SHAREHOLDER ADVOCATE

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Equivalence Suits Target ERISA Fiduciaries

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Equivalence Suits Target ERISA Fiduciaries

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It is important for Taft-Hartley plan trustees to be informed of developments related to ERISA fiduciary liability. Cohen Milstein continuously monitors ERISA lawsuits, and in this issue of the *Shareholder Advocate*, we summarize developments related to several lawsuits concerning actuarial equivalence rules found in certain ERISA provisions. Over the last year, there were nine class cases filed that allege pension plans are violating ERISA by paying less than actuarially equivalent benefits to defined benefit plan participants. Plaintiffs in these lawsuits generally allege that plan fiduciaries and sponsors of their defined benefit plans violate ERISA when a plan uses outdated mortality tables to calculate alternative forms of benefits or "form factors," which are predetermined factors used to convert normal form benefits into alternative forms. The plans at issue in these lawsuits are those sponsored by household names, such as American Airlines, U.S. Bancorp, AT&T, Metropolitan Life Insurance Company, Anheuser-Busch, Raytheon Company, and Huntington Ingalls Industries.

A participant's pension benefit is generally expressed as a monthly pension payment beginning at "normal retirement age" as defined by the plan (no later than age 65). This monthly payment is called a single life annuity because it pays a monthly benefit to the participant for her entire life (*i.e.*, from the time she retires until her death). ERISA-governed pension plans may (and, in some circumstances, must) offer optional forms of benefits. Several provisions of ERISA require that when participants receive optional forms of benefits, the value of the optional forms must be actuarially equivalent to benefits expressed as a single life annuity commencing at normal retirement age.

"Actuarial equivalence" is a computation that is designed to ensure that, all else being equal, two alternative forms of benefit payments have the same present value as each other. Generally speaking, present value is calculated using two primary actuarial assumptions: (1) an interest rate and (2) a mortality table. The interest rate discounts to present value each future payment using an assumed rate of return that is based on current market conditions. The mortality table provides the expected duration of that future payment stream at the time the table is published based on statistical life expectancy of a person at a given age. ERISA's actuarial equivalence requirements are summarized as follows:

- For defined benefit plans "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age [of 65] … the employee's accrued benefit … shall be the actuarial equivalent of such benefit[.]" ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3).

- ERISA's non-forfeitability requirements provide that if a participant receives less than the actuarial equivalent value of her accrued benefit, this results in an illegal forfeiture of her benefits, and hence a violation of ERISA § 203(a), 29 U.S.C. § 1053(a).
- In addition, ERISA requires all defined benefit plans to provide Qualified Joint and Survivor Annuities, which are the "actuarial equivalent of a single annuity for the life of the participant." ERISA § 205(a) & (d)(1)(B), 29 U.S.C. § 1055(a) & (d)(1)(B).
- Finally, if a plan offers early retirement benefits, ERISA requires that all participants receive no less than the actuarial equivalent of their benefit commencing at normal retirement age. ERISA § 206(a)(3), 29 U.S.C. § 1056(a)(3).

OVER THE LAST YEAR, THERE WERE NINE CLASS CASES FILED THAT ALLEGE PENSION PLANS ARE VIOLATING ERISA BY PAYING LESS THAN ACTUARIALLY EQUIVALENT BENEFITS TO DEFINED BENEFIT PLAN PARTICIPANTS.

