The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi

Grundfest, Joseph A [1] [1] The William A. Franke Professor of Law and Business at Stanford Law School and Senior Faculty of the Rock Center on Corporate Governance; Commissioner of the U.S. Securities and Exchange Commission (1985-90) . The Business Lawyer ; Chicago Vol. 75, Iss. 1, (Winter 2019/2020): 1319-1397.

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ABSTRACT (ENGLISH)

The Securities Act of 1933 ("Securities Act"') provides for concurrent federal and state jurisdiction. Securities Act claims were historically litigated in federal court, but in 2015 plaintiffs began filing far more frequently in state court, where dismissals are less common and where weaker claims are more likely to survive. Directors' and officers' insurance costs for initial public offerings ("IPOs") have since significantly increased. Today, approximately 75 percent of section 11 corporate defendants face state court proceedings. Federal forum provisions ("FFPs") respond to the migration of Securities Act claims to state court and to increased insurance costs by requiring that Securities Act claims be litigated in their traditional federal forum. In Sciabacucchi v. Salzberg, Delaware's Court of Chancery applied "first principles" to invalidate FFPs, primarily on grounds that charter provisions may regulate only internal affairs and that Securities Act claims are always external. In so concluding, the court adopted a novel definition of "internal affairs" that is narrower than the one established by U.S. and Delaware Supreme Court precedent. It asserted that plaintiffs have a federal right to file Securities Act claims in state court and further held that Securities Act plaintiffs are not existing stockholders to whom fiduciary duties are owed when they purchase shares. The opinion requires that all actions of the Delaware legislature relating to the Delaware General Corporate Law ("DGCL") comply with its novel "internal affairs" constraint. Sciabacucchi's logic and conclusion are fragile. The opinion conflicts with controlling U.S. and Delaware Supreme Court precedent and relies, critically, on incorrect assumptions of fact. The court asserted that FFPs are "contrary to the federal regime" because they preclude state court litigation of Securities Act claims. However, in Rodriguez de Quijas v. Shearson/American Express, Inc., the U.S. Supreme Court held that there is no immutable right to litigate Securities Act claims in state court and enforced an agreement precluding state court Securities Act litigation. The Sciabacucchi court asserted that Securities Act plaintiffs are not existing stockholders to whom fiduciary duties are owed. But U.S. Securities and Exchange Commission filings and the pervasiveness of order splitting conclusively establish that purchasers are often existing stockholders to whom fiduciary obligations are owed and breached as a result of misleading registration statements. The court feared hypothetical extraterritorial application of the DGCL. To prevent this result, it invented a novel definition of "internal affairs" that it applied to constrain all of the legislature's past and future activity. But the opinion nowhere addressed the large corpus of U.S. and Delaware Supreme Court precedent that already precludes extraterritorial applications of the DGCL. The court thus invented doctrine that conflicts with established precedent in an effort to solve a problem that does not exist. Sciabacucchi is additionally problematic from a policy perspective. By using Delaware law to preclude a federal practice in federal court that is permissible under federal law, the court created unprecedented tension with the federal regime. The opinion's narrow definition of "internal affairs" invites sister states to regulate matters traditionally viewed by Delaware as internal and thereby promotes positions inimical to Delaware's interests. By propounding its divergent definition of "internal affairs" as a categorical restriction on the General Assembly's past and future actions, the court causes the judiciary to cross into the legislature's lane. Moreover, data indicate that the Sciabacucchi opinion caused a statistically and economically significant decline in the stock price of recent

IPO issuers with FFPs in their organic documents. In contrast, a traditional textualist approach applies dictionary definitions and the doctrine of consistent usage to preclude extensions of the DGCL beyond traditional bounds. Textualism avoids all concerns that inspire the invention of a divergent definition of "internal affairs." Textualism does not require counterfactual assumptions, conflict with U.S. or Delaware Supreme Court precedent, cause Delaware to constrain federal practice in a manner inconsistent with federal law, or advocate policy positions inimical to Delaware's interests. Textualism also interprets the DGCL in a manner that restricts all Delaware corporations from adopting mandatory Securities Act arbitration provisions in their organic documents. A traditional, textualist approach validates FFPs in a manner that precludes the hypothetical collateral consequences that animate Sciabacucchi's fragile analysis, all without generating Sciabacucchi's troubling sequelae.

FULL TEXT

Headnote

The Securities Act of 1933 ("Securities Act"') provides for concurrent federal and state jurisdiction. Securities Act claims were historically litigated in federal court, but in 2015 plaintiffs began filing far more frequently in state court, where dismissals are less common and where weaker claims are more likely to survive. Directors' and officers' insurance costs for initial public offerings ("IPOs") have since significantly increased. Today, approximately 75 percent of section 11 corporate defendants face state court proceedings. Federal forum provisions ("FFPs") respond to the migration of Securities Act claims to state court and to increased insurance costs by requiring that Securities Act claims be litigated in their traditional federal forum.

In Sciabacucchi v. Salzberg, Delaware's Court of Chancery applied "first principles" to invalidate FFPs, primarily on grounds that charter provisions may regulate only internal affairs and that Securities Act claims are always external. In so concluding, the court adopted a novel definition of "internal affairs" that is narrower than the one established by U.S. and Delaware Supreme Court precedent. It asserted that plaintiffs have a federal right to file Securities Act claims in state court and further held that Securities Act plaintiffs are not existing stockholders to whom fiduciary duties are owed when they purchase shares. The opinion requires that all actions of the Delaware legislature relating to the Delaware General Corporate Law ("DGCL") comply with its novel "internal affairs" constraint.

Sciabacucchi's logic and conclusion are fragile. The opinion conflicts with controlling U.S. and Delaware Supreme Court precedent and relies, critically, on incorrect assumptions of fact. The court asserted that FFPs are "contrary to the federal regime" because they preclude state court litigation of Securities Act claims. However, in Rodriguez de Quijas v. Shearson/American Express, Inc., the U.S. Supreme Court held that there is no immutable right to litigate Securities Act claims in state court and enforced an agreement precluding state court Securities Act litigation. The Sciabacucchi court asserted that Securities Act plaintiffs are not existing stockholders to whom fiduciary duties are owed. But U.S. Securities and Exchange Commission filings and the pervasiveness of order splitting conclusively establish that purchasers are often existing stockholders to whom fiduciary obligations are owed and breached as a result of misleading registration statements. The court feared hypothetical extraterritorial application of the DGCL. To prevent this result, it invented a novel definition of "internal affairs" that it applied to constrain all of the legislature's past and future activity. But the opinion nowhere addressed the large corpus of U.S. and Delaware Supreme Court precedent that already precludes extraterritorial applications of the DGCL. The court thus invented doctrine that conflicts with established precedent in an effort to solve a problem that does not exist.

Sciabacucchi is additionally problematic from a policy perspective. By using Delaware law to preclude a federal practice in federal court that is permissible under federal law, the court created unprecedented tension with the federal regime. The opinion's narrow definition of "internal affairs" invites sister states to regulate matters traditionally viewed by Delaware as internal and thereby promotes positions inimical to Delaware's interests. By propounding its divergent definition of "internal affairs" as a categorical restriction on the General Assembly's past

and future actions, the court causes the judiciary to cross into the legislature's lane. Moreover, data indicate that the Sciabacucchi opinion caused a statistically and economically significant decline in the stock price of recent IPO issuers with FFPs in their organic documents.

In contrast, a traditional textualist approach applies dictionary definitions and the doctrine of consistent usage to preclude extensions of the DGCL beyond traditional bounds. Textualism avoids all concerns that inspire the invention of a divergent definition of "internal affairs." Textualism does not require counterfactual assumptions, conflict with U.S. or Delaware Supreme Court precedent, cause Delaware to constrain federal practice in a manner inconsistent with federal law, or advocate policy positions inimical to Delaware's interests. Textualism also interprets the DGCL in a manner that restricts all Delaware corporations from adopting mandatory Securities Act arbitration provisions in their organic documents. A traditional, textualist approach validates FFPs in a manner that precludes the hypothetical collateral consequences that animate Sciabacucchi's fragile analysis, all without generating Sciabacucchi's troubling sequelae.

I.Introduction

Sciabacucchi v. Salzberg1 addressed a question of first impression under Delaware law: may a certificate of incorporation validly contain a forum selection provision directing that claims arising under the Securities Act of 1933 ("Securities Act" or '33 Act") be litigated in federal court (a "federal forum provision" ("FFP")) even though the Securities Act expressly provides for concurrent federal and state jurisdiction?

This question is significant for reasons that reach far beyond its four corners. It interrogates the limits of the Delaware General Corporation Law ("DGCL") and calls upon Delaware courts to define the interpretive techniques they use to adduce those limits. The question thus challenges Delaware corporate law to define itself and to explain the principles by which it defines itself. There is much at stake.

FFPs were first proposed in 2016 in response to a dramatic shift of Securities Act section 11 litigation from federal to state court.2 Section 11 litigation is dismissed less frequently in state court, where weaker claims are more likely to survive and to have superior settlement value.3 This shift to state court was concurrent with a dramatic increase in the price of directors' and officers' insurance coverage for initial public offerings ("IPOs").4 FFPs redirect complex Securities Act claims to their traditional federal forum, which has a comparative advantage in resolving Securities Act claims.5 This efficient allocation of judicial responsibility is consistent with the neutral principle that litigation is best resolved by courts with the greatest expertise in addressing the underlying disputes.6 Notwithstanding neutral principles, redirecting Securities Act claims to federal court can also cause them to be heard in a forum where dismissals are more likely and where defendant corporations have a stronger hand in negotiating settlements. Plaintiffs' economic incentives to litigate Securities Act claims in state court are equally clear. Indeed, from a litigant's perspective, the question presented describes a zero-sum process: the gains to one party represent losses to the other. A litigant's perspective on the implications of FFPs therefore differs quite rationally from an academic or social-optimization perspective.

Although the Securities Act provides for concurrent federal and state jurisdiction, the U.S. Supreme Court in Rodriguez de Quijas v. Shearson/American Express, Inc.7 enforced a private agreement prohibiting state court Securities Act litigation and held that plaintiffs have no immutable right to litigate Securities Act claims in state court.8 FFPs are consistent with this precedent. This is the uncontested background against which FFPs have been adopted by dozens of publicly traded corporations conducting IPOs.9

Sciabacucchi's facts are simple. Three corporations adopted FFPs in their IPO charters. They were sued in a complaint that stated both derivative and direct claims10 and that mounted a facial challenge to the provisions' validity. More than fifty corporations have adopted FFPs in connection with IPOs.11 The three corporate defendants named in Sciabacucchi were selected arbitrarily from the adopting population.12

Two of the three corporate defendants, Roku, Inc. ("Roku") and Stitch Fix, Inc., adopted substantively identical FFPs:

Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of

action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of the Corporation shall be deemed to have notice of and consented to [this provision].13

The third corporate defendant, Blue Apron LLC, hedged a bit. Its provision tracked the others but also stated that "the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933."14

The Sciabacucchi court held that FFPs are "ineffective and invalid."15 It reasoned that "contrary to the federal regime, [FFPs] preclude a plaintiff from asserting a 1933 Act claim in state court."16 It also stated that there are "grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that the '33 Act permits, the [FFPs] could be pre-empted."17 The market's response to this decision was swift. Issuers with FFPs experienced financially and statistically significant declines in stock price.18 Chancery's decision in Sciabacucchi cost stockholders money.

The Sciabacucchi court supported its conclusion by observing that "at the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law."19 It reasoned that because purchaser plaintiffs are not stockholders at the time of purchase, no fiduciary duties are owed to them, so none can be breached.20

Most fundamentally, the Sciabacucchi court applied a purposive "first principles"21 analysis that abjured close scrutiny of the DGCL's text and concluded that organic provisions of Delaware-chartered entities may govern only internal affairs:

The certificate of incorporation differs from an ordinary contract, in which private parties execute a private agreement in their personal capacities to allocate their rights and obligations. When accepted by the Delaware Secretary of State, the filing of a certificate of incorporation effectuates the sovereign act of creating a "body corporate"-a legally separate entity. ... As the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation's internal affairs. . . . Delaware deploys the corporate law to determine the parameters of the property rights that the state has chosen to create. But Delaware's authority as the creator of the corporation does not extend to its creation's external relationships when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation's external interactions. . . . When litigation arises out of those [external] relationships, the DGCL cannot provide the necessary authority to regulate the claims.22

By Sciabacucchi's logic, even if the statute's plain text expressly and unambiguously supports the validity of FFPs, those provisions would still be invalid because they do not regulate internal affairs. Sciabacucchi reasoned that Securities Act claims are always external because they do not "turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation."23 A Securities Act claim thus "does not arise out of the corporate contract and does not implicate the internal affairs of the corporation."24 It is "an external claim that falls outside the scope of the corporate contract."25

This first-principles constraint is not limited to charter or bylaw provisions. It applies with equal force to every act of the Delaware General Assembly: "Delaware's authority as the creator of the corporation does not extend to its creation's external relationships"26 (i.e., matters that fail Sciabacucchi's internal affairs test). When "the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate."27 Delaware can therefore "regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs."28 Sciabacucchi thus advanced a proto-Marbury proposition that purports to govern all of Delaware's existing and future corporate law. Whereas Marbury v. Madison29 holds that courts can invalidate legislation as unconstitutional,30 Sciabacucchi asserts that Delaware courts can (and must) invalidate legislation that transgresses its view of "first principles," as reflected in its definition of "internal affairs," even if that legislation is otherwise consistent with the U.S. and Delaware Constitutions.

Sciabacucchi did not itself invalidate any DGCL provision.31 Instead, it mapped a legal Rubicon that commands

Delaware's legislature: "The line is drawn at 'first principles' and at 'internal affairs' as we define them. You may not cross it." Even if the legislature amended the DGCL to expressly permit FFPs,32 Sciabacucchi would invalidate that statute for seeking to regulate external conduct that offends the court's conceptualization of "first principles." The court's opinion thus introduced a novel constraint upon all of Delaware's past and future corporate laws.

Sciabacucchi's ruling is highly contestable. It relied on a purposive mode of analysis that minimized the significance of the statutory text and departed dramatically from Delaware's traditional interpretive approach, which emphasizes that the "most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it."33 Although it is "axiomatic that a statute . . . is to be interpreted according to its plain and ordinary meaning,"34 Sciabacucchi rejected this rule. The words of the statute are barely an afterthought to the court's first-principles analysis, which glossed over DGCL provisions that are highly relevant to-but inconsistent with-its conclusion. The opinion thus subjugated textualism to a first-principles purposivism that has no precedent in Delaware law.

To place Sciabacucchi in historical context, Part II of this article summarizes the relatively brief history of Delaware case law addressing the validity and operation of forum selection provisions in charters and bylaws. Part III moves beyond this history and addresses federal law governing FFPs. In particular, the Sciabacucchi court asserted that prohibiting state court Securities Act litigation is "contrary to the federal regime"35 and speculated that FFPs are "pre-empted."36 That is not the law. Rodriguez37 conclusively established that plaintiffs have no immutable right to litigate Securities Act claims in state court. The Sciabacucchi court nowhere mentioned Rodriguez, nor did it offer any support for its counterfactual assertion that prohibiting Securities Act litigation in state court is "contrary to the federal regime."38

Ironically, while Sciabacucchi warned that "asserting that state corporate law could be used to regulate federal claims" would have "vast" and negative implications,39 Sciabacucchi itself used Delaware law to regulate federal claims by prohibiting a federal practice governing a federal claim in federal court that is entirely consistent with federal law. Sciabacucchi thus created an unprecedented intrusion by Delaware into the federal space and paradoxically generated the "vast" and negative implications against which it cautioned.

Part III also observes that the Sciabacucchi court failed to examine U.S. and Delaware Supreme Court precedent holding that forum selection provisions are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."40 Part III further analyzes the operation of federal law as expressed in the Private Securities Litigation Reform Act ("PSLRA"),41 the Securities Litigation Uniform Standards Act ("SLUSA"),42and the U.S. Supreme Court's recent opinion in Cyan, Inc. v. Beaver County Employees Retirement Fund43 and explains that none of this federal precedent supports the Sciabacucchi court's holding.

Having addressed governing federal law, Part IV proceeds to examine the Sciabacucchi court's purposive analysis under Delaware law and demonstrate that Chancery's reasoning rested on demonstrably false assumptions of fact and a repeated failure to engage with controlling U.S. and Delaware Supreme Court precedent. In particular, the court's assertion that Securities Act plaintiffs are not stockholders at the time of purchase was presented with no citation support.44 It is demonstrably false. Registration statements filed with the United States Securities and Exchange Commission ("SEC") establish that existing holders purchase additional shares in IPOs and follow-on offerings.45 The ubiquity of order splitting also causes the vast majority of aftermarket Securities Act plaintiffs to be preexisting stockholders.46 When an institutional investor purchases 100,000 shares of an issuer's stock, the purchase is likely to be split and executed as, for example, 100 trades of 1,000 shares apiece rather than a single trade of 100,000 shares. By the Sciabacucchi court's logic, even if no fiduciary duty is owed in connection with the first 1,000-share purchase, after that purchase the purchaser is a preexisting holder to whom fiduciary duties are owed, and those duties are breached with respect to the acquisition of the remaining 99,000 shares. Order splitting also occurs in retail transactions. Indeed, the median trade size in today's Nasdaq market is a mere 100 shares.47 Defective registration statements can thus be material misrepresentations to existing holders who purchase pursuant to the false representations in the offering documents and who can assert fiduciary-breach claims under

Malone v. Brincat48 and In re Caremark International Derivative Litigation49 The Sicabacucchi court's logic thus collapses if its assumption that Securities Act purchasers are not preexisting stockholders is incorrect. The assumption is incorrect and the opinion's logic therefore collapses.50

The Sciabacucchi court also failed to address the fact that it was deciding a facial challenge. The plaintiffs' burden on a facial challenge "is a difficult one: they must show that [FFPs] cannot operate lawfully or equitably under any circumstance."51 Accordingly, there need be only one circumstance under which FFPs operate lawfully or equitably for a facial challenge to fail. Thus, by the Sciabacucchhi court's analysis, a Securities Act claim must be external even if an issuer's board willfully crafts a materially false prospectus to sell directors' own shares to existing stockholders. This conclusion is inconsistent with Delaware precedent and illuminates yet another flaw in the court's logic.

In addition, instead of focusing on fact patterns related to the case at hand, the Sciabacucchi court fixated on hypotheticals that can never arise in conjunction with FFPs. It was concerned that organic provisions might be used to govern tort, contract, or conversion claims by persons who happen to be stockholders. As an initial matter, these hypotheticals have nothing to do with FFPs, which, by their very construction, can regulate only Securities Act claims and have nothing to do with tort, contract, or conversion claims. In this context, Sciabacucchi's hypotheticals are not hypotheticals. They are impossibilities. Further, the court's fixation on remote hypotheticals violates Delaware's admonition that courts should focus on actual cases and controversies. The "wisdom of declining to opine on hypothetical situations that might or might not come to pass is evident."52 It follows that "Delaware courts 'typically decline to decide issues that may not have to be decided or that create hypothetical harm.'"53 Although it is "imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts,"54 the Sciabacucchi court's core analysis of first principles was largely animated by concerns over hypotheticals that might never arise as they might relate to charter provisions that might never exist.

The court's concern over the extraterritorial application of the DGCL55 is also fraught. While expressing its fear that Delaware might deploy the DGCL to regulate pollution in Pennsylvania, wages in Wisconsin, or taxes in Texas, the court never mentioned the large and sophisticated body of U.S. and Delaware Supreme Court precedent and other legal doctrine that already precludes such extraterritorial applications. The court nowhere explained why existing doctrine is inadequate to address its extraterritoriality concerns, how its internal affairs constraints differ from existing precedent, or why the addition of its self-imposed internal affairs constraint, which it uniquely defined, rationally advances the current state of the law. From an extraterritoriality perspective, the court's firstprinciples analysis thus proposed to solve a problem that has already been solved, at the cost of adding conflict and inconsistency to the law.

The Sciabacucchi court's definition of "internal affairs" is additionally problematic. In Edgar v. MITE Corp.,56 the U.S. Supreme Court defined "internal affairs" as "matters peculiar to the relationship among or between the corporation and its current officers, directors, and shareholders-because [if multiple states had authority to regulate a corporation's internal affairs,] a corporation could be faced with conflicting demands."57 Delaware's definition is essentially identical.58 The Sciabacucchi court, however, invented a materially narrower definition, claiming that a matter is internal if it "turn[s] on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation."59 The court offered no rationale for this divergence, nor did it acknowledge or analyze the conflict it created with controlling precedent. The definition of "internal affairs" is a matter of substantial import to Delaware corporate law. Careful analysis is warranted before Delaware's judiciary endorses a divergent definition that constrains established precedent. No such analysis resides in Sciabacucchi.

The court's divergent definition is also flawed in its application to the facts presented in Sciabacucchi. The conclusion that Securities Act claims are always external60 rested on a truncated rendition of section 11 liability that overlooked the profoundly internal nature of the section 11 claim. Directors and officers always sign the registration statement, and directors and officers are always liable for material misrepresentations in that

statement unless they can establish a due diligence defense by demonstrating that they behaved as a prudent person would in the management of their own property.61 This defense inexorably dives deeply into boardroom practice. It inquires as to the individualized and collective conduct of defendant officers and directors. It asks which documents each director reviewed, which questions each director asked, and whether each director exercised appropriate skepticism. These matters are entirely internal, and it is obvious that section 11 liability can arise from actions that emanate exclusively from within the corporate boardroom. There is nothing external about this conduct. Section 11 also contains a complex mechanism for allocating liability among directors, officers, and the corporation, and thus inevitably implicates "the equitable relationships that flow from the internal structure of the corporation."62 The Sciabacucchi court's edited rendition of section 11 liability was foundational to its incorrect conclusion that section 11 liability is always external. Indeed, the facts that give rise to Securities Act claims can be identical to those supporting traditional Malone63 or Caremark64 fiduciary-breach claims. This correspondence reinforces the internal nature of the section 11 claim.

As Part V explains, all these problems are efficiently avoided by recognizing that "[t]he most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it."65 The Sciabacucchi court paid scant attention to this "most important consideration." The plain text of DGCL sections 102(b)(1),66 115,67 and 20268 unambiguously supports the validity of FFPs, and because Sciabacucchi avoided plain text in order to focus on its novel "first principles," nothing in Sciabacucchi suggests that FFPs are inconsistent with the plain text of these sections.

The court's pervasive concern that the DGCL could be used to regulate tort, contract, or conversion claims invites two easy textualist responses. First, the plain text speaks only of stockholders and never of tort, contract, or conversion claimants who happen to be stockholders. If that distinction is insufficient, section 115 speaks of directors, officers, or stockholders only "in such capacity." The doctrine of consistent usage69 teaches that the same "in such capacity" constraint would apply to section 102(b)(1), thereby independently eliminating the need for a first-principles analysis designed to prevent an outcome that is already precluded by plain text.

Indeed, DGCL section 102(b)(1) plainly authorizes "any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders . . . if such provisions are not contrary to the laws of this State."70 FFPs are adopted for the management of a corporation's stockholder-litigation affairs, and by dictionary definition they regulate the powers of the corporation, directors, and stockholders, each in "such capacity." The plain text is dispositive and again supports the validity of FFPs, particularly when read in pari materia with DGCL section 202, which was nowhere addressed in Sciabacucchi. DGCL section 202 authorizes charter-based transfer restrictions that are "not manifestly unreasonable"71 and conclusively presumes that a restriction is for "a reasonable purpose" if it is for "maintaining any statutory or regulatory advantage . . . under applicable local, state, federal or foreign law."72 FFPs are adopted to maintain an advantage under federal law that is permitted by federal law and are therefore presumptively valid under section 202. If FFPs are valid as stringent restrictions on alienation, they are a fortiori valid as less stringent general charter or bylaw provisions. Any other conclusion forces the illogical result that Delaware permits stringent charter restrictions on alienation that it would preclude as less stringent charter provisions of general application.

