Spring 2018

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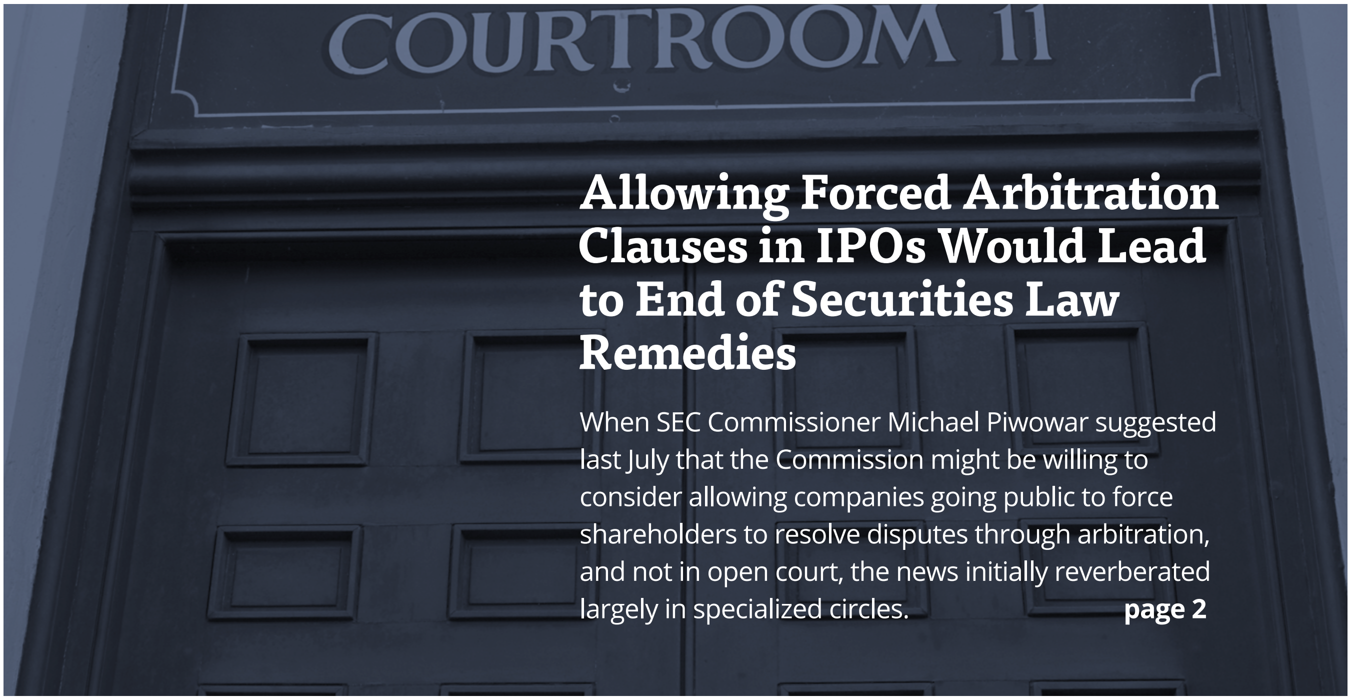

Allowing Forced Arbitration Clauses in IPOs Would Lead to End of Securities Law Remedies

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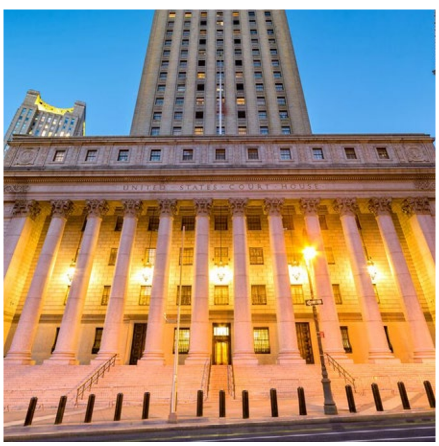

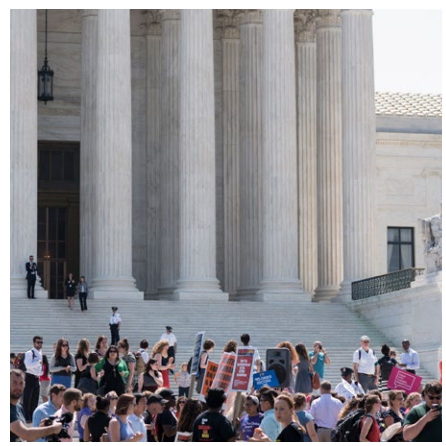

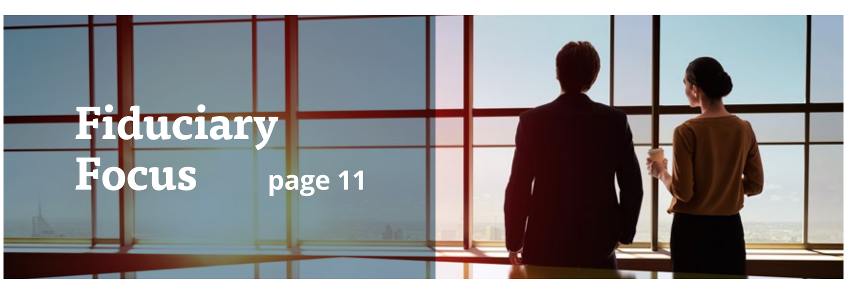

Allowing Forced Arbitration Clauses in IPOs Would Lead to End of Securities Law Remedies

