

The SEC's Attempt to Kill Securities Class Actions Through Mandatory Arbitration Violates Congressional Action

By Benjamin Schiffrin | *Director of Securities Policy*

November 5, 2025

Introduction

Class actions “play an essential role in deterring securities fraud and compensating victims for their losses.”¹ Congress recognized this fact thirty years ago when it passed the Private Securities Litigation Reform Act of 1995 (PSLRA). Although one purpose of the PSLRA was to “discourage frivolous litigation,” it also recognized that meritorious private securities litigation was essential “to the integrity of American capital markets.”² The PSLRA thus reflects Congress’s recognition of the importance to securities regulation of private securities class action lawsuits. The Supreme Court has also recognized “that class actions are a core part of securities regulation.”³

For many years, the Securities and Exchange Commission (SEC) shared this view. For example, Richard Breeden, then-chair of the SEC, testified before Congress in 1991 that “‘private actions perform a critical role in preserving the integrity of our securities markets.’”⁴ In light of this longstanding view, it is not surprising that the SEC has traditionally refused to allow initial public offerings to go forward if the filing contained mandatory arbitration provisions that could deprive shareholders of the power to bring claims against the company in the case of wrongdoing.⁵

Current SEC Chair Paul Atkins served on the staff of then-Chair Breeden, but he does not appear to share his former boss’s view regarding private securities litigation. His SEC recently announced a policy statement that would allow public companies to force shareholders into mandatory arbitration.⁶ Yet mandatory arbitration almost always favors corporations and rarely results in a win for investors.⁷ The reasons it is unfair to investors are numerous.⁸ Perhaps most importantly, it would prevent shareholders from suing in court.⁹ Chair Atkins is thus doing by fiat—eliminating private securities litigation class actions—what Congress refused to do when it passed the PSLRA.

The PSLRA

The SEC should not be able to override the will of Congress. The PSLRA was “an effort to achieve two competing goals: reducing burdensome and potentially frivolous litigation while preserving the ability of investors to pursue meritorious claims.”¹⁰ Congress’s view was:

Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private



lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.¹¹

To be sure, Congress was concerned about abusive litigation.¹² But it addressed these concerns by placing “burdens on investors seeking to bring class actions.”¹³ So by “tailoring the structure of the class action rather than eliminating it, the PSLRA reflected an implicit congressional decision to retain the class action mechanism.”¹⁴ The PSLRA thus could have, but did not, abolish securities litigation class actions. Congress’s decision to fix rather than “eliminate the securities fraud class action . . . confirmed its importance to the integrity of the U.S. capital markets.”¹⁵

The SEC’s Traditional View

The SEC has traditionally shared the view reflected in the PSLRA that private securities litigation is “a ‘necessary supplement’ to actions brought by the Commission” and “an ‘essential tool’ in the enforcement of the federal securities laws.”¹⁶ Arthur Levitt, who was chair of the SEC at the time Congress passed the PSLRA, supported litigation reform but said that class action litigation “serves a valuable purpose in our system, encouraging corporations to observe their disclosure obligations carefully.”¹⁷ The SEC has also opposed mandatory arbitration provisions that would prevent shareholders from availing themselves of the class action mechanism.

Although it has not issued more general policy guidance, the agency has long indicated its opposition to the inclusion of mandatory arbitration clauses in corporate charters and bylaws. It has refused, for example, to accelerate registration statements with charters that contain such a clause. In the context of shareholder proposals, SEC staff have suggested that mandatory arbitration charter provisions might violate securities laws.¹⁸

Even Jay Clayton, SEC Chair during President Trump’s first term, declined to endorse mandatory arbitration and refused to reverse the staff’s longstanding view that a mandatory arbitration provision would be inconsistent with the public interest and the protection of investors.¹⁹

The SEC’s Shift

Unfortunately, the SEC’s recent shift from investor protection to corporate protection has now extended to private securities litigation and mandatory arbitration.²⁰ On September 17, the SEC issued a policy statement that would allow corporations to include mandatory arbitration provisions for shareholder claims.²¹ Subsequently, Chair Atkins gave a speech in which he touted the supposed benefits of mandatory arbitration—without distinguishing between the potential benefits of arbitration and the costs of making arbitration *mandatory*—and criticized a recent Delaware law that prohibits mandatory arbitration of federal securities law claims.²²