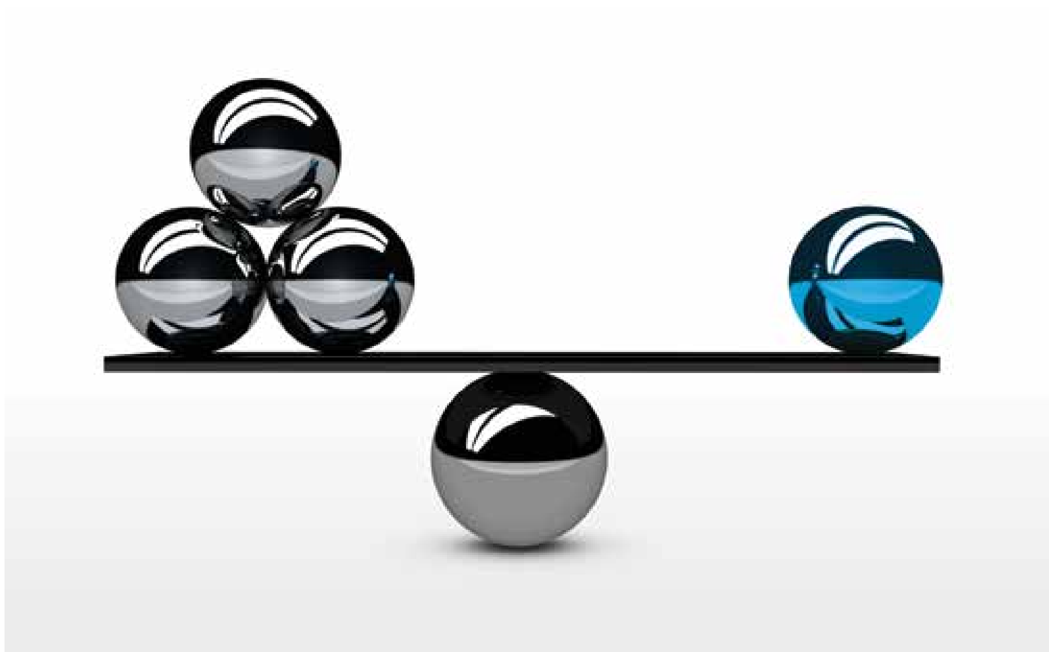
Whether the actuarial equivalence requirements have been met turns, in large part, on whether the actuarial assumptions used to calculate optional forms of benefits are reasonable and have been updated to reflect current trends in mortality and interest rates. In many of the cases where fiduciaries were sued, the mortality tables used to calculate optional forms of benefit were very outdated (with publication dates ranging from 1951-1984). If these allegations are true, the mortality tables used by several large plans have not been updated for decades—in some cases, for as much as 70 years. In other cases, the plans use form factors to convert benefits into optional forms and plaintiffs similarly allege that those form factors have not been updated for decades. These are the types of factual issues to be aware of if you are a trustee of an ERISA-governed plan.

While it is unclear how the lawsuits that have been filed to date will resolve, two of them have survived motions to dismiss and, in the one case that was originally dismissed, plaintiffs' motion for reconsideration was granted. Given the likelihood of continued litigation in this area, trustees should consider taking some "belts and suspenders" actions to help defend against or avoid these types of lawsuits. For example, trustees could ask their plan's actuary to periodically review the actuarial assumptions or form factors used to calculate the Qualified Joint and Survivor Annuities and early retirement benefits. The plan actuary could provide an opinion as to whether those assumptions or form factors are reasonable. Note, however, that if the plan actuary provides an opinion that the assumptions or form factors used by the plan to calculate

WHETHER THE ACTUARIAL EQUIVALENCE REQUIREMENTS HAVE BEEN MET TURNS, IN LARGE PART, ON WHETHER THE ACTUARIAL ASSUMPTIONS USED TO CALCULATE OPTIONAL FORMS OF BENEFITS ARE REASONABLE AND HAVE BEEN UPDATED TO REFLECT CURRENT TRENDS IN MORTALITY AND INTEREST RATES.

benefits are unreasonable, the plan likely will need to revise its terms to employ reasonable actuarial assumptions. The revised terms may increase pension benefits obligations for the plan and negatively impact its funding status. Being proactive in working with the plan's actuary to identify any potential issues related to actuarial equivalence should serve the plan well. ■

Michele C. Yau is a partner in the firm's ERISA practice group.



BOARDS MUST BE HELD ACCOUNTABLE FOR SEXUAL HARASSMENT SCANDALS

BY JULIE GOLDSMITH REISER
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TOXIC CORPORATE CULTURE DRAGS DOWN MORALE AND CAN BE A BOMBSHELL WAITING TO EXPLODE.

Editor's Note: This opinion piece originally appeared in the January 1, 2020 edition of the Financial Times.

When banks harm customers and preventable wildfires rage, corporate boards are remade and top executives are fired. Since 2016, when US regulators revealed that Wells Fargo had opened millions of unauthorised accounts, 9 of 14 members of the bank's board of directors have stepped down, and the chief executive has changed twice. Pacific Gas & Electric, blamed for sparking wildfires in California, has brought in a new CEO and 10 new directors, or 77 percent of its board.

One might expect companies reeling from sexual harassment scandals, brought to light by the #MeToo movement, to hold their corporate directors similarly accountable. As a lawyer who represents investors in lawsuits against corporate boards, I can tell you that the reality is very different when it comes to cases that involved allegations of pervasive sexual harassment, such as the ongoing litigation against Alphabet. Directors of companies embroiled in #MeToo-related crises have largely avoided accountability.

Take, for example, what used to be known as 21st Century Fox. In the first year following reports of rampant sexual harassment by news chief Roger Ailes and anchor Bill O'Reilly, not a single member of the company's board of directors stepped down. Even today, Fox has just one woman on its board.

