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SEC PUBLISHES POLICY STATEMENT REGARDING MANDATORY ARBITRATION PROVISIONS

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On September 17, 2025, the Securities and Exchange Commission ("SEC") published a policy statement clarifying that inclusion of mandatory arbitration provisions in a company's organizational documents will not influence the SEC's decisions about whether to accelerate effectiveness of a company's registration statement.[1] This clarification reflects a significant departure from the SEC's prior—albeit unwritten—position that it could delay or block a securities offering if a company included a mandatory arbitration clause for securities law claims in its organizational documents.

Key Takeaways

- The SEC will no longer delay securities offerings solely based upon the inclusion of a mandatory arbitration provision in a company's organizational documents.
- While this new policy provides clarity on the SEC's current position, federal and state law issues will continue to cloud the picture, as some federal and state laws may prohibit mandatory arbitration of certain stockholder claims. For non-U.S. companies, local laws may raise similar issues.
- Inclusion of mandatory arbitration provisions in organizational documents by companies going public, or existing public companies, may face litigation challenges.
- Companies considering inclusion of a mandatory arbitration provision in their organizational documents should contact counsel to discuss the potential legal risks.

The SEC's New Policy Statement

On September 17, 2025, the SEC announced that "decisions about whether to accelerate the effectiveness of a registration statement will not be affected by the presence" of mandatory arbitration

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provisions in a company's organizational documents. SEC Chairman Paul Atkins emphasized that "while 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." While this may be the SEC's view, plaintiff-side firms have already stated that they intend to challenge the SEC's position.

This policy statement represents a marked shift from the agency's previous unwritten position that the SEC staff could delay or block a company's access to U.S. public markets if a company included a mandatory arbitration clause for securities law claims in its organizational documents. This prior position appeared to be grounded in concerns that requiring arbitration, and thus eliminating a judicial forum in which a plaintiff could bring a securities claim, could run afoul of the federal securities anti-waiver provisions (Securities Act § 14 and Exchange Act § 29(a)).

Going forward, SEC staff will focus on the adequacy of registration statement disclosures, including disclosures regarding mandatory arbitration provisions, and not reject out of hand a company's registration because its organizational documents contain a mandatory arbitration provision. This means it will be up to the company and its investors to determine whether to impose a mandatory arbitration provision.

Practical Considerations and Implications

Now that the SEC no longer prohibits a company from including a mandatory arbitration provision in its organizational documents, a company must evaluate a multitude of legal considerations—in addition to non-legal considerations, such as reputation and the need and ability to attract investors—when deciding whether to adopt a mandatory arbitration provision.

1. State Law Considerations Remain Critical

Issuers may still face state statutory restrictions on including a mandatory arbitration provision. For example, Section 115(c) of the Delaware General Corporation Law, as recently amended, allows Delaware companies to include mandatory forum selection provisions in their charter or bylaws, but only as long as these provisions allow stockholders to bring direct claims in at least one court in the State of Delaware.[2] The SEC has acknowledged that new Section 115(c) may give pause to a Delaware corporation considering adoption of a mandatory arbitration provision.

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Companies will need to carefully evaluate applicable state law before adopting mandatory arbitration provisions in their governing documents.

2. Potential Limitations on Securities Class Actions

Adoption of a mandatory arbitration provision could substantially limit shareholders' ability to pursue class action lawsuits challenging disclosures in a company's SEC filings, instead channeling these disputes into individual arbitration proceedings. That would be a significant shift in the securities litigation landscape for public companies.

Potential benefits for issuers include avoiding class actions and allowing for potential control of litigation costs and exposure resulting from the securities offering process.

However, these benefits must be weighed with the potential drawbacks, including that actions brought through arbitration may lack the procedural protections imposed by the Private Securities Litigation Reform Act ("PSLRA")—including the automatic stay of discovery while motions to dismiss are pending. Additionally, companies may still face mass arbitrations covering hundreds or even thousands of individual claims, which can result in substantial costs (including, for example, paying for the arbitrator in each of these cases). In addition, there is substantial uncertainty as to whether a mandatory arbitration provision in either a company's bylaws or charter would be found by federal courts to be viable.

3. Adopters of Mandatory Arbitration Provisions May Face Legal Challenges

Despite greater SEC regulatory policy guidance, significant legal uncertainties remain. Any companies considering whether to include a mandatory arbitration provision for securities law claims should note that plaintiffs' law firms may litigate this issue and test the boundaries of the SEC's new policy and the nexus between this new policy and federal and state law. Potential litigation could raise various legal questions, including:

- Whether state laws, such as Section 115(c) of the Delaware General Corporation Law, prohibit investors from implementing mandatory arbitration provisions;
- Whether the Federal Arbitration Act ("FAA") preempts state laws that would otherwise require companies to allow investors to pursue claims in court;
- Whether mandatory arbitration provisions conflict with the anti-waiver and/or forum provisions of the Securities Act or the Exchange Act; and
- Whether a mandatory arbitration provision in a company's bylaws and/or charter is sufficient to inform an investor that it is waiving its right to bring securities litigation in the courts.

ENDNOTES:

[1]*SEC Issues Policy Statement Clarifying that Mandatory Arbitration Provisions Will Not Affect Effectiveness of Registration Statements,* U.S. SEC. & EXCH. COMM'N (Sep. 17, 2025) (https://www.sec.gov/newsroom/press-releases/2025-120-sec-issues-policy-statement-clarifying-mandatory-arbitration-provisions-will-not-affect).

[2]Del. Code Ann. Tit. 8, § 115(c) states that "[w]ith respect to claims that are not internal corporate claims, the certificate of incorporation or bylaws may require stockholders, when acting in their capacity as stockholders or in the right of the corporation, to bring any or all such claims only in 1 or more prescribed forums or venues . . . and allows a stockholder to bring such claims in *at least 1 court in this State that has* jurisdiction over such claims" (emphasis added).

SEC LAUNCHES CROSS-BORDER TASK FORCE TO COMBAT FRAUD, INCREASING SCRUTINY ON FOREIGN ISSUERS AND GATEKEEPERS

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Executive Summary

- **What is new:** The SEC has announced the formation of a cross-border task force to strengthen enforcement efforts against fraud involving foreign-based companies accessing U.S. capital markets, with a focus on China and jurisdictions perceived as high risk.
- **Why it matters:** The task force will increase scrutiny of foreign private issuers and gatekeepers such as auditors and underwriters, particularly those facilitating access to U.S. markets from certain jurisdictions.
- **What to do next:** Foreign private issuers and gatekeepers may want to review and bolster their accounting and disclosure controls and due diligence protocols, and prepare for potential new disclosure guidance and rulemaking from the SEC.

On September 5, 2025, the Securities and Exchange Commission ("SEC") announced the formation within its Division of Enforcement of a Cross-Border Task Force To Combat Fraud.[1] The new task force is designed to strengthen enforcement efforts against suspected fraud involving foreign-based companies accessing U.S. capital markets.

While the task force will continue to pursue traditional alleged securities law violations such as market manipulation and insider trading, it will apply a cross-border lens, with particular attention to companies based in China and other jurisdictions that may be perceived as posing higher regulatory risks.

Gatekeepers, such as auditors and underwriters, who facilitate access to U.S. capital markets will also face heightened scrutiny.

Key Takeaways From the SEC Announcement

Focus on Traditional Enforcement Priorities

The new task force is in line with the SEC's stated focus under the leadership of Chairman Paul Atkins and new Enforcement Director Margaret Ryan on core enforcement areas that impact retail investors—including market manipulation, insider trading, accounting fraud, and materially false or misleading disclosures—with an emphasis on cross-border activity, alongside conduct that impacts retail markets and results in demonstrable investor harm.

The task force's initial priority will be to investigate potential violations of securities laws relating to foreign companies, such as market manipulation. The announcement asserted that foreign issuers with shares trading in the United States are frequently suspected of being used for "pump and dump" and "ramp and dump" manipulation schemes.

Heightened Scrutiny of China and Other High-Risk Jurisdictions

The task force will prioritize cases involving companies operating in China and other jurisdictions where government influence and other factors are perceived by the SEC as posing increased investor risk.

