Assessing the Benefits of Mandatory Individual Arbitration Over Securities Class Actions

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For decades, securities class actions have driven domestic and foreign companies to avoid listing on the U.S. public markets. Given the importance of vibrant public securities markets to the sustained prosperity and competitiveness of the United States, the work of the Committee on Capital Markets Regulation (the "**Committee**") and our directors over the past two decades has emphasized our strong belief that it is critical to allow U.S. public companies and shareholders to adopt a mandatory system of individual arbitration[1] instead of securities class actions. Our collective efforts to bring awareness and change on this issue have encompassed reports,[2] academic research,[3] an academic blog,[4] op-eds,[5] litigation in federal court,[6] and an amicus brief before the U.S. Supreme Court.[7] The Committee therefore commends the Securities and Exchange Commission (the "**SEC**") for issuing a policy statement clarifying that the presence of an agreement to individually arbitrate claims arising under the federal securities laws will not impact the decision whether to accelerate the effectiveness of an issuer's registration statement (the "**Policy Statement**"),[8] a step that is necessary before issuers may sell their securities in a public offering, including in particular an initial public offering ("**IPO**").

In this statement, we review how mandatory arbitration provisions are both beneficial and legal. We first examine the costs of securities class actions and how adopting mandatory arbitration instead would stimulate the public markets. Next, we provide a brief history of the SEC's treatment of mandatory arbitration provisions. Finally, we explain how the Federal Arbitration Act (the

[1] For brevity, we will refer to "a mandatory system of individual arbitration" as "mandatory arbitration" throughout.
[2] COMMITTEE ON CAPITAL MARKETS REGULATION, *Interim Report of the Committee on Capital Markets Regulation* (Nov. 2006) [hereinafter **CCMR INTERIM REPORT**], https://capmktsreg.org/wp-content/uploads/2022/11/Interim-Report-of-the-Committee-on-Capital-Markets-Regulation-1.pdf; COMMITTEE ON CAPITAL MARKETS REGULATION, *The Competitive Position of the U.S. Public Equity Market*, (Dec. 2007), https://capmktsreg.org/wp-content/uploads/2022/11/The-Competitive-Position-of-the-US-Public-Equity-Market-1.pdf; COMMITTEE ON CAPITAL MARKETS REGULATION, *U.S. Public Equity Markets Are Stagnating*, (Apr. 2017), https://capmktsreg.org/wp-content/uploads/2022/11/U.S.-Public-Equity-Markets-are-Stagnating-1.pdf; COMMITTEE ON CAPITAL MARKETS REGULATION, *Roadmap for Regulatory Reform* (May 2017), https://capmktsreg.org/wp-content/uploads/2022/11/Roadmap-for-Regulatory-Reform-1.pdf.
[3] Hal S. Scott and Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARVARD JOURNAL LAW & PUBLIC POLICY 1187 (2013).
[4] Hal S. Scott, *Shareholders Deserve Right to Choose Mandatory Arbitration*, THE CLS BLUE SKY BLOG (Aug. 21, 2017), https://clsbluesky.law.columbia.edu/2017/08/21/shareholders-deserve-right-to-choose-mandatory-arbitration/.
[5] R. Glenn Hubbard and John L. Thornton, *Action Plan for Capital Markets*, THE WALL STREET JOURNAL (Nov. 30, 2006), https://www.wsj.com/articles/SB116484940945536404; Hal S. Scott & Leslie N. Silverman, *The Alternative to Shareholder Class Actions*, THE WALL STREET JOURNAL (Apr. 1, 2012), https://www.wsj.com/articles/SB10001424052702303816504577312373860495762; Hal S. Scott, *Relax the Rules to Kickstart the Stalled IPO Market*, FINANCIAL TIMES (May 10, 2017), https://www.ft.com/content/9fcfb668-3409-11e7-99bd-13beb0903fa3; Hal S. Scott, *The SEC's Misguided Attack on Shareholder Arbitration*, WSJ (Feb. 21, 2019), https://www.wsj.com/articles/the-secs-misguided-attack-on-shareholder-arbitration-11550794645.
[6] Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson, No. 22-1657, 2023 WL 3316329 (3d Cir. May 9, 2023).
[7] Brief for the Committee on Capital Markets Regulation as Amicus Curiae Supporting Petitioners, Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (No. 13–317).
[8] SECURITIES & EXCHANGE COMMISSION, *Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions*, 90 Fed. Reg. 45,125 (Sept. 19, 2025) [hereinafter **Policy Statement**].

