Fall 2019

SHAREHOLDER ADVOCATE

COHENMILSTEIN

Powerful Advocates. Meaningful Results.

SEC Approves Regulation Best Interest—Investors Beware

At a time when half the Americans eligible to retire can't afford to, getting sound financial advice is essential. But a new regulation that permits some financial professionals to put other interests ahead of their clients' is creating conflicts that can lead to bad investment advice and impose costs on investors that they simply cannot afford. page 2

SEC Approves Regulation Best Interest —Investors Beware

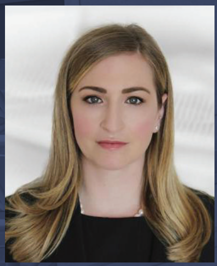
Nearly a quarter of Americans say they never plan to retire, and it is not because they all love their jobs. Nearly half of Americans will reach retirement age with too little savings to fund it. Yet amidst this retirement crisis, when Americans turn to a financial professional for help, they may be putting their trust in someone whose interests are contrary to their own—a conflict that, when it leads to bad advice, imposes costs on investors that they simply cannot afford.

Given an opportunity to end this conflict and provide essential clarity to investors, the Securities and Exchange Commission ("SEC") instead enshrined it. In June, the SEC finalized "Regulation Best Interest" ("Reg BI"), which essentially authorized brokers to put other interests before those of their investor clients as long as those conflicts are disclosed in some manner.[1] Now investors' best hope for protection from the dangers of such conflicted advice lies with state officials and others who are challenging Reg BI in court or imposing stricter standards for their own states.

The SEC's approval of Reg BI flies in the face of regulators' mission to protect investors of all sizes by issuing (and enforcing) rules and regulations designed to ensure that Wall Street puts investors first. As SEC Commissioner Robert J. Jackson explained in his public dissent of Reg BI: "[r]ather than requiring Wall Street to put investors first, [Reg. BI] retains a muddled standard that exposes millions of Americans to the costs of conflicted advice. Even worse, contrary to what Americans have heard for a generation, the [SEC] today concludes that investment advisers are not true fiduciaries. Today's actions fail to arm Americans with the tools they need to survive the Nation's retirement crisis."[2]

Commissioner Jackson was not alone in his criticism: nearly every consumer and investor advocacy group, from the AARP to the Consumer Federation of America, sharply criticized Reg BI, along with op-ed writers in newspapers and financial magazines across America. Even investment adviser associations opposed it. The lone supporters of the SEC's Rule were those who were set to personally gain from its weakness—broker-dealers.

As a result of the SEC's failure to put investors first, Reg BI faces challenges on several fronts. In the wake of the SEC's Final Rules on Reg BI, eight attorneys general—including those of California, Connecticut, Delaware,



LAURA H. POSNER
212.220.2925
lposner@cohenmilstein.com
V-CARD

Editor's Note: The author, Laura Posner, served as Bureau Chief of the New Jersey Bureau of Securities under the auspices of the New Jersey Attorney General from 2014 to 2017, the same office that is in the process of implementing a fiduciary duty rule for broker-dealers in New Jersey.

IN JUNE, THE SEC FINALIZED "REGULATION BEST INTEREST," WHICH ESSENTIALLY AUTHORIZED BROKERS TO PUT OTHER INTERESTS BEFORE THOSE OF THEIR INVESTOR CLIENTS AS LONG AS THOSE CONFLICTS ARE DISCLOSED IN SOME MANNER.

1 Reg BI followed in the wake of a rule issued in 2016 by the Obama Administration's Department of Labor that would have imposed a fiduciary duty on brokers making investment recommendations to savers in retirement accounts such as 401(k)s and IRAs. The rule was ultimately abandoned by the Trump Administration and then killed by the 5th Circuit Court of Appeals last year after surviving a lawsuit in Dallas federal court.

2 Currently, brokers are only required to have a reasonable basis to believe a recommended transaction or investment strategy is "suitable" for a customer in light of the customer's investment profile, not that the recommended transaction or strategy be the best or even good for the investor. Reg BI builds on the obligation to provide suitable recommendations by requiring that broker-dealers also consider potential risks and relative costs associated with recommendations, disclose certain information about the broker-client relationship, and disclose or eliminate certain conflicts of interest. Importantly, while the standard of conduct established in Reg BI draws in certain respects from key fiduciary principles, it **does not** establish a fiduciary standard for broker-dealers or require that investor interests are put first.

Maine, New Mexico, New York, Oregon and the District of Columbia—filed a federal lawsuit, *State of New York et al v. United States Securities and Exchange Commission and Walter "Jay" Clayton III*, in the Southern District of New York, arguing that Reg BI fails to meet basic investor protections that were laid out in the 2010 Dodd-Frank Act.[3] "With this rule, the SEC is choosing Wall Street over Main Street," New York Attorney General Letitia James said in a statement announcing the lawsuit. "Instead of adopting the investor protections of Dodd-Frank, this watered-down rule puts brokers first. The SEC is now promulgating a rule that fails to address the confusion felt by consumers and fails to remedy the conflicting advice that motivated Congress to act in the first place." The lawsuit seeks to vacate the final Reg BI rule, which was issued in June after a 3-1 vote by the SEC, and permanently prevent its scheduled implementation on June 30, 2020.

