Leading from the Legal Office: As the SEC Steps Back from Investor Protection, Public Pension Attorneys Must Step Up

By: Anya Freedman, Girolamo Brunetto, and Kelly Hogan

Public pension funds are fiduciary investors responsible for diverse investment portfolios, with U.S. equities often their most significant asset class.[1] The Securities and Exchange Commission has served as the primary federal regulator for U.S. equities since the Great Depression. In the past year, the SEC has gone through seismic shifts including the elimination of bipartisan leadership, significantly weakened enforcement, and diminished corporate accountability.

For public pension attorneys, understanding these changes is critical to advising our clients. We can no longer rely on historic regulatory protections to ensure market transparency or prompt government enforcement. We can no longer rely on neutral regulatory protection for softer shareholder engagement tools. Instead, these changes shift the burden to investors and their counsel to use strategic litigation and direct advocacy to protect their investments and legal rights.

We can no longer rely on historic regulatory protections to ensure market transparency or prompt government enforcement.

Changes to the Structure of the SEC

For 90 years, SEC commissioner appointments followed section 4(a) of the Exchange Act of 1934, which limits commissioners from any single party to three.[2] In January 2026, that balance was abandoned in favor of three Republican commissioners and no Democrats, a composition that forecloses healthy policy debates benefitting investors. For public pension counsel, this is compounded by the SEC's practice of implementing major policy changes behind closed doors, limiting the avenues available to participate in the process and contest changes. The Commission has not begun a single formal notice-and-comment rulemaking under current leadership.

SEC resources have also been significantly depleted. The agency has lost 15-19% of its staff since January 2025, including highly specialized enforcement units and senior personnel.[3] Executive orders have further eroded the SEC's independence. On February 18, 2025, the SEC and all independent federal regulatory agencies were placed under White House Office of Management and Budget (OMB) oversight for the first time.[4] That order also required SEC interpretations of securities statutes that conflict with prior executive branch or DOJ positions to be pre-authorized by the President or Attorney General in writing, a significant constraint on the agency's legal autonomy. A February 19, 2025, follow-on order directed agencies to deprioritize certain enforcement actions and develop a Unified Regulatory Agenda aimed at rescinding existing regulations.[5] Among the agenda's priorities are rules that would reduce the traceability of exchange trades—including insider trades—and decrease the frequency of public company reporting, both of which would impair the information environment on which investors depend.

Back

Changes in SEC Enforcement

Structural changes have been matched by a sharp decline in enforcement. On March 10, 2025, the SEC adopted a rule requiring majority commissioner approval before a formal investigation can be opened or a subpoena issued, ending 15 years of practice—established in the wake of the Financial Crisis and the Madoff scandal—that allowed senior staff to authorize investigations swiftly in response to reported fraud. This structural change meaningfully lengthens the timeline between suspected misconduct and any formal SEC response.

SEC enforcement actions fell 27% in 2025 to 313, the lowest in a decade. Of those, only 56 actions were initiated against public companies or their subsidiaries, which represents a 30% decline from fiscal year 2024;

The results are stark. SEC enforcement actions fell 27% in 2025 to 313, the lowest in a decade.[6] Of those, only 56 actions were initiated against public companies or their subsidiaries, which represents a 30% decline from fiscal year 2024; only four of those actions were commenced under the SEC's current leadership.[7] Monetary settlements totaled $808 million, a 45% year-over-year decline.[8] Moreover, not only has there been less enforcement against public companies, but also against key gatekeepers of the capital markets, like auditors.[9]

The Commission also voluntarily dismissed numerous high-profile cases—including cases that courts already determined were meritorious—because they did not align with new leadership's policy priorities.[10] Separately, the Commission dropped civil enforcement actions against pardoned individuals already convicted of large-scale investor fraud, including Trevor Milton, CEO of Nikola Corporation, convicted of fraud costing investors over $660 million,[11] and Devon Archer, convicted of targeting pension funds and a Native American tribal entity, and ordered to pay nearly $60 million in forfeiture and restitution.[12] Beyond forgoing those recoveries, these voluntary dismissals by the SEC leave pension funds exposed to repeat offenses by convicted fraudsters who may continue to operate in the financial industry, a risk counsel should factor into investment monitoring and litigation readiness.

SEC Actions Undermining Corporate Accountability

Mandatory Arbitration Provisions

Before a company's securities can trade publicly in the U.S., the SEC must declare the company's registration statement effective, weighing "the public interest and the protection of investors."[13] For decades, the SEC rejected initial public offerings requiring arbitration of investor claims under federal securities laws. In 1990, for example, the SEC objected to a company's inclusion of forced arbitration provisions, saying: "it 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 a waiver is made through a corporate charter rather than through an individual investor's decision."[14]

On September 17, 2025, the SEC reversed course without notice or public comment, issuing a "policy statement" that the presence of mandatory arbitration provisions will not impact the SEC's decision to declare a registration statement effective.