Although corporations have long championed mandatory arbitration provisions,²³ the SEC is supposed to be the investor’s advocate, not the industry’s advocate.²⁴ And despite Chair Atkins’s insistence that the SEC was merely providing “clarity that such provisions are not inconsistent with

the federal securities laws,”²⁵ the widespread adoption of such provisions by corporate issuers “would substantially curtail, if not eliminate, the securities fraud class action.”²⁶

The consequences of a shift to shareholder arbitration could be substantial. Private litigation, especially private aggregate litigation, is one of the main tools for enforcing securities and corporate law in the United States. A shift to arbitration likely would dramatically reduce the number of claims filed, in part because representative actions such as class actions or derivative suits probably would be unavailable. The future of shareholder rights may be at stake.²⁷

Mandatory arbitration thus “would *undercut* federal securities law by precluding most shareholders from seeking its enforcement through a class action.”²⁸ And because “shareholder class actions can serve vital deterrence and remedial functions in both corporate governance and capital markets[,] [c]hanneling this litigation into private arbitration that shareholders could only pursue on an individualized basis would largely neuter those functions and, thus, reshape the manner in which public corporations and securities markets operate.”²⁹ This transformation in securities regulation would be “to the detriment of large and small shareholders alike.”³⁰

After issuing the policy statement, Chair Atkins suggested that mandatory arbitration could reduce “meritless, vexatious, or frivolous litigation.”³¹ But this is not the SEC’s role. Congress enacted the PSLRA to do just that. Whether or not it was successful remains debatable.³² What is not debatable is that Congress could have eliminated securities class actions in the PSLRA but did not do so. And even if the PSLRA was not that successful, Congress has not done so since. The SEC has no business taking regulatory actions that subvert the will of the legislative branch.

Conclusion

The SEC cannot arrogate for itself the power to end securities fraud class action lawsuits. That is the prerogative of Congress, and Congress chose not to exercise that prerogative when it enacted the PSLRA. It has also not done so in the 30 years since the PSLRA became law. Yet the SEC’s statement that corporations are free to adopt mandatory arbitration provisions for shareholder claims could have exactly that result. There was no reason for the SEC to deviate from its longstanding and warranted opposition to mandatory arbitration provisions, and its action will only harm the very investors that the SEC supposedly exists to protect.

