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Delaware Supreme Court Validates Federal Forum Selection Provisions

The Delaware Supreme Court has validated federal forum selection provisions in the certificates of corporation of Delaware companies. Nevertheless, the decision leaves open several questions that will require further development.

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In a landmark opinion, *Salzberg v. Sciabacucchi*,[1] the Delaware Supreme Court, reversing the Delaware Court of Chancery's decision,[2] confirmed the facial validity of so-called federal forum selection provisions in certificates of incorporation of Delaware corporations.[3] The Court's opinion is significant not only for its key holding but also for the substantial guidance it provides with regard to the adoption and use of federal forum provisions as well as other corporate provisions to regulate the relationship among corporate constituents.

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Background

In 2017, three Delaware corporations, Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc., filed registration statements with the US Securities and Exchange Commission (SEC) for shares of their common stock and launched their initial public offerings.[4] Before filing its registration statement, each corporation included in its certificate of incorporation a federal forum selection clause providing that, unless the corporation consented otherwise, the US federal district court shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933 Act (Securities Act).[5] The provisions further stated that any person or entity purchasing or otherwise acquiring any interest in any security of the corporation shall be deemed to have notice of and consented to the federal forum selection provision. These provisions were adopted by these companies, among many

others, in an effort to address significantly increased costs, including premiums for director and officer liability insurance, that appeared to be correlated with the increase in filings of claims under the Securities Act, particularly claims pursuant to Section 11 of the Securities Act, in state, rather than federal, courts.

Plaintiff Matthew Sciabacucchi bought shares of common stock of each of the defendant corporations under their respective registration statements, either in the initial public offering or shortly thereafter, and therefore had standing to bring suit under specified provisions of the Securities Act, including claims under Section 11 alleging that the registration statements contained material misstatements or omissions.[6] In December 2017, the plaintiff filed his complaint against Blue Apron, Roku, Stitch Fix, and 26 individuals who had signed their respective registration statements and had served as directors, seeking a declaration that each defendant corporation's federal forum selection provision was invalid on its face.[7]

The Court of Chancery's Opinion

The Federal Law Backdrop

Before examining the key questions of Delaware law presented by federal forum selection provisions, the Delaware Court of Chancery provided an overview of the relevant federal securities law backdrop. The Court noted that Section 11 of the Securities Act permits purchasers of registered securities to sue various parties when false or misleading information is included in the registration statement.[8]

In 1995, in response to perceived abuses in class action litigation in respect of publicly traded securities, the United States Congress passed the Private Securities Litigation Reform Act (PLSRA), which contained various procedural hurdles for cases filed in federal court.[9] As the Court noted, those hurdles had the perverse consequence of directing plaintiffs' attorneys to favor state courts over federal courts for their class action securities litigation. In response, in 1998, Congress adopted the Securities Litigation Uniform Standards Act (SLUSA).[10]

The Court noted that SLUSA required plaintiffs to bring their actions in federal court if they were seeking to recover on a fraud-based theory, and modified the jurisdictional provisions of the Securities Act such that concurrent state and federal jurisdiction for specified claims under the Securities Act would exist, except as provided in SLUSA.[11] The Court noted that an ensuing split in the federal courts developed, with some circuits interpreting SLUSA to permit removal to federal court of only class actions raising state law fraud claims, while other circuits interpreted SLUSA to permit class actions asserting fraud claims under the Securities Act to be removed to federal court.[12]

In 2018, while *Sciabacucchi* was pending in the Court of Chancery, the US Supreme Court, in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, resolved the split, holding that class actions filed in state court that asserted actions under the Securities Act could not be removed to federal court.[13] The US Supreme Court's opinion effectively meant that stockholder plaintiffs nationwide had the option to file and maintain a claim under the Securities Act either in federal court, where the PSLRA standards would apply, or in state court, where the restrictions under the PSLRA did not apply.