There has also been no turnover on the board of directors at National Beverage Corp, even though billionaire CEO Nick Caporella has faced lawsuits alleging sexual misconduct (which he denies). Likewise, the Martin Agency's creative director, Joe Alexander, left his firm suddenly in 2017 after multiple allegations of improper behaviour (which he denies). Although its parent company, Interpublic Group Cos. Inc., installed female leadership at the Martin Agency, IPG's board remained the same.

Boards may feel comfortable giving themselves a pass because the top court in Delaware, where most US companies are incorporated, ruled in the 2000 case of *White v. Panic* that an all-male corporate board's decision to settle eight sexual harassment lawsuits with company funds, and to take no disciplinary action against the CEO, were "routine business decisions in the interest of the corporation".

Companies have successfully invoked this ruling for years. As far as I know, the recent ruling that the board of directors of Wynn Resorts may face liability for failing to adequately investigate or act on allegations of sexual harassment by company founder Steve Wynn, is the sole recent exception. (Full disclosure: I represent shareholders who recently settled with Wynn Resorts. He denies misconduct.)

The Delaware courts are more willing to hold boards of directors to account when public health and safety are jeopardised. Recently, judges there allowed a lawsuit to go ahead that alleges Clovis Oncology's board "ignored" red flags about safety in clinical trials. They also revived a lawsuit against ice-cream maker Blue Bell's corporate board over a listeria scandal.

It is time to force boards to respond to sexual harassment scandals that trigger public safety concerns within their own workforce. *White v. Panic* should be overturned, so it cannot be used to shield boards that enable sexual predators. This is not just the right thing to do. It makes financial sense. A toxic corporate culture drags down workforce morale and can be a bombshell waiting to explode. A company hit by scandal suffers damage to both its reputation and stock price, and may struggle with a leadership transition.

Boards should stop hiding behind an outdated legal decision to dodge responsibility for preventing sexual harassment and discrimination. Enabling harassers is a breach of directors' fiduciary duties. Shareholders ought to insist on the removal of those who are complicit. ■

Julie Goldsmith Reiser is a partner and co-chair of the firm's Securities Litigation & Investor Protection practice group.

Landmark Settlement in Wynn Resorts Derivative Litigation Delivers $41 Million Back to the Company and Significant Corporate Governance Reforms Valued at $49 Million

Two New York pension funds represented by Cohen Milstein have achieved a major victory for investors in a derivative lawsuit arising from an alleged longstanding pattern of employee sexual abuse and harassment by Wynn Resorts Ltd. founder and former CEO and Chairman Stephen A. Wynn.

New York State Common Retirement Fund and the New York City Pension Funds, as co-lead plaintiffs, filed this derivative lawsuit, a legal action taken on behalf of a company when it is believed its officers or directors failed to comply with their fiduciary obligations to the company, on behalf of Wynn Resorts. The lawsuit, filed in February 2018, claimed Wynn Resorts' board and certain officers knew about Mr. Wynn's alleged sexual abuse and harassment of employees but made no effort to stop it. The lawsuit sought monetary damages and improved governance measures aimed at protecting the corporation, its employees and shareholders from future harm.

After months of hard-fought litigation and arduous settlement negotiations, the parties agreed to a settlement that is noteworthy in several key respects. It requires the second largest individual contribution made by an individual defendant in the history of derivative litigation. Mr. Wynn's $20 million contribution will fully cover the fine imposed on the company by the Nevada Gaming Commission based on the same facts giving rise to the derivative suit. An additional $21 million will be paid to the company by insurance carriers on behalf of former and certain current Wynn Resorts' officers and directors.

The settlement also provides for the implementation of significant governance measures designed to prevent or deter future breaches of fiduciary duty, including the following:

- Bylaw provision that separates the role of board chair and CEO, with the additional requirement that the board chair be independent
- Majority voting requirement for board members in uncontested elections
- 10b5-1 trading plans for all board members and certain executives
- Commitment to 50 percent diversity on board of directors with candidates chosen from a diverse pool and each candidate will be individually interviewed as part of the board's recruitment effort (Rooney Rule)
- Prohibition on employer-forced arbitration or non-disclosure agreements for discrimination or sexual misconduct claims

The value of the reforms attributed to the lawsuit is estimated at $49 million, bringing the total settlement value to $90 million. Notice of the settlement was sent to Wynn Resorts shareholders in December 2019, and on February 12, 2020, the parties will jointly seek final approval of the settlement in a hearing before Judge Timothy C. Williams of the Eighth Judicial District Court of Clark County, Nevada. ■

JUDGE IN *GREENSKY* ALLOWS PLAINTIFFS TO MOVE FORWARD

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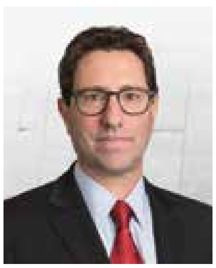

COHEN MILSTEIN IS CO-LEAD COUNSEL IN THE CASE, REPRESENTING CO-LEAD PLAINTIFFS NORTHEAST CARPENTERS ANNUITY FUND AND EL PASO FIREMEN & POLICEMEN'S PENSION FUND.

