Articles + Publications | September 23, 2025

SEC Takes Official Position on Inclusion of Issuer-Investor Mandatory Arbitration Provisions for IPOs

WRITTEN BY

Jay A. Dubow | J. Timothy Mast | Douglas D. Herrmann | Mary Weeks | Chloe Ann C. Lee

In a policy statement issued by the Securities and Exchange Commission (SEC) on September 17, 2025, the agency announced that companies seeking to go public will be permitted to include an issuer-investor mandatory arbitration provision — which would require investors to resolve claims of fraud, false statements, or other investor claims through arbitration rather than in court litigation — without impact on the acceleration of the effectiveness of the registration statement. The SEC has traditionally declined to approve bylaw provisions that allow companies to avoid securities class action litigation by requiring claims to be submitted to arbitration. This change in policy stance observes judicial attitudes regarding the Federal Arbitration Act (FAA) and indicates that initial public offering (IPO) investors should prepare to be required to arbitrate investor claims in the imminent future.

Overall Impact on Investors and Prospective IPOs

In his open meeting statement for the SEC's vote on the policy statement and apparent shift on the appropriateness of mandatory arbitration provisions, SEC Chairman Paul S. Atkins stated, "[w]hile many people will express views on whether a company should adopt a mandatory arbitration provision, the Commission's role in this debate is to provide clarity that such provisions are not inconsistent with the federal securities laws." Despite the SEC's efforts to clarify that the policy statement is not an active endorsement of arbitration provisions and that the SEC will not take a position on whether such arbitration provisions should be adopted, Reuters reports that some commentators believe the policy statement will have the effect of "open[ing] the floodgates" to mandatory arbitration. This would reduce the number and impact of securities class action litigation by requiring claims to divert to arbitration before a class can be certified. However, another school of thought is that many companies may decline to adopt mandatory arbitration provisions, as investors may opt to avoid investments in companies with such provisions.

In addition to the possible impact on securities class action litigation, the new policy eliminates a potential obstacle to IPO registration. The SEC's decision on whether to accelerate the registration process for a prospective IPO company will no longer be affected by inclusion of mandatory arbitration provisions. Rather, the SEC's focus will be on whether the issuer-investor mandatory arbitration provisions are adequately disclosed.

Further Considerations Related to Implementation

Prospective IPO companies and investors should ensure that any mandatory arbitration provision is adequately disclosed, as the policy statement expressly states the disclosure of such an arbitration provision will be a focus of the SEC's staff. While the SEC has issued its official stance relying on prior judicial interpretation of the FAA, it is

important for prospective IPO companies and investors to also consider the applicable state law of the company's state of incorporation. State law on the issue may vary from state to state, potentially impacting the ability of prospective IPO companies to implement mandatory arbitration provisions. Such companies should still ensure that their bylaw provisions comply with the applicable state law. Lastly, the SEC's statement is silent as to current public companies, and it is yet undetermined whether a current public company would be permitted to seek an amendment to include an issuer-investor mandatory arbitration clause. If a current public company desired to have such mandatory provisions, it would likely require shareholder approval to implement.

Abrianna T. Harris also contributed to this article. She is not licensed to practice law in any jurisdiction; bar admission pending.

RELATED INDUSTRIES + PRACTICES

- Business Litigation
- Corporate
- Corporate Governance
- Securities Investigations + Enforcement
- Securities Litigation