

## Shareholder Interests Appear to Remain Front and Center in Public Benefit Corporations

By Brian Calandra

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In the wake of the economic downturns following the collapse of the dot-com boom at the turn of the century and the Great Recession of 2008—which were both attributed, in part, to corporate misconduct—legal advocates began exploring alternatives to traditional corporations (“C Corps”) that would prioritize social responsibility and the greater good over short-term profits and share price maximization. These efforts accelerated in 2010, when Maryland became the first state to enact legislation authorizing “public benefit corporations” (“PBCs”). Since then, more than 35 states and the District of Columbia have enacted laws authorizing PBCs, which are for-profit corporations whose boards of directors are required to consider both public benefit and financial performance when making decisions.

While thousands of private PBCs quickly formed in response to these laws, it was not until 2017 that a PBC launched an IPO in the United States. After a short pause, at least nine more PBCs launched IPOs in 2020 and 2021, and, in January 2021, a public C Corp converted to a PBC for the first time. It most likely will *not* be the last time a C Corp converts to a PBC, as in the past year shareholders of at least 16 public C Corps (including Alphabet, Amazon, Facebook, and Wells Fargo) have submitted proposals to convert those companies to PBCs.

PBCs, and the laws enabling their existence, hope to incentivize socially responsible—or, more precisely, socially *cognizant*—decision-making by requiring their officers and directors to consider the interests of both the corporation’s shareholders and *stakeholders*, e.g., employees, customers, members of the community at large, and the environment, over short-term profits.

While these “dual priorities” of PBCs may appear to conflict with, or at the very least diminish, shareholders’ interests, upon closer examination, shareholders’ position at the focal point of corporate activity likely remains undisturbed.

### What is a PBC?

Three factors distinguish a PBC from a C Corp. First, the PBC’s corporate purpose stated in its formation documents must include a “social mission.” Second, as described

above, PBC directors must consider the impact of the company’s actions on shareholders as well as stakeholders. Third, PBCs must report on their pursuit of their social mission.

Although these elements are generally consistent across PBC statutes, their particulars can vary widely from state to state. For example, while some states require a primary corporate purpose of creating some public benefit, in Delaware, PBCs need only identify public benefits that are *among* their purposes. In addition, while PBC statutes generally require directors to consider non-shareholder stakeholders when making decisions, these statutes neither identify stakeholders nor assign levels of importance to different types of stakeholders. Finally, some states require PBCs to publicly report on their pursuit of their public benefits while other states only require these reports to be distributed to shareholders.



Brian Calandra, Of Counsel

At its core, incorporating as a PBC ostensibly protects the company’s directors by giving them the flexibility to consider stakeholders without breaching their fiduciary duties to shareholders. For example, a PBC’s board, as opposed to a C Corp’s board, can reject a substantially larger offer from a potential acquirer if the board determines that accepting the offer would undermine the public benefit defined in the PBC’s formation documents. On its face, this act would appear to conflict with shareholders’ interests, since it would seem to be in the shareholders’ interest for any acquisition to occur at the highest possible price. As we will see, however, such an act most likely would be exactly what the PBC’s shareholders wanted the board to do.

### Do the Dual Priorities of PBCs Conflict with Shareholders’ Best Interests?

Whether a board has a *legal duty* to maximize its shareholder value (*i.e.*, a company’s share price) has been and continues to be vigorously debated. Setting aside whether

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this duty exists, PBCs do not appear to conflict with shareholders' interests, even if certain actions may not maximize a PBC's share price.

For example, although a PBC's directors can consider other stakeholders when making corporate decisions, ultimate corporate authority is still vested squarely with shareholders. If shareholders are unsatisfied with a director's performance, they have the right to remove that director. Indeed, since the 1990s, rules and regulations have been enacted or revised to make it easier for shareholders to act if they are unsatisfied with a board's decisions. Rule 14-8 of the Securities and Exchange Act of 1934, which was adopted in 1992, made it easier for shareholders to include their own proposals in proxy statements, and New York Stock Exchange Rule 452, which was enacted in 2010, prohibits brokers from voting in director elections when they have not received instructions from their customers. Since brokers traditionally voted such shares in accordance with current management's proposals, removing these votes makes it much easier to reject management proposals.

