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New Tools in the Investor Toolbox: Using the Commodity Exchange Act and the Antitrust Laws to Protect Your Portfolio

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For the pension fund of yesteryear, with a portfolio composed exclusively of U.S. stocks and bonds, the securities laws would have provided essentially full protective coverage for their investments. Today, however, the situation has changed dramatically for two reasons. First of all, the legal protection provided by the securities laws has shrunk, providing reduced and more difficult access to protection and recourse for pension funds and other institutional investors. Second, the portfolios of pension funds and other institutional investors have grown more diversified and expanded in scope far beyond the domestic stock and bond portfolios of the past. This article will begin by delineating the gap in legal coverage between today's shrunken securities laws and the increasingly complex investment portfolios of today's pension fund. We will then focus on, as a partial solution, other laws that can help fill that gap—specifically the Commodity Exchange Act ("CEA") and the antitrust laws—and provide illustrative examples of cases today where the CEA and antitrust laws are providing protection to the investments of pension funds and other institutional investors. We conclude by briefly examining the import of the CEA and the antitrust laws for monitoring counsel retained by pension funds and other institutional investors.

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The Shrinking Scope of the Securities Laws

The securities laws, specifically the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), were enacted in "response to the sudden and disastrous collapse of the stock market in 1929, and the Great Depression that followed," *Criterium Capital Funds B.V. v. Tremont (Bermuda), Ltd. (In re Kingate Mgmt. Litig.)*, 784 F.3d 128, 136 (2d Cir. 2015), and designed to protect investors. Various states also put in place laws to protect investors. As originally enacted, the Securities and Exchange Acts provided broad protection to investors, with Section 10(b) of the Exchange Act forbidding "the 'use' or 'employ[ment]' of 'any manipulative or deceptive device or contrivance' 'in connection with the purchase or sale of any security' " *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014), quoting § 78j(b), and the Securities Act providing additional, even stricter protection for securities purchased in public offerings. The securities laws define " 'security' broadly to include not just things traded on national exchanges, but also 'any note, stock, treasury stock, security future, security-based swap, bond, debenture . . . [or] certificate of deposit for a security.' " 15 U. S. C. § 78c(a)(10). *See also* § § 77b(a)(1), 80a-2(a) (36), 80b-2(a)(18) (providing virtually identical definitions of "security" for the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940). *Id.*. at 1063. Over the last few decades, however, Congress and the Courts have made accessing the protection of the securities laws more difficult by both reducing their scope and making private actions cases utilizing the securities laws more difficult to prosecute. Congress first passed the Private Securities Litigation Reform Act of

1995 (PSLRA), 109 Stat. 737, 15 U. S. C. § § 77z-1, 78u-4 in 1995 and then followed it up with the Securities Litigation Uniform Standards Act of 1998 (''SLUSA''), Pub. L. No. 105-353, Title I, § 101(a)(1), 112 Stat. 3227 (1998) in 1998. The PSLRA '' imposes procedural and substantive limitations upon the scope of the private right of action available under § 10(b) and Rule 10b-5,'' ''requires plaintiffs to meet heightened pleading standards,'' ''permits defendants to obtain automatic stays of discovery,'' and ''creates a new 'safe harbor' for forward-looking statements.'' *Id.*at 1063, citing to § § 78u-4, 78u-5. Moreover, the PSLRA also barred ''civil RICO claims based on allegations of securities fraud.'' *MLSMK Inv. Co. v. JP Morgan Chase & Co*., 651 F.3d 268, 273-274 (2d Cir. 2011). SLUSA further shrunk the avenues of relief available to investors under the securities laws by closing the door to state courts and state causes of actions by barring ''state-law-based class actions alleging falsity in connection with transactions in categories of securities that [SLUSA] identifies as 'covered securities.'' *Criterium Capital Funds B.V.*, 784 F.3d at 132 (2d Cir. 2015).

A series of Supreme Court decisions over the last few decades have further narrowed the reach of the securities laws. For instance, in *Blue Chip Stamps*, the Supreme Court held that the private right of action covers only purchasers and sellers, not holders of securities; in *Central Bank of Denver*, the Supreme Court held that investors could not sue ''aiders and abettors'' of securities fraud; and, in *Morrison v. National Australia Bank*, the Supreme Court held that the jurisdiction of the U.S. securities laws only extended to transactions made within the United States. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-8 (1975); *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 179 (1994); *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010). Other Supreme Court decisions have imposed further restrictions. Collectively, these laws and Supreme Court decisions have dramatically reduced the scope, power, and accessibility of the securities laws for investors.

