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## Note

### FEDERAL COURTS TAKE THE WHEEL: THE DELAWARE SUPREME COURT VALIDATES FEDERAL FORUM PROVISIONS FOR '33 ACT LITIGATION IN *SALZBERG v. SCIABACUCCHI*

BRITTANY MANN\*

#### I. STARTING THE ENGINES: INTRODUCTION TO FFPs IN CORPORATE GOVERNANCE

U.S. corporations are subject to regulation at two primary levels: federal securities law and state corporate law, most commonly that of Delaware.<sup>1</sup> While federal securities law is generally focused on regulating disclosures related to securities and trading of securities, like stock in publicly held companies, state corporate law generally aims to regulate the internal affairs of the corporation, though they are often not mutually exclusive.<sup>2</sup> Accordingly, the line between these two bodies of law is often fuzzy and distinguishing between their overlapping authorities is complex.<sup>3</sup> Inherently though, state law must accede to federal authority when Congress chooses to institute corporate law.<sup>4</sup>

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1. See Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 610 (2003) ("We clearly have two major regulators of the large corporation in the United States: state corporate law and federal securities law."); B. John Torabi, *The Cyan Decision and its Impact on State-Level Securities Class Actions*, 26 FORDHAM J. CORP. & FIN. L. 253, 255 (2021) (summarizing the federal and state presence in securities regulation).

2. See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1608 (2005) (pointing out the overlap of Delaware and federal corporate law as to a public company's disclosure requirements); Roe, *supra* note 1, at 615–16 ("[T]he formal division of authority is said to be that the SEC forces disclosure and regulates stock trading while the states handle the internal affairs of shareholder-director relations . . .").

3. See Roe, *supra* note 1, at 610 ("Commentators regularly point to [federal securities law and state corporate law's] overlapping authority and the conflicts between their two bodies of regulation, and courts sometimes try to clarify the boundaries between them."); Torabi, *supra* note 1, at 255 (explaining the "substantial overlapping authority and complex interaction" of state and federal law in securities regulation).

4. See Kahan & Rock, *supra* note 2, at 1578 ("There is little constitutional doubt that, if Congress wished to enact a national corporate law that would displace all state corporate law, it could do so pursuant to its power under the Commerce Clause." (citing Roe, *supra* note 1, at 607–20)). *But see* STEPHEN M.

(613)

Meanwhile, the internal affairs doctrine is a product of state law and is applied to determine which law applies to state corporate law controversies.<sup>5</sup> This doctrine dictates that the internal matters of a corporation will be governed by the law of the state of incorporation, barring the rare scenario in which it is found another state has a more significant interest.<sup>6</sup> Accordingly, the doctrine establishes stability in the expectations of which state law corporations and their affiliates are subject to.<sup>7</sup> In addition, the consistent application of the internal affairs doctrine is particularly vital to Delaware maintaining its prominent position at the helm of corporate law.<sup>8</sup>

However, in the federal context, the Securities Act of 1933 (the 1933 Act) produces a converse effect to the expectations of corporate directors and shareholders.<sup>9</sup> The 1933 Act expressly permits plaintiffs to bring a cause of action challenging a corporation's compliance with securities regulation requirements in federal court *or* state court—wherein different procedural rules often apply and threaten not only different outcomes but also duplicative litigation costs for corporate defendants.<sup>10</sup> To address

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BAINBRIDGE, *MERGERS & ACQUISITIONS* 12 (4th ed. 2021) (“The U.S. Supreme Court has held repeatedly that the federal securities laws do not preempt state corporate law, but instead place only a limited gloss on the broader body of state law.”).

5. *See* 9 FLETCHER CYC. CORP. § 4223.50 (2021) [hereinafter FLETCHER] (“The internal affairs doctrine is a conflict of laws principle recognizing that only one state should have the authority to regulate a corporation’s internal affairs, because otherwise, a corporation might be faced with conflicting demands.”). *See* McDermott, Inc. v. Lewis, 531 A.2d 206, 215 (Del. 1987); Rogers v. Guar. Trust Co. of N.Y., 288 U.S. 123 (1933); *In re First Interstate Bancorp Consol. S’holder Litig.*, 729 A.2d 851, 865 (Del. Ch. 1998).

6. *See* FLETCHER, *supra* note 5 (“[The] internal matters of corporate governance are governed by the law of the state of incorporation, except in the unusual case where application of the law of another state is required due to an overriding interest of that other state in the issue to be decided.” (footnotes omitted)).

7. *See id.* (citing *Johnson v. Johnson*, 720 N.W.2d 20 (Neb. 2006) (explaining how the internal affairs doctrine provides predictability in state corporate law that assures the expectations of those with interests in the corporation)).

8. *See* JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE L. OF CORPS. § 2:13 (3d ed. 2021) (commenting that the internal affair doctrine not only created Delaware’s “dominant body of corporate law principles” but it also continues to feed into the success of the state in attracting corporate charters); *see also* Kahan & Rock, *supra* note 2, at 1616 (explaining that if Delaware attempts to expand its scope of authority outside of the internal affairs of a corporation, other states may counter by expanding the scope of their own).

9. *See* 15 U.S.C. § 77v(a) (2018) (allowing filing in both state and federal court); *cf.* Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 390 (2020) (“Congress enacted the Private Securities Litigation Reform Act (‘PSLRA’), which imposed many restrictions on securities class actions brought in federal courts.” (footnote omitted)).

10. *See* Aggarwal, Choi & Eldar, *supra* note 9, at 390 (noting “federal and state courts have had concurrent jurisdiction over 1933 Act claims” (citing 14 U.S.C. § 77v(a) (2018))); *see also* Mark J. Loewenstein, *Pushing the Envelope: Salzberg v. Sciabacucchi and Delaware’s Evolving View of the Internal Affairs Doctrine*, 48 No. 3

these issues, corporations began adopting provisions in their corporate governance documents, commonly referred to as federal forum provisions (FFPs), mandating that all claims filed against the corporation and its affiliates under the 1933 Act be brought *exclusively* in federal courts.<sup>11</sup>

Unsurprisingly, these FFPs did not sit well among plaintiffs' advocates in securities actions, making it likely that there would be a challenge to their validity.<sup>12</sup> That moment arose with *Salzberg v. Sciabacucchi*,<sup>13</sup> which came before the Delaware Supreme Court in 2018, on appeal from the Court of Chancery.<sup>14</sup> In *Salzberg*, the Delaware Supreme Court was tasked with determining the facial validity of FFPs adopted into a corporation's charter that purport to govern claims filed under the 1933 Act against the corporation and its affiliates.<sup>15</sup>

This Note analyzes the Delaware Supreme Court's facial application of Section 102(b)(1) of the Delaware General Corporate Law (the DGCL) to charter-based FFPs seeking to govern claims brought under the 1933 Act against a corporation and its affiliates in *Salzberg v. Sciabacucchi*.<sup>16</sup> In *Salzberg*, the court held that these FFPs were valid under the DGCL and federal law, thus enforceable.<sup>17</sup> This Note argues that, while the Delaware Supreme Court's decision is not binding on other states and may be viewed as the court exceeding its jurisdiction and betraying legislative intent, it ultimately confers a useful tool on corporations to provide meaningful stability for themselves and their affiliates.<sup>18</sup> In turn, this stability ultimately provides benefits not only to corporations themselves, but also to their stockholders.<sup>19</sup>

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SEC. REGUL. L.J. 182, 183 (2020) (commenting that the Supreme Court holding that plaintiffs maintain the ability to file in both state and federal court was followed by "a chaotic and, in some cases, an unmanageable situation for corporate defendants"); Torabi, *supra* note 1, at 272 (summarizing the after-effects of the Supreme Court case that confirmed concurrent jurisdictional nature of the 1933 Act). For further discussion on differences between filing in federal and state court, see *infra* Section II.C.

11. See Daniel B. Listwa & Bradley J. Polivka, *First Principles for Forum Provisions*, 2019 CARDOZO L. REV. DE-NOVO 106, 110 (2019) ("Forum-selection provisions of various kinds have quickly become familiar tools for corporations seeking to counteract potentially abusive shareholder litigation.").

12. See, e.g., *id.* at 111 (commenting that, with the growth in FFPs, it "was only a matter of time before they, too, were tested").

13. 227 A.3d 102 (Del. 2020).

14. See *id.* at 109 (addressing a facial challenge to FFPs when placed in a Delaware corporation's charter).

15. See *id.*

16. See *id.*

17. *Id.* at 137–38.

18. For an explanation of how the Delaware Supreme Court may have overstepped, see *infra* Section V.A–B. For an explanation as to how the decision provides a useful tool for corporations, see *infra* Section VI.C.

19. For an argument that the Delaware Supreme Court's validation of FFPs will provide benefits to both corporate defendants and shareholders, see *infra* Section VI.C.

Part II of this Note summarizes the vacillating history of the procedural landscape for claims under the 1933 Act and the seemingly irrelevant, though extremely pivotal, Delaware case law that speaks to the scope of the subject matter of corporate governance documents.<sup>20</sup> Part III provides the factual background and procedural history of *Salzberg*, including the analysis employed by the Court of Chancery.<sup>21</sup> Part IV describes the reasoning behind the Delaware Supreme Court's decision.<sup>22</sup> Part V critically analyzes the Delaware Supreme Court's reasoning and argues that, while certain aspects of the legislature's intent could have been larger considerations in the analysis, the court's interpretation was correct, and an important overall Delaware and federal public policy goal was advanced.<sup>23</sup> Finally, Part VI contemplates the likelihood of certain consequences and benefits of the decision on corporations and their affiliates and federal securities litigation.<sup>24</sup>

## II. FORMING LANES: BACKGROUND OF FEDERAL SECURITIES REGULATION & STATE CORPORATE GOVERNANCE

Almost ninety years ago, Congress enacted the Securities Act of 1933 to be a mechanism for re-instilling confidence in the U.S. federal securities market.<sup>25</sup> The 1933 Act was pivotal, not only because it provided a private right of action for securities investors to enforce regulation requirements, but also because it granted petitioners the ability to file claims in both federal and state courts.<sup>26</sup> However, an opinion emerged that some investors were abusing the power afforded to them under the 1933 Act, causing courts to become overcrowded with frivolous litigation often fueled by plaintiff's counsel.<sup>27</sup> In response, in 1995 Congress adopted the

20. For a summary of the procedural landscape for claims under the 1933 Act, see *infra* notes 25–51 and accompanying text. For a summary of the scope of subject matter allowable in corporate governance document in Delaware, see *infra* notes 52–74 and accompanying text.

21. For a summary of the factual background and procedural history of *Salzberg*, see *infra* notes 75–109 and accompanying text.

22. For a summary of the Delaware Supreme Court's reasoning in *Salzberg*, see *infra* notes 110–148 and accompanying text.

23. For a critical analysis of the Delaware Supreme Court's opinion in *Salzberg*, see *infra* notes 149–191 and accompanying text.

24. For a summary of the impact of the *Salzberg* decision, see *infra* notes 192–223 and accompanying text.

25. See Torabi, *supra* note 1, at 257 (stating the goal of this Act, along with the 1934 Act, was to “restor[e] the confidence of the investing public” in the wake of the 1929 market crash).

26. See 15 U.S.C. § 77v(a) (2018) (“The district courts of the United States and the United States courts of any Territory shall have jurisdiction . . . concurrent with State and Territorial courts.”); see also *Cyan, Inc. v. Beaver Cnty. Emp. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (commenting that in order to assist with the enforcement of regulation requirements under the 1933 Act, Congress enabled a private right of action).