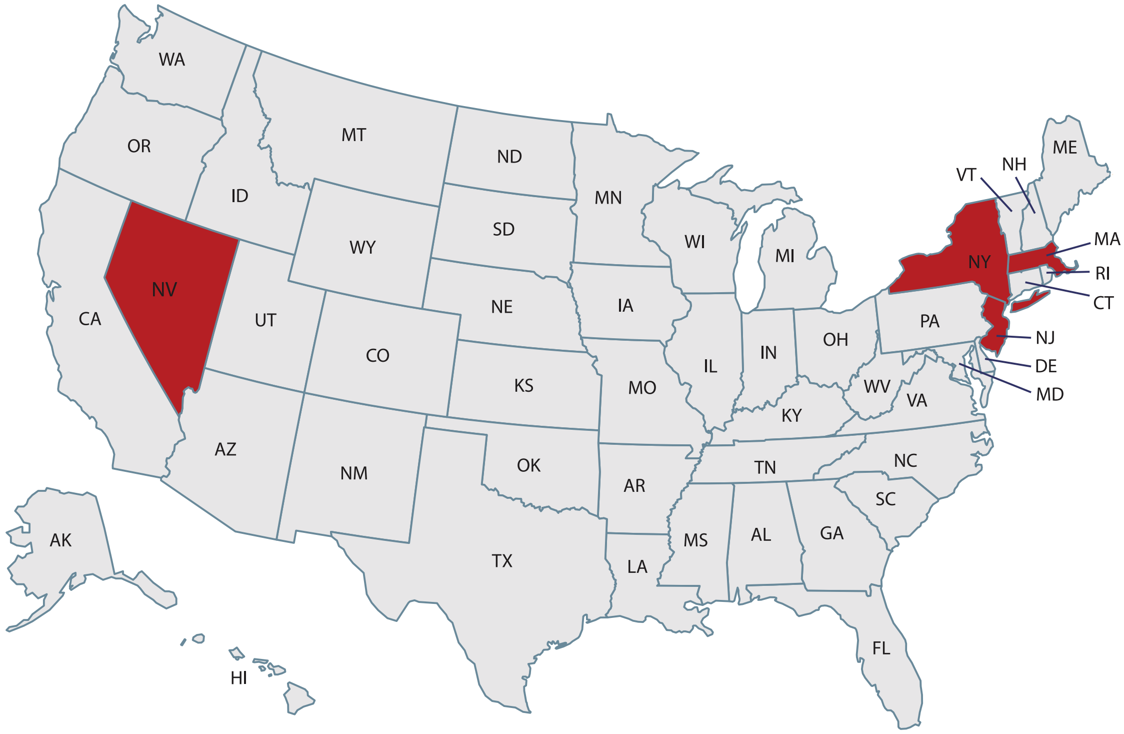
IN THE WAKE OF THE SEC'S FINAL RULES ON REG BI, EIGHT ATTORNEYS GENERAL—INCLUDING THOSE OF CALIFORNIA, CONNECTICUT, DELAWARE, MAINE, NEW MEXICO, NEW YORK, OREGON AND THE DISTRICT OF COLUMBIA—FILED A FEDERAL LAWSUIT, *STATE OF NEW YORK ET AL V. UNITED STATES SECURITIES AND EXCHANGE COMMISSION AND WALTER "JAY" CLAYTON III*, IN THE SOUTHERN DISTRICT OF NEW YORK, ARGUING THAT REG BI FAILS TO MEET BASIC INVESTOR PROTECTIONS THAT WERE LAID OUT IN THE 2010 DODD-FRANK ACT.

The Attorneys General claim that Reg BI "undermines critical consumer protections for retail investors" and increases investor confusion around the standards of conduct that apply when they get an investment recommendation from a broker versus a recommendation from a registered investment adviser. Specifically, the Attorneys General argue in the lawsuit that the SEC exceeded its statutory authority in violation of the Administrative Procedure Act by issuing the final rule, and that Reg BI fails to meaningfully elevate broker-dealer standards beyond their existing suitability requirements and, instead, allows them to consider their own interests when making recommendations. They also argue that Reg BI is likely to produce continued investor and industry confusion because it relies on a vague "best interest" standard and leaves key terms undefined, exacerbating investors' existing confusion over the duties of broker-dealers. The lawsuit states that the "Commission's disregard for Congress's directives in the Dodd-Frank Act will harm Plaintiffs and their residents. Among the harms they will suffer, Plaintiffs will lose revenue from the taxable portions of distributions from their residents' investment and retirement accounts that are worth less because of expensive conflicts of interest in investment advice; Plaintiffs will bear a greater financial burden to assist retirees and others whose savings are insufficient to meet their needs due to conflicted investment advice; and the regulation will harm Plaintiffs' strong quasi-sovereign interest in protecting the economic well-being of their residents."

Immediately following the filing of the Attorneys General lawsuit, an organization of over 1,000 registered investment advisers, XY Planning Network, and one of its members filed a second lawsuit that seeks to set aside or delay implementation of Reg BI. Like the Attorneys General, the investment adviser plaintiffs argue the SEC exceeded its authority under Dodd-Frank, in violation of the APA, by adopting a rule that neither establishes a universal conduct standard, nor a standard that requires broker-dealers to make recommendations without regard to their own financial interests.

3 Section 913 of the Dodd-Frank Act called for a commission to conduct a study regarding gaps or deficiencies in the regulation of broker-dealers and investment advisers and authorized the SEC to promulgate rules requiring that the standards of conduct for providing personalized investment advice "be the same and that the standard shall be to act in the best interest of the investor" but "without regard to" the personal interests of the financial professional providing the advice.

STATES INCLUDING NEVADA, NEW JERSEY, NEW YORK AND MASSACHUSETTS HAVE EITHER APPROVED, PROPOSED OR ARE CONSIDERING ACTUAL FIDUCIARY RULES FOR BROKER DEALERS OPERATING WITHIN THEIR STATE BORDERS.