When SEC Commissioner Michael Piwowar suggested last July that the Commission might be willing to consider allowing companies going public to force shareholders to resolve disputes through arbitration, and not in open court, the news initially reverberated largely in specialized circles. After all, the SEC, Congress and the courts have enshrined the right of private action—the ability to seek financial redress under federal and state securities laws—as a vital tool for investors. Then, in January, Bloomberg reported that the SEC itself was "laying the groundwork" to permit companies applying for SEC approval of initial public offerings to include such "mandatory arbitration" provisions in their charters. The news that the radical idea had spread far beyond one of the five Commission members drew swift and strong responses from institutional investors and their allies. Those condemning the proposal include another member of the Commission, and the SEC's own investor advocate, who called it "draconian." Forced to respond, SEC Chair Jay Clayton has limited himself to saying he was "not anxious" to pursue the rule, hardly a comfort to investors who understand that forced arbitration would vastly constrain their ability to recover money lost to securities fraud. Worse, Chairman Clayton recently refused even to commit that any consideration of such a radical change would be subject to the rigorous and transparent processes required by federal law. At the height of the debate, Cohen Milstein Partner Daniel Sommers participated in a teleconference organized by the Council of Institutional Investors, the nation's preeminent shareholder education and advocacy organization. The following article is adapted from his opening remarks at the February 21 teleconference. Sommers was elected chair of the CII's Markets Advisory Council last month.

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> **"STRIPPING AWAY THE RIGHT OF SHAREHOLDERS TO BRING A CLASS ACTION LAWSUIT SEEMS TO ME DRACONIAN AND ... COUNTERPRODUCTIVE."**
>
> **RICK FLEMING**
> **SEC'S INVESTOR ADVOCATE**

TO PUT IT BLUNTLY, COMMISSIONER PIWOWAR'S PROPOSAL IS CALCULATED TO AND WOULD IN FACT DENY INVESTORS THEIR RIGHTS UNDER THE SECURITIES LAWS IN ALMOST ALL SITUATIONS.

Adopting Commissioner Piwowar's proposal to permit companies to impose mandatory arbitration provisions in connection with their IPOs would rapidly lead to the end of meaningful securities law remedies for investors.

This proposal in fact presents as great a threat to investor rights as anything I have seen in the past thirty years—ranking with challenges in the Supreme Court to the fraud-on-the-market doctrine underpinning securities class actions. To put it bluntly, Commissioner Piwowar's proposal is calculated to and would in fact deny investors their rights under the securities laws in almost all situations.

While the proposal by Commissioner Piwowar presently is restricted to use by newly formed public companies, it would inevitably spread over time as companies with such provisions make up an increasing share of listed companies. Further, the scope of forced arbitration provisions would certainly morph beyond companies applying for IPOs, as existing public companies, emboldened by the precedent, will find ways to amend their charters or bylaws to force investors out of court and into arbitration proceedings. The temptation for public companies to avail themselves of what effectively is a "get-out-of-jail-free card" by restricting investors' ability to use both the court system and the class-action mechanism will be irresistible.

So why would this mark the beginning of the end of effective remedies for investors? The answer is that forced arbitration would compel investors to participate in a process that undermines all of the critical elements of current securities litigation that makes that process a fair and economically rational option for investors.

Currently, investors have the right to sue under federal securities laws when they believe they were misled in connection with the purchase of a security. This right to go to court is longstanding and essential. In fact, on numerous occasions the SEC and the Supreme Court have said that private enforcement of the federal securities laws is a vital supplement to the SEC's investor protection mission.

> ***"[N]ow – when SEC enforcement is hamstrung by budgetary and legal limits—is hardly the time to be thinking about depriving shareholders of their day in court."***
>
> **COMMISSIONER ROBERT J. JACKSON, JR.**

(Editor's Note: As mentioned above, recent critics of the mandatory arbitration proposal include the SEC's own Investor Advocate, Rick Fleming. In his February 24 speech, which highlighted similar issues as Sommers does here, Fleming said that "stripping away the right of shareholders to bring a class action lawsuit seems to me draconian and, with respect to promoting capital formation, counterproductive." Two days later, newly appointed Commissioner Robert J. Jackson Jr. signaled his opposition to a group of investors, saying: "[Now—when SEC enforcement is hamstrung by budgetary and legal limits—is hardly the time to be thinking about depriving shareholders of their day in court." In March, Democrats belonging to the House Financial Services Committee wrote Chair Clayton that they "strongly oppose any effort to reverse the Commission's longstanding position that such forced arbitration provisions violate Federal securities law." Even former SEC Chair Harvey Pitt, who has devoted much of his career to defending companies accused of securities fraud, said forced arbitration "is on the outer edges" and advised current Chair Clayton to put it "on the back burners.")

Our court system today offers investors a range of litigation options. Investors may choose to bring a case on their own behalf in court or seek to be a lead plaintiff in a class action, where a group of investors can seek redress at once. Importantly, because class actions automatically include all similarly harmed shareholders, investors can also remain as uninvolved members of a class but still share in any recovery.

Specifically, investors now have the following rights:

- The right to seek and obtain evidence before trial both from the defendants and from people and entities that are not parties to the case—including documents and testimony under oath from witnesses located anywhere in the United States and, if needed, in many other countries.
- The right, enforceable by a judge, to obtain evidence after litigation has commenced.
- The right to litigate their claims in a public forum and to bring corporate wrongdoing to light, which serves as a deterrent against future misconduct.
- The right to have their claims adjudicated by an impartial judge and have factual disputes resolved by a jury.
- The right to appeal any adverse decisions to a higher court.
- The right to proceedings governed by a clear set of well-established rules, including the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

- The right to have any judgments or orders enforced by a judge, including those relating to collection of a judgment.
- And, of critical importance, the right to utilize the class action process, which enables investors with losses too small to justify the significant expense of litigation to band together to obtain relief for themselves and all similarly aggrieved investors.

Forced arbitration will undo each of these rights.

In arbitration, investors have very limited ability to obtain pre-trial evidence and arbitrators have limited ability to enforce orders—especially with respect to parties who are not part of the arbitration.