27. See Aggarwal, Choi & Eldar, *supra* note 9, at 390 (commenting on congressional concern toward “the abundance of frivolous lawsuits brought by plaintiffs’

Private Securities Litigation Reform Act (PSLRA), which placed procedural impediments in front of the plaintiffs bringing these securities claims.<sup>28</sup> To avoid most of the obstacles created by the PSLRA, plaintiffs often chose to file their 1933 Act claims in state court rather than in federal court.<sup>29</sup> Accordingly, the concern for corporations' litigation costs began to grow and, as a result, more corporations began adopting FFPs into their corporate governance documents to require any 1933 Act claims brought against the corporation be brought exclusively in federal courts.<sup>30</sup>

Meanwhile, Delaware state courts were dealing with an influx of challenges toward modern private ordering tactics being adopted in corporate governance documents for the purpose of limiting shareholder litigation power.<sup>31</sup> While seemingly irrelevant, *Salzberg* shows the convergence of these federal regulation and corporate governance developments.<sup>32</sup> In order to appreciate the controversy at the center of *Salzberg*, it is necessary to look almost ninety years back to the significant legislation adopted just after the Great Depression.<sup>33</sup>

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lawyers in the hope of extracting settlements for meritless but expensive claims”); Listwa & Polivka, *supra* note 11, at 109 (describing the concurrent jurisdiction for 1933 Act claims and commenting on how “[i]t was not long . . . before concern over abuse of these causes of action arose”).

28. *See Cyan*, 138 S. Ct. at 1066 (“Congress passed [the PSLRA] principally to stem ‘perceived abuses of the class-action vehicle in litigation involving nationally traded securities.’” (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006))).

29. *See id.* at 1067 (“Rather than face the obstacles set in their path by the Reform Act, plaintiffs and their representatives began bringing class actions under state law.” (quoting *Dabit*, 547 U.S. at 82)). *But see* Torabi, *supra* note 1, at 264 (recognizing that “some commentators argue that there is little empirical evidence to support that such a venue shift actually took place on a significant scale”).

30. *See Cyan*, 138 S. Ct. at 1067 (indicating Congress’ intent to combat this circumvention of the PSLRA). Further amendments to the 1933 Act were adopted in an effort to prevent this avoidance of the 1933 Act, but it only partially corrected the issue. For further discussion, see *infra* Section II.B. *See Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at 6\* (Del. Ch. Dec. 18, 2018) (“In an effort to lock in their preferred forum . . . corporations began adopting forum-selection provisions that identified the federal courts as the exclusive forum for the 1933 Act claims.”), *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

31. *See generally* *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014) (holding fee-shifting provisions in non-stock corporation’s bylaws are valid under the DGCL); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 937–38 (Del. Ch. 2013) (holding that forum-selection provisions in bylaws are valid under the DGCL).

32. For discussion on the convergence of these two areas in the *Salzberg* case, see *infra* Part III.

33. *See Sciabacucchi*, 2018 WL 6719718, at \*8 (“A basic understanding of the 1933 Act provides essential context.”); *see also* Listwa & Polivka, *supra* note 11, at 108 (“An understanding of the current debate over federal forum-selection clauses is impossible without an appreciation of the procedural landscape of federal securities law.”).

A. *The Securities Act of 1933*

This is, of course, referencing the adoption of the Securities Act of 1933.<sup>34</sup> Following the Wall Street Crash of 1929, Congress adopted the 1933 Act with two primary aims: (i) to keep investors informed and protected against fraud in the sale of securities and thus restore investors' confidence in the securities market; and (ii) to ensure the marketability of securities when free of corruption.<sup>35</sup>

The 1933 Act right of action follows if the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."<sup>36</sup> Among other matters, the 1933 Act addressed a niche issue whereby an investor would buy stock from a corporation after a promoter had, prior to the public offering, executed a transaction with the corporation which ultimately cheapened the value of the stock in the offering.<sup>37</sup> In this scenario, the investor lacked standing to sue for the promoter's actions not being disclosed because the transaction occurred prior to the purchase of the investor's stock.<sup>38</sup> The 1933 Act addressed

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34. *See* Fed. Hous. Fin. Agency v. Nomura Hldg. Am., Inc., 873 F.3d 85, 96 (2d Cir. 2017) ("In the wake of the Great Depression, Congress took measures to protect the U.S. economy from suffering another catastrophic collapse. Congress's first step in that endeavor was the Securities Act of 1933."); *see also* Aggarwal, Choi & Eldar, *supra* note 9, at 389–90 (explaining the major securities statutes filed after the Great Depression are the Securities Act of 1933 and the Securities Act of 1934).

35. LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *FUNDAMENTALS OF SECURITIES REGULATION* § 5 (7th ed. 2020) (noting the purpose of the adoption of the 1933 Act was: (i) to "inform the investor of the facts concerning securities offered for sale and to protect him against fraud and misrepresentation," and (ii) "to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion" (quoting S. Rep. No. 47, 73d Cong., 1st Sess. 1 (1933))).

36. 15 U.S.C. § 77k(a) (2018).

37. *See* RICHARD A. BOOTH, *FINANCING THE CORPORATION*, § 4.2 (2020) (explaining how the interested promoter issue was resolved by the 1933 Act). Booth describes an example, wherein a new stockholder's stock may have less value in a corporation due to promoters having "sold themselves stock on the cheap before selling stock to the general public." *Id.* For a full picture of the issue prior to the enactment of the 1933 Act, compare *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206 (1908) (holding that under federal law stockholder was deemed to have assented at the time of purchase), with *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N.E. 193 (1909) (holding under Massachusetts law that there is a cause of action if the public offering was contemplated at the time of the prior transaction), *aff'd*, 225 U.S. 111 (1912).

38. *See* BOOTH, *supra* note 37, § 4.2 (explaining that when promoters sell stock at a more expensive rate in a public offering than to themselves, the "new stockholder has no standing to sue because the corporation is presumed to have assented to the terms on which it sold stock, and the new stockholder is presumed to have paid a fair price for his stock").

this issue by requiring disclosure of any previous issuance of stock to a promoter in the registration statement.<sup>39</sup>

Notably, Section 11 of the 1933 Act supplements federal enforcement of securities disclosure requirements by providing a private right of action for securities purchasers to directly sue the corporate directors, issuers, underwriters, and various other persons participating in the issuance of the registration statement for certain offerings of securities.<sup>40</sup> Additionally, the 1933 Act, unlike traditional securities regulations, provides a lower burden for plaintiffs to establish a right of action, thus making it easier for cases to survive pre-trial motions.<sup>41</sup> Around the early 1990s, Congress grew concerned with the increase in frivolous securities class actions and the toll on corporations concerned with financing their defenses to these actions.<sup>42</sup>

### B. *Securities Regulation Reform*

Due to the growing concern for overcrowded courts filled with frivolous litigation and ambitious plaintiffs filing securities claims, Congress adopted the PSLRA in 1995.<sup>43</sup> Under the PSLRA, plaintiffs who file a claim under the 1933 Act in federal courts face various procedural impediments meant to disincentivize frivolous claims, such as a stay of discovery and an increased number of requirements for lead plaintiffs.<sup>44</sup>

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39. See 15 U.S.C. § 77aa (2018) (listing the items required to be disclosed in the registration statement under the 1933 Act; referred to as “Schedule A of the 1933 Act”).

40. See 15 U.S.C. § 77k(a) (2018) (stating “any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue”); see also Listwa & Polivka, *supra* note 11, at 109 (noting that the 1933 Act “provided for concurrent state and federal jurisdiction and barred the removal of actions brought in state courts”).

41. See Torabi, *supra* note 1, at 258 (explaining Section 11 of the 1933 Act does not “require[ ] a showing of scienter or causation, a deliberate watering down of the traditional common law fraud elements meant to encourage compliance and enforcement of the law”).

42. See *id.* at 261 (commenting that Congress became concerned with “excess of class action suits” following the removal of more procedural hurdles for plaintiffs).

43. See 15 U.S.C. § 78u–4 (2018); see also Aggarwal, Choi & Eldar, *supra* note 9, at 390 (“Leading up to the 1990s, Congress became increasingly concerned with the impact of securities class actions, particularly the abundance of frivolous lawsuits brought by plaintiffs’ lawyers in the hope of extracting settlements for meritless but expensive claims. In response Congress enacted the Private Securities Litigation Reform Act (‘PSLRA’).”).

44. See 15 U.S.C. § 78u–4(b)(3)(B) (2018) (requiring that “all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss”); see also Aggarwal, Choi & Eldar, *supra* note 9, at 390 (“[Due to the PSLRA,] a stay [was] imposed on discovery prior to decisions on motions to dismiss, restrictions on lead plaintiffs, and potentially higher pleading standards.”).

Notably, unlike its sister act in 1934, the 1933 Act allows claims to be brought in both federal and state court.<sup>45</sup> In 1998, the Securities Litigation Uniform Standards Act (SLUSA) amended the 1933 Act and caused great uncertainty regarding the 1933 Act's concurrent jurisdiction.<sup>46</sup> The United States Supreme Court settled this uncertainty, holding that the concurrent jurisdiction in state and federal courts over these claims still stands, despite the adoption of the SLUSA amendments.<sup>47</sup> Further, the United States Supreme Court clarified that a defendant remains unable to remove these claims once filed in state court.<sup>48</sup>

### C. Growth of FFP Adoptions

Consequently, to avoid the procedural hurdles introduced by the PSLRA, many plaintiffs looking to file claims under the 1933 Act began filing predominately in state courts, in addition to federal courts, often leading to parallel actions.<sup>49</sup> When plaintiffs file in state court, as compared to federal court, they avoid many procedural burdens, including: (i)

45. See 15 U.S.C. § 77k(a) (2018) (specifying that the claim can be brought in “any court of competent jurisdiction”); see also Aggarwal, Choi & Eldar, *supra* note 9, at 390 (“Unlike the 1934 Act, federal and state courts have had concurrent jurisdiction over the 1933 Act claims from the time of its enactment.”).

46. See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended in scattered sections of 15 U.S.C.); see also Aggarwal, Choi & Eldar, *supra* note 9, at 391 (“SLUSA provided for the removal of state securities law class actions to federal court, and then for their dismissal. However, although the purpose of SLUSA was to bring securities class action back within the ambit of the federal courts (and thus within the restrictions of the PSLRA), SLUSA did not address class actions brought solely under the 1933 Act.” (footnotes omitted)). Until *Cyan*, there was a federal circuit split regarding the implications of SLUSA on the jurisdictional and removal restrictions of claims filed under the 1933 Act. *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at \*6 (Del. Ch. Dec. 18, 2018) (citing *Cyan, Inc. v. Beaver Cnty. Employees Ret. Fund*, 138 S.Ct. 1061, 1068–69 (2018)) (“The federal courts split on how to interpret SLUSA’s changes.”), *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

47. See *Cyan*, 138 S. Ct. at 1066 (holding that SLUSA did not “strip state courts of jurisdiction over class actions alleging violations of only the Securities Act of 1933” nor did it “empower defendants to remove such actions from state to federal court”).

48. *Id.* at 1078 (“Neither did SLUSA authorize removing such suits from state to federal court.”).

49. See Aggarwal, Choi & Eldar, *supra* note 9, at 393 (“*Cyan* sparked . . . a dramatic increase in 1933 Act claims filed in state courts, for which there was often a parallel case brought in federal court against the same defendant based on the same allegations.”); Torabi, *supra* note 1, at 273 (noting an increase in state court filings of Section 11 suits post-*Cyan*) (citing Michael Klausner, Jason Hegland, Cara LeVine & Jessica Shin, *State Section 11 Litigation in Post-Cyan Environment (Despite Sciabacucchi)*, 75 BUS. LAW. 1769, 1775 fig. 1 (2020)); see also CORNERSTONE RSCH., SECURITIES CLASS ACTION FILINGS: 2019 YEAR IN REVIEW 19–25, <https://securities.stanford.edu/research-reports/1996-2019/Cornerstone-Research-Securities-Class-Action-Filings-2019-YIR.pdf> [<https://perma.cc/A2PH-DCHA>] (showing the growth of 1933 Act actions involving parallel filings in both state and federal court following *Cyan*).

a stay of discovery until after the motion to dismiss period, (ii) lead plaintiff assignment requirements, (iii) a defendant's ability to consolidate claims, and (iv) the higher pleading standards of federal courts.<sup>50</sup> To protect themselves against these multi-forum litigations and lower burdens on plaintiffs, more corporations responded by adopting FFPs in their charters and bylaws that direct all 1933 Act claims brought against the corporation and its affiliates to federal court.<sup>51</sup>

#### D. Boilermakers, ATP, and the 2015 Amendments of the DGCL

While federal courts juggled securities regulation developments, the Delaware state courts faced challenges to modern developments within the corporate governance arena.<sup>52</sup> In 2013, the Delaware Court of Chancery addressed a facial challenge to forum-selection provisions adopted in the bylaws of corporations, which required any litigation pertaining to the internal affairs of the corporation to be brought in Delaware.<sup>53</sup> In *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*,<sup>54</sup> the Court of Chancery held that these provisions are valid under Section 109(b) of the DGCL, which governs the contents of bylaws of a corporation in Delaware.<sup>55</sup>

The *Boilermakers* court found that “the bylaws only regulate suits brought by stockholders as stockholders in cases governed by the internal affairs doctrine.”<sup>56</sup> Thus, because these bylaws “establish[ ] . . . procedural rules for the operation of the corporation,” they plainly fall within the

50. See Aggarwal, Choi & Eldar, *supra* note 9, at 394–98 (listing the restrictions on plaintiffs in federal court); Torabi, *supra* note 1, at 263 (detailing how the PSLRA made it easier for federal courts to dispose of meritless claims, and generally made it “substantially more difficult for investors to maintain securities class actions in federal court”). But see *id.* at 396 n.40 (acknowledging that some states have chosen to adopt some of the same procedural rules as under the PSLRA, such as the stay of discovery, removing some advantage to filing in state court over federal court).

51. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 111 (Del. 2020) (explaining that, because corporations prefer to litigate 1933 Act claims in federal court, they began adopting FFPs for these claims); see also Aggarwal, Choi & Eldar, *supra* note 9, at 390 (“*Cyan* sparked . . . the proliferation of FFPs, particularly in IPOs.”).

52. See generally *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 555 (Del. 2014); *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

53. See *Boilermakers*, 73 A.3d at 937–38 (stating that defendant Chevron’s bylaw required “litigation relating to Chevron’s internal affairs should be conducted in Delaware,” while defendant FedEx’s bylaw similarly provided “that the forum for litigation related to FedEx’s internal affairs should be the Delaware *Court of Chancery*” (emphasis added)).

54. 73 A.3d 934 (Del. Ch. 2013).

55. See *id.* at 939 (stating that the bylaws of a corporation “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 right or powers or the right or powers of its stockholders, directors, officers or employees” (quoting DEL. CODE ANN. tit. 8, § 109(b))).

56. *Id.*

broad grant of authority under Section 109(b).<sup>57</sup> This case not only provided a first impression treatment of forum-selection provisions in governance documents in Delaware, but it also served as a primary source of reasoning relied on by both of the Delaware state courts in their analysis of the validity of the FFPs.<sup>58</sup>

In the 2014 case *ATP Tour, Inc. v. Deutscher Tennis Bund*,<sup>59</sup> the Delaware Supreme Court considered a facial challenge to the validity of a by-law-based fee-shifting provision pertaining solely to “intra-corporate” disputes under the DGCL.<sup>60</sup> A corporation unilaterally adopted the provision in question which purported to “shift[ ] attorneys’ fees and costs to unsuccessful plaintiffs in intra-corporate litigation.”<sup>61</sup> The Delaware Supreme Court held that “fee-shifting provisions in a non-stock corporation’s bylaws can be valid and enforceable under Delaware law.”<sup>62</sup> Ultimately, the *Salzberg* court utilized *ATP* to identify an intermediate category for “intra-corporate” claims.<sup>63</sup>

In 2015, Delaware’s legislature passed the amendments of Sections 102 and 109 of the DGCL and added Section 115, which encompass limits and grants as to the subject matter of charters and bylaws for Delaware corporations.<sup>64</sup> The amendments to Section 102 and 109, though “not explicitly overrul[ing] the *ATP Tour* decision[,]” do “prohibit Delaware stock corporations from adopting fee-shifting bylaws or certificate of incorporation provisions.”<sup>65</sup> On the other hand, Section 115 codifies the *Boiler-*

57. *Id.* (“[The bylaws] plainly relate to the ‘business of the corporation[s],’ the ‘conduct of [their] affairs,’ and regulate the ‘rights or powers of [their] stockholders.’”).

58. *See Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at \*9 (Del. Ch. Dec. 18, 2018) (stating *Boilermakers* was a “seminal decision on the validity of forum-selection provisions in the corporate contract”), *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

59. 91 A.3d 554 (Del. 2014).

60. *See id.* at 555 (Del. 2014) (answering four certified questions from the U.S. District Court of Delaware). Notably, the court only answered questions pertaining to a Delaware non-stock corporation’s bylaw provision. *Id.*

61. *Id.*

62. *Id.* at 555, 558 (holding fee-shifting provisions in bylaws fall within the statutory limitations under the DGCL and are not prohibited under the common law).

63. *See Salzberg v. Sciabacucchi*, 227 A.3d 102, 122–23 (Del. 2020) (rejecting the Court of Chancery’s interpretation and stating that *ATP* supports the conclusion that the corporate contract can govern claims outside of state fiduciary duty claims, specifically pointing to the “repeated use of the phrase ‘intra-corporate litigation,’ as opposed to the phrase, ‘internal affairs’ claims”).

64. *See* Act of June 24, 2015, ch. 40, 80 Del. Laws 40, (2015) (codified as amended in DEL. CODE ANN. tit. 8, § 102, 109, 115 (West 2020)).

65. Gregory DiCiancia, Note, *Limiting Frivolous Shareholder Lawsuits Via Fee-Shifting Bylaws: A Call for Delaware to Overturn and Revise Its Fee-Shifting Bylaw Statute*, 56 B.C. L. REV. 1537, 1563 (2015) (explaining that “the *ATP Tour* decision is still applicable to non-stock corporations”); *see* DEL. CODE ANN. tit. 8, § 102(f) (prohibiting a charter from containing a fee-shifting provision relating to “an internal corporate claim”); *see also* *Solak v. Sarowitz*, 153 A.3d 729, 734 (Del. Ch. 2016)

*makers* decision by explicitly validating provisions that direct internal affairs claims to Delaware state courts as the exclusive forum.<sup>66</sup> Notably, Section 115 also defined what would qualify as “internal corporate claims.”<sup>67</sup>

#### E. *The Internal Affairs Doctrine in Delaware*

The internal affairs doctrine is the long-standing principle that the law of the state of incorporation governs issues relating to the internal affairs of a corporation.<sup>68</sup> This doctrine is essential in maintaining the expectations of corporations, their affiliates, and their shareholders as to what state corporate law applies to their conduct and, accordingly, what rights they possess.<sup>69</sup> The doctrine entails a unique choice of law analysis for state corporate law because it does not consider all facts of the transaction, including whether the corporation has maintained sufficient contacts within the state.<sup>70</sup> Rather, the doctrine dictates a strong presumption that the state of incorporation provides the applicable law on the internal corporate affairs, and this presumption can only be overcome when a rare “overriding interest” exists in another state.<sup>71</sup>

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(indicating that less than a year after the *ATP* decision, the 2015 Amendments were proposed to “prevent the boards of Delaware stock corporations from adopting fee-shifting bylaws” and stating that the purpose was to “limit *ATP* to its facts” (citation omitted)).

66. See DEL. CODE. ANN. tit. 8, § 115 (“The certificate of incorporation or the bylaws may require . . . that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State.”); see also *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL2018, 2018 WL 6719718, at \*30 (Del. Ch. Dec. 18, 2018) (commenting that Section 115 codified the *Boilermakers* decision), *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

67. See DEL. CODE. ANN. tit. 8, § 115 (defining internal corporate claims as “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”).

68. See FLETCHER, *supra* note 5 (summarizing the internal affairs doctrine).

69. See *id.* (“By providing certainty and predictability, the internal affairs doctrine protects the justified expectations of the parties with interests in the corporation.”); see also Aggarwal, Choi & Eldar, *supra* note 9, at 418 (“[T]he [internal affairs] doctrine . . . prospectively inform[s] directors and officers about the law that will apply to their actions, and inform[s] shareholders about the standards to which they can hold corporate executives.”). In addition, the internal affairs doctrine has long been seen as representing more than just a choice of law analysis. See *McDermott Inc. v. Lewis*, 531 A.2d 206, 216–17 (Del. 1987) (stating that the internal affairs doctrine also has “serious” constitutional implications “under due process, the commerce clause and the full faith and credit clause” by providing stability as to what laws will apply in any given situation).

70. See 1 AM. L. OF TORTS § 2:23 (2020) (explaining the analysis is different for actions based in “contracts entered between a corporation and individuals, torts, and dealings in personal and real property”).

71. See FLETCHER, *supra* note 5 (explaining the rarity of an “overriding interest” sufficient to overcome the presumption for the state of incorporation, such as: “[i]n some jurisdictions, a court may apply the forum state’s law even though the

Because of the internal affairs doctrine, differences among state corporate codes often dictate where a corporation will choose to incorporate.<sup>72</sup> Delaware is the most preferred state of incorporation for public corporations due to the benefits its corporate law confers upon corporations and stockholders.<sup>73</sup> To take advantage of the benefits of incorporating in Delaware, corporations rely on the internal affairs doctrine to be sure they are subject to Delaware law.<sup>74</sup> Accordingly, consistent application of the internal affairs doctrine is arguably the entire basis for Delaware's ability to exist as the primary state of incorporation.<sup>75</sup>

### III. THE INTERSECTION: THE COURT OF CHANCERY FINDS THE FFPs UNENFORCEABLE

In *Sciabacucchi v. Salzberg*, the petitioner asked the Delaware Court of Chancery to determine whether the provisions in the charters of three different corporations, requiring all 1933 Act claims be brought exclusively in federal court, are enforceable under Delaware corporate law.<sup>76</sup> The ultimate question in this challenge was whether it is proper under the DGCL for a corporation's governance documents to manage claims based in federal securities law.<sup>77</sup> This question was unclear because federal securities law is not traditionally seen as relating to the "internal affairs" of a Delaware corporation.<sup>78</sup>

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corporation is registered elsewhere if the corporation's contacts with the forum state are stronger than its contacts with the state of incorporation" and, in other jurisdictions, a court may use an approach that analyzes "the states' policies . . . to find out which state's interests would be more impaired by subordinating its policy to the policy of the other state").

72. See J. ROBERT BROWN JR., HERBERT B. MAX & STACEY L. BOWERS, *RAISING CAP. PRIVATE PLACEMENT FORMS* § 1.01 (3d ed. 2021) ("Variations among corporate codes may create an incentive to incorporate in a particular jurisdiction.").

73. For theories as to why Delaware is the preferred state of incorporation for public corporations, see COX & HAZEN, *supra* note 8 (listing several reasons as to why Delaware "remains supreme" in the race for corporate charters, including: the DGCL "has the largest body of precedent interpreting its provisions;" its law provides certainty; and "Delaware populates its judiciary with those experienced in the trenches of practicing corporate law"). *But see id.* (noting there is also a race to the bottom theory, wherein Delaware draws corporations to incorporate by catering to management (citing William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L. J.* 663 (1974))).

74. See COX & HAZEN, *supra* note 8 ("[Delaware's] success is fed by the vitality of the internal affairs doctrine.").

75. See Kahan & Rock, *supra* note 2, at 1616 ("The continued applicability of the internal affairs rule is, of course, the life-blood of Delaware.").

76. See *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at \*2 (Del. Ch. Dec. 18, 2018), *rev'd*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

77. See *id.* at \*1 (stating that the question turns on what subject matter a charter provision can address under the DGCL).

78. See *id.* (indicating that the answer rests upon whether the subject matter intending to be governed is a right or relationship established under Delaware law).

A. *Factual Background*

The nominal defendants in this case were three Delaware corporations: Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. (collectively, the “defendants”).<sup>79</sup> Each had recently filed a registration statement with the Securities and Exchange Commission (SEC) in preparation for their upcoming IPOs.<sup>80</sup> In addition, all three defendants had adopted “charter-based FFPs” prior to filing their registration statements.<sup>81</sup> The three FFPs were similar, in that they stated federal courts “shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933.”<sup>82</sup> The plaintiff, Matthew Sciabacucchi, bought shares in each of the defendants in either their IPOs or shortly thereafter, under the aforementioned registration statements.<sup>83</sup> Accordingly, the court stated Sciabacucchi had standing to sue under Section 11, Section 12(a), and possibly Section 12(a)(2) of the 1933 Act.<sup>84</sup>

On December 29, 2017, Sciabacucchi filed a complaint naming twenty individuals, including those who had endorsed the registration documents for the defendants and those acting as directors for the defendants subsequent to going public.<sup>85</sup> Overall, Sciabacucchi asserted a facial challenge to FFPs adopted into corporate charters when purporting to govern claims brought under the 1933 Act.<sup>86</sup>

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79. *Id.* at \*6.