The formation of the task force follows recent actions by the SEC and U.S. securities exchanges regarding the access of foreign private issuers, most notably those based in China, to the U.S. markets.

- In June 2025, the SEC issued a concept release[2] soliciting public comment on whether the definition of foreign private issuer should be amended in light of significant changes in the population of foreign private issuers, citing the increase of Chinese-affiliated variable interest entities ("VIEs") listed on U.S. exchanges.[3]
- In early September 2025, Nasdaq announced proposed enhancements[4] to its listing standards to ensure investor protection and uphold market integrity. These enhanced standards include requirements for minimum company public float and capital raised during initial public offerings ("IPOs") for companies

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principally operating in China, as well as stricter suspension and delisting procedures for companies failing to meet Nasdaq's continued listings standards.

Although the SEC is expected to face challenges in accessing evidence in China-based investigations due to data-blocking statutes, the task force could attempt to use other potential tools to gather evidence, including compelling information from U.S.-based parties such as the national offices of audit firms and/or issuing subpoenas to individuals while on travel in the United States.

Focus on Gatekeepers

Auditors, underwriters and other professionals that assist in facilitating foreign issuers' access to U.S. markets or registration of securities with the SEC may face increased scrutiny regarding their due diligence and review processes.

The SEC's emphasis on auditor conduct, in particular, is a continuation of the agency's focus on the quality of audits[5] of companies in China and other foreign jurisdictions where the SEC has encountered obstacles to conducting oversight, including difficulty in obtaining documents and information, such as audit work papers, in enforcement investigations.

Despite the oversight challenges, the SEC is expected to increase its focus and explore the use of additional investigative tools to determine whether U.S. auditors adhere to professional standards with respect to their affiliates' audit work in those jurisdictions.

SEC Cross-Divisional Review

Chairman Atkins directed other SEC divisions—including Corporation Finance, Examinations, Economic and Risk Analysis, Trading and Markets, and the Office of International Affairs—to recommend additional measures to protect investors. These measures may include updated disclosure guidance for foreign issuers and potential rulemaking to address evolving cross-border threats. There is also a risk that the Public Company Accounting Oversight Board ("PCAOB") will increase its examination and enforcement efforts for auditors of China-based issuers.

Recommendations and Next Steps

Foreign private issuers and gatekeepers should consider taking the following steps to mitigate potential risks from the SEC's heightened scrutiny.

Foreign Private Issuers

Companies listed on U.S. exchanges may want to take steps to ensure the accuracy of their disclosures in SEC filings and other public communications to investors. These steps would include:

- Reviewing accounting and disclosure controls.
- Assessing the accuracy of disclosures related to governmental influence and ownership risks.

Companies also will need to stay tuned for potential new disclosure guidance and rulemaking from the SEC in the coming months and be prepared to revise their policies, procedures and disclosures accordingly.

Gatekeepers

Auditors, underwriters and other advisers should consider bolstering their due diligence protocols, including implementing enhanced risk assessments for jurisdictions perceived as high risk. Their processes should be clearly documented to demonstrate adherence to SEC requirements and to minimize potential enforcement risk.

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ENDNOTES:

[1] https://www.sec.gov/newsroom/press-releases/2025-113-sec-announces-formation-cross-border-task-force-combat-fraud.

[2] https://www.sec.gov/newsroom/press-releases/2025-82-sec-solicits-public-comment-foreign-private-issuer-definition.

[3]Foreign private issuers benefit from certain accommodation, and the concept release identified possible approaches to amending the foreign private issuer ("FPI") definition: (1) updating the existing FPI eligibility criteria, (2) adding a foreign trading volume requirement, (3) adding a major foreign exchange listing requirement, (4) incorporating an SEC assessment of foreign regulation ap-

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plicable to the FPI, (5) establishing new mutual recognition systems, or (6) adding an international cooperation arrangement requirement.

[4] https://ir.nasdaq.com/news-releases/news-release-details/nasdaq-proposes-changes-its-listing-standards.

[5] https://www.sec.gov/newsroom/speeches-statements/gensler-audit-firms-china-hong-kong-20220826.

EXXONMOBIL ANNOUNCES FIRST-OF-ITS-KIND RETAIL VOTING PROGRAM

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On September 15, 2025, the Securities and Exchange Commission's ("SEC") Division of Corporate Finance granted[1] ExxonMobil's no-action request[2] to establish a new retail shareholder voting program (the "Retail Voting Program") that will allow shareholders to provide a standing voting instruction that directs ExxonMobil to vote their shares in line with the board of directors' recommendations on an ongoing basis.

ExxonMobil's Retail Voting Program is designed to increase retail shareholder participation in the proxy voting process. ExxonMobil reports that 75% of shares held by their retail investors were not voted at their last annual meeting, despite retail investors holding nearly 40% of their shares.

How Does It Work?

Retail shareholders will receive an invitation to "opt in" to the Retail Voting Program. Participation will be voluntary and available at no cost to all retail investors, including registered shareholders and beneficial owners holding through banks, brokers, or plan administrators. Participants can apply their standing instruction to: (i) all matters that come to a vote; or (ii) all matters except contested director elections or mergers, acquisitions, or divestitures that require shareholder approval.

On September 17, 2025, ExxonMobil filed a Schedule 14A[3] with the SEC containing sample Retail Voting Program invitations in both email and letter format and for both beneficial and registered shareholders. The filing also includes a snapshot of the website where a shareholder can submit its standing voting instruction.

Shareholders will be able to opt out of the Retail Voting Program, or override their standing instruction, at any time and at no cost to the shareholder. Votes cast pursuant to the Retail Voting Program will be submitted after the definitive proxy statement is filed and shareholders can override their standing instruction by voting using the proxy materials provided for the upcoming meeting.

Enrolled shareholders will receive an annual off-season reminder of their enrollment and rights, as well as an additional reminder before meetings involving contested director elections or specified transactions if they select the "all matters" option.

Significance and Potential Implications

The no-action relief granted by the SEC Staff is significant because Rules 14a-4(d)(2) and 14a-4(d)(3) generally prohibit proxies that confer authority for more than one meeting. The SEC Staff particularly noted in its relief that participants would receive annual reminders, could opt-out of the program or override their standing voting instruction, and would continue to receive all proxy materials.

Companies with significant retail investor bases may benefit from establishing similar programs to engage retail shareholders and increase participation at shareholder meetings, which could both help companies meet quorum requirements and reduce solicitation costs. Companies can also consider how they may be able to incorporate the voting program into their equity compensation awards and employee benefit plans.

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Companies that would like to consider establishing a similar program in advance of the 2026 proxy season should prioritize working with their transfer agent and vote processing agent so that shareholders can be given adequate time to opt in to the program before the next annual meeting.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect the views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*See* https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525.

[2]*See* https://www.sec.gov/files/corpfin/no-action/exxon-mobile-091525-incoming-letter.pdf.

[3]*See* https://www.sec.gov/Archives/edgar/data/34088/000119312525205261/d940666ddefa14a.htm.

MANDATORY DISAGREEMENTS: THE COMMISSION'S POLICY OF QUIETLY SHUTTING THE DOOR ON INVESTORS

By Caroline A. Crenshaw

Caroline Crenshaw is a Commissioner in the U.S. Securities and Exchange Commission. The following is adapted from remarks that she gave on September 17, 2025.

Today the Commission finds another way to stack the deck against investors—this time primarily small, retail shareholders in public companies. We do so by opening the floodgates to something called mandatory arbitration. So, what is mandatory arbitration?

Mandatory arbitration forces harmed shareholders to sue companies in a private, confidential forum, instead of a court and without the benefit of proceeding in the form of a class action. While, in theory, arbitration could cut costs for companies, there are real downsides for investors. Arbitrations are typically more expensive for individual shareholders; they are not public; they have no juries;[1] they lack consistent procedures; arbitrators are not bound by legal precedent; arbitration precludes collective action among shareholders; there are limited rights of appeal; and, ultimately, there is no assurance that two identical investors would get the same outcome. If that collection of things transpired in a courtroom without a party's consent, judges would not hesitate to call it what it is: a violation of due process.