DGCL section 115 directly addresses forum selection provisions, and its text and legislative history unambiguously support the validity of FFPs. As defined in section 115, "internal corporate claims" are those "based upon a violation of a duty by a current or former director or officer."73 As established in Malone,74 Securities Act section 11 claims are based on violations of officer and director internal fiduciary obligations to not lie to stockholders. They are therefore internal corporate claims. Significantly, section 115 does not require that the violation be exclusively of a Delaware duty or that the plaintiffs expressly state a claim under the DGCL.75 Nor does section 115 preclude a federal claim from also being an internal corporate claim. FFPs allow claims to be brought in federal or state court in Delaware and never preclude bringing a claim in any Delaware court. On a facial challenge, they are therefore entirely consistent with section 115 and nothing in Sciabacucchi contradicts this analysis. The

opinion instead reached a contrary conclusion by relying primarily on commentary by framers that was presented after section 115 was enacted. This commentary, however, is internally inconsistent, fails to address the operation of section 11 liability, and fails to recognize that Securities Act plaintiffs are purchasers to whom fiduciary duties are owed. In any event, post-adoption commentary cannot override a statute's plain text and legislative history.
Some observers have expressed concern that validating FFPs paves the way for mandatory Securities Act arbitration.76 Those concerns are misplaced and have the argument backward. FFPs expressly preclude arbitration and force litigation into federal or Delaware state court. It is illogical to argue that a provision that prohibits arbitration facilitates arbitration. Further, if section 115 is interpreted as categorizing Securities Act claims as "internal corporate claims," then section 115 would preclude mandatory arbitration for all Delaware-chartered entities, regardless of whether they include FFPs in their organic documents. Because Delaware-chartered entities constitute a majority of the Fortune 500,77 this interpretation of section 115 would immediately make mandatory Securities Act arbitration unavailable for most major investments in U.S. publicly traded corporations. This result might be hailed as a victory by opponents of mandatory Securities Act arbitration. Most fundamentally, however, if arbitration's opponents have a problem with federal law governing the arbitration of federal claims, they should address their concerns to federal authorities, such as Congress or the SEC. It makes little sense for Delaware to distort its own law to achieve a federal regulatory result, particularly when federal law can easily be amended to preempt any action that Delaware might take.
Part VI addresses a range of adverse public policy implications generated by Sciabacucchi. The court's divergent, narrow definition of "internal affairs" has materially adverse policy consequences for Delaware law. If conduct underlying the section 11 claim is external, then that conduct can be regulated by sister states. Nothing would then preclude a state like California from enacting legislation requiring that every director of a California-headquartered corporation spend at least six hours in video-recorded due diligence sessions in connection with federally registered offerings. Such regulation is deeply intrusive into a board's functioning and would, under MITE and VantagePoint Venture Partners 1996 v. Examen, Inc., constitute impermissible intrusion into a Delaware corporation's internal affairs. The Sciabacucchi court, however, would have no objection to this type of invasion because it deemed the section 11 violation always external. The result is a very slippery slope: if processes that cause defective registration statements are external, then so too are a host of other boardroom functions that then become amenable to regulation by sister states who could cite Sciabacucchi to support their right to regulate that boardroom conduct. Such an outcome would be inconsistent with Delaware's traditional policy objectives.
Part VI also explains that Sciabacucchi steers Delaware into the federal lane by precluding a practice that is valid under federal law. It also steers the judiciary into the legislature's lane by constraining the legislature's ability to set policy. In particular, the court's proto-Marbury constraint fails to recognize that Delaware courts "must . . . respect the broadly enabling nature of the DGCL, and [w]here the markets begin to use the DGCL's breadth in new ways, it is the General Assembly, not the courts, that should evaluate whether, on public policy grounds, the statute's authorizing breadth should be narrowed."78 Careful deliberation is appropriate before adopting a sweeping judicial constraint on all past and future legislative conduct, particularly when the question presented can be resolved on narrower grounds that adhere to the statutory text, avoid the significant interpretive challenges presented by "first principles," and do not call for a divergent definition of "internal affairs."
Part VII addresses miscellaneous matters, including the Sciabacucchi court's concerns about the definitions of the terms "security" under federal law and "outsider liability" under the Securities Act. Part VII also addresses liability under sections 12(a)(1) and (2) and section 15 of the Securities Act, the only provisions outside of section 11 that are covered by FFPs and that support private rights of action.
Part VIII concludes by observing that a straightforward textualist approach reads the statutory language and related legislative history as supporting the validity of FFPs. The question presented in Sciabacucchi can thus be resolved on narrow grounds that avoid all of the complexities associated with first principles and internal affairs logic. Moreover, while Sciabacucchi presented a facial challenge in which the plaintiff failed to carry the burden of demonstrating that FFPs "cannot operate lawfully or equitably under any circumstances,"79 Sciabacucchi is not

the last word on the validity of FFPs because each and every attempt to enforce an FFP will be subject to scrutiny in the state court in which the corporation seeks enforcement. Plaintiffs will thus be able to object on equitable grounds invoking Schnell v. Chris-Craft Industries, Inc.,80 which explained that "the answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw." Further, in accordance with precedent established in Bremen v. Zapata Off-Shore Co.81 and followed in Delaware,82 plaintiffs will also be able to challenge the application of an FFP for its potential violation of important state policy. This minimalist resolution is consistent with Delaware precedent and preserves the ability of future courts to efficiently police FFPs so as to ensure that they operate equitably. First principles are unnecessary to reach this conclusion. Plain English suffices.

II.The Evolution of Organic Forum Selection Provisions in Delaware Law

Delaware law governing the validity of forum selection provisions in organic corporate documents began with dicta in In re Revlon, Inc. Shareholders Litigation,83 a 2010 opinion in which Vice Chancellor J. Travis Laster suggested that boards adopt intra-corporate forum selection provisions in corporate charters.84 It proceeded through Boilermakers,85 a 2013 opinion by then-Chancellor Leo E. Strine that upheld intra-corporate forum selection bylaws. The migration of Securities Act litigation from federal to state court and the emergence of FFPs occurred after Boilermakers. The law rests today with Sciabacucchi,86 a 2018 opinion in which Vice Chancellor Laster rejected FFPs as improper subject matter for organic documents of Delaware corporations.

A. Revlon

In Revlon, class counsel was replaced "for failing to provide adequate representation when agreeing to a non-substantive settlement."87 The Chancery Court calculated that if Delaware sought to regulate abusive litigation, then plaintiffs' counsel might "accelerate their efforts to populate their portfolios by filing in other jurisdictions."88 But boards are not defenseless. As the court observed, "if boards of directors and stockholders believe that a particular forum would provide an efficient and value-promoting locus for dispute resolution, then corporations are free to respond with charter provisions selecting an exclusive forum for intra-entity disputes."89 These dicta rely on the "expectation that a forum-selection provision implemented through the corporation's constitutive documents only would extend to 'intra-entity disputes.'"90

B. Boilermakers

Boilermakers was the first Delaware decision to formally address the validity of a forum selection clause in an organic document of a Delaware corporation. The court upheld intra-corporate forum selection provisions91 in corporate bylaws and, by implication, corporate charters.92

The Boilermakers court adopted a textualist approach emphasizing that "the most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it."93 The court examined the text of DGCL section 109(b), which governs the subject matter for bylaws, and concluded that "[a]s a matter of easy linguistics, the forum selection bylaws address the 'rights' of the stockholders because they regulate where stockholders can exercise their right to bring certain internal affairs claims against the corporation and its officers and directors."94 According to the court, forum selection bylaws "are process-oriented because they regulate where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."95

The Boilermakers court observed that "the bylaws only regulate suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine."96 The U.S. Supreme Court described "internal affairs" as those "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders,"97 a definition accepted by the Delaware Supreme Court.98 Similarly, the Boilermakers court described the forum selection provisions in question as governing lawsuits that "plainly relate to the 'business of the corporation[s]' and the 'conduct of [their] affairs' and which seek to regulate the 'rights and powers of [their] shareholders.'"99

In contrast, a forum selection bylaw would be "regulating external matters if the board adopted a bylaw that

purported to bind a plaintiff, even a stockholder plaintiff, who sought to bring a tort claim against the company based on a personal injury that she suffered that occurred on the company's premises or a contract claim based on a commercial contract with the corporation."100 Provisions of this sort are "beyond the statutory language" for the "obvious" reason that "the bylaws would not deal with the rights and powers of the plaintiff-stockholder as a stockholder."101 Nevertheless, the "defendants [in Boilermakers] themselves read the [provision] in a natural way to cover only internal affairs claims brought by stockholders qua stockholders."102

The Boilermakers court also invoked the Delaware Supreme Court's holding in Ingres Corp. v. CA, Inc. that "forum selection clauses are presumptively valid and enforceable under Delaware law."103 It observed that Delaware follows the principles established by the U.S. Supreme Court in Bremen "and its progeny, which require[] courts to give as much effect as is possible to forum selection clauses and to only deny enforcement of them to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law."104 Significantly, the court explained that "U.S. Supreme Court precedent reinforces the conclusion that forum selection bylaws are, as a facial matter of law, contractually binding."105

The Boilermakers court was precise in characterizing the complaint as a facial challenge and observed that the plaintiffs' burden was thus "a difficult one: they must show that the bylaws' [forum selection provision] cannot operate lawfully or equitably under any circumstances."106 This requires showing that the provisions, as defined by the statute, "do not address proper subject matter and can never operate consistently with law."107 Accordingly, there was no need to confront "how the [forum selection provision] might be applied in any future, real-world situation."108 Indeed, "[t]he presumption is not that the [bylaw] is invalid upon adoption because it might, under some undefined and hypothetical set of later-evolving circumstances, be improperly applied."109 If a bylaw were later improperly applied, the court explained that the "answer . . . [would be] for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of Schnell v. Chris-Craft Industries[, Inc.]"110

The Boilermakers court refused to entertain a "salmagundi"111 of hypotheticals that strayed from the four corners of the question presented. It noted that the plaintiffs "conjured up an array of purely hypothetical situations in which they say that the bylaws [at issue] might operate unreasonably."112 Nonetheless, the court stated that it would "be imprudent and inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts."113 It observed that Delaware courts "do not render advisory opinions about hypothetical situations that may not occur."114 Accordingly, because plaintiffs "have no separate claims pending that are affected by the" forum selection provision, "they may not avoid their obligation to show that the [forum selection provisions] are invalid in all circumstances by imagining circumstances in which the [provisions] might not operate in a situationally reasonable manner."115 This reasoning reflects that "the settled approach of [Delaware] law regarding bylaws is that courts should endeavor to enforce them to the extent that it is possible to do so without violating anyone's legal or equitable rights."116

The Boilermakers court also observed that Delaware's "Supreme Court long ago rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority."117 Citing Unocal Corp. v. Mesa Petroleum Co., the Chancery Court reiterated that "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs. Merely because the General Corporation Law is silent as to a specific matter does not mean that it is prohibited."118 Critically, the court never described the internal affairs doctrine as defining a condition necessary for the validity of any organic provision but instead consistently described it as providing a condition sufficient for validity under Delaware law. Transmogrifying a sufficient condition into a necessary one is a significant logical leap that easily leads to error. That leap is at the heart of the Sciabacucchi court's analysis.

C. Sciabacucchi

Sciabacucchi's major proposition, based on "first principles" that are independent of statutory text, is that a corporation's organic documents can regulate only "internal affairs claims brought by stockholders qua stockholders."119 The court rejected the view that the plain text of DGCL section 102(b)(1) is broad enough to

encompass FFPs. "First principles"120 emanate from the observation that the "contract that gives rise to the artificial entity [i.e., the corporation] ... is not an ordinary private contract among private actors."121 The court determined that the state of incorporation "cannot use corporate law to regulate the corporation's external relations."122 Accordingly, it held that "Delaware can regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs."123 It follows that Delaware's "authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships."124

The Sciabacucchi court interpreted Boilermakers as "drawing a line at internalaffairs claims"125 and concluded that FFPs cross that line because "a 1933 Act claim is external to the corporation."126 It stated that Securities Act claims do not "turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision of the DGCL, or the equitable relationships that flow from the internal structure of the corporation."127 The court observed that those claims "do[] not arise out of the corporate contract and do[] not implicate the internal affairs of the corporation."128 Thus, it reasoned that "[a] 1933 Act claim is an external claim that falls outside the scope of the corporate contract."129 Put another way, "Federal Forum Provisions purport to regulate the forum in which parties external to the corporation (purchasers of securities) can sue under a body of law external to the corporate contract (the 1933 Act). They cannot accomplish that feat, rendering the provisions ineffective."130

The court emphasized that charters and bylaws cannot "dictate the forum for tort or contract claims against the company, even if the plaintiff happens to be a stockholder."131 It explained that "[t]he reason why those kinds of bylaws would be beyond the statutory language ... is obvious: the bylaws would not deal with the rights and powers of the plaintiff stockholder as a stockholder."132 The court observed that a '33 Act claim "resembles a tort or contract claim brought by a third-party plaintiff who was not a stockholder at the time the claim arose. At best for defendants, a 1933 Act claim resembles a tort or contract claim brought by a plaintiff who happens also to be a stockholder, but under circumstances where stockholder status is incidental to the claim."133

The court found further support in its interpretation of DGCL section 115, which it said validated forum selection provisions in Delaware corporations' charters and bylaws but only to "give statutory force to the Boilermakers decision."134 In the Sciabacucchi court's interpretation, section 115 "addressed only 'internal corporate claims,' defined to encompass claims covered by the internal affairs doctrine."135 Because Securities Act claims are not, in the court's view, internal, they also violate section 115.

The Sciabacucchi court's second major rationale rests on the assertion that "at the time the predicate act occurs," giving rise to '33 Act liability, "the purchaser is not yet a stockholder and lacks any relationship with the corporation that is grounded in corporate law."136 In the court's view, the cause of action "does not arise out of or relate to the ownership of the share, but rather from the purchase of the share. At the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law."137 The court also observed that a Securities Act plaintiff need not "continue to own the security to be able to assert a claim . . . : the plaintiff can sue even if it subsequently sells and is no longer a stockholder."138

In addition, the court asserted that prohibiting state court Securities Act litigation is "contrary to the federal regime"139 and observed that FFPs might be "pre-empted."140 Under this perspective, a state law prohibition on FFPs reinforces and is consistent with a preexisting federal prohibition.

The court offered a panoply of additional factors supporting its conclusion that FFPs are invalid in organic documents. It noted that the broad federal definition of "security" "underscores the absence of any meaningful connection between a 1933 Act claim and stockholder status" because, by the court's calculus, the '33 Act "could identify as few as fifty or as many as 369 different types of securities. Shares are just one of these many types of securities, and shares of a Delaware corporation are only one subset of that one type."141 Accordingly, the court found "no necessary connection between a 1933 Act claim and the shares of a Delaware corporation."142 The court also observed that to be named a defendant in a Securities Act claim, "[d]irector status is not required.

Officer status is not required. An internal role with the corporation is not required."143 This too distances Securities Act claims from internal claims.

The court closed its opinion by commenting on additional arguments by the plaintiffs that it had not otherwise formally reached. The plaintiffs argued that FFPs "took Delaware out of its traditional lane of corporate governance and into the federal lane of securities regulation."144 In response, the court opined that the "extent of infringement in this case might not seem significant (excluding one of the two forums that federal law permits), but the implications would be vast (asserting that state corporate law could be used to regulate federal claims)."145

III.Concurrent Jurisdiction, Federal Preemption, and the Federal Law of Forum Selection

The Sciabacucchi court stated that "contrary to the federal regime, [FFPs] preclude a plaintiff from asserting a 1933 Act claim in state court."146 Citing the plaintiffs' pleadings, the court also asserted that there "are also grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that the 1933 Act permits, the provisions could be pre-empted."147

The U.S. Supreme Court disagrees. In Rodriguez,148 a precedent that was not cited in Sciabacucchi, the U.S. Supreme Court upheld a contractual provision that precluded state court litigation of Securities Act claims. As Bremen149 and its progeny explain, FFPs are entirely consistent with federal law governing the enforcement of forum selection provisions. In addition, nothing in the PSLRA,150 SLUSA,151 or Cyan152 limits a forum selection provision from designating a federal court as the venue in which a Securities Act claims must proceed.153 Simply put, nothing in federal law precludes the enforcement of FFPs; their operation is entirely consistent with and welcomed by the federal regime.

It is Sciabacucchi that cannot be reconciled with federal law. The Sciabacucchi court used Delaware law to prohibit an act in federal court, under federal law, that is permitted by federal law. No other interpretation of Delaware law has ever so intruded into the federal regime. Instead of avoiding a Delaware-federal conflict, the Sciabacucchi court created a large one.

A.Rodriguez and Securities Act Concurrent Jurisdiction

The Rodriguez Court explained that arbitration provisions are "in effect, a specialized kind of forum selection clause."154 Consistently with that view, Scherk v. Alberto-Culver Co. observed that arbitration provisions "posit[] not only the situs of suit but also the procedure to be used in resolving the dispute."155 Rodriguez thus conclusively established that there is no immutable right to litigate Securities Act claims in state court. If such a right existed, Rodriguez could not have been decided as it was. Indeed, because the Supreme Court enforced a provision that prohibited litigation in federal or state court when the statute provides for concurrent jurisdiction in both federal and state court, it follows a fortiori that the U.S. Supreme Court would enforce a provision that required litigation in federal court. Arguments that FFPs improperly constrain plaintiffs' rights to designate a state court forum for the resolution of Securities Act claims must therefore fail as inconsistent with controlling U.S. Supreme Court precedent.156 The Sciabacucchi court's speculation that FFPs might be preempted is therefore also wrong.

The facts and analysis in Rodriguez are simple and instructive. The plaintiffs "signed a standard customer agreement" with a broker that included a "clause stating that the parties agreed to settle any controversies 'relating to [the] accounts' through binding arbitration."157 The arbitration agreement was "unqualified, unless it is found to be unenforceable under federal or state law."158 The plaintiffs argued that the agreement violated the anti-waiver language of section 14 of the Securities Act, which states as follows: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."159

The U.S. Supreme Court disagreed, holding that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."160 By identical logic, when agreeing to litigate a Securities Act claim in federal court, a party does not forgo any substantive right; it submits to the resolution of a federal claim in a federal forum rather than in a federal or state forum, with the exception of the possibility that the Securities Act claim will be litigated in Delaware state

court.161 Obviously, if Rodriguez's proposition upholding arbitration is true, even though the Securities Act never mentions arbitration as a forum for the resolution of Securities Act claims, then the latter proposition upholding litigation in federal court must be true, inasmuch as the Securities Act expressly designates federal courts as a proper forum for the resolution of Securities Act claims.

Standard objections to arbitration, which include a lack of transparency and the loss of rights that are common in federal or state court,162 are meaningless when assessing an FFP that directs federal claims to an open federal court where the Federal Rules of Civil Procedure and Federal Rules of Evidence apply. Thus, if a Securities Act arbitration agreement is enforceable notwithstanding policy concerns regarding arbitration, an FFP directing Securities Act claims to federal court is a fortiori enforceable.

Significantly, Rodriguez overruled Wilko v. Swan,163 an opinion that invalidated Securities Act arbitration agreements. The Rodriguez Court's rationale in overturning Wilko notably supports the validity of FFPs under federal law on grounds distinct from both the operation of the Federal Arbitration Act and the brokerage nature of the relationship between the litigants:

Once the outmoded presumption of disfavoring arbitration proceedings is set to one side, it becomes clear that the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that 14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers164

Here, the court expressly rejected the notion that the Securities Act is intended to "place buyers of securities on an equal footing with sellers" by providing them with a right to a forum that cannot be governed by a forum selection provision.165 This logic also precludes the argument that Rodriguez is somehow distinguishable because it involved an arbitration agreement and invoked the Federal Arbitration Act. If that were the case, the Rodriguez Court would not have had to reject the proposition that the Securities Act places buyers and sellers on equal footing and could have instead relied on a far narrower holding related exclusively to the enforcement of arbitration provisions. Its decision to reverse Wilko and uphold mandatory Securities Act arbitration significantly reinforces the validity of FFPs as a matter of federal law.

Objections based on concern that charter provisions are nonnegotiable "contracts of adhesion" in the context of public offerings are also of no avail. The standard brokerage agreement at issue in Rodriguez was a nonnegotiable contract of adhesion, and courts commonly reject complaints that stockholders cannot negotiate charter or bylaw provisions.166 The Boilermakers court dismissed these concerns, explaining that "[i]n sum, stockholders contractually assent to be bound by bylaws that are valid under the DGCL-that is an essential part of the contract agreed to when an investor buys stock in a Delaware corporation,"167 even if those bylaws were not in place when they initially purchased their shares. Indeed, this argument has no merit on the specific facts of Sciabacucchi because the charter provisions at issue were all in place before the plaintiff's purchase and fully described in the relevant prospectuses, thereby putting the plaintiff on notice.

As a matter of federal law, efforts to distinguish Rodriguez by arguing that it addressed a brokerage agreement that fundamentally differed from corporate charters or bylaws168 can also not succeed. Rodriguez turned neither on the form of the agreement containing the forum selection clause nor on the Federal Arbitration Act. It instead turned on the interpretation of Securities Act section 14, where the key observation is that "the right to select the judicial forum and the wider choice of courts are not such essential features of the Securities Act that 14 is properly construed to bar any waiver of these provisions. Nor are they so critical that they cannot be waived under the rationale that the Securities Act was intended to place buyers of securities on an equal footing with sellers."169 Even if one agrees that a contract defined for the purposes of the Federal Arbitration Act cannot include corporate charters or bylaws-a question irrelevant to the resolution of Sciabacucchi-this distinction is additionally irrelevant because Rodriguez applies irrespective of the operation of the Federal Arbitration Act.170

Current SEC policy also supports the validity of FFPs. SEC staff view mandatory Securities Act arbitration to be contrary to the public interest and refuse to accelerate the registration statements of issuers whose organic

documents provide for mandatory arbitration.171 In contrast, SEC staff have never denied acceleration to an issuer's registration statement with an FFP in its organic documents. Any such objection would also be more than a bit curious coming from an agency that litigates Securities Act claims in federal court. To put it another way, if federal courts are good enough for the SEC when litigating Securities Act complaints, they are good enough for private plaintiffs litigating Securities Act complaints, particularly when Supreme Court precedent establishes that private agreements can preclude state court litigation. Staff comment letters mentioning FFPs have been limited to observations regarding disclosure issues, and no objections have been raised as to the effectiveness or substance of any FFP under federal securities law.172

By invalidating FFPs, Sciabacucchi prohibits a forum selection mechanism that is entirely legitimate as a matter of U.S. Supreme Court precedent and consistent with current SEC practice. This inconsistency takes Delaware out of its lane and creates unnecessary friction between Delaware and federal law.173

B.The Federal Law of Forum Selection

In Bremen, the U.S. Supreme Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."174 A forum selection provision "should control, absent a strong showing that it should be set aside."175 The law in Delaware is identical: "the principles set down by the United States Supreme Court in Bremen [were] adopted explicitly by [Delaware's] Supreme Court in Ingres Corp. v. CA, Inc."176 Federal and Delaware law are of a single mind: forum selection provisions are presumptively valid.

Boilermakers further explained that the "presumption [of validity] is not that the [forum selection provision] is invalid upon adoption because it might, under some undefined and hypothetical set of later-evolving circumstances, be improperly applied."177 For facial challenges, hypothetical circumstances not before the court in which FFPs might be deemed invalid under federal, Delaware, or any other law are irrelevant.

The Boilermakers court emphasized that forum selection provisions are subject to an additional level of scrutiny by the courts in which complaints challenging those provisions are filed. It observed that the ensuing "[r]eview under Bremen and its progeny is genuine, not toothless."178 Indeed, the Boilermakers court reasoned that "the Bremen doctrine exists precisely to ensure that facially valid forum selection clauses are not used in an unreasonable manner in particular circumstances."179 Contemplating conditions under which an as-applied analysis might invalidate an FFP is thus unnecessary on a facial challenge where the presumption of validity prevails. Nonetheless, contemplating the dimensions of an as-applied analysis is here instructive because it underscores that state courts will rarely, if ever, have cause to refuse to enforce an FFP on state policy grounds.

In an as-applied context, Bremen specified three circumstances in which forum selection provisions might be invalidated. First, the provision could not be enforced when doing so might be "unreasonable and unjust."180 To challenge a provision on these grounds, a resisting party would need to demonstrate that "trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."181 Otherwise, "there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."182

Litigating federal Securities Act claims in federal court is neither unreasonable nor unjust. Congress has designated federal court as a permissible forum. Federal courts are the traditional forum for resolving Securities Act claims and have a comparative advantage in resolving those disputes. The selection of a sufficiently remote forum might be viewed as unreasonable under certain circumstances,183 but with ninety-four district courts throughout the nation, and with at least one in every state,184 including Delaware, the state of incorporation, no such objection can be raised against FFPs that allow plaintiffs to select any federal district court.

Second, a provision might be "invalid for such reasons as fraud or overreaching."185 However, FFPs are fully disclosed in the charter or bylaws and are described in the prospectus. Their operation is fully disclosed before the acquisition of any shares, and there is no opportunity for the sort of fraud or overreaching contemplated in Bremen186 There is also no undue influence or overweening bargaining power. The U.S. Supreme Court made clear that forum selection provisions are enforceable even if contained in contracts of adhesion.187 Indeed, if

FFPs are objectionable on these grounds, every IPO charter provision would be objectionable as the result of overreaching, undue influence, or excessive bargaining power.

Bremen's third concern was that a forum selection clause might "contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."188 Procedurally, the merits of any such hypothetical objection cannot be assessed in the abstract because it is presently impossible to identify any specific state's policy that might be offended by the enforcement of a hypothetical FFP. Nonetheless, precedent and logic suggest that state law public policy arguments against litigating federal claims in federal court are likely to fail, assuming that they ever arise at all.

C.State Law Public Policy Concerns

A review of leading treatises189 found no indication that any extant state law or policy stands for the proposition that a forum selection provision directing that federal courts address federal claims would "contravened a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."190 The absence of this type of precedent is unsurprising because for such a "strong public policy" to exist a state would have to conclude that it has a strong policy interest in preventing federal courts from resolving federal questions in accordance with federal law. The Supremacy Clause issues raised by such a position are obvious.

Indeed, no known state policy goes so far. The U.S. Court of Appeals for the Ninth Circuit's recent decision in Gemini Technologies v. Smith &Wesson Corp 191 illustrates this point. Idaho has perhaps the most aggressive statutory public policy against extraterritorial litigation, but not even Idaho's extreme statute would invalidate FFPs:

Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing this right under the contract in Idaho tribunals ... is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.192

Applying this text, the Ninth Circuit refused to enforce a forum selection provision requiring that litigation related to an asset-purchase agreement be brought in Delaware, reasoning that it contravened Idaho's strong public policy "and [wa]s therefore unenforceable."193 The court observed that only four other states- Montana, North Dakota, Oklahoma, and North Carolina-"have statutes similar to Idaho's."194

The important observation about the Idaho statute, however, is that it permits litigation in federal court in Idaho. Thus, even Idaho law could not defeat the enforcement of the FFPs at issue in Sciabacucchi. The clearly protectionist effect of Idaho's law-which seems calculated to protect the economic interests of the local Idaho bar from contractual provisions that might export litigation to other states-is not offended by FFPs that would simply move Securities Act litigation across the street from state to federal court. The local legal community still gets the business. Thus, as drafted in Sciabacucchi, FFPs raise no credible concern that they are void as being against state public policy under even the most aggressive interpretations of existing statutes.195

D. The PSLRA, SLUSA, and Cyan

The Sciabacucchi court relied in part on the U.S. Supreme Court's decision in Cyan196 barring the removal of section 11 actions from state to federal court and reaffirming concurrent jurisdiction under the Securities Act.197 Cyan, however, is irrelevant to the question presented in Sciabacucchi because Cyan addressed a question related to removal and remand in the absence of a forum selection provision. The law governing the former is distinct from the law governing the latter. When a plaintiff files in a forum precluded by a forum selection clause, the parties litigate over the proper application of Bremen and related precedent. They have no cause to argue over removal and remand, or even to cite Cyan. In contrast, when arguing over removal and remand in the absence of a forum selection provision, it is pointless to cite Bremen or related forum selection precedent that say nothing about removal and remand. It is a dramatic misreading of Cyan to suggest that sub silentio, and with no briefing or mention of the law governing forum selection, Cyan overturned Rodriguez, Bremen, and all other forum selection precedent that applies to Securities Act claims.