In arbitration, investors lose their constitutional right to trial by a jury and the panel of arbitrators may include individuals with pro-industry bias.

The procedural rules that apply in Court do not necessarily apply in arbitration. Investors do not have access to appellate courts as they would in a court proceeding. Moreover, arbitration proceedings are secretive and held outside of the public eye.

Most importantly, class or other collective actions are generally not available in arbitration, and any arbitration provisions that will be drafted under Commissioner Piwowar's proposal will almost certainly contain class action waivers, which will bar investors from initiating or participating in a class action.

This means that investors will be forced to litigate their own claims alone in arbitration, and to bear the costs of that litigation alone. Such a system is simply not economically rational for investors, except in the rarest cases where an investor has losses in the many tens or hundreds of millions of dollars. And even then, investors would be forced to pursue their claims in a process that lacks the procedural and substantive fairness currently afforded them by our court system.

So all this means that securities litigation in a forced-arbitration world would be economically irrational for mid-sized and small investors, and only possible for even the largest investors in the most unusual of circumstances.

As a result, I would expect that if this proposal is adopted we will see over a relatively short time that the number of securities cases that are filed in court will dwindle to insignificance. And for those few investors who find their way into arbitrations, they will be met by a forum that is fundamentally ill-equipped to properly and effectively adjudicate securities cases. ■

Daniel S. Sommers, a Cohen Milstein partner, is a member of the firm's Executive Committee and co-chair of its Securities Litigation & Investor Protection practice group.

FORCED ARBITRATION: ACTION AND REACTION

JULY 2017
SEC Commissioner Michael Piwowar tells the Heritage Foundation: "For shareholder lawsuits, companies can come to us to ask for relief to put in mandatory arbitration into their charters."

NOVEMBER 2017
President Trump approves a Congressional resolution repealing a rule that would have stopped financial firms from requiring consumers to use arbitration.

JANUARY 26, 2018
Bloomberg publishes an article saying the SEC is "laying the groundwork" to consider allowing companies going public to include forced arbitration provisions in their charters.

JANUARY 29, 2018
The Council of Institutional Investors expresses its concern to the SEC, urging the Commission to continue opposing such measures, as it has for three decades.

FEBRUARY 6, 2018
Testifying before the Senate Banking, Housing and Urban Affairs Committee, SEC Chair Jay Clayton says that, while he "can't pre-judge" future issues, he is "not anxious to see changes" to current rules.

FEBRUARY 24, 2018
In a speech, SEC Investor Advocate Rick Fleming calls efforts to introduce mandatory arbitration in publicly traded companies "draconian" and "counterproductive" to promoting capital formation.

FEBRUARY 26, 2018
SEC Commissioner Robert Jackson says forced arbitration would "radically" benefit corporate insiders by stripping investors' "right to their day in court."

MARCH 2018
Democrats on the House Financial Services Committee urge the SEC to "reaffirm its longstanding position that forced arbitration provisions ... harms the public interest and violates the anti-waiver provisions of the Federal securities laws."

SECOND CIRCUIT ISSUES TRIO OF HELPFUL RULINGS

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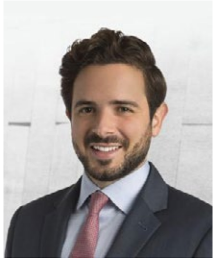
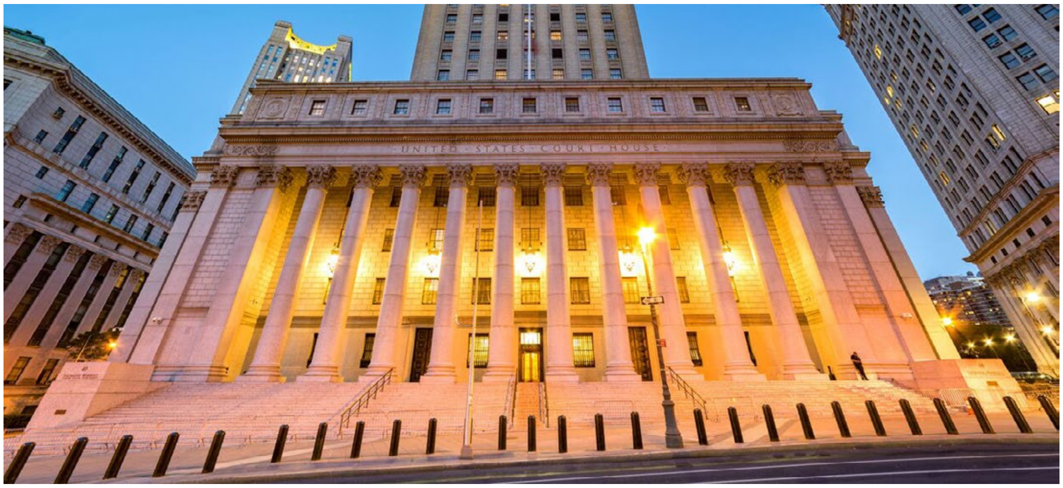




THE SECOND CIRCUIT NOW JOINS THE NINTH CIRCUIT IN REJECTING THE THIRD CIRCUIT'S HEIGHTENED STANDARD.

In the last year, the U.S. Court of Appeals for the Second Circuit issued three important decisions in securities fraud actions that provide investors with greater clarity in satisfying the standards for class certification in the Second Circuit.