Alternative Investment Laws: The CEA and the Antitrust Laws

At the same time as the protection provided by the securities laws shrunk for institutional investors, the diversity of their investment portfolios expanded. According to a recent Wall Street Journal article, ''[m]ore than $1.4 trillion in global pension assets are parked in alternative investments.'' Maxwell Murphy, *Pensions Have $1.4T Invested in Alternative Assets: Survey*, The CFO Report, The Wall Street Journal, (July 13, 2015), http://blogs.wsj.com/cfo/2015/07/13/pensions-have-1-4t-invested-in-alternative-assets-survey/ (emphasis added). Looking at the investment activities of specific pension funds and other, similar long-term institutional investors paints an even more vivid picture.

In an interview with the New York Times, Mark Wiseman, the president and chief executive of the $204 billion Canada Pension Plan Investment Board, stated that ''We're not a pension plan''—''We're an asset management business, an investment business.'' Ian Austen, *Canada Finds Key to Pension Fund Investing*, DealBook, New York Times, (December 8, 2014), http://dealbook.nytimes.com/2014/12/08/canada-finds-key-to-pension-fund-investing. According to the Harvard Crimson, ''over 10 percent of Harvard University's endowment—over $3 billion—is invested in ''forests, farms, and other natural resources'' with massive timber holdings in Brazil, Romania, Argentina, Chile, Ecuador and Uruguay. Sandra Y. I. Korn, *Harvard's Timber Empire*, The Harvard Crimson (April 7, 2014), http://www.thecrimson.com/column/the-red-line/article/2014/4/7/harvards-timber-empire/. At times, pension funds' holdings of these alternative assets becomes so large that the descriptive ''alternative'' becomes inapt—with, for instance, the South Carolina Retirement System keeping 53 percent of its assets in alternatives as of May 30, 2012. Sam Forgione, *Cash-Strapped U.S. Pension Funds Ditch Stocks for Alternatives*, Reuters, (Aug. 20, 2012) http://www.reuters.com/article/us-pension-investing-alternatives-idUSBRE87J0QX20120820. Moreover, many pension funds have been utilizing futures contracts and other sophisticated financial tools for years. For instance, like other pension funds and institutional investors, the New Jersey Laborers Statewide Funds invests in Treasury futures while the Public School Teachers' Pension and Retirement Fund of Chicago has utilized interest rate swaps as part of its investment portfolio for years.

While a survey of all the legal options available to cover alternative investments is far beyond the scope of this article (Harvard's options for protecting its Uruguayan timber investments for instance), there are two sets of laws that deserve special attention because of their accessibility and usefulness to pension funds and other institutional investors—the Commodity Exchange Act and the antitrust laws.

The Commodity Exchange Act. The Commodity Exchange Act or CEA is akin to the U.S. securities laws, except it protects investors in futures contracts concerning commodities instead of investors in securities. For instance, the CEA would cover and provide protection to investors in gold futures, corn futures, Treasury futures, Eurodollar futures, natural gas futures, oil futures, wheat futures, silver futures and any of the other myriad exchange-traded commodity futures contracts available to investors today in the U.S. This is important because, for certain pension funds and other institutional investors, commodities have become an important part of their investment strategy. Specifically, according to this year's P&I 1000, defined benefit pension funds held $22.5 billion in commodity assets as of Sept. 30, 2015, up from $4.1 billion in 2006. According to the survey, 55 U.S. pension funds held commodities, more than triple the number a decade ago. For instance, as the Wall Street Journal reported in 2013, ''the $26.8 billion Texas Permanent School Fund, Austin; the $26.6 billion Indiana Public Retirement System, Indianapolis; and the $26.4 billion South Carolina Retirement Systems, Columbia'' all added ''commodities strategies'' over the past year. Ianthe Jeanne Dugan, *Pension Funds Cut Back on Commodity Indexes*, Wall Street Journal, (Feb. 5, 2013), http://www.wsj.com/articles/SB10001424127887324761004578286172166045096. More broadly, Pension & Investments reported back in November of 2012 that, as of 2011, 36 of the largest 200 pension funds had commodity interests. *Asset allocations: past, present and future*, P&I, November 29, 2012.