"**FAA**") allows for and protects the legal right of companies and shareholders to opt for mandatory arbitration of U.S. securities law claims, both federally and under state law. Specifically, at the federal level, as the SEC Policy Statement explains, the federal securities laws do not override the right to agree to mandatory arbitration – regardless of whether such agreements are adopted during the IPO process or through subsequent amendment of corporate documents. At the state level, state attempts to prohibit mandatory arbitration provisions are preempted by the FAA.

Mandatory Arbitration Provisions Would Stimulate U.S. Public Markets

U.S. public equity markets are rapidly shrinking. From a peak of 7,842 public companies in 1997,[9] there were only 5,152 public companies at the end of 2024,[10] a contraction of 34%. In the 2000s, the principal problem facing U.S. public equity markets was foreign companies avoiding the U.S. public markets in favor of listing abroad. Today, the issue is principally *U.S.* companies opting to remain private. In either case, a key determining factor driving companies to avoid U.S. public listings is the specter of securities class actions.[11]

Securities class actions impose substantial costs on U.S. publicly listed companies and their shareholders. The United States is the only developed country in which shareholders can, without significant restriction, form a class and sue their own company for violations of the securities laws. As a result, U.S. companies are exposed to litigation risk for nothing more than a stock drop. This risk can cost billions annually. Shareholders bear the costs (in dollars and management time) of defending and settling these suits. One study found that in the 20-day window before and after the filing of a securities class action, an average firm experiences an abnormal return drop of 12.3%.[12]

Even where their legal merits are often doubtful, almost all securities class action suits are settled given the prospect of billions in potential liability. In 2024, 229 new federal securities class action lawsuits were filed in the United States.[13] Securities class action settlements totaled $3.8 billion,[14] with total plaintiffs' attorney fees and expenses amounting to $1.06 billion.[15] Securities class actions are not only costly in monetary terms but also require management time, a cost that can be significant considering that as of 2024, the median time between filing and settling a securities class action was approximately three years.[16] Over the past decade, securities class actions have

[9] Christine Dobridge, Rebecca John, and Berardino Palazzo, *The Post-COVID Stock Listing Boom*, FEDS NOTES (Jun. 17, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/the-post-covid-stock-listing-boom-20220617.html.

[10] Jay R. Ritter, *Number of Foreign and Domestic Companies Listed on Major U.S. Exchanges, 1980 – 2024*, WARRINGTON COLLEGE OF BUSINESS, https://site.warrington.ufl.edu/ritter/files/number-of-listed-firms-on-US-exchanges.pdf.

[11] *See generally*, CCMR INTERIM REPORT, *supra* note 2.

[12] Tamas Barko, Luc Renneboog, and Hulai Zhang, *Corporate Fraud and the Consequences of Securities Class Action Litigation* (Jul. 26, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521118.

[13] Edward Flores and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2024 Full-Year Review* at 1, NERA (Jan. 22, 2025), https://www.nera.com/insights/publications/2025/recent-trends-in-securities-class-action-litigation--2024-full-y.html?lang=en.

[14] *Id*.

[15] *Id*. at 29.

[16] Laarni T. Bulan and Eric Tam, *2024 Review and Analysis: Securities Class Action Settlements* at 13, CORNERSTONE RESEARCH (2025), https://www.cornerstone.com/wp-content/uploads/2025/03/Securities-Class-Action-Settlements-2024-Review-and-Analysis.pdf.

been lodged against an average of 5.7% of U.S. public companies per year[17] and have resulted in aggregate settlements of $32.7 billion,[18] a significant scale that is hard to justify, particularly in light of the fact that their purported benefits have not been borne out.