In July 2017, the Second Circuit considered the standards for class certification in securities fraud cases involving over-the-counter securities traded in a global market in *In re Petrobras Securities*. Defendant Petrobras is a Brazilian company that lists its securities on both foreign and domestic exchanges, so class certification required consideration of the precedent set by the U.S. Supreme Court in *Morrison v. Australian National Bank ("Morrison")*. In *Morrison*, the Supreme Court held that U.S. securities laws apply only "to transactions in securities listed on domestic exchanges and domestic transactions in other securities." In *Petrobras*, the defendants argued that it would be very difficult to identify which trades in Petrobras's debt were domestic, and that a class consisting of "domestic transactions" thus could not be ascertained and, therefore, that the case should not be permitted to proceed as a class action. The Second Circuit's opinion rejected defendants' argument and clarifies that the Circuit's ascertainability requirement is met where the class is "defined using objective criteria that establish a membership with definite boundaries," and that the criteria considered by the district court—subject matter, timing, and location—were "clearly objective" and it was thus "objectively possible" to ascertain which transactions were domestic. The Court noted that ascertainability does not require "a showing of administrative feasibility at the class certification stage," and acknowledged that its holding on this point conflicts with the standard applied by the Third Circuit. The Second Circuit now joins the Ninth Circuit in rejecting the Third Circuit's heightened standard. This is significant because a majority of securities fraud class actions are filed in the Second Circuit and Ninth Circuit. The circuit split signals that the Supreme Court may be inclined to address this matter in due course.

Next, in November 2017, the Second Circuit in *Waggoner v. Barclays PLC* upheld a district court's decision to certify a class of investors who sued Barclays for losses stemming from alleged misrepresentations it made regarding oversight of its so-called "dark pool" market. As is often the case, certification of the class turned on whether the plaintiffs had established that they relied on these alleged misrepresentations and omissions in buying the stock. The Supreme Court, in a rule known as the *Basic* presumption of reliance, permits reliance to be presumed in cases based upon fraudulent misrepresentations so long as the plaintiff satisfies certain requirements. At issue in *Waggoner* was the *Basic* presumption requirement that the stock at issue traded in an "efficient market," that is, that the stock reacted to important publicly announced information about the company as reflected in stock price movement.

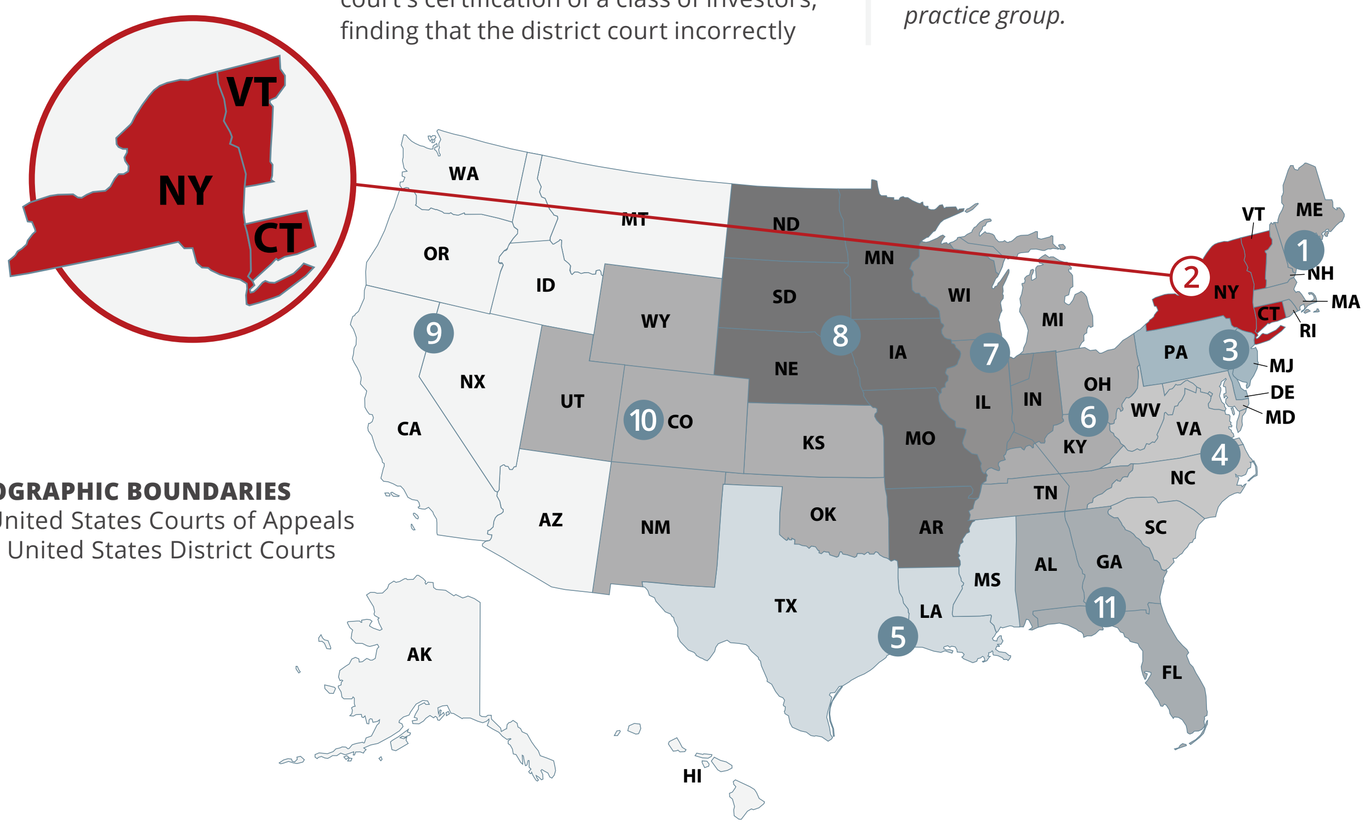
> “Taken together, Petrobras, Waggoner and Goldman Sachs clarify certain standards investors and defendants must meet on class certification ...”