The PSLRA and SLUSA also do not speak to the enforceability of FFPs. Nothing in the text of either statute or their

legislative histories suggests that Congress considered the operation of forum selection provisions in the context of Securities Act claims, much less that Congress legislated to constrain the operation of those provisions or to limit the reach of Rodriguez, Bremen, or any related precedent.

As the United States Supreme Court has emphasized, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes."198 To conclude that the PSLRA, SLUSA, or Cyan reverses, overrides, or modifies Rodriguez or Bremen is to conclude that Congress and the court hid three very large elephants in one small mousehole. That's three elephants too many.

IV.Sciabacucchi's Purposive Analysis

Sciabacucchi's purposive analysis presents a host of challenges. Nowhere did the opinion address the strong burden imposed on a plaintiff who makes a facial claim. Nor did it respect the presumption of validity that attaches to charter provisions. With no support, Sciabacucchi incorrectly asserted that section 11 purchasers are not stockholders to whom fiduciary duties are owed-duties that are breached as a consequence of registration statements that contain material misrepresentations or omissions. Although the opinion reasoned that an internal affairs constraint must be imposed on all of Delaware corporate law because of the danger of extraterritorial application, it nowhere addressed the copious body of federal and Delaware law that already obviates these concerns and establishes that internal affairs constraints are unnecessary to achieve the stated objective. The opinion then compounded the problems it unnecessarily created by inventing a novel definition of "internal affairs" that is inconsistent with U.S. and Delaware Supreme Court precedent. Further, the opinion failed to recognize that section 11 claims are inevitably internal on a facial challenge. Any other conclusion suggests that a board of directors could willfully draft a materially false registration statement and use it to sell their own personal shares to existing stockholders without breaching any internal fiduciary obligation. This is not Delaware law.

A. Sciabacucchi Is a Facial Challenge

Sciabacucchi and Boilermakers presented facial challenges to forum selection provisions. The plaintiffs' burden on a facial challenge is "a difficult one: they must show that the [forum selection provision] cannot operate lawfully or equitably under any circumstances."199 This requires showing that the provisions "do not address proper subject matter," as defined by the statute, "and can never operate consistently with law."200 It follows that "plaintiffs voluntarily assumed this burden by making a facial validity challenge, and cannot satisfy it by pointing to some future hypothetical application . . . that might be impermissible."201 Plaintiffs must therefore confront the reality that "[t]he answer to the possibility that a statutorily and contractually valid bylaw may operate inequitably in a particular scenario is for the party facing a concrete situation to challenge the case-specific application of the bylaw, as in the landmark case of Schnell v. Chris-Craft Industries[, Inc.]"202

As in Sciabacucchi, the plaintiffs in Boilermakers "ha[d] no separate claims pending that [were] affected by" FFPs.203 Therefore, the court observed that they "may not avoid their obligation to show that the [provisions] are invalid in all circumstances by imagining circumstances in which the [provisions] might not operate in a situationally reasonable manner."204 "The settled approach of [Delaware] law regarding bylaws is that courts should endeavor to enforce them to the extent that it is possible to do so without violating anyone's legal or equitable rights."205 Identical principles govern charter provisions.206

The Sciabacucchi court neither recited nor applied the standards governing facial challenges. It did not demonstrate that FFPs can never operate lawfully or equitably "under any circumstance." The court relied on incorrect assumptions of fact and dilated on yet-to-be-invented hypothetical forum provisions as they might apply to tort, contract, conversion, or other claims that might never be brought and that, in any event, could not apply in the context of the Securities Act claims regulated by FFPs. Sciabacucchi thus deviated from the "settled approach of Delaware law."

B. Charter Provisions Are Presumptively Valid

Charter provisions are "presumed to be valid, and the courts will construe the [charter provisions] in a manner consistent with the law rather than strike down the [charter provisions]."207 The Sciabacucchi court failed to

address or apply this presumption, and nowhere did it endeavor to construe FFPs "in a manner consistent with the law."

C. Purchasers, Sellers, and Stockholders

Sciabacucchi's analysis rests, critically, on a distinction between purchasers and stockholders. The court reasoned that the section 11 claim "does not arise out of or relate to the ownership of the share, but rather from the purchase of the share. At the moment the predicate act of purchasing occurs, the purchaser is not yet a stockholder and does not yet have any relationship with the corporation that is governed by Delaware corporate law."208 Thus, it determined that "even when the investor does purchase a share of stock[,] . . . the predicate act is the purchase. The cause of action does not arise out of or relate to the ownership of the share, but rather from the purchase of the share."209 The pervasive assumption is that no fiduciary duties are owed to Securities Act plaintiffs because those plaintiffs are never existing stockholders at the time of purchase, and charters are unable to regulate transactions with persons who are not already stockholders.

Sciabacucchi's assumptions of fact and descriptions of law relating to Securities Act transactions are problematic for five distinct reasons: (1) its assertions that purchasers are not existing stockholders have no citation support; (2) these unsupported assertions are inconsistent with a public record documenting that Securities Act purchasers are also commonly existing stockholders to whom fiduciary obligations are owed; (3) Delaware law permits charter and bylaw provisions that regulate transactions with purchasers to whom no fiduciary duties are owed; (4) the opinion did not consider that in registered offerings, officers and directors can sell their personal shares to new and/or existing stockholders in transactions that involve fiduciary obligations; and (5) the opinion failed to address trenchant critiques of the purchaser-stockholder distinction in fraud-related contexts that date back even farther than Judge Learned Hand's classic critical commentary of this distinction in a fiduciary context.

1.Securities Act Plaintiffs Are Stockholders

The assertion that section 11 purchasers are not preexisting stockholders who have "any relationship with the corporation that is governed by Delaware corporate law" is both unsupported and demonstrably incorrect. Registration statements filed with the SEC document that purchasers in IPOs include preexisting stockholders to whom fiduciary duties are owed.210 They also establish that preexisting holders purchase in follow-on offerings.211 The burden is on plaintiffs to demonstrate that Securities Act claimants can never be stockholders to whom fiduciary duties are owed. Plaintiffs cannot carry that burden.

This problem is, moreover, far more profound than examples drawn from registration statements suggest. Plaintiffs in section 11 proceedings include aftermarket purchasers who can trace their shares to demonstrate section 11 standing.212 "In financial markets, traders often slice large orders into smaller ones."213 Split orders emerge as part of "an attractive strategy for minimizing trading costs" because "transacting in a smaller size can enable [traders] to conceal their information advantage more effectively."214 A substantial literature has explored optimal rules for transacting without revealing private information that could cause a market to move against a trader's position.215 While trade splitting is more common among "more active and . . . larger-size traders,"216 it can occur in connection with any transaction, and in today's markets, orders are often split into multiple transactions across trading venues217 to avoid detection during large transactions218 or simply out of necessity.219 Algorithmic trading programs can split orders as a matter of course.220 Traders are also incentivized to split orders to avoid reporting requirements221 or minimize price impact.222 Smaller transactions are often split because of market conditions, even if investors do not direct that they be split.223 Order splitting is so common that, as of 2014, "the median trade size on the NASDAQ is 100 shares."224

The ubiquity of order splitting implies that the majority of shares acquired by section 11 aftermarket plaintiffs represent purchases by existing holders. "Institutions own about 78% of the market value of the U.S. broad-market Russell 3000 index, and 80% of the large-cap S&P 500 index."225 An institutional investor who seeks to acquire 100,000 shares of a recently issued IPO will likely not purchase them all in a single trade. The order might instead be split into 100 trades of 1,000 shares each. By Sciabacucchi's reasoning, no fiduciary duty is owed in connection with the acquisition of the first 1,000 shares, and the charter is incapable of regulating their acquisition. However,

as to each subsequent purchase, the purchaser is a preexisting holder to whom fiduciary duties are owed. By its own terms, Sciabacucchi's analysis would not apply to 99,000 of the acquired shares. The vast majority of institutional section 11 plaintiffs are therefore likely to be existing holders to whom fiduciary obligations are owed, and those obligations are potentially breached. A similar analysis applies to retail investors whose orders can also be split, even when investors are unaware.

Intriguingly, the complaint in Sciabacucchi alleged dates on which the plaintiff purchased an unspecified number of shares in the three nominal defendant corporations but nowhere described the number of trades the plaintiff used to acquire those shares or whether any of those trades were split.226 While these facts are irrelevant on a facial challenge, it is nonetheless informative that Sciabacucchi cannot preclude the possibility that the plaintiff in that case could have been an existing holder who was owed a fiduciary duty that was breached at the time of purchase.

The public record thus refutes an assumption of fact that was foundational to Sciabacucchi's analysis. Because the assumption is pivotal, it is impossible to discern how the Chancery Court might have resolved the question presented had it accurately recognized that Securities Act purchasers are frequently existing holders who are protected by fiduciary obligations instead of incorrectly presuming that purchasers are never existing holders.

2.The DGCL Regulates Purchasers as Purchasers

Even if Securities Act purchasers are not stockholders, the proposition that charters or bylaws are incapable of regulating purchasers is contrary to the plain text of the DGCL. Sections 152,227 157,228 166,229 and 2 02230 all regulate transactions with purchasers before they become stockholders. Delaware law thus does not require that charters or bylaws regulate only stockholders qua stockholders; it also clearly permits the regulation of purchasers qua purchasers. This result is entirely sensible because of an obvious underlying isomorphism (i.e., a one-to-one correspondence between two sets): every purchaser becomes a stockholder, and every stockholder was once a purchaser. It is impossible to become a stockholder without having been a purchaser, and it is impossible to be a purchaser without becoming a stockholder. Indeed, while the Boilermakers court spoke extensively of stockholders qua stockholders, nothing in Boilermakers rejects the notion that the DGCL can also regulate purchasers qua purchasers, particularly because of the identity linking purchasers and stockholders.

3. Directors and Officers as Securities Act Sellers

The Sciabacucchi court failed to consider situations in which existing officers or directors sell the corporation's and their own personal stockholdings as part of a registered offering. For example, while he was a director of Uber Technologies, Inc., Travis Kalanick sold 3,376,000 shares in the Uber IPO for gross proceeds of $151,920,000.231 Closer to home, in the IPO of Roku, one of the nominal defendants in Sciabacucchi, the Menlo Funds sold 6 million shares at $14.00 per share for aggregate proceeds of $84 million.232 Shawn Carolan, a managing member of the Menlo Funds, was a director of Roku on the effective date of the offering.233

It cannot be assumed on a facial challenge that the registered offering at issue does not cover a sale by an officer or a director who owes a fiduciary duty to purchasers who are already stockholders. The In re American International Group, Inc.234 court explained that Brophy claims could be alleged against officers who allegedly sold stock while they were aware of undisclosed "pervasive, earnings-inflating frauds."235 Yet, according to Sciabacucchi, identical conduct in a registered public offering would raise no concerns under Delaware law. The transaction would be external because the purchasers would not be existing stockholders to whom fiduciary duties are owed. The tension between Sciabacucchi and American International Group is apparent.

4. The Learned Hand Critique

Sciabacucchi's strong reliance on a purchaser-stockholder distinction implicates a question of fiduciary law that drew attention from Judge Learned Hand, who is "numbered among a small group of truly great American judges of the twentieth century, a group that includes Oliver Wendell Holmes, Jr., Louis Brandeis, and Benjamin Cardozo."236 Judge Hand is quoted more frequently by legal scholars and the U.S.Supreme Court than any other lower-court judge.237

The purchaser-seller distinction gathers most attention in the context of insider trading law:

[M]uch of insider trading law depends on the defendant having a fiduciary duty to the persons with whom the insider traded shares. This presents a question of whether different rules apply when a director sells shares to an outsider rather than buying them from an existing shareholder of the company. . . . Assuming arguendo that the director's fiduciary duties to shareholders proscribe buying shares from them on the basis of undisclosed material information, the logic of that rule does not necessarily extend to cases in which the director sells to an outsider.238

As this logic creates liability for insider purchases but not insider sales, it "seems an absurd elevation of form over substance."239 Judge Hand addressed this challenge head-on by rejecting Sciabacucchi's approach and concluding that insider transactions with non-holder purchasers generate fiduciary obligations even if the purchaser is not a preexisting holder:

[T]he director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary, although he was forbidden to do so, once the buyer had become one. Certainly this is true, when the buyer knows he is buying of a director or officer, for he expects to become the seller's cestui que trust [i.e., a beneficiary having an equitable interest in a trust, with the legal title being vested to the trustee]. If the buyer does not know, he is entitled to assume that if his seller in fact is already a director or officer, he will remain so after the sale.240

Sciabacucchi leans hard on Judge Hand's "sorry distinction." Judge Hand's emphatic rejection of the logic upon which Sciabacucchi relies "is now well accepted as a matter of federal law."241 Indeed, because the purchaser in a registered offering knows he is typically taking from the issuer pursuant to a registration statement prepared under the board's supervision in a process that requires the exercise of fiduciary duties, the purchaser "expects to become the seller's cestui que trust." That expectation is reinforced when the prospectus discloses that corporate officers or directors are selling personal holdings in the registered offering-a scenario that doubly challenges Sciabacucchi's assumptions and the logic that hinges critically upon them.

While Judge Hand's framing of the question, which rests on principles of equity, might in this context have found traction in the Court of Chancery, which is a court of equity, it apparently did not. Significantly, Judge Hand's views are consistent with those of the SEC,242 the U.S. Court of Appeals for the Second Circuit,243 and the American Law Institute's Principles of Corporate Governance, Analysis and Recommendations.244

D.Extraterritorial Effects

Sciabacucchi's first-principles analysis was motivated by concern that the DGCL might be used to regulate corporate conduct that occurs outside of Delaware. Sciabacucchi applied its internal affairs constraint to protect against such extraterritorial application:

Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation's external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims .... Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.245

This logic is deeply flawed. It assumes that unless the law imposes a novel internal affairs constraint on all of the DGCL, the DGCL can be broadly applied to regulate the extraterritorial conduct of Delaware-chartered corporations. This concern ignores a substantial body of U.S. and Delaware Supreme Court precedent that already precludes extraterritorial application of the DGCL. This robust, uncited, constraining precedent undermines the logic that is foundational to Sciabacucchi's first-principles analysis and demonstrates that the internal affairs constraint proposed by the Sciabacucchi court is both unnecessary and problematic.

It is unnecessary because Delaware's own supreme court has already explained that "[t]here is, of course, a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted."246 Further, the U.S. Supreme Court asserted that "[l]egislation is presumptively territorial and confined

to limits over which the law-making power has jurisdiction."247 Thus, "the legislature need not qualify each law by saying 'within the territorial jurisdiction of this state.' That is how statutes have always been interpreted . . . ."248
The Commerce Clause guarantees that the DGCL will not have inappropriate extraterritorial effect. The U.S. Supreme Court has overturned regulations that have no valid local purpose249 or that unduly burden interstate commerce.250 It has applied a balancing test that weighs local benefits against burdens imposed on interstate commerce.251 Delaware courts have additionally demonstrated a common-sense, text-based ability to defend against overzealous extensions of Delaware law, even in the absence of Sciabacucchi's self-imposed, divergent internal affairs constraint.252
Sciabacucchi's internal affairs constraint is additionally problematic because for it to have any bite-for it to limit Delaware law in any manner in which it is not already limited-it must be more restrictive than existing principles that already cabin the extraterritorial application of Delaware law. Otherwise, it is an ineffectual lesser-included constraint. Sciabacucchi's novel internal affairs constraint must therefore be more restrictive than current internal affairs doctrine for it to have meaning. This point, however, was nowhere addressed in Sciabacucchi. The court never described any deficiency in current doctrine that limits the extraterritorial application of state law or elaborated on how its constraint would cure such a deficiency. The court never attempted to define the gap in the law that the internal affairs doctrine was designed to fill, nor did it endeavor to explain how its novel articulation of it was a reasonable solution.
Finally, Sciabacucchi's internal affairs constraint is not a rule of general applicability that, if upheld, would govern any other state's law. It would be unique to Delaware. The Sciabacucchi court failed, however, to explain why the problem of extraterritorial application was sufficiently unique to Delaware that it would make sense for Delaware to self-impose a limitation that reaches beyond existing doctrine and applies to itself but no other jurisdiction. To rationalize such a result, one has to assume that the DGCL poses a special extraterritorial threat that requires a unique and additional constraining principle. There is no such showing in Sciabacucchi.
E.A Divergent Definition of "Internal Affairs"
"Adherence to precedent is 'a foundation stone of the rule of law,'" and overturning it is "never a small matter."253 While U.S. and Delaware Supreme Court decisions define "internal affairs," the Sciabacucchi court nowhere addressed the deviation between its proposed definition of "internal affairs" and established law. It also never explained why its proposed definition, which materially narrows both Supreme Courts' definitions, was appropriate or justifiable.
In MITE, the U.S. Supreme Court defined "internal affairs" as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders-because [if multiple states had the authority to regulate a corporation's internal affairs,] a corporation could be faced with conflicting demands."254 In VantagePoint, the Delaware Supreme Court explained that the "internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."255 The court observed that "the conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation to 'the entire gamut of internal corporate affairs.'"256 The MITE and VantagePoint definitions are substantially identical, and Boilermakers expressly followed MITE.257
But instead of applying controlling precedent, the Sciabacucchi court, with no citation support, invented a narrower definition of "internal affairs," holding that whether a provision is internal "turn[s] on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation."258 The court concluded that
a federal claim under the 1933 Act is a clear example of an external claim. The plaintiff is a purchaser of securities, and the source of the cause of action is the sale of a security that violates the federal regulatory regime. The defendants need not be directors or officers of the corporation; they can be anyone that the 1933 Act identifies as a viable defendant. The fact that the plaintiff might have purchased shares in a Delaware corporation is incidental to the claim; shares are but one type of security covered by the 1933 Act. Even if the purchase did involve shares, the event giving rise to the claim takes place just before the plaintiff becomes a stockholder, before the corporate

contract applies. Nor is continuing stockholder status necessary to assert a 1933 Act claim: the plaintiff can sue even if it sells and is no longer a stockholder. The federal claim does not invoke the stockholder's legal or equitable rights under the state law corporate contract.259

Put aside for a moment the contestable nature of some of these unsubstantiated assertions (e.g., that purchasers are not also existing stockholders to whom fiduciary duties are owed). Sciabacucchi's litany of perceived distinctions adds to the U.S. and Delaware Supreme Courts' shared definition of "internal affairs" a set of new conditions that are entirely unrelated to whether any matter is "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." Obviously, a matter can be "peculiar" to intracorporate relationships even if it implicates purchasers, even if the cause of action is federal, even if some defendants are not officers or directors, even if the operative federal statute applies to instruments other than shares of Delaware corporations, and even if the plaintiff has since sold her shares.260 These new and narrowing constraints clearly conflict with U.S. and Delaware Supreme Court precedent.

The U.S. and Delaware Supreme Courts' shared definition of "internal affairs," from which Sciabacucchi deviates, critically and logically does not hinge on the formalities of whether a cause of action arises under one state's laws or another's, nor does it depend on whether a cause of action is federal. The shared definition instead clearly allows for the existence of internal affairs that are regulated by federal statute yet remain internal. Indeed, the Supremacy Clause plainly allows federal law to regulate internal affairs without generating the inter-state disputes that the internal affairs doctrine is designed to prevent. The Supreme Courts' definition is thus functional and pragmatic. It looks to the facts of the underlying dispute rather than to labels applied by litigants. To suggest, as Sciabacucchi did, that a claim cannot be internal if it is federal is to misapprehend both the plain text of these Courts' definition and the rationale behind it.

By this shared Supreme Court definition, FFPs are entirely internal. Thus, even if an internal affairs standard is to be grafted onto the DGCL, FFPs would survive as valid charter provisions. On a facial challenge, a court can assume that section 11 claims arise because directors willfully craft fraudulent prospectuses that cover shares they are selling to purchasers to whom they owe fiduciary duties as preexisting stockholders. This is an internal affair that simultaneously supports a Delaware fiduciary-breach claim and a federal section 11 claim. But the fact that the affair supports the federal claim does not render it external under any interpretation of Delaware or U.S. Supreme Court precedent. Reaching that conclusion requires the invention of a far narrower and inconsistent definition of internal affairs.

But even if one were to accept Sciabacucchi's divergent definition of internal affairs, FFPs would remain internal because section 11 claims easily "turn on . . . the equitable relationships that flow from the internal structure of the corporation." A defective registration statement cannot be filed without the board's consent and would constitute a lie to existing stockholders. That lie would be fully actionable as an equitable fiduciary breach under Delaware law.261 Section 11 embeds a statutory presumption that directors are personally liable unless they can establish a due diligence defense.262 Section 11 thus always implicates the care with which directors, individually and as a group, prepare and review the registration statement. Indeed, plaintiffs commonly allege that boardroom failures giving rise to defective registration statements breach the directors' and officers' equitable fiduciary obligations that flow from the internal structures of the corporation.263 As the Boilermakers court explained, "it is common for derivative actions to be filed in state court . . . coincident to the filing of federal securities claims exclusively within the jurisdiction of the federal courts."264 The facts alleged in the parallel federal and state lawsuits are often substantially similar, if not identical, because the same misrepresentations and failures of loyalty or care that suffice to allege a section 11 claim also suffice to allege a Malone or Caremark claim. Thus, plaintiffs themselves commonly take positions inconsistent with Sciabacucchi's conclusion that section 11 violations are external.

At this level of analysis, the fly in Sciabacucchi's ointment is neither the court's insistence that charter provisions be limited to internal affairs nor even its failure to honor governing precedent. The problem is that the court neither analyzed the elements of a section 11 cause of action nor mapped those elements against its own or any other court's definition of "internal affairs." Sciabacucchi thus failed to recognize that the section 11 cause of action is

ineluctably internal, even by its own divergent standards.
At a higher level of abstraction, this novel definition of "internal affairs" could prove problematic for Delaware, which might prefer to not have multiple definitions of the term floating about, including and a governing definition that facilitates sister state intrusions into matters traditionally reserved for Delaware law. The Delaware Supreme Court might thus clarify that MITE and VantagePoint control and expressly reject Sciabacucchi's definition of "internal affairs," regardless of whether it appends an internal affairs test to all of the DGCL.
F.Malone and Caremark: Section 11 Claims as Fiduciary Breach Claims
Every section 11 violation involves a material misrepresentation or omission to current stockholders, purchasers, and the market. Every section 11 violation thereby establishes a critical predicate for a claim that a board has breached Delaware duties of care and loyalty as set forth in Malone265 and Caremark.266 The Boilermakers court recognized as much when it observed that "it is common for derivative actions to be filed in state court on behalf of corporations coincident to the filing of federal securities claims exclusively within the jurisdiction of the federal courts."267 When they relate to registered offerings, these tagalong Delaware claims generally recite facts that are substantially identical to the allegations of a federal section 11 claim and cannot give rise to liability under Delaware law unless there is first a judgment or settlement under the predicate federal claim. Section 11 claims and their tagalong Delaware fiduciary clones are "merely two sides of the same coin"268 that arise from a common set of facts. This pattern arises because the "historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary."269 Just as a federal breach can support a Delaware claim, a Delaware breach can support a federal claim.
Malone. In Malone, Delaware's Supreme Court explained as follows:
Whenever directors communicate publicly or directly with shareholders about the corporation's affairs, with or without a request for shareholder action, directors have a fiduciary duty to shareholders to exercise due care, good faith and loyalty. it follows a fortiori that when directors communicate publicly or directly with shareholders about corporate matters the sine qua non of directors' fiduciary duty to shareholders is honesty. . . . The duty of disclosure obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action.270
The issue is "not whether [the] directors breached their duty of disclosure"271 but "whether they breached their more general fiduciary duty of loyalty and good faith by knowingly disseminating to the stockholders false information about. . . the company."272 It also explained that directors can breach fiduciary duties through three different types of communication: "public statements made to the market, including shareholders; statements informing shareholders about the affairs of the corporation without a request for shareholder action; and, statements to shareholders in conjunction with a request for shareholder action."273
Section 11 violations can fit any of these three categories. A defective registration statement is a "public statement[] made to the market, including shareholders." It is disseminated with the board's active participation and approval. The misrepresentations remain alive in the market until corrected, thereby causing stockholders to whom the board owes fiduciary obligations to transact at prices distorted by its materially false information. A defective registration statement "inform[s] shareholders about the affairs of the corporation without a request for shareholder action." But when it is incorporated by reference into a proxy statement seeking a stockholder vote, it becomes a "statement to shareholders in conjunction with a request for shareholder action."
As Vice Chancellor Laster explained, when a complaint alleges "systematic governance failures and a pattern of false disclosures [in SEC filings] designed to conceal them," it describes a situation in which "it is reasonably conceivable that plaintiffs could obtain damages or another remedy [under Delaware law] for the alleged misstatements in the Form 8-K [(SEC filing)]."274 By identical logic, materially defective registration statements that give rise to section 11 claims can generate traditional derivative fiduciary-breach violations where it is "reasonably conceivable that plaintiffs could obtain damages or another remedy" under Delaware law.
To prevail under a Malone claim when there is no request for shareholder action, plaintiffs must demonstrate scienter, reliance, causation, and damages.275 This is consistent with the observation that "[t]he decision by the

[Delaware] Supreme Court to set a high bar for Malone-type claims was not . . . inadvertent."276 The goal was "to ensure that [Delaware] law was not discordant with federal standards."277 This is precisely the point. Section 11 allegations commonly support fiduciary-breach claims because the causes of action are complementary: both are ineluctably rooted in the assertion that the board itself has authorized a false statement to stockholders and the public. While the level of intent required to establish a section 11 claim is lower than that required to establish a Delaware fiduciary-breach claim based on identical underlying facts,278 those distinctions do not cause the federal claim to become external.