Securities class actions are ineffective at accomplishing their ostensible goals of compensating harmed investors (including retail investors) or deterring wrongdoing. Investors often hold stock in *both* the plaintiff class and defendant company, a phenomenon that has become more pronounced with the rise of index investing. Increasingly, investors are thus essentially suing themselves, effectively recirculating money within the same investor base, minus substantial attorneys' fees. Fees of plaintiffs' counsel typically amount to 25% of class action settlements.[19] And recoveries for retail investors are often so small that they do not bother with the paperwork necessary to collect.[20] Moreover, these suits do little to deter wrongdoing, as the individual directors and officers who profit from fraud rarely pay for any part of the plaintiffs' recovery.[21] Instead, past research has shown that deterrence mainly stems from publicity of the wrongdoing itself, uncovered by the press or disclosed by insiders, which nearly always results in the wrongdoers losing their jobs.[22]

Adopting mandatory arbitration provisions in the governing documents of U.S. publicly listed companies would eliminate the costs of securities class actions, replacing it with a far less costly system of claims resolution, thereby removing a major factor preventing companies from going public in the United States and stimulating our public capital markets. And doing so would result in limited to no diminution of investor protection. The strong U.S. public enforcement regime for securities laws will still provide a full measure of deterrence of violations in our markets. In 2024, the SEC announced that in the past fiscal year alone it had filed 583 total enforcement actions and obtained orders for $8.2 billion in financial remedies, the highest amount in the agency's history.[23] The SEC also distributed $345 million to investors in fiscal year 2024 (and $2.7 billion total over the period 2021 to 2024).[24]

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[17] CORNERSTONE RESEARCH, *Securities Class Action Filings: 2024 Year in Review* at 13, Fig. 12 (2024), https://www.cornerstone.com/wp-content/uploads/2025/01/Securities-Class-Action-Filings-2024-Year-in-Review.pdf.

[18] Flores and Starykh, *supra* note 13 at 20, Fig. 18 (settlements rise to $45.1 billion after adjusting for inflation).

[19] Scott and Silverman, *supra* note 3 at 1193.

[20] *See, e.g.,* Albert H. Choi, Stephen J. Choi, and A.C. Pritchard, *Just Say No? Shareholder Voting on Securities Class Actions*, 1(1) UNIVERSITY OF CHICAGO BUSINESS LAW REVIEW 41, 62 (2022) ("[P]ayment is typically only pennies on the dollar for losses; many investors do not bother to even submit claims for class action settlements"); Catherine J. Galley et al., *Approved Claim Rates in Securities Class Actions: Evidence from 2015–2018 Rule 10b-5 Settlements,* CORNERSTONE RESEARCH (2020), https://www.cornerstone.com/insights/research/approved-claims-rates-in-securities-class-actions/ (finding that the median dollar amount of claims made by securities class action class members was only 58.2% of estimated aggregate damages); *see also* Scott and Silverman, *supra* note 3 at 1193 & nn. 22, 24.

[21] Scott and Silverman, *supra* note 3 at 1197.

[22] *Id.* at 1198.

[23] SECURITIES & EXCHANGE COMMISSION, *SEC Announces Enforcement Results for Fiscal Year 2024*, (Dec. 17, 2024), https://www.sec.gov/newsroom/press-releases/2024-186.

[24] *Id.*

An effective mandatory arbitration provision requires protection against so-called "mass arbitration." In recent years, plaintiffs' attorneys have contorted agreements to individually arbitrate into a scheme resembling class actions, imposing corresponding costs. Specifically, plaintiffs' attorneys solicit for prospective clients and simultaneously file hundreds or thousands of nearly identical claims against a company, seeking to force settlement regardless of merit.[25]

Careful crafting of arbitration agreements can mitigate this risk. Provisions in the agreement to arbitrate should require the defendant company to bear the upfront forum costs for *only* a limited number of substantially similar claims, with the forum costs for any subsequently filed claims being borne initially by the claimant (or more likely claimant's counsel) and reimbursed by the defendant company only if successful. Although the mandatory arbitration provisions that appear generally to be used in the consumer context (in the form of agreements used by, inter alia, credit card and utility companies) require the company to bear the forum costs for *all* claims—and hence invite "arbitration fee extortion"—we do not believe the Supreme Court's test for access to the arbitral forum under the FAA—that such access not be "prohibitively expensive"[26]—requires that approach in a context that is likely to involve larger claims and in which the initial limited number of claims for which the defendant company will bear the forum costs offers a meaningful test of likely success.