In addition, many PBC statutes expressly provide for "enforcement proceedings" that can be brought when a company fails to pursue its stated public benefit or if the company violates a provision of benefit corporation law. These statutes, however, solely vest the right to bring such enforcement proceedings with *shareholders*, not the stakeholders.

Further, laws governing PBCs maintain all the rights vested in shareholders of traditional C Corps, including voting on major transactions, inspecting books and records, and filing derivative suits. In short, nothing in the formation of government of a PBC displaces shareholders from their perch atop the corporate hierarchy.

Beyond this undisturbed vesting of authority within shareholders, however, other factors strongly suggest that a PBC will act in its shareholders' interests. PBCs, which are formed expressly for the purpose of pursuing, and hopefully achieving, some social good, wear their proverbial hearts on their sleeves by enshrining these purposes in their foundational documents and, in the case of publicly traded PBCs, using "Risk Factors" in quarterly and annual reports to expressly warn investors that corporate decision-making may not be based solely on creating profits. Accordingly, an investor in a PBC decides to invest in substantial part *because* of the PBC's commitment to a particular social good at the expense of profits, and thus a PBC's board furthers shareholders' interests by prioritizing social good over short-term profits or share price.

In addition, a company that incorporates as a PBC should be able to (i) recruit employees who identify with its social mission and who will thus be more productive and loyal, (ii) motivate existing employees who share those values, and (iii) attract business from customers who share those values. Increasing employee productivity and customer loyalty is obviously in shareholders' best interests because it will make the company's performance more consistent over the long term.

While these and other arguments show how the PBC form

is designed to incentivize corporate conduct consistent with shareholders' interests, arguments that PBCs conflict with such interests tend to arise from assuming the worst in people—in this case, corporate officers and directors. For example, one common argument expressed by Frank H. Easterbrook and Daniel R. Fischel in *The Economic Structure of Corporate Law* asserts that officers and directors of a PBC cannot act in shareholders' best interests because "a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither." Another argument asserts that directors and officers will instantly prioritize their own personal interests over shareholders' and stakeholders' interests at the first sight of any weakening of their fiduciary duties to shareholders. This is because, the argument goes, there is no effective means to hold the officers and directors legally accountable given that shareholders' class actions and derivative lawsuits can be batted away by attributing any decision, no matter how irrational, to the pursuit of a vaguely defined social benefit, and stakeholders have no ability to sue under any circumstances.

### Conclusion

While it appears that shareholders continue to reign supreme even in PBCs, this new corporate structure has not been around long enough to generate a performance track record or to be tested by proxy battles, derivative lawsuits, and securities fraud class actions. Dueling arguments that they advance or undermine shareholders' interests are thus only based on theoretical deductions, not hard evidence. Once data on financial performance has accrued and a representative sample of challenges to decision-making have succeeded or failed, it will be time to take stock of whether PBCs are an advance in corporate evolution or a harbinger of doom. ■

## SEC Resets 'Set It and Forget It' 10b5 Plans

By Jessica N. Dell

On September 9th, the U.S. Securities and Exchange Commission's ("SEC") Investor Advisory Committee ("IAC") adopted new proposed recommendations to overhaul Rule 10b5-1, which the SEC first adopted in 2000 as a framework for insiders of publicly traded corporations to buy and sell securities without running afoul of insider trading laws, compliance rules or the appearance of conflicts of interest, and to set up a trading plan for selling stock they own. Rule 10b5-1 is a clarification of Rule 10b-5, created in 1942 under the Securities and Exchange Act of 1934 in order to explicitly prohibit the use of fraud or deception in connection to the sale or purchase of securities on U.S. exchanges.

Under the terms of Rule 10b5-1, both the seller and the broker making the sales must not have access to any material nonpublic information ("MNPI"). The SEC considers a stock transaction to have been made "on the basis of" MNPI if the trader was "aware" of the MNPI at

the time of the transaction. But it also provides an affirmative defense if the transaction was made pursuant to a trading plan that satisfies these conditions: (i) it was adopted in good faith before the insider became aware of MNPI; (ii) it specifies the amount, price, and date of the transactions; (iii) it provides written instructions or a formula that triggers the transactions; and (iv) it does not allow the insider to influence how, when, or whether transactions take place once the plan is established.