Investors suing GreenSky, Inc. and its underwriters for failing to disclose important changes to the company's business in documents accompanying its 2018 initial public offering ("IPO") cleared an important procedural hurdle recently when a federal judge denied defendants' motion to dismiss the case.

Judge Alvin K. Hellerstein of the U.S. District Court for the Southern District of New York announced his ruling from the bench November 25, 2019 after presiding over a spirited oral argument, handled largely on the plaintiffs' side by Cohen Milstein Managing Partner Steven J. Toll with participation by Partner S. Douglas Bunch. Judge Hellerstein issued his order denying the motion to dismiss the next day.

Cohen Milstein is co-lead counsel in the case, representing co-lead plaintiffs Northeast Carpenters Annuity Fund and El Paso Firemen & Policemen's Pension Fund. Judge Hellerstein upheld all claims alleged by those two funds, dismissing only one overlapping claim brought by a third co-lead plaintiff, the Employees' Retirement System of the City of Baton Rouge and Parish of East Baton Rouge.

GreenSky is a technology company that operates an online platform that allows creditors to process loan applications at the point of sale. More than 10,000 businesses use GreenSky's platform.

Plaintiffs argued that GreenSky was required under the Securities Act of 1933 to tell IPO investors about its decision to sharply reduce business from solar energy merchants who earned the company high transaction fees in favor of other less-profitable merchants.

In 2016, two years before its IPO, GreenSky had derived approximately 20 percent of its transaction-fee revenues from solar panel merchants; that share had dropped to 12 percent by 2017 and to 8 percent in the first quarter of 2018, just before the IPO. By the second quarter of 2018, it had fallen to 5 percent. While it was aggressively reducing its presence in the solar panel business, where the average transaction fee was 14 percent, the company was increasing its involvement in the elective healthcare industry, where the average transaction fee was 6.5 percent. When the truth about GreenSky's reduced transaction fees and consequential impact on transaction fee revenue emerged, the company's stock price fell, damaging investors.

At issue was whether, taken at face value, plaintiffs' allegations appeared plausible and were pleaded with enough particularity and detail.

At the November hearing, defense counsel argued that the company was not required to disclose the shift in

> “The prospectus cries out for an explanation,” Judge Alvin K. Hellerstein said, addressing defense counsel. “At this point, I have too many questions to grant the motion” to dismiss the case.

merchant mix in its offering documents and that some of the decline in business from solar panel merchants was unexpected. Defense counsel also contended that the risk disclosures contained in the prospectus for the IPO constituted sufficient disclosure.

Judge Hellerstein, however, noted that the shift from the higher-profit solar panel sector to lower-profit elective healthcare merchants seemed “counterintuitive” and was never explained in the prospectus. “There’s something missing here. It doesn’t make sense,” he said.

Toll argued that the prospectus and other offering documents made virtually no mention of the solar panel merchants, let alone their importance to the company’s bottom line. Despite all the pages in the prospectus devoted to risk disclosures, “you do not find the words ‘solar panel merchant’ in any risk factor in the entire prospectus,” he said.

In addition, Toll said, investors couldn’t know how a shift to healthcare would hurt the company without knowing more about its reliance on solar panel merchants. “This was their most profitable business,” he said. “It’s not like it’s 1 percent. It’s 20 percent in ’16. The investors aren’t told that. They don’t have a clue. So when [GreenSky] make[s] this disclosure they are going to actively reduce transaction volume with solar merchants, no investor knows what that means.”

The judge agreed. “The prospectus cries out for an explanation,” he said. “It doesn’t make sense without more of an explanation. At this point, I have too many questions to grant the motion [to dismiss] in this aspect.”

The case, *In re GreenSky Securities Litigation*, No. 18 Civ. 11071 (S.D.N.Y.), is proceeding to discovery.

