FEDERAL FORUM PROVISIONS FOR OHIO CORPORATIONS

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I. INTRODUCTION

Public companies and their directors and officers do not like securities litigation.[1] Even more, they dislike duplicative, redundant, and uncoordinated securities litigation brought simultaneously in multiple fora.[2] But in recent years, companies have faced this situation with increasing frequency, as claims arising under the Securities Exchange Act of 1934 (Exchange Act) have been brought in federal court,[3] while claims based on the same facts are brought in state court under the Securities Act of 1933 (Securities Act).[4]

Because Exchange Act claims are subject to the exclusive jurisdiction of the federal courts,[5] while the Securities Act forbids removal of suits brought in state courts under that statute,[6] companies faced simultaneously with claims under both statutes have had no means to bring those cases before a single court for coordinated proceedings.[7] While some courts formerly permitted defendants to remove Securities Act cases to federal court under the Securities Litigation Uniform Standards Act of 1998

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[1] *See* Doug Greene et al., *The Coming Securities Class Action Storm: Multijurisdictional Litigation After Cyan*, 32 PLUS J. 1, 2 (2018) ("By the 1990s, private securities litigation had gotten out of control. The class action mechanism had enabled plainiffs' lawyers to file abusive 'strike suits' targeting deep-pocketed defendants, often on behalf of 'professional plaintiffs' with only nominal holdings in the company.").

[2] *See id.* at 3.

[3] 15 U.S.C. § 78a–78qq (2018).

[4] 15 U.S.C. § 77a–77aa (2018). *See* Greene et al., *supra* note 1, at 3.

[5] Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018).

[6] *Id.*

[7] Michael Klausner et. al., *State Section 11 Litigation in the Post-Cyan Environment (Despite Sciabacucchi)*, 75 BUS. LAW. 1769, 1770 (2020).

(SLUSA),[8] the Supreme Court closed off that procedural pathway in 2018, holding in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that SLUSA does not override the anti-removal provisions of the Securities Act.[9] After *Cyan*, the plaintiffs' securities bar filed Securities Act suits in state courts at an even higher rate than before.[10]

Looking for a mechanism to avoid uncoordinated and wasteful securities litigation,[11] some companies turned to Delaware law for a solution.[12] Prompted by former SEC commissioner Joseph Grundfest, they adopted provisions in their certificates of incorporation that selected the federal courts as the sole forum for suits against the corporation or its officers or directors arising under the Securities Act.[13] These so-called "federal forum provisions" (FFPs) drew predictable challenges from the organized plaintiffs' securities bar, culminating in a recent ruling by the Delaware Supreme Court, in *Salzberg v. Sciabacucchi*, upholding FFPs.[14] Now that FFPs are deemed valid under Delaware law, many Delaware corporations have adopted them.[15]

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[8] *Id.*

[9] *Cyan*, 138 S. Ct. at 1078.

[10] Klausner et al., *supra* note 7, at 1774.

[11] *See id.* at 1773–74.

[12] *Id.* at 1770–71.

[13] Joseph A. Grundfest, *Federal Forum Provisions: Historical Development and Future Evolution* 1 (Stanford Univ. Rock Ctr. for Corp. Governance, Working Paper No. 242, 2019).

[14] Salzberg v. Sciabacucchi, 227 A.3d 102, 113–14 (Del. 2020).

[15] As of October 2020, companies (including those in the S&P 500 and/or Russell 1000 indices) that have adopted FFPs in their certificates of incorporation or bylaws since the Delaware Supreme Court issued its *Salzberg* decision include:

Mission Produce, Inc., Current Report (Form 8-K), at Exh. 3.1 (Oct. 7, 2020); Alector, Inc., Current Report (Form 8-K), at Exh. 3.1 (Oct. 6, 2020); Bill.com Holdings, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 30, 2020); Galera Therapeutics, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 25, 2020); Phathom Pharmaceuticals, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 25, 2020); Corsair Gaming, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 25, 2020); Ziopharm Oncology Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 22, 2020); Dyne Therapeutics, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 21, 2020); Guidewire Software, Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 14, 2020); GoDaddy Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 11, 2020); Dexcom Inc., Current Report (Form 8-K), at Exh. 3.1 (Sept. 9, 2020); Cole Credit Property Trust V, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 31, 2020); Cole Office & Industrial REIT (CCIT II), Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 31, 2020); Neurocrine

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But not all public corporations are Delaware corporations. Firms incorporated in Ohio, like those in other non-Delaware jurisdictions, will need to consider whether FFPs are permitted under the laws of their state of incorporation. This article analyzes whether FFPs pass muster under Ohio law, and concludes that they do. Ohio's corporation statutes include provisions that closely resemble the Delaware statutes that the Delaware Supreme Court found authorized FFPs.[16] Moreover, Ohio law and policy generally favor forum-selection provisions in contracts, and Ohio takes a permissive and enabling approach to corporate charters and bylaws.[17] For

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Biosciences Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 28, 2020); Capricor Therapeutics, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 25, 2020); Tandem Diabetes Care Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 21, 2020); Fate Therapeutics Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 19, 2020); AmerisourceBergen Corp., Current Report (Form 8-K), at Exh. 3.1 (Aug. 18, 2020); Builders FirstSource, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 14, 2020); iRhythm Technologies, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 14, 2020); Omnicell, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 12, 2020); Infinera Corp., Current Report (Form 8-K), at Exh. 3.1 (Aug. 11, 2020); Sunworks, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 10, 2020); Wayside Technology Group, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 6, 2020); AzurRx BioPharma, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 5, 2020); Five9, Inc., Current Report (Form 8-K), at Exh. 3.1 (Aug. 3, 2020); Acacia Research Corp., Current Report (Form 8-K), at Exh. 3.1 (Aug. 3, 2020); Annexon, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 28, 2020); CarParts.com, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 27, 2020); Welbilt, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 27, 2020); Pandion Therapeutics, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 21, 2021); Berkeley Lights, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 21, 2020); Blucora, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 16, 2020); Sunrun, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 10, 2020); Lemonade, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 10, 2020); Vivint Solar, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 10, 2020); Otonomy, Inc., Current Report (Form 8-K), at Exh. 3.1 (July 9, 2020); Adverum Biotechnologies, Inc., Current Report (Form 8-K), at Exh. 3.1 (June 29, 2020); Aclaris Therapeutics, Inc., Current Report (Form 8-K), at Exh. 3.1 (June 24, 2020); Adamis Pharm. Corp., Current Report (Form 8-K), at Exh. 3.1 (June 22, 2020); Huntsman Corp., Current Report (Form 8-K), at Exh. 3.1 (June 19, 2020); NantKwest, Inc., Current Report (Form 8-K), at Exh. 3.1 (June 19, 2020); Tricida, Inc., Current Report (Form 8-K), at Exh. 3.1 (June 16, 2020); IGM Biosciences, Inc., Current Report (Form 8-K), at Exh. 3.1 (June 12, 2020).