Despite the fact that Malone clearly reaches false securities filings directed at existing stockholders who acquire additional shares in transactions covered by section 11, the Sciabacucchi court concluded that filing a false registration statement is not an internal affair. But how is it that the lies that generate section 11 liability are external when precisely the same lies support a Malone claim that the board has breached its fiduciary duties? The Sciabacucchi court never analyzed the full operation of the section 11 cause of action, nor did it consider section 11's relationship to Malone or to any other aspect of Delaware law that frowns on officers and directors who lie to stockholders and purchasers.

Caremark. Sciabacucchi's relationship with Caremark is also fraught. As Vice Chancellor Sam Glasscock III crisply explained, unlawful acts, such as violations of section 11, "can result in fines, penalties, third-party damages, and other losses on the part of the entity. The essence of a Caremark claim is an attempt by the owners of the company, its stockholders, to force the directors to personally make the company whole for these losses."279 A section 11 settlement or judgment generates corporate liability that can serve as the basis for a Caremark derivative claim under Delaware law. This is a variant of the classic tagalong derivative claim.

In Stone v. Ritter,280 the court explained that Caremark liability attaches when "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."281 Because an internal control failure is a necessary precondition to section 11 liability, as a consequence of a failure either to implement adequate controls or to monitor extant controls adequately, section 11 claims can establish a necessary but insufficient predicate for Caremark liability. More to the point, this Caremark exposure is an internal matter governed by Delaware law and is potentially demonstrated with the same facts necessary to establish individual director liability under section 11.

To succeed in a Caremark claim, plaintiffs generally must demonstrate scienter,282 and Caremark claims are generally recognized as among the most difficult to prove in Delaware corporate law.283 However, the fact that a Caremark claim arising from a section 11 violation requires proof of scienter and may well fail even if section 11 liability is established does not alter the essential observation that the facts supporting both claims can be substantially similar, perhaps even identical, and always profoundly internal. It makes little sense to assert that facts giving rise to an internal Caremark claim are no longer internal when pled in support of a section 11 claim. The more logical view is that the section 11 claim grows out of internal conduct that simultaneously supports the Caremark claim.

Stay litigation. The prevalence of stay litigation, in which defendants petition to stay derivative claims while federal class action claims are pursued in another court, underscores an essential identity between some federal securities complaints and traditional Delaware fiduciary-breach complaints. The Groupon, Inc. ("Groupon") derivative litigation is instructive. Plaintiffs filed federal complaints alleging that Groupon violated federal securities law by issuing "materially false and misleading statements regarding the company's business practices and financial results and fail[ing] to disclose negative trends in the company's business."284 A different set of plaintiffs filed a derivative action alleging that individual defendants, including the corporation's directors, "breached their fiduciary duties . . . and abused their control . . . by permitting Groupon to function with deficient accounting controls[,] thereby harming the company. These deficient controls came to light in the months proceeding [sic] and immediately following Groupon's IPO."285

This Delaware derivative claim is derivative in two distinct senses: (1) the plaintiff stands in the shoes of the

corporation, and (2) there is no recovery without predicate liability under the federal securities claim. It is therefore unsurprising that "[c]ourts that have considered the interplay between derivative and securities actions have often found that derivative claims 'cannot be adjudicated in full (or even in large measure) until the [securities class] [a]ction is tried.'"286 Indeed, "[a]s for the similarity of the facts, both sets of plaintiffs rely on the same documents to support their claims," including the registration statement, the prospectus (which is Part I of the registration statement), and press releases and news documents.287 The court concluded that "both actions rest on the same or closely related transactions, happenings or events, and thus will call for the determination of the same or substantially related questions of fact."288 It follows that "these alternate theories are merely two sides of the same coin, and courts have regularly stayed one action in favor of the other despite the different natures of the claims."289

G.Section 11 Claims Are Internal

Because Sciabacucchi involved a facial challenge, plaintiff's burden was to demonstrate that a section 11 claim can never be internal. That is an impossible task. Consider a board of directors that knowingly drafts a materially misleading prospectus to be used to sell the corporation's and the directors' own securities to existing stockholders. The proceeds of the offering will enrich the board at the expense of the stockholders to whom they owe fiduciary obligations. This conduct is clearly internal and, as described in Malone or Caremark, constitutes a classic Delaware fiduciary breach. Nonetheless, the Sciabacucchi court asserted that "claims alleging fraud in connection with a securities sale ... do not concern corporate internal affairs."290 The tension with controlling Delaware Supreme Court precedent is again palpable but not discussed.

While even under Sciabacucchi's standards it is unnecessary on a facial challenge to demonstrate that section 11 claims are always, or almost always, internal, such a demonstration helps illuminate the gap between real-world boardroom practice and the picture Sciabacucchi painted with no citation support. Applying the definition shared by MITE, VantagePoint, and Boilermakers, section 11 claims always relate to matters "peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."291 As the U.S. Supreme Court explained,

Section 11 of the 1933 Act allows purchasers of a registered security to sue certain enumerated parties . . . when false or misleading information is included in a registration statement. The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering. . . . Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence.292

Unless they successfully carry their burden of establishing a due diligence defense, officers and directors are among the enumerated parties liable alongside the corporation.293 Section 11 defines the standard for "what constitutes reasonable investigation and reasonable ground for belief" as "that required of a prudent man in the management of his own property."294 This defense "is calibrated to the objective reasonable person in each defendant's position."295 It is also individualized: a director with experience as an investment banker is held to a different standard than a director who is a physician, sales executive, or attorney.296 Outside directors' "minimal conduct" will not support a due diligence defense.297 "Passive and total reliance on company management" is insufficient.298 Thus, section 11 always implicates the care with which directors reviewed the allegedly defective registration statement and always challenges the internal processes that caused its filing. Section 11 always questions the collective and individual conduct of the board and always implicates the "equitable relationships that flow from the internal structure of the corporation," as required by Sciabacucchi's own definition of "internal affairs."

Slapping a California caption on a fact pattern that relates exclusively to a Delaware internal affair cannot transform an internal affair that should be resolved under Delaware law into an external claim that can be resolved under California law. Otherwise, the entire internal affairs doctrine is a nullity because clever pleading practices can allow sister states to regulate every corporation's internal affairs.

By the same token, slapping a federal caption on an internal affairs claim does not transmute the claim from

internal to external. The claim remains internal as it gives rise to both a cause of action alleging a breach of duty under the DGCL and a federal section 11 claim. Just as federal securities laws allow for cumulative remedies when the same underlying fact pattern supports section 11 and Rule 10b-5 claims,299 a single fact pattern can generate a DGCL claim and a section 11 claim. Delaware and federal law are thus "not only compatible but complementary,"300 inasmuch as a fact pattern can be entirely internal and simultaneously constitute both a Delaware and a federal violation.301 To state this point even more starkly, imagine that section 11 did not exist. If a board then made material misrepresentations or omissions to existing stockholders in connection with the sale of securities to stockholders to whom they owe fiduciary duties, then the conduct would support an internal fiduciary-breach claim. Introducing a federal section 11 claim that covers identical conduct does not cause the internal fiduciary-breach claim to disappear or to become external.

The Chancery Court's contrary conclusion resulted in part from a failure to consider the liability regime inherent in the section 11 cause of action and the realities of the process of preparing a registration statement. In addition to the fact that nothing external can cause the filing of a defective registration statement, section 11 differs from every other federal securities fraud claim under the Securities Act or Securities Exchange Act of 1934 ("Exchange Act") in that it is the only one that creates a presumption of liability for the corporation's executives and directors. Further, the issuer is always exposed to strict liability under section 11. Under Caremark, the internal processes that management and the board follow must therefore be tuned to this high level of exposure. Thus, every section 11 violation reaches deep into the corporate boardroom in a manner that profoundly implicates the corporation's internal affairs.

The internal nature of section 11 claims can be demonstrated with greater granularity by examining five distinct factors that support section 11's internality. First, the allegedly defective registration statement must contain material misrepresentations or omissions. These defects can result only from a failure of processes and controls that are internal to the corporation and must implicate the corporation's internal reporting, oversight, and due diligence practices. These failures call into question management's and the board's integrity and competence. Nothing external to the corporation can cause the filing of a registration statement containing a material omission or misrepresentation. A defective registration is a self-inflicted wound resulting from a failure or absence of internal controls. Filing a defective registration statement is perhaps as internal a corporate act as can be imagined.

For directors and officers, "their fiduciary duties and corporate responsibilities demand a prudent focus on due diligence" in the process of preparing the registration statement.302 Accordingly, "[t]he responsibilities and duties of directors and officers [under state law] encompass the preparation and contents of the Form S-1 and the IPO process."303 The task of preparing a registration statement thus implicates the proper exercise of state law fiduciary obligations.

The internal nature of the registration statement preparation process is underscored by the fact that a director or officer who signs it "cannot avoid liability by suggesting that he or she did not read or understand it."304 Directors or officers "must inquire about the portions of the Form S-1 with which they are unfamiliar or that they do not understand."305 A director "cannot rely exclusively on assurances from senior management that the Form S-1 is accurate and complete."306 For a director, "[a] cursory review of the Form S-1, by itself, is insufficient."307 A director "who is deeply involved with the preparation of the Form S-1 is held to a higher standard of investigation than other directors."308 Furthermore, "a director or officer cannot rely exclusively on the company's lawyers and auditors to make sure the Form S-1 is accurate and complete, especially if the director or officer has reason to believe parts of the Form S-1 are inaccurate."309 These practices are entirely internal, and section 11 litigation can implicate them all. Common best-practice counsel to directors and officers of issuers filing registration statements is that they should build a record that establishes an affirmative due diligence defense.310 Again, these inquiries go to the heart of each individual director's potential liability under section 11. They are personalized, intrusive, and inexorably internal to the collective and individual processes by which the registration statement was prepared and to the good faith of the participants in the process.

Second, the issuer is strictly liable for all material misrepresentations and omissions in the registration statement that are declared effective.311 Internal procedures that the management and board follow must be calibrated to recognize that issuers typically have no effective defense once a material defect is established. Strict liability of this magnitude heightens the level of care that Delaware law expects of a board that has been expressly charged with the responsibility for reviewing a document that creates such exposure to liability.

Third, the corporation's directors are expressly liable under section 11312 and are required to sign the registration statement.313 This level of mandatory directorial engagement and liability amplifies the internal nature of a section 11 claim. Indeed, intra-corporate disputes governed by forum selection provisions that are clearly valid under Boilermakers need not implicate any boardroom conduct at all. In contrast, every section 11 claim reaches into the boardroom. From this perspective, the disputes covered by FFPs are more consistently internal than those addressed in Boilermakers because plaintiffs' Boilermaker claims do not need to implicate officer and director conduct.

Fourth, directors who fail to establish a due diligence defense can be liable alongside the corporation under section 11.314 Directors are thus always exposed to potential personal liability in every section 11 claim. Directors can avoid section 11 liability only if they establish a due diligence defense by bearing the burden of demonstrating that they satisfied the "standard of reasonableness [that] shall be that required of a prudent [person] in the management of his [or her] own property."315 This standard probes deeply into the board's internal procedures and looks expressly to each director's personal experience in the context of their review of the registration statement. These matters are all internal to the board's processes.

Fifth, section 11 allocates liability between and among the corporation and individual defendants through a complex attribution scheme that further amplifies the internal nature of the section 11 claim. Section 11 provides a right to contribution that implicates a complex and entirely internal inquiry that considers which directors knowingly violated the statute, among other factors.316 The personal liability incurred by WorldCom, Inc.'s directors in settling section 11 litigation underscores this point.317 Ten former directors paid $18 million out of their own pockets-with no indemnification or insurance-to settle claims against them as individuals.318 These payments constituted "20 percent of the directors' aggregate net worth, not counting their primary residences and retirement accounts."319 The individualized nature of the inquiry leading to these liability and settlement amounts emphasizes the personal, internal exposure facing section 11 defendant directors. Nothing external drives that kind of exposure to liability.

H. A Gedankenexperiment: Illuminating Sciabacucchi's Internal Contradictions

The internal contradictions inherent in Sciabacucchi's analysis can be illustrated through a Gedankenexperiment320 that involves identical triplets who own the same number of shares in the same Delaware-chartered corporation. These shares were purchased in three separate transactions covered by the same defective registration statement. The corporation's relationships with the three triplets are identical.

The first triplet sues in the Delaware Court of Chancery under Delaware law, alleging a Malone breach of fiduciary duty by the board in preparing the registration statement. The second sues in California state court, alleging that the same conduct violated California law governing boardroom conduct. Assume that the California claims expose the corporation's directors to liability far more substantial than they face in Delaware and require a far weaker showing of intent. The third triplet files a section 11 claim based on the same conduct.

The Delaware claim is internal. By the logic of Sciabacucchi and Boilermakers, that claim can be regulated by a forum selection provision. The California claim is also internal. It is based on precisely the same set of facts and alleges precisely the same internal relationships. That claim can also be regulated pursuant to a forum selection provision that could prevent it from proceeding in California. The section 11 claim is identical to and just as internal as the Delaware and California claims. Rodriguez established that there is no federal impediment to an FFP that precludes Securities Act litigation in state court. The section 11 claim should therefore also be regulable pursuant to an FFP.

But Sciabacucchi would have us conclude that the Delaware and California actions are internal whereas the

federal action based on the same facts is not.321 Ironically, the Sciabacucchi court's failure to respect the internal nature of the claim was intended to prevent the operation of a forum selection provision that is fully consistent with federal law and relates exclusively to federal law. Sciabacucchi cannot have it both ways. This Gedankenexperiment underscores that the caption on the complaint and the source of the liability alleged in the complaint, be it Delaware, California, or federal law, is irrelevant to determining whether a claim is internal or external. That categorization turns on the facts underlying the claim and whether they are peculiar to the relationship between corporations, boards, and stockholders, and nothing else.322

V.The Statutory Text

An alternative approach to the challenge posed by Sciabacucchi is to look to the statutory text for guidance. The "most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it."323 It is "axiomatic that a statute ... is to be interpreted according to its plain and ordinary meaning."324 Thus, "[w]here the language of the statute is unambiguous, no interpretation is required and the plain meaning of the words controls."325

The court must "give the statutory words their commonly understood meanings"326 and is to "read and examine the text of the act and draw inferences concerning the meaning from its composition and structure."327 A "determination of the General Assembly's intent must, where possible, be based on the language of the statute itself. In divining the legislative intent, '[s]tatutory language, where possible, should be accorded its plain meaning.'"328

The rule in "Delaware case law is well settled that undefined words are given their plain meaning based upon the definition provided by a dictionary."329 "Without any accompanying definition from the Legislature, the Court finds that [a] dictionary provides 'fair warning of the nature of the conduct proscribed.'"330 The U.S. Supreme Court relies extensively on dictionary definitions, and when a statute does not expressly define a term, courts assume that "Congress uses common words in their popular meaning, as used in the common speech of men" and women.331 Delaware courts' reliance on dictionary definitions is consistent with a far broader judicial trend that relies on them as the lodestar for statutory interpretation. "[T]he biggest change in the search for word meaning in the past twenty years is the . . . attention courts now pay to dictionaries, including using them as authorities for ordinary meaning."332

Delaware courts also rely on the doctrine of in pari materia; "[u]nder this rule, related statutes must be read together rather than in isolation."333 "It is a canon of construction that statutes in pari materia should be construed together, so that ambiguities in one statute may be resolved by looking at another statute on the same subject."334 It follows that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory."335 Courts favor interpretations that "accord[] more coherence" to statutory text336 and "read and examine the text of the act and draw inferences concerning the meaning from its composition and structure."337 The presumption of consistent usage338 is related to in pari materia and further counsels that terms should be identically defined in a single statute.

The view from the U.S. Supreme Court is clear: "The text of the law is the law. As Justice Kagan recently said, 'we're all textualists now.'"339 Textualism concludes that FFPs are valid under the DGCL. It rejects Sciabacucchi's logic and holding as inconsistent with the statute's plain meaning. It also resolves all of Sciabacucchi's concerns regarding tort, contract, or conversion claims and makes clear that the DGCL does not regulate those matters either domestically or extraterritorially. Textualism achieves that result without resorting to "first principles" or novel, divergent definitions of "internal affairs."

A. DGCL Section 202

Sciabacucchi did not address the text of DGCL section 202, which establishes that (1) the DGCL expressly authorizes charter provisions that regulate purchasers who are not preexisting holders, (2) FFPs are valid as transfer restrictions if framed as such, and (3) in reading the statute in pari materia, FFPs are a fortiori permissible as charter provisions of general applicability that do not restrain alienation under section 102(b)(1) because they are permissible as restraints on alienation under section 202.

1.Charters May Regulate Purchases by Non-Stockholders

Section 202 authorizes charter provisions that impose "[r]estrictions on transfer and ownership of securities."340 These provisions can prohibit transactions with or limit the number of shares sold to non-stockholders, including sales to unaccredited investors, persons refusing to be bound by SEC resale restrictions, and foreigners who are not preexisting stockholders.341 Section 202 also "permits certain persons to be excluded ab initio."342 Nowhere is section 202 limited to restraints on existing stockholders, and the statute's plain text makes it clear that any such reading is irrational. Section 202 thus contradicts Sciabacucchi's suggestion that charter provisions are incapable of regulating transactions with persons who are not already stockholders. DGCL sections 152, 157, and 166 also regulate transactions with persons who are not preexisting holders.343

2.Federal Forum Provisions as Valid Transfer Restrictions

Section 202(c)(5) authorizes transfer restrictions that "[p]rohibit[] . . . the transfer ... or the ownership of restricted securities by[] designated persons or classes of persons or groups of persons," provided that the "designation is not manifestly unreasonable."344 But what is "manifestly unreasonable"? Section 202(d) explains that "[a]ny restriction on the transfer ... of the securities of a corporation . . . for any of the following purposes shall be conclusively presumed to be for a reasonable purpose."345 One purpose expressly enumerated in section 202(d)(2) is "[maintaining any statutory or regulatory advantage . . . under applicable local, state, federal or foreign law."346 Section 202(d)(2) thus establishes the conclusive validity of provisions designed to comply with federal law "such as restrictions imposed on transfers of unregistered stock by the Securities Act of 1933."347

In Capital Group Cos. v. Armour,348 the Chancery Court granted declaratory relief enforcing a restriction on a stock transfer to a spouse in a dispute relating to a divorce settlement. The court held that "[t]he policy of restricting the number of record shareholders to avoid public company reporting and filing requirements is clearly a valid purpose under section 202(d). Not having to comply with the burdensome and costly filing and disclosure requirements is an obvious 'statutory or regulatory advantage.'"349

FFPs are restrictions for the purpose of maintaining a "statutory or regulatory advantage" under "applicable . . . federal law."350 As a matter of federal law, Rodriguez gave its blessing to contractual provisions that prohibit state court Securities Act litigation. Thus, just as a corporation can impose a transfer restriction to avoid the expense of registration under the federal securities laws, which is a perfectly legitimate business purpose, so too can a corporation impose transfer restrictions requiring that Securities Act litigation be brought in federal court, which is also a perfectly legitimate business purpose. Therefore, FFPs are pre- sumptively designed for a reasonable purpose and permissible as transfer restrictions under section 202. This presumption is "conclusive[]."351

The Sciabacucchi court nowhere considered the implications of its analysis for the validity of section 202. Because FFPs are external by Sciabacucchi's analysis, they should be just as prohibited as transfer restrictions under section 202 as they are under section 102(b)(1). But FFPs are clearly valid on the face of section 202. Thus, if Sciabacucchi is correct, the legislature has exceeded its authority in enacting section 202 because that provision permits charter provisions in the form of transfer restrictions that violate Sciabacucchi's internal affairs constraint. Sciabacucchi, consistently applied to the DCGL, therefore does far more than invalidate FFPs. It also invalidates applications of section 202.

3.Reading Section 102(b)(1) in Pari Materia

Section 202 can be read in pari materia with section 102 only if section 202 is understood as authorizing a subset of charter provisions that are otherwise permissible under section 102 as standard charter provisions that do not restrain alienation to act as more onerous transfer restrictions that restrain alienation pursuant to section 202's additional limitations and notice requirements.352 Any other interpretation forces the illogical conclusion that Delaware's legislature intended to permit transfer restrictions under section 202 that it would forbid under section 102 if the identical language had simply been framed as a less restrictive standard charter provision that imposed no restraint on alienation.

Put another way, if the statute is to be read as a coherent whole, it cannot be that a charter provision that is

framed as a transfer restriction, that is conclusively valid as for a reasonable purpose, and that operates as an onerous transfer restriction becomes invalid if the same provision is reframed as a less intrusive standard charter provision that imposes no restraint on alienation. A restriction that is invalid under section 102(b)(1) cannot become valid by adding a notice provision under section 202 and reframing it as a transfer restriction. It follows that FFPs that are validly framed as transfer restrictions under section 202 must also be valid when reframed as standard charter provisions under section 102(b)(1).

B. DGCL Section 102(b)(1): Permissible Charter Provisions

Section 102(b) of the DGCL provides as follows:

In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders . . . ; if such provisions are not contrary to the laws of this State.353

The "plain and ordinary meaning" of section 102(b)(1) is that FFPs are proper subject matter for Delaware corporate charters as "a matter of easy linguistics."354 The first clause of section 102(b)(1) permits "any" charter provision "for the management of the business and for the conduct of the affairs of the corporation." The increased risk of section 11 litigation in state rather than federal court is apparent.355 Retentions and premiums have significantly increased for directors' and officers' liability insurance coverage for IPOs.356 Every identified FFP has been in connection with an IPO, which is the form of transaction most exposed to the litigation risk that FFPs address.

It is rational that "for the management of the business and for the conduct of the affairs of the corporation," and in a manner entirely consistent with controlling U.S. Supreme Court precedent, Delaware corporations seek to control litigation risk and insurance costs by directing that complex federal claims that are traditionally litigated in federal court continue to be litigated in federal court. FFPs govern affairs entirely internal to a corporation. The affected parties are the stockholders, corporation, directors, and executives, each "in such capacity."357 These are the constituencies that are expressly enumerated by statute. FFPs, by their very structure, cannot reach beyond a Securities Act claim to address any sort of tort, contract, or conversion claim.

The Sciabacucchi court failed to address this first portion of section 102(b)(1) and proceeded as though that text does not exist. It instead focused on the second portion of section 102(b)(1), which permits "any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders."358 Because dictionary definitions of the statute's terms confirm the validity of FFPs, restricting the analysis in this manner does not alter the conclusion. To eliminate concern over dictionary shopping, this analysis relies on Black's Law Dictionary for legal terms defined therein and Webster's Third New International Dictionary for all other terms. These dictionaries are most frequently cited by the U.S. Supreme Court in each respective context.359

"Create"360 is defined as "to bring into existence."361 FFPs bring into existence a rule that governs the forum in which a dispute involving the corporation, officers, directors, and stockholders is litigated in accordance with federal law. FFPs are "process-oriented because they regulate where stockholders may file suit, not whether the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."362

"Define" means "[t]o fix or establish (boundaries or limits)."363 FFPs fix and establish the boundaries and limits of stockholder power to bring federal claims outside of federal court in a manner consistent with federal law and that preserves stockholders' substantive rights.

"Limit" means "to assign to or within certain limits."364 FFPs assign Securities Act claims to federal court in a manner that preserves all stockholder substantive rights under federal law and in compliance with Rodriguez.

"Regulate" means to "control (an activity or process) esp. through the implementation of rules."365 FFPs control the activity or process of Securities Act litigation by implementing rules controlling the forum in which Securities

Act claims are litigated, again in a manner that preserves all stockholder substantive rights in compliance with Rodriguez.
In summary, FFPs create, define, limit, and regulate stockholder power exclusively within the context of a stockholder's ability to sue the corporation, its directors, and its officers for conduct relating to materially false registration statements. FFPs address no relationships other than those that arise as a consequence of material misrepresentations or omissions by the corporation and its directors and officers to the corporation's existing stockholders, new purchasers of the corporation's shares, and the market as a whole.
Section 102(b)(1) also requires that charter provisions not be contrary to Delaware law. The Delaware Supreme Court has explained that "[f]orum selection [] clauses are 'presumptively valid.'"366 A provision that is presumptively valid under Delaware law is not contrary to Delaware law. Further, no Delaware law or policy opposes the adoption of a forum selection provision that directs a federal claim to federal court in a manner consistent with U.S. Supreme Court precedent and DGCL sections 115 and 202.
This conclusion does not invoke Delaware precedent indicating that section 102(b)(1) should be interpreted expansively.367 That additional form of analysis reinforces the conclusion that FFPs are proper subject matter for Delaware charters.
C. DGCL Section 115: Federal Forum Provisions Comply with THE STATUTORY TEXT
Section 115's plain text and legislative history further confirm that FFPs are proper subject matter for Delaware corporate charters. The Sciabacucchi court reached a contrary conclusion only by gliding over section 115's plain text and legislative history and by relying on a secondary source368 that conflicts with both.
The plain text of section 115. Section 115 of the DGCL, adopted in 2015, states in full:
The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.369
Section 115's second sentence defines "internal corporate claims" to include those "based upon a violation of a duty by a current or former director or officer" (emphasis supplied). Significantly, the plain text requires neither that the violated duty be expressed as a DCGL cause of action nor that the internal corporate claim "arise from" a violation of a duty. Nor does it preclude the possibility that the internal corporate claim is both a violation of federal law and a Delaware duty. This is the plain text.
Had the General Assembly wanted to narrow the scope of actions defined as "internal corporate claims," it could have easily done so by limiting section 115 to require that covered claims expressly state violations of the DGCL. But any such limitation could defeat the statute's purpose because it would open an easy path for evasion. Plaintiffs seeking to avoid section 115 could then simply file suit in a non-Delaware court and allege a violation of some other state's statutory or common law. Section 115 would then not apply because the claim would fail to allege a violation of the DGCL. The broad reach of the "based upon" language is not a linguistic tic. It serves an essential, functional purpose.370
Similarly, if a "violation of a duty by a current or former director or officer" also gives rise to a federal violation, the underlying violation remains an internal corporate claim under section 115's plain text. The fact that an internal corporate claim simultaneously generates a federal claim does not mean that the internal corporate claim is no longer internal because a claim can be both federal and internal. To be sure, federal claims can provide for exclusive federal jurisdiction, as is the case under section 27 of the Exchange Act.371 But section 115 is irrelevant under those circumstances because federal actions subject to exclusive federal jurisdiction must remain in federal court. But when a federal statute provides for concurrent jurisdiction, as is the case under the Securities Act, the plain text of section 115 supports the validity of an FFP.
The statute's first sentence states that internal corporate claims may (not must) be brought "solely and exclusively

in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State."372 This sentence is susceptible to two interpretations, both of which conclude that FFPs are internal corporate claims.