Endnotes

- ¹ *Class Actions – Certification Requirements Under SEC Rule 10b-5 – Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 127 Harv. L. Rev. 268 (2013).
- ² H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.).
- ³ Hilary A. Sale and Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 Wash. U. L. Rev. 487, 509 (2015); see also *Amgen v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 478 (2013) (“We have already noted what Congress has done to control exorbitant securities-fraud actions. Congress, the Executive Branch, and this Court, moreover, have ‘recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.’”) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)).
- ⁴ Edward Labaton, *Consequences, Intended and Unintended, of Securities Law Reform*, 29 Stetson L. Rev. 395, 401 n.43 (1999) (quoting *Securities Investor Protection Act of 1991: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102d Cong. 15-16 (1991)).
- ⁵ Kevin Roose, *Carlyle Drops Arbitration Clause From I.P.O. Plans*, N.Y. Times (Feb. 3, 2012), <https://archive.nytimes.com/dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/>.
- ⁶ Press Release, *SEC Issues Policy Statement Clarifying that Mandatory Arbitration Provisions Will Not Affect Effectiveness of Registration Statements*, Securities and Exchange Commission (Sept. 17, 2025), <https://www.sec.gov/newsroom/press-releases/2025-120-sec-issues-policy-statement-clarifying-mandatory-arbitration-provisions-will-not-affect>.
- ⁷ Better Markets, *Forced Arbitration: Taking Away Your Rights and Your Money* (June 1, 2019), <https://bettermarkets.org/newsroom/forced-arbitration-taking-away-your-rights-and-your-money/>.
- ⁸ Better Markets, *The Dirty Dozen—Why Mandatory Arbitration is Unfair* (Oct. 11, 2017), <https://bettermarkets.org/newsroom/dirty-dozen-why-mandatory-arbitration-unfair-0/>.
- ⁹ Press Release, *SEC Allowing Corporations to Force Harmed Investors into Biased Arbitration Star Chambers is Wrong*, Better Markets (Sept. 17, 2025), <https://bettermarkets.org/newsroom/sec-allowing-corporations-to-force-harmed-investors-into-biased-arbitration-star-chambers-is-wrong/>.
- ¹⁰ Jill E. Fisch, *Federal Securities Fraud Litigation as a Lawmaking Partnership*, 93 Wash. U. L. Rev. 453, 466 (2015).
- ¹¹ H.R. Rep. No. 104-369, at 31.
- ¹² Jill Fisch, *Class Action Reform: Lessons From Securities Litigation*, 39 Ariz. L. Rev. 533, 535 (1997).
- ¹³ Fisch, 93 Wash. U. L. Rev. at 466.
- ¹⁴ *Id.*
- ¹⁵ Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 Colum. Bus. L. Rev. 802, 810 (2009).
- ¹⁶ Labaton, 29 Stetson L. Rev. at 401 n.43 (quoting Richard Breeden).
- ¹⁷ Arthur Levitt, “*Final Thoughts on Litigation Reform*,” 33 San Diego L. Rev. 835, 838 (1996).
- ¹⁸ Zachary D. Clopton and Verity Winship, *A Cooperative Federalism Approach to Shareholder Arbitration*, 128 Yale L.J. Forum 169, 178 (2018).
- ¹⁹ Letter from SEC Chair Jay Clayton to Representative Carolyn B. Maloney (Apr. 24, 2018), https://www.skadden.com/-/media/files/publications/2018/05/maloney_et_al_forced_arbitration_es156546_response.
- ²⁰ See Benjamin Schiffrin, *Chair Atkins’ Agenda is the Industry’s Agenda*, Better Markets (Aug. 11, 2025), <https://bettermarkets.org/wp-content/uploads/2025/08/Better-Markets-Atkins-Agenda-Fact-Sheet-8.11.25.pdf>.
- ²¹ *Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions*, <https://www.sec.gov/files/rules/policy/33-11389.pdf> (Sept. 18, 2025).
- ²² Paul S. Atkins, Chairman, *Keynote Address at the John L. Weinberg Center for Corporate Governance’s 25th Anniversary Gala* (Oct. 9, 2025), <https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala>.
- ²³ Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y.

Times (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

Schiffrin, *supra* note 20.

SEC Issues Policy Statement Clarifying that Mandatory Arbitration Provisions Will Not Affect Effectiveness of Registration Statements, *supra* note 6.

Black, 2009 Colum. Bus. L. Rev. at 804.

Clopton and Winship, 128 Yale L.J. at 170-71.

Mohsen Manesh and Joseph A. Grundfest, *The Corporate Contract and Shareholder Arbitration*, 98 N.Y.U. L. Rev. 1106, 1142 (2023) (emphasis in original).

Id. at 1110-1111.

Id. at 1142.

Atkins, *supra* note 22.

Compare, e.g., Lynn A. Baker, et al., *Is the Price Right? An Empirical Study of Fee-Shifting in Securities Class Actions*, 115 Colum. L. Rev. 1371, 1380 (2105) (“Many of this study’s findings show that the PSLRA has not worked as hoped.”), *with, e.g.,* James D. Cox, et al., *There are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 Vand. L. Rev. 355, 386 (2008) (“In sum, our data and accompanying analysis provide reassurance that the PSLRA is working and likely working well”).



Better Banks | Better Businesses
Better Jobs | Better Economic Growth
Better Lives | Better Communities

Better Markets is a public interest 501(c)(3) non-profit based in Washington, DC that advocates for greater transparency, accountability, and oversight in the domestic and global capital and commodity markets, to protect the American Dream of homes, jobs, savings, education, a secure retirement, and a rising standard of living.

Better Markets fights for the economic security, opportunity, and prosperity of the American people by working to enact financial reform, to prevent another financial crash and the diversion of trillions of taxpayer dollars to bailing out the financial system.

By being a counterweight to Wall Street's biggest financial firms through the policymaking and rulemaking process, Better Markets is supporting pragmatic rules and a strong banking and financial system that enables stability, growth, and broad-based prosperity. Better Markets also fights to refocus finance on the real economy, empower the buy-side and protect investors and consumers.

For press inquiries, please contact us at press@bettermarkets.com or (202) 618-6430.



[SUBSCRIBE](#) to Our Monthly Newsletter

FOLLOW US ON SOCIAL