The Commission takes two steps to advance this policy goal. *First*, the Commission issues a policy statement dictating that staff make public-interest findings without considering whether a corporation has forced its shareholders into mandatory arbitration.[2] And, *second,* we amend the Rules of Practice to ensure that no Commissioner or third party can effectively intervene to challenge those public-interest findings.[3]

The policy statement fails on many fronts. It fails to identify a problem. It fails to adequately address numerous and complex legal and economic issues. And it fails entirely to discuss the practical consequences of allowing public companies to mandate arbitration. If, however, we *actually were* to consider whether mandatory arbitration is in the public interest—an analysis required by the Securities Act—we would face overwhelming evidence that it is not. So, to start there, what are some of those consequences?

The Practical Consequences of Our Policy Statement

***First*, small shareholders will be prevented from vindicating their rights.** Cases involving offering frauds, accounting misstatements or other types of public company malfeasance are usually complex, and require extensive litigation resources, multiple experts, and services that require upfront fees.[4] For these types of claims, most shareholder investments are too small, and the costs of arbitration too high, to incentivize individual shareholder suits—even if the *collective* losses would more than justify the expense of litigation through class action. As one court put it, "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[5]

Indeed, the primary defense of mandatory arbitration is that it provides cost savings to companies. But if *every*

single member of a class sued in arbitration individually, there likely would not be great cost savings.[6] Part of the reason that companies will save money is precisely because many investors will decide not to sue in the first place.[7]

***Second,* the markets will go under-policed.** If we erode private rights of action, not only are shareholders uncompensated for the wrong perpetrated on them, but the *wrongdoers* get off scot-free.

There are two ways to remedy wrongdoing in our markets—(i) by governmental enforcement action or (ii) by private lawsuit. Private lawsuits can be a more efficient remedy than government action in terms of investor recompense. In 2024, securities class action settlements brought by shareholders returned approximately $3.7 billion to harmed investors.[8] By contrast, over a similar period, Commission enforcement returned only $345 million to investors.[9] This may also explain why mandatory arbitration is so appealing—some companies would rather keep their ill-gotten gains than return them to harmed investors.

If we chisel away at private actions, then we lean more heavily on the Commission to police the markets. But that crutch is faltering. The staff of the Commission has shrunk by approximately 16% since the beginning of the current fiscal year.[10] But our markets have grown.[11] So, we are reducing private enforcement mechanisms at the same time as agency resources are shrinking.[12]

One might expect that, as we deregulate and seek *less* government intervention, we would lean *more* into an individual's freedom to pursue her own recovery; not less.[13] But that is apparently not the case.

***Third,* mandatory arbitration undermines deterrence.** Deterrence is subverted, not only because wrongdoers are not held to account, but also because arbitration claims and awards are non-public. Parties bear the burden of compelled silence. Defrauded investors who are not part of an arbitration may not know they have been defrauded, nor may the markets, paving the road for the same company to inexpensively engage in the same misconduct again in the future. And where there is no public account, there is also no deterrence to *other* would-be wrongdoers.[14]

This lack of deterrence will lead not only to more brazen misconduct, but it will also reduce the integrity of our markets. It lays the groundwork for less accurate disclosures, less reliable financial statements, and executives who are incentivized to cut corners. Less accurate market information is a solution to a problem that I don't think exists.

***Fourth*, market transparency and integrity will suffer**. Judicial resolution of shareholder disputes provides a public good. Arguments about the costs of litigation often leave out the tremendous benefits being provided.

Private litigation allows the law to develop. Many seminal federal and state securities law cases have developed from private litigation.[15] Where caselaw is allowed to develop, it provides for consistent and predictable outcomes for market participants. On the contrary, there is no consistency in arbitration.

- Arbitrators are often not required to follow the law;
- There are not bound by precedent;
- Arbitrators need not provide reasoning for their decisions;
- Nor are they required to apply rules of evidence;
- Discovery and evidence are curbed; and,
- Judicial review is limited.

This means that similarly situated investors—victims of the same mass fraud—may face significantly divergent outcomes in arbitration. That is bad for our markets, which thrive on consistency and predictability.[16]

***Finally*, allowing companies to mandate arbitration squelches investor choice**. It is worth pointing out the dissonance in allowing companies to strip investors of the choice to litigate in court, while touting the primacy of investor choice in other contexts—for example, in the Commission's push to open the private markets to retail investors. This raises the unsavory specter that "freedom of investor choice" is only a Commission priority when that choice serves the goal of lining the pockets of favored business interests.

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The Commission's Policy Position is Out of Step with History and the Law

All of this is to say, there are compelling reasons that mandatory arbitration provisions are against the public interest and at odds with protecting investors.[17] They deprive shareholders of fundamental rights, fundamental choices, and they fly in the face of market integrity, fairness and efficiency. And perhaps that is why today's action is so out of step with our agency's history.[18] The Commission has never—either expressly or implicitly—granted permission to a public company to force their shareholders into mandatory arbitration.[19] And Chairmen and Commissioners of both parties—such as Chairmen Breeden, Donaldson, and Levitt—have exalted the import of private litigation,[20] alongside Congress.[21] Before today, we have never adopted a policy of willful blindness to those provisions.

To be clear—the legal analysis that staff puts forward in the Policy Statement does not demand the conclusion that we reach. Today's actions are a matter of policy and not a matter of law. Certainly, the Supreme Court has interpreted the scope of the Federal Arbitration Act to allow for greater enforcement of arbitration agreements. But, neither the Supreme Court nor Congress has ever adjudged that the FAA requires enforcement of mandatory arbitration provisions tucked away in governance documents of public companies.[22] And there are good reasons to believe that neither the FAA nor certain state laws would require enforcement of such provisions in the context of shareholder disputes.[23] For example, do corporate bylaws bear the hallmarks of privity and consent sufficient to constitute written agreements under the FAA?[24]

Absent unequivocal mandates from the courts or Congress to enforce forced arbitration provisions, the Commission should enforce the securities laws, which provide (unequivocally) that any attempt to require a shareholder to waive her rights is void.[25]

A Needless Binding of Our Hands

But, perhaps the most anomalous outcome of today's policy statement is that we predetermine a certain outcome—regardless of what a particular mandatory arbitration clause says and regardless of our statutory obligation to make a specific public interest finding for the offerings of individual issuers. Today's statement leaves little room for staff or the Commission to make an assessment of whether a particular mandatory arbitration provision violates a quintessential shareholder right—which the Supreme Court has stated would be unlawful.[26] One could imagine many clever ways that arbitration provisions could eliminate substantive rights by, for example, wholesale eliminating remedies, limitations periods, or even entire causes of action. What if there were a provision that required shareholders to bring fraud claims within one day of the occurrence of the fraud?

We have, in effect, hard-wired a finding that that mandatory arbitration is in the public interest, without any real consideration of any issuer's filings. Do we even have authority to make such a broad finding through a policy statement? I can't remember another time in recent history where the Commission chose to take a critical tool out of its toolbox for performing a task it was mandated to do by Congress.

A Policy Without a Process

This brings me to the utter lack of input from market participants.

Today's statement includes a quasi-economic analysis, which glaringly concludes that . . . we have no idea what the outcome of our policy shift might be.[27] There is a reason why we don't know the full extent of the costs and the benefits of today's action—because we didn't ask. This seismic policy shift has too many ramifications to be done without an economic analysis.

The last time mandatory arbitration provisions took the limelight, then-Chairman Jay Clayton promised that "[no] decision would be made by the Commission absent a fair amount [] of consideration and debate, including [input on] the law, the economics, [and] what investors want."[28] Commissioners who came before us shared that view.[29] Hundreds of interested stakeholders have in the past written to the Commission expressing not only concern over green lighting mandatory arbitration provisions, but also seeking the opportunity to be heard before the implementation of any policy change. These interested stakeholders include members of Congress,[30] State Treasurers of both parties,[31]

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academics of all stripes,[32] institutional investors,[33] and investor advocates,[34] among many others.[35]

Indeed, one letter from 26 Members of Congress summed it up well:

> [B]ecause of the longstanding public-position of the SEC, and the significant impact such a monumental shift in policy would have on American investors, any examination of this issue should be done in a transparent manner . . . . Anything less will be seen as a stealth attempt by the Commission to circumvent U.S. securities laws and the fundamental rights of shareholders.[36]

Today we fail to heed this warning. Instead of soliciting public comment as to the practical, economic and legal effects of our actions, we cover our ears and simply do the thing that we want to do. We could have engaged in rulemaking. We could have considered building in guardrails to protect investors and market integrity. And we could have actually addressed complex substantive questions about the nexus between our policy statement and state law,[37] and the fiduciary duties corporate managers owe to investors.[38] But, full speed ahead—no matter the consequences. Through today's policy statement, we not only silence investors in court, we also silence their ability to be heard by the Commission, the body specifically tasked with protecting their interests. This is a double slight, at best. A due process violation at worst.

