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SEC Issues Policy Statement Approving Use of Mandatory Arbitration Clauses in Registration Statements

On September 17, 2025, the Securities and Exchange Commission ("SEC"), the U.S. securities regulator, issued a policy statement reversing a long-standing policy prohibiting the use of mandatory arbitration clauses in registration documents filed by securities issuers pursuant to the Securities Act of 1933 (the "Securities Act"), such as the registration statement filed in Initial Public Offerings ("IPOs"). A copy of the policy statement can be found **Here**.

The SEC's long-standing policy prohibited the use by issuers of registration statement provisions requiring arbitration of investor claims pursuant to the Securities Act's section 14 anti-waiver provision, which, as interpreted by the U.S. Supreme Court in 1953, meant that investors could not waive their right to have their claims heard in a judicial (i.e., not an arbitral) forum. However, the Court modified that interpretation in two decisions in the 1980s, holding that the anti-waiver provision applied only to substantive provisions in a registration statement, not to jurisdictional or procedural provisions.

The new policy states that the presence of a mandatory arbitration clause in Securities Act registration statements requiring investors making claims against the issuer to submit them to arbitration will not impact the SEC's decision of whether to allow the registration statement to go effective pursuant to Securities Act sections 5 and 8(a), provided that the mandatory arbitration clause is adequately disclosed in the registration statement.

The SEC mandate in evaluating registration statements to determine

whether they should be allowed to go effective is section 8(a)'s standard of public interest and investor protection. The SEC noted the countervailing considerations of the Federal Arbitration Act's ("FAA") policy bias in favor of enforceability of arbitration clauses as a matter of freedom of contract, and the Delaware General Corporation Law's recent amendments prohibiting mandatory arbitration clauses in certain DGCL-governed corporate charter documents, further noting that the FAA can in some cases preempt state laws restricting the enforceability of mandatory arbitration clauses, ruling that the federal securities laws do not override the FAA's pro-arbitration clause enforceability bias and that the SEC did not have the competence to decide and interpret among the various state corporate laws and the federal securities and arbitration laws. Accordingly, the SEC ruled, the presence of a mandatory arbitration clause in a registration statement cannot in and of itself be deemed to contravene the section 8(a) public interest and investor protection standards and should not affect the SEC determination of whether to allow the registration statement to go effective.

With the change in SEC policy to allowing registration statements to go effective notwithstanding containing mandatory arbitration provisions as long as adequate disclosure is made, the question remains of whether, and how universally, such clauses will find their way into registration statements going forward. Issuers should consider the risks that the presence of mandatory arbitration clauses will be dissuasive to potential investors, and that a federal court in which a disgruntled investor filed suit might assume jurisdiction and override the SEC's policy in a given case, based on inadequate disclosure, substantive fairness (given a wide-spread opinion that arbitral tribunals tend to favor issuers against investors), or other grounds. In particular, since the U.S. Supreme Court recently overturned the "Chevron Doctrine" requiring courts to give deference to the interpretation by administrative agencies like the SEC of the statutes they are charged with interpreting, administering and enforcing, the courts are not obliged to pay deference to the SEC's policy either generally or on a case-by-case basis.

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