[16] *See* DEL. CODE ANN. tit. 8, § 102 (West 2020); OHIO REV. CODE ANN. § 1701.04 (West 2020); *Salzberg*, 227 A.3d at 113–14 (Del. 2020).

[17] Geoffrey Ritts & Brandon Mordue, *The Validity of Litigation-Reform Bylaws in Ohio*, 49 U. TOL. L. REV. 27, 28–29 (2017) (discussing permissive contract formation in Ohio).

these reasons, Ohio courts are likely to uphold FFPs, and Ohio public companies would be well advised to consider them.

II. THE PROBLEM: SECURITIES ACT CASES IN STATE COURTS

Plaintiffs have long favored state courts for claims asserting violations of the Securities Act,[18] which can relate to an IPO (for a company that is going public) or a secondary offering (by a company that is already public).[19] A state judicial forum supplies several advantages to plaintiffs.[20] First, state courts historically apply protections afforded to defendants under the Private Securities Litigation Reform Act of 1995 (PSLRA),[21] in an inconsistent manner.[22] In particular, state courts enforce the PSLRA's automatic stay on discovery less rigorously or, sometimes, not at all.[23] Second, state courts generally have less experience with federal securities law issues.[24] Third, defendants tend to be less successful on motions to dismiss securities claims in state court.[25] Last, defendants face challenges when trying to coordinate parallel state and federal lawsuits that assert claims arising from the same

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[18] Greene et al., *supra* note 1, at 2.

[19] Klausner et al., *supra* note 7, at 1771.

[20] Grundfest, *supra* note 13, at 5.

[21] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

[22] Grundfest, *supra* note 13, at 5.

[23] Klausner et al., *supra* note 7, at 1773, 1780 (discussing how state courts are divided as to whether the PSLRA's discovery stay applies to state-court proceedings); *see* Rachel Graf, *N.Y. Judges Split on Post-Cyan Discovery Stays*, LAW360 (Aug. 7, 2019, 8:17 PM), https://www.law360.com/articles/1185924/ny-judges-split-on-post-cyan-discovery-stays; *see also* Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066–67 (2018) (explaining that the PSLRA's requirement that the lead plaintiff in any class action brought under the Federal Rules of Civil Procedure file a certification stating, among other things, that she had not purchased the relevant security at the direction of plaintiff's counsel, is procedural, and thus applies only to suits brought in federal court).

[24] Grundfest, *supra* note 13, at 9.

[25] Boris Feldman, *Federal Forum Provision Possible Impact on D&O Insurance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 6, 2020), https://corpgov.law.harvard.edu/2020/04/06/federal-forum-provision-possible-impact-on-do-insurance/ [https://perma.cc/6ZSQ-4T3Q] ("Historically, state judges have been reluctant to toss out meritless Section 11 claims that would not have survived scrutiny in Federal court."); *see also* Greene et al., *supra* note 1, at 2–5; David M.J. Rein et al., *Securities Litigation Involving the Private Securities Litigation Reform Act (PSLRA)*, THOMSON REUTERS' PRAC. L., October/November 2017, at 39, 45.

circumstances.[26] Unsurprisingly, and for the opposite reasons, defendants thus tend to favor federal courts.[27]

What forum did the Securities Act provide? Initially, both, but it made the plaintiffs' choice of forum binding.[28] It established concurrent jurisdiction in state and federal courts, while barring removal to federal court.[29] The question got murkier, however, when Congress enacted SLUSA.[30] SLUSA was intended to channel securities class action litigation to federal law and federal courts.[31] The statute permitted defendants to remove to federal court "covered class actions" asserting violations of the federal securities laws.[32] The circuits, however, split on the correct interpretation of this provision.[33] Some courts interpreted SLUSA as superseding the removal bar in the Securities Act and thus permitted removal.[34] Other courts disagreed.[35]

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[26] *See* Klausner et al., *supra* note 7, at 1773–74. The same circumstances that give rise to Securities Act claims often also give rise to claims under the Securities Exchange Act of 1934, which can be brought only in federal court. *See* 15 U.S.C. § 78aa(a) (2018); Grundfest, *supra* note 13, at 5–6 (Though federal courts provide for "a relatively orderly process by which related cases are consolidated in one court, . . . there is no process for consolidation of a state case and a federal case.").

[27] Klausner et al., *supra* note 7, at 1770–71.

[28] 15 U.S.C § 77v(a) (2018).

[29] 15 U.S.C § 77v(a) ("The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . concurrent with State and Territorial courts . . . ."; "Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.").

[30] Securities Litigation Uniform Standards Act of 1998, Pub. Law No. 105-353, § 2, 112 Stat. 3227, 3227 (1998).

[31] *See* William B. Snyder, Jr., Comment, *The Securities Act of 1933 After SLUSA: Federal Class Actions Belong in Federal Court*, 85 N.C. L. REV. 669, 680 (2007).

[32] 15 U.S.C. § 77p(c) (2018) ("Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending . . . .").

[33] Rajasekaran v. CytRx Corp., No. CV 14-3406-GHK (PJWx), 2014 WL 4330787, at *2 (C.D. Cal. Aug. 21, 2014).