This also begs the question—what other consequential actions does the Commission think it can adopt without soliciting public comment? The public should be concerned because today might mark the beginning of an era in which the Commissions acts first and asks questions only later (if at all).[39]

Doubling Down on Disenfranchisement

It would be bad enough if all the Commission did today was issue the mandatory arbitration policy statement. But we simultaneously propose amendments to our Rules of Practice in order to eviscerate the procedural rights of those who might choose to challenge an issuer's inclusion of mandatory arbitration.

Currently, when either a Commissioner or a third-party requests Commission review of almost any staff action made pursuant to delegated authority, those actions are automatically stayed pending Commission consideration. This consideration is an important backstop to delegated staff action. That all goes away with today's amendments. From now on, the automatic stay, which provides the mechanism for meaningful Commission review of registration statements before an offering hits the market, vanishes. Accordingly, I also cannot support today's amendments to the Commission's Rules of Practice.

First, creating a new exception—only the third one and the first in 30 years—to the automatic-stay provisions amplifies the tension between Rule 431 of our Rules of Practice and Section 4A of the Exchange Act.

Section 4A provides a statutory basis for the Commission to delegate its own authority to staff.[40] However, by statute, the Commission must review such delegated action if one Commissioner requests review.[41] Third parties may also petition the Commission for review of delegated actions.[42] The statute further specifies two (and only two) situations in which the delegated action "shall . . . be deemed the action of the Commission."[43]

Despite these two narrow circumstances in which the statute deems delegated action to be Commission action, Rule 431 broadly states, "An action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission."[44] On its face, the expansiveness of the rule's text directly conflicts with the statute. In our legal system, that is impermissible, and the statute wins.[45]

Historically, the automatic-stay provisions of Rule 431 eased that tension between the rule and Section 4A since decisions made pursuant to delegated authority were automatically stayed once review was requested, thus halting the immediate effect of any staff action.[46] But, by removing the pressure-release valve of the automatic-stay provisions, today's amendments amplify the conflict between Rule 431 and Section 4A.[47] Thus, today's amendments raise serious questions regarding whether Rule 431 violates the Exchange Act.[48]

Second, the Commission errs, yet again, by deciding to enact these amendments without the benefit of public comment. We assert that today's amendments are not

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subject to the notice-and-comment requirements of the Administrative Procedure Act because they qualify for an exemption for "rules of agency organization, procedure, or practice."[49] I am not convinced that this exemption applies here since after today's amendments an investor's right to Commission review will exist in name only. Seems to me, this is more than just internal agency procedure.[50]

Even if the amendments do qualify for the exemption to notice-and-comment rulemaking, we still should have solicited public comment. By my count, over the last 30 years the Commission has revised our Rules of Practice 17 times.[51] And, like today, we have often (though not always[52]) asserted that the revisions do not require notice-and-comment rulemaking.[53] The Commission nevertheless solicited public comment on revisions to the Rules of Practice in all but seven instances, and six of those seven involved amendments that were technical, ministerial, or related to other simultaneous amendments that themselves went through notice and comment.[54] And, again, today's amendments are much more than technical or ministerial changes. Indeed, the only other time that the Commission carved out exceptions to the automatic stay, it did so after notice and comment.[55]

So why not ask for comments today when the weight of past Commission practice would dictate that we do so? Maybe the Commission views the amendments as controversial, is afraid of the comments it might receive, and is uncertain how it might effectively answer those comments. Maybe it is just in a hurry to stymie investors' access to courts. Whatever the reason, the Commission's rush to adopt this change without input from the public is perplexing and hard to square with my colleagues' past calls for more robust public comment when the Commission issues rules.[56] The Commission's decision to promulgate these consequential amendments without first hearing from the public is unsound.

Third, the amendments are bad policy. They cut off the ability for investors to obtain any meaningful Commission review of staff decisions to accelerate the effectiveness of registration statements. Once a registration statement is declared effective, issuers can offer and sell those securities.[57] Thus, without an automatic stay, the offers and sales might well be completed before the Commission can review staff actions. Unwinding those transactions after the fact would be much more difficult and disruptive than it would be under the current automatic-stay regime. In light of this, after today's amendments, the opportunity for Commission review of staff acceleration of registration statements will exist merely as an illusion. Moreover, rather than providing issuers with more predictability, stripping away the automatic stay introduces more uncertainty and a greater possibility for disruption following Commission reversal of staff action than the current automatic-stay regime, which has been on the books for decades—seemingly without any complaint.[58]

As such, even if the amendments were not being so transparently paired with the Commission's attempt to promote mandatory arbitration clauses, they would not merit inclusion in our rulebook. But these amendments are not travelling alone. The Commission is using them as a tool to further tilt the scales and accelerate the adoption of mandatory arbitration clauses by public companies. This will, correspondingly, supercharge our descent into a world where investors are unable to effectively vindicate the rights Congress promised them in our nation's securities laws.

Today, the Commission has decided to hastily construct a new shortcut to its preferred policy destination. Investors will be distressed to discover that the only thing waiting to greet them at the end of their journey down this new path is a courthouse with its doors welded shut.

ENDNOTES:

[1]*See generally SEC v. Jarkesy*, 603 U.S. 109 (2024) (extolling the importance of the right to trial by jury).

[2]Final Rule, Policy Statement, "Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions," Rel. Nos. 33-11389, 34-103988 (Sept. 17, 2025) ("Policy Statement"); *see generally* Securities Act Section 8, 15 U.S.C. § 77h ("The effective date of a registration statements shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to . . . ***the public interest and the protection of investors***.") (emphasis added).

[3]Final Rule, "Amendments to the Commission's Rule of Practice," Rel. No. 34-103980 (Sept. 17, 2025).

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[4]*See* Rick Fleming, Mandatory Arbitration: An Illusive Remedy for Public Company Shareholders (Feb. 24, 2018).

[5]*Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (cited by Letter to Chairman Jay Clayton from Twenty-Two U.S. Senators (May 3, 2018) ("Letter from 22 Senators")). The point was reinforced by six bipartisan State Treasurers: [I]ndividual police and firefighter pensioners, teachers and municipal workers, and other individual and retail investors simply do not possess the financial size or scale to contest the inclusion of a forced arbitration clause or class action waiver in a company charter or corporate bylaw. The choice is either to forego any reasonable hope of accountability in the wake of securities fraud, or to forego the investment entirely. We can all support concepts of individual choice and freedom of contract without sacrificing our commitment to ensure that such investment choices and contractual relationships are informed and not predatory. Letter to Chairman Jay Clayton from State Treasurers of California, Illinois, Iowa, Oregon, Pennsylvania and Rhode Island (July 2, 2018) ("Letter from State Treasurers"); *see also* Forbes, Trial Lawyers Find Unusual Allies in Fight Against Arbitration: Conservative State Treasurers (Dec. 10, 2018) (citing the State Financial Officers Foundation letter to the SEC "opposing any move to allow companies to require investors to arbitrate disputes," and signed by ten treasurers, including from Kentucky, Indiana, Idaho, Arizona, Arkansas, Louisiana, Maine, Nevada, South Carolina and Washington) ("Letter from State Financial Officers Foundation").

[6]The Supreme Court has shown hostility to the argument that class action waivers are unenforceable. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (in upholding a class action waiver in a credit card agreement, finding that "the anti-trust laws do not guarantee an affordable path to every claim."). That does not, however, compel this Commission to put on blinders as to what the practical effect of its actions will be as a matter of public interest.