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Specifically, the ''CEA is a remedial statute that serves the crucial purpose of protecting the ''innocent'' ''investor''—''from being misled or deceived.'' *Loginovskaya v. Batratchenko*, 764 F.3d 266, 270 (2d Cir. 2014) (internal citations omitted). The CEA contains a private right of action, which is ''limited to four circumstances, each of them explicitly transactional in nature: receiving trading advice for a fee, making a contract of sale of any commodity for future delivery or the payment of money to make such a contract, placing an order for purchase or sale of a commodity, or market manipulation in connection with a contract for sale of a commodity.'' *Id*. It is this fourth circumstance, market manipulation in connection with a contract for sale of a commodity, which most often directly concerns pension funds and other institutional investors as pension funds can be investors in the manipulated market and damaged by the artificially low (or high price) created by the market manipulator. Current examples of this include *In re: Gold Fixing Antitrust and Commodities Exchange Act Litigation*, 1:14-cv-01642 (S.D.N.Y.) (''Gold''), a class action on behalf of, among others, purchasers of gold futures, which involves the alleged manipulation of the market for gold futures contracts; *In Re Libor-Based Financial Instruments Antitrust Litigation*, MDL No. 2262, 11-cv-2613 (S.D.N.Y.) (''LIBOR''), a class action on behalf of investors in Eurodollar futures bringing, *inter alia*, Commodity Exchange Claims based on the manipulation of the LIBOR rate (Michael Eisenkraft, one of the authors of the articles, represents plaintiffs in this suit); and *In re: Treasury Securities Auction Antitrust Litigation*, MDL No. 2673,15-cv-5794 (S.D.N.Y.) (''Treasuries''), a case alleging, *inter alia*, violation of the Commodity Exchange Act by some of the world's largest banks in connection with the manipulation of the market for U.S. Treasury Futures (Carol Gilden and Michael Eisenkraft, the authors of this article, both represent plaintiffs in this suit). While the coverage provided by the CEA is narrow, as it is limited to futures contracts concerning commodities, if a pension fund does invest in the commodities space this could be a critical tool in protecting those assets. For instance, over a dozen pension funds filed suit in the Treasuries case and asserted claims under the CEA (and the antitrust laws, discussed *infra*).

The Antitrust Laws. In the words of the Supreme Court, the antitrust laws were ''designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.'' *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4-5 (1958). The ''purpose of the antitrust laws . . . is the protection of competition.'' *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007). To achieve this goal, the antitrust laws prohibit ''[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States'' though courts have construed this provision as ''precluding only those contracts or combinations which 'unreasonably' restrain competition.'' *Northern Pacific Railway Co.*, 356 U.S. at 4-5 (1958).

As the behavior barred by the antitrust laws—contract, combinations or conspiracies in restraint of trade—can touch arguably any good or service, they can provide protection from price fixing, market manipulation and other conspiracies to a broad range of investments by pension funds and other institutional investors. Some current examples of antitrust class actions impacting pension investments, in addition to the Gold, Treasuries, and Eurodollar Futures cases discussed previously are *In re: Credit Default Swaps Antitrust Litigation*, 1:13-md-02476 (S.D.N.Y.) (''CDS''), a case involving the market for credit default swaps which recently settled for $1.9 billion and injunctive relief which should make it easier for credit default swaps to be exchange traded; *Public School Teachers' Pension and Retirement Fund of Chicago v. Bank of America et al*, 1:15-cv-09319 (S.D.N.Y.) (''Interest Rate Swaps''), a case recently brought by the Chicago Teachers Pension Fund alleging antitrust violations in connection with the market for interest rate swaps (The authors of this article both represent Chicago Teachers in this action); and *In Re Foreign Exchange Benchmark Rates Antitrust Litigation*, 1:13-cv-07789 (S.D.N.Y.) (''Forex''), a case involving manipulation of the foreign exchange markets which already has partial settlements totaling approximately $2 billion.

Pension Funds Should Make Sure They Hire Monitoring Counsel Capable of Utilizing These Alternative Tools

Litigation is a powerful tool in a pension fund's and institutional investors' tool box. It can be used to address malfeasance at the corporate level and in the financial markets themselves. In addition to obtaining a monetary recovery for the harm suffered to an investor's assets as a result of malfeasance, lawsuits can be used to reform the corporate governance of companies in which the investments are made, and in the financial markets themselves. For instance, in the CDS case, in addition to recovering almost $2 billion for the class, the lawsuit also resulted in injunctive relief which played an important role in freeing the market for credit default swaps.

As the aforementioned cases illustrate, in addition to the Securities and Exchange Acts, laws like the CEA and antitrust laws are becoming more and more important to pension funds and other institutional investors when protecting their investments—in particular, alternative investments outside the domestic stock and bond sphere. Given the importance of these alternative laws, it is crucial, when selecting monitoring counsel, that pension funds and other institutional investors choose attorneys whose firms have the ability to both recognize and prosecute CEA claims, antitrust claims, and other non-securities claims.