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Memorandum

Seeking to Bolster IPOs, SEC Issues Policy Statement Permitting Mandatory Arbitration of Federal Securities Law Claims

September 23, 2025

On September 17, 2025, the SEC approved by a three-to-one vote the issuance of a policy statement permitting public companies to adopt mandatory arbitration provisions for federal securities law claims in their organizational documents.

Previously, the SEC had effectively prohibited initial public offerings for companies with mandatory arbitration provisions by refusing to accelerate the effective date of registration statements for such companies pursuant to authority granted to it under Section 8(a) of the Securities Act in cases where it determines that such refusal is, among other things, in the public interest and promotes investor protections. Opponents have long contended that mandatory arbitration provisions are void under the "anti-waiver" provisions of Section 14 of the Securities Act and Section 29(a) of the Exchange Act and would undermine investor protection by removing securities lawsuits from the U.S. federal courts in favor of private arbitration and undermine the ability of investors to proceed on a classwide basis.

SEC Chairman Paul Atkins stated that while he is "pleased that the Commission is voting today on whether to issue the Policy Statement," he noted that "the agency is, unfortunately, at least a decade too late in taking this action." Pointing out that "the law in this area has been clear since *at least* 2013," Chairman Atkins stated that the issuance of the policy statement will provide clarity that mandatory arbitration provisions "are not inconsistent with the federal securities laws."[1] The SEC now takes the view that, based on the Supreme Court's current interpretation and application of the Federal Arbitration Act, the existence of such a provision will not impact determinations whether to accelerate the effective date of a registration statement. In evaluating a registration statement, the SEC staff will now focus in this area on the adequacy of the disclosure regarding the arbitration provision.

The SEC's policy statement provides companies with greater flexibility to implement mandatory arbitration provisions in connection with going public. There is, however, divergent commentary on the advisability of adopting such provisions, reflecting broad support in the business community for procedural mechanisms that reduce the burden and expense of securities class action lawsuits but also cautioning that arbitration has both pros and cons for companies that must be considered carefully. Moreover, companies will also need to consider

[1] *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

the enforceability of these provisions as a matter of relevant state law and the likelihood of further federal court litigation around the provisions under the federal securities laws "anti-waiver" provisions. For example, recent amendments to Section 115 of the Delaware General Corporations Law provide that forum selection provisions in Delaware charters and bylaws must provide for a Delaware forum (state or federal). The status of such provisions under Nevada and Texas law remains unclear.

Companies inclined to consider adopting mandatory arbitration provisions should be thoughtful about how they proceed and exercise care in the drafting of such provisions.

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