Meanwhile, states including Nevada, New Jersey, New York and Massachusetts have either approved, proposed or are considering actual fiduciary rules for broker dealers operating within their state borders.[4] For example, Nevada enacted a new law, effective July 1, that imposes a fiduciary duty on broker-dealers and investment advisers. Similarly, the New Jersey Bureau of Securities is in the final stages of implementing a regulation which requires advisors and brokers offering retail advice in the state to adhere to a uniform fiduciary standard. And William F. Galvin, Secretary of the Commonwealth of Massachusetts, released a proposed broker-dealer conduct rule that will "apply a fiduciary duty of care and loyalty to both investment advisers and broker-dealers who handle money belonging to anyone in Massachusetts."

In addition, a rule that partially took effect in New York last month requires intermediaries selling annuities and life insurance to act in customers' best interests, and the Certified Financial Planner Board of Standards Inc. is similarly expanding its fiduciary standard for financial advisers and brokers who hold the group's CFP mark.

Meanwhile, the U.S. House of Representatives, led by the Chair of the House Financial Services Committee, Representative Maxine Waters (D-CA), approved legislation in June that would block Reg BI from taking effect. That provision was approved as part of the annual Financial Services and General Government Appropriations Act (H.R. 3351) to fund the SEC and a broad range of government agencies for the 2020 fiscal year. A companion provision is unlikely to be approved by the current Senate but may come up later this year as a bargaining chip during congressional budget negotiations.

While the fate of Reg BI is pending, we urge all investors to take matters into their own hands—seek out and demand true fiduciary advice from financial professionals willing to put your interests first—and continue to press for meaningful protections in both the states and with your government representatives, so that all investors can have the opportunity for a safe and secure retirement. ■

Laura H. Posner is a Partner at Cohen Milstein and a member of the firm's Securities Litigation & Investor Protection and Ethics & Fiduciary Counseling practice groups.

4 Following the release of Reg BI, several other states and state securities regulators, including those in Connecticut, Illinois, Maryland, and Mississippi, also signaled a willingness to implement their own broker-dealer conduct rules that will be more rigorous than the standard set out in Reg BI.

DELAWARE'S CHIEF JUSTICE LEO STRINE RETIRES, LEAVING JUDICIAL LEGACY

BY RICHARD A. SPEIRS
OF COUNSEL
212.838.7797
rspeirs@cohenmilstein.com
V-CARD

When Chief Justice Leo Strine of the Delaware Supreme Court retires this fall after more than 20 years on the bench, he will leave a legacy of decisions that have changed or clarified significant matters often raised in corporate and stockholder litigation. As Chief Justice of the state's only appeals court since 2014 and before that on the Court of Chancery, Chief Justice Strine displayed creativity, acerbic wit and an unparalleled clarity in complex matters of Delaware corporate law, which frequently serves as a model for business jurisprudence in other states.

Although he has authored hundreds of opinions over the years, some of which were more shareholder-friendly than others, two decisions from his tenure as Chief Justice illustrate Strine's influence over principles of Delaware law and corporate governance matters.

Firstly, in June of this year, in *Marchand v. Blue Bell Creameries*, 212 A. 2d. 805 (Del. 2019) ("*Blue Bell Creameries*") the Delaware Supreme Court reinforced a corporate board's duty to oversee company management, reversing a Chancery Court ruling that had dismissed a derivative action asserting so-called *Caremark* claims. The *Blue Bell Creameries* plaintiffs had alleged claims based on the directors' failure to oversee the proper management of the company's safety risks as related to a fatal food poisoning outbreak and product recall. Writing for the court, Chief Justice Strine reinforced the guiding principles relevant to the board's duty of oversight in the context of stockholder derivative litigation as originally articulated in the landmark decision *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 106 (Del. Ch. 1996).

In *Blue Bell Creameries*, plaintiffs had alleged that defendants breached their duties of care and loyalty by "knowingly disregarding contamination risks and failing to oversee the safety of Blue Bell's food-marketing operations." In addition to finding that one director's very close and personal ties to the Company's CEO rendered him conflicted and not able to objectively consider a demand on the Board to investigate the alleged claims, the Supreme Court found that "Blue Bell['s] board failed to implement any system to monitor Blue Bell's food safety performance or compliance." Citing *Caremark*, Chief Justice Strine wrote that "[a] board's 'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in breach of the duty of loyalty."

Reinforcing the board's duties, the Court held that under *Caremark*, a board is required to "make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks."

WHILE THE SPECIFICS OF STRINE'S NEXT MOVE ARE UNKNOWN, HE RECENTLY ISSUED A RESEARCH PAPER PUBLISHED BY THE UNIVERSITY OF PENNSYLVANIA LAW SCHOOL'S INSTITUTE FOR LAW AND ECONOMICS INDICATING THAT THE SCALE OF HIS AMBITION IS NO LESS THAN LEGAL AND REGULATORY REFORM TO CHANGE THE BEHAVIOR OF U.S. CORPORATIONS AND INSTITUTIONAL INVESTORS.

With this holding, Chief Justice Strine provided additional clarity to potential *Caremark* claims emphasizing that "[i]f *Caremark* means anything, it is that a corporate board must make a good faith effort to exercise its duty of care. A failure to make that effort constitutes a breach of duty of loyalty." Based on Chief Justice Strine's analysis of *Caremark*, the Supreme Court reversed the Chancery Court's decision and sustained the derivative plaintiffs' claims. There is little doubt that *Blue Bell Creameries* will be relied upon by shareholder litigants for years to come.