The first assumes that the U.S. District Court for the District of Delaware is a court both in and of Delaware. FFPs clearly comply with this provision because they do not prohibit bringing claims in Delaware district court, which is then a court of the State. They also allow internal corporate claims to be brought in courts in Delaware, which includes the federal district court in Delaware.

An alternative interpretation distinguishes between courts "in this State" and courts "of this state."373 Under this approach, the chancery and superior courts are courts of Delaware while the federal district court is a court in Delaware. No part of an FFP prohibits plaintiffs from bringing Securities Act claims in the chancery or superior court, and a corporation can always agree to litigate the matter in a Delaware state court, if that is where plaintiffs file. Thus, FFPs do not prohibit bringing section 11 claims in the courts of Delaware. Moreover, as a practical matter, any corporation facing a Securities Act claim filed in a court of Delaware would rationally consent to litigate in that court. If it refused to do so, plaintiffs could argue that, on an as-applied basis, the FFP in question violates section 115 because it prohibits the claim from being adjudicated in the courts "of this state." Under this reading, FFPs also comply with section 115's "of" test. Indeed, because any effort to preclude section 11 litigation from occurring in a court of Delaware could invalidate the FFP, section 115 has real teeth in that it forces section 11 litigation into a federal court or into a court of Delaware.

The fact pattern in which a section 11 claim is filed in a court of Delaware and the corporation refuses to allow it to proceed in that court was not before the court in Sciabacucchi. For the reasons just described, that fact pattern is likely never to arise and is a form of hypothetical that Boilermakers warned against.374 Nevertheless, the hypothetical illuminates that the practical implication of FFPs is to direct section 11 claims against Delaware-chartered entities either to federal district court or a court of Delaware. Thus, FFPs are Delaware-tropic, though the strength of that tropism is currently conjectural.

Section 115's legislative history. The legislative synopsis for section 115 ("Synopsis") is reproduced in its entirety in the footnote, with the most relevant text italicized.375 The Synopsis explains that "[s]ection 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction."376 FFPs do not "foreclose suit in federal court based on federal jurisdiction." Sciabacucchi does. Sciabacucchi therefore conflicts with the plain text of the legislative history as well as with the plain text of the statute.

Post-adoption commentary. The Sciabacucchi court's section 115 analysis launched from the observation that "[a]s the parties recognize, Section 115 does not say explicitly that the charter or bylaws cannot include forum-selection provisions addressing other types of claims."377 If that is the case, and section 115 is silent as to the question presented, then the matter is resolved on a textual basis by reference to sections 102(b)(1) and 202, both of which affirm the validity of FFPs in corporate charters. Instead, the court turned to post-adoption commentary378 to conclude that section 115 invalidates FFPs. That logic fails because the commentary relied upon by the court does not support the proposition for which it is cited, and cannot, in any event, override the statute's plain text and legislative history.

The Sciabacucchi court reasoned that "[t]he omission comports with the precedent leading up to section 115, which recognized that the charter and bylaws can only address internal-affairs claims."379 This statement is a non sequitur because section 115 itself expressly defines "internal corporate claims" so that FFPs fit comfortably within the statutory definition and Synopsis. The court's analysis thus sought to solve a problem that does not exist, and the only reason to rummage outside the four corners of the statutory text and Synopsis was to search for arguments that support conclusions inconsistent with the statutory text and synopsis.

The statement is also not a precise description of the "precedent leading up to Section 115" (i.e., Boilermakers). The Boilermakers court relied on the internal affairs doctrine as a sufficient condition to support its conclusion. It did not frame the internal affairs doctrine as a necessary condition for the validity of all Delaware charter and bylaw provisions or the entirety of the DGCL.

It was in this posture that the Sciabacucchi court turned to a post-adoption article authored by "[t]wo past presidents and leading members of the Corporation Law Council."380 Citing the article, the court asserted that "a securities law claim is not an 'internal corporate claim' within the meaning of the amendments"381 and explained that "because the corporate charter and bylaws could not be used to regulate external claims . . . , the Council 'saw no reason for a statutory amendment that purported to reach beyond the confines of internal governance litigation.'"382 The flaw in this argument is apparent from the article's full text.

The article states that federal securities claims do not "typically fall within clause (i) of the definition of 'internal corporate claims'"383 and refers primarily to the liability arising under Rule 10b-5 of the Exchange Act. The authors do not categorically assert that federal securities claims "never" fall within clause (i). That would have been an inaccurate statement because federal securities claims can and do fall within clause (i), as do section 11 claims. This locution is critical in the context of a facial challenge because it demonstrates that the plaintiffs cannot establish the lack of any circumstance in which an FFP qualifies under clause (i). The modifier "typically" concedes that the requisite showing of impossibility is impossible. That ends the debate in a manner that defeats the Sciabacucchi court's application of the post-enactment commentary to invalidate FFPs.

The article continues: "The predominant form of federal securities class action litigation is based on section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and most commonly involves allegations that a material misstatement or omission induced class members to purchase securities before the misstatement or omission was corrected."384 While this is true, it is also irrelevant because FFPs are limited to Securities Act claims while Exchange Act claims, such as Rule 10b-5 claims, are subject to exclusive federal jurisdiction. Raising Rule 10b-5 concerns is thus a meaningless distraction as applied to FFPs.

The article also states that "[accordingly, any duty breached under Rule 10b-5 (or under sections 11 or 12 of the Securities Act of 1933) does not arise from a director or officer's duty to the corporation or its stockholders, and a Rule 10b-5 claim should not be considered an 'internal corporate claim' within the meaning of new Section 115."385 There are five problems with this sentence, particularly with its parenthetical. First, the statement is unsupported. Nowhere does the article analyze the elements of any Securities Act claim, recognize that a section 11 claim can be generated by lies told to stockholders by directors who profit from their own lies, consider the implications of section 11's statutory presumption of directorial liability, contrast section 11 liability with the Rule 10b-5 claim, or consider that section 11 claims implicate Malone and Caremark liability. Second, the parenthetical contradicts the statute's plain text and legislative history. As already explained, the plain text of the definition of "internal corporate claims" covers section 11 claims. Third, the sentence contradicts other parts of the same article, which elsewhere recognizes that federal securities claims do not "typically" fall within clause (i) and thereby implicitly and correctly concedes that some federal securities claims can be internal corporate claims. Fourth, directors and officers have clear Delaware-based duties to tell the truth to stockholders and to the market when selling shares, as established in Malone. Thus, the duty breached under the Securities Act does "arise from a director or officer's duty to the corporation or its stockholders." Fifth, the statute does not require that the duty breached "arise from" any Delaware duty. It is instead sufficient that the claim is "based upon" the breach.

D. Tort, Contract, and Conversion Claims

The Sciabacucchi court's efforts to restrict section 102(b)'s scope were motivated in part by concern that the validation of FFPs could facilitate charterbased regulation of tort, contract, or conversion claims between the corporation and its stockholders.386 The obvious response is that FFPs cannot possibly be applied to regulate tort, contract, conversion, or any other sort of claims of persons who coincidentally happen to be stockholders because FFPs are narrowly drafted to govern only Securities Act claims. To raise concerns about tort, contract, and conversion claims in the context of Securities Act litigation is to engage in the form of hypothetical imagineering against which Delaware precedent strongly warns. Nor do FFPs chart a pathway for charter-based regulation of such claims because, as already established, the plain text of the statute precludes such application.

The Sciabacucchi court noted its concern with conversion claims in passing and provided no accompanying analysis. This concern is a mystery because the DGCL addresses the issue. Section 167 governs claims of lost or

stolen stock certificates and allows the corporation to demand a bond "sufficient to indemnify it against any claim that may be made against it on account of the alleged loss [or] theft."387 Section 168 authorizes the Chancery Court to address charges that the corporation improperly failed to issue shares following a claim of theft or loss of a certificate. "If, upon hearing, the court is satisfied that the plaintiff is the lawful owner,"388 the Chancery Court can compel the issuance of shares, but a bond shall be required. If the Sciabacucchi court's passing observation suggests that Delaware courts cannot address claims of conversion, the statute's plain text is to the contrary. If the concern is over a different scenario, then a more precise articulation is needed to allow for a response.

E. Consistent Usage as a Text-Based Limiting Principle

If the concern is that FFPs invite charter provisions that stray from the statute's plain text, it is valuable to observe that textualism contains further limiting principles that do not require reliance upon first principles, atextual references, new definitions of "internal affairs," or even traditional definitions of "internal affairs" to resolve the question. The DGCL regulates relationships amongst corporations and stockholders, including transactions by which purchasers become stockholders, provided that the regulation is rooted in the stockholder or purchaser relationship. This limiting principle is inherent in the statutory text and can be expressed with greater precision through a simple necessity test: if being or becoming a stockholder (one cannot be a stockholder without having been a purchaser, nor can one be a purchaser without becoming a stockholder) is not required to state a claim governed by a forum selection provision, then the provision in question neither creates, defines, limits, nor regulates the powers of the stockholder as a stockholder. In other words, the provision is invalid because it regulates something else. First principles are unnecessary to reach this conclusion. Plain English suffices.

The text of section 115 is instructive in this regard. It speaks of "violations of a duty by a current or former director or officer or stockholder in such capacity."389 The director must be acting as a director, the officer as an officer, the stockholder as a stockholder. This natural reading of the text avoids all of Sciabacucchi's imaginary concerns without having to resort to first principles or divergent interpretations of "internal affairs."

More formally, the presumption of consistent usage provides that "identical words used in different parts of the same act are intended to have the same meaning."390 Because section 115 refers to the "stockholder in such capacity,"391 the presumption of consistent usage applies that qualification to section 102(b)(1) and further precludes any extension to the regulation of stockholders in the capacity of tort, contract, conversion, or any other form of claimant. That would not be regulation of a stockholder in the capacity of a stockholder.

This necessity test and the presumption of consistent usage leads immediately to the conclusion that a charter provision governing a tort, contract, or conversion claim would be invalid. Stockholder status is not necessary to state a tort claim between a corporation and an injured person who happens to be a stockholder, nor is stockholder status relevant to a contract claim. Indeed, pleading stockholder status in a tort or contract claim is a non sequitur that could be stricken from the complaint.392 The tort or contract claim has nothing to do with a person's status as a stockholder and thus fails the necessity test.

F.The Dangers of Reaching Beyond Textualism

Textualism puts an end to the inquiry by recognizing the validity of FFPs without opening the door to claims unrelated to the corporation's operations or its relationships with its stockholders, directors, and management in their capacities as such. This approach has the further virtue of avoiding problems created by Sciabacucchi's search for a bright-line rule prescribing, for all conceivable circumstances, precise conditions under which yet-to-be-invented charter provisions might be proper subject matter for corporate charters that do not yet exist.

Resolving the validity of FFPs does not compel the invention of categorical imperatives of Kantian dimension, particularly by resorting to atextual analysis that calls for the imposition of a divergent internal affairs constraint on all of the DGCL in a manner that inevitably affects the interpretation of myriad charter and bylaw provisions not before the court.

Boilermakers avoided this error. The court there observed that the "wisdom of declining to opine on hypothetical situations that might or might not come to pass is evident."393 Accordingly, "Delaware courts 'typically decline to decide issues that may not have to be decided or that create hypothetical harm.'"394 It is "imprudent and

inappropriate to address these hypotheticals in the absence of a genuine controversy with concrete facts."395 Further, the U.S. Supreme Court is "acutely aware . . . that [it] sit[s] to decide concrete cases and not abstract propositions of law."396 It has therefore "decline[d] to lay down . . . broad rule[s] . . . to govern all conceivable future questions in [an] area."397

The challenge presented in Sciabacucchi is therefore better addressed through respect for the plain text of the statute and a common law process that considers future proposed charter amendments on their merits. This common law process affords the judiciary the benefit of experience over time. It allows views to evolve in response to changed circumstance and avoids speculation over the validity of hypothetical charter provisions and their application to facts that do not yet exist. It also avoids concerns that application of Sciabacucchi's internal affairs test will inspire substantial litigation challenging the validity of charter and bylaw provisions that are currently viewed as uncontroversial.

G.Arbitration of Securities Act Claims

Some observers have expressed concern that the SEC will permit mandatory arbitration of Securities Act claims398 and have rallied their support behind the result in Sciabacucchi because they perceive it as a state law bulwark against mandatory arbitration. They have reasoned that if state law prohibits mandatory arbitration in organic documents, then state law will constrain the propagation of arbitration provisions even if the SEC later permits arbitration under federal law.399 From this perspective, FFPs pose a threat because they map a path toward mandatory Securities Act arbitration and not because they direct federal claims to federal court.

This concern not only is misplaced but has the argument backward. FFPs are anti-arbitration provisions. They unambiguously direct Securities Act litigation toward federal court and clearly preclude arbitration. If every charter included an FFP, mandatory arbitration of Securities Act claims would be impossible. It stands logic on its head to argue that a provision that prohibits arbitration facilitates it.

Moreover, the section 115 rationale in support of the validity of FFPs that is presented in this article categorically precludes mandatory Securities Act arbitration provisions for all Delaware corporations, even if they have not adopted FFPs. Section 11 claims are, as explained above,400 "internal corporate claims" as that term is defined in section 115 and therefore cannot be subject to mandatory arbitration.401 Mandatory arbitration of section 11 claims is thus prohibited for all Delaware corporations, with no need for further legislative or judicial action. This is hardly a pro-arbitration analysis.

Opponents of mandatory section 11 arbitration who support Sciabacucchi would have Delaware pay an unnecessarily high price to achieve their preferred policy objective. They would have Delaware adopt an overly narrow conceptualization of the internal affairs doctrine that opens the door for other states to govern boardroom conduct, just so they have an argument that need not be accepted by any other jurisdiction402 against the propagation of mandatory arbitration provisions. This is not a wise bargain for Delaware particularly because, as just demonstrated, it is entirely possible to preclude mandatory arbitration of Securities Act claims for all Delaware corporations without resorting to an internal affairs restraint, much less an internal affairs restraint that narrows the Supreme Courts' definition of internal affairs. Moreover, if the Federal Arbitration Act is in the future interpreted to preempt state corporate law, then Delaware would be left in the ditch. It would be unable to do anything to prevent Securities Act arbitration but would remain saddled with a narrow interpretation of the internal affairs doctrine and a divergent constraint on the application of all Delaware corporate law. Sciabacucchi's supporters thus map a path to an unfortunate future for Delaware law.

This article's proposed interpretation of section 115 that would preclude mandatory Securities Act arbitration for all Delaware-chartered corporations is no small achievement. Delaware charters make up approximately 66 percent of the Fortune 500 and more than half of all publicly traded corporations.403 It asks too much of Delaware to solve the Securities Act arbitration challenge for the entire nation, particularly when it cannot do so.404 From this perspective, the easy response to opponents of mandatory arbitration is that they should embrace this article's interpretation of section 115 and direct their residual concerns to Congress and the SEC because arbitration of federal claims is clearly a federal matter. Urging that Delaware contort its definition of "internal

affairs" to provide opponents of arbitration with a fallible argument outside Delaware makes little sense. Indeed, as objectionable as mandatory arbitration of Securities Act claims may be to some, Delaware would clearly be intruding into the federal lane by interpreting the DGCL in an effort to interfere with that policy.405

VI.Public Policy Considerations

Public policy considerations also indicate that the holding and analysis in Sciabacucchi are highly problematic and inimical to Delaware's best interests. By prohibiting a federal practice that arises under federal law and that is permissible in federal court, Sciabacucchi creates unprecedented tension between Delaware law and the federal regime. It steers Delaware directly into the federal lane. By holding that all of Delaware law is constrained by its newly invented definition of internal affairs, Sciabacucchi intruded into the General Assembly's domain and steers Delaware's judiciary directly into the legislature's lane. By urging a novel, narrow definition of "internal affairs," the opinion invites sister states to regulate board conduct that Delaware has traditionally viewed as internal and subject to Delaware's exclusive jurisdiction. Further, the available evidence suggests that Sciabacucchi's holding promotes the interests of plaintiff counsel who file section 11 claims and tagalong Delaware derivative claims based on those section 11 claims over the interests of the stockholders to whom counsel owe fiduciary obligations.

A.Delaware's Lane

1. Sciabacucchi Conflicts with Federal Law

Delaware is sensitive to its role in the federal system and seeks to not intrude into matters that are federal or generate conflict between Delaware and federal law.406 "The historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complementary."407 The Sciabacucchi court recited plaintiff's position that "Federal Forum Provisions take Delaware out of its traditional lane of corporate governance and into the federal lane of securities regulation."408 It also cited scholarship explaining that "the focus of the federal lane has always been, and should always be, market fraud and disclosure. On the other hand, monitoring the structure of internal corporate governance is the focus of the state lane."409

However, the reality is that Sciabacucchi steers Delaware into a headlong collision with federal law. Federal law rejects the thesis that plaintiffs have an immutable right to litigate Securities Act claims in state court, and federal courts enforce private agreements that preclude state court litigation of Securities Act claims.410 The Sciabacucchi court, with no citation support or analysis of any precedent, did precisely the opposite. It divested parties of the federally recognized right to designate the forum in which a Securities Act claim will be heard and "foreclose[d] suit in a federal court based on federal jurisdiction" in direct contradiction of section 115's Synopsis.411 Sciabacucchi thus created unprecedented and unnecessary tension with the federal regime while failing to adhere to the statutory text and clear warning of the Synopsis.

2. Matsushita v. Epstein

The U.S. Supreme Court explored the interplay between federal and Delaware law in Matsushita Electric Industrial Co. v. Epstein,412 which held that Delaware courts can settle claims subject to exclusive federal jurisdiction even if they cannot adjudicate those claims. "[T]he release of federal claims pursuant to a settlement of a state court proceeding does not violate the federal courts' exclusive jurisdiction."413 If federal courts are not offended when Delaware courts dismiss federal claims that Delaware cannot adjudicate, then federal courts are not offended when Delaware courts, following controlling U.S. Supreme Court precedent, allow parties to direct federal claims to federal court where there is concurrent jurisdiction.

In Matsushita, a common set of facts generated Delaware fiduciary claims and Exchange Act claims that were subject to exclusive federal jurisdiction. Matsushita Electric Industrial Co. ("Matsushita") tendered for the shares of MCA Inc., a Delaware corporation. Procedurally,

[f]irst, a class action was filed in the Delaware Court of Chancery against MCA and its directors for breach of fiduciary duty in failing to maximize shareholder value. The complaint was later amended to state additional claims against MCA's directors for, inter alia, waste of corporate assets by exposing MCA to liability under the federal securities laws. In addition, Matsushita was added as a defendant and was accused of conspiring with

MCA's directors to violate Delaware law. The Delaware suit was based purely on state-law claims.
While the state class action was pending, . . . suit was filed in Federal District Court in California. The complaint named Matsushita as a defendant and alleged that Matsushita's tender offer violated Securities Exchange Commission (SEC) Rules 10b-3 and 14d-10.414
The Court of Chancery entered an order approving settlement of the state and federal claims while recognizing that it had no jurisdiction over the Exchange Act claims. As the Matsushita court explained, "[w]hile 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, i.e., suits arising under state law or under federal law for which there is concurrent jurisdiction."415 The order approving the settlement had preclusive effect, "notwithstanding the fact that [shareholders] could not have pressed their Exchange Act claims in the Court of Chancery."416 The court also referenced Nottingham Partners v. Dana,417 in which Delaware's Supreme Court approved a settlement releasing claims pending in federal court and eliminated the requirement that settled "claims could have been raised in the suit that produced the settlement."418
Matsushita and Nottingham support an easy a fortiori argument. If neither of these fact patterns offend federal law, and if Delaware can settle federal claims that it cannot adjudicate, then Delaware, a fortiori, does not inappropriately intrude into the federal lane by upholding FFPs that keep federal claims in federal court in a manner consistent with federal law.
B. The Legislature's Lane and Sciabacucchi's Proto-Marbury Implications
Sciabacucchi's implications are not limited to FFPs. Its holding constrains all Delaware's legislative activity to comply with its conceptualization of "first principles." The Sciabacucchi court made clear that "[a]s the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation's internal affairs .... But Delaware's authority as the creator of the corporation does not extend to its creation's external relationships. . . . [When] the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate."419 Put another way, "Delaware can regulate the internal affairs of its corporate creations, regardless of their location, but only their internal affairs."420
Sciabacucchi thus commanded that all past, present, and future legislative activity relating to the DGCL must comply with its internal affairs test even though its definition of "internal affairs" appears nowhere in the U.S. or Delaware Constitutions and conflicts with existing precedent. Sciabacucchi thus forces a protoMarbury421 constraint on Delaware's legislature whereby Delaware's courts can invalidate the legislature's enactments that violate Sciabacucchi's internal affairs standard, even if they are otherwise constitutional.
In adopting this sweeping constraint, the Sciabacucchi court failed to recognize that Delaware courts "must . . . respect the broadly enabling nature of the DGCL, and [w]here the markets begin to use the DGCL's breadth in new ways, it is the General Assembly, not the courts, that should evaluate whether, on public policy grounds, the statute's authorizing breadth should be narrowed."422 In Sciabacucchi, it was the court rather than the General Assembly that decided to narrow the statute's authorizing breadth, thereby veering Delaware's judiciary into the legislature's lane.
Careful deliberation is appropriate before imposing a sweeping judicial constraint on all past and future actions of the General Assembly, particularly when the question presented can be resolved on far narrower grounds that adhere to the statutory text, avoid significant interpretive challenges presented by "first principles," require no application of a divergent definition of "internal affairs," and avoid conflict with numerous decisions of the U.S. and Delaware Supreme Courts.
C. Efficiency Rationales and Neutral Principles
FFPs promote judicial economy. They direct complex federal Securities Act claims to federal courts with a comparative advantage in resolving those disputes. They eliminate the need for expensive jurisdictional wrangling about whether securities Act claims should proceed in federal or state court.
These efficiency gains are consistent with the neutral principle that litigation is best resolved by courts with a

comparative advantage in adjudicating the underlying disputes. Just as Delaware courts have a comparative advantage in interpreting Delaware law, and just as California courts have a comparative advantage in interpreting California law, federal courts have a comparative advantage in interpreting federal law. The fact that FFPs adhere to neutral principles designed not to advantage either plaintiffs or defendants reinforces their benefit to society, corporations, and stockholders.

D. Are Federal Courts Inferior?

Unless plaintiffs can demonstrate that resolving Securities Act claims in federal court is contrary to the best interests of corporations, their stockholders, or society, FFPs' efficiency gains are a sufficient public policy rationale for their enforcement. Simply put, if society can achieve equally fair outcomes in both fora, but one is more efficient, the efficient forum is to be preferred. Significantly, neither the opinion in Sciabacucchi nor the plaintiffs challenging the validity of FFPs ever assert that litigating Securities Act claims in federal courts is in any sense unfair or inimical to the best interests of the corporation, its stockholders, or society. The interests of plaintiffs' attorneys are a different matter.

E. Conflicts of Interest

Derivative claims exist to promote the corporation's best interests.423 The claim in Sciabacucchi is derivative,424 but it promotes the interests of plaintiffs' counsel at the expense of the corporation and thus raises the specter of conflict. The documented stock price decline in response to Sciabacucchi supports this analysis.425

Class and derivative litigation are plagued by agency problems that have been closely examined in the academic literature.426 In run-of-the-mill, product-liability-style class action litigation, plaintiffs and defendants are in a pure adversarial relationship; the mass tort claimant has no reason to be concerned about a defendant's best interests. Agency problems arise in this context because of incentive incompatibility between plaintiffs and their counsel. In other words, actions that are in the plaintiff's best interests are not necessarily in their counsel's best interests, and vice versa.

Additional conflicts arise in tagalong derivative litigation alleging Securities Act violations. Plaintiff counsel in tagalong claims have existential incentives to argue that the corporation violated the Securities Act because if the corporation successfully defends the predicate Securities Act claim, the tagalong claim disappears and derivative tagalong counsel collect nothing. Victory for the corporation is utter defeat for tagalong counsel. This is a conflict because the derivative counsel who is supposed to be acting in the corporation's best interests is incentivized to argue against the corporation's interests that the corporation has violated the law. In part because of this conflict, courts commonly stay derivative tagalong claims until the predicate Securities Act litigation is resolved.427

In Sciabacucchi, plaintiff's counsel described Securities Act counsel's incentives in connection with FFPs as follows:

I think if you talk to plaintiffs, the plaintiffs' bar, [Sciabacucchi] is a very important issue to them. They believe that they get better settlements and judgments in state court '33 Act actions than they do in federal court. And so, that's why, in part, this is such a hot issue.428

This is precisely the problem. In plaintiff counsel's own words, "they"-the "plaintiffs' bar"-do "get better settlements and judgments" in state court. Because these settlements and judgments are better for the plaintiffs' counsel in the predicate Securities Act claims, they are also better for the tagalong derivative counsel. But are these "better settlements and judgments" in state court also better for the corporation whose interests are primary in the context of derivative litigation like Sciabacucchi? Recent empirical evidence finds otherwise: stock prices declined in response to Sciabacucchi, suggesting that the Chancery Court's opinion did more to help the plaintiffs' counsel than the corporation or stockholders whose interests are theoretically paramount.429

This negative stock price response is easily explained by the fact that a plaintiff's "better settlements and judgments" can result from the survival of weaker state court claims that would have been dismissed in federal court and from state court procedural advantages that allow plaintiffs to extract settlements greater than they would have obtained had the same claim been litigated in federal court.430 The survival of weaker or non-meritorious Securities Act claims in state court also encourages the filing of cases that would not have been

brought if they had been subject to a federal filing requirement. In this context, a "better" result for plaintiffs' counsel is a worse outcome for the corporation and stockholders. Therefore, by working to keep Securities Act litigation in state court, plaintiff's counsel in Sciabacucchi advocated an outcome that was inimical to the best interests of the three nominal defendant corporations.