[7]Today's policy statement brings about another anomalous result. Critics of securities class actions argue that, because most shareholders own the defendant company that they sue, a recovery is tantamount to transferring money from their left pocket to their right. I disagree with that notion and would argue that shareholder litigation benefits investors, punishes wrongdoers and corrects market ills. Nonetheless, if only large shareholders can sue and recover for wrongdoing in individual arbitrations (with small shareholders effectively locked out of recovery by the lack of a class action mechanism), and small shareholders remain the equity owners of the defendant, smaller shareholders are forced to subsidize the recoveries of larger shareholders for corporate wrongdoing. In other words, we would have a redistribution of funds from those with less to those with more—a wealth transfer running in the wrong direction. *See* David H. Webber, "Shareholder Litigation without Class Actions" 57 Ariz. L. Rev. 202, 258 (2015).

[8]Cornerstone, Securities Class Action Settlements—2024 Review and Analysis, at 1.

[9]SEC Announces Enforcement Results for Fiscal Year 2024 (noting "in fiscal year 2024, the SEC distributed $345 million to harmed investors"). *See also* Commissioner Robert J. Jackson, Keeping Shareholders on the Beat: A Call for a Considered Conversation about Mandatory Arbitration (Feb. 26, 2018) (noting similar results for 2016 and further noting that private lawsuits in Worldcom, Enron, Tyco, Bank of America and Global Crossing resulted in recovery of more than $19.4 billion to investors; whereas the SEC obtained $1.75 billion). It is also worth noting that the remedies available to investors and regulators diverge—regulators can seek to disgorge only a wrongdoer's ill-gotten gains, whereas investors can seek full restitution of their own losses and compensatory damages.

[10]*See generally* Fiscal Year 2026 Congressional Budget Justification Annual Performance Plan (May 2025).

[11]*See, e.g.,* World Bank Group, Market Capitalization of Listed Domestic Companies (1975-2024) (showing U.S. market cap at $17.28 trillion in 2010 and at $62.19 million in 2024).

[12]*See* Commissioner Luis A. Aguilar, Defrauded Investors Deserve Their Day in Court (Apr. 11, 2012) ("It is unrealistic to expect that the Commission will have the resources to police all securities frauds on its own, and as a result, it is essential that investors be given private rights of action to complement and complete the Commission's efforts."); *see also* Stephen J. Choi and A.C. Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, June 3, 2015, Univ. of Michigan Law & Econ Research Paper No. 12-022 (finding that plaintiff lawsuits may more accurately target misconduct than SEC enforcement).

[13]*See generally* Brian Fitzpatrick, "The Conservative Case for Class Actions," Univ. of Chicago Press (2020).

[14]As one scholar has noted: "If you take shareholder suits out of the light of day and put them in a dark closet, you lose the deterrent effect . . . The very reasons why some corporations would like the ability to require shareholders to arbitrate securities fraud claims are the reasons why it would be bad public policy to allow them to do so." Alison Frankel, Shareholder Alert, SEC Commissioner Floats Class Action Killing Proposal," Reuters (July 17, 2017) (quoting NYU Professor Jennifer Arlen).

[15]*See, e.g.,* Commissioner Elisse B. Walter, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional ("CRCP") Program (Nov. 8, 2011) (noting the overlap of private litigation with Commission action, including "decisions on core issues including the definition of 'security,' such as [*Reves v. Ernst & Young*, 494 U.S. 56 (1990)]; when fraud is 'in connection with' securities purchases or sales, such as [*Superintendent of Ins. v. Bankers Life & Cas. Co*, 404 U.S. 6 (1971)]; the degree of intent needed to violate the antifraud provisions of the Securities laws, such as [*Ernst & Ernst v.*

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Hochfelder, 425 U.S.185 (1976)]; and the contours of the element of materiality under Rule 10b-5, such as [*Basic Inc. v. Levinson*, 485 U.S. 224 (1988)]"); Keeping Shareholders on the Beat (citing the importance of the development of Delaware law on the fiduciary duties managers owe their investors and citing *In re Caremark Int'l Inc*., 698 A.2d 959 (Del. Ch. 1996) and *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985)).

[16]These are just a few among many reasons that forced arbitration leads to bad policy outcomes.

[17]*See* Securities Act Section 8(a), 15 U.S.C. § 77h(a) (noting the requirement that the Commission's decision to accelerate a registration statement be made with due regard to "the public interest and the protection of investors").

[18]*See* SEC Associate General Counsel Thomas L. Riesenberg, Commentary, "Arbitration and Corporate Governance: A Reply to Carly Schneider," Insights: Corp. & SEC. L. Advisor, Vol. 4, No. 8, Aug. 1990, at 2 ("[I]t would be contrary to the public interest to require investors who want to participate in the nation's equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such waiver is made through a corporate charter rather than an individual investor's decision.")

[19]*See* Consumer Federation of America, A Settled Matter: Mandatory Shareholder Arbitration Is Against the Law and the Public Interest, at 15-19 (2018) ("A Settled Matter") (noting that at least twice in recent history, staff has rebuffed acceleration requests with the presence of a corporate mandatory arbitration clauses (Franklin First Financial Corp. and Carlyle Group LP), and three times staff has granted no action relief to corporations who sought to exclude proxy provisions that required the adoption of mandatory arbitration provisions (Gannett Co. Inc.; Pfizer Inc.; and Alaska Air Group, Inc.); *see also* Office of Chief Counsel, Division of Corporation Finance, Letter Regarding Johnson & Johnson's Letter Dated December 11, 2018 (Feb. 11, 2019) (granting company no-action relief to exclude proxy proposal that would require the company to adopt a bylaw provision requiring disputes be arbitrated). Certain corporations have done offerings under Reg A with such provisions where there is no public interest finding required of the Commission.

[20]Former Chairman Richard Breeden, for example, stated that "[p]rivate rights of action are an essential enforcement tool to protect investors against fraud. Private suits under Section 10(b) of the Securities Exchange Act and Rule 10(b)(5) thereunder, for example, are instrumental in recompensing investors who are cheated through the issuance of false and misleading information or by other means. When corporate officers, accountants, lawyers or others involved in the operation of a public company deceive investors for their own benefit, they should be held accountable for their actions. If this were not the case, investors would be far less willing to participate in our securities markets. This would limit the most important source, and raise the costs, of new capital for all American businesses." Chairman Richard Breeden, Private Litigation under the Federal Securities Laws, Hearings before the Senate Securities Subcommittee (1993). Former Chairmen Donaldson and Levitt, along with former Commissioner Goldschmid, wrote a joint amicus brief stating that "Private cases, so long as they are well grounded, are an important enforcement mechanism supplementing the SEC in the policing of our markets. Most often, the larger the frauds, the greater investors must rely on private cases to recover their losses." *Brief Amici Curiae of Former SEC Commissioners in Support of Petitioner's Interest, Stoneridge Investment Partners, LLC v. Scientific-Atlantic, Inc*., 552 U.S. 148 (2008).

[21]*See, e.g*., H.R. Conf. Rep. 104-369, 104th Cong., 1st Sess. 1995, 1995 WL 709276, at *31 (House of Representatives Conference Report noting that private securities actions "promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditor, directors, lawyers and others properly perform their jobs. . . . [Private securities actions are] an indispensable tool with which defrauded investors can recover their losses without having to rely on government action.").

[22]Letter to Chair Mary Jo White from Twenty-Nine Law Professors (October 30, 2013) ("Letter from 29 Law Professors") ("[T]he FAA has never been interpreted to require the enforcement of bylaws or similar provisions unilaterally adopted to remove judicial oversight of investor disputes.").