80. *See id.* (noting each of the defendants had filed its registration statement at various times in 2017 and subsequently launched an initial public offering).

81. *See id.* (“Blue Apron adopted a charter-based [FFP] . . . Roku adopted a charter-based [FFP] . . . Stitch Fix adopted a charter-based [FFP].”). The defendants had adopted these provisions into their charters prior to the *Cyan* decision, and thus a circuit split still remained over whether the SLUSA would prevent 1933 Act filings in state courts and allow removal. *Id.* (noting that all three nominal defendants filed their registration statements in 2017 and had adopted FFPs prior to their IPOs).

82. *Id.* (citing Pl.’s Compl. ¶¶ 15–16) (also stating that “[a]ny 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]”). Blue Apron’s provision differed slightly in that its provision specified that the federal district courts would be the only forum “to the fullest extent permitted by law.” *Id.* (citing Pl.’s Compl. ¶ 14).

83. *See id.* at \*7 (noting Sciabacucchi bought shares of common stock under the registration statements).

84. *See id.* (“[A]ddress[ing] any material misstatements or omissions in the registration statements.”); *see also id.* (“[E]nforc[ing] the 1933 Act’s registration requirements.”); *id.* (addressing “a material misstatement or omission in a prospectus”).

85. *See id.* The court also notes that the *Cyan* decision was decided on March 20, 2018—subsequent to the filing of this complaint—confirming that plaintiffs remained able to sue under the 1933 Act in state court. *Id.*

86. *Id.* (acknowledging the petitioner’s request was a facial challenge, thus was seeking “a declaratory judgment that the FFPs are invalid” under the DGCL).

B. *The Boilermakers Test and Its Application to 1933 Act Claims*

In *Sciabacucchi*, the Court of Chancery began the analysis by discussing *Boilermakers*, which addressed the validity of forum provisions as adopted into the bylaws of a Delaware corporation.<sup>87</sup> There, the Court of Chancery held that the explicit language of Section 109(b) of the DGCL, which governs the contents of bylaws, permits bylaws to regulate “internal affairs claims brought by stockholders *qua* stockholders,” but does not permit regulating the “external relationships” of the corporation.<sup>88</sup> Accordingly, the *Sciabacucchi* court summarized *Boilermakers* as stating that Delaware corporations are authorized to include forum provisions in their bylaws that solely apply to internal affairs claims.<sup>89</sup>

Subsequently, the Court of Chancery applied the same logic to Section 102(b)(1) of the DGCL, which governs the contents of charters, finding that the “scope parallels Section 109(b).”<sup>90</sup> Thus, the Court of Chancery concluded, there are two types of matters—“external” or “internal”—and an FFP in a charter is only valid governing solely internal claims.<sup>91</sup> Accordingly, the pivotal determination was whether claims brought under the 1933 Act constituted “internal affairs” or “external affairs.”<sup>92</sup>

After establishing this test, the Court of Chancery succinctly concluded that an action under the 1933 Act would constitute external affairs of a corporation.<sup>93</sup> To justify this distinction, the court pointed to the fact that petitioners in 1933 Act claims are not yet stockholders of the corporation “[a]t the time the predicate act occurs.”<sup>94</sup> As such, the court found a petitioner’s status as a stockholder is merely “incidental to a claim under the 1933 Act.”<sup>95</sup>

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87. *See id.* at \*1, 9 (citing *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) (summarizing the decision)).

88. *Id.* at \*1 (noting reference specifically to stockholders bringing the claims in their role *as stockholders*); *id.* at \*10 (“[The *Boilermakers* court] had no difficulty holding that the forum-selection bylaws fell within the scope of Section 109(b).”).

89. *See id.* at \*11 (“*Boilermakers* thus validated the ability of a corporation to adopt a forum-selection provision for internal-affairs claims.”).

90. *See id.* at \*1 (noting that the same reasoning applies).

91. *See id.* (recounting that Section 109(b) only authorizes regulation of internal matters).

92. *Id.* (“The *Boilermakers* distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act.”).

93. *See id.* at \*18 (finding 1933 Act claims more synonymous with a “tort or contract claim brought by a third-party plaintiff”).

94. *Id.* at \*17 (“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.”).

95. *Id.*

C. *Impact of the 2015 Amendments and First Principles*

The Court of Chancery next explored the impact of the 2015 Amendments of the DGCL, in particular Sections 102, 109, and 115.<sup>96</sup> The Court of Chancery focused initially on Section 115—pointing to the lack of a prohibition of forum-selection provisions for non-“internal corporate claims.”<sup>97</sup> The court concluded that this was because the drafters had “recognized that the charter and bylaws can only address internal affairs claims.”<sup>98</sup>

The court then focused on the amendments of Section 102 and 109—which collectively prohibit fee-shifting provisions in both the charter and the bylaws when “in connection with an internal corporate claim.”<sup>99</sup> The Court of Chancery asserted that the purpose of these amendments was to *wholly* prohibit fee-shifting provisions in the charters and bylaws of stock corporations.<sup>100</sup> Accordingly, the court found the failure to address non-internal claims reinforced the conclusion that the charters and bylaws can only regulate the internal affairs of a corporation.<sup>101</sup>

The Court of Chancery concluded its analysis by citing “first principles.”<sup>102</sup> Referring to the internal affairs doctrine, the court described an inherent limit placed on a corporation’s governance documents due to the DGCL’s limited jurisdiction—so as not to violate territorial principles.<sup>103</sup> The court explained that the claim “does not arise out of the corporate contract” between a stockholder and a corporation, and thus does not involve the internal affairs that the corporate contract can govern.<sup>104</sup> Finally, the court stated that, even if securities lawsuits “involve the business and affairs of the corporation,” it does not automatically “follow that these matters involve the *internal affairs* of the corporation.”<sup>105</sup> The Court of Chancery held that because claims brought under the 1933 Act

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96. *Id.* at \*14 (noting Section 115 regulates the adoptions of forum-selection provisions in charters and bylaws).

97. *Id.* (“Section 115 does not say explicitly that the charter or bylaws cannot include forum-selection provisions addressing other types of claims.”).

98. *Id.* (explaining that the “omission comports with the precedent,” and with the opinions of “[t]wo past presidents and leading members of the Corporation Law Council”).

99. *Id.* at \*15 (recounting the amended portions of the sections).

100. *Id.* (“Their overarching policy goal was to ban fee-shifting provisions from the corporate contract.”).

101. *Id.* (noting that “[i]f [the drafters] thought that the charter or bylaws could regulate other types of claims, then the prohibitions would have swept more broadly”).

102. *Id.* at \*18 (“The same result derives from First Principles.”).

103. *See id.* at \*18–21 (explaining the prerequisite that any authority held by a corporation is ultimately derived from state corporate law).

104. *Id.* at \*1–2 (“A claim under the 1933 Act does not turn 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.”).

105. *Id.* at \*22.

fall within the external affairs of a corporation, “the nominal defendants lack authority to use their certificate of incorporation to regulate claims under the 1933 Act.”<sup>106</sup>

#### D. *Effect of the Court of Chancery’s Holding*

Overall, this opinion generated a “substantial slowdown in the adoption of these FFPs.”<sup>107</sup> It even induced many corporations who had already adopted these FFPs to either issue reports simply stating that the FFPs will be unenforceable or even reflecting that they plan to amend to remove the FFPs if the decision is not reversed.<sup>108</sup> Some corporations, though, chose to adopt these same FFPs even after the Court of Chancery decision, gambling that the decision would be overturned.<sup>109</sup> As this Note will reveal below, it is safe to say these particular corporations made a good bet. Upon an appeal by the defendants, the Delaware Supreme Court reviewed the Court of Chancery’s decision.<sup>110</sup>

#### IV. DELAWARE SUPREME COURT GIVES CORPORATIONS THE GREEN LIGHT

In *Salzberg*, the Delaware Supreme Court re-analyzed the validity of FFPs governing 1933 Act claims but decided to go a different route. While the Court of Chancery’s analysis focused on the perceived intent of the DGCL, the Delaware Supreme Court chose to instead focus on the plain text.<sup>111</sup> Straight away, the court’s analysis diverged from that of the Court of Chancery, finding that 1933 Act claims *do* fall within the scope of the statutory grant.<sup>112</sup> The court rejected the Court of Chancery’s equation of the scope of the internal affairs doctrine with the scope of Section 102(b)(1).<sup>113</sup> The Delaware Supreme Court determined that corporate affairs should be categorized on a “continuum,” rather than in a binary structure.<sup>114</sup> Accordingly, 1933 Act claims fall within the intermediate cat-

106. *Id.* at \*23.

107. Aggarwal, Choi & Eldar, *supra* note 9, at 394.

108. *See id.* (“Unsurprisingly . . . the decision led to a substantial slowdown in the adoption of FFPs, and some companies have even issued a special 8-K to investors in order to inform the market about the invalidity of the provision. In some cases, companies issuing an 8-K promised to amend their charters or bylaws (as applicable) if the decision is not reversed by the Delaware Supreme Court.”).

109. *See id.* (noting Lyft’s adoption of an FFP into its charter “*despite* the decision”).

110. *See generally* *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

111. *See id.* at 113 (explaining the provisions are valid because they fall within the plain meaning of the statute).

112. *See id.* at 114 (“An FFP could easily fall within one [of Section 102(b)(1)’s] broad categories.”).

113. *See id.* at 125 (dismissing the Court of Chancery’s argument that “superimposed the ‘internal affairs’ doctrine onto and narrowed the scope of Section 102(b)(1)[—]contrary to its plain language”).

114. *Id.* at 130–31 (explaining that “there is a category of matters that is situated on a continuum between the *Boilermakers* definition of ‘internal affairs’ and its description of purely ‘external’ claims”).

egory of “intra-corporate” claims, existing within the corporate contract, yet outside of the internal affairs.<sup>115</sup> Ultimately, the court reversed the lower court’s ruling and held that these charter-based FFPs are facially valid and enforceable.<sup>116</sup>

A. *1933 Act Claims Fall within the Scope of Section 102(b)(1)*

In *Salzberg*, the Delaware Supreme Court chose to focus more on the statutory language of the DGCL, and began by going directly to the source—the text of Section 102(b)(1).<sup>117</sup> The court began by summarizing the two broad categories that the statute enables charters to govern as: (i) “any provision for the management of the business and for the conduct of the affairs of the corporation,” and (ii) “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.”<sup>118</sup> Analyzing these two categories of enablement, the Delaware Supreme Court disagreed with the Court of Chancery and concluded that “[a]n FFP could easily fall within either of these broad categories.”<sup>119</sup> The court reasoned that, because 1933 Act claims regulate the management of litigation originating from the “drafting, reviewing, and filing of registration statements by a corporation and its directors,” they are inherently related to the “management of business” and the “conduct of the affairs of the corporation” as directly included in 102(b)(1).<sup>120</sup>

The Delaware Supreme Court then highlighted the benefits that these FFPs provide to corporations, especially when in the context of the escalation of 1933 Act claims filed in state court following the *Cyan* decision.<sup>121</sup> The court focused in particular on the inefficiencies and costs that arise from the inability to remove cases from state court or consoli-

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115. *See id.* at 131 (concluding that 1933 Act claims are appropriately deemed intra-corporate claims because they are within the scope of Section 102(b)(1) but outside of internal affairs claims as defined by Section 115).

116. *See id.* at 109–12 (holding that FFPs address a proper subject matter under Section 102(b)(1)).

117. *See id.* at 113 (“The ‘most important consideration for the court in interpreting the statute is the words the General Assembly used in writing it.’” (quoting *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73A.3d 934, 950 (Del. Ch. 2013))).

118. *Id.*

119. *Id.* at 114.