Plaintiff counsel's position in Sciabacucchi is thus analogous to that of a derivative counsel in a tagalong claim who takes affirmative steps to disadvantage the nominal defendant corporation in the predicate securities litigation. This strategy benefits derivative tagalong counsel, who stand to earn higher fees, but harms the corporation and its stockholders. Sciabacucchi's situation is parallel; the conflicting incentives are clear.

An immediate response to this critique is that corporations are not permitted to adopt invalid charter provisions regardless of the parties benefited or harmed. The flaw in this argument is, however, apparent from its formalist nature. It does not contend that invalidating FFPs promotes the corporation's best interests. Instead, it argues that because the dispute is over the validity of an organic provision, derivative counsel are permitted to advocate a position that is inimical to the corporation's and stockholders' best interests. To the extent that this defense is effective, it concedes the conflict but contends that the conflict is permissible when litigating the validity of a charter provision. The conflict is accepted, but it does not disappear.

F.Implications of an Underinclusive Definition of "Internal Affairs"

If section 11 is external, as Sciabacucchi held, then sister states can cite Sciabacucchi when adopting legislation that would govern procedures by which boards prepare registration statements. They might mandate that boards spend a minimum number of hours reviewing registration statements, adhere to prescribed diligence procedures, and keep records in various forms, including video files of diligence review sessions. The result is a slippery slope. if a board's processes in preparing and reviewing a registration statement are external, then why would any other board processes be internal? Why could a sister state not require that all corporations headquartered within that state adhere to a novel set of boardroom procedures set by the headquarters state rather than by the chartering state? Where is the distinguishing principle that categorizes the preparation of the registration statement as external but any other boardroom decision process as internal?

Recent events establish that sister states face strong political incentives to legislate in a manner that intrudes on Delaware's traditional conceptualization of internal affairs. California's recently enacted S.B. 826,431 for example, established a minimum number of women directors that must serve on the boards of all publicly held corporations headquartered in California even if they are chartered in Delaware.432 New Jersey433 and Illinois434 are considering similar measures that would impose gender and other quota-like restrictions on board composition or disclosure requirements that would apply to Delaware-chartered corporations headquartered in those states. States such as California and New York, which "host significant economic activity within their borders" generated by Delaware-chartered entities, "are most likely to adopt a narrow view of the [internal affairs] doctrine. Doing so gives these states wider latitude, with respect to the foreign corporations within their jurisdiction, to regulate matters that would be otherwise off-limits if the internal affairs doctrine was accorded a more expansive interpretation."435 The prospect that a narrow conceptualization of the internal affairs doctrine will come to predominate Delaware-charted businesses would "chip away at the hegemony of Delaware. Aspects of corporate governance once the exclusive province of Delaware corporate law will become subject to regulation by other states. And each such regulation will incrementally diminish the value of being chartered in Delaware."436 If it stands, Sciabacucchi's holding can only encourage this tendency and could help trigger a cascade of state-level legislative and regulatory interventions that rely on Sciabacucchi's narrow interpretations of the internal affairs doctrine. After all, if Delaware, the state with perhaps the strongest interest in an expansive definition of the internal affairs doctrine, adopts a novel, narrow definition of internal affairs, then Delaware will have little moral, legal, or political standing to complain if a sister state chooses to do what Sciabacucchi has already done. Sauce for the goose is sauce for the gander.

All these analytic challenges can be avoided if the section 11 claim is recognized for what it is: a federal claim that creates federal liability for conduct that can be purely internal and that can be regulated at the state level only by

the state of incorporation under the existing definition of "internal affairs" that is shared by the U.S and Delaware Supreme Courts. By straying from this precedent, Sciabacucchi's holding threatens Delaware's ability to exercise exclusive control over a broad range of internal boardroom matters. Indeed, Sciabacucchi appears to be the only decision in Delaware history that advocates a narrowing conceptualization of the internal affairs doctrine.437

VII.Miscellaneous Considerations

Sciabacucchi raised several minor points in an effort to categorize Securities Act claims as external. All are easily addressed.

A. Outsider Liability Does Not Externalize Section 11 Claims

The Sciabacucchi court observed that for section 11 liability, "[d]irector status is not required. Officer status is not required. An internal role with the corporation is not required."438 The fact that section 11 allows claims against persons other than officers or directors and that a formal internal role with the corporation is not a prerequisite to liability does not cause the claim to become external for at least five distinct reasons.

First, on a facial challenge, the test is not to ascertain whether the charter provision can be applied in every conceivable scenario but rather whether the provision can be applied in any conceivable scenario. Sciabaccuchi's framing of the question adroitly (but inappropriately) flipped the controlling presumption for a facial challenge. Second, whether defendants include officers or directors is irrelevant to whether a claim is internal under the precedent established by the U.S. and Delaware Supreme Courts and under Sciabacucchi's own narrower test. None of these tests hinge on officer or director status, and a matter can be entirely internal even if no officer or director is implicated. Third, although officer or director status is not required for section 11 liability, every director and officer signing the registration statement is presumed liable unless they establish a due diligence defense. Thus, if a non-officer or non-director faces a section 11 claim, the registrant's directors and officers are virtually certain to be sued for failing to exercise due diligence in identifying and preventing the alleged wrongdoing. The Sciabacucchi court fixated on a hypothetical pattern that, due to the statute's structure, is improbably extreme. Fourth, internal claims can proceed against officers and directors even if outsiders, such as investment bankers, accountants, lawyers, and others, are deeply engaged in the alleged fiduciary breach. Delaware courts impose aiding-andabetting liability on outsiders in connection with internal activities, and the presence of outsider liability does not transmute the claim from internal to external.439 Fifth, each of the outsiders named as potentially liable in section 11 are so named only because they participate in the inevitably internal act of preparing the registration statement. From this perspective, to borrow a locution common in the analysis of insider trading law, those persons are "temporary insiders." They assist the officers and directors responsible for preparing and signing the registration statement. They assume section 11 liability without diminishing any officer's or director's liability or transforming the process of prospectus preparation from an internal affair to an external one.

B. The Definition of "Security" Does Not Externalize Section 11 Claims

The Sciabacucchi court stated that the broad federal definition for the term "security" "underscores the absence of any meaningful connection between a 1933 Act claim and stockholder status" because by the court's calculus, the '33 Act "could identify as few as fifty or as many as 369 different types of securities. Shares are just one of these many types of securities, and shares of a Delaware corporation are only one subset of that one type."440 Therefore, there is "no necessary connection between a 1933 Act claim and the shares of a Delaware corporation."441

Putting aside the precision of the court's mathematics, even if this observation is numerically correct, it is logically irrelevant. Whether an act or claim is internal is not determined by whether a statute creating a federal claim that adds federal liability for an internal act also covers other acts or instruments that are not internal. There is no need for a "necessary" connection in the sense that every security identified by the '33 Act constitutes a share of a Delaware-chartered corporation. Put another way, on a facial challenge, it is irrelevant to ask whether every application of '33 Act liability generates an internal claim. The proper question to ask is instead whether any application generates an internal claim. Finally, internal claims regularly arise from violations of positive law that are not limited to violations of statutes that exclusively target the shares of Delaware corporations. Violations of

food safety442 and anti-pollution laws443 that govern matters far removed from Delaware corporate law can form the basis for allegations of fiduciary breach under Caremark or Malone. These violations can be foundational for internal claims even though there is "no necessary connection between" them "and the shares of a Delaware corporation."

C. Sections 12(a)(1) and (2) and Section 15 of the Securities Act

Although the text of FFPs encompass all private rights of action arising under the Securities Act, the analysis to this point has focused on section 11 liability. Sections 12(a)(1) and (2) and section 15 are the only other provisions of the Securities Act that support private rights of action. The analysis of each of these claims supports a conclusion identical to the analysis under section 11 on a facial challenge.

Section 12(a)(1) liability attaches to sales of unregistered securities in violation of section 5 of the '33 Act. These violations can arise from process and control failures that are internal to the corporation and can involve officer and director action. No external force is necessary to cause a corporation to sell unregistered shares without a valid exemption. The section 12(a)(1) violation is therefore readily described as an internal affair on a facial challenge.

Section 12(a)(2) liability attaches only to the use of a "prospectus."444 As is the case with a section 11 violation, a defective prospectus can arise from a process flaw that is internal to the issuer and can directly implicate officers and directors. No external force is necessary to cause such a failure.

Section 15 imposes joint-and-several secondary liability on control persons for primary liabilities that arise in connection with violations of sections 11 and 12 of the Securities Act.445 Absent a primary violation, there is no section 15 control-person liability. The presence of control-person liability therefore does not alter any of the analysis as to whether the primary conduct violating the Securities Act is internal under Delaware law. The presence of secondary, control-person liability is therefore irrelevant to the question of whether a Securities Act claim can, on a facial challenge, be internal under Delaware law.

VIII. Conclusion

A textualist resolution of the question presented in Sciabacucchi hews faithfully to the norm that the "most important consideration for a court interpreting a statute is the words the General Assembly used in writing it."446 It also abides by the rule that on a facial challenge, plaintiffs' burden is "a difficult one: they must show that [FFPs] cannot operate lawfully or equitably under any circumstance."447 Textualism easily concludes that FFPs are facially valid under Delaware law.

A straightforward textualist reading avoids all first-principles concerns that inspire the invention of a divergent definition of "internal affairs." Textualism does not require counterfactual assumptions, conflict with U.S. or Delaware Supreme Court precedent, cause Delaware to constrain federal practice in a manner inconsistent with federal law, advocate policy positions inimical to Delaware's interest, or require that courts dilate over hypothetical fact patterns that can never arise and that are not before the court. Textualism eliminates the possibility that the DGCL can be applied extraterritorially or that FFPs might regulate claims unrelated to the Securities Act. Textualism also interprets the DGCL so as to constrain the ability of all Delaware corporations to adopt mandatory arbitration of Securities Act claims in their organic documents. Textualism achieves these objectives without generating any of Sciabacucchi's unfortunate sequelae.

The narrow precision of this approach bears emphasis. A ruling that FFPs are facially valid under Delaware law preserves plaintiffs' ability to challenge the enforcement of every future FFP on an as-applied basis in the state court in which that future Securities Act claim is filed. Those state courts can effectively defend local state interests in keeping federal Securities Act claims out of federal court, assuming that such legitimate interests exist. The state courts will also be able to adjudicate challenges as to the fairness of "as applied" enforcement of specific FFPs then before the state court. These challenges can include Schnell-based equitable challenges to the board's conduct in enforcing any specific FFP at issue448 and challenges based on the safeguards articulated in Bremen449 and its progeny. These procedural safeguards provide powerful additional assurances against the inappropriate application of FFPs.

Footnote

1. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).
2. See Joseph A. Grundfest, Federal Forum Provisions: Historical Development and Future Evolution (Dec. 2, 2019) (unpublished manuscript available at https://ssrn.com/abstract=3497126); see also Complaint ¶46, Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) [hereinafter Sciabacucchi Complaint].
3. See Grundfest, supra note 2, at 5-6.
4. See Grundfest, supra note 2, at 9-12.
5. However, if a plaintiff files a Securities Act claim in Delaware state court, the defendant corporation will rationally not seek to dismiss the complaint because any such motion would allow plaintiffs to raise an as-applied challenge to the federal forum provision's validity under DGCL section 115. Del. Code Ann. tit. 8, 115 (2019); see infra Part V.C.
6. See, e.g., Joseph A. Grundfest &Kristen A. Savelle, The Brouhaha over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis, 68 Bus. Law. 325 (2013); see also Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013).
7. 490 U.S. 477 (1989).
8. Id.
9. For data describing the characteristics of corporations that have adopted FFPs, see Grundfest, supra note 2, at 13-15; see also Dhruv Aggarwal, Albert H. Choi &Ofer Eldar, Federal Forum Provisions and the Internal Affairs Doctrine at 14 (Univ. of Mich. Law &Econ. Research Paper No. 19-009; Univ. of Mich. Pub. Law Research Paper No. 646; Duke Law Sch. Pub. Law &Legal Theory Series No. 2019-58, Aug. 18, 2019), https://ssm.com/abstract=3439078.
10. Sciabacucchi Complaint, supra note 2, ¶60 (stating that the complaint was asserting both direct class and derivative claims).
11. See Grundfest, supra note 2, at 13-15; see also Aggarwal, Choi &Eldar, supra note 9 (reporting 107 corporations with FFPs).
12. Transcript of Oral Argument on Motion for Fees and Expenses at 22, ll. 7-8, Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Apr. 11, 2019) ("The reason we sued these three is we had a client who owned stock in these three. That's why we sued these three.").
13. Sciabacucchi, 2018 WL 6719718, at ·6 (citing Sciabacucchi Complaint, supra note 2, ¶¶15-16).
14. Id. at ·3 (citing Sciabacucchi Complaint, supra note 2, ¶14) (emphasis added by the court).
15. Id. at ·3, ·23.
16. Id. at ·1.
17. Id. at ·23.
18. See Aggarwal, Choi &Eldar, supra note 9.
19. Sciabacucchi, 2018 WL 6719718, at ·17.
20. Id.
21. Id. at ·2, ·18-23.
22. Id. at ·2.
23. Id. at ·1.
24. Id. at ·2.
25. Id. at ·18.
26. Id. at ·2.
27. Id.
28. Id. at ·21.
29. 5 U.S. (1 Cranch) 137 (1803).
30. See Sylvia Snowiss, Judicial Review and the Law of the Constitution 38-40 (1990) (overviewing the role of Marbury in the emergence of judicial review).

31. Sciabacucchi implies that existing provisions of the DGCL are invalid because they govern matters that are external by Sciabacucchi's definition. See infra Part V.A.
32. This article's analysis concludes that DGCL section 115 expressly authorizes FFPs and precludes mandatory arbitration for all Delaware-chartered corporations. See Del. Code Ann. tit. 8, ?115 (2019); infra Part V.G.
33. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950 (Del. Ch. 2013) (citing New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment, 65 A.3d 607, 611 (Del. 2013); Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 877 (Del. Ch. 1994)).
34. New Cingular Wireless, 65 A.3d at 611.
35. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·1 (Del. Ch. Dec. 19, 2018).
36. Id. at ·23.
37. 490 U.S. 477 (1989).
38. Sciabacucchi, 2018 WL 6719718, at ·1.
39. Id. at ·23.
40. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); see also Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013) (citing Ingres Corp. v. CA, Inc., 8 A.3d 1143 (Del. 2010)); id. at 957 ("U.S. Supreme Court precedent reinforces the conclusion that forum selection bylaws are, as a facial matter of law, contractually binding.").
41. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).
42. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C.).
43. Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018).
44. Sciabacucchi, 2018 WL 6719718, at ·2.
45. See infra Part IV.C.1.
46. For an explanation of order splitting, see infra Part IV.C.1.
47. Maureen O'Hara et al., What's Not There: Odd Lots and Market Data, 79 J. Fin. 2199, 2200 (2014).
48. 722 A.2d 5 (Del. 1998); see infra Part IV.G.
49. 698 A.2d 959 (Del. Ch. 1996); see infra Part IV.G.
50. Moreover, DGCL section 202 and other sections expressly authorize organic provisions regulating transactions with purchasers who are not yet stockholders. See Del. Code Ann. tit. 8, 202 (2019). Sciabacucchi's proposition that organic provisions cannot regulate purchasers who are not yet stockholders thus conflicts with the statute's plain text. See infra Parts IV.C.2, V.A.1.
51. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 948 (Del. Ch. 2013).
52. Id. at 963.
53. Id. at 940 (quoting 3 Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Officers 3498 (6th ed. 2009)).
54. Id.
55. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·2 (Del. Ch. Dec. 19, 2018) ("But Delaware's authority as the creator of the corporation does not extend to its creation's external relationships, particularly when the laws of other sovereigns govern those relationships. Other states exercise territorial jurisdiction over a Delaware corporation's external interactions. A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims. . . . Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate.").
56. 457 U.S. 624 (1982).
57. Id. at 645.
58. VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("[T]he internal affairs doctrine applies to those matters that pertain to the relationship among or between the corporation and its

officers, directors, and shareholders.").
59. Sciabacucchi, 2018 WL 6719718, at ·1.
60. Id. at ·1 ("[A] 1933 Act claim is external to the corporation.").
61. 15 U.S.C. 77k(b), (c) (2018).
62. Sciabacucchi, 2018 WL 6719718, at ·1.
63. Malone v. Brincat, 722 A.2d 5, 14-15 (Del. 1998); see infra Part IV.F.
64. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); see infra Part IV.F.
65. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 951 (Del. Ch. 2013).
66. Del. Code Ann. tit. 8, 102(b)(1) (2019).
67. Id. 115.
68. Id. 202.
69. See infra Part V.E.
70. Del. Code Ann. tit. 8, 102(b)(1) (2019).
71. Id. 202(c)(5).
72. Id. 202(d)(2).
73. Id. 115.
74. Malone v. Brincat, 722 A.2d 5, 14-15 (Del. 1998)
75. The General Assembly could with trivial ease have constrained section 115 to regulate only claims alleging violations of the DGCL rather than claims "based upon a violation of a duty" even if no DGCL violation is alleged. The legislature avoided this narrower locution, and had it been adopted it would have rendered section 115 toothless because plaintiffs could then simply frame fiduciary breaches as violations of sister state laws, and section 115 would then not govern. For the same reason, the definitions of "internal affairs" in MITE and VantagePoint nowhere hinge on the jurisdiction that adopted the statute that was allegedly violated. The definitions are instead pragmatic and ask whether the conduct is itself internal irrespective of the jurisdictions involved.
76. See infra Part V.G.
77. See Del. Div. of. Corps., Annual Report Statistics (2018), https://corp.delaware.gov/stats.
78. Del. State Bar Ass'n Corp. L. Council, Explanation of Council Legislative Proposal 10 (2015), https://www.corporatedefensedisputes.com/files/2015/03/COUNCIL-SECOND-PROPOSAL-EXPL ANATORY-PAPER-3-6-15-U0124513.pdf.
79. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 948 (Del. Ch. 2013).
80. Id. at 949 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971)).
81. 407 U.S. 1, 15 (1972).
82. Ingres Corp. v. CA Inc., 8 A.3d 1143 (Del. 2010).
83. In re Revlon, Inc. S'holders Litig., 990 A.2d 940 (Del. Ch. 2010).
84. Id. at 964 n.8.
85. 73 A.3d 934.
86. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018)
87. Id. at ·8.
88. Id. (citations omitted).
89. Id. (citing Revlon, 990 A.2d at 960).
90. Id. (citing Revlon, 990 A.2d at 960, 964 n.8).
91. The provision at issue in Boilermakers reads as follows:
Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting

a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation shall be deemed to have notice of and consented to the provisions of this [bylaw].
Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 942 (Del. Ch. 2013).
92. Section 102(b)(1) provides that "[a]ny provision which is . . . permitted ... to be stated in the bylaws may instead be stated in the certificate of incorporation." Del. Code Ann. tit. 8, 102(b)(1) (2019).
93. Boilermakers, 73 A.3d at 950.
94. Id. at 950-51.
95. Id. at 951-52.
96. Id. at 939.
97. Id. at 943 (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)) (internal quotation marks omitted).
98. Id. at 939, 963 n.5 (citing VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005)).
99. Id.; see also Del. Code Ann. tit. 8, 109(b) (2019) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.").
100. Boilermakers, 73 A.3d at 952.
101. Id.
102. Id.
103. Id. at 963 n.6 (citing Ingres Corp. v. CA, Inc., 8 A.3d 1143 (Del. 2010)).
104. Id. at 941 (citing Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).
105. Id. at 957.
106. Id. (emphasis in original).
107. Id. at 949 (citing Stroud v. Grace, 606 A.2d 75, 79 (Del. 1992); Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985)).
108. Id. at 948.
109. Id. at 954 (quoting Grundfest &Savelle, supra note 6, at 331) (internal quotation marks omitted).
110. Id. at 949 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971)).
111. Id. at 945.
112. Id. at 940.
113. Id.
114. Id. at 959, 964 n.124 (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 51 (Del. 1993) ("It is the nature of the judicial process that we decide only the case before us . . . ."); Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479 (Del. 1989) ("[T]his Court's jurisdiction . . . does not require us to entertain suits seeking an advisory opinion or an adjudication of hypothetical questions . . . .") (citation and internal quotation marks omitted))).
115. Id. at 949.
116. Id. (citing Edward P. Welch et al., Folk on the Delaware General Corporate Law 109.4 (2009); R. Franklin Balotti &Jesse A. Finkelstein, The Delaware Law of Corporations and Business Organizations 1.10 (2014)).
117. Id. at 953 (citing Moran v. Household Int'l, Inc., 500 A.2d 1346, 1351 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 947, 957 (Del. 1985)).
118. Id. at 952 (quoting Moran, 500 A.2d at 1346) (internal quotations and citation omitted).
119. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·11 (Del. Ch. Dec. 19, 2018) (quoting Boilermakers, 73 A.3d at 952).
120. Id. at ·18-23.
121. Id. at ·19.
122. Id. at ·20.

123. Id. at ·21.
124. Id. at ·2.
125. Id.
126. Id. at ·18.
127. Id. at ·1.
128. Id. at ·2.
129. Id. at ·18. The Sciabacucchi court also found support from the fact that in ATP Tour, Inc. v. Deutscher Tennis Bund, the Delaware Supreme Court held that a bylaw that shifted litigation expenses was facially valid because it was expressly limited to a situation that "allocate[d] risk among parties in intra-corporate litigation." Id. at ·13 (citing ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014)). The Delaware Supreme Court "did not suggest that the corporate contract can be used to regulate other types of claims." Id.
130. Id. at ·18.
131. Id. at ·1 (citing Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 952 (Del. Ch. 2013); id. at ·2 ("A Delaware corporation that operates in other states must abide by the labor, environmental, health and welfare, and securities law regimes (to name a few) that apply in those jurisdictions. When litigation arises out of those relationships, the DGCL cannot provide the necessary authority to regulate the claims. This limitation applies even when the party asserting the claim happens to be a stockholder. Envision a customer who happens to own stock and who wishes to assert a product liability claim against the corporation. Even though the corporation's relationships with its customers are part of its business and affairs, and even though the customer stockholder plaintiff would own stock, the shares are incidental to the operative legal relationship. Only a state exercising its territorial authority can regulate the product liability claim. Because the claim exists outside of the corporate contract, it is beyond the power of state corporate law to regulate."); see also id. at ·11, ·34 (citing Boilermakers, 73 A.3d at 952).
132. Id. at ·11 (citing Boilermakers, 73 A.3d at 952).
133. Id. at ·18.
134. Id. at ·14 (citing Del. State Bar Ass'n Corp. L. Council, supra note 78, at 9).
135. Id. (citing Lawrence A. Hamermesh &Norman M. Monhait, Fee-Shifting Bylaws: A Study in Federalism, Inst. Del. Corp. Bus. L. (June 29, 2015), http://blogs.law.widener.edu/delcorp/2015/06/ 29/fee-shifting-bylaws-a-study-in-federalism/#sthash.O9AscFqH.dpbs).
136. Id.
137. Id. at ·17.
138. Id. (citing 15 U.S.C. 77k(e))
139. Id. at ·1.
140. Id. at ·23.
141. Id.
142. Id.
143. Id.
144. Id. at ·23.
145. Id.
146. Id. at ·1.
147. Id. at ·23 (citations omitted).
148. Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477 (1989).
149. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).
150. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).
151. Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered sections of 15 U.S.C.).
152. Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018).
153. See infra Part III.D.

154. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483 (1989) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974)) (internal quotation marks omitted).
155. Scherk, 417 U.S. at 519.
156. The Sciabacucchi court observed that "[t]here are also grounds to believe that because the Federal Forum Provisions conflict with the forum alternatives that the 1933 Act permits, the provisions could be preempted," but it did not rely on those arguments in reaching its holding. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·23 (Del. Ch. Dec. 19, 2018).
157. Rodriguez, 490 U.S. at 478 (alteration in original) (quoting the customer's agreement).
158. Id.
159. 15 U.S.C. 77o (2018).
160. Rodriguez, 490 U.S. at 481 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)) (internal quotation marks omitted). To be sure, the choice of forum can have economic value to litigants. As explained in Grundfest, supra note 2, at 5-7, section 11 claims are less frequently dismissed in state court and are therefore likely more valuable to plaintiffs if filed there. But the Supreme Court did not view forum-location decisions as affecting the substantive claim. The analysis in Boilermakers is identical. See Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 960 n.129 (Del. Ch. 2013).
161. See infra Part V.C.
162. See, e.g, Letter from Jeffrey P. Mahoney, Gen. Counsel, Council of Inst. Inv'rs, to Jay Clayton, Chairman, U.S. Sec. &Exch. Comm'n (Jan. 31, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/January%2031%202019%20SEC%20letter%20on%20mandatory%20arbitration.pdf (summarizing concerns relating to Securities Act arbitration).
163. 346 U.S. 427 (1953).
164. Rodriguez, 490 U.S. at 481 (emphasis added).
165. Id.
166. See, e.g, Drulias v. 1st Century Bancshares, Inc., 241 Cal. Rptr. 3d 843, 852 (Ct. App. 2018) ("[N]either California nor Delaware law requires forum selection clauses be freely negotiated to be enforceable. . . . Rather, a forum selection clause contained in a contract of adhesion, and thus not the subject of bargaining, is 'enforceable absent a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable.'" (internal citations and quotations omitted)); Hornberger Mgmt. Co. v. Haws &Tingle Gen. Contractors, Inc., 768 A.2d 983, 987 (Del. Super. Ct. 2000) (applying Delaware law).
167. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 958 (Del. Ch. 2013).
168. See, e.g, Ann M. Lipton, Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws, 104 Geo. L.J. 583, 601-39 (2016).
169. Rodriguez, 490 U.S. at 488.
170. See Lipton, supra note 168; Ann M. Lipton, Locked Out: The Carlyle Group Tries to Bar Investors from Court, The Advocate (Summer 2012), https://www.blbglaw.com/news/publications/data/00149/_res/id=File1/Advocate_Summer2012_Lipton.pdf; Albert H. Choi &Geeyoung Min, Contractarian Theory and Unilateral Bylaw Amendments, 104 Iowa L. Rev. 1 (2018).
171. See Jay Clayton, Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions, U.S. Sec. &Exchange Commission (Feb. 11, 2019), https://www.sec.gov/news/pub lic-statement/clayton-statement-mandatory-arbitration-bylaw-provisions; see also Zachary D. Clopton &Verity Winship, A Cooperative Federalism Approach to Shareholder Arbitration, 128 Yale L.J. Forum 169, 178 (2018) ("[T]he agency has long indicated its opposition to the inclusion of mandatory arbitration clauses in charters and bylaws. It has refused, for example, to accelerate registration statements with charters that contain such a clause.").
172. See Jay Knight &Taylor Wirth, Exclusive Forum Provisions in Charters and Bylaws: An Area of Frequent SEC

Comment, Bass, Berry &Sims: Sec. L. Exch. (Apr. 5, 2019), https://www.bassberrysecur itieslawexchange.com/exclusive-forum-provisions.
173. See infra Part VI.A.
174. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).
175. Id. at 15.
176. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013) (citing Bremen, 407 U.S. 1; Ingres Corp. v. CA, Inc., 8 A.3d 1143 (Del. 2010)).
177. Id. at 954 (quoting Grundfest &Savelle, supra note 6, at 331).
178. Id. at 958.
179. Id. at 958-59.
180. Bremen, 407 U.S. at 15.
181. Id. at 18.
182. Id.
183. Id. at 16-17.
184. Court Role and Structure, U.S. Cts., https://www.uscourts.gov/about-federal-courts/court-roleand-structure (last visited Nov. 16, 2019).
185. Bremen, 407 U.S. at 15.
186. See also 14D Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction and Related Matters 3803.1 n.36 (4th ed. 2013) (collecting cases).
187. See, e.g., Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
188. Bremen, 407 U.S. at 15.
189. See 3 Cyclopedia of Federal Procedure 4:14 (3d ed.); 16 Moore's Federal Practice 107.130 (3d ed.); Wright et al., supra note 186, 3803.1 (collecting cases). The types of cases where courts strike down forum selection clauses present scenarios than differ sharply from Sciabacucchi. For example, in America Online, Inc. v. Superior Court, the court struck down a forum selection clause that would have required California residents seeking relief under California law to litigate in Virginia state court because California public policy strongly favored consumer class actions that were unavailable in Virginia courts and because enforcing the clause would violate the California statute. 108 Cal. Rptr. 2d 699, 710-12 (Ct. App. 2001); see also DHX, Inc. v. Allianz AGF MAT Ltd., No. CV 02-06397 PA, 2002 WL 31421952 (C.D. Cal. Oct. 17, 2002) (striking down a forum selection clause selecting an English court because it-combined with a choice-of-law clause-would have deprived the plaintiff of the constitutional and statutory right to a jury trial). in other cases, even local law that "expressly proscribes the enforcement of [forum selection] clauses" will not defeat their enforcement. Renaissance Mktg., Inc. v. Monitronics Int'l, Inc., 606 F. Supp. 2d 201, 212 (D.P.R. 2009); see also Brahma Grp., Inc. v. Benham Constructors, LLC, No. 2:0-CV-970TS, 2009 WL 1065419 (D. Utah 2009).
190. Bremen, 407 U.S. at 15.
191. Gemini Techs., Inc. v. Smith &Wesson Corp., 931 F.3d 911 (9th Cir. 2019).
192. Idaho Code 29-110(1) (2019).
193. Gemini Techs., 931 F.3d at 917. The case was remanded "so that the district court may apply a traditional forum non conveniens balance analysis." Id.
194. Id. at 916.
195. This analysis does not address FFPs that designate a specific federal district court in which a claim must be brought.
196. Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061 (2018).
197. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·1 (Del. Ch. Dec. 19, 2018) ("In 2018, the Supreme Court of the United States held that state courts continue to have concurrent jurisdiction over claims by private plaintiffs and that defendants cannot remove actions filed in state court to federal court." (citing Cyan, 138 S. Ct. at 1061)).

198. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
199. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 948 (Del. Ch. 2013).
200. Id. at 949 (emphasis added).
201. Id. (citations omitted).
202. Id. (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971)).
203. Id. at 941.
204. Id.
205. Id. at 949; see 1 Edward P. Welch et al., Folk on the Delaware General Corporation Law 109.04 (6th ed. 2015) ("Bylaws are presumed to be valid. Courts will interpret a bylaw in a manner consistent with the law rather than striking it down. The rules of construction used to interpret statutes, contracts, and other written instruments apply to bylaws." (citations omitted)); cf. Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 342-43 (Del. 1983) (noting that "the rules which are used to interpret statutes, contracts, and other written instruments are applicable when construing corporate charters and bylaws").
206. In re Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010); see also Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc., No. 2017-0785-AGB, 2018 WL 4057012, at ·20 (Del. Ch. Aug. 27, 2018); id. at ·20 n.174.
207. Cedarview, 2018 WL 4057012, at ·20 n.174 (alteration in original) (citation omitted) ("Boilermakers involved challenges to bylaws, rather than a charter provision, but Delaware courts have held that the legal principles relevant to interpreting a charter provision and a bylaw are identical." (citing Boilermakers, 73 A.3d at 948 n.55)); see also Stroud v. Grace, 606 A.2d 75, 96 (Del. 1992) (supporting the presumptive validity of bylaws); Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 407 (Del. 1985) (supporting the presumptive validity of bylaws).
208. Sciabacucchi v. Salzberg, C.A. No. 2017-0931-JTL, 2018 WL 6719718, at ·17 (Del. Ch. Dec. 19, 2018).
209. Id.
210. For example, the final prospectus for the IPO of Inspire Medical Systems, Inc. discloses that "[i]n connection with our IPO, certain of our existing stockholders and members of our board of directors purchased shares of our common stock from the underwriters at the initial public offering price of $16.00 per share, and on the same terms as other investors in our IPO." Inspire Med. Sys., Inc., Prospectus (Form 424B4) 146 (Dec. 6, 2018), https://www.sec.gov/Archives/edgar/ data/1609550/000104746918007527/a2237281z424b4.htm; see also Kiniksa Pharm., Ltd., Prospectus (Form 424B) 179 (Jan. 31, 2019), https://www.sec.gov/Archives/edgar/data/1730430/ 000104746919000331Za2237624z424b4.htm ("Baker Brothers and HH RSV-XVII Holdings Limited, each a beneficial owner of more than 5% of our Class A common shares, purchased 3,000,000 and 1,388,888 Class A common shares, respectively, in our initial public offering at the initial public offering price of $18.00 per share."); Verrica Pharm., Inc., Prospectus (Form 424B) 131 (June 14, 2018), https://www.sec.gov/Archives/edgar/data/1660334/000119312518194500/d361077d424b4. htm ("Certain of our existing beneficial owners of more than 5% of our voting securities, including entities affiliated with certain of our directors, have agreed to purchase an aggregate of 1,500,000 shares of our common stock in this offering at the initial public offering price per share.").
211. For example, the final prospectus supplement for a follow-on offering by Intercept Pharmaceuticals, Inc. explains that "[o]ur Chief Executive Officer and certain members of our Board of Directors have agreed to purchase an aggregate of 16,795 shares of our common stock in this offering at the price offered to the public and on the same terms as the other purchasers in this offering." Intercept Pharm., Inc., Final Prospectus Supplement (Form 424B5), at S-5 (Apr. 5, 2018), https://www.sec.gov/Archives/edgar/data/1270073/000114420418019603/tv490441_424b5.htm; see also Axovant Sci. Ltd., Prospectus Supplement (Form 424B5), at S-12 (Dec. 14, 2018), https://www.sec.gov/Archives/edgar/data/1636050/000104746918007702/a2237357z424b5.htm ("RSL, our majority shareholder, has agreed to purchase 10,000,000 common shares in this offering at the public offering price of $1.00 per share on the same terms as those offered to the public."); Akebia Therapeutics, Inc, General Statement of Acquisition of

Beneficial Ownership (Schedule 13D/A) 9 (Jan. 19, 2016), https://www.sec.gov/Archives/edgar/data/1376359/000114420416076141/v429206_sc13da.htm ("On January 12, 2016, in connection with a secondary sale of the Issuer's Common Stock to the public, [preexisting stockholders with positions in excess of 5 percent of an equity class of the issuer's securities] acquired from the Issuer an aggregate of 444,444 shares of the Issuer's Common Stock for a purchase price of $9.00 per share, or an aggregate of $4,000,000.").

212. See, e.g, Joseph A. Grundfest, Morrison, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform, 41 J. Corp. L. 1 (2015).

213. Ryan Garvey et al., Why Do Traders Split Orders? 52 Fin. Rev. 233, 255 (2017).

214. Id. at 234 (citing James J. Angel et al., Equity Trading in the 21st Century, 1 Q.J. Fin. 1 (2011); James J. Angel et al., Equity Trading in the 21st Century: An Update, 5 Q.J. Fin. 1 (2015); Michael J. Barclay &Jerold B. Warner, Stealth Trading and Volatility: Which Trades Move Prices? 34 J. Fin. Econ. 281 (1993); Sugato Chakravarty, Stealth Trading: Which Traders' Trades Move Stock Prices? 61 J. Fin. Econ. 289 (2001); Gordon J. Alexander &Mark A. Peterson, An Analysis of Trade-Size Clustering and Its Relation to Stealth Trading, 84 J. Fin. Econ. 435 (2007)).

215. See, e.g., Gerry Tsoukalas et al., Dynamic Portfolio Execution, 65 Mgmt. Sci. 1949, 2015 (2019).

216. Id. at 2035.

217. Valeriia Klova &Bernt Arne Ødegaard, Equity Trading Costs Have Fallen Less Than Commonly Thought: Evidence Using Alternative Trading Cost Estimators 11 (UiS Working Papers in Econ. &Fin., Paper No. 2018/4, 2019), https://ideas.repec.org/p/hhs/stavef/2018_004.html.

218. Soohun Kim &Dermot Murphy, The Impact of High-Frequency Trading on Stock Market Liquidity Measures 2 (June 2013) (unpublished manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278428).

219. Gabriella Vaglica et al., Statistical Identification with Hidden Markov Models of Large Order Splitting Strategies in an Equity Market, 12 New J. Physics 075031, at 2 (2010) (collecting scholarship regarding order splitting).

220. O'Hara et al., supra note 47, at 2200 (observing that "[a]lgorithmic trading routinely slices and dices orders into smaller pieces").

221. Id. at 2215.

222. Klova &Ødegaard, supra note 217, at 2; id. at 1 (noting that "innovation has led to a huge drop in order sizes due to order splitting").

223. See, e.g., Garvey et al., supra note 213, at 240 (providing the example of a trader who submits an order into an electronic trading platform to purchase 1,000 shares and finds that "400 shares execute through two separate 200-share trades").

224. O'Hara et al., supra note 47, at 2200.

225. Charles McGrath, 80% of Equity Market Cap Held by Institutions, Pensions &Inv. (Apr. 25, 2017), https://www.pionlme.com/article/20170425/INTERACTIVE/170429926/80-of-equity-mar ket-cap-held-by-institutions.

226. Verified Class Action Complaint for Declaratory Judgement ¶13, Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 29, 2017).

227. Section 152 of the DGCL regulates the forms of "subscriptions to, or the purchase of, the capital stock" and specifies that consideration "shall be paid in such form and in such manner as the board of directors shall determine." Del. Code Ann. tit. 8, 152 (2019). The board may authorize "consideration consisting of cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof." Id. A charter provision regulating the form of acceptable consideration by, for example, requiring that all payments be in cash regulates a transaction with a person who is not a stockholder and to whom no fiduciary duty is owed. Id.

228. Section 157 of the DGCL permits the creation of rights on options entitling persons who were not previously stockholders to acquire shares in the corporation. The terms of acquisition upon exercise "shall be such as stated

in the certification of incorporation, or board resolutions." Id. 157(b).
229. Section 166 of the DGCL provides that a "subscription for stock of a corporation . . . shall not be enforceable against a subscriber, unless in writing and signed by the subscriber or by such subscriber's agent." Id. 166. A corporate charter can define the nature of the writing sufficient to establish an enforceable subscription agreement. Such a restriction would not violate section 102(b)(1) despite the fact that it governs a purchaser who is not yet a stockholder.
230. Section 202 of the DGCL permits charter and bylaw provisions that act as transfer restrictions on purchasers who are not yet stockholders. Id. 202. Section 202 is analyzed in greater detail in Part V.A.
231. Uber Techs., Inc., Prospectus (Form 424B) 266 (Apr. 11, 2019), https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm (indicating the sale of 3,376,000 shares in the IPO for gross proceeds of $151,920,000).
232. Roku, Inc., Prospectus (Form 424B) 133 (Sept. 27, 2017), https://ir.roku.com/node/6671/ html.
233. Id.
234. 965 A.2d 763 (Del. Ch. 2009).
235. Id. at 800-01.
236. Gerald Gunther, Learned Hand: The Man and the Judge xv (2d ed. 2011).
237. Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism 200 (2004).
238. Stephen M. Bainbridge, Insider Trading Law and Policy 8 (2014).
239. Id.
240. Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir. 1951).
241. Bainbridge, supra note 238, at 9.
242. "We cannot accept [the] contention that an insider's responsibility is limited to existing stockholders and that he has no special duties when sales of securities are made to non-stockholders." In re Cady, Roberts &Co., 40 S.E.C. 907, 913 (Nov. 8, 1961).
243. United States v. Chestman, 947 F.2d 551, 565 n.2 (2d Cir. 1991) ("The insider's fiduciary duties, it should be noted, run to a buyer (a shareholder-to-be) and to a seller (a pre-existing shareholder) of securities, even though the buyer technically does not have a fiduciary relationship with the insider prior to the trade.").
244. Principles of Corporate Governance 5.04 cmt. d (Am. Law. Inst. 1994).
245. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·2 (Del. Ch. Dec. 19, 2018).
246. Singer v. Magnavox Co., 380 A.2d 969, 981 (Del. 1977), overruled on other grounds by Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); see also Hilton v. Guyot, 159 U.S.113, 163 (1894); Brocalsa Chem. Co. v. Langsenkamp, 32 F.2d 725 (6th Cir. 1929); FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 855-57 (Del. Ch. 2016) (citing Singer, 380 A.2d at 981-82); Eurofins Panlabs, Inc. v. Ricerca Biosciences, LLC, No. 8431-VCN, 2014 WL 2457515, at ·18 (Del. Ch. May 30, 2014); McBreen v. Iceco, Inc., 139 N.E.2d 845 (Ill. App. Ct. 1956); Gillespie v. Blood, 17 P.2d 822 (Utah 1932); 73 Am. Jur. 2d Statutes 357-59 (2019); 69 Am. Jur. 2d Securities Regulation, State 8 (2019); 79 C.J.S. Supp. Securities Regulation 189 (2019); 14 Fletcher, Cyclopedia Corporations 6742 (1975).
247. Sandberg v. McDonald, 248 U.S. 185, 195 (1918).
248. Antonin Scalia &Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 268-69 (2012).
249. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).
250. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
251. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).
252. For example, in FdG Logistics LLC v. A&R Logistics Holdings, Inc., Chancellor Bouchard interpreted section 2708 of Delaware's Uniform Commercial Code "as intending to permit contracting parties to incorporate the law of Delaware, which primarily would concern its common law, to decide questions concerning the interpretation and enforceability of a contract. What section 2708 does not stand for, in my view, is a mechanism for the wholesale importation of every provision of Delaware statutory law into the commercial relationship of contracting parties."

131 A.3d 842, 855-56 (Del. Ch. 2016) (citing Del. Code Ann. tit. 6, 2708).
253. Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (citing Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2409 (2015); Mich. v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).
254. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); see Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1082 (Del. 2011) ("The term 'internal affairs' encompasses 'those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders.' The doctrine requires that the law of the state ... of incorporation must govern those relationships." (footnote omitted) (quoting VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005))); McDermott Inc. v. Lewis, 531 A.2d 206, 214 (Del. 1987); see also Kamen v. Kamper Fin. Servs., Inc., 500 U.S. 90, 106 (1991).
255. VantagePoint, 871 A.2d at 1113.
256. Id. (quoting McDermott, 531 A.2d at 216).
257. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 943 (Del. Ch. 2013).
258. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·1 (Del. Ch. Dec. 19, 2018).
259. Id. at ·22.
260. See also Mohsen Manesh, The Contested Edges of Internal Affairs 54, 87 Tenn. L. Rev. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3435165 ("The fact that the relevant rights arise under federal securities law-and not state corporate law-should not make a difference. After all, forum selection provisions covering state corporate law claims regulate a shareholder's rights arising not just under state corporate law, but also under generally applicable rules of civil procedure.").
261. See infra Part IV.F.
262. 15 U.S.C. 77k(b)(3) (2018).
263. See infra Part IV.G.
264. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 961 (Del. Ch. 2013)
265. Malone v. Brincat, 722 A.2d 5 (Del. 1998).
266. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996).
267. Boilermakers, 73 A.3d at 961 (citing Bach v. Amedisys, Inc., No. 10-395-BAJ-CN, 2010 WL 4318755 (M.D. La. Oct. 22, 2010)) (characterizing Bachv. Amedisys, Inc. as "describing four securities class actions and four derivative suits that arose out of the same facts").
268. In re Groupon Derivative Litig., 882 F. Supp. 2d 1043, 1051 (N.D. Ill. 2012).
269. Malone, 722 A.2d at 13.
270. Id. at 10 (footnote omitted). Delaware's definition of "materiality" is identical to that applied in federal securities law. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985); see also Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994).
271. Malone, 722 A.2d at 10.
272. Id. The "duty of disclosure is not an independent duty, but derives from the duties of care and loyalty." Pfeffer v. Redstone, 965 A.2d 676, 684 (Del. 2009) (quoting Pfeffer v. Redstone, No. 2317-VCL, 2008 WL 308450, at ·8 (Del. Ch. Feb. 1, 2008)).
273. Malone, 722 A.2d at 11.
274. Heng Ren Silk Rd. Invs. LLC v. Chen, No. 2019-0010-JTL, 2019 WL 3207210, at ·4 (Del. Ch. July 16, 2019).
275. Wilkin v. Narachi, No. 12412-VCMR, 2018 WL 1100372, at ·14 (Del. Ch. Feb. 28, 2018) ("To successfully state a duty of loyalty claim against directors for providing information in the absence of a request for shareholder action, a stockholder must allege that he received 'false communications' from directors who were 'deliberately misinforming shareholders about the business of the corporation.'" (quoting Orloff v. Shulman, No. Civ. A. 852-N, 2005 WL 3272355, at ·14 (Del. Ch. Nov. 23, 2005))); id. ("'[W]hen shareholder action is absent, plaintiff must show reliance, causation, and damages' in order to establish a breach of the duty of loyalty." (quoting A.R. DeMarco Enters., Inc. v. Ocean Spray Cranberries, Inc., No. Civ. A. 19133-nC, 2002 WL 31820970, at ·4 n.10 (Del. Ch. Dec. 4, 2002))).

276. Id. (third alteration in original) (quoting Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 158 (Del. Ch. 2004)).
277. Id. (alteration in original) (quoting Metro Commc'n, 854 A.2d at 158).
278. Clark v. Davenport, No. 2014-0839-JTL, 2019 WL 3230928, at ·9 (Del. Ch. July 18, 2019) ("[The] standard for evaluating a claim under Malone [is] 'similar to but more stringent than, the level of scienter required for common law fraud.' " (quoting Metro Commc'n, 854 A.2d at 158)); id. ("For a common-law fraud claim, a plaintiff can show reckless indifference, but Malone requires knowing misconduct." (quoting Metro Commc'n, 854 A.2d at 158 n.88)).
279. Oklahoma Firefighters Pension &Ret. Sys. v. Corbat, No. 12151-VCG, 2017 WL 6452240, at ·1 (Del. Ch. Dec. 18, 2017).
280. 911 A.2d 362 (Del. 2006).
281. Id. at 370.
282. Corbat, 2017 WL 6452240, at ·14.
283. In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).
284. In re Groupon Derivative Litig., 882 F. Supp. 2d 1043, 1047 (N.D. Ill. 2012).
285. Id. at 1046.
286. Id. at 1048 (alterations in original) (quoting Brudno v. Wise, No. Civ. A. 19953, 2003 WL 1874750, at ·4 (Del. Ch. Apr. 1, 2003)).
287. Id. at 1050.
288. Id. (quoting Cucci v. Edwards, No. SAVC 07-532 PSG, 2007 WL 3396234, at ·2 (C.D. Cal. Oct. 31, 2007)).
289. Id. at 1051.
290. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·21 (Del. Ch. Dec. 19, 2018). This argument is distinct from the proposition that the claim is external because it "does not involve rights or relationships that were established by or under Delaware law." Id. at ·2.
291. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).
292. Herman &MacLean v. Huddleston, 459 U.S. 375, 381-82 (1983) (footnotes omitted).
293. 15 U.S.C. 77k(a) (2018).
294. Id. 77k(c).
295. In re Countrywide Fin. Corp. Sec. Litig., 588 F. Supp. 2d 1132, 1174 (C.D. Cal. 2008).
296. In re WorldCom, Inc. Sec. Litig., No. 02-Civ-3288, 2005 U.S. Dist. LEXIS 4193, at ·24-25 (S.D.N.Y. Mar. 21, 2005); Escott v. BarChris Constr. Corp., 283 F. Supp. 643, 697 (S.D.N.Y. 1968).
297. BarChris, 283 F. Supp. at 688.
298. WorldCom, 2005 U.S. Dist. LEXIS 4193, at ·37 n.12 (quoting Laven v. Flanagan, 695 F. Supp. 800, 812 (D.N.J. 1988)).
299. Herman &MacLean v. Huddleston, 459 U.S. 375, 387 (1983); see also 17 C.F.R. 240.10b-5 (2019) (employment of manipulative and deceptive devices).
300. Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998).
301. The Sciabacucchi plaintiff's counsel suggest that my position regarding the validity of FFPs as internal matters has been inconsistent. In their complaint, after observing that I proposed the federal forum provision, they stated, "[i]nterestingly, Professor Grundfest previously took a different view and recognized that a provision limiting plaintiff's ability to bring securities claims 'would not be seeking to regulate the stockholder's rights as a stockholder' and, so, 'would be extended beyond the contract that defines and governs the stockholders' rights.'" Sciabacucchi Complaint, supra note 2, ¶47 n.18; Sciabacucchi v. Salzberg, No. 2017-0931, 2018 WL 6719718 (Del. Ch. Dec. 29, 2017) (quoting Grundfest &Savelle, supra note 6, at 370).
This matter is put to rest by quoting the full passage from the relevant text and admiring the art with which the plaintiffs' language, here italicized, is extracted from the original:
Charter provisions are interpreted as though they are contract provisions, and inasmuch as contract rights can legitimately be regulated through forum selection provisions, it follows that stockholders' rights to pursue intra-

corporate claims can also be regulated through ICFS [intra-corporate forum selection] provisions. To be sure, this conclusion would arguably not follow (or not hold as strongly) if the forum selection provision sought to regulate the right to pursue causes of action that were not intra-corporate in nature because then the provision would not be seeking to regulate the stockholder's rights as a stockholder and would be extended beyond the contract that defines and governs the stockholders' rights.

Grundfest &Savelle, supra note 6, at 369-70 (emphasis added) (footnotes omitted).

As is apparent from the full text, the quoted snippet is carefully qualified in the original and does not support the far broader proposition for which it is cited. The full text begins with the observation that the conclusion would "arguably not follow (or not hold as strongly)." Id. at 369 (emphasis added). But the snippet fails to reference that essential qualification and incorrectly suggests that the quoted language is unconditional. Further, the article from which the quote is extracted addresses the intracorporate nature of the claim in terms of supporting a sufficient condition. It does not suggest that the intra-corporate nature of the ICFS provision is a necessary constraint. In that regard, the article and then-Chancellor Strine's opinion in Boilermakers are of a single mind. It is Sciabacucchi and the plaintiffs' complaint that seek, incorrectly, to transform Boilermakers' sufficiency analysis into a necessary condition.

Moreover, it is apparent in context that the challenge addressed by intra-corporate forum selection provisions occurs in connection with merger-related disclosure litigation that gives rise to Exchange Act claims, not Securities Act claims, if litigated under federal law. However, Exchange Act claims are subject to exclusive federal jurisdiction. FFPs are unnecessary in that context. It stretches the article's logic beyond reason to assume that an analysis that applies to Exchange Act claims (where FFPs are unnecessary) also applies to Securities Act claims (where concurrent jurisdiction creates a demand for FFPs).

302. David A. Westenberg, Initial Public Offerings: A Practical Guide to Going Public 12:3 (2d ed. 2012).

303. Id. 12:7.1.

304. Id. 12:7.2[A] (citing Escott v. BarChris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968)).

305. Id.

306. Id.

307. Id.

308. Id.

309. Id.

310. See, e.g, D. Anthony Rodriguez, Building the Section 11 "Due Diligence" Defense for Outside Directors, Bus. L. Today, July 2012, at 1, 2 ("To build a strong due diligence defense to present at summary judgment, an outside director will establish his or her attendance at board and committee meetings; dialogue with management about key policies and practices, the state of the business, and unusual developments; reasonable reliance on management, the company's retained professionals, and other sources; and that he or she believed the challenged statements were consistent with his or her knowledge of the company at the time. . . . The outside director should show his or her attendance at board and committee meetings, how he or she prepared for those meetings, and information (relevant to the case) to which he or she paid particular attention. Each outside director also should describe what he or she did over the course of his or her tenure, before the statement at issue was made, to become familiar with the company .... The outside director also should describe processes within the company, particularly those that he or she was aware of, for drafting and verifying the statement at issue before it reached the outside director. On this point, before litigation, outside directors should consider requesting an annual briefing on how the company prepares its SEC filings.").