Addressing concerns that SEC Chair Gary Gensler first raised in comments to the *Wall Street Journal* in June, the proposed recommendations seek to “freshen up” Rule 10b5-1, with the goal to reduce the risk that company executives, using private information to opportunistically sell shares of companies they oversee, could invoke this rule as a shield against charges of insider trading. Certain features had “led to real cracks in our insider trading regime,” according to Gensler, and it would be a top priority of the SEC to move quickly to tighten regulations against insider trading.

While the protective trading structure offered to executives under 10b5-1 could continue to meet the intended purpose for good faith transactions, critics pointed to data showing the plans were being used to shield abuse. A 2020 Stanford University study had detailed trends suggestive of abuse, flagging problems with their structure that would continue to frustrate the purpose of these accounts. Calling it a matter of “good corporate hygiene,” the prior SEC Chairman, Jay Clayton, also called for these changes in order to eliminate “any suggestion of impropriety or unfairness.”

Compliance with these plan terms seemed straightforward. To qualify for protection under Rule 10b5-1, executives would enter into a nonbinding contract with a broker third party to execute trades on their behalf and have a “Set it and Forget it” schedule of trades. However, while the expectation was that the executive would rely on Rule 10b5-1 to sell in multiple transactions spread out over time, the reality was starkly different. Because the original rule did not specify a minimum number of transactions, executives could use a newly minted plan for a single trade, as needed. They could have as many plans as they desired to deal on new information and could terminate or modify these at will.

Stanford University’s Rock Center for Corporate Governance, in the aforementioned study, reported that their review of a dataset of over twenty thousand 10b5-1 plans revealed that “a subset of executives use 10b5-1 plans to engage in opportunistic, large-scale selling of company shares.” The report described major “red flags ... suggestive of potential abuse” while stating that their findings were also consistent with prior research that suggested “10b5-1 sales systematically precede periods of underperformance and early termination of planned sales systematically precede periods of outperformance.” These trends were suggestive that Rule 10b5-1 plans were being exploited to shield insider trading.

Following Gensler’s directive, a subcommittee of the



Jessica N. Dell, Associate

IAC issued draft recommendations in August. Stating that there was “strong bipartisan support” for revisions to Rule 10b5-1 to “improve transparency regarding insider trades and enable effective investigation and enforcement of violations,” the IAC recommended that the SEC “move quickly to close identified gaps in the current rule.” Among other policy changes, the IAC recommended that insiders or issuers be prevented from having more than one 10b5-1 plan in effect at the same time and would require a cooling-off period from the time of origination or modification.

Under the proposal, executives creating a new 10b5-1 plan or modifying an existing plan would have to endure a “cooling-off” period of at least four months before making trades under the newly adopted or modified plan. The IAC noted that such a cooling-off period would ensure that an insider or issuer could not put in place a plan that trades in the same quarter as its adoption and that limiting the affirmative defense protections to a single plan “would signal to the market that a plan was entered into in good faith.”

The recommended policy also set out additional disclosure requirements including proxy statement disclosure of the number of shares covered under corporate 10b5-1 plans for each executive as well as disclosure (on Form 8K) of the adoption, modification, or cancellation of 10b5-1 plans by an issuer, noting the number of shares covered by such plans. The new rules also extend Form 4 (Statement of Changes in Beneficial Ownership) reporting requirements to all companies – including non-U.S. issuers – with any securities listed on a U.S. exchange.

Approving the IAC’s recommendations in September, Gensler applauded the fast work of the subcommittee, stating “I believe plans under Exchange Act Rule 10b5-1 have exposed potential gaps in our insider trading enforcement regime...you’ve pointed out some important areas that are in line with what I’ve asked staff to consider in a proposed rulemaking.” ■

## Jennifer Pafiti Honored with 2021 Women, Influence & Power in Law Award

*Corporate Counsel* magazine honored Jennifer Pafiti, Pomerantz's Partner and Head of Client Services, with a 2021 Women, Influence & Power in Law award for Collaborative Leadership. The awards recognize attorneys — general counsel, in-house leaders and law firm partners — who have “demonstrated a commitment to advancing the empowerment of women in law.” Dedicated to honoring women who champion other women and promote diversity in the legal industry, the WIPL award winners are “business strategists, complex problem-solvers and, of course, great lawyers.”

