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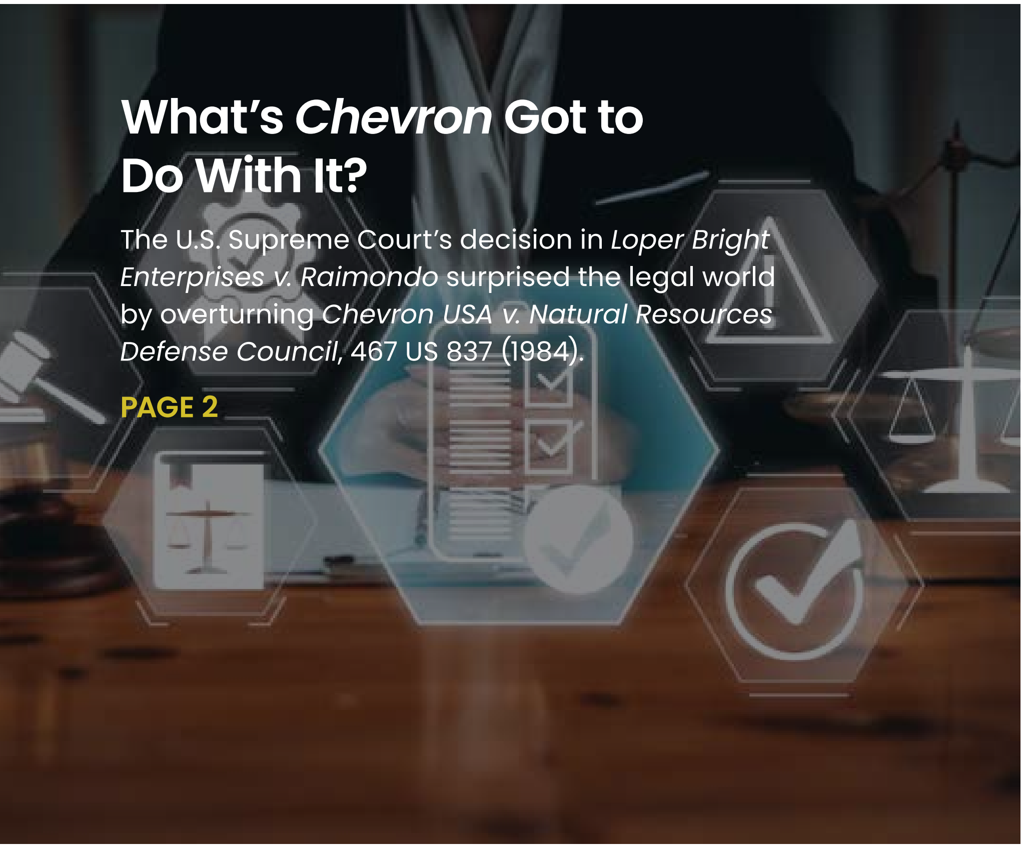

What's *Chevron* Got to Do With It?

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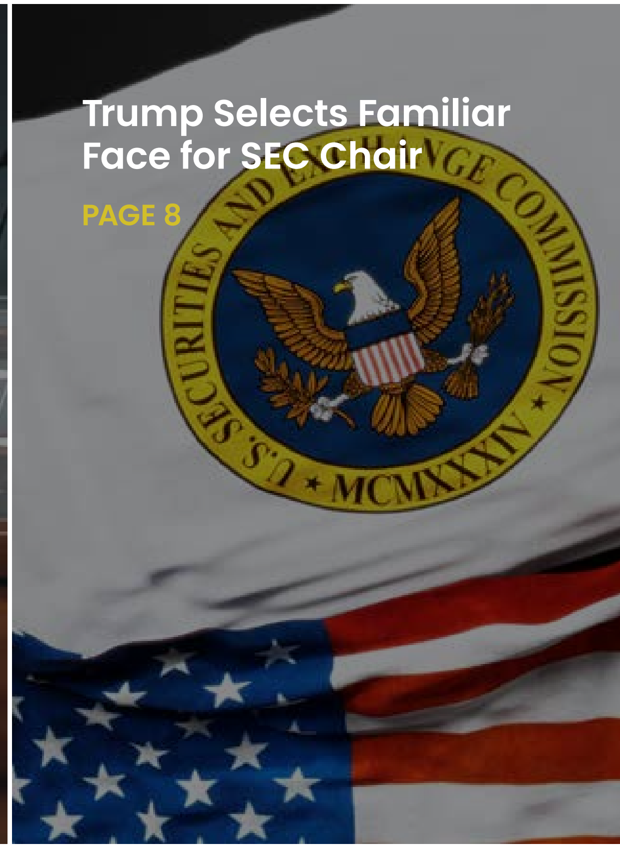

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[1] *Loper Bright Enterprises v. Raimondo*, 603 US ___ (June 28, 2024).

For the past 40 years, *Chevron* has required judicial deference to federal agencies' reasonable interpretation of statutes that courts deem ambiguous. This departure from precedent left lawyers in every regulated industry pondering, with apologies to Tina Turner, "What's *Chevron* got to do, got to do with it?"

At first glance, *Loper Bright*'s only connection to retirement benefits is that it involves fishing, a favored pastime for retirees. However, *Loper Bright* goes deeper, increasing the likelihood that federal agency regulations will be challenged and rejected. *Loper Bright*'s impact may extend to administrative agency interpretations across consumer protection, transportation, healthcare, energy, and banking. It will take years to get certainty about which regulations are at risk, under what circumstances the courts will side with agencies over regulated entities, how far the challenges will go through the courts, and what the impact all of this may have on how public pension funds operate and function.