The Development of Forum Selection Provisions

After reviewing the federal law backdrop that led to defendants' adoption of the federal forum selection provisions—namely, the increased litigation costs associated with Securities Act claims filed in state courts and the additional burdens to plaintiffs of litigating such claims in federal court—the Court summarized the relatively recent history of forum selection provisions generally in the certificates of incorporation and bylaws of Delaware corporations. The Court noted that its own statements, made in the context of a 2010 settlement hearing, precipitated a wave of adoptions of forum selection provisions in certificates of incorporation and bylaws for the resolution of matters relating to internal

affairs.[14] Three years later, the Court issued its seminal decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* upholding the facial validity of bylaws specifying that the Court would be the exclusive forum for litigation involving various types of intra-corporate claims.[15]

Although the *Boilermakers* Court was addressing a bylaw provision, the *Sciabacucchi* Court nevertheless relied on its reasoning for purposes of analyzing the federal forum selection clauses in the defendants' certificates of incorporation, noting the similarity in the language of Section 109 of the Delaware General Corporation Law (DGCL) (dealing with bylaws) and Section 102(b)(1)[16] (dealing with certificates of incorporation).[17] The Court observed that the *Boilermakers* opinion repeatedly referenced the fact that the provision at issue regulated intra-corporate claims,[18] found that the *Boilermakers* opinion "drew a line at internal-affairs claims."[19] It then reviewed the Delaware Supreme Court's opinion in *ATP Tour, Inc. v. Deutscher Tennis Bund* upholding the facial validity of a fee-shifting provision in the bylaws of a Delaware nonstock corporation, based on reasoning very similar to the *Boilermakers* decision.[20] Addressing arguments suggesting that the *ATP* decision validated the application of a fee-shifting bylaw to claims arising under antitrust law, the Court of Chancery concluded that the Supreme Court's holding in *ATP* was premised on the notion that the bylaw at issue

> allocate[d] risk among parties in intra-corporate litigation, but could not be read to suggest that the corporate contract can be used to regulate other types of claims.[21]

The Court then examined the relevant legislative developments that followed *Boilermarkers* and *ATP* and informed its conclusion regarding the facial validity of the federal forum selection provisions. In 2015, the DGCL was amended to add new Section 115, which in many respects codified the *Boilermakers* opinion, expressly providing that corporations could adopt provisions in the certificates of incorporation or bylaws providing for exclusive jurisdiction in the courts of the State of Delaware for "intra-corporate claims."[22] At the same time, Sections 102 and 109 of the DGCL were amended to proscribe the adoption of fee-shifting charter provisions and bylaws for stock corporations in relation to "internal corporate claims."[23] According to the Court, the amendments prohibiting fee-shifting with respect to "internal corporate claims" "reinforce[d] the conclusion" that the Delaware legislature "only believed that the charter and bylaws could regulate internal corporate claims," given that their "overarching policy goal was to ban fee-shifting provisions from the corporate contract" and that, if they believed certificates of incorporation and bylaws were able to regulate other classes of claims, "the prohibitions would have swept more broadly."[24]

On the basis of its review of the relevant authority, and relying on what it called "first principles" of corporate law, the Court concluded that a "charter-based forum-selection provision" could only address "the rights and powers of the plaintiff-stockholder as a stockholder."[25] In the Court's view, the fact that a plaintiff asserting claims under the Securities Act would only be required to claim that the registration statement contained material misstatements or omissions or that the issuer wrongfully failed to register the securities served to demonstrate that the claims were external to the corporation—and therefore not within the realm of "internal corporate claims" susceptible to regulation through the certificate of incorporation or bylaws.[26] To this point, the Court reviewed the list of potential defendants in a suit under the Securities Act, and noted: "Director status is not required. Officer status is not required. An internal role with the corporation is not required."[27] The Court also observed that the Securities Act's definition of "security" was drafted in such a manner that it "could identify as few as fifty or as many as 369 different types of securities," of which shares of a Delaware corporation are but one type, leading the Court to conclude that there is "no necessary connection between a Securities Act claim and the shares of a Delaware corporation."[28] Moreover, the Court noted, even where a claim under the Securities

Act arises out of a purchase of shares of stock, "the predicate act is the purchase," and concluded that the claim does not arise out of the purchaser's ownership of the stock, because the purchaser, at the time of the predicate act, is not even a stockholder and need not remain a stockholder to pursue a claim under the Securities Act.[29]

There is "no necessary connection between a Securities Act claim and the shares of a Delaware corporation." The "state of incorporation cannot use corporate law to regulate the corporation's external relationships."