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BLUE SLIPS IGNORED TO FILL FEDERAL BENCH

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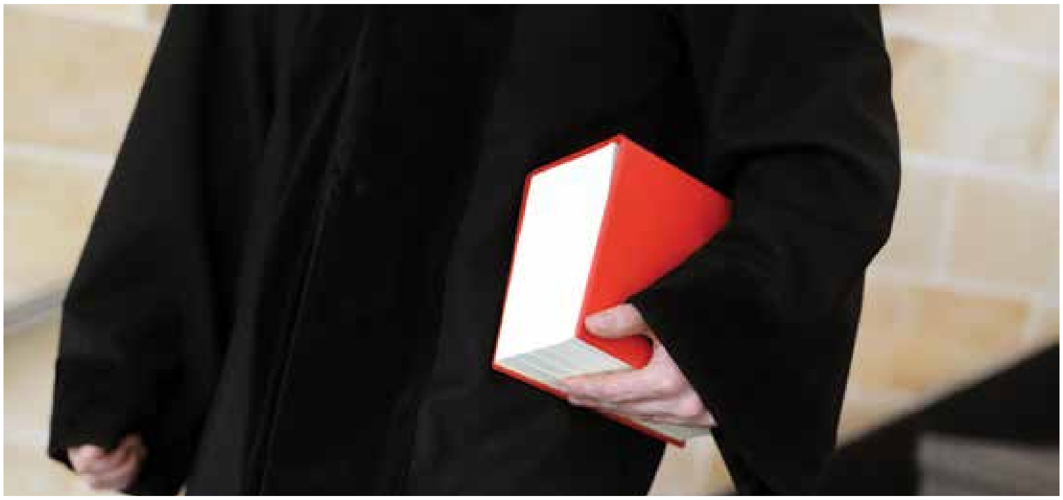

CHUCK GRASSLEY (REPUBLICAN FROM IOWA) AND LINDSEY GRAHAM (REPUBLICAN FROM SOUTH CAROLINA) WHO HAVE SERVED AS JUDICIARY COMMITTEE CHAIRS DURING PRESIDENT TRUMP'S TERM ADVANCED FEDERAL APPELLATE NOMINEES EVEN IF ONE OF THEIR HOME-STATE SENATORS OBJECTED BY WITHHOLDING A BLUE SLIP.

A key measure of a president's legacy is his or her impact on the federal judiciary. President Donald Trump's tenure has been marked by a remarkably voluminous and rapid change to the federal bench.

The highest-profile changes were on the Supreme Court. In April 2017, Justice Gorsuch joined the Court, replacing late Justice Scalia, and in October 2018, Justice Brett Kavanaugh, replacing retired Justice Anthony Kennedy. But the federal courts of appeal—the final arbiter of all but the few disputes considered by the Supreme Court—have also seen dramatic change. Fifty judicial nominees to the federal court of appeals have been confirmed, making more than one-quarter of all active federal appellate judges Trump appointees. Significantly, that has flipped three federal courts of appeals—previously, the majority of judges on the Second, Third, and Eleventh Circuit Court of Appeal were nominated by a Democratic president and now, the majority of judges on each circuit is the appointee of a Republican president. Additionally, 112 judges have been confirmed to the federal district courts during the Trump administration.

The dramatic increase in the pace of judicial confirmations is revealed through a comparison of the number of federal appellate judges confirmed at this same point under each recent president:

Federal Appellate Judges Confirmed

TRUMP	48
OBAMA	24
GEORGE W. BUSH	30
CLINTON	27
GEORGE H.W. BUSH	31
REAGAN	23

The rapid pace of judicial confirmations is explained, in part, by the significant number of vacant federal judicial seats at the start of President Trump's term. Another contributing factor is the change in approach to the "blue slip" tradition. This tradition allows the senators from the state from which a federal court nominee hails to express their approval of the nominee by returning a "blue slip," or conversely

TRUMP'S NOMINEES ARE WIDELY CONSIDERED MORE CONSERVATIVE THAN ANY PRIOR SET. WHAT THIS MEANS FOR SECURITIES FRAUD AND SHAREHOLDER RIGHTS LITIGATION IS NOT YET CLEAR BUT THE SECOND CIRCUIT'S SHIFT TO A MAJORITY OF JUDGES APPOINTED BY REPUBLICAN PRESIDENTS MAY IN TIME BE THE MOST TELLING.

their disapproval by declining to return a blue slip. During the Obama administration, Judiciary Committee Chair Patrick Leahy (Democrat from Vermont) observed an unusually strict interpretation under which failure to receive both blue slips constituted a veto of the nominee. Eighteen judicial nominees (a combination of federal appellate and district court judges) did not advance because they did not have support from home-state senators. Many of those seats remained vacant for the entirety of President Obama's term and were ultimately filled by Trump nominees. In contrast, Chuck Grassley (Republican from Iowa) and Lindsey Graham (Republican from South Carolina) who have served as Judiciary Committee Chairs during President Trump's term advanced federal appellate nominees even if one of their home-state senators objected by withholding a blue slip.