On appeal, the Second Circuit affirmed the district court’s certification of the class based on the *Basic* presumption. First, the Court rejected Barclays’ argument that the plaintiffs were required to present direct evidence of price impact through event studies, noting that Barclays’ stock is traded frequently on a national exchange. Next, after reviewing the history of the *Basic* presumption and the Supreme Court’s subsequent opinions, the Second Circuit concluded that, to rebut the *Basic* presumption at the class certification stage, defendants cannot merely produce some evidence to show a lack of price impact, instead defendants must demonstrate a lack of price impact by a preponderance of the evidence. This means that the evidence must show it is more likely than not that there was no price impact attributable to a defendant’s alleged misrepresentations. The Second Circuit concluded that the district court did not abuse its discretion in finding that Barclays failed to rebut the *Basic* presumption.

Finally, in January of this year, the Second Circuit again addressed the issue of price impact in its opinion in *In re Goldman Sachs Grp., Inc.* The Court reversed a district court’s certification of a class of investors, finding that the district court incorrectly applied a heightened standard of proof by requiring Goldman to “conclusively” show “a complete absence of price impact.” Relying on *Waggoner*, the Second Circuit reaffirmed that a defendant is only required to rebut the *Basic* presumption by “a preponderance of the evidence.” The Second Circuit also found that the district court erred in rejecting Goldman’s evidence of a lack of price impact, requiring the district court on remand to consider this evidence in determining “whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock.”

Taken together, *Petrobras*, *Waggoner* and *Goldman Sachs* clarify certain standards investors and defendants must meet on class certification, standards that ease the path for certification of investor classes. Petrobras rejects the Third Circuit’s heightened “administrative feasibility” showing for domestic transactions, and *Waggoner* and *Goldman Sachs* require defendants to rebut the *Basic* presumption by a preponderance of the evidence. ■

Eric S. Berelovich is an associate in the firm’s Securities Litigation & Investor Protection practice group.



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

PLACING LIMITS ON DUAL-CLASS STOCK

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3 MAJOR STOCK INDEX PROVIDERS

HAVE TAKEN STEPS TO REMOVE DUAL-CLASS COMPANIES FROM THEIR INDICES OR REDUCE THEIR WEIGHTING ...

Debate is sharpening over the value of dual-class stock, the controversial governance structure that multiplies the voting power of founders and other insiders—often forever—at the expense of ordinary shareholders.

The number of publicly traded U.S. companies with multi-class stock increased 44% from 2005 to 2015, and nearly one in five IPOs now feature the structure, according to a recent report presented to the Securities and Exchange Commission's Investment Advisory Committee (IAC).

In March, the IAC recommended that the Commission require additional disclosures from dual-class companies. Others want to go further, including one of the SEC's own Commissioners, who suggested U.S. stock exchanges should only allow dual-class shares that automatically convert to ordinary ones over time.

The issue of continuing to allow companies with "perpetual" dual-class stock to list on U.S. markets may be too ripe for the SEC to ignore, despite Chair Jay Clayton's insistence in March that revisiting rules on the topic is "not on my list of near-term priorities."

Since last summer, three major stock index providers have taken steps to remove dual-class companies from their indices or reduce their weighting, potentially leaving legions of index-fund investors without an interest in some of the world's most important companies.

The two Democrats on the SEC, Commissioners Kara Stein and Robert Jackson, jumpstarted the conversation the same week in February with speeches criticizing dual-class companies as "inherently undemocratic" (Stein) and creators of "corporate royalty" (Jackson).

Both spoke at Stanford University, near the Silicon Valley headquarters of dual-class powerhouses Facebook and Alphabet, and down the bay from Dropbox, whose March IPO gave founders 10 times the voting power of ordinary shareholders.

Supporters argue that a dual-class structure allows visionary founders to take their companies public and remain focused on creating lasting value instead of short-term market pressures. They say prohibiting them would put U.S. stock markets at a disadvantage when competing for IPOs of the world's most innovative companies. (Several Asian stock markets are now, paradoxically, considering allowing dual-class companies to list, raising the specter of a "race to the bottom.")

Shareholder advocates say the arrangements inordinately protect corporate insiders from accountability—and can contribute to the collapse of companies like Theranos, where CEO Elizabeth Holmes, accused of fraud by the SEC, exercised almost complete control due to her ownership of all 100-to-1-vote class B shares.

In his February 15 speech at Stanford, SEC Commissioner Jackson sought a middle ground. Setting aside the question of "whether dual-class ownership is always good or bad," Jackson asked "whether dual-class structures, once adopted, should last forever." His answer: a resounding "no," for reasons of principle and practice.

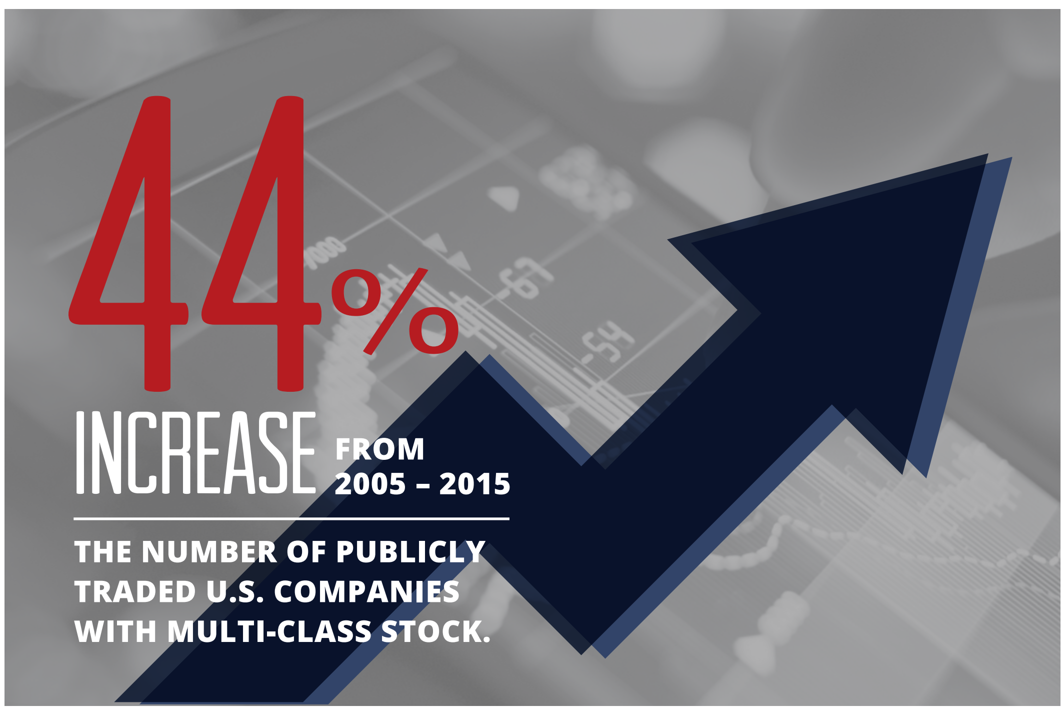
Perpetual dual-class stock "removes entrenched managers—and their kids, and their kids' kids—from the discipline of the market forever," he said. "Simply put: asking investors to put eternal trust in corporate royalty is antithetical to our values as Americans."