> ***Loper Bright*'s impact of overturning Chevron may extend to administrative agency interpretations across consumer protection, transportation, healthcare, energy, and banking.**

For now, the judicial challenge to the Department of Labor's (DOL) Employee Retirement Income Security Act (ERISA) guidance concerning private pension funds through its rule on "Prudence and Loyalty in Selecting Plan Investments" is farther along than most other post-*Loper Bright* challenges. While the viability of that rule is uncertain and its applicability to public pension systems is only instructive, basic fiduciary duties emanating from state law remain in place. Even though *Chevron* is just a sweet old-fashioned notion now, public pension fiduciaries, as they have done in the past, need to engage in a rigorous review of their decision-making processes and thoroughly document the steps taken to arrive at those decisions to allow them to continue rolling on the river of prudent decision-making amidst what could be years of uncertainty while legal challenges wend their way through the courts.

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We Don't Need to Follow *Chevron*: *Loper Bright* Reverses Administrative Deference

In *Chevron*, the U.S. Supreme Court held that federal administrative agency determinations were entitled to judicial deference if the interpretation of an ambiguous statute was challenged in court. The rationale underlying the so-called "*Chevron* deference" was that federal agencies, with their specialized expertise and accountability to the elected president, were better equipped than judges to make policy choices left open by Congress. For 40 years, courts have applied *Chevron* deference across regulated industries in such areas as food safety, pollution, and labor regulations. On June 28, 2024, as NAPPA was concluding its Legal Education Conference, the Supreme Court decided *Loper Bright Enterprises v. Raimondo* (No. 22-451, June 28, 2024) (and a companion case, *Relentless, Inc. v. Department of Commerce*). *Loper Bright* involved family fishing businesses that challenged a regulation requiring industry-funded ocean monitoring promulgated by the National Marine Fisheries Service as unauthorized by the Magnuson-Stevens Fishery Conservation and Management Act of 1976 and as contrary to the federal Administrative Procedure Act (APA).[2] The U.S. District Court for the District of the District of Columbia, applying *Chevron* deference, granted summary judgment upholding the regulation and the U.S. Court of Appeals for the D.C. Circuit affirmed. The Supreme Court granted certiorari and reversed. *Relentless*, the companion case, followed a similar path through the First Circuit.

> **In *Chevron*, the U.S. Supreme Court held that federal administrative agency determinations were entitled to judicial deference if the interpretation of an ambiguous statute was challenged in court.**

Chief Justice Roberts wrote the *Loper Bright* opinion that overruled *Chevron* and held that courts must determine whether an agency has acted within its statutory authority using "traditional tools of statutory construction" to ensure that the agency's determination is the best interpretation of the law pursuant to the APA. Even though agency determinations might still be "especially informative" when arising from "factual premises" that the agency is uniquely qualified to assess, courts still must independently determine the meaning of the ambiguous statute as a matter of law. The Supreme Court also emphasized that although *Chevron* deference has been overruled, prior decisions that relied on *Chevron* deference remain valid.

Justice Thomas concurred, concluding that *Chevron* deference violated the separation of powers through executive overreach into the judicial function. Justice Gorsuch also wrote separately, agreeing with Justice Thomas in a lengthy concurrence that *Chevron* deference violated the separation of powers and explaining why stare decisis did not require following *Chevron*. Justices Kagan, Sotomayor, and Jackson (Jackson participating only in *Relentless*) dissented. Their dissent emphasized the expertise of administrative agencies and political accountability of the executive branch, as well as Congress's failure for 40 years to cure any disagreement with the *Chevron* doctrine. They also warned that the *Loper Bright* majority opinion enables judges to insert themselves into policy decisions.

[2] 5 U.S.C. §§ 551–559.

> **Chief Justice Roberts wrote the Loper Bright opinion that overruled *Chevron* and held that courts must determine whether an agency has acted within its statutory authority using "traditional tools of statutory construction" to ensure that the agency's determination is the best interpretation of the law pursuant to the APA.**

Finally, their dissent expressed concerns about the chilling effect on agencies to offer their own interpretations of statutory ambiguities, knowing that well-resourced regulated entities will challenge their interpretation.

In the near term, regulatory guidance from agencies will remain in effect unless a court rejects it. However, when regulations are challenged, challengers and government agencies will be placed on equal footing in advancing their arguments about the best interpretation of ambiguous laws. There is no longer deference accorded agency determinations.

It May Seem to You That ERISA Guidance Is Acting Confused: *Loper Bright*'s Shake-Up of DOL Standards

In 2022, the Biden Administration promulgated a rule that required an ERISA fiduciary to make investment decisions, "based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis" and stated that, depending on the facts and circumstances, risk and return factors "may include" ESG factors. A coalition of 26 states challenged the DOL's 2022 rule asserting that the rule "contravenes ERISA's clear command that fiduciaries act with the sole motive of promoting the financial interests of plan participants and their beneficiaries" and complaining that it introduced "ill-defined, subjective ESG concerns" into the fiduciary framework. These challenges culminated in the 26 states filing the lawsuit *Utah v. Walsh* (No. 23-11097, N.D. Tex.).

Surprisingly, considering his prior decisions favored more conservative policy outcomes, in September 2023, U.S. District Judge Matthew Kacsmaryk upheld the DOL's interpretation based on then-applicable *Chevron* deference.[3] Unsurprisingly, the Plaintiffs appealed the decision to the U.S. Court of Appeals for the Fifth Circuit. The Plaintiffs argued that the 2022 Biden rule could not be supported without agency deference. The DOL countered, saying that the rule was consistent with ERISA itself and deference was unnecessary. Both parties agreed that the Fifth Circuit should assess whether the 2022 rule aligned with ERISA requirements. Then, less than two weeks before oral argument, the Supreme Court overturned *Chevron* deference. The Fifth Circuit, hearing the case with a new name, *Utah v. Su*, and new mandate (no *Chevron* deference), directed the District Court to independently interpret whether the 2022 rule was consistent with ERISA, with the instruction to Judge Kacsmaryk: "[W]e vacate and remand so that the district court can reassess the merits."[4] This case can be seen as a bellwether for how agency determinations will be reviewed under the *Loper Bright* holding.[5]