120. *Id.*

121. *Id.* at 114 (“FFPs 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, Inc. v. Beaver County Employees Retirement Fund.*”). For a discussion on the procedural landscape following *Cyan* see *supra* notes 46–51 and accompanying text.

date cases in state court.<sup>122</sup> The Delaware Supreme Court found that, because FFPs allow corporations to consolidate these claims in federal court, they directly concern the “management of the business” and “the conduct of the affairs of the corporation.”<sup>123</sup>

B. *FFPs Do Not Conflict with Delaware Law or Public Policy*

Next, the Delaware Supreme Court zeroed in on the limiting phrase in Section 102: “if such provisions are not contrary to the laws of this State.”<sup>124</sup> In order to confirm that the FFPs do not violate any express laws or public policy of Delaware, the Delaware Supreme Court walked through the corresponding background to both.<sup>125</sup> Ultimately, the court concluded the FFPs violated neither.<sup>126</sup>

In regard to the public policy of Delaware, the court explained that the DGCL is meant to be a “‘broad enabling act which leaves latitude for substantial private ordering’” and that it is “widely regarded as the most flexible in the nation because it leaves the parties to the corporate contract . . . with great leeway to structure their relations, subject to relatively loose statutory constraints.”<sup>127</sup> Thus, “as a matter of Delaware public policy,” the FFPs are facially valid because they agree with Delaware’s endorsement of private ordering.<sup>128</sup>

Next, the Delaware Supreme Court touched on the 2015 Amendments to the DGCL, which the Court of Chancery had interpreted to find the FFPs invalid.<sup>129</sup> Nonetheless, in the Delaware Supreme Court’s interpretation of Section 115, it found that the section was only intended to prohibit the adoption of charter provisions that would *completely* exclude *Delaware* as a forum for internal corporate claims.<sup>130</sup> Thus, the FFPs do

122. *Id.* at 115 (“When parallel state and federal actions are filed, no procedural mechanism is available to consolidate or coordinate multiple suits in state and federal court.”).

123. *Id.* In addition, the court also found that by limiting the power of a shareholder to bring this action in federal court, the provision also relates to the “defining, limiting and regulating the powers of the corporation, the directors and the shareholders.” *Id.*

124. *Id.* (referencing the precise language in the statute).

125. *See id.* at 115–18 (summarizing the related DGCL provisions and Delaware public policy on forum provisions and private ordering generally).

126. *See id.*

127. *Id.* at 116 (quoting *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996)).

128. *See id.* (finding that because “corporate charters are contracts among a corporation’s stockholders, stockholder-approved charter amendments are given greater respect under [Delaware’s] law”); *see also id.* at 132 (“[F]orum selection clauses are presumptively valid and enforceable under Delaware law.” (citing *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010))).

129. *See id.* at 116–17. To review the earlier analysis in the Court of Chancery’s opinion, see notes 96–101 and accompanying text.

130. *See id.* at 116 (explaining that Section 115 does not prohibit directing *federal claims* to *federal court*).

not violate this section because they specifically “direct 1933 Act claims (federal claims) to federal court.”<sup>131</sup>

The General Assembly’s choice *not* to amend Section 102(b)(1) was also notable, according to the Delaware Supreme Court, especially in light of the language added to Section 102(f) which “prohibits fee-shifting as against stockholders (of stock corporations) in connection with an ‘internal corporate claim.’”<sup>132</sup> Diverging from the Court of Chancery again, the Delaware Supreme Court interpreted these amendments to imply that the scope of Section 102(b)(1) is *broader* than Section 102(f) or Section 115.<sup>133</sup> The court rejected the Court of Chancery and Sciabacucchi’s argument that the amendments in the other sections implicated an amendment to Section 102(b)(1), stating that the “argument runs afoul of a number of well-established principles of statutory construction.”<sup>134</sup> The Delaware Supreme Court also concluded that its holding agreed with both federal law and public policy regarding FFPs because Delaware law largely follows federal law on those issues.<sup>135</sup>

### C. 1933 Act Claims Designated as “Intra-Corporate Claims”

At this point in the opinion, the Delaware Supreme Court had established that (a) FFPs governing 1933 Act claims *do not* fall within the scope of Section 115’s definition of internal corporate claims and (b) Section 102(b)(1)’s scope authorizes provisions that would govern non-internal corporate claims in a charter.<sup>136</sup> Additionally, both the Court of Chancery and the Delaware Supreme Court agreed that a Delaware corporation

131. *Id.* at 117 (emphasis added).

132. *Id.* (“The 2015 amendment adding Section 102(f) further supports the view that Section 102(b)(1) remains expansive enough to include FFPs.”).

133. *See id.* at 118 (comparing the absence of limitation to “internal corporate claims” in Section 102(b) to the inclusion of the limitation in Section 115, Section 102(f), and Section 109(b)). The Delaware Supreme Court also pointed to Section 202, which concerns the conduct of persons who are not yet shareholders, as an example of other sections of the DGCL applying more broadly than Section 115. *Id.* at 129 (“This is supported by the fact that other sections of the DGCL have an impact on conduct with persons who are not yet stockholders, such as Section 202.”).

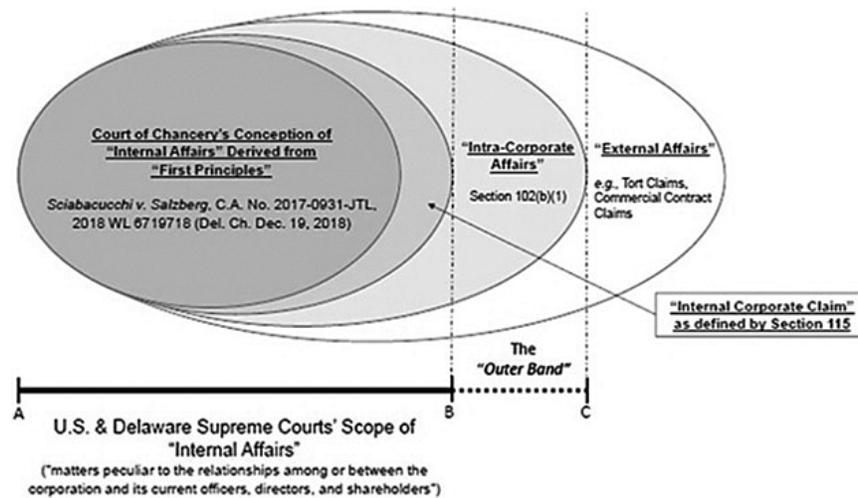
134. *Id.* at 118–19 (noting the principles of statutory interpretation that other statutes should not be used to interpret a statute that is otherwise “clear and unambiguous” and “statutes should not be superseded or altered by implication unless there is an irreconcilable conflict.”). The court also employed the canon of statutory construction wherein one should interpret statutes in a way that gives meaning to every word in the statute. *Id.* Thus, the *omission* of “internal corporate claims” in Section 102(b)(1) has a significance in order to give the *inclusion* of that same term meaning in the other sections of the DGCL. *Id.*

135. *See id.* at 132–33 (stating Delaware public policy as to forum-selection provisions “follows United States Supreme court precedent . . . which requires the court to give as much effect as 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.’” (quoting *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73A.3d 934, 949 (Del. Ch. 2013))).

136. *See supra* notes 117–123 and accompanying text.

does not have the ability to adopt an FFP that would govern external claims into either its charter or bylaws.<sup>137</sup> Thus, according to the Delaware Supreme Court, the only logical conclusion is that there is a category *between* internal corporate claims and external claims, wherein there lies subject matter including claims brought under the 1933 Act.<sup>138</sup> The court, adopting the term used in *ATP*, named this category intra-corporate claims.<sup>139</sup> The Delaware Supreme Court designated 1933 Act claims within this category because they “are not governed by substantive Delaware law,” yet are still sufficiently “internal” to the corporation’s affairs as to fall within Section 102(b)(1).<sup>140</sup>

The Delaware Supreme Court provided a helpful visual to further illustrate the span of corporate affairs<sup>141</sup>:



137. See *id.* at 131 (acknowledging that “there are purely ‘external’ claims . . . which are clearly outside the bounds of Section 102(b)(1)”); see also *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at \*18 (Del. Ch. Dec. 18, 2018) (“[A] corporation does not have the power to adopt in its charter or bylaws a forum-selection provision that governs external claims.”) *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020). Instead, the disagreement lies in whether there is a binary division of claims (external/internal) or a continuum. *Id.*

138. See *Salzberg*, 227 A.3d at 125 (“There is a category of matters that is situated on a continuum between the *Boilermakers* definition of ‘internal affairs’ and its description of purely ‘external’ claims.”).

139. See *id.* (“*ATP* suggests that certificate of incorporation provisions governing certain types of ‘intra-corporate’ claims that are not strictly within *Boilermakers*’ “internal affairs,” can still be within the boundaries of the DGCL, and specifically Section 102(b)(1).”).

140. *Id.* at 123–24 (noting that 1933 Act claims still “arise from internal corporate conduct on the part of the Board” and pointing out that because the examples provided in *Boilermakers* of “external claims” had “no Board action . . . present as it necessarily is in Section 11 claims”).

141. See *id.* at 131 fig. 1 (including the Venn diagram to illustrate the continuum of corporate affairs).

This visual draws a comparison between the Court of Chancery's "binary world," which consists of only external claims and internal affairs claims, and the Supreme Court's "continuum," which includes a broader scope of Section 115 internal corporate claims, the "Outer Bound" of strictly Section 102(b)'s intra-corporate affairs claims, and strictly external claims.<sup>142</sup>

D. *Delaware Supreme Court Acknowledges Potential Responses to the Holding*

Ultimately, the court re-emphasized that its obligation on appeal was only to determine whether an FFP could be valid on its face.<sup>143</sup> Accordingly, the court noted that the possibility of a non-stockholder plaintiff bringing a 1933 Act claim against a corporation is irrelevant to its assessment of the facial validity of these FFPs.<sup>144</sup> Nevertheless, the court also acknowledged that it remains possible that an FFP governing 1933 Act claims could be found unenforceable in an as-applied challenge.<sup>145</sup> Overall, the court listed three "as applied" bases for potentially finding these FFPs unenforceable: (i) if enforcement would be "unreasonable or unjust;" (ii) if the FFPs involved "fraud or overreaching;" or (iii) if enforcement would contradict "strong public policy of the forum in which suit is brought."<sup>146</sup>

Finally, to conclude its opinion, the Delaware Supreme Court acknowledged the potential "down the road" effects its decision may have, particularly the enforceability, or lack thereof, of these FFPs by Delaware's "sister states."<sup>147</sup> The court noted that, while the "question of enforceability" is important to consider, it should not be the driver in a challenge of facial validity.<sup>148</sup> Regardless, the court felt compelled to provide reasoning for other states to similarly enforce these FFPs, and did so by parallel-

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142. *Id.* at 131 (illustrating the court's understanding of the Court of Chancery's scope of Section 102(b) as being even narrower than the definition as provided in Section 115, rather than broader as the Supreme Court understands it). The court also illustrated the Court of Chancery's shrinking of the concept of internal affairs, as it is understood by not only the Delaware Supreme Court, but also the United States Supreme Court. *Id.* See also *id.* at 125 (concluding that the scope of Section 102(b) is broader than Section 115).

143. See *id.* at 130 (noting the question was whether "an FFP can survive a facial challenge based upon claims asserted by an existing stockholder").

144. See *id.* (finding that it does not matter whether or not 1933 Act claims "arise from the purchase of shares, as opposed to share ownership" because the FFPs are valid as to existing stockholders).

145. See *id.* at 135 (recognizing that "provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose").

146. *Id.* at 135 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

147. See *id.* at 133 (acknowledging that "[p]erhaps the most difficult aspect of this dispute is . . . whether [FFPs] will be respected and enforced by [Delaware's] sister states").