> *"Simply put: asking investors to put eternal trust in corporate royalty is antiethical to our values as Americans."*
>
> SEC COMMISSIONER ROBERT JACKSON

Jackson also presented data that suggested that any performance benefits associated with dual-class structures disappeared over time—as soon as two years after an IPO, according to his study comparing perpetual dual-class companies to those with "sunset" provisions. Seven years after the IPO, companies with perpetual dual-class stock performed worse than those had allowed enhanced voting shares to "sunset" into ordinary shares.

His suggestion, quickly seconded by CII, is that U.S. exchanges consider allowing dual-class companies to list only if they automatically convert to one-share, one-vote after a certain period. "Such standards," he said, "would allow Main Street investors to share in our economy's growth—but avoid asking them to trust corporate management forever." ■

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



SUPREME COURT GRAPPLES WITH CONSTITUTIONALITY OF "FAIR SHARE" UNION FEES

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In *Janus v. AFSCME Council 31, et al.*, the Supreme Court heard oral argument recently on whether an Illinois law requiring non-union public employees to pay partial fees to unions that negotiate on their behalf violates their constitutional right to free speech. A decision against the unions would undo forty years of precedent and financially devastate organized labor in its last stronghold, the public sector.

In bringing this case, state employee Mark Janus has asked the Court to overrule the 1977 decision *Abood v. Detroit Board of Education*. Under *Abood*, non-members can opt out of paying for a public employee union's political activities but may be required to pay "fair share" fees to support services a union is statutorily required to provide all employees, such as negotiating collective bargaining agreements.

A DECISION AGAINST THE UNIONS WOULD UNDO FORTY YEARS OF PRECEDENT AND FINANCIALLY DEVASTATE ORGANIZED LABOR IN ITS LAST STRONGHOLD, THE PUBLIC SECTOR.

Mr. Janus argues that a union's bargaining against the government is not government speech expressed through employees but rather advocacy or political speech expressed through an independent interest group. As such, to require non-member employees to pay fees that subsidize the union's bargaining infringes the non-member employees' First Amendment rights to choose which political speech is worthy of their support.

This position appeared to resonate with conservative justices during the February 26 hearing. Justice Samuel Alito was particularly vocal, asking at one point: "When you compel somebody to speak, don't you infringe that person's dignity and conscience in a way that you do not when you restrict what the person says?"

Lawyers for the American Federation of State, County and Municipal Employees, known as AFSCME, countered by arguing that "fair share" fees are not allocated to the union's political advocacy. Negotiation of union contracts, they said, cannot be deemed "political speech" but rather speech about terms and conditions of employment which have never been afforded First Amendment protections. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonya Sotomayor and Elena Kagan appeared to side with AFSCME. Justices Ginsburg and Sotomayor observed that if "fair share" fees are stripped, unions would be deprived of the resources to effectively negotiate and non-member employees would be "free riding" on the higher wages, benefits and grievance representation that unions secure in contracts with government employers.

Justice Kagan focused on the potential detrimental impact of overruling *Abood*, and stated: "I don't think we have ever overruled a case where reliance interests are remotely as strong as they are here. . . . Twenty-three states, the District of Columbia, Puerto Rico, all would have their statutes declared unconstitutional at once. Thousands of municipalities would have [public employee] contracts invalidated." Justice Kagan questioned, "When have we ever done something like that? What would be the justification for doing something like that?"

Amici curiae or "friends of the court" also presented argument. The Trump

THE TRUMP ADMINISTRATION'S NEW SOLICITOR GENERAL ARGUED "FAIR SHARE" FEES ARE UNCONSTITUTIONAL, AND THE SOLICITOR GENERAL OF ILLINOIS COUNTERED WITH ARGUMENT IN SUPPORT OF AFSCME'S POSITION.

administration's new Solicitor General argued "fair share" fees are unconstitutional, and the Solicitor General of Illinois countered with argument in support of AFSCME's position. These divergent views emphasized the importance of this issue to the future financial health of public employee unions, the viability of existing union contracts, and the constitutionality of certain other states' laws that also allow broad fair share fees for public employees.

This is the second time this issue has come before the Court since *Abood*. In 2016, it was teed up in *Friedrichs v. California Teachers Association*, but the Court deadlocked at 4-4 because it lacked the deciding vote due to the vacancy left by Justice Anton Scalia's death. Justice Neil Gorsuch, who has since filled the vacancy, is an avowed conservative, strict constructionist. He is expected to side with the other conservative justices to cast the fifth vote to overrule *Abood*, yet Justice Gorsuch was uncharacteristically silent during the argument, leaving an open question as to his leanings. The Court is expected to issue its ruling in June.