The second opinion, which Chief Justice Strine authored in 2015, caused a sea-change in the types of merger litigation filed in Delaware Chancery Court. In *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015), Chief Justice Strine took the opportunity to clarify and reconcile application of the business judgment rule for directors in a post-closing damages action involving an arms-length merger where there was a fully informed non-coercive shareholder vote. Writing for a unanimous court, Chief Justice Strine confronted, among other things, the proper application of the business judgment rule in the context of an ostensibly arms-length merger transaction. After concluding that the transaction did not involve a controlling stockholder which would have implicated the duty of loyalty and negated application of the business judgment rule, Chief Justice Strine concluded that where "the [vote] of a disinterested stockholder majority [ ] determines that a transaction with a party other than a controlling stockholder is in their best interests," Delaware will apply the business judgment rule. The decision ultimately eliminated what was perceived as wasteful pre-merger litigation in the Delaware courts, while still permitting stockholders to challenge coercive, self-dealing, misleading or otherwise unfair corporate transactions.

These two cases are prime examples of Chief Justice Strine's lasting influence over Delaware corporate law. While the specifics of his next move are unknown, he recently issued a research paper published by the University of Pennsylvania Law School's Institute for Law and Economics indicating that the scale of his ambition is no less than legal and regulatory reform to change the behavior of U.S. corporations and institutional investors. Entitled "Toward Fair and Sustainable Capitalism," his proposal aims to "reform the American corporate governance system by aligning the incentives of those who control large U.S. corporations with the interests of working Americans who must put their hard-earned savings in mutual funds in their 401(k) and 529 plans." To achieve this goal, Strine says, he will push for laws and regulations that require corporations and institutional investors to "give appropriate consideration to and make fair disclosure of their policies regarding" what Strine calls "EESG"—in which he adds "Employees" to the now-familiar trio of Environmental, Social and Governance policy. The comprehensive list of proposals includes everything from changes in tax law (closing the carried-interest loophole, establishing a financial transaction tax, and lengthening from one to five years the holding period for long-term capital gains), corporate behavior (requiring some corporate boards to create "workforce committees" to address employee concerns and expanding corporate disclosure requirements to include their impact on society, the environment, workers and consumers) and institutional investing (requiring heightened EESG disclosures).

Although retiring from the bench, clearly Chief Justice Strine will remain active and engaged in pursuing policies reflecting his view of the appropriate balance between corporations and their stockholders as reflected in this most recent paper. Whether as an academic or in some other context, his future contributions will undoubtedly generate significant debate among all interested constituents. ■

Richard A. Speirs is Of Counsel and a member of the firm's Securities Litigation & Investor Protection practice group.

NEW STUDIES LOOK AT TRENDS IN OPT-OUT CASES AND LITIGATION BY MUTUAL FUND COMPANIES

BY RICHARD E. LORANT
202.408.3622
rlorant@cohenmilstein.com
V-CARD

SETTLEMENT DATA FOR THE 26% OF OPT-OUTS FILED IN THE POST-PSLRA ERA, SHOWED OPT-OUT PLAINTIFFS GETTING A 13% PREMIUM OVER OTHER CLASS MEMBERS. BUT MOST OF IT CORRESPONDED TO CASES SETTLED PRIOR TO 2014.

Even casual observers of securities litigation trends know that in recent years case filings have increased. Using new data, a pair of recent empirical studies addressed questions of interest to institutional investors: is the number of opt-out cases going up and how involved are mutual funds in shareholder lawsuits?

The first study titled *Opt-Out Cases in Securities Class Action Settlements: 2014-2018 Update* from Cornerstone Research concluded that opt-out cases remain a "significant (although still relatively small) part of the securities class action landscape." Cornerstone researchers found that at least one opt-out case filed in 82 of the 1,775 class actions settled in the 23 years between the beginning of 1996, when the Private Securities Litigation Reform Act ("PSLRA") took effect, and the end of 2018. The 4.6% opt-out rate increased to 8.9% for cases settled from 2014 through 2018, during which opt-outs were filed in 34 of the 382 settled class actions. The opt-out rate rose significantly for large cases, especially in the most recent time period. Overall in the post-PSLRA era, 28% of cases that settled for more than $20 million drew opt-outs, while two-thirds of "mega-settlements" over $500 million had opt-outs associated with them. All four cases that settled for over $500 million in 2014-2018 attracted opt-out plaintiffs.

The Cornerstone study theorized that the apparent increase in opt-out cases since 2014 may be due to a succession of court decisions that found that investors could not rely on the existence of a class action to extend, or "toll," the three-year statute of repose contained in the Securities Act of 1933; the only way to guarantee that a court won't dismiss their claims as untimely is to file their own lawsuit less than three years after the allegedly unlawful behavior at issue took place. The same logic applies to the five-year statute of repose found in the Securities Exchange Act of 1934 ("Exchange Act").

One area where the Cornerstone researchers were unable to shed new light was on whether more recent opt-out plaintiffs were able to continue to achieve higher settlements than their class-action counterparts. Settlement data for the 26% of opt-outs filed in the post-PSLRA era, showed opt-out plaintiffs getting a 13% premium over other class members. But most of it corresponded to cases settled prior to 2014.

Finally, the Cornerstone study looked at the type of plaintiffs filing direct actions and noted the "significant role" played by mutual funds, hedge funds, and other investment firms, which participated in 15 of the 34 opt-outs in 2014-2018. Individuals, trusts, and other companies were involved in 30 of the 34 opt-outs.

“Traditionally, there are three levers of power in corporate governance: voting, selling, and suing. Selling is not an option for many mutual funds … leaving them with only two remaining levers of power: voting and suing. Yet mutual funds use only one: They vote but they do not sue.”