This shift has real consequences for public pension funds. Arbitration bars class actions, forcing investors to bring individual claims without the benefit of

Back

judges, juries, public records, or meaningful appellate review. Arbitrators need not follow precedent or rules of evidence or even explain their decisions. Arbitration could increase the cost of pursuing recovery while reducing the likelihood of a meaningful outcome. It also undermines deterrence because proceedings are confidential and misconduct is less likely to come to light. Even successful outcomes create no binding precedent on other companies or industries, and similarly situated investors may reach inconsistent results for identical conduct.

By contrast, since the passage of the Private Securities Litigation Reform Act of 1995, securities class actions have efficiently policed corporate misconduct and enabled investor recoveries. As Justice Ruth Bader Ginsburg observed, private securities litigation is "an indispensable tool with which defrauded investors can recover their losses – a matter crucial to the integrity of domestic capital markets."[15] In 2024, securities class action settlements distributed $2.74 billion directly to shareholders.[16] That compares to $345 million the SEC returned to investors through enforcement actions the same year, which was touted "the highest amount in SEC history."[17] Since parallel private actions have proven more effective at returning losses than SEC enforcement alone, attempts to weaken private securities class actions are particularly problematic at a time when SEC enforcement is at a low point.

In response to the SEC's arbitration policy reversal, public pension funds and other institutional investors managing trillions of dollars mobilized to voice concerns and foster public debate.[18] Their decisive, collective action made an impact on companies: widespread adoption of mandatory arbitration provisions has not materialized. Public pension counsel should, however, advise clients to remain engaged by voicing concerns through comment processes and letters, monitoring portfolio companies for governance changes that threaten shareholder rights, and building litigation readiness into the fund's policies. Investment advisors and securities monitoring counsel can help to monitor portfolio company governance documents for these provisions.

Counsel should also seriously evaluate appropriate opportunities to lead securities class actions to protect the rule of law, promote the healthy functioning of U.S. capital markets, and maximize investors' monetary recovery.[19]

Counsel should also seriously evaluate appropriate opportunities to lead securities class actions to protect the rule of law, promote the healthy functioning of U.S. capital markets, and maximize investors' monetary recovery.[19] Indeed, the SEC has now revised its enforcement manual to expressly recognize the importance of private litigation to enforce the securities laws and deter corporate misconduct, not only in parallel with SEC enforcement, but in lieu of it, given limited Commission resources.[20]

Changes to the Rule 14a-8 Shareholder Proposal Process

Rule 14a-8 of the Exchange Act governs when public companies must include shareholder proposals in proxy materials. Historically, a company seeking to exclude a proposal submitted a "no-action" request to the SEC's Division of Corporation Finance; if the SEC declined to grant it, the company had to include the proposal or risk enforcement action.

On November 17, 2025, the SEC announced that, for all no-action requests from October 1, 2025, through September 30, 2026, it would no longer substantive-

Back

ly review most proposal exclusions.[21] Instead, the SEC will issue a "no-objection" letter if a company provides an "unqualified representation" of a reasonable basis for exclusion, without any independent legal review. This new approach is popular: over 100 companies have obtained such letters this proxy season.[22]

With the removal of this critical SEC safeguard, counsel should help funds recalibrate shareholder engagement strategies. The no-action process was a neutral check ensuring that shareholder proposals were not improperly excluded. Without it, decisions rest almost entirely with the companies whose conduct such proposals seek to address, and shareholders lose this avenue for signaling priorities to management. Former SEC Commissioner Caroline A. Crenshaw characterized the change as "an act of hostility toward shareholders" and one which essentially "hands companies a hall pass to do whatever they want" by "creat[ing] unqualified permission for companies to silence investor voices…."[23]

The rule change also aligns with broader administration efforts to shift power toward corporations and away from shareholders.

The rule change also aligns with broader administration efforts to shift power toward corporations and away from shareholders. On December 11, 2025, President Trump directed the SEC chair to consider revising or rescinding existing rules and guidance regarding shareholder proposals, especially those that "implicate 'diversity, equity, and inclusion' and 'environmental, social, and governance' policies."[24]

Public pension attorneys should advise clients that the withdrawal of the no-action process does not eliminate shareholders' right to submit proposals or challenge improper exclusions. Recent cases demonstrate an emerging new tactic. New York City public pension funds sued AT&T over the exclusion of a workforce diversity disclosure proposal.[25] AT&T agreed to include the proposal within a week.[26] When an investor sued PepsiCo over an animal welfare proposal, PepsiCo agreed to include it within a day.[27] A shareholder challenged Axon Enterprise over exclusion of a political spending transparency proposal.[28] While litigation continues, the court urged Axon to include some form of the shareholder proposal.[29]

These cases illustrate that when softer engagement strategies are undermined, litigation becomes a more central instrument for shareholders to voice their concerns. Because windows for action can be narrow, counsel should work proactively with boards and executives to establish clear protocols for rapid response. Such protocols may include delegated authority to executives or counsel to act between board meetings or a standing mechanism to call special sessions.

Conclusion

In a regulatory environment that is pulling back from investor protection, leadership by public pension attorneys is critically important. We must equip our clients to act dynamically and collectively to protect their investments and legal rights. Working together, public pension attorneys and our institutional investor clients have significant power to effect positive change.