As noted above, limiting the number of substantially similar claims for which the defendant company will bear the upfront costs would not prevent additional claims from being brought (as is generally the case in so-called bellwether provisions), but because claimants or their counsel would be required to front those costs, they may not be brought until the initial claims are decided. The outcome of those test cases will help both the company and the prospective claimants better assess the strengths of their respective positions.

Issuers can also adapt their indemnity practices to fit the arbitration context. It is common for issuers to indemnify underwriters against investor lawsuits. To bring such suits within the scope of arbitration, the issuer's mandatory arbitration provision can state that the provision applies to investor claims against any underwriter that consents to be bound by the mandatory arbitration provision. Issuers can further require the underwriters to consent in the underwriting agreement. In this way, investors will be bound to bring their claims against issuers and underwriters in the same arbitration, and the underwriters will be represented in all arbitrations by the same counsel at the issuer's expense, as is standard in the class action context.

SEC Treatment of Mandatory Arbitration Provisions

The issue of mandatory arbitration provisions has traditionally arisen in two contexts. In both contexts, the SEC has taken action with respect to specific companies, but prior to the Policy

[25] Charles Edward Harris, Amber Masha, and Trenten Swinton, *The Evolution of Mass Arbitration: Understanding Changes to the Arbitration Rubric*, AMERICAN BAR ASSOCIATION (Mar. 14, 2025), https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-march/evolution-of-mass-arbitration/.

[26] Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 92 (2000).

Statement, had not expressed a public view on the general permissibility of issuer-shareholder mandatory arbitration provisions.

The first context is where a company seeks to include a mandatory arbitration provision in its corporate charter or bylaws at the time of its IPO, thus subjecting the proposed provision to review by the SEC's staff before the effectiveness of the issuer's registration statement is "accelerated" by the staff, making it effective. An effective registration statement is required before the issuer's securities can be sold. For example, in connection with its 2012 IPO, The Carlyle Group L.P. proposed a mandatory arbitration provision in its limited partnership agreement that would have required individual arbitration of U.S. federal securities law claims.[27] The company withdrew this proposal shortly thereafter in response to the objections of the SEC's staff, which stated in a letter that it would *not* accelerate the effective date of Carlyle's registration statement if its limited partnership agreement contained such a provision.[28]

The second context is where a publicly listed company seeks to amend its bylaws or corporate charter to adopt mandatory arbitration at a later date.[29] Management can amend a company's bylaws or corporate charter on its own initiative, or shareholders can propose an amendment during the annual proxy process, which would require the company to amend the relevant document if the proposal is adopted. Under SEC rules, a company may exclude a shareholder proposal from its proxy statement where it would violate federal or state law.[30] In the past, the Commission staff has issued no-action relief to publicly listed companies seeking to exclude shareholder proposals to make mandatory arbitration bylaw amendments. Specifically, in 2012, SEC staff issued no-action relief to companies seeking to exclude such provisions based on the companies' claims that they would violate federal law.[31] In 2019, SEC staff approved no-action relief for Johnson & Johnson ("**J&J**") to exclude a shareholder proposal for a mandatory arbitration bylaw amendment put forth by the Committee's President, Professor Hal Scott, as trustee of a trust owning shares in J&J.[32] The SEC issued the no-action letter on the grounds that the provision would violate state law, resting its conclusions on correspondence received from a state attorney general.[33] The staff explicitly declined to express a view as to whether the proposal, if implemented, would violate

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[27] THE CARLYLE GROUP, *Amendment No. 2 to Form S-1* (Jan. 10, 2012), https://www.sec.gov/Archives/edgar/data/1527166/000095012312000638/w83442a2sv1za.htm.

[28] Pamela Long, as Assistant Director of the Division of Corporation Finance, *Letter to Jeffrey W. Ferguson, General Counsel, The Carlyle Group L.P.* (Feb. 3, 2012), https://www.sec.gov/Archives/edgar/data/1527166/000000000012006433/filename1.pdf.