[34] *E.g.*, Knox v. Agria Corp., 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009) (holding that state courts lack jurisdiction over 1933 Act class actions after SLUSA).

[35] *E.g.*, Luther v. Countrywide Fin. Corp., 125 Cal. Rptr. 3d 716, 720–21 (2011) (holding that state courts have jurisdiction over covered class actions asserting only 1933 Act claims);

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The Supreme Court resolved the split in *Cyan*.[36] In *Cyan*, the Court held that federal and state courts have concurrent jurisdiction over class actions based on claims brought under the Securities Act and that such cases are not removable to federal court, SLUSA notwithstanding.[37]

The implications immediately became apparent. Around this time, Securities Act lawsuits filed in state courts escalated to record numbers.[38] As Cornerstone Research reported, "[t]he number of state 1933 Act filings in 2019 increased by 40 percent from 2018 . . . ."[39] State-only and parallel filings made up over 75 percent of all Securities Act filings in 2019.[40] In contrast, "[p]rior to 2015, there were only a handful of state court filings . . . ."[41] Additionally, because Securities Act cases could not be removed and consolidated, corporations were forced to defend duplicative lawsuits on multiple fronts. In fact, "[a]bout 45 percent of all state 1933 Act filings in 2019 had a parallel action in federal court."[42] Since *Cyan*, 43 parallel class actions have been filed in multiple jurisdictions.[43] These multiple-jurisdiction lawsuits are costly, wasteful, and could result in inconsistent judgments.

III. A POTENTIAL REMEDY: FEDERAL FORUM PROVISIONS

Companies responded to this situation and began looking for ways to curtail inefficient and unnecessary litigation costs and risks post-*Cyan*. One promising approach came from Professor Grundfest of Stanford: federal

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Rajasekaran, 2014 WL 4330787, at *2–6 (remanding Securities Act claim to state court and rejecting the SLUSA removal argument); City of Birmingham Ret. & Relief Sys. v. MetLife, Inc., No. 2:12-CV-02626-HGD, 2013 WL 5526621, at *3, *5–7 (N.D. Ala. Aug. 23, 2013), *aff'd*, City of Birmingham Ret. & Relief Sys. v. MetLife, Inc., No. 2:12-CV-2626-SLB, 2015 WL 4385277, at *3–4 (N.D. Ala. Mar. 31, 2015) (same).

[36] Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1078 (2018).

[37] *Id.* ("SLUSA did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.").

[38] *See* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2019 YEAR IN REVIEW 4 (2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review [https://perma.cc/YJ8K-YRHU].

[39] *Id.*

[40] *Id.* at 25.

[41] *Id.*

[42] *Id.* at 4.

[43] *Id.* at 24.

forum provisions (FFPs).[44] Professor Grundfest proposed that companies adopt forum-selection provisions that designate federal courts as the exclusive forum for Securities Act claims.[45] Take an example:

> 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 Company] shall be deemed to have notice of and consented to [this provision].[46]

Such a provision requires Securities Act plaintiffs to litigate in federal court.[47] The provision also serves as notice to potential investors.

Delaware corporations led the charge.[48] A few companies adopted these provisions in their certificates of incorporation before going public.[49] The FFPs do not, of course, overrule the *Cyan* decision.[50] Rather, because certificates of incorporation and bylaws are contracts between companies and their stockholders, they represent an agreement by stockholders to exercise their rights in a particular manner—that is, by agreeing to limit the forum available for litigation of claims under the Securities Act.[51] These FFPs thus could provide a way for companies to avoid duplicative state and federal securities class actions.[52] But the legality of these provisions was not immediately certain.[53]

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[44] *See generally* Grundfest, *supra* note 13.

[45] *Id.* at 1.

[46] Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *14 (Del. Ch. Dec. 19, 2018) (excerpting Roku's and Stitch Fix's FFPs in their certificates of incorporation).

[47] *Id.*

[48] *Id.* at *12.

[49] *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020).

[50] *Id.* at 132–33.

[51] *Id.* at 135.

[52] *Id.* at 137.

[53] *Sciabacucchi*, 2018 WL 6719718, at *51–53.

IV. THE DELAWARE SUPREME COURT'S *SALZBERG* DECISION

The Delaware courts recently grappled with the legality of federal forum-selection provisions in *Salzberg v. Sciabacucchi*.[54] The case involved three Delaware corporations—Blue Apron, Roku, and Stitch Fix—that adopted FFPs for Securities Act claims in their certificates of incorporation prior to their IPOs.[55] A stockholder, Matthew Sciabacucchi, brought a putative class action challenging the validity of these provisions.[56] He sought a declaratory judgment that the FFPs are facially invalid under Delaware law.[57] As a facial challenge, the question for the court was whether there was any circumstance in which an FFP could properly operate under the law.[58]

The Delaware Court of Chancery found in favor of the stockholder-plaintiffs.[59] It examined various case law and "first principles" of Delaware corporate law.[60] Under "first principles," the Court of Chancery held that Securities Act claims brought by a stockholder do not involve rights or relationships established under Delaware's corporate law.[61] The court determined that the Securities Act is a federal statute that sweeps broadly; it is not specific to Delaware corporations, corporate officers and directors, or even to common stock.[62] The court also noted that Securities Act claims arise from the purchase of securities, not the purchaser's status as a stockholder: "stockholder status is incidental to the claim," and, consequently, the "claim falls outside the scope of the corporate contract."[63] The court therefore decided that the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."[64] Because "the [FFPs] attempt to accomplish

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[54] *Salzberg*, 227 A.3d at 118.

[55] *Id.* at 109.

[56] *Id.* at 112.

[57] *Id.*

[58] *Id.* at 113.

[59] Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *54 (Del. Ch. Dec. 19, 2018).

[60] *Id.* at *38.

[61] *Id.* at *49.

[62] *Id.* at *48–49.

[63] *Id.* at *39.