> ***Loper Bright* is a "sea-change" decision, and public pension counsel needs to be alert to developments in federal administrative law because of the uncertainty it introduced.**

How Public Pension Funds Should Navigate the Waters Post-*Loper Bright*

Loper Bright is a "sea-change" decision, and public pension counsel needs to be alert to developments in federal administrative law because of the uncertainty it introduced. Despite this watershed alteration in administrative law, public pension fiduciaries' duties of loyalty, prudence, and care as the primary drivers of their decisions remain the same. Public pension fiduciaries must still always exercise their duties consistent with the exclusive benefit rule as their guiding principle, acting solely in the interest, and with the exclusive purpose of providing benefits to members and beneficiaries of the plan.

Similarly, public pension fiduciaries must continue to exercise both procedural and substantive due diligence in their decision-making. Fiduciaries should continue to carefully document the information considered in making investment decisions, their reliance on experts, the reasoning behind their conclusions, and how they monitor these decisions to ensure they remain sound. Trustees who stay true to these responsibilities will find that these practices are "simply the best."

[3] *Utah v. Walsh*, ___ F Supp3d ___ , (N. D. Tex. 2:2023-cv-00016, Sept. 21, 2023), vacated and remanded sub. nom. *Utah v. Su*, ___ F4th ___ (23-11097, 5th Cir., July 18, 2024).

[4] *Utah v. Su*, supra note 3.

[5] It also should be noted that "more than 40 federal lawsuits citing the high court's ruling in *Loper Bright Enterprises v. Raimondo* have been filed in the two-plus months since the decision. The suits—including those targeting firearm regulations, COVID-era loan programs, and Health and Human Services Department rules—show the wide range of court battles already prompted by the ruling." Justin Henry, "Leading DC Firms Play Long Game in Life After *Chevron* Ruling," Bloomberglaw.com (Sept. 13, 2024).

Public pension attorneys will also need to be cognizant of impacts on investment and operating environments as the post-*Chevron* world evolves. Federal agencies with regulatory authority as diverse as the SEC, CFTC, IRS, FTC, CFPB, DOT, HHS and DOJ, among others, will be directly affected so that future regulatory schemes that affect public pension investments, partners, benefits, operations and even governance will need to be considered in this new context. Likewise, states may be emboldened to adjust their regulatory review models to follow *Loper Bright*, which can have a more direct effect on public pension systems that are subject to state law requirements regarding their fiduciary duties.

The era of *Chevron* deference provided stability to the regulatory environment in which public pension systems operate. This new post-*Chevron* era promises uncertainty through trial and error that will, over time, define the way the judiciary and the legislature operate. While this plays out, public pension systems must be vigilant in observing and learning from related developments and, most importantly, must maintain focus on their basic fiduciary duties that prioritize the exclusive benefit rule for their members and beneficiaries. That is what *Chevron* has to do with it.

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Trump Selects Familiar Face for SEC Chair

With some federal appointees publicly tasked with overhauling or even eliminating the departments they're tapped to lead, President Trump's choice of Securities and Exchange Commission veteran and Washington insider Paul V. Atkins to head the agency seems to harken to a more conventional time.

Mr. Atkins is an unarguably experienced pick with a history of service to the agency, acting as an SEC Commissioner under Presidents George W. Bush and Obama and a high-level staffer for SEC Chairs Arthur Levitt and Richard Breeden before that. That makes him likely to be a more evolutionary Chair than a revolutionary one, according to Cohen Milstein partner Daniel S. Sommers.

"In contrast to some of the President-elect's nominees for other agencies, I think it unlikely that Mr. Atkins will have the dismantling of the SEC as his mission," Mr. Sommers said. "So, to the extent that U.S. politics is cyclical, there may still be a sufficient infrastructure at the SEC to resume pro-investor activity when Democratic control returns to the White House."

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As an SEC Commissioner from 2002 to 2008, Mr. Atkins largely followed the standard recent playbook for Republican appointees—backing measures to expand access to capital markets over increased regulation and expressing doubts about the value of holding public companies responsible when their executives break the law.

Mr. Sommers said Mr. Atkins' tenure as an SEC Commissioner provides strong evidence as to how he will approach the SEC's enforcement function if confirmed by the Senate. "We should expect that Mr. Atkins will strongly favor enforcement actions against individuals rather than corporations, and will look at all potential enforcement actions with heightened skepticism," he said.

"While those approaches may not be ideal for institutional investors, I take at least some limited comfort from his history of working at the SEC and what appears to be his appreciation of the SEC's importance as an institution," Mr. Sommers said.

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After leaving the SEC, Mr. Atkins founded DC-based political consulting firm Patomak Global Partners, advising financial industry and cryptocurrency clients about markets and regulatory issues. In 2016, he was a member of President Trump's first-term transition team, advising the incoming administration on financial policies and appointments.

Since returning to the private sector, Mr. Atkins has expressed views in line with policies currently popular among Republican lawmakers and diametrically opposed to positions favored by his predecessor, Gary Gensler, who resigned on January 20. Under former Chair Gensler, the SEC filed lawsuits against large crypto-related companies, including digital exchanges Coinbase and Kraken, and enacted rules requiring climate-risk disclosures in public company filings.

Mr. Atkins, meanwhile, is an outspoken advocate for facilitating the growth of cryptocurrencies, sitting on the board of advisors of the Digital Chamber of Commerce, a blockchain trade association. Last year, he criticized "activist" investing, denouncing in a *Newsweek* article Department of Labor rules changes that he said "would encourage" asset managers to include environmental, social, and governance considerations in their investment decisions.