[23]*See, e.g., id*.; A Settled Matter, at 21-25; infra at n.36. The Policy Statement relies on *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332 (1987) and *Rodriguez de Quijas v. Shearson/American Express, Inc*., 109 S. Ct. 1917 (1989) to conclude that the anti-waiver provisions of the securities statutes do not override the FAA's policy of favoring enforcement of arbitration agreements. Those cases, however, held that arbitration clauses in brokerage agreements did not violate the anti-waiver provisions, where that the arbitration process was carried out by a self-regulatory organization (SRO) that was subject to the oversight of the Commission. *See McMahon*, 482 U.S. at 233-34; *Rodriguez*, 490 U.S. at 483. This was the position advocated by the Commission itself in its amicus in *McMahon*, noting that its position "would not apply" where the arbitration procedure was not subject to the SEC's oversight. Notably, after *McMahon* and *Rodriguez* were decided, the Commission took the position that it would not accelerate a registration statement under Section 8A where the company mandated arbitration of shareholder disputes. *See* Carl Schneider, "Change, the SEC and . . . me: Reflections From the Loyal Opposition," Revised Remarks before the 1998 ABA Annual Meeting, at 14 (1998) (company counsel to First Keyston noting that "I was advised that the commission itself determined not to allow acceleration of the registration statement's effectiveness if and when we requested acceleration . . . unless we eliminated the

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arbitration provision."). But *see American Express Co. v. Italian Colors Restaurant*, 133. S. Ct. 2304 (2013) (noting that courts must "rigorously enforce" arbitration agreements, and that the federal anti-trust laws do not evidence an intention to preclude a waiver of class action, rendering and arbitration provision enforceable).

[24]Ann Lipton, "Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws," 104 Georgetown Law Journal 583 (2016).

[25]*See* Securities Act Section 14, 15 U.S.C.A. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."); Exchange Act Section 29(a), 15 U.S.C.A. § 78cc(a) ("Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder, or any rule of a self-regulatory organization, shall be void.").

[26]The Court has ruled that a mandatory arbitration provision would violate the securities laws "where arbitration is inadequate to protect the substantive rights at issue." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

[27]Policy Statement at 19-20 ("It is possible that some issuers may adopt issuer-investor mandatory arbitration provisions, which could potentially deter or prevent some investors from filing civil actions arising under the Federal securities laws. . . . It is difficult to estimate . . . the ultimate economic impact of such provisions.").

[28]Council of Institutional Investors, Spring 2018 Meeting, Plenary 1: Interview with the SEC Chair (Mar. 12, 2018) (17:40).

[29]*See, e.g.*, Keeping Shareholders on the Beat, ("[I]f we're going to take away investors' rights to their day in court, I hope my colleagues on the Commission can agree that we should, at least, do so in the light of day.").

[30]Letter from 22 Senators (voicing concerns that the Commission "might be willing to abandon a critical investor protection and remedy without applying the rigorous processes and analysis that would normally accompany such a major change in policy."); Letter to Chairman Jay Clayton from Twenty-Six Members of Congress (March 12, 2018) ("Letter from 26 Members of Congress").

[31]*See* Letter from State Treasurers; Letter from State Financial Officers Foundation.

[32]Letter from 29 Law Professors.

[33]*See, e.g.,* Comment Letter to Chairman Jay Clayton from Council of Institutional Investors (Jan. 31, 2019).

[34]Letter to Chairman Jay Clayton From 56 Organizations (Jan. 16, 2018) (underscoring the need for an open and deliberative process) ("Letter from 56 Organizations"); Letter to Chairman Jay Clayton from Public Citizen and Better Markets (Mar. 16, 2018); Letter to Chairman Jay Clayton from 133 Organizations (Aug. 21, 2018).

[35]*See, e.g.,* Letter to Jay Clayton from the North American Securities Administrators Association, Inc. (Feb. 21, 2018).

[36]Letter from 26 Members of Congress.

[37]The Federal Arbitration Act (FAA) provides a presumption in favor of arbitration. *See* 9 U.S.C. § 2. But, the presumption only applies to valid and binding clauses in valid and binding contracts—matters of state law—and it does not apply "upon such grounds as exist at law or inequity for the revocation of any contract. 9 U.S.C. § 2. Delaware law prohibits mandatory arbitration. 8 Del. Code Ann. Tit. 8, Section 115(c) (2025); *see also* Mohsen Manesh and Joseph A. Grundfest, "The Corporate Contract and Shareholder Arbitration," 98 N.Y.U. L. Rev. 1106 (Oct. 2023) (arguing that mandatory arbitration provisions are inequitable and unenforceable under state law (which is not preempted under the FAA)); Ann Lipton, "Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws," 104 Georgetown Law Journal 583, 587 (arguing that "corporate governance arrangements are not contractual" and therefore not subject to the FAA's presumption because "contract law is organized around a theory of consent, whereby the application of state coercive force is justified on the presumption that the parties, acting at arms' length, agreed to terms that they deemed to be mutually beneficial at the time"); Asaf Raz, "Mandatory Arbitration and the Boundaries of Corporate Law," 29 Geo. Mason L. Rev. 223 (2001) (arguing that corporate law is nearly the structural opposite of contract law). The Policy Statement expressly does not address whether any mandator arbitration provision is valid and enforceable pursuant to state contract law, noting that "it is not within the Commission's purview." *See* Policy Statement at 7-8. Notably, however, earlier this week staff granted no-action relief based on matters of Indian law, making it hard to understand why, for example, Delaware law might be too inscrutable. *See* Office of Mergers and Acquisitions, Division of Corporation Finance, Letter re Infosys Ltd (Sept. 11, 2025) ("Indian law mandates that the Issuer Tender Offer be open to all shareholders [] on equal terms . . . . ").

[38]*See, e.g.*, Letter from 56 Organizations.

[39]The Commission might do well to pause and consider how such a playbook might be used in the future when their seats are occupied by new individuals. It would not be surprising if future Commissions adopted the same tactics to advance their own (perhaps very different) policy goals.

[40]*See* Exchange Act Section 4A(a), 15 U.S.C. § 78d-1(a).

[41]*See* Exchange Act Section 4A(b), 15 U.S.C. § 78d-1(b).

[42]*See* Exchange Act Section 4A(b), 15 U.S.C. § 78d-1(b).

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[43]Exchange Act Section 4A(c), 15 U.S.C. § 78d-1(c) (explaining that delegated staff action is "deemed the action of the Commission" only if either (1) the Commission declines review or (2) no review is sought within the time periods in Commission rules); *see also* Rules of Practice 430(b) & 431(c), 17 C.F.R. §§ 201.430(b) & .431(c) (providing time periods for seeking Commission review of delegated actions).

[44]*See* Rule of Practice 431(e), 17 C.F.R. § 201.431(e).

[45]*See* Am. Fed'n of Gov't Emps., *ALF-CIO v. Gates,* 486 F.3d 1316, 1321-22 (D.C. Cir. 2007) (Kavanaugh, J.) ("If the relevant statutory language is plain but is inconsistent with [agency] regulations, we must hold the regulations invalid.").

[46]*See* Rule of Practice 431(e), 17 C.F.R. § 201.431(e).

[47]This is especially true since there is a ticking clock for investors to obtain anything resembling meaningful Commission review of the staff decisions to accelerate registration statements because, by statute, registration statements without active delaying amendments go effective no later than 20 days after filing. *See* Securities Act Section 8(a), 15 U.S.C. § 77h(a) (effective dates of registration statements); 17 C.F.R. § 230.473 (delaying amendments).

[48]This conflict looks like a facial violation, but, even if not, the rule might well violate the statute as applied to staff actions accelerating registration statements because, as explained below, such actions are particularly insulated from meaningful Commission review.

[49]5 U.S.C. § 553(b)(3)(A).

[50]*See Am. Fed'n of Lab. and Cong. of Indus. Orgs. v. NLRB*, 57 F.4th 1023, 1035-36 (D.C. Cir. 2023) (noting that Section 553(b)(3)(A)'s exemption to notice-and-comment rulemaking does not apply to rules that alter the rights or interests of parties and that the exemption must be construed narrowly and invalidating a rule not promulgated through notice-and-comment rulemaking).

