholder rights, or to otherwise impede the ability of shareholders to exercise such right, and has done so without seeking shareholder approval. Examples of board actions that may cause such a recommendation include: . . . the adoption of provisions that limit the ability of shareholders to pursue full legal recourse — such as bylaws that require arbitration of shareholder claims." ISS' 2025 Proxy Voting Guidelines does not address mandatory arbitration provisions. It remains to be seen whether Glass Lewis or others will amend their views on mandatory arbitration provisions in light of the SEC's policy statement. Thus, initial adopters of these mandatory arbitration clauses must be calculated in their approach.

If the use of mandatory arbitration clauses becomes more widespread, it will be important to monitor their impact, institutional investors' response to their use, and additional legislation and court decisions setting boundaries on or regulating their implementation. Additionally, Delaware could find itself at the center of an

eventual clash between state and federal law on mandatory arbitration provisions and the ability of a state to require claims be brought in its courts, and as a result, Delaware may have to contend with the positions of the FAA, *Conception* and its progeny, and the SEC.

[1] Proposed LPA, § 16.9 (available as Appendix A to the Amended Registration Statement on Form S-1 filed on January 10, 2012).

[2] *See* Tex. Civ Prac & Rem Code, § 171.001 (2025) (stating generally that a written agreement to arbitrate is valid and enforceable if the controversy arises between the parties after the date of the parties' agreement, with a company's organizational document constituting an agreement under state law).

[3] *See* Nev. Rev. Stat. § 78.046 (2025) (permitting a corporation to prescribe a forum or venue, which, for internal actions, must include at least one court in Nevada, but specifying that the law is applicable to the extent not inconsistent with any applicable jurisdictional requirements and the laws of the United States and "must not be interpreted as prohibiting any corporation from consenting . . . to any alternative forum in any instance.").