> **"We should expect that Mr. Atkins will strongly favor enforcement actions against individuals, rather than corporations, and will look at all potential enforcement actions with heightened skepticism," Cohen Milstein partner Daniel S. Sommers said.**

President Trump, who as recently as 2021 said cryptocurrencies looked like a "disaster waiting to happen" and that bitcoin "just seems like a scam," did an about-face on digital currencies during this year's election campaign. In a Truth Social post announcing his pick, President Trump said Mr. Atkins "recognizes that digital assets & other innovations are crucial to Making America Greater than Ever Before."

In his post, President Trump also called Mr. Atkins "a proven leader for common sense regulations" who "believes in the promise of robust, innovative capital markets that are responsive to the needs of Investors, & that provide capital to make our Economy the best in the World."

Whatever agenda he sets as Chair, Mr. Atkins will almost certainly face some daunting challenges to retain experienced staff if the new administration makes good on its public promises to "drain the swamp" by greatly reducing the size of the federal workforce.

In his first days in office, President Trump signed an executive order reclassifying federal employees involved in policy to make those employees easier to fire. The president of the American Federation of Government Employees, Everett Kelly, said the new order could eliminate civil service protections for "hundreds of thousands of federal jobs," making those employees "answerable to the will of one man."

> **Mr. Atkins is an outspoken advocate for facilitating the growth of cryptocurrencies and has criticized rules that he says encourage pension funds to include ESG factors in their investment decisions.**

In addition, President Trump issued an executive order creating a new Department of Government Efficiency (DOGE) within the Executive Office. In an opinion article published by *The Wall Street Journal* following the election, DOGE Chair Elon Musk wrote that the projected "drastic reduction in federal regulations" would justify "mass head-count reductions" across the federal government. These reduction, he wrote, could be achieved through "large-scale firings" and "voluntary terminations" induced by measures such as relocating federal employees outside Washington and ending remote work.

As if to underscore the changing of the guard, the SEC issued a flurry of enforcement actions in the waning days of the Biden administration, including one against Mr. Musk. The SEC suit accused Mr. Musk of violating federal securities laws by failing to timely disclose his acquisition of more than 5% of Twitter's outstanding shares prior to his 2022 acquisition of the social media platform, now named X. The maneuver allowed Mr. Musk to underpay for his purchase by at least $150 million, the SEC alleged. It's unclear if the SEC will continue to pursue the lawsuit under Chair Atkins.

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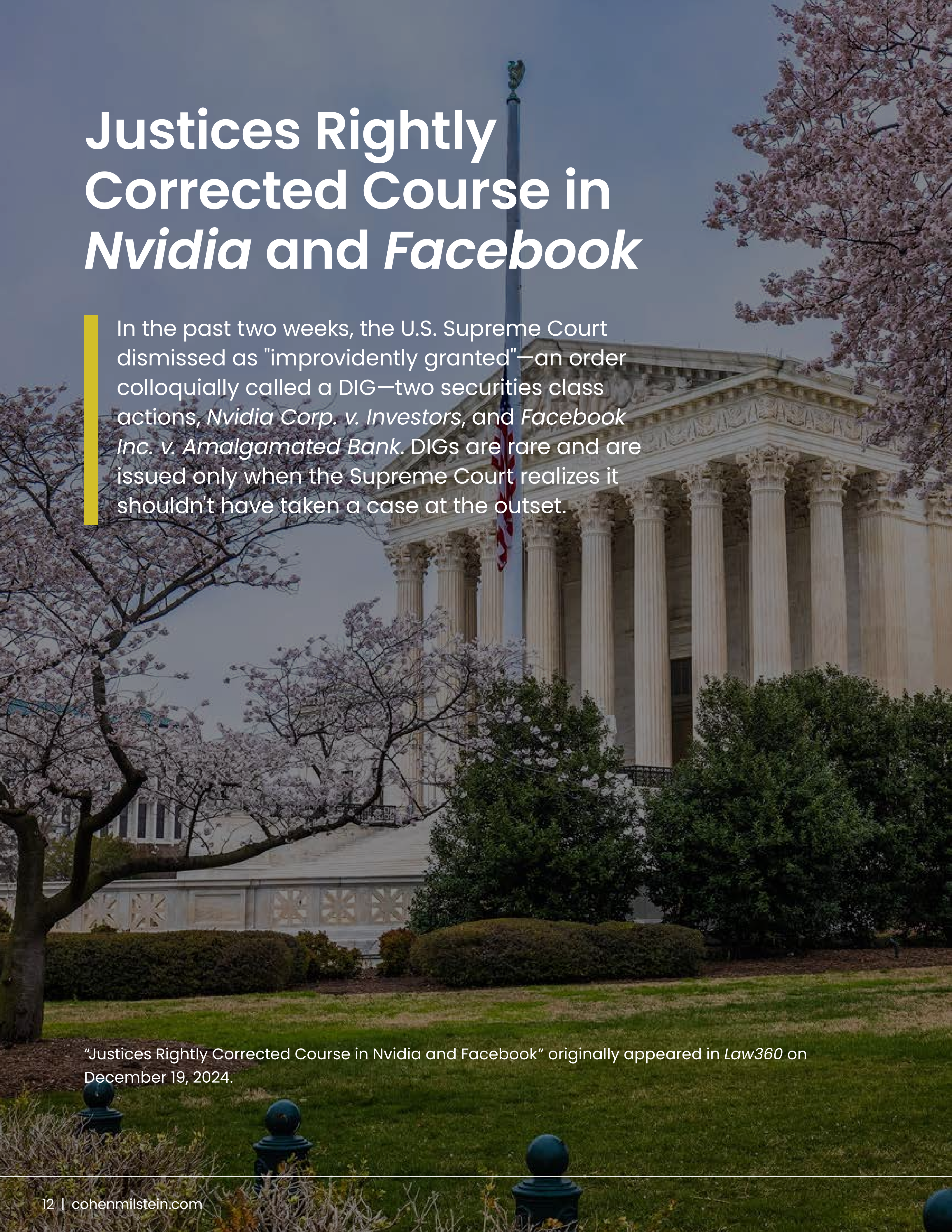

Justices Rightly Corrected Course in *Nvidia* and *Facebook*

In the past two weeks, the U.S. Supreme Court dismissed as "improvidently granted"—an order colloquially called a DIG—two securities class actions, *Nvidia Corp. v. Investors*, and *Facebook Inc. v. Amalgamated Bank*. DIGs are rare and are issued only when the Supreme Court realizes it shouldn't have taken a case at the outset.