As a key player in Pomerantz's litigation against Brazilian oil giant, *Petróleo Brasileiro S.A.–Petrobras*, Jennifer — along with a litigation team that was 80% female — helped secure a record-breaking \$3 billion settlement on behalf of defrauded investors. The culmination of over three years of hard-fought litigation led by Managing Partner Jeremy Lieberman, this significant 2018 victory set records as the largest securities class action settlement in a decade, the largest settlement ever in a class action involving a foreign issuer, and the fifth-largest class action settlement ever achieved in the United States. It is also the largest settlement ever achieved by a foreign lead plaintiff, and the largest class action settlement in history not involving a restatement of financial reports.



*Jennifer Pafiti, Partner and Head of Client Services*

Universities Superannuation Scheme (“USS”), the trustee of the UK's largest private pension scheme as measured by assets, served as lead plaintiff for the class in *Petrobras*. As an attorney dually qualified to practice law in the US and the UK, Jennifer worked closely with USS throughout the litigation.

While pursuing complex securities fraud litigation, Jennifer also spearheads client development and oversees PomTrack®, a proprietary system for monitoring clients' assets with state-of-the-art technology and a team of professionals who cross-reference trading data against current and potential securities class action claims.

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## CORPORATE GOVERNANCE ROUNDTABLE EVENT

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Seating is limited. To express interest in attending, please email:

[pomerantzroundtable2022@pomlaw.com](mailto:pomerantzroundtable2022@pomlaw.com)

# Q&A

## Natalie Tuck



**Natalie Tuck is Editor of European Pensions, a highly authoritative information source for pension decision makers. She recently shared her expertise with the *Monitor* in an interview.**

**Monitor:** What are some of the major hurdles facing European pension schemes today?

**Natalie Tuck:** The sustainability of pension systems, amid Europe's ageing population, is a major challenge across the continent. According to data from Eurostat, in 2020 the percentage of those aged over 65 was 20.6%, an increase of 3 percentage points since 2010. This will only increase over the coming years, putting added pressure on public pension systems. Institutions for Occupational Retirement Provision (IORP) schemes are seen as one solution to ease some of that pressure. Defined benefit occupational schemes have their own funding problems, which is why we are seeing a gradual transfer to defined contribution systems in Europe – the Netherlands is in the process of transitioning. However, this passes the burden of sustainability onto individuals, who now need to make sure they save enough for retirement – yet another problem for the industry to solve!

**M:** What are the current hot topics in regulatory and legislative issues?

**NT:** Sustainable finance is a key policy area for the European Union and, as a result, it has introduced a package of legislative measures to achieve its objectives. In July this year, the European Commission published its new Sustainable Finance Strategy, which includes several proposals that will impact the pensions industry. For example, it detailed proposals to develop reporting obligations under the Sustainable Finance Disclosure Regulation (SFDR), a regulation that applies to IORPs, to include more reporting on the decarbonization of financial products and social factors. The Commission also proposed changing the prudent person rule under the key pension legislation, the IORP II Directive, to require pension funds to consider participants' sustainability preferences in investment decisions. In addition, the Commission may make it mandatory for pension schemes to consider the non-financial impact of investment decisions on ESG factors. While the industry is largely supportive of the changes, the industry association, PensionsEurope, is calling for proportionality in the Commission's approach to IORPs, which greatly vary in size.

**M:** How does cross-border pension pooling work?

**NT:** Pension funds have several options when it comes to cross-border pension pooling. They can create their own cross-border IORP scheme, join a cross-border master trust, or companies can pool their pension fund assets through common investment funds. The first two are facilitated through the IORP II Directive introduced in 2016 but have actually been possible since 2003, when the first IORP Directive was introduced. These schemes, which can be defined benefit or defined contribution, must comply with the local social and labor laws, and taxation rules, of the country they are offered in. For example, if a cross-border fund is based in country A (home state), but operates in countries B, C and D, it would be necessary to create specific national compartments complying with the local laws and rules of each country. The latter option of pooling assets through common investment funds is more of a lite touch option to pension pooling. In this case, companies have the option to invest assets from their pension schemes in different countries alongside each other in a common investment fund. There are several tax transparent vehicles that can be

used, such as Ireland's Common Contractual Fund (CCF) or the Luxembourg-domiciled Fonds Commun de Placement (FCP), among others.

