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SEC Changes Staff's Role in Processing Registration Statements Containing Mandatory Arbitration Provisions Governing Investor Claims

The Policy Statement does not reflect a change in the SEC's substantive viewpoint on the merits of mandatory arbitration provisions, but instead signals that the SEC will no longer play a major role in gate keeping such provisions.

Overview: On September 17, 2025, the Securities and Exchange Commission (SEC) issued a statement (the Policy Statement)[1] that the SEC Staff will no longer object to the inclusion of a provision in a company's bylaws or charter requiring arbitration of investor claims under federal securities laws. This Policy Statement does not reflect a change in the SEC's substantive viewpoint on the merits of mandatory arbitration provisions, but instead signals that the SEC will no longer play a major role in gate keeping such provisions.

Background: For decades, practitioners have debated whether a mandatory arbitration provision in an issuer's charter documents would delay or prevent the acceleration of that issuer's registration statement because of concerns that the federal securities statutes may override the Federal Arbitration Act (FAA). And for decades, the SEC Staff took the view that any such provision would be inconsistent with the public interest finding necessary to accelerate the effectiveness of a registration statement under Section 8(a) of the Securities Act of 1933 (the

Securities Act). As a result, the SEC Staff would not declare effective registration statements of companies that had mandatory arbitration provisions in their organizational documents. This practically meant that public companies or companies seeking to go public could not have such provisions.

Scope of Policy Statement: The Policy Statement applies to (i) registration statements filed under the Securities Act, (ii) registration statements filed under the Securities Exchange Act of 1934 (the Exchange Act), (iii) post-effective amendments to registration statements, (iv) offering statements or post-qualification amendments under Regulation A, and (v) amendments of bylaws or corporate charters of Exchange Act reporting issuers that adopt an issuer-investor mandatory arbitration provision.[2]

New Position and Rationale: The SEC issued the Policy Statement to "provide issuers with greater certainty concerning the Commission's approach to requests to accelerate the effective date of a registration statement disclosing an issuer-investor mandatory arbitration." In a tightly argued release, the SEC analyzed recent Supreme Court precedents and concluded that the federal securities statutes do not override the FAA. Accordingly, as directed by the SEC, the SEC Staff will not take any such provision into consideration when considering an acceleration request for an issuer's registration statement. Of course, the SEC Staff may focus on the adequacy of the registration statement's disclosures, including disclosure regarding issuer-investor mandatory arbitration provisions, and issuers should expect that the SEC Staff's focus on disclosure will be rigorous.

To support this change in its Staff's position, the SEC rejected two arguments that arbitration provisions conflict with federal securities statutes by (1) violating anti-waiver provisions in the statutes, and (2) impeding investors' ability to bring class actions. After reviewing relevant case law, the SEC concluded that the anti-waiver provisions in the Securities Act and Exchange Act apply only to substantive rights, not to procedural or jurisdictional rights such as the choice of forum. As to the second argument, the SEC reasoned that the federal securities statutes do not guarantee a right to class or collective actions. In support of this conclusion, the SEC relied on the Supreme Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant*, which held that the federal antitrust statutes do not guarantee the right to bring a class action.[3] Whether the SEC is correct in its analysis is ultimately a question to be decided by the courts.

Broader Context: This change in the SEC Staff's practice does not reflect a substantive point of view about the merits of mandatory arbitration provisions. Rather, as directed by the SEC, the SEC Staff is no longer going to play the role of "arbitration cop". So long as the disclosures about such provisions are adequate from the Staff's standpoint, then it will be up to issuers, their underwriters, and ultimately investors, to decide whether such provisions are acceptable. More broadly, this ceding of the SEC Staff's role to private ordering is what we should anticipate from the Atkins Commission in other areas of the securities laws that impact the relationship between issuers and their shareholders.

Potential Implications: We believe that market reactions (from investors, proxy advisors, stock exchanges) and state law will likely drive issuer decisions. Whether a company is planning an IPO or not, it will have to consider multiple factors when deciding whether to adopt mandatory arbitration provisions. One reason for such adoption could be the prospect of reduced class action litigation exposure. However, in an age of mass arbitration threats and the absence during arbitration of certain procedural protections of the Private Securities Litigation Reform Act, companies would need to carefully evaluate the pros and cons of a mandatory arbitration process. We will be monitoring how shareholder proxy advisory firms, such as Glass Lewis and Institutional Shareholder Services, may update or change their voting recommendations in relation to mandatory arbitration provisions.

Stockholder Litigation: If companies adopt mandatory arbitration provisions for investor disputes, we anticipate there could be legal challenges to those provisions. As noted in the Policy Statement, the enforceability of arbitration provisions is a matter of state law, and the SEC takes no position on the enforceability of such provisions. We expect there could be litigation over whether state laws that purport to require companies to permit investors to bring claims in court are preempted by the FAA. As the SEC acknowledged, this could be an issue for Delaware corporations that adopt investor arbitration provisions in light of Section 115(c) of the Delaware General Corporation Law.[4] If such laws are not preempted, we expect there could be litigation over whether investor arbitration provisions are enforceable contracts under state law, and whether the adoption of such arbitration provisions, to the extent they eliminate the ability of stockholders to bring class actions under federal securities laws, implicate the anti-waiver provisions of the Securities Act and Exchange Act.

[1] *See* SEC, Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions, Release No. 33-11389 (Sept. 17, 2025).

[2] *Id.* at n.8. and n.7. The Policy Statement makes clear that it does not apply to issuer-investor arbitration provisions that impose conditions or restrictions which may affect investors' substantive rights under the federal securities laws.

[3] *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 233 (2013).

[4] 8 DEL. CODE ANN. Tit. 8, Section 115(c) provides that forum provisions in corporate charters or bylaws must "allow[] a stockholder to bring … claims in at least 1 court in this State that has jurisdiction over such claims."

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