"Justices Rightly Corrected Course in Nvidia and Facebook" originally appeared in *Law360* on December 19, 2024.

Dismissing two securities cases in such close succession, both of which presented significant risks to investor protections, is not only a procedural anomaly—it's a necessary course correction.

The petitioners' questions presented in both the *Facebook* and *Nvidia* cases were flawed—mischaracterizing existing law, purported circuit splits, the facts of the cases and the lower courts' decisions.

The Supreme Court's decisions to dismiss these cases maintain securities law pleading standards, preventing them from being unfairly tilted in favor of corporate defendants. The stakes in both cases were immense: The petitioners—Nvidia and Meta—in both cases sought rulings that would have significantly weakened securities laws and undermined investors' ability to hold corporations accountable for fraud.

In *Facebook*, the company argued it wasn't obligated to disclose that Cambridge Analytica accessed and misused Facebook user data without users' consent—a data breach that caused a multibillion-dollar loss in Facebook's market value and hundreds of millions in regulatory fines—because the events were historical and purportedly immaterial in nature to investors.

> **The stakes in both cases were immense: The petitioners—Nvidia and Meta—in both cases sought rulings that would have significantly weakened securities laws and undermined investors' ability to hold corporations accountable for fraud.**

If the Supreme Court had endorsed this argument and ruled in Facebook's favor, corporations would have been able to conceal material information simply by arguing it happened in the past, limiting any recourse in cases brought by shareholders, and undermining the trust that underpins financial markets.

The Court's refusal to take up Facebook's argument leaves intact the principle that material information, regardless of its timing, must be disclosed to investors when a company speaks on the topic. Shareholders rely on full transparency to make informed decisions, and the law requires this from companies.

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In *Nvidia*, the stakes for investor protection were even higher. In their complaint, the Plaintiffs cited an overwhelming body of evidence, including knowledge by former employees of internal documents reviewed by the company's CEO and expert analysis, that clearly supported their allegations of fraud.

This evidence was far more information in breadth and detail than most plaintiffs can obtain before the discovery stage of litigation. Yet, Nvidia sought to impose an impossibly high pleading standard for securities fraud claims.

The question Nvidia posed to the Court would have required plaintiffs to detail and quote from internal company documents in their initial complaints, despite the fact they can't realistically access these documents without discovery in the vast majority of cases.

> **By declining to rewrite securities law in ways that favor corporations at the expense of transparency, the Supreme Court has reinforced the laws that protect investors from corporate misconduct.**

In securities class actions, discovery only occurs after a judge assesses that a case has met the standard to continue past a motion to dismiss. If the Court moved forward with the case, they could have effectively immunized corporations from investor claims of securities fraud or lesser securities violations.

Nvidia also sought to undermine investors' ability to use an expert at the pleading stage. Disallowing such testimony in securities fraud cases would have further harmed investors' ability to hold wrongdoers accountable, and made it more difficult for courts to weigh and understand scientific, or particularly complex, information pled in complaints.

These DIGs protect more than legal principles; they safeguard the broader ecosystem of trust and accountability in the financial markets and the courts. If the Supreme Court had issued rulings based on the petitioners' misleading characterizations of the facts and law, the consequences for investors and markets could have been severe. By declining to rewrite securities law in ways that favor corporations at the expense of transparency, the Supreme Court has reinforced the laws that protect investors from corporate misconduct.

While DIGs often fly under the radar, don't underestimate their implications.

For securities lawyers, the *Nvidia* and *Facebook* cases represent real and dangerous efforts to distort the law under the guise of Supreme Court review.

For investors, these decisions underscore the continued importance of robust securities laws and the courts in protecting their interests. Corporations could evade accountability without these protections, jeopardizing market fairness and stability.

By issuing DIGs in both *Facebook* and *Nvidia*, the Supreme Court has sent a clear message: It will not be a party to undermining the integrity of securities litigation. These decisions are not just procedural footnotes; they reaffirm the principles that ensure corporate accountability, protect investors and uphold the rule of law.

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InnovAge Shareholders Obtain Class Certification in Lawsuit

The U.S. District Court for the District of Colorado has granted class certification in a lawsuit brought by the El Paso Firemen & Policemen's Pension Fund, the San Antonio Fire & Police Pension Fund, and the Indiana Public Retirement System (Plaintiffs).

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The securities fraud suit names InnovAge Holding Corp., several of its executives and board members, two private equity firms that allegedly controlled the company, and 11 underwriters who facilitated the company's initial public offering in March 2021 (IPO) as Defendants. This decision by Judge William J. Martínez marks an important milestone in the case.

Background

InnovAge, a healthcare provider specializing in senior care through the federal Program of All-Inclusive Care for the Elderly (PACE), went public in the spring of 2021. Plaintiffs allege that the push to go public was driven by two private equity firms—Apax Partners and Welsh, Carson, Anderson & Stowe—who owned controlling stakes in InnovAge and had been instrumental in the InnovAge's controversial decision to convert from a nonprofit to a for-profit company in the years prior to the IPO.