PROFESSORS SEAN GRIFFITH AND DOROTHY LUND

The involvement of mutual funds in securities litigation—or, more accurately, the lack thereof—is precisely the subject of the second study, a *University of Chicago Law Review* working paper entitled “Toward a Mission Statement for Mutual Funds in Shareholder Litigation.” The empirical study by Sean Griffith, a professor at Fordham University School of Law, and Dorothy Lund, an assistant professor at USC’s Gould School of Law, shows that the ten largest mutual fund companies “very rarely” participate in securities litigation despite their highly vocal claims that they are actively engaged to improve corporate governance.

“Traditionally, there are three levers of power in corporate governance: voting, selling, and suing,” the authors wrote in an article posted on Columbia Law School’s *Blue Sky Blog*. “Selling is not an option for many mutual funds—especially index funds, EFTs, and other passive funds that are effectively long-only—leaving them with only two remaining levers of power: voting and suing. Yet mutual funds use only one: They vote, but do not sue.”

Griffith and Lund looked at ten years of data on the major types of securities litigation and found that the ten largest U.S. mutual fund companies were involved in just ten traditional shareholder lawsuits involving five instances of managerial misconduct—all of them opt-outs. Over the same ten years, the major mutual fund companies filed just one appraisal-rights action and no derivative cases. None of the funds had served as lead plaintiff. In contrast, for example, Griffith and Lund found that large hedge funds sued more frequently than their mutual fund counterparts, most often bringing derivative or other fiduciary cases that lined up with their activist positions.

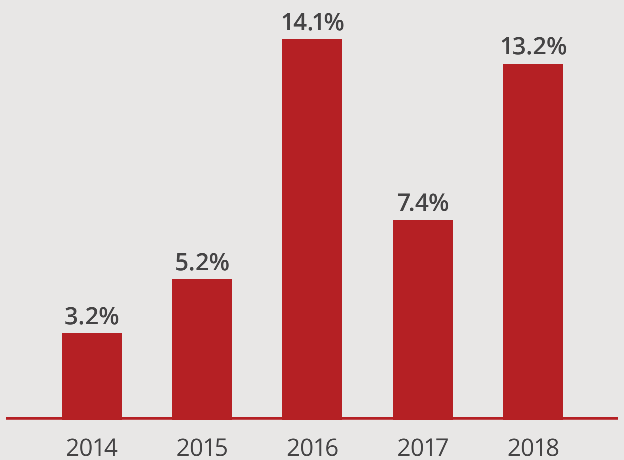
The authors urge mutual fund companies to more closely monitor “agency costs and conflicts of interest” that discourage them from undertaking litigation. Such conflicts include the desire not to sue corporate clients that are the source of 401(k) and other advisory business and an unwillingness to serve as lead plaintiff because it benefits all investment companies, including competitors.

Whatever the causes, the impact of large mutual fund companies’ decision to sit on the sidelines in most types of securities litigation is enormous because of the vast size of their public equity holdings, the authors argue, and greater involvement would benefit mutual fund investors by increasing overall returns, providing effective deterrence to corporate wrongdoing, implementing meaningful corporate governance reform, and intervening in non-meritorious cases.

The working paper concludes that mutual fund companies’ decision to sit on the sidelines in most types of securities litigation has a negative impact on investors and may not be in the companies’ best interests. “Our empirical study of the largest mutual funds’ conduct in shareholder litigation leaves little doubt that mutual funds are not using litigation as a tool to create value for investors. Mutual funds’ abysmal litigation record sheds light on the broader debate over mutual funds’ stewardship incentives,” they write. “To the extent that mutual funds take governance seriously, as some, including the funds themselves, claim they do, they must reform their approach to shareholder litigation.”

Richard E. Lorant is Director of Institutional Client Relations for the firm.

Total Percentage of Investor Opt-Outs in Securities Class Action Settlements



Source: Cornerstone Research

COHEN MILSTEIN TAKES LEAD IN *EQT*

BY S. DOUGLAS BUNCH
PARTNER
202.408.4600
dbunch@cohenmilstein.com
V-CARD

On September 19, Cohen Milstein, representing the Northeast Carpenters Annuity Fund and the Northeast Carpenters Pension fund ("Northeast Carpenters"), was appointed co-lead counsel in a securities class action against EQT Corporation ("EQT" or "Company"). The case, *In re EQT Corporation Securities Litigation*, No. 2:19-cv-00754, is currently pending in the U.S. District Court for the Western District of Pennsylvania before U.S. Magistrate Judge Maureen P. Kelly.

In the case, Northeast Carpenters and its co-lead plaintiff the Government of Guam Retirement Fund ("Guam") allege that EQT misrepresented the "substantial synergies" that were expected to arise from a planned merger with rival natural gas producer Rice Energy due to "the contiguous and complementary nature of Rice's asset base with EQT's."

This case is somewhat unique in that, repeatedly throughout the proposed class period, activist investor JANA Partners LLC challenged the accuracy of EQT's statements to investors about the purported benefits of the merger, calling the Company's calculation of $2.5 billion in synergies "highly questionable." In multiple letters to the Company, JANA argued that abutting acreage acquired in the Rice transaction would only marginally increase lateral well length—touted as the primary benefit of the merger—and even where parcels of newly acquired land were adjacent to land EQT already owned, many of those parcels had already been drilled out. Actual synergies, according to JANA, would be approximately $1.3 billion less than EQT was advertising. JANA also noted that EQT executives were improperly incentivized to complete the merger, regardless of whether it was in the best interests of shareholders because of their compensation structure.

