

SEC Changes Course, Concludes Mandatory Arbitration Provisions Do Not Conflict With Federal Securities Laws

November 4, 2025

The US Securities and Exchange Commission (SEC) recently changed its longstanding position disfavoring the inclusion of certain mandatory arbitration provisions in corporate certificates of incorporation or bylaws. As [Chair Paul Atkins explained](#), the SEC's September 17, 2025, [policy statement](#) "provides the Commission's views on whether mandatory arbitration provisions are inconsistent with the federal securities laws – and concludes that they are not." The upshot? The [SEC's decisions concerning](#) "whether to accelerate the effectiveness of a registration statement will not be affected by the presence of a provision requiring arbitration of investor claims arising under the federal securities laws."

To be clear, the policy statement does not express a view on whether mandatory arbitration provisions are "appropriate or optimal for issuers or investors." And Atkins explained that the SEC will not weigh in on the second-order question of whether a company **should** adopt mandatory arbitration provisions, noting that he expects "robust public debate on this issue among various interested parties." Indeed, since the SEC issued its policy statement, stakeholders have already begun debating the costs and benefits of mandating arbitration in this context – an issue we anticipate will be litigated on multiple fronts.

SEC neutral on mandatory arbitration provisions

The SEC's policy statement emphasized two main takeaways. First, the SEC is taking a neutral stance on mandatory arbitration provisions – specifically, "the presence of an issuer-investor mandatory arbitration provision will not impact decisions whether to accelerate the effectiveness of a registration statement under the Securities Act." Second, disclosure remains paramount. The SEC made clear that it will "focus on the adequacy of the registration statement's disclosures, including disclosure regarding issuer-investor mandatory arbitration provisions."

The SEC concluded that mandatory arbitration provisions are not inconsistent with the federal securities laws. But the SEC left open key questions related to state law preemption – an area that will be closely watched going forward.

Federal securities laws not inconsistent with mandatory arbitration

The SEC addressed whether the federal securities statutes "override" the Federal Arbitration Act of 1925 (FAA), which establishes "[a liberal federal policy favoring arbitration agreements](#)." The SEC identified two ways that issuer-investor mandatory arbitration provisions were previously considered to be "inconsistent" with the federal securities statutes:

1. They "could violate the anti-waiver provisions of the Federal securities statutes by foreclosing a judicial forum."
2. They "could unduly impede the ability of investors to bring private actions to vindicate their rights under the Federal securities laws by foreclosing class action litigation in courts."

After examining relevant US Supreme Court jurisprudence, the policy statement ultimately concluded that neither of these potential issues superseded the FAA's policy in favor of enforcing arbitration agreements.

The anti-waiver provisions essentially void contractual provisions that bind parties to waive compliance with the securities laws or related SEC rules and regulations. According to the policy statement, a Supreme Court case from the 1950s ([Wilko v. Swan](#)) held that the anti-waiver provisions prohibited these types of arbitration agreements. But later Supreme Court decisions from the 1980s ([Shearson/American Express v. McMahon](#) and [Rodriguez de Quijas v. Shearson/American Express](#)) held that the anti-waiver provisions only relate to waiver of "substantive obligations," not procedural or jurisdictional provisions, and thus do not preclude enforcing arbitration agreements. While those two cases addressed agreements between broker-dealers and their customers, the SEC "discern no reason to believe that any different result should follow" in the context of issuer-investor mandatory arbitration provisions.

The SEC also noted that for federal statutes enacted **after** the FAA, the Supreme Court has explained that the FAA may be superseded only by a "clearly expressed congressional intention" – which the SEC determined is not present in the federal securities statutes. The SEC thus determined that, "there is no basis to conclude that either the anti-waiver

provisions or any other provision of the Federal securities statutes displaces the primacy of the in the context of issuer-investor mandatory arbitration provisions.”

Regarding the second issue, the SEC also rejected arguments that the FAA should be displaced on the basis that mandatory arbitration provisions impede investors’ ability to bring private securities claims by foreclosing class actions and/or reducing the economic incentives to bring private claims. Among other things, the SEC relied on a Supreme Court opinion ([American Express Co. v. Italian Colors Restaurant](#)) in a case where it would cost the plaintiff more to individually arbitrate its antitrust claims than it could potentially recover. According to the SEC, the Supreme Court rejected arguments related to the plaintiff’s economic incentives because “nothing in the Federal antitrust statutes affords a right to bring a class action,” and “in fact, those statutes were enacted years before class actions were even authorized in Federal courts.”

The SEC observed that, as with the antitrust laws, “no provision in the Federal securities statutes ‘guarantee an affordable procedural path to the vindication of every claim.’” It further noted that, as with the antitrust laws, both the Securities Act and the Exchange Act were enacted “before class-action proceedings were permitted,” so “it stands to reason that ‘the individual suit’ based on claims under those acts that was considered adequate and consistent at the time those statutes were enacted remains so notwithstanding the advent of class-action litigation.” As such, the SEC concluded that even if issuer-investor mandatory arbitration provisions were to “diminish, or even eliminate” investors’ economic incentives to bring private claims, the federal securities statutes would not displace the FAA’s command to enforce arbitration agreements.