> **The story of InnovAge is emblematic of a broader trend of private equity firms' involvement in the healthcare industry in which the quest for profits can have serious repercussions not only for patients, but ultimately for shareholders backing the healthcare companies.**

Plaintiffs allege that InnovAge made false and misleading statements regarding the company's regulatory compliance, the quality of its care model, and the viability of its growth strategy. The claims focus heavily on InnovAge's compliance with regulatory standards, a critical requirement in the highly regulated PACE industry. Plaintiffs assert that the company misrepresented its adherence to these standards, concealing issues later revealed by government audits. According to the lawsuit, these audits uncovered significant compliance violations, including woefully understaffed care centers, that ultimately resulted in sanctions that hindered InnovAge's ability to accept new participants, negatively impacting its stock value.

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Class Certification Decision

In its decision certifying Plaintiffs' proposed shareholder class, the Court rejected Defendants' two arguments opposing class certification.

First, the Court found that Plaintiffs satisfied the predominance requirement for class certification, rejecting Defendants' argument that Plaintiffs did not comply with the Supreme Court's decision in *Comcast Corp. v. Behrend*, which held that antitrust plaintiffs had failed to provide a damages methodology that aligned with their theory of liability. Defendants argued that Plaintiffs' damages model failed to disentangle the effects of actionable misrepresentations from other factors affecting InnovAge's stock price. Plaintiffs responded that Defendants were attempting to stretch the logic of *Comcast* beyond the specific, limited context in which it was originally applied. Judge Martínez sided with Plaintiffs, citing well-established precedent that Plaintiffs' proposed "out-of-pocket" event study methodology is widely accepted in securities fraud cases. Judge Martínez also reasoned that, even if there were any shortcomings in the damages model, they would affect all class members uniformly and thus would not preclude class certification. The Court ultimately found that common issues, including the alleged misrepresentations and their impact on InnovAge's stock price, predominated over any individual questions.

> **Being certified to proceed as a class increases bargaining power for plaintiffs, as well as streamlining discovery and motions practice.**

The "*Comcast* argument" Defendants raised is one that plaintiffs in securities class actions regularly encounter at the class certification stage, despite its being routinely rejected by courts. Just two months ago, attorneys at Cohen Milstein overcame a nearly identical argument when a district court in South Carolina granted a motion for class certification against Deloitte. This argument has become so common that, in briefing motions for class certification, Cohen Milstein attorneys have begun filing a list of district court opinions rejecting *Comcast* arguments, which they did here, listing 90 such instances.

Judge Martínez also found that Plaintiffs satisfied the requirement under Rule 23 of the Federal Rules of Civil Procedure that named plaintiffs in class actions are "adequate" representatives. In doing so, Judge Martinez noted that Plaintiffs were "sophisticated institutional investors who manage billions in assets," who had "thus far capably demonstrated their understanding of this action by testifying as to the occurrence of key events; the cause of their alleged losses; and the causes and effects of Defendants' alleged conduct." (internal citations omitted).

Implications & Next Steps

Class certification is a key step in securities litigation and enables the Plaintiffs to serve as representatives of the class of InnovAge investors. Being certified to proceed as a class, rather than on an individual basis, increases bargaining power in the litigation and streamlines discovery and motions practice.

The story of InnovAge—that is, the story of a non-profit healthcare company converted into a publicly traded, for-profit corporation controlled by private equity firms—is emblematic of a broader trend of private equity firms' involvement in the healthcare industry. As this lawsuit illustrates, that involvement often comes with a pursuit of cost-cutting and profit maximizing that can have serious repercussions not only for patients, but ultimately for other investors backing the healthcare companies.

Discovery in the matter is under way.

For further details, refer to the Court's official order dated January 9, 2025.

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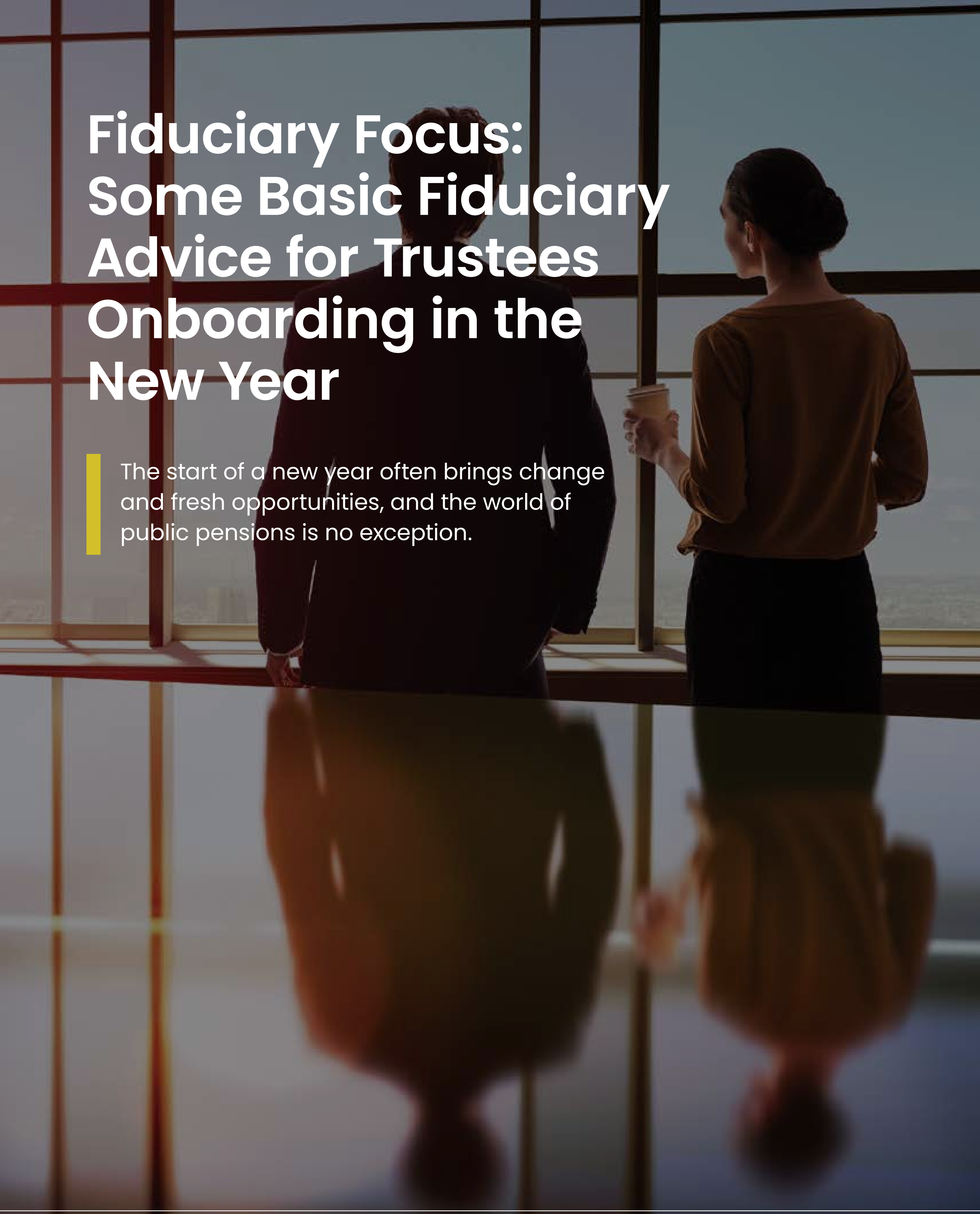