[51]*See Rules of Practice*, Exchange Act Release No. 35833, 60 Fed. Reg. 32738 (June 23, 1995) (hereinafter "June 1995 Release"); *Rules of Practice; Technical Amendments and Corrections*, Exchange Act Release No. 36174, 60 Fed. Reg. 46498 (Sept. 7, 1995) (hereinafter "September 1995 Release"); *Rules of Practice*, Exchange Act Release No. 40636, 63 Fed. Reg. 63404 (Nov. 13, 1998) (hereinafter "1998 Release"); *Rules of Practice*, Exchange Act Release No. 48018, 68 Fed. Reg. 35787 (June 17, 2003); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 49412, 69 Fed. Reg. 13166 (Mar. 19, 2004); *Adoption of Amendments to the Rules of Practice and Delegations of Authority of the Commission*, Exchange Act Release No. 52846, 70 Fed. Reg. 72566 (Dec. 5, 2005); *Amendments to the Informal and Other Procedures, Rules of Organization and Program Management, and Rules of Practice; Interim Commission Review of Public Company Accounting Oversight Board Inspection Reports and Regulation P*, Exchange Act Release No. 62575, 75 Fed. Reg. 47444 (Aug. 6, 2010) (hereinafter "2010 Release"); *Rules of Practice*, Exchange Act Release No. 63723, 76 Fed. Reg. 4066 (Jan. 24, 2011) (hereinafter "January 2011 Release"); *Rescission of Outdated Rules and Forms, and Amendments To Correct References*, Exchange Act Release No. 65686, 76 Fed. Reg. 71872 (Nov. 21, 2011) (hereinafter "November 2011 Release"); *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 78319, 81 Fed. Reg. 50212 (July 29, 2016) (hereinafter "2016 Release"); *Technical Amendments to Rules of Practice and Rules of Organization; Conduct and Ethics; and Information and Requests*, Exchange Act Release No. 83325, 83 Fed. Reg. 25365 (June 1, 2018) (hereinafter "2018 Release"); *Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons To Effect or Be Involved in Effecting Security-Based Swaps*, Exchange Act Release No. 84858, 84 Fed. Reg. 4906 (Feb. 19, 2019) (hereinafter "February 2019 Release"); *Technical Amendments To Update Cross-References to Commission's FOIA Regulations*, Exchange Act Release No. 86982, 84 Fed. Reg. 50737 (Sept. 26, 2019) (hereinafter "September 2019 Release"); *Cross-Border Application of Certain Security-Based Swap Requirements*, Exchange Act Release No. 87780, Fed. Reg. 6270 (Feb. 4, 2020) (hereinafter "February 2020 Release"); *Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments and Modified Procedures for Proposed NMS Plans and Plan Amendments*, Exchange Act Release No. 89618, 85 Fed. Reg. 65470 (Oct. 15, 2020) (hereinafter "October 2020 Release"); *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 85 Fed. Reg. 86464 (Dec. 30, 2020) (hereinafter "December 2020 Release"); *Security-Based Swap E*xecution and Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 98845, 88 Fed. Reg. 87156 (Dec. 15, 2023).

[52]*See* February 2019 Release (not claiming an exemption to notice-and-comment rulemaking); February 2020 Release (same).

[53]*See, e.g.*, 1998 Rule Release at 63405 (claiming an exemption for rules of agency organization, procedure, or practice); 2016 Rule Release at 50233 (same); December 2020 Rule Release at 86474-75 (same).

[54]*See* September 1995 Release (technical/ministerial); 2010 Release (technical/ministerial); November 2011 Release (technical/ministerial); 2018 Release (technical/ministerial); September 2019 Release (technical/ministerial); October 2020 Release (amendments to Rules of Practice related to Regulation NMS amendments, which received public comment). But *see* January 2011 Release (promulgating rules setting forth the procedural requirements to determine whether to disapprove an SRO's proposed rule change).

[55]*See* June 1995 Release.

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[56]*See* Commissioner Mark T. Uyeda, Statement on Reporting of Securities Loans (Oct. 13, 2023) (expressing "significant concerns with the rulemaking process" when the public was given only 30 days to comment); Commissioner Mark T. Uyeda, Statement on Reopening of Comment Period for Share Repurchase Disclosure Modernization (Dec. 7, 2022) ("One might ask: what is the purpose of the comment period? Is it merely an item to be checked off to satisfy the lowest acceptable standard of process required by the Administrative Procedures [sic] Act? Or is it a vital component of a discussion between an administrative agency and the public in order to better understand the effects of a proposed rule, especially under a changed factual scenario? I believe it is the latter." (footnote omitted)); Commissioner Mark T. Uyeda, Statement on the Final Rule Related to Listing Standards for Recovery of Erroneously Awarded Compensation (Oct. 26, 2002) (arguing that 30-day comment periods "significantly weaken a cornerstone of effective rulemaking: feedback from investors, issuers, and intermediaries to provide us with their expertise"); Commissioner Mark T. Uyeda, Remarks at the APABA-DC Awards and Installation Reception (Oct. 19, 2022) ("The quality of agency rulemaking suffers when the public is unable to meaningfully participate. These procedural failures also can expose Commission rulemaking to challenge in the courts."); id. (arguing that the legitimacy of agency action needs to be restored and that "[t]he blueprint for restoring that legitimacy is straightforward: ensure that every regulatory action goes well above and beyond the bare minimum required by law"); Commissioner Mark T. Uyeda, Statement on Final Rule Amendments on Proxy Voting Advice (July 13, 2022) (arguing that a 30-day comment period spanning "major holidays, including Thanksgiving, Christmas, Hanukkah, and the beginning of Kwanzaa" was insufficient and noting that short comment period might have "resulted in the Commission only seeing a narrower picture of the public concerns and failing to capture relevant data and perspectives"); *see also* Commissioner Hester M. Peirce, Rendering Innovation Kaput: Statement on Amending the Definition of Exchange (Apr. 14, 2023) ("Today's Commission treats the notice-and-comment rulemaking process not as a conversation, but as a threat."); Commissioner Hester M. Peirce, Exclusion Preclusion: Statement on the Shareholder Proposals Proposal (July 13, 2022) ("The likelihood of receiving thoughtful comments in response to these questions and the many others in the proposal is diminished by the Commission's continued unwillingness to afford adequate time for public comment."); Commissioner Hester M. Peirce, Rip Current Rulemakings: Statement on the Regulatory Flexibility Agenda (June 22, 2022) (advocating for longer comment periods and contending, "We have abandoned our careful and considered approach to altering regulation in favor of effecting hasty and sweeping change"); Commissioner Hester M. Peirce, Dissenting Statement on the Proposal to Amend Regulation ATS (Jan. 26, 2022) ("I cannot comprehend why we insist on blindfolding ourselves, rather than embracing the notice-and-comment process that has been so valuable in unearthing issues for our consideration. . . . We face no emergency in these markets that compels us to limit comments to 30 days; indeed, the Commission's precipitous rush to plow through the comment period—almost as if it were a mere formality in our process—presents a greater immediate risk to the market than any of the issues that have led to this recommendation.").

[57]*See* Securities Act Section 5(a) & (c), 15 U.S.C. § 77e(a) & (c).

[58]If there has, in fact, been some actual problem in the markets because of the status quo, we should have identified that problem and asked the public about it.

SEC UPDATE: SEC TO PROPOSE RULE CHANGE IN RESPONSE TO TRUMP'S CALL TO END QUARTERLY EARNINGS REPORTS; SEC CHARGES PENNSYLVANIA RESIDENT AND HIS COMPANIES WITH $770 MILLION PONZI SCHEME

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SEC to Propose Rule Change in Response to Trump's Call to End Quarterly Earnings Reports

Announcement and Trump's Call

On September 19, 2025, U.S. Securities and Exchange Commission Chair Paul Atkins announced that the agency intends to propose a rule change that would give U.S. public companies the option of continuing quarterly earnings reports or switching to semiannual reporting.[1] The announcement followed a September 15 post from President Donald Trump urging companies to abandon the quarterly model in favor of six-month intervals, which he described as less costly and more supportive of long-term business priorities.[2]

Historical Context

Quarterly reporting for public companies has been

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required in the United States since 1970, when the SEC mandated that companies file Form 10-Q in addition to their annual Form 10-K. The system was intended to give investors more frequent visibility into company performance, though critics have long argued that it encourages short-term thinking and imposes significant compliance costs.

This is not the first time the frequency of public company reporting obligations has been revisited. During President Trump's first term, he similarly questioned the value of quarterly reporting. In response, the SEC issued a request for comment in 2018 on quarterly earnings releases and reports, but the rulemaking process did not move forward and the quarterly reporting requirement remained in place.