148. See *id.* at 134 (conceding nonetheless that the enforceability in other states is a "powerful concern that has infused much of the briefing here").

ing the beneficial effects and concerns related to the internal affairs doctrine to those raised when enforcing these FFPs.<sup>149</sup>

#### V. SWERVING OUT OF ITS LANE? CRITICAL ANALYSIS OF *SALZBERG*

While most commentary following *Salzberg* focused on the potential negative implications to stockholders, some critics latched on to the court's express acknowledgment that its decision may be regarded as an "out-of-[its]-lane power grab" by "stepping on the toes of . . . the federal government."<sup>150</sup> Another criticism is that *Salzberg* did not sufficiently consider Congress's initial objective for the 1933 Act—protecting investors.<sup>151</sup> In addition, some critics found that, though claiming to agree with the previously existing scope, in reality *Salzberg* effectively broadened the boundaries of Section 102(b)(1).<sup>152</sup> While each of these criticisms have strong reasoning, they are incorrect for the reasons stated below.<sup>153</sup> This Part will rebut each of these arguments because *Salzberg*'s analysis encompasses stronger support and promotes a common policy goal of the 1933 Act and Delaware—improving judicial economy.<sup>154</sup> Finally, this Part will conclude by describing an alternative theory as to how the Delaware Supreme Court could have determined the FFPs were valid under the DGCL—by directly characterizing 1933 Act claims as internal affairs claims.<sup>155</sup>

##### A. Federal Legislative Intent

A narrow look into federal law relating to the 1933 Act has led some critics to conclude that *Salzberg* neglected the intent of the 1933 Act and the United States Supreme Court decision in *Cyan*.<sup>156</sup> They point to Congress's objective—to heighten the regulation of the securities markets by

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149. See *id.* at 135–37 (finding that the Constitutional concerns raised with enforcement of FFPs, similar to with the internal affairs doctrine, are not violated because of FFPs "procedural nature" and the "uniformity and predictability" that they provide).

150. *Id.* at 134 (commenting that some of the briefs expressed views that the court's holding would be beyond its authority).

151. See *infra* notes 156–160 and accompanying text.

152. See *infra* notes 167–172 and accompanying text.

153. See *infra* notes 156–181 and accompanying text.

154. See *infra* notes 177–181 and accompanying text.

155. See *infra* notes 182–192 and accompanying text.

156. See Aggarwal, Choi & Eldar, *supra* note 9, at 421–22 ("These provisions have attracted criticism from both academics and practitioners, in large part because they constitute private ordering devices that customizes (and restricts) rights conferred on shareholders by Congress and interpreted by the Supreme Court in *Cyan*."); see, e.g., BARBARA ROPER, CONSUMER FED'N OF AM., CAUTION: SLIPPERY SLOPE: HOW DELAWARE SUPREME COURT'S BLUE APRON DECISION COULD HARM INVESTORS AND UNDERMINE MARKET INTEGRITY 16 (2020) ("The direct and immediate effect of the Delaware Supreme Court decision was to effectively negate the U.S. Supreme Court's *Cyan* decision.").

providing a forum in both federal court and state court.<sup>157</sup> These critics also mention that *Cyan* reaffirmed this intent by reaffirming the concurrent jurisdiction, with no option for removal even after the adoption of SLUSA.<sup>158</sup> Accordingly, critics claim it follows from *Cyan* that stockholders' ability to bring 1933 Act claims in state court can only be removed by an explicit act of Congress.<sup>159</sup> Consequently, these critics argue that *Salzberg* is "stepping on the toes" of Congress's intent by allowing corporations to prevent filings in state court and take away a portion of investors' broad enforcement abilities.<sup>160</sup>

However, these criticisms are incorrect because they fail to account for federal case law already on point.<sup>161</sup> The Delaware Supreme Court included an analysis of the federal law's treatment of FFPs, finding a United States Supreme Court case, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*,<sup>162</sup> strongly supports "the notion that FFPs do not violate federal public policy by narrowing the forum alternatives available under the Securities Act."<sup>163</sup> *Rodriguez* validated the use of FFPs with claims under the

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157. See ROPER, *supra* note 156, at 6 (explaining "Congress recognized the importance of providing both public and private enforcement mechanisms" to accomplish its enforcement goals).

158. See *id.* at 16 ("*Cyan* held that Congress intended to allow investors to bring such cases in both federal and state court."); see also Torabi, *supra* note 1, at 256 (explaining that the *Cyan* decision was able to "faithfully maintain[ ] the original intent of the 1933 Act" by "preservation of the narrow class of pure 1933 Act state court class actions").

159. See ROPER, *supra* note 156, at 8 (concluding that FFPs "effectively negate the *Cyan* ruling").

160. See *id.* at 16 n. 31 ("[T]he decision may effectively overturn the flexibility afforded plaintiffs under the *Cyan* decision." (quoting *Delaware Supreme Court Upholds Forum Selection Clause Provisions For Securities Act Claims*, QUINN EMANUEL TRIAL LAWS. (Mar. 19, 2020), <https://www.quinnemanuel.com/the-firm/publications/Delaware-supreme-court-alert/> [<https://perma.cc/8U6B-98EN>])). There is also concern that it may be seen as encroaching into federal securities regulation, and it may attract further federal regulation. See Loewenstein, *supra* note 10, at 187 (commenting that "if Delaware corporations are too aggressive in defining the rights of their shareholders, particularly in the area of federal law, they will invite federal regulation"); ROPER, *supra* note 156, at 1 ("*Salzberg* has the potential to greatly diminish the importance of Delaware corporate law and the state's courts."); see also Torabi, *supra* note 1, at 255 ("Especially where the safeguards of state corporate law and internal accounting controls fail . . . investors turn to federal authorities and securities law for relief, not to state corporate law."). For discussion of further regulations that may be adopted by corporations, see *infra* notes 196–207 and accompanying text.

161. See Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, 75 BUS. LAW. 1319, 1320 (2019) (commenting that the Chancery Court analysis was problematic because it "us[ed] Delaware law to preclude a federal practice in federal court under a federal statute that is permissible under federal law").

162. 490 U.S. 477 (1989).

163. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 132 (Del. 2020) (citing *Rodriguez*, 490 U.S. at 485–86) (summarizing the holding in *Rodriguez* finding an arbitration provision in a standard contract that effectively precluded litigation in state court for Security Act claims was enforceable)).

1933 Act because, in validating an arbitration provision governing 1933 Act claims, the United States Supreme Court equated the provision to “a specialized kind of forum selection clause.”<sup>164</sup> Additionally, *Rodriguez* supports that there is no absolute right for investors to litigate 1933 Act claims in state court.<sup>165</sup> *Rodriguez* is more on point for this issue than the supposed implicit holding in *Cyan*, thus is more persuasive.<sup>166</sup>

#### B. Delaware Legislative Intent

On the state law portion of the analysis, some critics argue that *Salzberg* effectively expanded Delaware’s internal affairs doctrine beyond its previous scope.<sup>167</sup> These critics find issue in the expansion of the scope of Section 102(b)(1), and thus the DGCL, beyond the internal affairs of a corporation.<sup>168</sup> Specifically, they argue that the Delaware Supreme Court’s analysis contradicts the general understanding of the scope of the subject matter governed by the corporate contract—formed via the DGCL, the charter, and the bylaws—as limited to those matters within the internal affairs doctrine.<sup>169</sup>

As the Court of Chancery cited in its opinion, two past chairs of the Council of the Delaware State Bar Association’s Corporation Law Section agreed with the implicit limit under the internal affairs doctrine and further concluded that securities claims fall outside the scope of what can be governed by the charter and bylaws of a corporation.<sup>170</sup> While their opin-

164. *Id.* (quoting *Rodriguez*, 490 U.S. at 482–83); see also Grundfest, *supra* note 161, at 1340. *But see* ROPER, *supra* note 156, at 14 n.28 (“[T]he *Salzberg* court did not recognize the important procedural safeguards that distinguish broker-dealer arbitration from other types of arbitration.”).

165. See Grundfest, *supra* note 161, at 1323 (opining that *Rodriguez* supports that “there is no immutable right to litigate Securities Act claims in state court”).

166. See *id.* at 1340 (explaining that, in addition to being supported by federal precedent, “nothing in the PSLRA, SLUSA, or *Cyan* limits a forum selection provision from designating a federal court as the venue in which a Securities Act claims must proceed” (footnotes omitted)).

167. See, e.g., Loewenstein, *supra* note 10, at 182 (“Although, strictly speaking, the [c]ourt left this definition untouched, the practical effect of the decision was, perhaps, to expand the reach of state corporate law by expanding the kinds of provisions that a corporation may include in its charter and bylaws.”).

168. See ROPER, *supra* note 156, at 11 (stating explicitly that *Salzberg* extended the outer limits of what was previously able to be included in a charter or bylaw).

169. See *Sciabacucchi v. Salzberg*, No. 2017-0931-JTL, 2018 WL 6719718, at \*14 (Del. Ch. Dec. 18, 2018) (arguing the precedent leading up to the adoption of Section 115 “recognized that the charter and bylaws can only address internal-affairs claims”), *rev’d*, *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

170. See Lawrence A. Hamermesh & Norman M. Monhait, *Fee Shifting Bylaws: A Study in Federalism*, INST. DEL. CORP. BUS. L. (June 29, 2015), <https://blogs.law.widener.edu/delcorp/2015/06/29/fee-shifting-bylaws-a-study-in-federalism/#sthash.pe8gY0Tm.dpbs> [<https://perma.cc/MS5J-8CM2>] (concluding that subsequent to the 2015 Amendments to Section 102(b)(1) and 109(b), the subject matter of these provisions “does not extend so far as to permit the charter or the bylaws to create a power to bind stockholders in regard to fee-shifting in, or the venue for, federal securities class actions” (emphasis added)).

ion did not necessarily reflect the view of the drafters of the 2015 amendments, it does suggest that it may have been the previous understanding held by the Council.<sup>171</sup> Accordingly, some critics see *Salzberg* as neglecting the consensus that charters and bylaws should never be able to govern the area of matters being termed “intra-corporate.”<sup>172</sup>

This argument ignores the fact that the DGCL already explicitly governs matters outside the scope of the internal affairs doctrine.<sup>173</sup> Section 202 of the DGCL “authorizes charter provisions that impose ‘[r]estrictions on transfer and ownership of securities.’”<sup>174</sup> Notably, Section 202’s restrictions are not limited to existing shareholders by express language or by implication, thus Section 202 governs transactions outside non-current stockholders.<sup>175</sup> By reading Section 102(b)(1) *in pari materia* with Section 202 of the DGCL, it must be interpreted that Section 102(b)(1) also is able to govern the same.<sup>176</sup>

### C. Public Policy

Ultimately, the *Salzberg* decision promotes the common public policy goal of both Delaware corporate law and federal securities law—judicial efficiency. One of the Delaware Supreme Court’s considerations was facilitating the “predictability, uniformity, and prompt judicial resolution to

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171. See *id.* at n.1 (noting that “Mr. Monhait is the immediate past chair, and Professor Hamermesh a prior chair and a member, of the Council of the Delaware State Bar Association’s Corporation Law Section,” however their comments “do not necessarily represent the views of the Association, the Section, or its Council”). In addition, former-Justice Strine, also former-Chancellor of the Court of Chancery, had stated that “Delaware corporation law governs only the internal affairs of the corporation.” Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 674 (2005) (explaining the narrow application of Delaware corporate law by expanding on a speech the author had given at the European Policy Forum).

172. See Hamermesh & Monhait, *supra* note 170 (stating that “the subject matter scope of Sections 102(b)(1) and 109(b) is broad,” but “it does not extend so far as to permit the charter or the bylaws to create a power to bind stockholders in regard to . . . the venue for[ ] federal securities class actions”).

173. See Aggarwal, Choi & Eldar, *supra* note 9, at 414 (“Delaware corporate law, in conjunction with the federal securities laws, also regulated the proxy process.”); see also Grundfest, *supra* note 161, at 65–66 (arguing that Delaware corporate law already regulates subject matter that technically falls outside of the internal corporate affairs).

174. Grundfest, *supra* note 161, at 1372 (citing DEL. CODE ANN. tit. 8 § 202(a) (2019)).

175. See *id.* at 1373 (“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.”); see *id.* (explaining that Section 202 denies the *Sciabacucchi* holding); see also *id.* (adding that DGCL sections 152, 157, and 166 also govern transactions with persons who are not existing security holders).