Fiduciary Focus: Some Basic Fiduciary Advice for Trustees Onboarding in the New Year

The start of a new year often brings change and fresh opportunities, and the world of public pensions is no exception.

For some pension plans, the new year may signal the appointment of new trustees to their boards. It's essential for new trustees to educate themselves, particularly when it comes to the fiduciary responsibilities that form the foundation of everything they do. Even the most well-intentioned trustees must take care to fully understand their obligations as fiduciaries to prevent inadvertent errors that could potentially leave them in violation of their fiduciary duty. As we welcome these individuals to their important roles, we would like to take the opportunity to address some frequently asked questions, drawn from many years of experience in trustee training.

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I am a new trustee on the board of a police and firefighters' pension system elected by the police members. I owe a fiduciary duty to my constituents—the police members—to always act in their best interests. Correct?

Not exactly. Trustees owe a fiduciary duty to all the members of a public pension plan—not just the membership group from which they were elected. This **duty of loyalty** is central to every statement of fiduciary duty.

The duty of loyalty means that a trustee wears only one "hat." The courts have determined that a trustee may not, at the same time he or she is serving as a fiduciary for all members, wear a second hat as a representative of the entity that appointed him or her. This can be hard, as constituents may expect their elected "representative" on the board to take care of their needs. But as the courts have consistently held and the U.S. Supreme Court has reiterated, the duty to the trust beneficiaries must overcome any loyalty to the interests of the party or parties that appointed the trustee.

But as a governor's appointee to a state pension board, shouldn't I be primarily concerned with the taxpayers? After all, taxpayer money flows into the fund from the state, which is the employer.

Trustees of public retirement systems are not fiduciaries for appointing authorities, employers who pay into the systems, unions, constituencies from which they are elected, taxpayers, or the public. Rather, as noted, the duty of loyalty provides that trustees always act in the best interests ***solely*** of the members and beneficiaries.

The duty of loyalty is closely related to and informed by the **exclusive benefit rule**, which provides that trustees shall administer their pension systems for the sole and exclusive benefit of the members and participants. The pension plan's assets are held in a trust, and once contributions are made to that trust—whether by employees who are members of the plan or by states or municipalities who continue as employers—those contributions become part of the trust.

Moreover, public pension plans are generally considered "qualified" retirement plans under the Internal Revenue Code, which allows for tax advantages such as tax-deferred contributions and earnings growth for employees participating in the plan. The Internal Revenue Code specifies that no part of the corpus or income from the trust may be used for purposes other than for the exclusive benefit of the employees or their beneficiaries. Any violation of this "exclusive benefit rule" could put the tax qualification of the plan at risk.

As a fiduciary, I feel that "the buck stops with me." Isn't it my job to make decisions—not the job of the staff or outside experts?

The role of the board is certainly as the final decision-maker, but the answer to the question posed is a little more complex. The importance of governance is critical, since research indicates a strong positive correlation between good governance and a performance premium. The role of the board is one of oversight. As noted by the National Association of State Retirement Administrators, boards are established to oversee the operations of the system, to ensure that the system is fulfilling its statutory responsibilities related to retirement system functions. The board is also charged with establishing the policies of the system and with strategic planning. Staff, on the other hand, has responsibility for the day-to-day operation of the system, as well as the implementation of the policies and strategic plan set by the board. Consultants provide the outside expertise that enables both the board and staff to better fulfill their respective responsibilities.

Fiduciary law provides that a trustee has a duty to personally perform the responsibilities of a trustee *except* as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority, and in monitoring those to whom they have delegated responsibility, trustees owe a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person of comparable skill would act in similar circumstances (**duties of prudence and care**).

The law recognizes that a trustee cannot personally perform every function and does not possess all required expertise. Thus, trustees are authorized to delegate; delegation is, in fact, a critical part of a proper exercise of fiduciary duty. The decisions to appoint and monitor delegates are fiduciary functions: the trustee has a duty to properly select delegates and to monitor them.