The Court reasoned that because a Delaware corporation, which exists pursuant to Delaware's sovereign authority, can exercise only those powers granted to it under the DGCL,[30] and the power of a state of incorporation to govern the relationships among parties to the broader corporate contract "manifests itself through the internal-affairs doctrine,"[31] the "state of incorporation cannot use corporate law to regulate the corporation's external relationships." [32] The Court concluded, moreover, that the limitation on the sovereign authority to regulate corporations necessarily operated as a constraint on the contractual power granted to corporations under Sections 102 and 109, limiting the scope of permissible charters and bylaws to those that regulated matters within the scope of the internal affairs doctrine.[33] Having found claims under the Securities Act to be external to the corporation (and therefore not within the scope of the internal affairs doctrine), the Court held that the federal forum selection provisions in the defendants' certificates of incorporation were invalid and ineffective.

The Supreme Court's Reversal

Reviewing the Court of Chancery's decision *de novo*, the Delaware Supreme Court noted that the plaintiff, in bringing the facial challenge to the federal forum provisions, had the burden of showing that the provisions do not address a proper subject matter for a provision of the certificate of incorporation under Section 102(b)(1) of the DGCL.[34] The Court then began its analysis with the plain language of Section 102(b)(1), observing that it has two key components: (1) "any provision for the management of the business and for the conduct of the affairs of the corporation;" and (2) "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."[35] The Court found that a federal forum provision "could easily fall within either of these broad categories, and thus, is facially valid."[36] The Court observed that federal forum provisions address securities claims arising out of the board's disclosures to current and prospective stockholders and that preparing registration statements involves an important component of the board's managerial duties. The Court also noted its prior opinions finding significant overlap of state and federal law in the area of disclosure and noting that the two bodies of law are complimentary.[37]

In reaching its conclusion, the Supreme Court observed that federal forum provisions may provide corporations with "certain efficiencies in managing the procedural aspects of securities litigation following the United States Supreme Court's decision in *Cyan*," following which the number of state-only filings under the Securities Act increased dramatically.[38] The Supreme Court also observed that, given the inefficiencies of multi-forum litigation and the prospect of inconsistent rulings, federal forum selection provisions, which would direct claims to the federal courts and allow for coordination and consolidation of claims that could be brought against the corporation's directors and officers, would easily fall within the ambit of provisions governing "'the

management of the business and for the conduct of the affairs of the corporation'" and "'defining, limiting and regulating the powers of the corporation, the directors and the stockholders'"[39]

Federal forum provisions do not violate the laws or policies of Delaware.

Next, the Supreme Court addressed whether the federal forum provisions ran afoul of the key limitation in Section 102(b)(1)—that is, that the certificate of incorporation may only contain provisions within its scope if they "are not contrary to the laws of this State." The Court found that federal forum provisions do not violate the laws or policies of Delaware. To this end, the Court pointed to the prior precedent proscribing only those provisions that "'transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself.'"[40] Indeed, the Supreme Court observed that there "are a few statutory provisions that cannot be limited in a certification of incorporation," and cited to academic literature reviewing the cases that limit fundamental rights, including periodic elections of directors, stockholders' rights to inspect books and records and the directors' duty of loyalty.[41]