Trump's nominees are widely considered more conservative than any prior set. What this means for securities fraud and shareholder rights litigation is not yet clear but the Second Circuit's shift to a majority of judges appointed by Republican presidents may in time be the most telling. Historically, the majority of securities cases have been filed in district courts within the Second Circuit. Under that court's current composition, the three-judge panels considering appeals or the fuller *en banc* court providing an additional layer of review before the Supreme Court are more likely to have a Republican-appointed majority. This may influence the types of arguments that are appealing to the Second Circuit—such as a heavier emphasis on textual arguments—and potentially how this appellate court approaches key issues such as class certification in private cases and review of regulations issued by the Securities and Exchange Commission.

At the Supreme Court, one jurist to watch is Justice Neil Gorsuch. In his early-career writings, Justice Gorsuch championed reforms to the securities laws that arguably limited shareholder rights, but whose most significant securities opinion as a Tenth Circuit judge was more mixed, holding that a plaintiff failed to establish liability for an opinion statement that was sincerely held, but not challenging precedent that opinion statements with no reasonable basis may create liability. Since joining the Supreme Court, Justice Gorsuch has not authored any significant securities' opinions but did, notably, join the dissent in *Lorenzo v. SEC*, taking the position that the defendant could not be liable for false or misleading statements in an email that he sent. The *Shareholder Advocate* will continue to monitor key cases and the impact of the changing judiciary on the investor community. ■

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FIDUCIARY FOCUS

RESOLVED FOR THE NEW YEAR—GET YOUR ETHICS, COMPLIANCE AND FIDUCIARY HOUSE IN ORDER: A Checklist for 2020

Ask public pension plan trustees or counsel what keeps them up at night, and you're likely to hear about ethics, compliance and fiduciary issues. Resolve to address these issues in 2020. Here's a checklist to help you achieve your New Year's resolution.

Tone at the Top: "Tone at the top" is not just a cliché—it has a significant effect on an organization and its people, and shapes the culture of ethics, compliance and risk management. Several organizational studies have shown that, when presented with a hypothetical ethical quandary, only a small percentage of individuals in an organization are likely to always do the right thing or the wrong thing. For the vast majority—90 percent, according to these studies—their choice of actions will depend upon the organization's culture and the individuals' access to guidance.

These studies confirm that when faced with a moral choice, most people act based upon environmental circumstances. For that reason, it is essential to set the correct tone and focus on core values. Communicate the message throughout the organization, speaking frequently on it, and integrating the message throughout. Articulate the mission and the values of the organization. Don't just pay them lip service.

When an organization's ethical culture is weak you can wind up with headlines like those we've seen over the years—pay to play scandals, improper disability awards, pension spiking, nepotism, lack of oversight, and misrepresentation—which have led to ethics investigations, criminal convictions, regulatory enforcement actions, and reputational damage. Don't let that happen to your organization.

A Resource for Guidance: The organizational studies cited above also found that access to information and guidance were key factors in determining ethics and compliance issues. Make sure your organization has a resource where people can comfortably go get the answers to ethical questions. The person tasked with responding to questions from trustees and staff must be knowledgeable, approachable and able to address sensitive questions. Importantly, that person must be given enough resources to respond quickly.

A Reporting Mechanism: Ethical cultures create an atmosphere in which individuals are comfortable coming forward to report wrongdoing. Be sure you have an appropriate resource where people can report allegations without fear of retaliation and with a belief that the issue will be taken seriously, together with a mechanism for investigating such allegations.

Codes of Ethics: An important element of the vigorous and robust ethics program needed to create an ethical culture or maintain an existing ethical culture is a code of ethics that sets forth permissible and impermissible conduct. Such codes must be workable and clearly written, preferably with examples of actual conflicts of interest or situations that create the appearance of a conflict. Many public pension plans have separate codes for trustees and employees, although sometimes both appear in the same document. At a minimum, codes must be consistent with the state or local ethics laws, but public pension

"TONE AT THE TOP" IS NOT JUST A CLICHÉ—IT HAS A SIGNIFICANT EFFECT ON AN ORGANIZATION AND ITS PEOPLE, AND SHAPES THE CULTURE OF ETHICS, COMPLIANCE AND RISK MANAGEMENT.

systems often wish to adopt customized codes that are directly applicable to the work and mission of pension plans.

Training Program: Clearly communicating rules is essential to compliance. Put in place a comprehensive training program to educate trustees and staff. Remember the 90 percent of the population cited in the studies above—the overwhelming majority of trustees and employees are trying to do the right thing and need access to resources to help them do so. Among the elements of an effective training program are annual fiduciary training for trustees and appropriate staff, and regular ethics and compliance training for trustees and all staff. Attendees say they often prefer shorter, more frequent training sessions on tightly focused topics. Use a variety of speakers to keep the material fresh. For example, while a staff member is likely in the best position to train on the organization's code of ethics, you may wish to invite a trainer from your jurisdiction's commission on open meetings/open records to speak on those requirements for a subsequent session.