**M:** How do European pension funds see litigation as a vehicle for asset recovery after incidents of securities fraud?

**NT:** European pension funds are increasingly turning to the law as a way to recover assets lost due to securities fraud. Your own Managing Partner, Jeremy Lieberman, recently explained in a podcast with *European Pensions*, that having watched their US counterparts receive compensation whilst they suffered only losses, European pension funds realised that engaging with companies on this wasn't working. To quote Jeremy, whilst many European institutional investors "don't want to put their head above the parapet," that attitude is now changing, driven by the necessity to recover financial losses. There's also strength in numbers, and many pension funds are joining class actions and multi-claimant cases, and in some instances, acting as the lead plaintiff.

**M:** What is the most significant story that you have covered so far on the pension beat?

**NT:** The introduction of the freedom and choice pension reform in the UK market, which was introduced in April 2015. It was a huge shock to the industry when it was announced by then Chancellor George Osborne in March 2014, as there had been no leaks about it beforehand. The industry was given one year to prepare for the changes, which completely revolutionized the decumulation market in the country. Savers went from, in most cases, having to purchase an annuity upon retirement, to having the freedom to choose between an annuity, drawdown or to take all their cash at once.

**M:** How do ESG and equity inclusion for women and minorities rank as concerns for European pension funds?

**NT:** Pension funds in the Nordics lead the way when it comes to ESG considerations, with many now publishing sustainability reports alongside their annual reports detailing the work they do in this area. However, a lot of the focus is on the 'E' (environmental) part of ESG and although progress is being made on the equity of women, there is still a long way to go. That being said, I have noticed the issue rising up the agenda, from pension funds pushing for greater female board representation within their investee companies to looking at ways to close the gender pension gap that so often affects their own scheme members.

**M:** What inspires you most in your work each day?

**NT:** One of the reasons I became a journalist is because I get to do something different, learn something new and speak to different people every day. As a pensions journalist I'm fortunate to write on a hugely diverse topic; one day I could be covering class actions, or ESG investment topics, and the next I might be writing about diversity or pensions inadequacy. I'm particularly inspired by the passion of those working in the pensions industry, who strive for the best outcomes for pensions scheme members.

**M:** Arsenal or Manchester United?

**NT:** Manchester United – hopefully we will be in with a chance now that Cristiano Ronaldo has returned to Old Trafford.

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PomTrack® enables the Firm to alert fiduciaries when assets they oversee suffer significant losses that may be attributable to financial misconduct. Jennifer brought in Pomerantz's first portfolio monitoring clients from the UK, Germany, and the Netherlands, growing the Firm's foreign and domestic client base to include some of the most influential institutional investors around the globe. Under her supervision, PomTrack® assets under management have tripled, currently at \$6.8 trillion in combined client assets. More than 50% of Jennifer's PomTrack® team are women and minorities.

Jennifer also leads the Firm's institutional investor educational initiatives, organizing Pomerantz-sponsored conferences around the world. In 2018, Jennifer organized a Corporate Governance and Securities Litigation conference in New York on the theme of how corporations, law firms, government agencies and pension funds might help women and minorities rise through the ranks and pioneer a path for change and unity in our communities. She is also managing Pomerantz's upcoming Corporate Governance roundtable, which, after

several COVID-related postponements, will take place in California on June 14, 2022, featuring special guest speaker President Bill Clinton.

"There is nothing new about mentoring colleagues while empowering their inclusion and growth in the process," according to Jennifer. "This has been the status quo for men since time immemorial. What's new is that public sentiment and the number of women in power in the legal industry have both reached a scale where meaningful gains in equity and inclusion for women will no longer be denied. We owe a responsibility to each other and those who have come before us to help our generation push the tipping point over the edge. This is the moment for women to exert their influence and power."