[29] *See generally*, Chairman Jay Clayton, *Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions* (Feb. 11, 2019), https://www.sec.gov/newsroom/speeches-statements/clayton-statement-mandatory-arbitration-bylaw-provisions.

[30] 17 C.F.R. § 240.14a-8(i)(2).

[31] PFIZER INC., *SEC No-Action Letter* (Feb. 22, 2012) [hereinafter **Pfizer Letter**], https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/donaldvuchetich022212-14a8.pdf

[32] Hal Scott, as Trustee for the Doris Behr 2012 Irrevocable Trust, *Letter to the U.S. Securities and Exchange Commission Division of Corporation Finance, Office of Chief Counsel Re. Shareholder Proposal to Johnson & Johnson Regarding an Amendment to the Johnson & Johnson Bylaws* (Dec. 24, 2018), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf.

[33] JOHNSON & JOHNSON, *SEC No-Action Letter* (Feb. 11, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf.

U.S. federal law.[34] The trust subsequently filed a lawsuit in federal district court seeking a declaratory judgment that the proposal would not cause J&J to violate federal or state law, however the suit did not reach litigation on the merits.

In September 2025, the SEC issued the Policy Statement, clarifying its views on the legality of mandatory arbitration provisions in light of developments in U.S. Supreme Court decisions.[35] In the Policy Statement, the SEC opines that the federal securities laws do not prohibit mandatory arbitration provisions – regardless of whether they are adopted during the IPO process or through later amendment – and that the presence of such a provision will not prevent the SEC from accelerating the effectiveness of a registration statement.[36] The SEC also stated that it is not in a position to determine the legality of mandatory arbitration provisions under state law because, although a state law attempting to prevent such provisions may be preempted by the FAA, the SEC is not authorized to administer the FAA.[37]

Mandatory Arbitration of Federal Securities Law Claims is Legal

The FAA establishes the legality and enforceability of mandatory arbitration provisions under federal law. The FAA provides that "[a] written provision in any… contract evidencing a transaction involving commerce to… arbitrat[e]… shall be valid, irrevocable, and enforceable,"[38] and the Supreme Court has held that the FAA established "a national policy favoring arbitration."[39] The FAA does not apply, however, where another federal statute has expressly displaced it, or where an agreement to arbitrate is not valid and enforceable under state law,[40] to the extent state law is not preempted by the FAA. As the SEC Policy Statement explains, the federal securities statutes do not displace the FAA. Moreover, where state law attempts to prohibit mandatory arbitration, particularly of *federal* securities law claims, it will be preempted by the FAA.

U.S. Federal Securities Law Permits Mandatory Arbitration

U.S. federal securities law permits mandatory arbitration of shareholder disputes. As explained above, the SEC concurs with this conclusion and will not prevent companies with mandatory arbitration clauses from going public. And as noted by the SEC, federal securities law permits mandatory arbitration provisions regardless of whether they exist at the time of an IPO or are later adopted by amendment of the company's charter or bylaws.[41]

Legality under federal securities law rests on the fact that the securities laws do not displace the effect of the FAA, as confirmed by Supreme Court precedent. In *Epic Systems Corp. v. Lewis* (2018),[42] the Supreme Court held that in order to displace the enforceability of mandatory arbitration agreements under the FAA, a subsequently enacted federal statute must include "a

[34] *Id.*
[35] Policy Statement, *supra* note 8 at 45,125-26.
[36] *Id.* at 45,126 n.8, 45,127-30.
[37] *Id.* at 45,127.
[38] 9 U.S.C. § 2.
[39] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
[40] *See* Policy Statement, *supra* note 8 at 45,127 & n.22.
[41] *Id.* at 45,126 n.8.
[42] 584 U.S. 497 (2018).

clearly expressed congressional intention" to do so.[43] The Court made clear that its prior decisions have found that neither the Securities Act of 1933 nor the Securities Exchange Act of 1934 (both of which were enacted after the FAA's original 1925 adoption) overrides the FAA.[44] And as the SEC correctly concludes, "we can discern nothing in [any of] the Federal securities statutes that demonstrates a clear and manifest congressional intention to displace the FAA in the context of issuer-investor mandatory arbitration agreements."[45]

Conflicting State Law Regarding Mandatory Arbitration of Federal Securities Law Disputes Is Preempted by the FAA