AN IMPORTANT ELEMENT OF THE VIGOROUS AND ROBUST ETHICS PROGRAM NEEDED TO CREATE AN ETHICAL CULTURE OR MAINTAIN AN EXISTING ETHICAL CULTURE IS A CODE OF ETHICS THAT SETS FORTH PERMISSIBLE AND IMPERMISSIBLE CONDUCT.

Governance: It is hard to overstate the importance of good governance in public pension plan management and success. Among the most critical questions in this area is whether the board has delegated appropriately and, having delegated, is careful to exercise appropriate oversight without micromanaging day-to-day operations. While trustees should not be substituting their judgment for that of staff who have been delegated authority, trustees are responsible for carefully monitoring and overseeing those operations and for regularly reviewing the performance of direct reports (the Executive Director and sometimes the Chief Investment Officer).

Policies and Procedures: Policies and procedures are at the heart of the public pension plan and can provide a strong system of internal controls. Many plans organize their policies in a Board Governance Manual that sets forth committee charters and contains such policies as a Communication Policy, Gifts Policy, Travel Policy, Placement Agent and Political Contribution Policy, Whistleblower Policy, and Discrimination, Harassment and Retaliation Policy, among others. In addition to having the right internal controls in place, policies and procedures must be regularly revisited and revised so that they remain relevant and robust.

Chief among policies is the Investment Policy Statement (IPS), which is at the core of good governance. The IPS should clearly set forth investment objectives; roles and responsibilities among trustees, staff, consultants and advisers; long-term strategic asset allocation; operational guidelines for carrying out the asset allocation; and rules for monitoring and reviewing the investment strategy.

Process: Remember that fiduciaries are judged by the process by which they reach their decisions. Establishing a reasonable decision-making process and adhering to that process helps to demonstrate prudence. Documenting the process is an important part of demonstrating prudence. Be sure that your review process has been sufficiently memorialized in order to demonstrate such prudence.

Happy New Year! ■

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

- "Allergan Settles Pay-for-Delay Lawsuit for $300M," *Becker's Hospital Review* – January 7, 2020
- "ERISA Class Settlements Rebounded to $449 Million in 2019," *Bloomberg Law* – December 26, 2019
- "Sutter Health to Pay $575 Million to Settle Antitrust Lawsuit," *The New York Times* – December 20, 2019
- "Investors Fight Performance Sports Execs' Bid to Nix Suit," *Law360* – December 13, 2019
- "Litigation Leaders Across the 'v': Cohen Milstein's Steven Toll on Fearless Litigation, Defense-Side Competition and the Greater Good," *The American Lawyer's Litigation Daily* – December 1, 2019
- "Settlement Reached in Suit Over Video Captioning at Harvard," *The New York Times* – November 27, 2019
- "Facebook Users Win Injunctive Class Cert. in Data Breach Suit," *Law360* – November 27, 2019
- "Fintech Lender Loses First of 2 Bids to Kill Stock-Drop Suits," *Law360* – November 26, 2019
- "McDonald's Agrees to Pay $26 Million to Settle Accusations of Wage Theft," NPR – November 25, 2019
- "Cohen Milstein's Laura Posner Appointed First Female Chair of NYC Bar Association's Securities Litigation Committee," Press Release – November 19, 2019
- "Large Gender Bias Class Action vs Sterling Jewelers Revived: U.S. Appeals Court," *Reuters* – November 18, 2019
- "Liquid Holdings Reaches $4M Settlement over IPO Claims," *Law360* – October 30, 2019
- "'FINRA Settlement Expungement Process Is Broken,' Former Regulator Says," *PlanAdviser* – October 28, 2019
- "AG Curtis Hill Files Lawsuit Against Three Opioid Distributors," Indiana Office of the Attorney General – October 22, 2019
- "Securities Lawyers Call on FINRA to Halt Expungement Process," *Investment News* – October 15, 2019
- "Carol Gilden Draws Attention to Accountability," *Modern Counsel* – October 14, 2019
- "Judge Consolidates Wage-Fixing Suits Against Chicken Cos.," *Law360* – October 9, 2019
- "Supreme Court Case Creates Jitters for Defined Benefit Plan Managers," *Financial Times* – October 9, 2019