Far from finding that federal forum provisions violate Delaware law or public policy, the Supreme Court reaffirmed the well-established principle that "corporate charters are contracts among a corporation's stockholders," that "'all amendments to certificates of incorporation and mergers require stockholder action,'" and that "'Delaware's legislative policy is to look to the will of the stockholders in these areas.'"[42] The Court concluded that such provisions in "stockholder-approved charter amendments should be respected as a matter of policy" and in any event should not be found to violate Delaware's public policy.[43]

The Supreme Court then addressed whether the addition of Section 115 of the DGCL implicitly amended Section 102(b)(1) to prevent the adoption of forum selection provisions that would exclude the courts in the State of Delaware as a forum. The Supreme Court found that the adoption of Section 115 was intended to codify the holding in *Boilermakers*. The Supreme Court then reached the exact opposite conclusion that the Court of Chancery reached when analyzing the amendments to Section 102(f) prohibiting fee-shifting adopted in conjunction with Section 115. The Supreme Court found that the provisions of Section 102(f) barring fee-shifting for "internal claims" actually supported the view that Section 102(b)(1) could address claims other than "internal corporate claims."[44] "Otherwise," the Supreme Court stated, "the reference to 'internal corporate claims' in new Section 102(f) would not have been necessary."[45] Ultimately, the Supreme Court concluded that, because claims under Section 11 of the Securities Act are not "internal corporate claims," as defined in Section 115, Section 115 does not apply to them—and the provisions would not run afoul of Section 115's proscription of provisions that would purport to exclude the courts in the State of Delaware as a forum for resolving those claims.[46]

The Supreme Court then rejected the Court of Chancery's attempt to limit Section 102(b)(1)'s scope to internal affairs matters.[47] The Supreme Court found that the Court of Chancery's view that *ATP*'s reference to "intracorporate litigation" was synonymous with fiduciary duty claims or other claims arising under Delaware substantive law was overly constrained. It also took issue with the Court of Chancery's reliance on *Boilermakers* to draw the conclusion that all claims other than "internal claims" are external to the corporation and thus beyond the purview of regulation through the corporation's organizational documents. The Supreme Court noted that *Boilermakers* did not create a dichotomy between internal claims and external claims—and that the examples the Court of Chancery offered in *Boilermakers* to illustrate the types of claims not susceptible to regulation through the organizational documents (*e.g.*, "slip and fall" tort claims and commercial contract claims) were claims that are unrelated to the relationship between the corporation and

its stockholders generally, and thus would be outside the purview of Section 102(b)(1) (or Section 109, in the case of bylaws) in any event. The Supreme Court then observed that if Delaware's General Assembly were inclined to narrow the scope of Section 102(b)(1) such that it would align with the internal affairs doctrine, it would have the power to do so.[48]

Stopping short of demarcating the precise point at which Section 102(b)(1)'s authority ends, the Supreme Court noted that

> [t]here 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.[49]

Indeed, the Supreme Court found that its holding in *ATP*, which included an analysis of a bylaw provision dealing with antitrust matters, bolstered the view that matters beyond merely those involving "internal affairs" could be addressed through Section 102(b)(1).[50] Using a Venn diagram, the Court illustrated the relationship among (1) intra-corporate claims that could be regulated pursuant to Section 102(b)(1), (2) internal corporate claims governed by Section 115, and (3) purely external claims.

Federal forum provisions do not violate federal law or public policy.

The Court further held that federal forum provisions do not violate federal law or public policy, pointing to the U.S. Supreme Court's opinion in *Rodriguez de Quijas v. Shearson/American Express, Inc.*[51] holding that federal law does not object to provisions precluding state litigation under the Securities Act (and upholding an arbitration provision in a brokerage firm's contract precluding state court claims).[52] Those types of provisions, according to the Supreme Court, enabled buyers to consent to the forum in which to enforce their rights. In reaching its conclusion, the Supreme Court cited other decisions of the US Supreme Court and Delaware Supreme Court enforcing forum selection provisions generally.[53]