[64] *Id.* at *8.

that feat," the court held that they are "ineffective and invalid."[65] The Court of Chancery concluded that Delaware law permits regulation only of "internal affairs" claims brought by stockholders *qua* stockholders (such as shareholder derivative claims for breach of fiduciary duty), and Securities Act claims fall outside that classification.[66] Defendants appealed.[67]

The Delaware Supreme Court reversed.[68] The court adopted a more textualist approach, focusing primarily on the language of Section 102(b)(1) of the Delaware General Corporation Law (DGCL), which describes the topics that "may" be addressed in a certificate of incorporation.[69] The court determined that the lower court read the statute too narrowly when it limited § 102(b)(1) to only "internal affairs," a term that does not appear in the statute.[70] Instead, the court observed that § 102(b)(1) broadly enables corporations to structure their relationship with stockholders through private ordering, and found that § 102(b)(1) authorizes FFPs in two separate ways.[71] First, "[b]y directing Securities Act claims to federal courts where coordination and consolidation are possible[,]" FFPs "classically fit the definition of a provision 'for the management of the business and for the conduct of the affairs of the corporation,'" a permitted topic under § 102(b)(1).[72] Second, an FFP also is a "provision 'defining, limiting and regulating the powers of the corporation, the directors and the stockholders,'" another permitted topic, because "FFPs prescribe where current and former stockholders can bring [Securities Act] claims against the corporation and its directors and officers."[73] The court also concluded that Section 115 (which codified an earlier decision upholding forum-selection provisions requiring that stockholders assert internal

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[65] *Id.*

[66] *Id.* at *3.

[67] *Id.* at *15.

[68] Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020).

[69] DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2020) ("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 . . . .").

[70] *Salzberg*, 227 A.3d at 120.

[71] *Id.* at 113–14.

[72] *Id.* at 115.

[73] *Id.*

corporate claims only in Delaware) does not restrict FFPs enacted under § 102(b)(1) and, instead, supports the validity of FFPs.[74]

The Delaware Supreme Court further rejected the Court of Chancery's reasoning that Securities Act claims are inherently "external."[75] In upholding the FFPs, the Delaware Supreme Court distinguished between matters that are not "internal affairs," as traditionally understood under Delaware law, but still are "internal" or "intra-corporate" claims.[76] Securities Act claims are not strictly "internal affairs" because "they are not governed by Delaware substantive law."[77] But neither are they "external" because they "arise from internal corporate conduct on the part of the Board."[78] The court instead categorized these claims as "intra-corporate."[79] For example, directors may be liable under Section 11 of the Securities Act for misstatements in a registration statement for a secondary offering.[80] Those claims, the court reasoned, are "internal" because they arise from internal corporate actions by a board.[81] As such, the claims and FFPs that direct stockholders where to file them fit within § 102(b)(1)'s broad ambit.[82] The court offered this diagram to illustrate its analysis:

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[74] *Id.* at 116–20. The Delaware Supreme Court noted that § 115 codified the Court of Chancery's decision in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), upholding a forum-selection provision requiring stockholders to assert internal corporate claims only in Delaware, but did not "address the propriety of forum-selection provisions applicable to other types of claims," such as claims under the Securities Act. *Salzberg*, 227 A.3d at 117.

[75] *Id.* at 124.

[76] *See id.* at 125–26.

[77] *Id.* at 123.

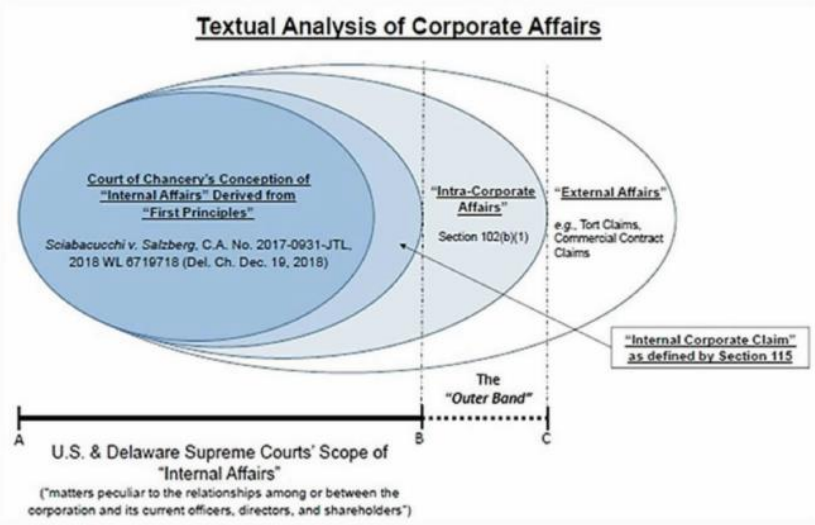
[78] *Id.*

[79] *Id.* at 121.

[80] *Id.* at 110–11.

[81] *Id.* at 123.

[82] *Id.* at 114, 116.



Lastly, the court held that FFPs are also not inconsistent with the policies underlying Delaware and federal law. FFPs do not violate the policies or laws of Delaware because the DGCL "allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance and governance of their enterprise."[83] The same is true, the court concluded, as to federal law and policy.[84] The court relied on the U.S. Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, where the Court held that federal law has no objection to provisions that require arbitration of Securities Act claims—and thus preclude state-court litigation.[85] According to the court, "[t]he holding in *Rodriguez* provides forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act."[86] And "nothing in *Cyan* prohibits a forum-selection provision from designating federal court as the venue for litigating Securities Act claims."[87] In sum, FFPs are facially valid under Delaware law.

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[83] *Id.* at 116.

[84] *Id.* at 132.

[85] *Id.* at 132. (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989)).

[86] *Id.*

[87] *Id.*

V. POST-*SALZBERG* IMPLICATIONS

Elimination of dual-track state and federal Securities Act litigation provides clear benefits to corporations and their stockholders. As the Delaware Supreme Court observed, these provisions "can provide a corporation with certain efficiencies in managing the procedural aspects of securities litigation following the United States Supreme Court's decision in [*Cyan*]."[88]

The *Salzberg* case thus has important implications for Delaware corporations, both pre- and post-IPO alike. Though the court analyzed FFPs only in certificates of incorporation, the implications almost certainly extend beyond just certificates of incorporation.[89] The *Salzberg* holding and rationale upholding FFPs adopted pursuant to Section 102(b)(1) of the DGCL should apply with equal force to Delaware companies who wish to adopt FFPs in their bylaws pursuant to Section 109.[90] Indeed, many Delaware public corporations already have adopted FFPs in their bylaws pursuant to § 109.[91]

But the *Salzberg* ruling does not necessarily end all challenges to these provisions. As the Delaware Supreme Court recognized, "the most difficult aspect of this dispute is not with the facial validity of FFPs, but rather, with the 'down the road' question of whether they will be respected and enforced

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[88] *Id.* at 114.

