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Delaware Supreme Court Upholds Federal-Forum Provisions for Litigation Under the Securities Act of 1933

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The Securities Act of 1933, which generally prohibits false and misleading statements in connection with securities offerings, provides for concurrent jurisdiction over claims arising under the Securities Act in both federal court and state court. Following a 2018 decision by the United States Supreme Court in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), holding that Securities Act claims filed in state court are not removable to federal court under the Securities Litigation Uniform Standards Act, the number of Securities Act claims filed in state court increased significantly, with corresponding risk to corporations (and their directors and officers) of multi-forum litigation.

On March 18, 2020, the Delaware Supreme Court issued a landmark decision in [*Salzberg v. Sciabacucchi*](#), No. 346, 2019 (Del. Mar. 18, 2020), reversing a 2018 decision by the Delaware Court of Chancery and upholding the validity of Delaware corporate charter provisions requiring stockholders to litigate claims under the Securities Act exclusively in federal court. While Securities Act claims arise under federal law and do not implicate the internal affairs of a Delaware corporation, the Delaware Supreme Court held that such claims nevertheless are “intra-corporate” claims and that the flexible and broad enabling provisions of the Delaware General Corporation Law permit Delaware corporations to adopt charter provisions regulating the forum where such claims may be filed. In upholding the validity of federal-forum provisions, the Delaware Supreme Court specifically noted the increased filing of Securities Act claims in state court post-*Cyan*, the risks of multi-forum litigation, and the “efficiencies” that Delaware corporations and their stockholders may realize from federal-forum provisions.

There are, however, potential limitations to the Delaware Supreme Court’s *Salzberg* decision. First, the federal-forum provisions at issue in *Salzberg* appeared in corporate charters adopted by Delaware corporations prior to initial public offerings. For already-public corporations, amending the corporate charter to adopt a federal-forum provision may not be practical, as such an amendment would require approval by a majority of the corporation’s stockholders. As an alternative, boards of directors may consider adopting federal-forum bylaws, which often do not require stockholder approval—just as many corporate boards did with respect to internal affairs claims (*e.g.*, direct and derivative claims for breach of fiduciary duty) and which the Delaware courts upheld before an amendment to the Delaware General Corporation Law explicitly authorized such bylaws. Second, the stockholder

challenge in *Salzberg* was a “facial challenge”—in other words, a challenge to the legal validity of federal-forum provisions under the Delaware General Corporation Law—but there remains the possibility of “as applied” challenges to such provisions—*i.e.*, that the adoption or enforcement of such provisions in particular circumstances is allegedly inequitable. Finally, it remains to be seen whether courts outside of Delaware will enforce federal-forum provisions adopted by Delaware corporations.

The *Salzberg* decision is an important development for Delaware corporations facing an increased risk of multi-forum Securities Act litigation following the United States Supreme Court’s decision in *Cyan*. Delaware corporations should now consider adopting federal-forum provisions in their corporate charters or bylaws to require the filing of Securities Act claims exclusively in federal court.

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