Potential conflict with state law

Separate from its analysis of the federal securities laws, the SEC identified “potential uncertainty ... regarding the intersection of the FAA and state law,” but determined this question was ultimately outside its reach. Though the SEC declined to take a position, whether the FAA preempts state laws that prohibit these types of mandatory arbitration provisions will likely be contested in future litigation.

Specifically, in the policy statement, the SEC explained that whether the FAA applies to a particular arbitration agreement “turns in the first instance on whether there is a valid and enforceable written agreement to arbitrate,” which is “generally determined based on ‘the contract law of the state governing the agreement.’” At the same time, as the SEC observed, the Supreme Court has held that the FAA may preempt state laws that “[target arbitration either by name or by more subtle methods, such as by ‘interfering with fundamental attributes of arbitration.’](#)” Given that whether the FAA applies to a mandatory arbitration provision is “a legal matter implicating the intersection of a Federal statute that Congress did not authorize the Commission to administer, and the unique laws of the state or other jurisdiction governing the provision,” the SEC declined to consider it further.

To illustrate the potential conflict with state law, the policy statement noted a recent change to the law in Delaware, the place of incorporation for [81% of US initial public offerings in 2024](#). As the SEC explained, “Delaware recently amended its General Corporation Law in a way that may prohibit certificates of incorporation or bylaws from including an issuer-investor mandatory arbitration provision.” The SEC here was referring to [DGCL Section 115\(c\)](#), which as of August 1, 2025, provides that certificates of incorporation or bylaws may designate a forum or venue for a set of claims that are not internal corporate claims, but only if the provision “allows a stockholder to bring such claims in at least **court** in this State that has jurisdiction over such claims.” (Emphasis added.) Put another way, it does not allow for the possibility that such claims could be heard in arbitration. The SEC did not weigh in as to whether this provision conflicts with the FAA, which would raise significant questions related to preemption.

It is worth noting that in his remarks at an [October gala at the University of Delaware](#), Atkins stated that he was “disappointed” by this Delaware law amendment, which “prohibited mandatory arbitration with respect to claims” in Delaware. But he recognized that the amendment was passed before the SEC issued its policy statement and urged Delaware to reconsider: “With the benefit of clarity under the federal securities laws, I hope that the Delaware legislature will revisit the prohibition of ... mandatory arbitration ... with respect to federal securities law claims.”

Scope

The policy statement specified that the SEC’s conclusion that “the Federal securities statutes do not override the FAA in the context of issuer-investor mandatory arbitration provisions” extends not only to decisions regarding whether to accelerate the effectiveness of registration statements under the Securities Act, but also to determinations regarding whether to: “(i) accelerate the effectiveness of registration statements filed under the ; (ii) declare effective post-effective amendments to registration statements; and (iii) qualify an offering statement or a postqualification amendment under .” It

also extends to other contexts, including “if an Exchange Act reporting issuer were to amend its bylaws or corporate charter” to adopt such a provision.

But the SEC declined to address the question of any “conditions or restrictions that are part of the issuer-investor mandatory arbitration provision that may impact investors’ **substantive** rights under the Federal securities laws.” (Emphasis added.) Likewise, the SEC did not take a position on “whether arbitration provisions are appropriate or optimal for issuers or investors.”

Implications

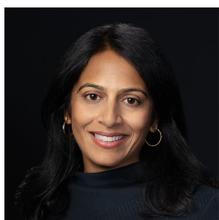
While the SEC’s policy statement in some ways breaks new ground, Atkins explained that in his view the SEC is “at least a decade too late in taking this action,” stating that the law as to “whether the federal securities statutes override” the FAA “has been clear since at least 2013.” Now that the SEC has provided clarity on the issues within its ambit, however, questions remain regarding how state contract law (including, significantly, the recent change to Delaware law) will factor in the equation. We anticipate that this issue, among other things, will be the subject of future legal challenges.

The higher-order question remains whether companies will choose to adopt mandatory arbitration provisions. There are many factors to consider, including (as the SEC pointed out) “concern about potential negative reactions from shareholders and other investors” and “actions or potential actions by others, including proxy voting advice businesses, stock exchanges, and institutional investors.”

Companies considering the relative merits of arbitration for resolving shareholder disputes will need to weigh myriad issues – including, but not limited to, the ability to have a meritless action dismissed early in the proceeding, the cost of discovery, the potential for confidentiality, the availability of precedential decisions and appeals, the familiarity of an arbiter or judge with the federal securities laws, the desirability of resolving claims on an individual basis (and the potential for “mass arbitration”), the likelihood of settlement, and the effects on directors and officers (D&O) insurance, as well as potential litigation exposure related to the adoption of the clause itself. (It is worth noting that the SEC’s policy statement is not binding on courts – which means that its conclusion that mandatory arbitration provisions do not conflict with federal law may also be subject to challenge.)

One thing remains clear: The SEC will be “focus on the adequacy” of disclosures related to mandatory arbitration provisions – so companies that do adopt such provisions should pay careful attention to related disclosures. While it remains to be seen what real-world effect the SEC’s new policy will have, we anticipate a range of reactions and legal challenges will follow.

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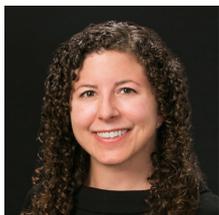
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