[89] *Id.* at 132.

[90] First, the broad scope of Section 109(b) is virtually identical to that of Section 102(b)(1). *Compare* DEL. CODE ANN. tit. 8, § 109(b) (West 2020) ("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."), *with* DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2020) (authorizing "[a]ny 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, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State."). Second, an FFP under Section 109(b) would provide companies with the same efficiencies as one under Section 102(b)(1). Third, Section 115, which codified exclusive-forum provisions for internal corporate claims, expressly states that such forum provisions may be in the certificate of incorporation or the bylaws. DEL. CODE ANN. tit. 8, § 115 (West 2020).

[91] *See supra* note 15.

by our sister states."[92] The *Salzberg* court left open the possibility that "Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose."[93] Some stockholders may attempt to challenge these provisions on an as-applied basis.[94] These challenges will "[depend] on the manner in which [the FFP] was adopted and the circumstances under which it [is] invoked."[95] More on this later.

VI. DEVELOPMENTS BEYOND DELAWARE

The recency of the *Salzberg* decision has left little time for state courts outside of Delaware to address the validity of FFPs. Some courts have begun considering these "down the road" questions.[96] The answers, as of this article's drafting, are encouraging for companies seeking to adopt FFPs and limit duplicative securities litigation.

Perhaps unsurprisingly, the first post-*Salzberg* challenges to FFPs came in California. A trio of state trial court decisions all dismissed securities lawsuits brought against companies with FFPs in their corporate documents. The first was *Wong v. Restoration Robotics, Inc.*[97] Restoration Robotics amended its Delaware certificate of incorporation to include an FFP.[98] The California Superior Court initially rejected the company's reliance on this provision, citing the Court of Chancery's decision in *Sciabacucchi*, but it granted a motion to reconsider in light of the Delaware Supreme Court's subsequent reversal of *Sciabacucchi* in *Salzberg*.[99] Although the *Restoration Robotics* court determined that *Salzberg*'s Delaware law holding was "basically irrelevant" to the California law question before it, the court nevertheless also upheld the FFP's validity.[100] The court's holding primarily relied on analogous contract law for forum selection clauses and the fact that a majority of stockholders approved the provision.[101]

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[92] *Salzberg*, 227 A.3d at 133.

[93] *Id.* at 135 (citing ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014)).

[94] *Id.*

[95] *Id.*

[96] *See Salzberg*, 227 A.3d at 133.

[97] No. 18CIV02609, 2020 Cal. Super. LEXIS 227 (Cal. Super. Ct. Sept. 1, 2020).

[98] *Id.* at *3–4.

[99] *Id.* at *15.

[100] *Id.* at *16, *57–58.

[101] *See id.* at *38–49, *56.

Next came *In re Uber Technologies, Inc. Securities Litigation*.[102] Once again, the court upheld an FFP.[103] As in *Restoration Robotics*, the *Uber* court relied on the fact that the FFP in Uber's charter "was approved by a majority of its shareholders" and the plaintiffs had provided "no evidence to show that the FFP was unexpected or unreasonable."[104] The court thus concluded that the plaintiffs were "on notice, and presumptively agreed to the terms of Uber's Charter by purchasing the securities."[105] The *Uber* decision also found that the FFP was not unconscionable because the FFP did not "eliminate the substantive protections provided by the Securities Act" given the availability of federal courts, where similar "rights to discovery, jury trial or appeal" exist.[106]

The same result followed most recently for another Delaware incorporated company in *In re Dropbox, Inc. Securities Litigation*.[107] Unlike the charter-based FFPs at issue in the previous cases, Dropbox amended its *bylaws* to include the relevant provision.[108] Even still, the *Dropbox* court upheld the provision under both Delaware and California law.[109] The FFP was reasonable, the court determined, because "when Plaintiffs acquired their shares, their purchases were subject to the Dropbox Bylaws and they assented to the FFP."[110] And Dropbox provided a "legitimate business need to support the FFP"—avoiding "the unnecessary costs and burden of defending multiple cases simultaneously in both state and federal courts and the possibility of inconsistent judgments and rulings."[111]

These initial rulings provide no guarantee that FFPs will be universally accepted in California or elsewhere, or for non-Delaware corporations. But this early support should help reassure companies implementing these provisions (and courts assessing them) that Delaware's conclusion was no anomaly.

That judicial support has been bolstered by the recent update from one of the two major proxy advisory firms, Institutional Shareholder Services Inc. (ISS). In November 2020, ISS published its Proxy Voting Guidelines

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[102] No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020).

[103] *Id.* at 2, 14.

[104] *Id.* at 11.

[105] *Id.*

[106] *Id.* at 14.

[107] No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020).

[108] *Id.* at 2.

[109] *Id.* at 4–5.

[110] *Id.* at 12.

[111] *Id.* at 14–15.

Updates for 2021.[112] ISS updated its policy regarding shareholder litigation rights, including those relating to FFPs. Acknowledging "the benefits of eliminating duplicative litigation and ensuring that cases are heard by courts that are well-versed in the applicable law," ISS now generally recommends a vote in favor of proposals to adopt FFPs in the charter or bylaws that specify "the district courts of the United States" as the exclusive forum for shareholder claims arising under the federal securities laws.[113]

So what, then, does all this mean for Ohio corporations?