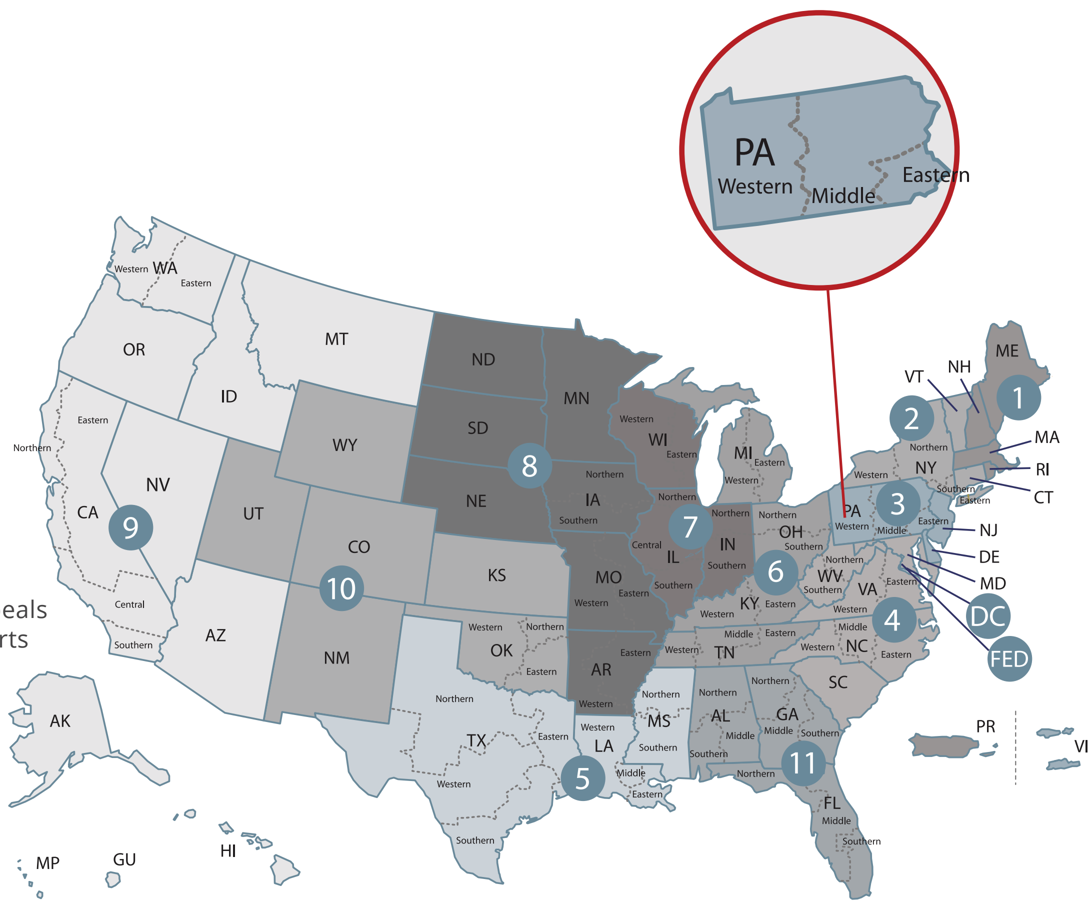
On October 25, 2018, EQT reported its financial results for the third quarter of 2018, revealing the truth: the merger had not only failed to achieve the represented benefits, it had created inefficiencies. In particular, the Company had not been able to achieve the lateral well length it told investors was possible. EQT shares fell 13% on the news, dropping from a close of $40.46 per share on October 24, 2018 to $35.34 on October 25, 2018—a single-day erasure of nearly $700 million in shareholder value. Over

ON OCTOBER 25, 2018, EQT REPORTED ITS FINANCIAL RESULTS FOR THE THIRD QUARTER OF 2018, REVEALING THE TRUTH: THE MERGER HAD NOT ONLY FAILED TO ACHIEVE THE REPRESENTED BENEFITS, IT HAD CREATED INEFFICIENCIES.

the next several days, EQT shares fell to as low as $31.00 per share—*less than half* what the Company was worth when the acquisition closed in November 2017.

The precise contours of the case may shift as Cohen Milstein and its co-lead counsel vigorously seek new information to bolster and expand the amended complaint, which will likely be filed later this year. As of now, however, Northeast Carpenters and Guam are pursuing the action under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 on behalf of all investors who purchased EQT common stock between June 19, 2017 and October 24, 2018. The co-lead plaintiffs are also bringing claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 on behalf of all persons who purchased or otherwise acquired EQT common stock in exchange for their shares of Rice common stock as of September 25, 2017, the record date for shareholders to vote on the merger with Rice. ■

S. Douglas Bunch is a partner in the firm's Securities Litigation & Investor Protection practice group.



GEOGRAPHIC BOUNDARIES
of United States Courts of Appeals and United States District Courts

SUZANNE M. DUGAN
SPECIAL COUNSEL
202.408.4600
sdugan@cohenmilstein.com
V-CARD

FIDUCIARY FOCUS

THE COUNCIL OF INSTITUTIONAL INVESTORS, WHOSE MEMBERS HOLD A COLLECTIVE $4 TRILLION IN ASSETS, WARNED THAT "ACCOUNTABILITY TO EVERYONE MEANS ACCOUNTABILITY TO NO ONE" AND ARTICULATED ITS POSITION THAT BOARDS AND MANAGERS NEED TO SUSTAIN A FOCUS ON LONG-TERM SHAREHOLDER VALUE.

