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BLOG

SEC Issues Policy Statement on Mandatory Arbitration Provisions and Acceleration of Registration Statement Effectiveness

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BACKGROUND

On September 17, 2025, the Securities and Exchange Commission (SEC or the Commission) released a policy statement (the Policy Statement)[i] addressing its approach to mandatory arbitration provisions in the governing documents of companies intending to go public (each, an Issuer). The SEC acknowledged prior uncertainty on this issue. The Policy Statement aims to give Issuers clear guidance when requesting acceleration of the effectiveness of a registration statement that discloses mandatory arbitration provisions.

Under federal securities laws, Issuers must file registration statements with the SEC that include various disclosures about the Issuer (i.e., its material contracts, executive compensation, etc.). In most cases, Issuers cannot sell securities until the SEC has completed review of the registration statement. Under the Securities Act of 1933 (the Securities Act), a registration statement becomes effective automatically 20 calendar days after it is filed. However, most Issuers include a "delaying amendment" in their registration statement, which postpones effectiveness until SEC staff declares the registration statement effective, typically upon the Issuer's request for acceleration of effectiveness.

Among the disclosures required of the Issuer is the presence of mandatory arbitration provisions in its governing documents. Such provisions require investors to resolve disputes with the Issuer through arbitration rather than in a judicial forum. In its Policy Statement, the SEC specified that it does not believe that this lack of a judicial forum violates the anti-waiver provisions of federal securities statutes. Such anti-waiver provisions are found in section 14 of the Securities Act, which states that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void[,]" and in section 29(a) of the Securities Exchange Act of 1934, which states that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder, or any rule of a self-regulatory organization, shall be void[,]" are statutory clauses that render void any agreement requiring an investor to waive compliance with the substantive protections of federal securities laws.

SEC'S NEW POLICY ON MANDATORY ARBITRATION PROVISIONS

SEC Chairman Paul S. Atkins has stated that, going forward, disclosure of mandatory arbitration provisions will no longer result in denial of acceleration requests, and the SEC will focus solely on the transparency, clarity, and adequacy of the disclosure (the New Policy).[ii] The SEC clarified that it is not expressing a view on whether mandatory

arbitration provisions benefit Issuers or investors, but it did provide its views that mandatory arbitration provisions are not inconsistent with federal securities laws and should not be a factor in the Commission's decision to approve or deny an Issuer's request for acceleration. In support of this view, the Policy Statement discusses Supreme Court decisions that upheld the enforceability of arbitration provisions under the Federal Arbitration Act of 1925 (FAA) in federal securities claims.

COMMISSIONERS' PERSPECTIVES

SEC Commissioner Mark T. Uyeda issued a statement on September 17, 2025, acknowledging that, historically, the SEC took the position that acceleration would not be granted for Issuers with mandatory arbitration provisions in their governing documents and stating that, under the New Policy, the SEC would focus on its limited role as to whether there is appropriate disclosure in registration statements.[iii]

On that same day, SEC Commissioner Caroline Crenshaw issued a statement expressing ardent opposition to the New Policy.[iv] Commissioner Crenshaw contends that Issuers' adoption of mandatory arbitration provisions will result in less market transparency and the stripping of shareholders' litigation rights. Commissioner Crenshaw stated that public companies will now be able to handle dispute resolutions discreetly, contributing to a lack of visibility and decreased deterrence of adverse corporate practices. Additionally, Commissioner Crenshaw stated that for any shareholder claims that are settled through arbitration, there is no precedent set, little consistency, limited options for appeal, and preclusion of shareholders' ability to bring collective action claims.

OTHER LIMITS OF MANDATORY ARBITRATION PROVISIONS

While the SEC's policy addresses federal law, state law may impose additional restrictions. Not all states allow mandatory arbitration provisions. For example, under recent amendments to the Delaware General Corporation Law,[v] Delaware may prohibit issuer-investor mandatory arbitration provisions. This is particularly significant because Delaware is a key jurisdiction of incorporation for IPO companies.[vi] There remains an open question as to whether Delaware's statute is preempted by the FAA, and the SEC declined to weigh in on questions regarding the FAA's preemption of state law.

POTENTIAL IMPACT OF THE NEW POLICY

The New Policy will likely have a substantial impact on investors and Issuers alike, in that Issuers with mandatory arbitration provisions in their governing documents can now request acceleration of the effective date of a registration statement. The overall impact remains unclear and will depend on whether investors view mandatory arbitration provisions as favorable or unfavorable for investment and to what degree such provisions may sway their decision to invest in any particular Issuer. Issuers with existing, or in the process of adopting, mandatory arbitration provisions should work with counsel to ensure appropriate disclosure.

Winston's Capital Markets and Securities Law Watch will continue to monitor developments and will provide our readers with additional updates as they become available.

For more information, or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

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[i] SEC, Policy Statement, Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions, Release No. 33-11389 (Sept. 17, 2025), *available at* https://www.sec.gov/files/rules/policy/33-11389.pdf.

[ii] Chairman Paul S. Atkins, Statement, Open Meeting Statement on Policy Statement Concerning Mandatory Arbitration and Amendments to Rule 431 of the Commission's Rules of Practice (Sept. 17, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431.

[iii] Commissioner Mark T. Uyeda, Statement, Open Commission Meeting Remarks on Commission Policy Statement and Amendments to the Rules of Practice (Sept. 17, 2025), *available at* 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.

[iv] Commissioner Caroline A. Crenshaw, Statement, Mandatory Dis-Agreements: The Commission's Policy of Quietly Shutting the Door on Investors (Sept. 17, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-mandatory-dis-agreements-the-commissions-policy-of-quietly-shutting-the-door-on-investors-091725.

[v] Delaware General Corporation Law, 8 Del. Code Ann. tit. 8, § 115(c) (2025).

[vi] Delaware Division of Corporations, Delaware Corporate Statistics, *available at* https://corp.delaware.gov/stats/.

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