176. *Id.* at 1374 (“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.”).

corporate disputes.”<sup>177</sup> These are important policy goals in Delaware.<sup>178</sup> In addition, federal public policy—especially for the 1933 Act—promotes judicial efficiency.<sup>179</sup> Parallel actions asserting the same claims “run completely counter to the efficiency rationale of the class action.”<sup>180</sup> Thus, because FFPs improve the “judicial economy” of securities actions by “allow[ing] for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs,” the *Salzberg* decision promotes this common policy goal.<sup>181</sup>

D. *Alternative Route: The 1933 Act as a Federal Mandate for State Corporate Law*

An alternative theory as to why these FFPs do not violate the DGCL and the internal affairs doctrine, without requiring a continuum, is that 1933 Act claims are inherently related to matters of the internal affairs of a corporation.<sup>182</sup> As mentioned in Part II above, prior to the 1933 Act, no mechanism existed for stockholders to sue a corporation or its affiliates for not disclosing a transaction occurring prior to a public offering between a promoter and the corporation.<sup>183</sup> For example, if a promoter had sold itself stock at a lower price prior to selling to the general public, thus decreasing the value of the stock to the new stockholders, a new stockholder would have no redress.<sup>184</sup> State corporate law at the time did

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177. *Salzberg v. Sciabacucchi*, 227 A.3d 102, 137 (Del. 2020) (citing *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996) (footnotes omitted)); *see also Carvel v. Andreas Hldgs. Corp.*, 698 A.2d 375, 379 (Del. Ch. 1995); *Cantor Fitzgerald v. Chandler*, Nos. 15698-NC, 15690-NC, 1999 WL 1022065, at \*4 (Del. Ch. Oct. 14, 1999) (commenting on how Delaware law attempts “to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes”).

178. *See Broz*, 673 A.2d at 159 (“[C]ertainty and predictability are values to be promoted in [Delaware] corporation law.”); *see also Carvel*, 698 A.2d at 378–79 (noting Delaware policies are to promote expeditious determinations and uniformity); *Cantor Fitzgerald*, 1999 WL 1022065, at \*4–5 (justifying decision based on policy in Delaware of “achieving maximum judicial economy and efficiency of effort where substantive due process rights of the parties are not affected”).

179. In the definition section of the 1933 Act, it states for the benefit of future rule makers that they should consider the efficiency. *See* 15 U.S.C. § 77b(b) (2018) (stating that, when engaging in rulemaking under this subchapter, “the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation”).

180. James J. Beha II & Steve Rappoport, *Will Delaware Sciabacucchi Decision Limit Multi-Jurisdictional Securities Act Litigation?*, WESTLAW J. SEC. LIT. REGUL., May 2020, at 2 (quoting *Swierkowki v. Consol. Rail Corp.*, 168 F.Supp. 2d 389, 395 (E.D. Pa. 2001)).

181. *Salzberg*, 227 A.3d at 137.

182. *See* Richard A. Booth, *Oops! The Inherent Ambiguity of Out-of-Pocket Damages in Securities Fraud Class Actions*, 46 J. CORP. L. 319, 340 (2021) (criticizing the reasoning in *Salzberg* and providing an alternative interpretation for finding 1933 Act claims within the reach of Section 102).

183. For discussion on the lack of redress for these types of transactions, see *supra* notes 37–39 and accompanying text.

184. *See* BOOTH, *supra* note 37, § 4.2.

not address this issue because, there was “no wrong done” directly to the stockholder at the transaction in which the new stockholder had purchased the security.<sup>185</sup> This limitation was later termed the “contemporaneous ownership rule.”<sup>186</sup> The contemporaneous ownership rule is a state corporate law limitation on derivative actions, sometimes extended to direct actions, that requires stockholders to own stock at the time the wrong is inflicted in order to have standing.<sup>187</sup> The 1933 Act circumvented that requirement by allowing stockholders to sue despite the claim relating to a transaction occurring prior to the purchase of the stock.

Accordingly, the 1933 Act is arguably a “federally mandated provision of state corporation law.”<sup>188</sup> It supplements state corporate law by undoing the limitation imposed by the contemporaneous ownership rule by providing a direct right of action for stockholders to sue if not disclosed by the corporation.<sup>189</sup> In addition, this aspect is evidenced by Congress’s choice to include concurrent jurisdiction in state court in addition to federal court, indicating intent for these claims to be enforced in the same manner as state corporate law substantive claims.<sup>190</sup> Inherently, 1933 Act claims are “matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.”<sup>191</sup> Just because 1933 Act claims are based in federal law, does not change the actuality that the substance of these claims regards the same subject matter as internal affairs claims based in state corporate law.<sup>192</sup>

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185. See, e.g., *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U.S. 206, 212 (1908) (reasoning that there is no state fiduciary duty violation because the alleged breach occurred prior to the plaintiff’s purchase of stock).

186. See J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement*, 33 DEL. J. CORP. L. 673, 673 (2008) (defining the contemporaneous ownership requirement as: “if a stockholder-plaintiff does not own stock at the time the wrong is inflicted on the corporation, the stockholder lacks standing to sue” (citing DEL. CODE. ANN. tit. 8, § 327 (2021))).

187. See *id.* at 673 n.1 (“Although the statute and rule speak only of derivative actions, the Delaware Court of Chancery has extended the contemporaneous ownership requirement to plaintiffs asserting direct (as opposed to derivative) claims.”).

188. Booth, *supra* note 182, 340 n.76 (describing the 1933 Act as a “federally mandated provision”).

189. See BOOTH, *supra* note 37, § 4.2 (explaining that, prior to the 1933 Act, no mechanism existed for stockholders to sue a corporation or its affiliates for not disclosing a transaction occurring prior to a public offering between a promoter and the corporation, and the 1933 Act circumvented the contemporaneous ownership rule to allow stockholders to sue despite the claim relating to a transaction occurring prior to the purchase of the stock).

190. See Booth, *supra* note 182, 340 n.76 (“This view of the 1933 Act is quite consistent with the provision of concurrent jurisdiction therein.”).

191. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982) (describing the internal affairs of a corporation).

192. Cf. Booth, *supra* note 182, 340 n.76 (explaining how the 1933 Act filled in the gaps in for stockholder standing); BOOTH, *supra* note 37, § 4.2 (describing the consistencies between the subject matter in fiduciary duty state law claims and 1933 Act claims).

VI. EFFECTS DOWN THE ROAD: SALZBERG'S IMPACT ON  
SECURITIES LITIGATION

There was, and still is, significant uncertainty remaining following *Salzberg*. First, questions remain unanswered as to whether *Salzberg* opened the door to other potentially more restrictive provisions for shareholder litigation, such as arbitration provisions.<sup>193</sup> In addition, one of the most important questions left open was the treatment of these FFPs by Delaware's sister states.<sup>194</sup> Ultimately, the impact most likely to follow the *Salzberg* decision will be an escalation in the adoption of FFPs into charters and bylaws of corporations expecting to commence an offering in the near future.<sup>195</sup> As will be detailed below, the result of this will not only be of benefit to these corporations and their affiliates, but also their shareholders.

A. *Salzberg May Open the Door to Broader Restrictions on  
Shareholder Litigation*

Arguably, the most dominating fear by investor advocates is that the *Salzberg* decision will encourage corporations to adopt provisions that restrict shareholder security regulation power against corporations even more than FFPs do.<sup>196</sup> Regardless of whether *Salzberg* was responsible for granting the expanded reach of these provisions, it is apparent that the opinion has at least implicitly shown a broader reach of Delaware state corporate law than many commentators and courts had previously thought possible.<sup>197</sup> Thus, there is fear that corporations will now take

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193. For discussion on how *Salzberg* may have opened the door to broader restrictions, see *infra* notes 196–207 and accompanying text.

194. For discussion on how *Salzberg* left open the question of how sister states may treat the FFPs, see *infra* notes 208–213 and accompanying text.

195. See *ROPER*, *supra* note 156, at 16 n.31 (“The explosion of Securities Act class actions in state court will likely cease as more Delaware corporations adopt forum selection clause provisions.” (quoting *Delaware Supreme Court Upholds Forum Selection Clause Provisions For Securities Act Claims*, QUINN EMANUEL TRIAL LAWS. (Mar. 19, 2020), <https://www.quinnemanuel.com/the-firm/publications/delaware-supreme-court-alert/> [<https://perma.cc/7JDH-V24F>])).

196. See Aggarwal, Choi & Eldar, *supra* note 9, at 415 (commenting that the possibility of mandatory arbitration provisions and fee-shifting provisions being adopted to handle 1933 Act disputes may be seen by some as “an unattractive by-product of an expansive notion of corporate contract”); *ROPER*, *supra* note 156, at 16–49 (detailing the various provisions they predict corporations may be able to or may try to adopt following *Salzberg*).

197. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 121 (Del. 2020) (holding that the contents of charter provisions and bylaws may govern beyond just “internal affairs” of a corporation); see also Loewenstein, *supra* note 10, at 1 (concluding that despite the explicit re-defining of the internal affairs doctrine, “the practical effect of the decision was . . . to expand the reach of state corporate law by expanding the kinds of provisions that a corporation may include in its charter and bylaws”).

advantage of this revelation and adopt provisions previously thought to be prohibited within a corporation's governance documents.<sup>198</sup>

One particular kind of provision being discussed post-*Salzberg* is one that mandates arbitration of all claims brought under the 1933 Act by shareholders or even mandates individual arbitration.<sup>199</sup> The Delaware Supreme Court attempted to quell this concern by stating in a footnote that “such provisions, at least from our state law perspective, would violate Section 115 which provides that, ‘no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this state.’”<sup>200</sup> However, Section 115 only invalidates internal corporate claims, and does not address intra-corporate claims.<sup>201</sup> Per *Salzberg*, 1933 Act claims do not fall within Section 115's internal corporate claims, thus there is no explicit restriction of an arbitration provision in the charter or bylaws under Section 115.<sup>202</sup>

Nonetheless, many commentators opine that these clauses are likely to remain invalid under state law.<sup>203</sup> One theory is that, in validating FFPs, the court “expressly preclude[s] arbitration and force[s] litigation into federal or Delaware state court,” and thus arguing that this decision

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198. See *ROPER*, *supra* note 156, at 16–17 (“Put simply, the decision creates a slippery slope, with the potential for its logic to be applied beyond ‘33 Act claims and to charter and bylaw provisions that address a broader range of issues than whether claims will be heard in federal or state court.”); see also *Delaware Supreme Court Ruling Allows Exclusive Federal Forum Provisions For ‘33 Act Claims*, MORGAN LEWIS (Mar. 19, 2020), <https://www.morganlewis.com/pubs/2020/03/delaware-supreme-court-ruling-allows-exclusive-federal-forum-provisions-for-33-act-claims> [<https://perma.cc/9TNA-D9KG>] (opining that the *Salzberg* decision will likely have “far-reaching implications for the scope of matters subject to private ordering for Delaware corporations”).

199. See *Salzberg*, 227 A.3d at 137 n.169 (“Much of the opposition to FFPs seems to be based upon a concern that if upheld, the ‘next move’ might be forum provisions that require arbitration of internal corporate claims.”); see also Aggarwal, Choi & Eldar, *supra* note 9, at 414 (noting corporations “may even attempt to adopt a mandatory, individual arbitration provision for 1933 Act claims.”); see also *ROPER*, *supra* note 156, at 2 (listing an individual arbitration clause among the types of provisions that may be “force[d] upon shareholders” in the wake of the *Salzberg* decision); *Delaware Supreme Court Unanimously Upholds Federal-Forum Provisions*, GIBSON DUNN (Mar. 20, 2020), <https://www.gibsondunn.com/delaware-supreme-court-unanimously-upholds-federal-forum-provisions/> [<https://perma.cc/R6KQ-T2RQ>] (listing the potential for a “push to include arbitration as an exclusive means to resolve certain intra-corporate disputes lying within the ‘outer bound’ of Section 102(b)(1)” among the key takeaways of the *Salzberg* decision).

200. *Salzberg*, 227 A.3d at 137 n.169 (quoting DEL. CODE ANN. tit. 8, §115).

201. DEL. CODE ANN. tit. 8, §115 (stating that forum selection is permissible for internal corporate claims and defining the term “internal corporate claims,” but lacking reference to “intra-corporate” claims).