VII. THE VIABILITY OF FFPS FOR OHIO CORPORATIONS

Several Ohio corporations already have adopted forum-selection clauses for internal-affairs claims, following Delaware's lead regarding such provisions.[114] With Delaware companies now adopting FFPs as well, Ohio corporations might consider doing the same. They should: Ohio companies face the same threat of duplicative state-court Securities Act lawsuits as their Delaware counterparts. In *Parker v. National City Corp.* and *Rosenberg v. Cliffs Natural Resources*, for example, Ohio corporations were unable to defend Securities Act claims in federal court despite the existence of parallel securities litigation in federal court—an undesirable result for the reasons stated above.[115] Adopting FFPs would eliminate the risk of uncoordinated, duplicative state-court litigation and provide Ohio corporations substantial relief from the rising post-*Cyan* tide of nonremovable state court Securities Act claims.

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[112] INSTITUTIONAL S'HOLDER SERVS., AMERICAS PROXY VOTING GUIDELINES UPDATES FOR 2021 (2020), https://www.issgovernance.com/file/policy/active/updates/Americas-Policy-Updates.pdf [https://perma.cc/8CY3-P693].

[113] *Id.* at 19–21.

[114] *See, e.g.*, Archive of Proctor & Gamble Code of Regulations art. V, § 1, PROCTOR & GAMBLE, https://us.pg.com/structure-and-governance/code-of-regulations/ [https://perma.cc/89BR-8R7Y]; Archive of Cardinal Health Restated Code of Regulations 23, CARDINAL HEALTH http://s1.q4cdn.com/687095970/files/doc_downloads/Guidelines/2019/Restated-Code-of-Regulations-11.6.2019.pdf [https://perma.cc/2K8L-XPTE]. Compare to DEL. CODE ANN. tit. 8, § 115 (West 2020) (codifying the Delaware Court of Chancery's decision in *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013), upholding the validity of forum selection provisions that designated Delaware as to the exclusive forum for internal corporate claims).

[115] Parker v. Nat'l City Corp., No. 1:08 NC 70012, 2009 WL 9152972, at *9 (N.D. Ohio Feb. 12, 2009) (granting motion to remand to state court); Rosenberg v. Cliffs Nat. Resources, Inc., No. 1:14-CV-1531, 2015 WL 1534033, at *3 (N.D. Ohio Mar. 15, 2015) (granting motion to remand to state court).

Just as Delaware law supports FFPs,[116] so does Ohio law. *First*, when interpreting a statute, Ohio courts "rely on general principles of statutory construction."[117] That requires a focus on the text of the statute.[118] Accordingly, Ohio's corporate code will guide a court's analysis, just as the DGCL guided the Delaware Supreme Court's analysis in *Salzberg*.[119] Ohio courts are thus less likely to employ a "first-principles" or similar approach like the Delaware Court of Chancery did in *Salzberg*, before the Delaware Supreme Court reversed it. Instead, Ohio courts tend to follow the more textualist approach taken by the Delaware Supreme Court in *Salzberg*.

Second, FFPs are consistent with the text of Ohio's corporate statutes, which take a permissive and enabling approach like that of the DGCL. Ohio's corporate code Section 1701.04 parallels Section 102(b)(1) of the DGCL and outlines broad categories of permissible contents for certificates of incorporation.[120] Like § 102(b)(1), R.C. § 1701.04 broadly permits provisions that define and regulate the authority of corporations and shareholders.[121] Because Ohio's relevant statutes are sufficiently similar to their Delaware counterparts, Ohio courts would be on solid footing by adopting the reasoning and conclusions of *Salzberg*.[122]

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[116] DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2020).

[117] Spencer v. Freight Handlers, Inc., 131 Ohio St. 3d 316, 2012-Ohio-880, 964 N.E.2d 1030, ¶ 16 (citing Cline v. Ohio Bur. of Motor Vehicles, 61 Ohio St. 3d 93, 97, 573 N.E.2d 77 (1991)).

[118] Hubbard v. Canton City Sch. Bd. of Educ., 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14 ("[W]here the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.").

[119] *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 113 (Del. 2020).

[120] *See generally* OHIO REV. CODE ANN. § 1701.04 (West 2020).

[121] OHIO REV. CODE ANN. § 1701.04(b) (West 2020) (authorizing the articles of incorporation to set forth "[a]ny lawful provision for the purpose of defining, limiting, or regulating the exercise of the authority of the corporation, the incorporators, the directors, the officers, the shareholders, or the holders of any class of shares").

[122] The similarity of the statutory provisions is likely no coincidence, as the DGCL no doubt influenced drafting of Ohio's corporations statute. *See* David Porter, *Competing With Delaware: Recent Amendments to Ohio's Corporate Statutes*, 40 AKRON L. REV. 175, 176 (2007) ("One of the major tasks of the [Ohio State Bar Association's] Corporation Law Committee is to monitor developments in business entity law in other states, especially Delaware."); *id.* at 177–78 ("Delaware's corporate law . . . is widely influential far beyond its borders."). *Cf.* In re Keithley Instruments, Inc., Derivative Litig., 599 F. Supp. 2d 908,

(*continued*)

Specifically, R.C. § 1701.04(b)(3) permits "[a]ny lawful provision for the purpose of defining, limiting, or regulating the exercise of the authority of the corporation, the incorporators, the directors, the officers, the shareholders, or the holders of any class of shares."[123] That enabling provision mirrors DGCL § 102(b)(1), which permits "any provision for the management of the business and for the conduct of [its] affairs," and which authorizes FFPs because they prescribe where stockholders can bring Securities Act claims against the corporation and its directors and officers.[124] As a result, Ohio courts are likely to likewise conclude that FFPs are valid under R.C. § 1701.04(b)(3).[125] Additionally, R.C. § 1701.11 authorizes regulations "for the government of a corporation, the conduct of its affairs, and the management of its property . . . ."[126] FFPs thus should fit with Ohio's permissive corporate provisions, whether an FFP is enacted through a corporation's articles of incorporation or its regulations (the Ohio equivalent of bylaws under Delaware law).