NEW CORPORATE PRINCIPLES RAISE QUESTIONS

A one-page statement of corporate principles signed by the heads of more than 180 U.S. companies has created quite a furor in the ordinarily sedate and staid field of fiduciary law. The Statement on the Purpose of a Corporation issued by the Business Roundtable in August provides that while each of the individual companies serves its own corporate purpose, they "share a fundamental commitment to <u>all</u> of [their] stakeholders" (emphasis in original). In the Statement, the CEOs commit to deliver value to their customers, invest in their employees, deal fairly and ethically with suppliers, support the communities in which they work, and generate long-term value for shareholders as providers of capital. The Statement concludes by emphasizing that:

> *Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities, and our country.*

So why all the fuss? The Business Roundtable has periodically issued principles of corporate governance since 1978, and each version since 1997 has endorsed principles of shareholder primacy. By broadening its vision to give equal attention to other stakeholders, the latest Statement suggests a new and different standard for corporate responsibility.

The Statement immediately prompted commentary from academics, business leaders, lawyers, and corporate governance experts across the ideological spectrum. Some, such as *The New York Times*' Andrew Ross Sorkin, called it a significant and welcome shift to rethink the responsibility of corporations to society. Others argued that it was the role of government rather than corporations to address societal concerns.

Still others noted that the Statement characterized shareholders only as providers of capital and not as owners of the corporations, warning that in trying to serve all stakeholders equally, boards of directors would be sidetracked from serving the long term interests of the owners of companies, including pensions funds.

The Council of Institutional Investors ("CII"), whose members hold a collective $4 trillion in assets, warned that "accountability to everyone means accountability to no one" and articulated its position that boards and managers need to sustain a focus on long-term shareholder value. In order to achieve that long-term shareholder value, according to CII, "it is critical to respect stakeholders but also have a clear accountability to company owners."

CII's Chair and the Executive Director and Chief Investment Officer of the Florida State Board of Administration, Ashbel Williams, applauded the Roundtable for its intent, but said they "did not get the words quite right." In a thoughtful commentary, Williams noted that it would have been preferable for the Roundtable to "say more clearly that the fair treatment for customers, employees, suppliers and communities is necessary to create sustainable, long-term shareholder value."

PUBLIC PENSION PLAN TRUSTEES WILL RECOGNIZE A PARALLEL TO THEIR FIDUCIARY DUTY OF LOYALTY, ESTABLISHED IN STATE AND COMMON LAW, TO ACT SOLELY IN THE BEST INTEREST OF THE MEMBERS AND BENEFICIARIES OF THE PLANS, AND THE ONGOING DEBATE REGARDING THE APPROPRIATE ROLE OF CONSIDERATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS IN INVESTMENT DECISION-MAKING IN LIGHT OF THAT FIDUCIARY DUTY.

Public pension plan trustees will recognize a parallel to their fiduciary duty of loyalty, established in state and common law, to act solely in the best interest of the members and beneficiaries of the plans, and the ongoing debate regarding the appropriate role of consideration of environmental, social and governance ("ESG") factors in investment decision-making in light of that fiduciary duty. A public pension plan trustee must always act for the *exclusive* purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. This does not mean that ESG factors may never be taken into consideration; when ESG factors affect the economic merits of an investment analysis, for example, they may be integrated into investment decision-making in the same manner as more traditional financial measures of risk and return.

A corporate director likewise has a fiduciary duty to act in the best interests of the shareholders, not to further the interests of other constituencies. But as noted in an analysis by Morton Pierce published on the Harvard Law School Forum on Corporate Governance, "if directors feel that taking into account the views of employees, customers or suppliers on a given issue would further the interests of shareholders, they are currently empowered to do so." Pierce notes that there is no need to change the basis for corporate decisions in order to consider other stakeholders in such a situation.

There will no doubt continue to be lively discussion regarding whether the Statement is merely symbolic or reflects a more significant cultural shift in the norms applicable to public corporations. Still, it is possible to read the Statement in a manner that can be reconciled with the principles of existing law on fiduciary duty, and the initial uproar may turn out to be overblown. ■

Suzanne Dugan heads Cohen Milstein's Ethics & Fiduciary Counseling practice, which assists pension systems in creating and updating policies and procedures designed to address these and other fiduciary issues.

RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

- "Facebook Cuts $40M Deal to End Suit Over Video Ad Metrics," *Law360* – October 7, 2019
- "Walmart Likely Discriminated Against Female Store Workers, EEOC Finds," *The Wall Street Journal* – September 17, 2019
- "UFC, Fighters Trade Blows Ahead of Class Cert. Decision," *Law360* – September 13, 2019
- "Former DOJ Trial Lawyer Joins Cohen Milstein's Antitrust Practice," *Reuters* – September 9, 2019
- "Tower Research Can't Duck Korean Futures Suit: Investors," *Law360* – September 6, 2019
- "Google's $13M Street View Deal Gets OK from Intrigued Judge," *Law360* – September 6, 2019
- "Major Chicken Processors Hit with Wage Conspiracy Suit," *Law360* – September 3, 2019
- "BlackRock Can't Dodge Most of $100M ERISA Suit," *Law360* – September 3, 2019
- "Lawyers Seek Appointment of Settlement Counsel in Flint Water Class Action," *The National Law Journal* – August 16, 2019
- "Teva, AbbVie Face Certified Class Over Niaspan Pay-For-Delay," *Law360* – August 14, 2019
- "The American Workplace Still Won't Accommodate Pregnant Workers," *The Nation* – August 12, 2019
- "Bad RIAs Are Just as Much a Problem as Bad Brokers, Lawyers Claim," *Financial Advisor IQ* – August 1, 2019
- "Kruse-Western Workers Advance Suit over $244 Million Stock Sale," *Bloomberg Law* – July 29, 2019