Remember that fiduciaries are judged by the decision-making process they follow. Do you as a trustee have sufficient information from experts, both staff and independent outside experts? Does your board engage in a rigorous decision-making process in a manner consistent with procedural prudence? The process undertaken should be documented to demonstrate prudence in decision-making. And finally, fiduciaries have an ongoing duty to monitor decisions to make sure those decisions remain prudent.

Suzanne M. Dugan is special counsel to Cohen Milstein and leads the Ethics and Fiduciary Counseling practice.

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NAR Buyer-Broker Settlement Approved Over DOJ Concerns
Law360 – November 27, 2024

XL Fleet SPAC Suit Tentatively Settled For $4.75M In Del.
Law360 – November 14, 2024

Deloitte Stuck with Investor Class Over Nuke Plant Audit Reports
Bloomberg Law – November 13, 2024

Texas Rebar Giant CMC Hit With $110M Antitrust Verdict
Law360 – November 5, 2024

AWARDS & ACCOLADES

Cohen Milstein Named Legal Lion of the Week for Pacific Steel
Law360 – November 8, 2024

Cohen Milstein Named a 2024 Antitrust Enforcement Award Honoree
American Antitrust Institute – November 4, 2024

Seven Cohen Milstein Attorneys Recognized as 2024 New York Super Lawyers & Rising Stars
Super Lawyers – October 29, 2024

Michelle Yau Named MVP – Benefits 2024
Law360 – October 21, 2024

UPCOMING EVENTS

February 7 | Santa Clara University Investor Protection Summit

Santa Clara, CA – Carol Gilden

Carol Gilden will speak on the panel "AI and the Litigation Terrain: Liabilities, Social Media, Memes, Risks, and Price Movement."

February 13-18 | National Labor & Management Conference

Hollywood, FL – Molly Bowen and Christopher Lometti

February 19-25 | National Association of Public Pension Attorneys Winter Seminar

Charlotte, NC – Luke Bierman, Suzanne Dugan, Carol Gilden, and Julie Reiser

March 1-3 | National Association of State Retirement Administrators Winter Meeting

Washington, DC – Richard Lorant

March 5 | PLUS D&O Symposium

New York, NY – Julie Reiser

Julie Reiser will speak on the panel "AI and the D&O Risks."

March 6-9 | National Coordinating Committee for Multiemployer Plans Annual Conference

Hollywood, FL – Molly Bowen and Christopher Lometti

March 16-18 | County Commissioners Association of Pennsylvania Spring Conference

Harrisburg PA – David Maser

Team Profile

Christina D. Saler | Partner

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Christina Donato Saler, a partner in Cohen Milstein's Securities Litigation & Investor Protection practice group, focuses primarily on shareholder litigation, representing public pension funds and other institutional investors as plaintiffs in class actions against corporations and their officers and directors for securities fraud or breaches of fiduciary duty. In recent years, Christina has expanded her representation to serving as outside counsel to state attorneys general and, in working with those state enforcement offices, has recovered over $1.2 billion from pharmacy benefit managers that were overcharging state funded health plans, including Medicaid plans. She is also the Editor of the Shareholder Advocate. *For this issue, Christina spoke with* Shareholder Advocate *team member Richard Lorant.*

I grew up in … Medford, a town in south New Jersey known for its lakes and historic log cabins. Medford is about 45 minutes from Philadelphia and people there associate themselves more with Philly than New York. That was even more true in my family because my parents grew up in Philadelphia. My father is a first-generation American. My mother's grandparents, who had a bakery on the island of Ischia before they came over from Italy, started a bakery in Southwest Philadelphia called Mattera's. Medford was a very nice place to grow up, with great school sports programs and an outdoorsy environment. My parents still live in Medford at the edge of the Pine Barrens and my two daughters love to visit.

I first decided to become a lawyer when … Well, that's a long story! I was always interested in the law, but I was always drawn to advertising as well. My dad was a creative director for a New York ad agency, so I grew up watching his commercials on television, seeing his ads in magazines, and driving past his billboards on the highway. I was always captivated by that—and proud. Probably, his best-known campaign was for the U.S. Army, the one with the slogan: "Be All That You Can Be." After college I went to work for an advertising and public relations agency. Though I managed several creative campaigns, my principal focus was managing our client Bell Atlantic's spokesperson contract with James Earl Jones, the voice of Darth Vader who became the voice and face of Bell Atlantic and later Verizon. We negotiated contracts with James Earl's agent on behalf of Bell Atlantic and ensured contract compliance—that got me wanting to learn more. So, in 2000, I went to law school with the idea of becoming an entertainment lawyer. But while I was applying to law schools, I met my husband. He is a lobbyist, and I quickly became immersed in his political network. My focus changed to working with public sector clients to get them relief when corporations play too fast and loose with the law.

I found my way to Cohen Milstein … in 2017, when after focusing on representing public and union pension fund clients as plaintiffs in securities fraud and corporate governance litigation at a smaller firm, I wanted to find a professional home with broader capabilities. And it has worked out so well! As a partner overseeing investor litigation, I still partner with pension fund professionals and trustees—but I have also expanded my practice to serving as outside counsel to different state attorneys general to investigate and take legal action against abuses by PBMs. This has given me a whole new avenue to protect people from corporate wrongdoing.

I'm currently watching … Given my work and two teenage daughters to raise, I'm not ashamed to admit I tend to keep my entertainment light and fluffy! I highly recommend the Netflix series *Nobody Wants This*, which is about an interfaith couple navigating the challenges of overbearing parents. Also, I recently went out on a limb and watched *Carry-On* with Jason Bateman, a disturbing and suspenseful Netflix movie about how TSA workers could be manipulated by some evil people. Finally, I'm eagerly awaiting the Disney+ reboot of *Golden Girls*, with Tina Fey, Amy Pohler, Maya Rudolph, and Lisa Kudrow. How can that not be hysterical!

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Please contact us with questions or comments at 202.408.4600.

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