Labaton Keller Sucharow

Investor Alert

Forced Arbitration One Year After the SEC Reversed Course

One year after the Securities and Exchange Commission ("SEC") reversed its long-standing opposition to forced arbitration provisions in initial public offering ("IPO") registration statements,[1] the feared rush toward private arbitration has not occurred. The policy change opened the door for companies going public to require investors to resolve claims in arbitration rather than in federal court. Critics warned that these provisions could force investors into costly, individual proceedings and weaken protections under the federal securities laws.[2]

What the SEC changed

On September 17, 2025, the SEC announced that it "will not put its thumb on the scale" on forced arbitration. Commissioner Hester Peirce explained that "[i]f companies opt for mandatory arbitration clauses, investors can decide what to make of them."[3] The statement, issued without public notice and comment, reversed decades of SEC skepticism about provisions that can prevent investors from bringing claims in federal court.[4] Former Commissioner Caroline Crenshaw, then the SEC's lone Democratic commissioner, warned that the policy would "open the floodgates" to mandatory arbitration, deny shareholders their rights, and allow alleged misconduct to remain private. She also noted that many investors may not sue if they cannot share legal costs through a class action.[5]

Why Forced Arbitration Matters

Before the reversal, companies that tried to include mandatory arbitration clauses in IPO registration statements were met with firm SEC resistance.[6] Critics contend that forced arbitration can give companies too much control over the forum, rules, and location of disputes. Arbitration proceedings are generally private, discovery can be limited, and judicial review is narrow.[7]

Class actions also make it practical for investors with similar claims to pool costs and pursue relief together. Without that option, many individual claims may be too small to justify the expense. Private lawsuits have long played an important

[1] Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions, 17 C.F.R. §§231, 241, (Sept. 19, 2025).

[2] American Association For Justice, *SEC Policy Change to Gut Shareholder Rights: What They're Saying*, Press Release (Oct. 17, 2025).

[3] Hester M. Peirce, Commissioner, U.S. Sec. & Exch. Comm'n, *Staying in Our Lane: Statement on Two Recommendations from the Division of Corporation Finance* (Sept. 17, 2025).

[4] Lauren A. Ormsbee, *SEC Arbitration Shift Is At Odds With Fraud Deterrence*, LAW360 (Oct. 6, 2025); Al L. Fatale III, *SpaceX's IPO asks investors to surrender more than they realise*, FT ADVISER (Aug. 17, 2026).

[5] *See* Caroline A. Crenshaw, Commissioner, U.S. Sec. & Exch. Comm'n, *Mandatory Dis-Agreements: The Commission's Policy of Quietly Shutting the Door on Investors* (Sept. 17, 2025) (likening the SEC's policy shift to "a courthouse with its doors welded shut").

[6] *See, e.g.*, Steven Davidoff Solomon, *Carlyle Readies an Unfriendly I.P.O. for Shareholders*, N.Y. TIMES (Jan. 18, 2012); Rick Fleming, *Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders*, PLI'S THE SEC SPEAKS (Feb. 24, 2018).

[7] *See* Sam Rosen, *Clauses and Consent: How Forced Arbitration Quietly Took Over Everything*, SYSTEMIC JUSTICE JOURNAL: CRITICAL CORPORATE THEORY COLLECTION (July 2021).

role in enforcing the securities laws: since 1995, investors have recovered approximately $100 billion through securities class actions, including more than $19.4 billion after the WorldCom, Enron, and Tyco frauds.[8]

Forced arbitration can create risks for companies as well. Federal securities cases are subject to heightened pleading rules, discovery is generally paused while a motion to dismiss is pending, and federal judges often have experience with these claims. If an arbitration clause bars class proceedings, investors may file separate claims based on the same alleged conduct. Executives, lawyers, and other witnesses could then be called to testify repeatedly, without a single judgment resolving the issue for everyone.

What Happened After One Year

After the reversal, a broad group of investors and governance organizations urged the SEC to change course. They included 61 pension funds and institutional investors, the International Corporate Governance Network, the Council of Institutional Investors, the California Public Employees' Retirement System, Oregon's state treasurer, the San Francisco City and County Employees' Retirement System, and Glass Lewis.[9]

The predicted rush has not materialized. Of 330 IPO filings since September 17, 2025, only one company, SpaceX, has included a forced-arbitration provision in its registration statement. SpaceX did so in June 2026, when it raised $85 billion in a closely watched IPO.

Legal scholars, former SEC officials, and securities lawyers generally view SpaceX as an outlier. SpaceX is incorporated in Texas, which has no state law barring these provisions, and its CEO is the majority owner and has unusual resources to absorb the costs and risks of litigation or arbitration. Most boards appear unwilling, at least for now, to leave the federal court system or risk alienating investors. As Harvard law professor John Coates observed near the end of the 2026 proxy season, it remains "business as usual."[10]

For investors, the practical takeaway is straightforward: forced arbitration is now an option for companies going public, but it has not become common. Investors should still review IPO documents for provisions that require arbitration or restrict class claims.

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[8] Natalia Renta, *SEC's New Forced Arbitration Policy Puts Everyday Investors at Risk*, Chief Investment Officer (Apr. 6, 2026).

[9] Alliance to Protect Shareholder Value, *One Year of Opposition: Only SpaceX Backs Highly Controversial SEC Attack on Shareholders After 365 Days, 330+ IPOs Filed*, (Sept. 17, 2026).

[10] Dan Novak, *SpaceX Took a Risk on Mandatory Arbitration, Other IPOs Staying Away*, LAW.COM (Aug. 26, 2026).

Labaton Keller Sucharow's lawyers are available to address any questions you may have regarding these developments. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or the contacts below.

Lauren A. Ormsbee:
Partner
LOrmsbee@labaton.com
+1 212.907.0864

Jacqueline E. Lacovara:
Associate
JLacovara@labaton.com
+1 212.907.0754