AWARDS & ACCOLADES

- Cohen Milstein's Jessica Weiner Receives "Outstanding Antitrust Litigation Achievement Award" from the American Antitrust Institute – October 9, 2019
- Cohen Milstein Named to *Benchmark Litigation's* 2019 List of "Top 10 Plaintiffs Firms" – October 1, 2019
- Cohen Milstein's Carol Gilden Recognized as a "Chicago Woman of Influence" by the *Chicago Business Journal* – September 30, 2019
- Fifteen Cohen Milstein Attorneys Recognized Among the 2019 *Lawdragon 500* "Leading Plaintiff Financial Lawyers" – September 20, 2019
- Cohen Milstein's Mary Bortscheller Recognized as a "Rising Star" by *Law360* – September 8, 2019
- Cohen Milstein's Stephan A. LeClainche Recognized as a Medical Malpractice "Lawyer of the Year: West Palm Beach, FL" by *The Best Lawyers in America* – August 15, 2019
- Cohen Milstein's Karen L. Handorf Recognized as an ERISA Litigation "Lawyer of the Year – Washington, DC" by *The Best Lawyers in America* – August 15, 2019
- Twelve Cohen Milstein Attorneys Recognized in the 2020 Edition of *The Best Lawyers in America* – August 15, 2019
- Five Cohen Milstein Lawyers Named to *Benchmark Litigation's* 2019 List of "Litigation Stars" – August 1, 2019
- Cohen Milstein Named an "Elite Trial Lawyer: Environmental Protection" Winner by *The National Law Journal* – July 23, 2019
- Six Cohen Milstein Lawyers Recognized Among the 2019 *Lawdragon 500* "Leading Plaintiff Consumer Lawyers" – July 23, 2019

UPCOMING EVENTS

- **October 20-23** | International Foundation of Employee Benefit Plans (IFEBP) – 65th Annual Employee Benefits Conference, San Diego, CA – Christopher Lometti and Arthur Coia
- **October 27-30** | National Conference on Public Employee Retirement Systems (NCPERS) Public Safety Employee Pension & Benefits Conference, New Orleans, LA – Christina Saler and Richard Lorant
- **November 23-26** | County Commissioners Association of Pennsylvania (CCAP) Fall Conference, Hershey, PA – David Maser
- **November 12-15** | State Association of County Retirement Systems (SACRS) Fall Conference, Monterey, CA – Julie Reiser and Richard Lorant

ATTORNEY PROFILE

MICHAEL B. EISENKRAFT
PARTNER
212.838.0177
meisenkraft@cohenmilstein.com
V-CARD

> “I realized that law was like history in that you are telling stories—but in law the stories had power and could affect people’s lives with an immediacy that academia could not match.”

Michael Eisenkraft is a Partner at Cohen Milstein in the Securities & Investor Protection and Antitrust practice groups. Michael has pioneered the use of antitrust laws in the financial and commodity markets, and his innovation has garnered much success and industry honors. He serves as the Administrative Partner for Cohen Milstein’s New York office and on several firm committees, including the Summer Associate committee which is formed to acclimate law students joining the firm for summer work. For this issue of the* Shareholder Advocate*, Michael talked with Editor Christina Saler.

I grew up in … Ossining, New York which happens to be a neighboring town to where I currently live with my wife and two young daughters. So, very little progress in my life. I often bump into childhood classmates.

I realized I wanted to be lawyer … late in college. I was a history and political science major. I realized that law was like history in that you are telling stories—but in law the stories had power and could affect people’s lives with an immediacy that academia could not match. I saw this firsthand one summer in college when I worked for the Neighborhood Defender Service of Harlem.

One of the most rewarding aspects of my job … is knowing that I have been able to make a small contribution in righting wrongs that have caused thousands of people to be harmed and that, through the cases that I have helped litigate, I have helped shape law that provides greater protections to investors and consumers.

My advice to young lawyers is … to have the greatest impact on our legal system, you need to be highly creative in crafting well-reasoned arguments and willing to take calculated risks. Don’t follow your friends. This is a tough profession. To be happy in it, you need to find your own path.

My bookshelf is … crammed with books ranging from mysteries to thrillers to studies in anthropology. I like variety. I recently finished *Levels of the Game* by John McPhee. It’s an account of the tennis match played by Arthur Ashe against Clark Graebner at Forest Hills in 1968. It’s a beautiful little book where McPhee narrates the back-and-forth of the match while also alternating between vignettes of the lives and backgrounds of the two tennis players. ■

CHICAGO, IL

190 South LaSalle Street
Suite 1705
Chicago, IL 60603
t: 312.357.0370

NEW YORK, NY

88 Pine Street
14th Floor
New York, NY 10005
t: 212.838.7797

PALM BEACH GARDENS, FL

2925 PGA Boulevard
Suite 200
Palm Beach Gardens, FL 33410
t: 561.515.1400

PHILADELPHIA, PA

Three Logan Square
1717 Arch Street, Suite 3610
Philadelphia, PA 19103
t: 267.479.5700

RALEIGH, NC

150 Fayetteville Street
Suite 980
Raleigh, NC 27601
t: 919.890.0560

WASHINGTON, DC

1100 New York Ave. NW
Fifth Floor
Washington, DC 20005
t: 202.408.4600

Editor: Christina D. Saler
Editorial Team: Michael E. Gleeson, Richard E. Lorant, David M. Maser and Samuel P. Waite

Please contact us with questions or comments at (202) 408-4600.

COHENMILSTEIN

Powerful Advocates. Meaningful Results.