Third, Ohio courts likely would adopt a contractarian approach when analyzing the validity of FFPs.[127] Ohio case law supplies strong support for upholding forum-selection clauses in the commercial context: "[a]bsent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust."[128] Courts interpret "business entities" loosely, as even an unincorporated sole proprietor is considered a "business entity."[129] It follows that purchasing stock (buying an equity interest in a corporation, *i.e.*, a business entity) would reasonably be viewed by Ohio courts as a

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921 n.6 (N.D. Ohio 2009) ("Ohio courts routinely look to Delaware case law for guidance in deciding corporate law issues generally, and demand futility issues specifically.").

[123] OHIO REV. CODE ANN § 1701.04(b)(3) (West 2020).

[124] *Salzberg*, 227 A.3d at 113–14.

[125] *Id.* at 115.

[126] OHIO REV. CODE ANN. § 1701.11(a)(1) (West 2020); *see also* OHIO REV. CODE ANN. § 1701.04(b)(4) (West 2020) (authorizing the articles of incorporation to include "any provision that may be set forth in the regulations").

[127] *See* Ritts & Mordue, *supra* note 17, at 27–28.

[128] Kennecorp Mortg. Brokers, Inc. v. Country Club Convalescent Hosp., 610 N.E.2d 987, 989 (Ohio 1993).

[129] *See* Info. Leasing Corp. v. Jaskot, 151 Ohio App. 3d 546, 2003-Ohio-566, 784 N.E.2d 1192, ¶ 14 ("It is immaterial that [defendant] is a sole proprietor."). *See also* Preferred Capital, Inc. v. Power Eng'g Grp., Inc., 112 Ohio St. 3d 429, 2007-Ohio-257, 860 N.E.2d 741, ¶ 8.

commercial transaction as well. As such, this permissive contractarian approach should extend to validate forum-choice provisions in corporate documents.[130] That result would also mirror Delaware law. In *Salzberg*, the Delaware Supreme Court observed that the rules for determining the validity of forum-selection provisions in the contractual context were informative because corporate charters create contracts among the corporation's stockholders.[131] Under this reasoning, Ohio courts should likewise uphold FFPs as a presumptively valid form of private ordering.

Because of that contractarian approach, Ohio corporations likely can adopt FFPs in bylaws, in addition to their articles of incorporation. Regulations, Ohio's term for bylaws, "have the force of contracts between the corporation and its shareholders,"[132] just as in Delaware.[133] The same permissive private ordering regime applies.[134] But one potential wrinkle exists. Ohio's corporate code limits directors' ability to amend the regulations unilaterally.[135] Ohio's corporate law specifies that the "regulations may include provisions . . . [d]efining, limiting, or regulating the exercise of the authority of the shareholders; provided, that any amendment of the regulations that would change or eliminate any such provision shall be *adopted only by the shareholders*."[136] This vague provision has yet to be interpreted by any Ohio court, and the drafting history offers little guidance on its meaning.[137] Depending on judicial interpretation of R.C. § 1701.11, an Ohio corporation adopting a forum-selection regulation may be required to do so by stockholder vote, rather than by unilateral action of the directors.[138] Despite this caveat, bylaw amendments remain a viable option for Ohio companies seeking to implement FFPs.[139]

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[130] *See* Ritts & Mordue, *supra* note 17, at 28–29; *see also* Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1229–32 (6th Cir. 1995) (holding that forum selection clause was not invalid on grounds that it deprived investors of remedy or that enforcement of clause would be unreasonable in light of public policy behind Ohio's securities statutes).

[131] Salzberg v. Sciabacucchi, 227 A.3d 102, 116–17 (Del. 2020).

[132] Carr v. Acacia Country Club Co., 970 N.E.2d 1075, 1086 (Ohio Ct. App. 2012).

[133] *See* Ritts & Mordue, *supra* note 17, at 29.

[134] *See id.* at 28; *Salzberg*, 227 A.3d at 116.

[135] *See* Porter, *supra* note 122, at 191 n.96.

[136] OHIO REV. CODE ANN. § 1701.11(B)(11) (West 2020) (emphasis added).

[137] *See* Ritts & Mordue, *supra* note 17, at 29.

[138] *Id.*

[139] *See id.* at 29 n.20.

Finally, Ohio's corporate code, like Delaware's, requires that a provision in a certificate or regulations be "lawful."[140] The Delaware Supreme Court held in *Salzberg* that FFPs do not violate any Delaware law.[141] FFPs similarly should pass muster under Ohio law, as there is no Ohio statute that they appear to contradict.[142] FFPs should survive facial challenge under federal law, too. The Delaware Supreme Court addressed this very point.[143] The U.S. Supreme Court decision in *Rodriguez de Quijas v. Shearson*, permitting binding arbitration of Securities Act claims, necessarily means that federal law does not mandate the availability of a state forum (or any court forum) for Securities Act claims.[144] As the *Salzberg* court observed, "[t]he holding in *Rodriguez* provides forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act."[145]

The Delaware Supreme Court's view on the validity of FFPs does not bind Ohio courts and a stockholder of an Ohio corporation could still challenge the validity of FFPs.[146] But a plaintiff may face significant difficulty asking an Ohio court to strike down FFPs on the basis that they violate federal law.[147] *Salzberg* directly addresses this "lawfulness"

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[140] OHIO REV. CODE ANN. § 1701.04(B)(3) (West 2020).

[141] Salzberg v. Sciabacucchi, 227 A.3d 102, 109 (Del. 2020).

[142] *See supra* text accompanying notes 136–140 (discussion re OHIO REV. CODE ANN. §§ 1701.04(B)(3), 1701.11(B)(11) (West 2020)). Furthermore, unlike Delaware, there is no express statutory limitation regarding forum provisions for Ohio corporations, as there is no Ohio counterpart to DEL. CODE ANN. tit. 8, § 115 (West 2020), which the *Salzberg* court analyzed in finding that Section 115 did not alter the broad scope of Section 102(b)(1) of the DGCL.

[143] *Salzberg*, 227 A.3d at 132–33.

[144] 490 U.S. 477, 482–83 (1989).