Anya Freedman is a Partner, and Girolamo Brunetto and Kelly Hogan are Associates with Bernstein Litowitz Berger & Grossmann.

Back

Endnotes

[1] NCPERS, Public Retirement Systems Study Trends in Fiscal, Operational, and Business Practices (2025), available at https://www.ncpers.org/file/secure/2025ncperspublicretirementsystemsstudy.pdf.

[2] 15 U.S.C. § 78d(a).

[3] Gillison and Prentice, *US SEC buyouts hit legal, investment divisions hardest, data shows* (May 16, 2025), available at https://www.reuters.com/business/world-at-work/secs-legal-investment-markets-divisions-cut-up-19-staff-after-buyout-program-2025-05-15/#:~:text=Reuters%20Plus-,US%20SEC%20buyouts%20hit%20legal%2C%20investment%20divisions%20hardest%2C%20data%20shows,to%20comment%20about%20staffing%20levels.

[4] Executive Order 14215, "Ensuring Accountability for All Agencies" (signed February 18, 2025) (https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/).

[5] Exec. Order No. 14,219, 3 C.F.R. (2025). https://www.federalregister.gov/documents/2025/02/25/2025-03138/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency.

[6] Gerald Hodgkins, Lilia Abecassis & John Minor, *SEC Focused On Fraud As Actions Markedly Declined In 2025*, Law360 (Nov. 12, 2025), https://www.law360.com/articles/2409430/sec-focused-on-fraud-as-actions-markedly-declined-in-2025.

[7] Cornerstone Research, *SEC Enforcement Activity: Public Companies and Subsidiaries* (2025) at 1, https://www.cornerstone.com/wp-content/uploads/2025/11/SEC-Enforcement-Public-Companies-Subsidiaries-FY2025.pdf.

[8] *Id*.

[9] *See* Russell Molter & Jean-Philippe Poissant, Cornerstone Research, *Public Company Accounting Oversight Board (PCAOB) Enforcement Activity: 2025 Year In Review* (2025).

[10] *See, e.g.,* SEC Litigation Release No. 26330 (June 18, 2025). (https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26330).

[11] SEC Litigation Release No. 26397 (September 11, 2025) (https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26397).

[12] SEC Litigation Release No. 26404 (September 18, 2025) (https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26404).

[13] 15 U.S.C. § 77h(a).

[14] Thomas L. Riesenberg, Commentary Arbitration and Corporate Governance: A Reply to Carl W. Schneider, 8 INSIGHTS 2 (Aug. 1990).

[15] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 n.4 (2007) (internal quotations and citation omitted).

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

[17] *See* SEC Announces Enforcement Results for Fiscal Year 2024 (Nov. 22, 2024), *available at* https://www.sec.gov/newsroom/press-releases/2024-186.

[18] *See, e.g.*, ICGN letter to SEC on retail voting programs and mandatory arbitration (Oct. 20, 2025), *available at* https://www.icgn.org/letters/retail-voting-programs-and-mandatory-arbitration-sec; Letter from the Council of Institutional Investors to SEC Chairman Paul S. Atkins (Nov. 6, 2025), *available at* https://www.cii.org/files/issues_and_advocacy/correspondence/2025/November%206,%202025%20SEC%20letter%20on%20mandatory%20arbitration%20(final).pdf.

[19] James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and … There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 Vand. L. Rev. 355, 370 (2008) ("The largest settlements arise in cases with institutional investor lead plaintiffs.").

[20] Securities and Exchange Commission, Enforcement Counsel (Feb. 24, 2026), available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

Back

[21] *See* Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season (Nov. 17, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finances-role-exchange-act-rule-14a-8-process-current-proxy-season.

[22] *See* 2025-2026 Correspondence Under Exchange Act Rule 14a-8 (Mar. 1, 2026), *available at* https://www.sec.gov/rules-regulations/shareholder-proposals/2025-2026-responses-issued-under-exchange-act-rule-14a-8.

[23] Statement on Division of Corporation Finance's Announcement on the 14a-8 Process (Nov. 17, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-division-corpfins-announcement-14a-8-process-111725.

[24] The White House, Protecting American Investors from Foreign-Owned and Politically-Motivated Proxy Advisors (Dec. 11, 2025), *available at* https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/.

[25] Jonathan Stempel, *AT&T settles New York City lawsuit, to let shareholders vote on diversity proposal*, Reuters (Feb. 25, 2026), *available at* https://www.reuters.com/sustainability/society-equity/att-settles-new-york-city-lawsuit-over-diversity-proposal-2026-02-25/.

[26] *Id*.

[27] Sarah Jarvis, *PepsiCo Will Allow Shareholder Proposal Following Lawsuit*, Law360 (Feb. 25, 2026), *available at* https://www.law360.com/articles/2446012/pepsico-will-allow-shareholder-proposal-following-lawsuit.

[28] *See Nathan Cummings Foundation, Inc. v. Axon Enterprise, Inc.*, No. 26-cv-00501-ACR (D.D.C. filed Feb. 17, 2026).

[29] *See id*., Minute Order (Mar. 2, 2026).

Back