Jennifer and her fellow honorees will be recognized at an awards ceremony in October 2021 as part of Corporate Counsel's Women, Influence & Power in Law Conference in Washington, D.C. ■

## NOTABLE DATES ON THE POMERANTZ HORIZON



Jeremy A. Lieberman



Jennifer Pafiti



Marc I. Gross



Janalee Spencer

**IF YOU WILL BE ATTENDING ANY OF THESE EVENTS AND WOULD LIKE TO MEET WITH US, SEND US A MESSAGE AT [EVENTS@POMLAW.COM](mailto:EVENTS@POMLAW.COM).**

**JENNIFER PAFITI** and **JANALEE SPENCER** will attend the **Texas Local Firefighter Retirement Act (TLFFRA) Pension Conference** in Denison, TX from October 3rd-5th.

**JENNIFER** will attend the **National Association of Public Pension Attorneys (NAPPA) 2021 Winter Seminar** in Tempe, AZ from October 5th-7th.

On October 7, **JENNIFER** will virtually attend **Corporate Counsel's** awards ceremony in Washington, DC, where she will be honored with a Women, Influence and Power in Law award for Collaborative Leadership

On October 26, **POMERANTZ** will sponsor a lunch for institutional investors, hosted by **JEREMY LIEBERMAN** and **JENNIFER**, in London, England. The special guest speaker Baroness Karren Brady, CBE and a member of the House of Lords, will discuss why "Women Make Better Leaders Than Men."

On November 2nd, **POMERANTZ** will sponsor an event at the **Tel Aviv Hilton** featuring former head of the Mossad, **Yossi Cohen**, who will discuss geopolitical events that are impacting the political, security and legal landscape in Israel.

**JENNIFER** and **JANALEE** will attend the **International Brotherhood of Electrical Workers (IBEW) Membership Development Conference** in Atlanta, GA from November 2nd-4th. They will also attend the **State Association of County Retirement Systems (SACRS) Fall Conference** in Hollywood, CA from November 9th-12th.

**MARC GROSS** will speak on the panel, Parties' Ex Ante Attorney-Fee Award, at the **Second Annual Class Action Case Law and Practice Review Conference** at the George Washington University Law School in Washington, DC on November 11th-12th.

**JEREMY** and **JENNIFER** will attend the **ICLG Class Actions Symposium** in London, England on November 16th-17th, where Jeremy will chair a panel discussion on Global Trends in Securities Litigation.

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## YEARS

### Clearing the Air About Discovery

Michael J. Wernke, Partner



### In Fiat Chrysler, Pomerantz increased the discovery tools available to investors litigating against highly regulated companies

In September 2015, Pomerantz filed a complaint against Fiat Chrysler Automobiles N.V., one of the world's largest car manufacturers, on behalf of a retail investor. After years of hard-fought litigation, in late 2019, the Firm achieved a \$110 million settlement for defrauded investors, representing between 13.75% and 19% of maximum recoverable damages – an exceptionally high percentage for this type of action. In addition to the substantial financial recovery, Pomerantz set important precedent that expanded shareholder rights, while significantly advancing the ability of investors to obtain critically important discovery from regulators that are often at the center of securities actions.

The complaint alleged that defendants misled investors by asserting that the company was complying with regulations for conducting safety recalls set by the National Highway Traffic Safety Administration (“NHTSA”), and with regulations for controlling emissions of Nitrogen Oxide (“NOx”) set by the Environmental Protection Agency (“EPA”) and the European Union. Fiat Chrysler, in fact, had been violating those regulations since 2013 – it purposefully delayed notifying vehicle owners of defects and failed to repair the defects for months or years. More nefariously, the company also installed “defeat device” software in its diesel vehicles, designed to detect when the vehicle was being tested by a regulator such as the EPA. When testing conditions were detected, the vehicle would perform in a compliant manner, limiting emissions of NOx. When testing conditions were not detected, such as during real-world driving conditions, the emissions controls were disabled, and the vehicles would spew illegal and dangerous levels of NOx.