Editor's Note: On January 19, 2018, Cohen Milstein attorneys Joseph M. Sellers and Miriam R. Nemeth filed an amicus curiae brief on behalf of Professor Benjamin I. Sachs that argued in support of AFSCME's position.

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FIDUCIARY FOCUS

THE CONTINUING RELEVANCE OF FIDUCIARY EDUCATION

A recent survey revealed some startling news about the lack of fiduciary awareness. In the survey conducted by AllianceBernstein L.P., more than 1,000 defined-contribution plan executives were asked if they were fiduciaries. While all in fact were fiduciaries, nearly half said they were not, and another 6 percent didn't know or weren't sure. Worse, the survey suggested that fiduciary awareness is steadily decreasing over time. In 2011, 61 percent of interviewees correctly identified themselves as fiduciaries; by 2014, the percentage had dropped to 58 percent; and now we are at a low of 45 percent.

45%

IN 2011, 61 PERCENT OF INTERVIEWEES CORRECTLY IDENTIFIED THEMSELVES AS FIDUCIARIES; BY 2014, THE PERCENTAGE HAD DROPPED TO 58 PERCENT; AND NOW WE ARE AT A LOW OF 45 PERCENT.

Despite the need for fiduciary education made so painfully clear by the study, only about two-thirds of the plans surveyed offered any fiduciary training at all. And of those respondents who were offered fiduciary training, about 50 percent reported that the training program was not comprehensive. The results dovetail with a 2014 survey of multiemployer trustees conducted by the International Foundation of Employee Benefit Plans (IFEBP), which found that only 15 percent of funds surveyed had formal orientation, mentoring, or knowledge transfer programs for new trustees. The majority of trustees surveyed by the IFEBP opined that it takes 3 to 5 years to develop a competent trustee, and 93 percent found the trustee role more challenging than in the past.

Of course, trustees who are on the front lines know that pension systems are facing greater challenges than ever. The financial meltdown, government gridlock, scandals across the country, growing underfunded liabilities, moves to "reform" or restructure plans—as challenges mount, ethics and fiduciary issues for pension funds will be at the forefront. Pension plans need a vigorous and robust ethics program to create an ethical culture, and trustees deserve comprehensive fiduciary education as part of such a program.

Effective fiduciary education is conducted on at least an annual basis for trustees utilizing training programs designed and delivered by experts in fiduciary duty. Annual education should include coverage of the basic fiduciary rules, such as the exclusive benefit rule, the duty of prudence, the duty of loyalty and avoidance of conflicts, and rules on prohibited transactions and self-dealing. The application of these rules is not always easy. A trustee training program that reflects best practices includes discussions of the application of fiduciary principles in real world scenarios. Continuing fiduciary training should be tailored to meet the specific needs of trustees and cover additional topics such as insider trading, gift rules, SEC "pay to play" rules on placement agents and political contributions, cybersecurity, and economically targeted and ESG investing.

Institutional investors know that governance matters. As shareholders, they rightly demand that the companies in which they invest focus on corporate governance, since research has shown a strong relationship between good corporate governance and investment returns. Effective plan governance is just as important, and studies likewise have demonstrated a strong relationship between plan governance and performance outcomes such as investments returns, funding ratios, and other financial variables. Fiduciary education is a necessary and integral part of effective plan governance.

At the very time that the Fifth Circuit has vacated the U.S. Department of Labor's fiduciary rule for retirement account advisers, creating confusion and greater uncertainty across the country, it is now more important than ever for pension trustees to focus on protecting the plans that they serve. Trustees depend on education to fulfill their fundamental duties, and there is nothing more fundamental for trustees than to ensure sound and effective attention to fiduciary responsibilities. ■

Suzanne M. Dugan is Special Counsel to the firm and leads the Ethics & Fiduciary Counseling practice.

RECENT HIGHLIGHTS

COHENMILSTEIN IN THE NEWS

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- "Mylan Must Face Many of Investors' EpiPen Fraud Claims," *Law360* – March 29, 2018
- "After Steve Wynn Sexual Harassment Scandal, NYC Pension Funds Join Lawsuit Against Wynn Resorts' Board of Directors," New York City Comptroller – March 26, 2018
- "New York High-Speed Firm Tower Must Face Korean 'Spoofing' Claims: U.S. Court," *Reuters* – March 29, 2018
- "Endo, Others Ink $166M Lidoderm Pay-For-Delay Settlements," *Law360* – March 21, 2018
- "Class Action Targets Alleged Manipulation of Wall Street's 'Fear Index,'" *The National Law Journal* – March 13, 2018
- "Court: Army Corps Liable for Years of Missouri River Flooding," *Politico* – March 13, 2018
- "She Wrote Hollywood's 'Inclusion Rider.' But She Fights for Women at Walmart, Chicken Plants and Hospitals, Too." *The Washington Post* – March 8, 2018
- "Beirut Barracks Bombing Victims and Their Families Are Awarded $920M Judgment Against Iran," *ABA Journal* – March 2, 2018
- "Brazilian Petrochemical Braskem to Settle Lawsuit for $10 Million" *Reuters* – February 21, 2018
- "Indiana Gears up for Opioid Litigation by Hiring Cohen Milstein," *Reuters* – February 15, 2018
- "Federal Judge Appoints Leadership in Equifax MDL," *The National Law Journal* – February 12, 2018
- "Opus Bank Cuts $17M Deal to End Suit Over Risky Loans" *Law360* – January 30, 2018
- "BarBri Settles Case Over Blind Access to Bar Review Site," *Bloomberg BNA* – January 24, 2018
- "Ascension Health Gets OK for $29.5M Deal to End ERISA Suit," *Law360* – January 16, 2018
- "Legal Heavy Hitters Line Up Behind 'Time's Up' Launch," *The American Lawyer* – January 3, 2018
- "Drywall Makers Agree to Pay $125M to Settle Antitrust Claims," *The Legal Intelligencer* – January 2, 2018