202. See *Salzberg*, 227 A.3d at 116–17.

203. See Aggarwal, Choi & Eldar, *supra* note 9, at 415 (“[A]t least as a matter of policy, it does not follow that validating FFPs should also lead to validating mandatory arbitration provisions that can preclude shareholders from filing lawsuits altogether.”).

invites mandatory arbitration is illogical.<sup>204</sup> Another argument points to the fact that the SEC has never allowed public companies to mandate arbitration and *Salzberg's* footnote reaffirms that practice.<sup>205</sup> Further, these advocates claim that a director would not dare try to adopt such a provision for fear that they would be voted out.<sup>206</sup> Nevertheless, there are many other restrictions corporations may now have the opportunity to utilize to reduce shareholder litigation power.<sup>207</sup>

204. Grundfest, *supra* note 160, at 1331, 1385 (“It stands logic on its head to argue that a provision that prohibits arbitration facilitates it.”).

205. See Alison Frankel, *Dela. Supreme Court: Companies Can Pick Forum for Shareholders’ Section 11 Claims*, REUTERS (Mar. 18, 2020, 7:08 PM), <https://www.reuters.com/article/legal-us-otc-blueapron/dela-supreme-court-companies-can-pick-forum-for-shareholders-section-11-claims-idUSKBN21540M> [<https://perma.cc/RWT5-RM9G>] [hereinafter Frankel, *Dela. Supreme Court*] (explaining the likely result of a pending case in the U.S. District Court of New Jersey contemplating the inclusion of an arbitration clause in proxy materials following *Salzberg*); see also Alison Frankel, *N.J. Judge Tosses Suit Testing Legality of Shareholder Arbitration*, REUTERS (July 6, 2021, 5:02 PM), <https://www.reuters.com/legal/litigation/nj-judge-tosses-suit-testing-legality-shareholder-arbitration-2021-07-06/> [<https://perma.cc/4EHG-P74T>] (dismissing due to ripeness).

206. See Frankel, *Dela. Supreme Court, supra* note 204. Additionally, this concern may be unsubstantiated due to grounds in equity and unconscionability, especially if purporting to be included in unilaterally adopted bylaws. See Aggarwal, Choi & Eldar, *supra* note 9, at 415–16 (considering challenges to arbitration clauses under the FAA and unconscionability and concluding there would likely have grounds for invalidation of these clauses).

207. See Aggarwal, Choi & Eldar, *supra* note 9, at 414–15 (explaining that a fee-shifting provision “with respect to 1933 Act claims is also a possibility”); DiCiancia, *supra* note 65, at 1564 (noting “uncertainty still remains as to . . . whether the prohibition applies to securities class action lawsuits”); see also Booth, *supra* note 182, at 339 (noting *Salzberg* would also support “a bylaw requiring that claims for collateral damage be litigated as a derivative action in Delaware state court”). A provision likely to survive a challenge under *Salzberg* is an FFP restricting filing of 1933 Act claims to a specific federal court. See, e.g., *Practical Considerations for Private and Public Company Clients in Light of the Delaware Supreme Court’s Decision Upholding Federal Forum Provisions*, WILSON SONSINI (Mar. 23, 2020), <https://www.wsgr.com/en/insights/practical-considerations-for-private-and-public-company-clients-in-light-of-the-delaware-supreme-courts-decision-upholding-federal-forum-provisions.html> [<https://perma.cc/B4D6-8YMG>] (noting that nothing in the Supreme Court’s analysis would prevent this type of provision); John F. Sylvia, Patrick E. McDonough & Ellen Shapiro, *Supreme Court of Delaware Overturns Court of Chancery, Allowing Corporations To Enact Federal Forum Provisions to Keep Securities Act Claims In Federal Court*, MINTZ, (Mar. 20, 2020), <https://www.mintz.com/insights-center/viewpoints/2901/2020-03-20-supreme-court-delaware-overturns-court-chancery-allowing> [<https://perma.cc/WVR6-TN7A>] (suggesting the adoption of such provisions); see also James L. Hallowell, Mark H. Mixon, Jr. & Andrew Kuntz, ‘Salzberg’ Opens Door to Creativity in the ‘Outer Band’ of ‘Intra-Corporate Affairs’, DEL. BUS. CT. INSIDER (Apr. 8, 2020), <https://www.gibsondunn.com/wp-content/uploads/2020/04/Hallowell-Mixon-Kuntz-Salzberg-Opens-Door-to-Creativity-in-the-Outer-Band-of-Intra-Corporate-Affairs-Delaware-Business-Court-Insider-04-08-2020.pdf> [<https://perma.cc/MAA8-PJVR>] (noting same rationale would apply). In addition, FFPs in bylaws will likely be valid due to implicit acquiescence by stockholders to bylaws. See *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939–40 (Del. Ch. 2013) (“[Delaware] Supreme Court has long noted that bylaws, together with the certificate of incorporation . . . may authorize the board

B. *Sister States' Treatment of FFPs following Salzberg*

Though *Salzberg* is influential in the validation of FFPs in corporate governance documents due to Delaware's strong influence in state corporate law, it is not binding on courts outside of Delaware's jurisdiction.<sup>208</sup> Accordingly, it remains unsettled how other state courts will address the use of FFPs.<sup>209</sup> The recent cases decided in other state courts demonstrate the likelihood that Delaware's sister states will continue to enforce these FFPs, at least for Delaware corporations.

In California, a state traditionally seen as plaintiff friendly, at least three cases have affirmed the validity of these FFPs.<sup>210</sup> All three involved Delaware corporations either headquartered or having their principal place of business in California.<sup>211</sup> The decisions in these cases point to a "broad consensus among different California Courts to enforce FFPs" with reasoning paralleling *Salzberg's*.<sup>212</sup> Nevertheless, though these cases are potentially predictive of how courts in other states are likely to treat these FFPs in the future, "the decisions are not binding precedent even in California nor do they address FFPs for entities incorporated outside of Delaware."<sup>213</sup>

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to amend the bylaws' terms and that stockholders who invest in such corporation assent to be bound by board-adopted bylaws when they buy stock in those corporations" (citing *Centaur Partners, IV v. Nat'l Intergrp., Inc.*, 582 A.2d 923, 928 (Del. 1990)); see also *In re Dropbox Securities Litigation*, Case No. 19-cv-06348-BLF, 2020 WL 6161502 (N.D. Ca. Dec. 4, 2020) (granting motion to dismiss due to FFP in bylaws).

208. See David A. Edgar, David M. Aceto & Jorgen M. Rehn, *Channeling Claims: The Importance of Considering (and Updating) Exclusive Forum Provisions Now*, K&L GATES (Nov. 25, 2020), <https://www.klgates.com/Channeling-Claims-The-Importance-of-Considering-And-Updating-Exclusive-Forum-Provisions-Now-11-25-2020> [<https://perma.cc/8XSZ-Z6VV>] (recommending adoption of FFPs based on the Delaware endorsement because "many other jurisdictions often follow Delaware's lead on corporate law matters").

209. See *Salzberg v. Sciabacucchi*, 227 A.3d 102, 133 (Del. 2020) ("Perhaps 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 by our sister states.").

210. See Gregory A. Markel, Daphne Morduchowitz, Vincent A Sama, Catherine B. Schumaker & John P. Hunt, Legal Update, *Dropbox Becomes Third California Superior Court Decision to Enforce Delaware Corporations' Federal Forum Provisions for Securities Act Lawsuits*, SEYFARTH (Dec. 8, 2020), <https://www.seyfarth.com/news-insights/dropbox-becomes-third-california-superior-court-decision-to-enforce-delaware-corporations-federal-forum-provision-for-securities-act-lawsuits.html> [<https://perma.cc/8QLG-J2ZS>] ("*Restoration Robotics* effectively upheld [*Salzberg's*] holding . . . . The courts in *Uber* and *Dropbox* reached the same conclusion as [*Salzberg*]."); see *id.* ("*Restoration Robotics* and *DropBox* are significant in part because the Superior Court for San Mateo County in the past has been considered a plaintiff friendly jurisdiction.").

211. See *id.*

212. See *id.* (noting the significance of these cases).

213. *Id.*; see also *Hook v. Casa Systems, Inc.*, No. 654548/2019, 2021 WL 3884063 (N.Y. Sup. Ct. Aug. 30, 2021) (from a state court in New York, dismissing claims based on an FFP in the defendant corporation's charter).

C. *Conclusion: Salzberg Will Improve Judicial Economy for Securities Litigation—Benefiting Both Corporations and Shareholders*

Ultimately, it is in the best interest of both corporations and their shareholders for these FFPs to continue to be enforced because they promote both judicial efficiency for courts and cost efficiency in litigation for corporations.<sup>214</sup> Some critics argue that *Salzberg* took away a powerful check on corporations to ensure conformity with regulations, and therefore it was not in the best interest of shareholders.<sup>215</sup> This is an incomplete assessment of *Salzberg's* down the road effects.<sup>216</sup> Rather, the advantages of allowing corporations to adopt these FFPs far outweigh the potential disadvantages to stockholders' enforcement power.<sup>217</sup>

Parallel federal and state court litigation inflicts a considerable financial burden on corporations, with no accompanying financial benefit to shareholders.<sup>218</sup> Claims filed in state court are able to avoid a lot of the protections for corporations against frivolous claims and prevent the corporation from consolidating identical claims.<sup>219</sup> Thus, by preventing parallel filings and allowing consolidation in federal court, these FFPs reduce the overall cost to corporations in defending these litigations.<sup>220</sup> In turn, the reduction in overall costs to corporations provides more return for shareholders.<sup>221</sup>

Notably, FFPs do not remove shareholders' ability to sue when their claim holds merit, but instead specifically preserve this right in federal

214. For discussion on how *Salzberg* improved judicial efficiency and cost efficiency for securities litigation, see *infra* notes 216–221 and accompanying text.

215. See ROPER, *supra* note 156, at 2–3 (noting the fear that provisions could “insulat[e] the corporation and its management from being held accountable for wrongdoing” and potentially cause “the fairness, transparency, and stability of our securities markets [to] be severely damaged”).

216. For full description of more down the line effects, see *infra* notes 218–224 and accompanying text.

217. See Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U.L. REV. 501, 523 (2021).

218. See *id.* at 511–12 (explaining how the litigation costs incurred by corporations when there were parallel actions in state and federal court “came without any attendant benefit to investors, the purported plaintiffs in a section 11 class action”).

219. See Aggarwal, Choi & Eldar, *supra* note 9, at 422 (determining that FFPs are able to “direct litigation to . . . federal courts, where cases will be subject to the various procedural and substantive rules under the PSLRA and SLUSA that Congress thought desirable for federal securities litigation”).

220. See *id.* at 422 (“[P]roponents of federal forum provisions have argued that they may serve a useful role in curbing excessive litigation.”); see also *id.* at 383 (reporting empirical findings that “suggest[ ] that federal forum provisions may serve shareholders’ interest by mitigating excessive 1933 Act litigation.”).

221. See GIBSON DUNN, *supra* note 195 (“FFPs clearly benefit stockholders by minimizing wasteful multi-jurisdictional litigation over many disputes involving the corporations they own.”); Manesh, *supra* note 217, at 523 (“By channeling section 11 claims into federal court, FFPs enabled corporations, and ultimately their shareholders, to avoid the wasteful cost of defending parallel lawsuits in state courts, while still allowing meritorious claims to proceed in a federal forum.”).

court.<sup>222</sup> It is also inaccurate to state that the corporations that choose to adopt FFPs are necessarily more likely to be “bad apples.”<sup>223</sup> Instead, these FFPs are necessary to avoid meritless filings wherein the corporation may be required to settle to avoid compounding costs.<sup>224</sup> Ultimately, the costs saved by blocking these meritless claims will cause more value to be retained in the corporation for the stockholders.

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222. *See* Salzberg v. Sciabacucchi, 227 A.3d 102, 137 (Del. 2020) (arguing that FFPs do not violate the balance of the interests of the stakeholders and costs imposed on Delaware entities, because “they allow for litigation of federal Securities Act claims in a federal court of plaintiff’s choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs”).

223. *See* Aggarwal, Choi & Eldar, *supra* note 9, at 408 (concluding from its empirical study that “firms that choose to adopt FFPs may not necessarily be the ‘bad apples,’ but rather firms that are more likely to be targeted by plaintiffs”).

224. *See id.* (noting that firms “might have to settle just to get rid of lawsuits that may take place in state courts that have limited expertise and experience in securities litigation”).

