SEC Policy Statement Concerning Mandatory Arbitration Provisions

September 24, 2025

On September 17, 2025, the U.S. Securities and Exchange Commission (the "SEC") issued a policy statement (the "Statement") concerning the presence of mandatory arbitration provisions in issuer governance documents in connection with requests to accelerate the effectiveness of registration statements.[1] As set out in the Statement, the SEC's position is now that provisions requiring arbitration of investor claims arising under federal securities laws will not impact the SEC's decision as to whether to declare a registration statement effective, representing a reversal of its prior policy position. Instead, the Statement emphasizes that the SEC's primary role is evaluating the adequacy of disclosure, including with respect to such provisions. Whether issuers will adopt mandatory arbitration provisions will depend upon various factors, including restrictions under applicable state law, questions of enforceability generally and adverse stockholder and proxy advisor reactions.

Background. Under Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), a registration statement must be effective before an issuer may offer or sell securities. The SEC will declare a registration statement effective if the standards in Section 8(a) of the Securities Act and Rule 461 thereunder are met—principally, that disclosure of material information is complete and adequate and that effectiveness of the registration statement is consistent with the public interest and the protection of investors.

Prior to the Statement, the SEC's position was that mandatory arbitration provisions were inconsistent with the public interest, protection of investors and the anti-waiver provisions of Section 14 of the Securities Act. Consequently, the staff of the SEC would not declare a registration statement effective if such a provision were included in an issuer's governing documents.

Analysis. In remarks issued concurrently with the Statement, SEC Chairman Paul S. Atkins observed that the permissibility of mandatory arbitration provisions sits at the intersection of the federal securities laws, state corporate law and the Federal

[1] See SEC Release No. 33-11389; 34-103988 (Sept. 17, 2025).

Arbitration Act (the "FAA"). As it relates to federal securities law, the Statement highlights several Supreme Court cases from the 1980s that upheld the enforcement of arbitration agreements in light of the anti-waiver provisions of the Securities Exchange Act of 1934 in the context of broker-dealer and customer arrangements, as well as cases where the Supreme Court noted that a federal statute must include a "clearly expressed congressional intention" to override the FAA. Noting the absence of a clear and manifest congressional intent for the Securities Act to override the FAA, the Statement concludes that an assessment of the policy implications of a mandatory arbitration provision is not within the scope of the application of Section 8(a) of the Securities Act. The Statement acknowledges that state corporate law (including the Delaware General Corporate Law) may prohibit certificates of incorporation or bylaws from including issuer-investor mandatory arbitration provisions.

If the FAA were to apply, the next issue is whether there exists a valid and enforceable written agreement to arbitrate, which is itself a matter of state contract law. As a result, the Statement concludes that the SEC "does not consider it within [its] purview to conclude whether any particular issuer-investor mandatory arbitration provision is enforceable for purposes of the FAA," and does not override the FAA's policy favoring enforcement of arbitration agreements.

Implications for Issuers Adopting Mandatory Arbitration Provisions. In light of the SEC's view that mandatory arbitration provisions do not conflict with federal securities laws, issuers may now consider including such provisions in their constituent documents whether at the IPO stage or through amendments thereafter. The permissibility of such provisions under applicable state law represents a threshold issue.

In any event, adequate disclosure of any mandatory arbitration provision in the issuer's registration statement will be necessary, including the scope of claims covered, any limits on class actions, the particular arbitration forum and the potential implications for investors.

Issuers will also want to take into account the potential impact such provisions may have from a shareholder relations perspective.

For more details, please see the full Policy Statement.

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Please do not hesitate to contact us with any questions.

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