Finally, the Supreme Court reviewed what it characterized as "the most difficult aspect" of the case, which was not whether federal forum selection provisions are facially valid as a matter of Delaware law but whether the provisions would be enforced in other states. Recognizing that this is an issue that ultimately must be decided by courts in other jurisdictions, the Court nonetheless expressed the view that its sister states should enforce the provisions, and explained the basis for its view. Noting that the focus of the plaintiff-appellee's arguments had been on the risk that other states may react to the ruling as "an out-of-our-lane power grab" that could invite questions over the internal affairs doctrine or precipitate a move toward greater federalization of corporate law, the Supreme Court explained its view that allowing corporations, through their certificates of incorporation, to dictate the forum in which claims under the Securities Act may be brought "does not offend principles of horizontal sovereignty."[54] In this regard, the Supreme Court reaffirmed its recent precedent establishing that corporate charters should be viewed as contracts among the corporation, its directors, officers and stockholders,[55] and observed that under traditional principles applicable to contractual forum selection provisions, the party seeking to avoid enforcement of a forum selection provision would bear the burden of demonstrating its invalidity.[56] Because it was addressing only a facial challenge, however, the Supreme Court was not required to engage in that analysis. Nevertheless, it observed that, as claims under Section 11 of the Securities Act

> closely parallel state law breach of fiduciary duty claims, many of the same reasons requiring application of the internal affairs doctrine would support the enforcement of [federal forum provisions].[57]

The Supreme Court also observed that, because forum-selection provisions are "process-oriented" and not substantive, dealing with where parties may file suit and not whether they may file suit, they do not offend constitutional principles that prohibit states from exceeding their jurisdiction.

Takeaways

As a result of the Supreme Court's ruling in *Salzberg*, it is now clear that federal forum selection provisions are facially valid and may be included in the certificate of incorporation of a Delaware corporation. For the reasons articulated in the opinion, corporations that are anticipating a public offering of securities should consider adopting federal forum provisions to obtain the efficiencies those provisions are designed to create.

Although it did not squarely address the issue, the Supreme Court's opinion supports the proposition that federal forum selection provisions would be equally valid, as a facial matter, in the corporation's bylaws. The reasoning underlying the Supreme Court's opinion was informed largely by the holdings in *Boilermakers* and *ATP*, both of which dealt with the facial validity of bylaws. Moreover, even though it was addressing the matter in a different context, the Supreme Court specifically observed that forum selection clauses are procedural, not substantive, which would appear to uncut any argument that forum selection bylaws would infringe on substantive board powers and therefore be invalid.[58] Additionally, considering that the Supreme Court made clear that federal forum provisions are not strictly within the scope of "internal corporate claims," the adoption of a federal forum provisions in the bylaws should not conflict with an existing traditional forum selection provision in the certificate of incorporation covering internal corporate claims.

In addition to its specific holding, the Supreme Court's opinion confirms the basic precept that the DGCL is a broadly enabling statute, one that allows corporate planners the flexibility to adopt governance structures and arrangements that meet their specific goals and objectives. Moreover, the Supreme Court's opinion signaled its continued receptiveness to thoughtful applications of corporate law principles to address real-world concerns, such as the unnecessary costs and expenses stemming from multi-forum litigation. Although the Supreme Court did not establish a bright line to distinguish internal affairs and external matters, its invocation of the choice-of-law analysis provides some guidance to corporate planners to follow when considering the types of matters that may be validly regulated through the certificate of incorporation or bylaws.

Nevertheless, it is important to reiterate that the Supreme Court's opinion was only addressing a challenge to the facial validity of the federal forum provisions at issue. Corporations and practitioners should be mindful that challenges to the adoption or use of any provision of the organizational documents in a particular factual setting may be viable, even if the underlying provision would be facially valid (and analyzed only for purposes of determining whether there is *any* circumstance in which it might be valid).