[145] *Salzberg*, 227 A.3d at 132. In fact, as the *Salzberg* court observed, FFPs are arguably less restrictive than other forum-selection provisions that Delaware courts have sanctioned and that other states have respected. *Id.* at 137 (noting that an exclusive Delaware-forum provision "require non-resident stockholders to litigate [those] claims exclusively in Delaware—potentially far from their geographic home-base. . . . By contrast, FFPs require that non-residents bring Section 11 claims in federal court (which could be in their home state).").

[146] Feldman, *supra* note 25.

[147] *Id.*

question, and Ohio courts tend to respect the expertise of Delaware judges in matters of corporate law.[148]

Of course, the potential for an as-applied challenge remains. However, as the *Salzberg* court pointed out, because "many Section 11 claims closely parallel state law breach of fiduciary duty claims, many of the same reasons requiring application of the internal affairs doctrine would support the enforcement of FFPs."[149] Nevertheless, stockholder-plaintiffs could try to assert as-applied challenges to Ohio corporations' FFPs, based on the specific circumstances under which a particular FFP is adopted and invoked.[150] Boards are thus well advised to consider the process by which FFPs are adopted and how they are enforced,[151] as a stockholder may argue that a company's FFP was adopted inequitably, that enforcement of the FFP would lead to unjust results, or that the FFP otherwise contravenes Ohio's public policy.[152] Because Ohio courts tend to take a contractarian approach,[153] they tend to defer to the facially valid agreements between parties—such as a corporation and its stockholders.[154]

There are other, non-legal considerations that the boards of Ohio corporations should consider in weighing whether to adopt FFPs. One

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[148] *See* Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1343 (7th Cir. 1990), *rev'd on other grounds*, 500 U.S. 90 (1991) (referring to the Delaware Supreme Court as the "Mother Court of corporate law"); John Armour et al., *Delaware's Balancing Act*, 87 IND. L.J. 1345, 1398–99 (2012). *See also* North v. McNamara, 47 F. Supp. 3d 635, 648 (S.D. Ohio 2014) (enforcing, under federal law, board-adopted bylaw of Ohio-domiciled Delaware corporation and transferring derivative suit to Delaware); *id.* at 642 n.3 (collecting state-court decisions).

[149] *Salzberg*, 227 A.3d at 135–36. FFPs promote uniformity and predictability and thus further the same interests as the internal affairs doctrine, which addresses the rights of directors and officers to know what law will be applied to their actions and also the rights of stockholders to know by which standards the actions of fiduciaries will be evaluated.

[150] Feldman, *supra* note 25.

[151] *See* OHIO REV. CODE ANN. § 1701.59 (West 2020) (statutory codification of business judgment rule and limitation on liability for damages for directors of Ohio corporations).

[152] Preferred Capital, Inc. v. Power Eng'g Grp., Inc., 860 N.E.2d 741, 744 (2007) (affirming the three-pronged test to determine the validity of a forum-selection clause and noting its similarity to the U.S. Supreme Court's test in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)) ("(1) Are both parties to the contract commercial entities? (2) Is there evidence of fraud or overreaching? (3) Would enforcement of the clause be unreasonable and unjust?")). Relying on *Bremen*, the *Salzberg* court noted that "forum-selection clauses are 'presumptively valid.'" 227 A.3d at 135 (citation omitted).

[153] Ritts & Mordue, *supra* note 17, at 27–28.

[154] *Id.*

relates to directors-and-officers liability insurance (D&O insurance).[155] In addition to the advantages identified earlier,[156] FFPs may help companies in connection with their D&O insurance program.[157] D&O underwriters may take the *Salzberg* ruling into consideration and may be more willing to provide coverage and/or to provide more competitive pricing for companies with FFPs, on the grounds that those companies face a lower risk of uncoordinated Securities Act litigation in plaintiff-friendly state-court venues.

Another non-legal factor boards should weigh is how stockholders and their advisors might react to an FFP. Ohio companies should be prepared to explain how an FFP can benefit the company and its stockholders, whether the company is seeking to secure shareholder approval of a proposal to adopt an FFP or is seeking to avoid a negative director-election result following the unilateral adoption of an FFP. The main proxy advisors, ISS and Glass Lewis, both have policies relating to forum-selection provisions, and a board should understand those policies before deciding to proceed.[158] In addition to examining the ISS and Glass Lewis policies, a board should also consider whether to consult informally with large stockholders before proceeding with an FFP.

VIII. CONCLUSION

The Delaware Supreme Court's recent *Salzberg* decision has broad implications, including for Ohio corporations. The ruling provides an avenue to alleviate the risks and costs associated with plaintiffs filing duplicative Securities Act lawsuits in state and federal courts across the

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[155] Feldman, *supra* note 25.

[156] *Salzberg*, 227 A.3d at 135.

[157] Feldman, *supra* note 25.

[158] As noted, ISS has updated its guidance regarding FFPs. *See supra* note 112 and accompanying text. Glass Lewis, however, has not similarly embraced FFPs. GLASS LEWIS, GUIDELINES: AN OVERVIEW OF THE GLASS LEWIS APPROACH TO PROXY ADVICE (UNITED STATES) 52 (2021), https://www.glasslewis.com/wp-content/uploads/2020/11/US-Voting-Guidelines-GL.pdf?hsCtaTracking=7c712e31-24fb-4a3a-b396-9e8568fa0685%7C86255695-f1f4-47cb-8dc0-e919a9a5cf5b [https://perma.cc/WV82-XK4T] (recommending "that shareholders vote against any bylaw or charter amendment seeking to adopt an exclusive forum provision unless the company: (i) provides a compelling argument on why the provision would directly benefit shareholders; (ii) provides evidence of abuse of legal process in other, nonfavored jurisdictions; (iii) narrowly tailors such provision to the risks involved; and (iv) maintains a strong record of good corporate governance practices").

country. FFPs are consistent with Ohio corporation law and public policy, and they are in accord with federal public policy as well. Ohio courts are likely to reject a facial challenge to an FFP, and careful attention to the mechanics for adopting an FFP will likely mitigate the risks of an as-applied challenge. In sum, Ohio corporations seeking to manage litigation risk and contain litigation costs should seriously consider adopting FFPs.