AWARDS & ACCOLADES

- Cohen Milstein Ranked No. 3 for Investor Recoveries in the ISS Securities Class Action Services Top 50 of 2017 – April 5, 2018
- Seven Cohen Milstein Partners, including Julie Reiser and Steve Toll of the Securities Litigation & Investor Protection practice group, recognized among the 2018 Lawdragon 500 Leading Lawyers in America – March 21, 2018
- Cohen Milstein's Daniel S. Sommers elected to chair the Markets Advisory Council of the Council of Institutional Investors – March 12, 2018
- Cohen Milstein's Theodore J. Leopold Named to *The National Law Journal*'s 2018 Energy and Environmental Trailblazers List – March 1, 2018
- Cohen Milstein Named a *Law360* Privacy Practice Group of the Year – January 26, 2018

UPCOMING EVENTS

- **April 15-17** | Building and Construction Trades Department Legislative Conference, Washington, DC – Art Coia and Chris Lometti
- **April 15-18** | Texas Association Public Employee Retirement Systems Annual Conference, South Padre Island, TX – John Dominguez and Richard Lorant
- **May 13-16** | National Conference on Public Employee Retirement Systems Annual Conference and Exhibition, New York City – Suzanne Dugan (Speaker), Richard Lorant, Laura Posner and Christina Saler
- **May 15-18** | California State Association of County Retirement Systems, Anaheim, CA –Richard Lorant and Christina Saler
- **May 19-22** | Michigan Association of Public Employee Retirement Systems Spring Conference, Mt. Pleasant, MI – Richard Lorant
- **June 3-6** | Massachusetts Association of Contributory Retirement Systems Spring Conference, Hyannis, MA – David Maser and Christina Saler
- **June 5** | Webinar – Fiduciary Litigation: Risks and Challenges for Defined Contribution Plan Administrators, Selecting Plan Investments, Monitoring Fees, Breach of Duty Claims, Recent Court Decisions on New DOL Fiduciary Rule – Julie Reiser (Panelist)
- **June 26-29** | National Association of Public Pension Attorneys Legal Education Conference, Savannah, GA – Luke Bierman, Suzanne Dugan (Panelist), Carol Gilden and Julie Reiser (Panelist)
- **June 25-27** | Missouri Association of Public Employee Retirement Systems Annual Conference, Osage Beach, MO – Richard Lorant

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> *"As plaintiff class action lawyers, we're able to fight corporate corruption, misconduct and greed on behalf of individuals and smaller business owners, plus pension funds who invest money for the benefit of millions of their employees. It's satisfying to know that we're going after bad actors who are trying to take advantage of consumers, investors, employees and other businesses."*

Steven J. Toll joined Cohen Milstein in 1979 when there were only four attorneys. As managing partner since 1997, he now guides a firm of nearly 100 attorneys in seven cities around the country. Steve has been called a "titan" of the securities class action bar, Law360 recently named him the 2017 "Class Action MVP," and Lawdragon included Steve in its 2018 list of the 500 Leading Lawyers in America. He is well-respected by the bench and his peers for his integrity and expertise. To inaugurate a regular feature highlighting the personal side of the firm's professionals, Steve talked with Shareholder Advocate Editor Christina Saler about growing up on Long Island, what led him to become a lawyer and his healthy obsession with basketball.

I grew up in … New Hyde Park, a town on New York's Long Island. Most people are more familiar with neighboring towns Roslyn and Great Neck.

I first knew I wanted to be a lawyer when … I was in my junior year at Penn's Wharton School of Business. I took a constitutional law class which piqued my intellectual interest far more than the accounting classes I was taking for my major. So, I applied to law schools and decided on Georgetown University, which brought me to Washington DC. Other than for a four-year period in Seattle, I've been in DC since 1972.

For me, the most challenging part of my job is … ensuring that as the firm grows we maintain our wonderful culture – we, both lawyers and our terrific supporting staff, feel like we're part of one big family. We operate in a relatively informal manner and value our colleagues, paying attention to providing what they need to develop and succeed. Since 2009 we have more than doubled in size, adding over 50 attorneys. We're now I believe the second largest plaintiff's class action firm in the country with 96 attorneys, and we're certainly the most diversified with 13 different practice areas. Given our size and scope, it takes a lot of energy to make sure that there is clear communication among the attorneys in our different offices so that we are a cohesive team playing off each other's strengths to best serve our clients.

When young lawyers join the firm, I tell them … that we want them to enjoy their work. As plaintiff class action lawyers, we're able to fight corporate corruption, misconduct and greed on behalf of individuals and smaller business owners, plus pension funds who invest money for the benefit of millions of their employees. It's satisfying to know that we're going after bad actors who are trying to take advantage of consumers, investors, employees and other businesses. I also let our lawyers know that, while the work is demanding and meaningful, it is just as important that they have a full life outside the office.

When not working, my favorite thing to do is … watch basketball. In fact, I've got to admit I'm pretty fanatical about the sport. I played in high school and college and most of my adult life. I only recently retired from my weekend league after my second Achilles heel surgery, and I miss playing. One of my good friends is a former NBA player, and we try to catch as many Washington Wizards games as we can. My wife, who had zero interest in basketball when we met, has now become a devoted Washington Wizards fan. My son went to Michigan and my daughter went to Wisconsin, so I follow those teams, too. Michigan made it to the Final Four in 2013. My son had graduated in 2011, but the Michigan alumni base is incredible across the country, so they mobilized for the tournament. I met him and his friends from multiple cities in Atlanta for the Final Four. Although Michigan lost to Louisville in the Championship game, we had a fantastic and unforgettable time that weekend.

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