The *Salzburg* decision also leaves open several other questions and matters that will require further development. First, time will tell whether Delaware's General Assembly considers whether to follow the Court's suggestion to narrow the scope of Section 102(b)(2) (and, presumably, Section 109) of the DGCL. Next, it remains to be seen whether other states will follow Delaware's lead in permitting the adoption of similar (or broader) litigation management provisions in certificates of incorporation or bylaws. Yet another question is whether federal forum provisions may be applied with respect to claims against underwriters, recognizing that underwriting agreements generally obligate the issuer to indemnify the underwriter for claims arising under the Securities Act. If not, there remains a possibility that plaintiffs could file claims under Section 11 of the Securities Act in state court solely against the underwriter as a means of avoiding the application of a federal forum provision. Finally, as the Supreme Court in *Salzburg* noted, the extent to which courts in other states will enforce federal forum provisions

"as applied" in specific circumstances has yet to be determined, and will ultimately be decided by courts outside of Delaware.

Notes

1. Salzberg v. Sciabacucchi, — A.3d —, 2020 WL 1280785 (March 18, 2020).
2. Sciabacucchi v. Salzberg, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).
3. *Salzberg*, 2020 WL 1280785, at *1.
4. *See Sciabacucchi*, 2018 WL 6719718, at *6.
5. Blue Apron's federal forum selection clause was substantively identical to those of Roku and Stitch Fix, except that it contained a qualifier that it would only apply "to the fullest extent permitted by law." *See id*.
6. *Id.* at *7.
7. *Id.*
8. *Id.* at *3. In addition, Section 12(a)(1) provides a remedy if a person offers securities without complying with the registration requirements of the 1933 Act, and Section 12(a)(2) provides an additional cause of action when a prospectus contains material misstatements or omissions. *Id.* at *3 – 4.
9. *Id.* at *4.
10. *Id.* at *5.
11. *Id.* at *6.
12. *Id.*
13. Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061 (2018).
14. In In re Revlon, Inc. S'holders Litig., 990 A.2d 940 (Del. Ch. 2010), the Court observed that its efforts to regulate abusive litigation (including its effort, in that particular case, to remove plaintiff's counsel for agreeing to a non-substantive settlement) could lead to cases being filed in other jurisdictions. *Id.* at 960. To mitigate that risk, the Court suggested that corporations were "free to respond with charter provisions selecting an exclusive forum for intra-entity disputes." *Id.* The Court stated: "The *Revlon* dictum appears to have stirred practitioners and their clients to adopt forum-selection provisions. Before *Revlon*, forum-selection provisions appeared in the charters or bylaws of sixteen publicly traded companies. A year later, approximately 195 public companies had either adopted forum-selection provisions or proposed them. By August 2014, 746 publicly traded corporations had adopted them." *Sciabacucchi*, 2018 WL 6719718, at *9.
15. Boilermakers Local 154 Retirement Fund v. Chevron Corp., 373 A.2d 934 (Del. Ch. 2013). The bylaw provision at issue in *Boilermakers* stated: "Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine." *Id.* at 942.
16. *Compare* 8 Del. C. § 102(b)(1) (the "certificate of incorporation may also contain any . . . provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State"), *with* 8 *Del. C.* § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.").
17. The Court stated: "Section 102(b)(1) of the DGCL specifies what charter provisions can address. Its scope parallels Section 109(b), so the reasoning in *Boilermakers* applies to charter-based provisions." *Sciabacucchi*, 2018 WL 6719718, at *1.
18. The Court observed that the "phrase 'internal affairs' appears four times in the opening paragraph [of the *Boilermakers* opinion], and the decision as a whole deployed either those words or an equivalent concept (such as 'internal governance') over forty times." *Id.* at *11.
19. *Id.* at *11.

20. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 557 (Del. 2014).
21. *Sciabacucchi*, 2018 WL 6719718, at *13 (citing *ATP*, 91 A.3d at 558).
22. 8 *Del. C.* § 115. Section 115 defines "internal corporate claims" to mean "claims, including those brought 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 the DGCL confers jurisdiction upon the Court of Chancery)." *Id.*
23. *Id.* § 102(f) ("The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title."); *id.* § 109(b) ("The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.").
24. *Sciabacucchi*, 2018 WL 6719718, at *15.
25. *Id.* at *16–18.
26. *Id.*
27. *Id.* at *17. Specifically, the Court noted that, under the 1933 Act, potential defendants included, among others, accountants, engineers, appraisers and underwriters. *Id.* (*citing* 15 U.S.C. § 77k(a)).
28. *Sciabacucchi*, 2018 WL 6719718, at *17.
29. *Id.*
30. *Id.* at *19.
31. *Id.* at *20.
32. *Id.* As the Court stated: "Without more, the corporate contract does not enable Delaware to regulate the activities of parties that are beyond its territorial jurisdiction." *Id.* at *21.
33. *Id.*
34. *Salzberg*, 2020 WL 1280785, at *3. As the Court noted, "the plaintiff must show that the charter provisions 'cannot operate lawfully or equitably under any circumstances.' Plaintiffs must demonstrate that the charter provisions 'do not address proper subject matters' as defined by statute, 'and can never operate consistently with law.'" *Id.* (citations omitted).
35. *Id.* at *4.
36. *Id.*
37. *Id.* at *4, n. 39 (*quoting* Malone v. Brincat, 722 A.2d 5 (Del. 1998) for the propositions that "'[w]hen corporate directors impart information they must comport with the obligations imposed by both the Delaware law and the federal statutes and regulations,"' and that '"[t]he historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complimentary.'"
38. *Salzberg*, 2020 WL 180785, at *5.
39. *Id.*
40. *Id.* at *6 (*citing* Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952)).
41. *Salzberg*, 2020 WL 180785, at *6, n. 55 (*citing* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 Del. J. Corp. L. 845, 856–60 (2008).
42. *Salzberg*, 2020 WL 1280785, at *6 (*quoting* Williams v. Geer, 671 A.2d 168, at 1381 (Del. 1996).
43. *Salberg*, 2020 WL 1280785, at *6.
44. *Id.* at *7.
45. *Id.*
46. *Id.* at *10.
47. *Id.*
48. *Id.* at *13.
49. *Id.* at *18. Although it noted the possibility of a scenario in which a federal forum provision would impinge on an internal corporate claim, the Supreme Court reiterated that it was addressing a claim to the facial validity of the provisions at issue, and not to challenges to their application in a specific factual scenario. *Id.*
50. *Id.* at *11. The Court noted, "the argument that ATP's holding encompasses only state law fiduciary duty claims ignores the significance in that case of the federal antitrust claims as evidenced by this Court's repeated mention of those claims, and this Court's repeated use of the phrase 'intra-corporate litigation,' as opposed to the phrase, 'internal affairs' claims. At a minimum, this Court did not distinguish between the validity of the bylaw's application to the state law fiduciary claims and the federal antitrust claims." *Id.* (footnotes omitted).
51. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).
52. *Salzberg*, 2020 WL 1280785, at *18.

53. *Id.* at *18–19.
54. *Id.* at *20.
55. *Id.* at *21. The Court referenced its opinion in BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd., ––– A.3d ––––, 2020 WL 131370 (Del. Jan. 13, 2020).
56. The Court also suggested that the contractual choice-of-law analysis would be helpful in assessing where to mark the "outer band" on the continuum between "internal affairs" and purely "external" matters. *Salzberg*, 2020 WL 1280785, at *20–21. The Court stated: "Although [federal forum provisions] are somewhere in-between, the rules for determining the validity of forum-selection provisions in the contractual context lend themselves well to the corporate charter context in Section 102(b)(1)'s Outer Band area." *Id.* at *21.
57. *Id.* at *22.
58. *See* CA, Inc. v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008) (holding, prior to the adoption of Section 113 of the DGCL, that a bylaw mandating reimbursement of a proponent's proxy expenses was invalid as a matter of Delaware law as it extended beyond process-oriented matters permissible in the bylaws and infringed upon the board's substantive authority).