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New SEC Policy Opens Door to Mandatory Investor Arbitration

Regulatory Certainty Creates Strategic
Opportunity to Limit Class Action Exposure



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EXECUTIVE SUMMARY

On September 17, 2025, the Securities and Exchange Commission issued a groundbreaking policy statement that fundamentally alters the regulatory landscape for public companies considering mandatory arbitration provisions. The Commission has determined that **mandatory arbitration provisions requiring investors to arbitrate securities law claims will not impact SEC decisions to accelerate the effectiveness of registration statements**. This represents the most significant development in securities law arbitration policy in decades and creates immediate strategic opportunities and considerations for public companies.

THE POLICY CHANGE

The Commission's new position removes what has been a significant regulatory uncertainty that previously deterred companies from including arbitration provisions in their corporate documents. Under this policy, SEC staff will focus solely on the adequacy of disclosures when evaluating acceleration requests, including proper disclosure of any arbitration provision itself. This landmark change means that companies can now confidently include mandatory arbitration provisions without concern that they will delay or complicate the registration process for future securities offerings.

The SEC's position is grounded in comprehensive analysis of Supreme Court precedent interpreting the Federal Arbitration Act. The Commission concluded that federal securities laws do not override the FAA in the context of issuer-investor arbitration provisions, noting that anti-waiver provisions in securities statutes do not prohibit arbitration agreements that foreclose judicial forums. The policy recognizes that the FAA's "liberal federal policy favoring arbitration agreements" controls absent clear congressional intent otherwise.

LEGAL FOUNDATION AND EVOLUTION

The Commission's analysis traces a remarkable evolution in arbitration jurisprudence. For decades following the Supreme Court's 1953 [Wilko](#) decision, the anti-waiver provision in Section 14 of the Securities Act was understood to prohibit issuer-investor mandatory arbitration provisions. The Court initially held that "the right to select the judicial forum is the kind of 'provision' that cannot be waived" under securities laws, reflecting concerns that sellers could maneuver buyers into positions that might weaken their recovery rights.

However, the regulatory landscape changed dramatically in the late 1980s with the Supreme Court's decisions in [McMahon](#) and [Rodriguez de Quijas](#). These watershed decisions established that arbitration does not inherently undermine substantive rights under securities laws and that the anti-waiver provisions apply only to substantive obligations, not to jurisdictional or procedural provisions. The Court explicitly rejected the "outmoded presumption of disfavoring arbitration proceedings" and concluded that "resort to the arbitration process does not inherently undermine any of the substantive rights afforded to petitioners under the Securities Act."

The Commission's policy statement builds on subsequent Supreme Court precedent, particularly the 2013 [American Express Co. v. Italian Colors Restaurant](#) decision, which held that the Arbitration Act requires enforcement of mandatory arbitration agreements even when bilateral arbitration may eliminate the economic incentive for some claimants to pursue their claims. The Court rejected arguments that federal statutes should override arbitration requirements merely because individual arbitration might be economically unfeasible, noting that federal laws "do not guarantee an affordable procedural path to the vindication of every claim."



STRATEGIC BENEFITS FOR PUBLIC COMPANIES

The potential benefits of implementing mandatory arbitration provisions are substantial and multifaceted. Companies can realize significant cost savings through streamlined arbitration processes that typically resolve disputes more quickly and with greater predictability than court litigation. The elimination of class action exposure for securities law claims represents perhaps the most significant benefit, as class action settlements can reach tens or hundreds of millions of dollars even in cases with questionable merit.

Arbitration provides privacy protection through confidential proceedings, which can be valuable in protecting sensitive business information during disputes. Companies also gain greater control over the dispute resolution process, including the ability to select arbitrators with relevant expertise and establish procedural rules that may be more efficient than traditional litigation. The bilateral nature of arbitration typically results in more predictable costs and timelines compared to the unpredictable dynamics of class action litigation.

From a risk management perspective, mandatory arbitration provisions can help companies avoid the substantial costs and reputational risks associated with high-profile securities class actions. The private nature of arbitration proceedings means that disputes are resolved away from public scrutiny, which can be particularly valuable for companies dealing with sensitive business matters or competitive information.

MARKET AND GOVERNANCE CONSIDERATIONS

However, the implementation of mandatory arbitration provisions carries meaningful risks that must be carefully evaluated. We believe the market reception of such provisions is likely to be mixed, with significant potential for negative shareholder reactions. Institutional investors have increasingly viewed limitations on legal remedies as contrary to good governance principles, and many have adopted policies opposing such provisions. The growing emphasis on environmental, social, and governance factors in investment decisions means that arbitration provisions could likely impact a company's ESG ratings and access to certain investment funds.

Proxy advisory firms, particularly Institutional Shareholder Services and Glass Lewis, are likely to recommend voting against directors or proposals related to arbitration requirements. These firms have historically viewed such provisions as limiting shareholder rights and we expect they may frame them as contrary to investor protection principles. The influence of proxy advisors on institutional voting means that companies implementing arbitration provisions should expect organized opposition during proxy seasons.

The broader stakeholder capitalism movement and increasing focus on corporate accountability may also influence how investors and other stakeholders view mandatory arbitration provisions. Companies must consider whether such provisions align with their public commitments to transparency and stakeholder engagement, particularly in an environment where corporate governance practices are under increasing scrutiny.