AWARDS & ACCOLADES

- Cohen Milstein Recognized as One of "America's Most Influential Law Firms" by *Trial Magazine* and *The National Law Journal* – January 20, 2020
- Cohen Milstein's Betsy A. Miller and Steven J. Toll Listed Among "America's 50 Most Influential Lawyers" by *Trial Magazine* and *The National Law Journal* – January 20, 2020
- Cohen Milstein Recognized as a *Law360* "Practice Group of the Year" in Two Categories: Benefits and Consumer Protection – January 13, 2019
- Cohen Milstein's Agnieszka Fryszman and Steven J. Toll Named "Lawdragon Legends" – December 15, 2019
- Cohen Milstein Named an "Elite Trial Lawyer: Finalist" by ALM and The National Trial Lawyers in Seven Practice Areas: Antitrust; Class Actions; Consumer Protection; Environmental Protection; Financial Products; Pharmaceuticals Litigation; and Securities Litigation – November 20, 2019
- Cohen Milstein's Karen L. Handorf Recognized by ALM and The National Trial Lawyers as One of 2020's "Elite Women of the Plaintiffs Bar" – November 20, 2019
- Cohen Milstein's Karen L. Handorf Named a *Law360* "Benefits MVP" – November 12, 2019
- Cohen Milstein's Sharon K. Robertson Named a *Law360* "Antitrust / Competition MVP" – November 12, 2019

UPCOMING EVENTS

- **February 9-11** | National Association of State Treasurers (NAST) Legislative Conference, Mayflower Hotel, Washington, DC – Richard Lorant
- **February 13-18** | National Labor & Management Conference, The Diplomat Resort and Spa, Hollywood, FL – Arthur Coia and Christopher Lometti
- **February 19-21** | National Association of Public Pension Attorneys (NAPPA) Winter Seminar Meeting, Tempe Mission Palms Hotel and Conference Center, Tempe, AZ – Luke Bierman, Jay Chaudhuri, Suzanne Dugan and Julie Reiser
- **February 29-March 2** | National Association of State Retirement Administrators (NASRA) 2020 Winter Meeting, Westin City Center, Washington, DC – Richard Lorant and Julie Reiser
- **March 9-11** | Council of Institutional Investors (CII) Spring 2020 Conference, Mandarin Oriental Hotel, Washington, DC – Jay Chaudhuri and Daniel Sommers
- **March 22-24** | County Commissioners Association of Pennsylvania (CCAP) Spring Conference, Hilton Harrisburg/ Dauphin County, PA – David Maser

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> "A sense of social justice has always stuck with me and influenced the classes I took in college, the volunteer civil rights work I did in law school, the jobs I have taken and the cases that I continue to prosecute."

Laura H. Posner is a Partner at Cohen Milstein in the Securities & Investor Protection and Ethics & Fiduciary Counseling practice groups. For more than 15 years, Laura has served the interests of investors both in private practice and as a regulator. Prior to joining Cohen Milstein, Laura served as Bureau Chief of the New Jersey Bureau of Securities under the auspices of the New Jersey Attorney General from 2014 to 2017. Based in the firm's New York office, Laura is active with the New York City Bar and was recently appointed Chair of its Securities Litigation Committee. For this issue of the **Shareholder Advocate*****, Laura talked with Editor Christina Saler.***

I grew up in … the San Francisco Bay Area. I went to college in Southern California at UCLA and headed east for law school at Harvard. My parents and brother still live in the Bay Area, and I try to get back as often as I can.

I knew I wanted to be a lawyer … as cliché as it sounds, for as long as I can remember. One of my most vivid memories from elementary school is from Ms. Evans' fourth grade class where we had to present to the class on what we wanted to be when we grew up. I told my classmates that I wanted to be a lawyer so I could "help people"—although my parents will tell you that I also really enjoyed arguing! That sense of social justice has always stuck with me and influenced the classes I took in college, the volunteer civil rights work I did in law school, the jobs I have taken and the cases that I continue to prosecute.

Serving as a state regulator … enabled me to protect investors in a different way than I had been doing while in private practice. As the Bureau Chief of the New Jersey Bureau of Securities and head of Enforcement of the North American Securities Administrators Association, I was able to help shape state and national policies that were designed to prevent fraud and to educate investors on how to avoid becoming a victim of fraud, while at the same time using the authority of the Bureau to bring enforcement actions and seek recovery for those investors who had been harmed.

Today the biggest threat to investor rights … unquestionably, is forced arbitration provisions that the Chamber of Commerce and businesses are angling to insert into company bylaws, which would deny shareholders the right to seek relief for securities fraud in court and from banding together to bring class actions. A case involving Johnson & Johnson on this issue is currently being litigated in federal court in New Jersey. We are working closely with our institutional investor clients and other stakeholders across the country to fight these insidious and illegal forced arbitration bylaw proposals and to encourage Congress to pass legislation prohibiting them.

Next up on my bookshelf … is *1, 2, 3 Magic* since I have a newly minted 2-year-old son at home. The book, written by Thomas Phelan, is about positive parenting. I also just started re-reading Louis Mae Alcott's classic *Little Women* in anticipation of seeing the remake recently released in theaters. ■

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