On July 26, 2015, the NHTSA fined Fiat Chrysler a record-high \$105 million and required a substantial number of recalls and repairs. On October 28, 2015, the company announced a \$900 million charge to earnings for an increase in estimated future recalls. The market responded to this news with a nearly 5% drop in the company's share price, resulting in a \$950 million decline in its market capitalization. In 2016 and 2017, when the EPA and other U.S. and European regulators publicly accused Fiat Chrysler of using defeat devices to cheat NOx emissions regulations, the company's stock price declined further by 5% and 12% respectively.

Discovery in the case was particularly challenging, given the complexity of the emissions software technology, the international nature of the claims, and that the key defendant, Fiat Chrysler CEO and Chairman Sergio Marchionne, was hospitalized (and later died) three days before his scheduled deposition. Additionally, it involved analyzing millions of pages of documents and resulted in the exchange of reports by eleven experts on issues implicating U.S. as well as European regulations.

Pomerantz sought the deposition of a former employee of NHTSA. The United States Department of Transportation (“USDOT”), like most federal agencies, has enacted a set of regulations — known

as “Touhy regulations” — governing when its employees may be called by private parties to testify in court. On their face, USDOT's regulations apply to both current and former employees. Citing these regulations, NHTSA denied Pomerantz's request to depose a former NHTSA employee who had interacted with Fiat Chrysler. Despite the widespread application of these regulations to former employees, Pomerantz filed an action against USDOT and NHTSA, arguing that Touhy regulations speak only of “employees,” which should be interpreted to apply only to current employees. The court granted summary judgment in favor of Pomerantz's clients, holding that “USDOT's Touhy regulations are unlawful to the extent that they apply to former employees.” This victory has greatly shifted the discovery tools available, so that investor plaintiffs in securities class actions against highly regulated entities (for example, companies subject to FDA regulations) may now depose former employees of the regulators to get critical testimony concerning the company's violations and misdeeds.

The claims ultimately survived multiple rounds of motions to dismiss. Initially, the emissions allegations were dismissed because the court determined that the complaint did not plead facts sufficient to demonstrate that the defendants knew that their statements of compliance were misleading. Given leave to replead, Pomerantz filed Freedom of Information Act (“FOIA”) requests with the EPA, which led to critical new information. Pomerantz successfully argued, in opposition to the defendants' second motion to dismiss, that emails received by the company's head of regulatory affairs from the EPA stating that the company may be violating the law were sufficient to plead that the defendants' subsequent statements of compliance were actionable. Significantly, Pomerantz established that a company professing compliance with regulations must also disclose if their regulators have taken a different position, even if it is not a final determination by the regulator. The additional allegations in Pomerantz's amended complaint revived the emissions claims. Ultimately, Pomerantz secured class certification on behalf of investors.

At the summary judgment stage, Pomerantz did not merely defend against defendants' motions, but also affirmatively moved to exclude certain expert testimony proffered by defendants, and for sanctions for spoliation of evidence. As the prospect of trial loomed, defendants finally agreed to settle.

The litigation was led by Pomerantz Partner Michael J. Wernke with Managing Partner Jeremy A. Lieberman. In approving the settlement, the court stated that Pomerantz should view the award of attorneys' fees “as a substantial compliment for you[r] work ... [I]t is most clearly evidenced by the results which were quite impressive on behalf of the class. And needless to say, given my own familiarity with the extensive litigation of the class including the collateral litigation that you had to engage in, I think you've done substantially a really terrific job on behalf of the class and really are to be commended.” ■

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Pomerantz is acknowledged as a global leader in securities and corporate governance litigation. Pomerantz monitors the portfolios of some of the most influential institutional investors and financial institutions worldwide, monitoring assets in excess of \$6.8 trillion. Founded by Abraham L. Pomerantz, who was known as the “dean of the plaintiffs’ securities bar,” the Firm pioneered the field of securities class actions. For 85 years and counting, Pomerantz has continued the tradition that Abe Pomerantz established, fighting for the rights of victims of securities fraud, breaches of fiduciary duty, and corporate misconduct. Prior results, however, do not guarantee a similar outcome in future cases.

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We welcome input from our readers. If you have comments or suggestions about *The Pomerantz Monitor*, or would like more information about our firm, please visit our website at [www.pomlaw.com](http://www.pomlaw.com) or contact:

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