To the extent that state law purports to conflict with, prohibit, or restrict a provision in the governing documents of a corporation to mandate arbitration of federal securities law claims, it will be preempted by the FAA and therefore invalid. The Supreme Court has stated that the FAA "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,"[46] and has repeatedly rejected state laws creating barriers to arbitration.[47] Particularly relevant here, the Court has upheld mandatory arbitration clauses for claims made under the Securities Act[48] and the Exchange Act,[49] in consumer contracts of adhesion,[50] and where California state law purported to prohibit class arbitration waivers on consumer protection grounds.[51]

More specifically, the Supreme Court has read the FAA to "establish[] an equal-treatment principle."[52] Under this principle, the FAA "preempts any state law discriminating on its face against arbitration" and also "displaces any rule that covertly accomplishes the same objective by disfavoring contracts that … have the defining features of arbitration agreements."[53] The equal treatment rule applies to state laws governing either the formation of an arbitration agreement or its enforcement.[54]

Thus, a state law attempting to mandate a particular (non-arbitral) forum, or to prohibit arbitration, would be preempted. For instance, Delaware amended its General Corporation Law in August 2025 to allow companies to include forum or venue selection clauses in their governing documents covering certain claims (including federal securities law claims), *provided* that they "allow[] a stockholder to bring such claims in at least one court in this State."[55] The Supreme Court has

[43] *Epic*, 584 U.S. at 510 (internal quotation and citated omitted).
[44] *Epic*, 584 U.S at 516.
[45] Policy Statement, *supra* note 8, at 45,129.
[46] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
[47] *See, e.g.*, Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246 (2017); Marmet Healthcare Ctr., Inc. v. Brown, 565 U.S. 530 (2012) (per curiam); AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011); Preston v. Ferrer, 552 U.S. 346 (2008); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); Perry v. Thomas, 482 U.S. 483 (1987).
[48] Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477 (1989).
[49] Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).
[50] *Id.*
[51] AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011).
[52] *Kindred Nursing*, 581 U.S. at 251.
[53] *Id.*
[54] *Id.* at 1428-29.
[55] DGCL § 115(c).

squarely stated that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[56] While Delaware's new law has not yet been litigated, it plainly runs afoul of the FAA, as it outright prohibits arbitration of federal securities law claims.

The FAA provides an exception to preemption for "generally applicable contract defenses, such as fraud, duress, or unconscionability."[57] However, the equal treatment principle still applies.[58] Even state laws that *appear* to be "generally applicable" can run afoul of the equal treatment principle if they "stand as an obstacle to the accomplishment of the FAA's objectives."[59] The Supreme Court has found that the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[60] The only practical way for a company and its stockholders to agree to arbitration of federal securities claims would be to include an arbitration provision in the company's constitutive documents.[61] Therefore, any state law attempting to limit the ability to do this would "stand as an obstacle" to the FAA's "principal purpose" of enabling arbitration agreements.

Conclusion

As the Committee has long argued, it is critical to allow U.S. public companies and shareholders to opt for mandatory individual arbitration of federal securities law claims in lieu of securities class actions. Securities class actions impose substantial costs on U.S. publicly listed companies and their shareholders without corresponding benefits. Mandatory individual arbitration clauses opting out of the securities class action framework are permissible under both federal and state law. The Committee therefore strongly supports the SEC's Policy Statement affirming the legality of mandatory individual arbitration clauses under federal law. The Committee also believes it is important to affirm that state attempts to prohibit mandatory individual arbitration provisions are preempted by federal law.

[56] *AT&T Mobility*, 563 U.S. at 341.
[57] *Id.* at 339 (internal quotation and citation omitted).
[58] *Kindred Nursing*, 581 U.S. at 251 (quoting *AT&T Mobility*, 563 U.S. at 339).
[59] *AT&T Mobility*, 563 U.S. at 343.
[60] *Id.* at 344
[61] Airgas, Inc. v. Airgas Prods. & Chems., Inc., 8 A.3d 1182, 1188 (Del. 2010) ("Corporate charters and bylaws are contracts among a corporation's shareholders…"); *see also* Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 955-956 (Del. Ch. 2013).