STATE LAW COMPLEXITIES

The policy statement acknowledges significant state law complications that add complexity to implementation decisions. Delaware recently amended its General Corporation Law to potentially prohibit such provisions in corporate charters and bylaws, effective August 1, 2025. While the SEC policy statement notes this development, it expressly avoids taking a position on whether Delaware's restrictions are consistent with the FAA, creating uncertainty about implementation mechanisms.

This state law uncertainty means that companies must carefully evaluate their incorporation jurisdiction and consider alternative approaches. Companies may need to explore contractual provisions in indentures or other agreements that may not be subject to the same state law limitations, or potentially consider reincorporation in jurisdictions that permit such provisions. The varying approaches different states may adopt to this issue creates a complex patchwork of legal considerations that companies must navigate.

The interaction between federal arbitration policy and state corporate law represents an evolving area of jurisprudence that may require ongoing monitoring and adjustment of corporate strategies. Companies should prepare for potential legal challenges to their arbitration provisions and ensure they have comprehensive legal analysis supporting their chosen implementation approach.

DISCLOSURE OBLIGATIONS AND BEST PRACTICES

While arbitration provisions won't affect acceleration decisions, companies must provide comprehensive disclosure regarding any such provisions. This includes clear explanation of the arbitration provision's existence and scope, description of how the provision affects investors' rights under federal securities laws, impact on investors' ability to pursue class action litigation, and any conditions or restrictions affecting investors' substantive rights.

The quality and completeness of these disclosures will be subject to SEC staff scrutiny during the registration process. Companies should develop comprehensive disclosure templates that clearly explain the rationale for arbitration provisions while addressing likely investor concerns. The disclosure should be written in plain English and avoid technical legal language that might obscure the practical implications for investors.

Future disclosure will likely include providing concrete examples of how the arbitration provision would apply to typical investor claims, explaining the arbitration process and how it differs from court litigation, describing any protections built into the arbitration framework, and addressing common concerns about arbitration proceedings. Companies should also consider providing cost-benefit analysis that explains why they believe arbitration serves both company and investor interests.

IMPLEMENTATION STRATEGIES

Companies considering mandatory arbitration provisions should develop comprehensive implementation strategies that address legal, business, and stakeholder considerations. The timing of implementation is critical, as market conditions and stakeholder sentiment may influence the reception of such provisions. Companies might consider phased implementation that initially applies provisions only to new securities offerings while preserving existing shareholders' rights, or include sunset provisions that allow future reconsideration of the policy.

Proactive stakeholder engagement will likely be essential to successful implementation. This should include early consultation with major institutional shareholders to gauge reaction and address concerns, comprehensive education of board members about both benefits and risks, preparation for proxy advisor engagement and potential opposition, and development of clear communication strategies that explain the business rationale for arbitration provisions.

Companies should also prepare for potential market volatility around announcements of arbitration provisions. Early adopters may face particular scrutiny, and companies should be prepared to articulate clear business justifications and demonstrate that the provisions serve legitimate corporate purposes rather than simply limiting shareholder rights.



RISK MANAGEMENT FRAMEWORK

Effective implementation of mandatory arbitration provisions requires comprehensive risk management planning. Legal risks include ensuring compliance with applicable state laws, preparing for potential challenges to provision enforceability, and maintaining adequate disclosure to meet SEC expectations. Reputational risks involve managing negative publicity and stakeholder reactions, addressing proxy advisor concerns and recommendations, and maintaining consistency with broader corporate governance principles and ESG commitments.

Operational risks include ensuring that arbitration procedures are fair and accessible to investors, maintaining adequate resources to manage arbitration proceedings, and developing internal expertise in arbitration administration. Financial risks encompass the costs of arbitration administration and proceedings, potential impacts on stock valuation and investor interest, and the need to maintain appropriate insurance coverage for arbitration-related risks.

Companies should establish clear governance frameworks for overseeing arbitration provisions, including regular board review of provision effectiveness and stakeholder impact, ongoing monitoring of market and regulatory developments, and periodic assessment of whether arbitration provisions continue to serve company and investor interests.

LOOKING FORWARD

This SEC policy statement represents a watershed moment in securities regulation that will likely influence corporate governance practices for years to come. Companies now have unprecedented regulatory clarity regarding mandatory arbitration provisions, but this clarity comes with the responsibility to carefully weigh the benefits against potential costs and risks.

We believe the market will likely see varied approaches to implementation as companies assess their specific circumstances, shareholder bases, and strategic objectives. Early adopters may face additional scrutiny but could also gain competitive advantages through reduced litigation costs and more predictable dispute resolution processes. Companies that choose not to implement arbitration provisions may find themselves at a disadvantage if arbitration becomes more widely adopted and proves effective in managing litigation costs and risks.

The evolution of this area will depend significantly on market reactions, state law developments, and potential future regulatory changes. Companies should remain prepared to adapt their strategies as the landscape continues to evolve and should maintain flexibility in their approaches to arbitration provisions.

The Commission's policy statement fundamentally changes the calculus for public companies considering mandatory arbitration provisions. While the regulatory path is now clearer, successful implementation requires careful analysis, strategic planning, and comprehensive stakeholder engagement. Companies that approach this groundbreaking opportunity thoughtfully and systematically will be best positioned to realize the benefits while managing the risks and challenges

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