311. 15 U.S.C. 77k(b) (2018). The registration statement is generally amended on several occasions before being declared effective by the Commission's staff. The declaration of effectiveness grants permission for the issuer and underwriter to sell the shares on offer. Section 11 liability attaches only to the version of the registration statement declared effective and not to previous incarnations of that document.

312. Id. 77k(a)(2).

313. Id. 77f(a).
314. Section 11(f)(1) of the Securities Act creates joint and several liability, but subparagraph (f)(2)(A) limits the liability of outside directors in accordance with section 21D of the Exchange Act. Id. 77k(f). Section 21D in turn requires that the "trier of fact specifically determine[] that such covered person knowingly committed a violation of the securities laws." Id. 78u-4(f)(2)(A).
315. Id. 77k(c).
316. Paul Vizcarrondo, Jr. &Bradley R. Wilson, Liabilities Under the Federal Securities Laws 59 (Dec. 2016) (unpublished manuscript available at https://docslide.net/documents/liabilities-underthe-federal-securities-prepare-the-original-version-of-this-outline.html) ("The PSLRA, through 21D(f) of the Exchange Act, instituted proportionate rather than joint and several liability for any violation that is not 'knowingly committed' by a 'covered person.' The term 'covered person' is defined as one liable under either the Exchange Act or, in the case of outside directors, under 11 of the Securities Act. The provision also creates an explicit right of contribution: 'covered persons have an explicit right to contribution from (1) other 'covered persons held proportionately or jointly and severally liable, or (2) any other person responsible for the violation. Moreover, for purposes of 21D(f) only, 'reckless conduct by a covered person shall not be construed to constitute a knowing commission of a violation of the securities laws by that covered person. A defendant is liable for an uncollectible share in proportion to his share, up to 50 percent of the dollar amount of the defendant s original proportionate share. if an individual plaintiff has a net worth of $200,000 or less and the judgment is equal to more than 10 percent of her net worth, all defendants are jointly and severally liable for the uncollectible share." (quoting 15 U.S.C. 78u-4 (2018))).
317. In re WorldCom, Inc. Sec. Litig., 346 F. Supp.2d 628 (S.D.N.Y. 2004).
318. Gretchen Morgenson, 10 Ex-Directors from WorldCom to Pay Millions, N.Y. Times (Jan. 6, 2005), https://www.nytimes.com/2005/01/06/business/10-exdirectors-from-worldcom-to-pay-millions.html.
319. Id.
320. A Gedankenexperiment is a thought experiment that "considers a hypothesis, theory, or principle for the purpose of thinking through its consequences." See Thought Experiment, Wikipedia, https://en.wikipedia.org/wiki/Thought_experiment (last visited Nov. 20, 2019).
321. To be sure, if I am misreading Sciabacucchi, and if the implication of that opinion is that Delaware is ready to concede to California and other states the authority to regulate boardroom conduct that has traditionally been viewed as internal and subject to Delaware's exclusive control, then the internal contradiction is resolved because Delaware will have voluntarily agreed to abandon a large part of the authority by which it regulates Delaware-chartered entities. This would constitute a major retreat from the position adopted by Delaware's Supreme Court in VantagePoint and could be the first step in unraveling Delaware's position as the preeminent chartering jurisdiction. See generally Manesh, supra note 260.
322. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982).
323. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950 (Del. Ch. 2013) (citing New Cingular Wireless PCS v. Sussex Cty. Bd. of Adjustment, 65 A.3d 607, 611 (Del. 2013); Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 877 (Del. Ch. 1994)).
324. New Cingular Wireless, 65 A.3d at 611.
325. Del. Comp. Rating Bureau, Inc. v. Ins. Comm'r, No. 4318-VCL, 2009 WL 2366009, at ·4 (Del. Ch. July 24, 2009) (quoting Ingram v. Thorpe, 747 A.2d 545, 547 (Del. 2000)); Rubick v. Sec. Instrument Corp., 766 A.2d 15, 18 (Del. 2000); Fid. &Deposit Co. of Md. v. State of Del. Dep't of Admin. Servs., 830 A.2d 1224, 1228 (Del. Ch. 2003); see also In re Adoption of Swanson, 623 A.2d 1095, 1096-97 (Del. 1993) ("If the statute as a whole is unambiguous and there is no reasonable doubt as to the meaning of the words used, the court's role is limited to an application of the literal meaning of those words. However, where ... the Court is faced with a novel question of statutory construction, it must seek to ascertain and give effect to the intention of the General Assembly as expressed by the statute itself." (citation omitted)).
326. Kofron v. Amoco Chems. Corp., 441 A.2d 226, 230 (Del. 1982).

327. Klotz v. Warner Commc'ns, Inc., 674 A.2d 878, 879 (Del. 1995) (quoting 2A Norman J. Singer, Sutherland Statutory Construction 47.01 (5th ed. 1992)).
328. Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 877 (Del. Ch. 1994) (alteration in original) (quoting State v. Lillard, 531 A.2d 613, 617 (Del. 1987)).
329. State v. Taye, 54 A.3d 1116, 1121 (Del. Super. Ct. 2009).
330. Id. (citing Del. Code tit. 11, 201(2)); see also Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").
331. Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 536 (1947).
332. Lawrence M. Solan, The New Textualists' New Text, 38 Loy. L.A. L. Rev. 2027, 2055 (2005).
333. Richardson v. Bd. of Cosmetology &Barbering, 69 A.3d 353, 357 (Del. 2013).
334. Scalia &Garner, supra note 248, at 430.
335. Id. at 180; see William N. Eskridge, Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 1198 (5th ed. 2014) ("Avoid interpreting a provision in a way that is inconsistent with the overall structure of the statute or with another provision ....") (citations omitted)); see also Lindh v. Murphy, 521 U.S. 320, 336 (1997) (favoring the interpretation that "accords more coherence" to statutory text).
336. Lindh, 521 U.S. at 336.
337. Klotz v. Warner Commc'ns, Inc., 674 A.2d 878, 879 (Del. 1995) (quoting 2A Norman J. Singer, Sutherland Statutory Construction 47.01 (5th ed. 1992)).
338. Scalia &Garner, supra note 248, at 170.
339. Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2118 (2016) (book review) (quoting Elena Kagan, Justice, U.S. Supreme Court, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:09 (Nov. 17, 2015), http://today.law.harvard. edu/in-scalia-lecture-kagan-discusses-statutory-interpretation).
340. Section 202 states in material part that "[a] written restriction or restrictions on transfer . . . or on the amount of the corporation's securities that may be owned by any person or group of persons, if permitted by this section and noted conspicuously on the certificate or certificates representing the security or securities so restricted . . . may be enforced against the holder of the restricted security or securities, or any successor or transferee . . . Unless noted conspicuously on the certificate ... a restriction, even though permitted by this section, is ineffective except against a person with actual knowledge of the restriction." Del. Code Ann. tit. 8, 202(a) (2019).
341. See, e.g, 2 David A. Drexler et al., Delaware Corporation Law and Practice 22.01 (Matthew Bender 2018); Jesse A. Finkelstein, Stock Transfer Restriction upon Alien Ownership Under Section 202 of the Delaware General Corporation Law, 38 Bus. Law. 573 (1983).
342. Robert L. Reed, Section 202 on the Delaware Corporation Law-Per Se Rules for Stock Transfer Restrictions, 9 B.C. Indus. &Comm. L. Rev. 405, 417 (198).
343. See supra notes 227-29.
344. Del. Code Ann. tit. 8, 202(c)(5) (2019).
345. Id. 202(d).
346. Id. 202(d)(2).
347. Drexler et al., supra note 341.
348. Capital Grp. Cos. v. Armour, No. 422-N, 2005 WL678654 (Del. Ch. Mar. 15, 2005).
349. Id. at ·9.
350. Del. Code Ann. tit. 8, 202(d)(2) (2019).
351. Id.
352. To be valid and enforceable, DGCL section 202(a) requires that transfer restrictions be conspicuously noted on the certificate. Absent such notice, restrictions are effective only as against persons with actual knowledge. Del. Code Ann. tit. 8, 202(a) (2019). These notice restrictions do not apply to FFPs because they are not framed as

transfer restrictions.
353. Del. Code Ann. tit. 8, 102(b) (2019).
354. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950 (Del. Ch. 2013).
355. See Grundfest, supra note 2, at 2-5.
356. Id.
357. Del. Code Ann. tit. 8, 115 (2019).
358. Id. 102(b)(1).
359. Jeffrey L. Kirchmeier &Samuel A. Thumma, Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century, 94 Marq. L. Rev. 77, 94 (2010).
360. The statute employs the gerundive form of the verbs "create," "define," "limit," and "regulate"; for ease of reference, the cited definitions are of the verb that serves as the root.
361. Create, Webster's Third New International Dictionary of the English Language, Unabridged (1993) [hereinafter Webster's Third].
362. Boilermakers, 73 A.3d at 951-52.
363. Define, Black's Law Dictionary (11th ed. 2009) [hereinafter Black's].
364. Limit, Webster's Third, supra note 361.
365. Regulate, Black's, supra note 363.
366. Ingres Corp. v. CA, Inc., 8 A.3d 1143, 1146 (Del. 2010) (second alteration in original) (quoting Capital Grp. Cos. v. Armour, No. Civ. A. 422-N, 2004 WL 2521295, at ·3 (Del. Ch. Nov. 3, 2004)).
367. Manesh, supra note 260, at 41-42 ("Delaware corporate law is routinely touted as being broadly enabling, containing few mandatory rules, and permitting an expansive freedom for the private ordering of internal corporate governance through the provisions of a corporation's governing documents."); id. at 41 n.220 (citing Shintom Co. v. Audiovox Corp., 888 A.2d 225, 227 (Del. 2005) (describing Delaware's corporation statute as "an enabling statute that provides great flexibility")); Jones Apparel Grp., Inc. v. Maxwell Shoe Co., 883 A.2d 837, 845 (Del. Ch. 2004) (Strine, V.C.) (noting that Delaware corporate law "is widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints"); In re Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973, 976 (Del. Ch. 1997) (Allen, C.) (explaining that "unlike the corporation law of the nineteenth century, modern corporation law contains few mandatory terms; it is largely enabling in character"); Jill E. Fisch, Governance by Contract: The Implications for Corporate Bylaws, 106 Cal. L. Rev. 373, 379 (2018) ("By virtue of its largely enabling structure, Delaware corporate law is consistent with the private ordering approach."); Lawrence A. Hamermesh, The Policy Foundations of Delaware Corporate Law, 106 Colum. L. Rev. 1749, 1783 (2006) ("There has been a strong tendency in Delaware corporate policymaking to broaden that room for private ordering."); Leo E. Strine, Jr., Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan &Kamar's Price Discrimination in the Market for Corporate Law, 86 Cornell L. Rev. 1257, 1260 (2001) (describing Delaware's approach to corporate law as one that is "largely enabling and provides a wide realm for private ordering").
368. Lawrence A. Hamermesh &Norman M. Monhait, Fee-Shifting Bylaws: A Study in Federalism, Inst. Del. Corp. Bus. L. (June 29, 2015), http://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylawsa-study-in-federalism/#sthash.O9AscFqH.dpbs).
369. Del. Code Ann. tit. 8, 115 (2019).
370. Section 115 also does not require that internal claims be based exclusively on violations by directors or officers. The Sciabacucchi court's suggestion that an outsider's participation causes internal claims to become external is thus also inconsistent with section 115's text.
371. 15 U.S.C. 78aa (2019).
372. Del. Code Ann. tit. 8, 115 (2019) (emphasis added).
373. A similar analysis and distinction is found in the Model Business Corporations Act's forum selection

provisions, which expressly authorize the inclusion of "additional specified courts or all courts of this state or courts in this state (such as federal courts) or in one or more additional jurisdictions with a reasonable relationship to the corporation. In addition, the provision may prioritize among the specified courts." Model Bus. Corp. Act 2.08 cmt. (Am. Bar Ass'n 2016).
374. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013)
375. New Section 115 confirms, as held in Boilermakers Local 154 Retirement Fund v. Chevron Corporation, 73 A.3d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State. Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced. Section 115 is not intended to foreclose evaluation of whether the specific terms and manner of adoption of a particular provision authorized by section 115 comport with any relevant fiduciary obligation or operate reasonably in the circumstances presented. For example, such a provision may not be enforceable if the Delaware courts lack jurisdiction over indispensable parties or core elements of the subject matter of the litigation. Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court.
Synopsis 5, S. 75, 148th Gen. Assemb. (Del. 2015) (emphasis added).
376. Id. (emphasis added).
377. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·14 (Del. Ch. Dec. 19, 2018).
378. Hamermesh &Monhait, supra note 368.
379. Id.
380. Id. (citing Hamermesh &Monhait, supra note 368). Hamermesh and Monhait caution that the views expressed in their article are "solely those of the authors, and do not necessarily represent the views of the Association, the Section, or its Council." Hamermesh &Monhait, supra note 368, at n.1. The article also appeared after the enactment of section 115. To the extent the Chancery Court viewed the authors' involvement as a relevant form of legislative history, there is substantial precedent against deference to such post-enactment statements. See, e.g., Cobell v. Norton, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("Post-enactment history is not only oxymoronic but inherently entitled to little weight."), cited with approval by Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 530 n.27 (2007)). Sullivan v. Finkelstein, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part) (observing that post-enactment legislative history "should not be taken seriously"); Bruesewitz v. Wyeth, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.").
381. Sciabacucchi, 2018 WL 6719718, at ·14.
382. Id. (final alteration in original) (quoting Hamermesh &Monhait, supra note 368).
383. Hamermesh &Monhait, supra note 368 (emphasis added).
384. Id. (footnotes omitted).
385. Id. (footnote omitted).
386. Sciabacucchi, 2018 WL 6719718, at ·16.
387. Del. Code Ann. tit. 8, 167 (2019).
388. Id. 168(b).
389. Id. 115 (emphasis added).
390. Atlantic Cleaners &Dyers Inc. v. United States, 286 U.S. 427, 433 (1932); see also Scalia &Garner, supra note

248, at 170.
391. Del. Code Ann. 8, 115 (2019) (emphasis added).
392. Fed. R. Civ. P. 12; Del. Ch. Ct. R. 12.
393. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 963 (Del. Ch. 2013).
394. Id. at 940 (quoting 3 Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Officers 3498 (6th ed. 2009)).
395. Id.
396. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).
397. Id.; see also New York v. United States, 326 U.S. 572, 575 (1946) ("One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract."); United States v. Blackburn, 461 F.3d 259, 262 n.2 (2d Cir. 2006) (noting that courts are "empowered to decide concrete cases and not abstract principles").
398. See, e.g., Clopton &Winship, supra note 171; Lipton, supra note 170; Andrew Rhys Davies, The Legality of Mandatory Arbitration Bylaws, Harv. L. Sch. F. on Corp. Governance &Fin. Reg. (Sept. 13, 2018), https://corpgov.law.harvard.edu/2018/09/13/the-legality-of-mandatory-arbitration-bylaws; Lawrence A. Hamermesh, Delaware Law Status of Bylaws Regulating Litigation of Federal Securities Law Claims, Harv. L. Sch. F. on Corp. Governance &Fin. Reg. (Nov. 29, 2018), https://corpgov.law. harvard.edu/2018/11/29/delaware-law-status-of-bylaws-regulating-litigation-of-federal-securitieslaw-claims; Ann Lipton, Litigation Limits, Corporate Governance, and Securities Law-A New Hope, Bus. L. Prof Blog (Dec. 19, 2018), https://lawprofessors.typepad.com/business_law/2018/12/litigationlimits-corporate-governance-and-securities-law-a-new-hope.html; Jay Clayton, Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions, U.S. Sec. &Exchange Commission (Feb. 11, 2019), https://www.sec.gov/news/public-statement/clayton-statementmandatory-arbitration-bylaw-provisions.
399. Jacob Hale Russell, Mandatory Securities Arbitration's Impermissibility Under State Corporate Law: An Analysis of the Johnson &Johnson Shareholder Proposal (Rock Ctr. for Corp. Governance, Working Paper Series, Paper No. 237, 2019), https://papers.ssrn.com/sol3/papers.cfm? abstract_id=3332853.
400. See supra Part V.C.
401. As the Synopsis explains, section 115 "invalidates such a [forum selection] provision selecting .. . an arbitral forum, if it would preclude litigating such claims in the Delaware courts." Synopsis 5, S. 75, 148th Gen. Assemb. (Del. 2015); see also Manesh, supra note 260, at 46-47 (Delaware's "ban [on arbitration]-quietly enacted as part of the 2015 DGCL amendments-is essential to Delaware's corporate law enterprise. By prohibiting arbitration of state corporate law claims, Delaware law ensures that its state courts-the crown jewel of the state's corporate law-remain the central regulatory authority for the nation's corporations, and that those courts continue to produce new precedents to address emergent and novel issues relevant to corporations. . . . For this reason, arbitration has been described as an 'existential threat' to Delaware corporate law." (quoting Lipton, supra note 170, at 588)).
402. Manesh, supra note 260, at 5 ("[T]he boundaries of 'internal affairs' . . . may be contested by other states . . . [and] other states may have a different perspective" from Delaware's."). Typically, other states will prefer narrower definitions of internal affairs because narrower definitions allow them to intrude more aggressively into matters traditionally regulated by Delaware. Id. at 56-60.
403. See Del. Div. of Corps., supra note 77.
404. Also, the separate possibility exists that the Federal Arbitration Act can be interpreted to preempt the space, in which case any state law rule prohibiting arbitration, including section 115, would be rendered invalid. See, e.g., Clopton &Winship, supra note 171.
405. See infra Part VI.A for a discussion of Delaware law and the "federal lane."
406. See, e.g, Manesh, supra note 260, at 43-48 (explaining that Delaware interprets its law to avoid conflicts with federal law that might lead to federal preemption of state corporate law).
407. Malone v. Brincat, 722 A.2d 5, 13 (Del. 1998).

408. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·23 (Del. Ch. Dec. 19, 2018).
409. Id. at ·23 n.6 (quoting Myron T. Steele, Sarbanes-Oxley: The Delaware Perspective, 52 N.Y. L. Sch. L. Rev. 503, 506-07 (2008)).
410. See supra Part III.A.
411. See supra note 375.
412. 516 U.S. 367 (1996).
413. 6 Thomas Lee Hazen, Treatise on the Law of Securities Regulation 17:8 (7th ed. 2016).
414. Matsushita, 516 U.S. at 370.
415. Id. at 381 (emphasis added).
416. Id. at 378.
417. 564 A.2d 1089 (Del. 1989).
418. Matsushita, 516 U.S. at 376.
419. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·2 (Del. Ch. Dec. 19, 2018).
420. Id. at ·21.
421. Marbury v. Madison, 5 U.S. 137 (1803) (establishing the foundational principle that courts can invalidate legislative actions that violate the Constitution).
422. Del. State Bar Ass'n Corp. L. Council, supra note 78.
423. 13 Fletcher Cyclopedia of the Law of Corporations 5949 ("A shareholder cannot bring a derivative proceeding unless it will promote justice and the best interests of the corporation."); see also Parfi Holding AB v. Mirror Image Internet, Inc., No. Civ. A. 18507, 2006 WL 903578, at ·2 n.4 (Del. Ch. Apr. 3, 2006) ("[A] derivative plaintiff . . . steps into the shoes of the corporation . . . ."); 3 James D. Cox &Thomas Lee Hazen, Treatise on the Law of Corporations 15:2 (3d ed.) ("The derivative suit plaintiff . . . presents himself as spokesman for the corporate interest.").
424. Sciabacucchi Complaint, supra note 2, ¶60.
425. See Aggarwal, Choi &Eldar, supra note 9; see also Grundfest, supra note 2.
426. See, e.g, In re MCA, Inc. S'holder Litig., 785 A.2d 625, 639 (Del. 2001) ("It has been recognized that there is an inherent conflict when class counsel seeks to settle claims on behalf of a class whose claims have been asserted globally in different jurisdictions on different grounds .... Courts have recognized the problem inherent in this situation and have established standards to prevent class counsel from selling out the class merely to collect that fee."); Brief of Special Counsel at 12-26, 31-35, Scully v. Nighthawk Radiology Holdings, Inc., No. 5890-VCL (Del. Ch. Mar. 11, 2011) (discussing the judicial scrutiny of potentially collusive class settlements in multijurisdictional litigation under both Delaware and federal law as well as the role courts should play in preventing such collusion); Lynn A. Baker et al., Is the Price Right?: An Empirical Study of Fee-Setting in Securities Class Actions, 115 Colum. L. Rev. 1371 (2015) (providing an empirical study of fees in securities class actions and proposing reforms); Brian Cheffins at al., Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar, 2012 Colum. Bus. L. Rev. 427 (2012) (tracing trends of the plaintiffs' bar in recent decades and describing the behaviors through which poor incentives play out); John C. Coffee, Jr., The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, 48 L. &Contemp. Probs. 5, 12 (1985) (analyzing the problem and proposing reforms to align plaintiffs' attorneys' interests with shareholders' interests); John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 680 (1986) (describing the central role of fees in motivating shareholder litigation); Charles R. Korsmo &Minor Myers, The Structure of Stockholder Litigation: When Do the Merits Matter? 75 Ohio St. L.J. 829, 841-42 (2014) ("This agency problem strikes at the very heart of most stockholder litigation ...."); Reinier Kraakman et al., When Are Shareholder Suits in Shareholder Interests? 82 Geo. L.J. 1733, 1743-45 (1994) (suggesting that the contingent-fee regime distorts litigation incentives); Jonathan R. Macey &Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 22-27 (1991) (analyzing the economic incentives facing plaintiffs' attorneys in class action and derivative litigation); BrianJ.M. Quinn, Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum

Provision, 45 U. Cal. Davis. L. Rev. 137, 149 (2011) ("Control over litigation and access to fees are an important motivating factor in this competition amongst plaintiff groups."); id. at 151. "This type of litigation is highly susceptible to agency costs because the interests of counsel will not always align with the interests of their purported clients, the shareholders."; Roberta Romano, The Shareholder Suit: Litigation Without Foundation? 7 J.L. Econ. &Org. 55, 57 (1991) ("[Ajttorneys' incentives are the key factor in shareholder litigation . . . ."); id. at 65 ("[T]he principal beneficiaries of cash payouts in shareholder suits are attorneys . . . ."); Third Circuit Task Force Report on Selection of Class Counsel, 74 Temp. L. Rev. 685 (2001); Robert S. Thompson &Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133, 148 (2004) ("If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients."); Eliott J. Weiss &Lawrence J. White, File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions, 57 Vand. L. Rev. 1797, 1855 (2004) ("Our other findings (and economic theory) all suggest it is far more likely that plaintiffs' attorneys are motivated primarily by self-interest and that their litigation efforts, shaped as they are by the incentives provided by Delaware law, produce little in the way of meaningful benefits for the shareholders that those attorneys purport to represent."); Elliot J. Weiss &John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2064-66 (1995) (analyzing agency-cost issues and the misalignment of incentives between plaintiffs' attorneys and plaintiff classes in securities class actions).

427.See supra Part IV.F. (stay litigation).

428. Transcript of Oral Argument on Plaintiffs' Motion for Fees &Expenses at 57, Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018) (Apr. 11, 2019).

429. See Aggarwal, Choi &Eldar, supra note 9, at 20-21, and tbls. 6-9.

430. See Grundfest, supra note 2, at 5-9.

431. S. 826, 2018 Leg., Reg. Sess., 2018 Cal. Stat. 954.

432. See generally Joseph A. Grundfest, Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826 (Rock Ctr. for Corp. Governance, Working Paper Series, Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791.

433. Gen. Assemb. 4726, 218th Leg. (N.J. 2018). The bill would require public corporations headquartered in New Jersey to have one woman on their boards by the end of 2019 and then up to three women, depending on the size of the board, by the end of 2021. At the time of publication, no action had been taken on the bill. A4726, N.J. St. Legislature, https://www.njleg.state.nj.us/bills/ BillView.asp (last visited June 10, 2019).

434. H.R. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). The bill originally mandated the inclusion of women and minorities on boards; the version as passed requires only disclosure of demographics. See John T. Blatchford et al., Illinois General Assembly Passes Bill to Require Annual Reporting of Board Diversity Information, Nat'l L. Rev. (June 5, 2019), https://www.natlawreview.com/article/illi nois-general-assembly-passes-bill-to-require-annual-reporting-board-diversity. At time of publication, the modified version had passed both houses and was awaiting signing by the governor. Bill Status of HB3394, Ill. Gen. Assembly, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=3394&GAro=15&DocTypeID=HB&LegId=119985&SessionID=108&GA=101 (last visited June 10, 2019).

435. Manesh, supra note 260, at 57.

436. Id. at 58.

437. Id. at 5 ("Sciabacucchi represents a departure from Delaware precedents. Rather than invoking the [internal affairs] doctrine to fend off incursions into Delaware's regulatory domain, the court in Sciabacucchi invoked the doctrine to limit the regulatory reach of Delaware.").

438. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at ·16-·17 (Del. Ch. Dec. 19, 2018).

439. See, e.g, RBC Cap. Mkts., LLC. v. Jervis, 129 A.3d 816 (Del. 2015).

440. Sciabacucchi, 2018 WL 6719718, at ·17.

441. Id.

442. See, e.g, Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).
443. See, e.g, City of Birmingham Ret. and Relief Sys. v. Good, 177 A.3d 47 (Del. 2017).
444. The U.S. Supreme Court explained that "prospectus" in the context of section 12(a)(2) "is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." Gustafson v. Alloyd Co., 513 U.S. 561, 583-84 (1995).
445. 15 U.S.C. 77o (2018).
446. Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 950 (Del. Ch. 2013)
447. Id. at 948.
448. Id. at 949 (citing Schnell v. Chris-Craft Indus., Inc. 285 A.2d 437 (Del. 1971)).
449. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

DETAILS

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