Other major markets, including the United Kingdom, the European Union, and Australia, do not mandate quarterly reports. Nonetheless, many companies in those jurisdictions still provide interim updates voluntarily to meet investor expectations, underscoring that market practice often extends beyond regulatory requirements.

Chair Atkins' Position

Chair Atkins explained that the SEC's new proposal would not abolish quarterly reports altogether but would instead allow companies to determine the cadence that works best for them.[3] He emphasized that investors, creditors, and companies should collectively decide whether quarterly or semiannual reporting is most appropriate for a given business.

Support for Semiannual Reporting

Supporters of semiannual reporting argue that reducing the number of required filings could lower compliance costs and make it less burdensome for companies to remain public. Nasdaq CEO Adena Friedman has voiced support for reforms that would reduce regulatory burdens on issuers.[4] Some investors, particularly those focused on sustainability and long-term governance, have also supported less frequent reporting, contending that quarterly disclosure encourages short-term decision making and distracts management from long-term strategy.[5] Others point to potential benefits of aligning U.S. practice with international markets, where semiannual reporting is more common, as a way to simplify cross-border comparability.

Concerns About Semiannual Reporting

Critics counter that less frequent reporting could reduce transparency, delay the disclosure of negative information, and increase risks for investors. Some commentators note that semiannual reporting may slow market efficiency and leave investors with less timely data, increasing the likelihood that negative developments will be disclosed only after significant delays.[6] Others warn that releasing financial results only twice a year could make markets more volatile when larger amounts of information are disclosed at once, while investor groups such as the CFA Institute, a global association of investment professionals, argue that six months is too long a gap between required disclosures for fast-moving industries.[7] Analysts further emphasize that even if the SEC relaxes the requirement, investors, creditors, and market participants may continue to expect quarterly updates, which could compel many companies to provide them despite a regulatory change.

Next Steps

The SEC has not yet set a timeline for issuing the proposal. Any rule change would need to go through the agency's formal rulemaking process, beginning with publication of a draft rule, a public comment period, and then a decision on adoption. Even if semiannual reporting becomes an option, many expect that a large number of companies will continue issuing quarterly updates voluntarily to satisfy investor and market expectations.

SEC Charges Pennsylvania Resident and His Companies with $770 Million Ponzi Scheme

On September 3, 2025, the SEC filed a complaint in the Eastern District of Pennsylvania charging Daryl F. Heller ("Heller") and his companies, Paramount Management Group, LLC ("Paramount") and Prestige Investment Group, LLC ("Prestige"), with orchestrating a Ponzi-like scheme that raised more than $770 million from about 2,700 investors and caused losses of approximately $400 million.[8]

The SEC's complaint alleges that from at least January 2017 through June 2024, Heller and his companies defrauded investors through a series of automated teller machine ("ATM") investment funds that promised fixed monthly returns of about 25%.[9] The SEC alleges that, dur-

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ing this seven-year period, distributions to investors were largely funded with money from new investors and high-interest loans, while the underlying ATM network never generated sufficient revenue to sustain the promised payouts.

According to the SEC's complaint, Heller and Prestige told investors their money would be used to acquire and operate a nationwide network of ATMs managed by Paramount. In reality, only a fraction of investor funds went toward purchasing ATMs, and many of those machines were never deployed, were old and damaged, or sat idle in warehouses generating no revenue.

The SEC alleges that despite this, Heller and his companies provided investors with distribution notices and account statements claiming strong ATM revenues and consistent monthly returns. The SEC's complaint highlights that the figures given to investors far exceeded Paramount's internal records. For example, in the first quarter of 2022, investors were told the ATM funds generated $50 million in fee revenue, while internal reports showed only $17.4 million, a gap of more than $32 million. Between January 2022 and September 2023, investor notices overstated ATM fee revenue by roughly $380 million.

The SEC further alleges that Heller used new investor money and high-interest merchant cash advance loans to make promised payouts to investors, while misappropriating approximately $185 million for personal use, including the purchase of a New Jersey beach house, and funneling tens of millions more to affiliated entities and fund managers who recruited investors.

According to the SEC, when new investments slowed in 2024, the scheme collapsed. Investor payments stopped and Heller attempted to buy time with misleading explanations, including claims about ATM upgrade costs, new acquisitions, and a supposed private equity buyout that never materialized.

The SEC's complaint charges violations of the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The Commission is seeking injunctive relief, disgorgement of ill-gotten gains with prejudgment interest, civil penalties, and an officer-and-director bar against Heller. In addition to the SEC's civil enforcement action, the U.S. Attorney's Office for the Eastern District of Pennsylvania announced parallel criminal charges against Heller.

ENDNOTES:

[1]*See* https://www.cnbc.com/2025/09/19/sec-to-propose-rule-change-on-trumps-call-to-end-quarterly-earnings-reporting-says-chair-atkins.html.

[2]*See* https://www.reuters.com/sustainability/boards-policy-regulation/trump-renews-calls-ending-quarterly-reports-companies-2025-09-16/.

[3]*See* https://www.reuters.com/sustainability/boards-policy-regulation/us-sec-chair-says-markets-can-decide-cadence-company-reports-2025-09-19/.

[4]*See* https://www.reuters.com/sustainability/boards-policy-regulation/nasdaq-supports-reforms-reduce-burden-public-companies-ceo-friedman-says-2025-09-15.

[5]*See* https://www.reuters.com/sustainability/boards-policy-regulation/trumps-call-end-quarterly-reports-gets-unlikely-support-climate-conscious-2025-09-16/.

[6]*See* https://www.marketwatch.com/story/trump-revives-call-to-ditch-quarterly-earnings-reports-what-comes-next-d51225ca.

[7]*See* https://www.investopedia.com/trump-wants-to-end-quarterly-reporting-for-companies-here-s-why-that-matters-11809859.

[8]*See* https://www.sec.gov/newsroom/press-releases/2025-111-sec-charges-pennsylvania-resident-his-companies-770-million-ponzi-scheme.

[9]*See* https://www.sec.gov/litigation/complaints/2025/comp-pr2025-111.pdf.

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FROM THE EDITOR

Combining Forces

On September 29, SEC Chairman Paul Atkins said the day "marks a turning point in the history of American financial markets." What this meant in translation is that Atkins' SEC is looking to align far more closely and thoroughly with the Commodity Futures Trading Commission. No more turf wars, but "operat[ing] in concert, side by side, hand in glove, so that American innovation and investment can thrive."

This isn't an actual merger of the SEC and CFTC by any means—such a merger would require Congressional and Presidential approval and Atkins has been publicly skeptical of such a move. Instead, Atkins said the two Commissions are going to seek a greater level of harmonization, as "for too long, the SEC and CFTC have operated in parallel lanes, too often in conflict with one another, leaving the American public to bear the costs of duplication, delay, and uncertainty. That era is behind us."

"What matters is building a framework where our agencies coordinate seamlessly, reduce duplicative regulation, and give markets the clarity they deserve. The path forward right now is collaboration, not consolidation," Atkins said.

He added that the CFTC being granted exclusive regulatory jurisdiction over commodity futures was the right move when it was created by Congress in 1974 ("this initiative reflected the realities of that era—distinct markets, separate participants, and clear lines between securities and commodity derivatives"). But 50 years later, "markets, like rivers, have a way of finding new channels." Many securities and commodity futures offerings have blurred, yet investors and issuers have had to contend with two different, and sometimes clashing, sets of regulations pertaining to such offerings.

Atkins claimed that "decades of regulatory fragmentation have left innovation stranded," and that "entrepreneurs [have been] forced to navigate two, often conflicting, rulebooks" and many "have taken their ideas overseas. Investors have been saddled with duplicative collateral requirements, locking up capital that could otherwise drive growth. America . . . has watched innovation migrate abroad as our two agencies protected their turf at the expense of the American investor."

This era of greater collaboration between the SEC and CFTC will be most notable in crypto-related offerings. While the SEC is expected to oversee crypto securities and the CFTC cover the bulk of digital assets transactions, the two Commissions hope to make borders between securities and commodities to be as traversable as possible in the digital space.

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