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FREE SPEECH vs CORPORATE LIES: The Role of the First Amendment in Securities Fraud

By Villi Shteyn

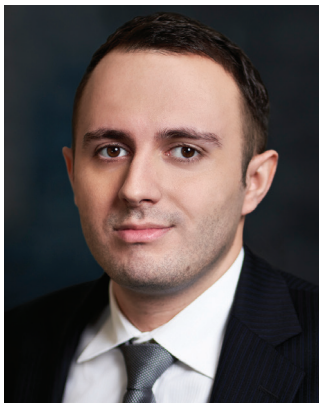
INSIDE THIS ISSUE

The intersection of fraud and claimed free speech protection under the First Amendment is fraught with controversy. From defamation to fraud, obscenity, hate speech, and even fighting words – the fine line between protected and prohibited speech is left largely undefined by guidelines from the bench that sometimes fail to go beyond "you'll know it when you see it." Add commercial speech and the complexities of securities fraud class action litigation into the debate and you have what James C. Goodale – famed General Counsel who represented *The New York Times* in their *Sullivan* and Pentagon Papers cases – described as a "collision course" between the First Amendment and securities regulation. Goodale asserted that "there is no greater statutory regulation of speech than the '33 and '34 Securities Acts and the '40 Investment Adviser and Investment Company Acts."

A recent case involving oil giant ExxonMobil Corp. ("Exxon") shows how bad faith misuse of the First Amendment can threaten investor protections. In a recent appeal in Massachusetts state court, Exxon argued that Massachusetts Attorney General Maura Healey's suit under the state's consumer protection statute should fail because Exxon's public statements (and alleged omissions) relating to climate change were protected under the First Amendment of the United States Constitution. Exxon claimed the statements, rather than being targeted at consumers and investors, were directed at policymakers and the public at large to influence energy policy, thus fitting into the statutory definition of "petitioning." Exxon argued that, due to its position as a large energy company, it must take an active role in the public discussion on energy policy, and these statements are protected so that it can fulfill that role.

Suffolk Superior Court Justice Karen Green did not find Exxon's arguments convincing and denied dismissal of the suit. Justice Green found that Attorney General Healey's claims that Exxon lied to consumers by marketing its products as environmentally friendly could move forward, as could claims that Exxon misled investors by downplaying any climate-driven financial risks to its bottom-line financials. Significantly, Justice Green found that commercial speech is protected under the First Amendment if the speech concerns lawful activity and is not misleading, but not when it includes fraudulent statements. Given the allegation of fraud to consumers and investors, she held that First Amendment protection was not warranted at the motion to dismiss stage.

On appeal, Exxon has argued that "[b]y premising its claims on Exxon's advocacy and alleged omissions regarding preferred policies on climate change, the Commonwealth seeks to curtail Exxon's exercise of its right of petition by punishing Exxon, through litigation, for not propounding a particular message." Exxon further claims that climate change is one of several controversial and sensitive topics of public concern, and due to that, forcing any disclaimers to accompany Exxon's statements regarding the matter to prevent allegedly misleading omissions is compelled speech on issues of public concern, and an unconstitutional step by the Commonwealth of Massachusetts to take. It further argues that this is simply "a policy disagreement about the potential scale and efficacy" of certain alternative energy sources. Exxon also claims that the Commonwealth's views on what constitutes good or poor energy policy should not form the basis of forcing the company to disseminate opposing viewpoints on the matter or otherwise subject itself to liability. This, according to Exxon, creates a chilling effect on petitioning activity vis à vis the First Amendment.



Villi Shteyn, Associate

The Massachusetts Attorney General responded that the intended audience was very clearly investors and consumers; Exxon's statements were commercially motivated and profit-oriented, rather than petitioning the government. Exxon's claims of petitioning, according to the AG, are a phony pretext for its actual goal for the statements, and its First Amendment defense is a delay tactic used by defendants in similar cases. Additionally, the Commonwealth of Massachusetts had the clear goal of protecting investors and consumers, not punishing Exxon due to disagreements with its climate change policy viewpoints.

Some examples of representations clearly made to investors were that Exxon will "face virtually no meaningful transition risks from climate change." In Exxon's *2018 Energy Outlook*, the company told investors that it "use[s] the *Outlook* to help inform ... long-term business strategies and investment plans." According to the AG, these statements plainly target investors and should not be shielded from liability under the contrived premise of free speech. The Commonwealth further pointed to the fact that Exxon itself described their communications as "branding and marketing efforts," "corporate messaging," and "statements highlighting the positive features of its business." Plainly, the

Continued on page 2

Continued from page 1

Commonwealth argues, they aim to deceive investors about the significant and existential threat that climate change poses to the company's value. The appeal is currently pending in the Massachusetts Supreme Court.

Exxon's line of reasoning certainly raises concerns in the context of securities fraud actions, although, in a good sign to investors, courts have been similarly unconvinced in that context in several recent cases. One example is in a recent major victory for Pomerantz in the Altria and JUUL securities fraud litigation in the Eastern District of Virginia. The court there, in a 2021 opinion, found that the *Noerr-Pennington* doctrine, which is meant to safeguard the First Amendment right to petition the government for a redress of grievances by immunizing liability that may attend the exercise of that right, did not call for the dismissal of plaintiffs' claims related to defendants' statements made to Congress – in this case, Altria and Juul's denials that they marketed their nicotine vaping products to children – because "the First Amendment offers no protection when petitioning activity ... is a mere sham to cover an attempt to violate federal law." The court found that plaintiffs' fraud allegations under the Exchange Act raised the sham exception, and, in any event, the doctrine was an affirmative defense that could not be decided at the motion to dismiss stage. Thus, even if speech was established as petitioning, First Amendment protection does not apply when the speech is used to fraudulently deceive investors.

A 2020 Northern District of California court opinion found similarly against Apple in a securities fraud action against the company concerning allegations that processing performance was intentionally throttled on iPhones. In this case, the court denied the *Noerr-Pennington* First Amendment defense because Apple could not show that it was seeking any redress from policymakers implicating their First Amendment rights, despite the speech in question being a letter to Congress.

In 2003, in *Nike, Inc. v. Kasky*, the argument for First Amendment protection for corporate speech reached the United States Supreme Court, as Nike fought allegations of false advertising by claiming that their denials of engaging in unfair labor practices and subjecting workers to unsafe working conditions were actually protected speech related to matters of public concern. Nike initially prevailed at trial and in the California Court of Appeals but lost on reversal in California Supreme Court – sending it to the High Court. While the U.S. Supreme Court accepted the case, they eventually sent it back down as "improvidently granted" – meaning they should not have accepted it in the first place – although Justice John Paul Stevens noted that the case presented "novel First Amendment questions because the speech at issue represents a blending of commercial speech and debate on issues of public importance." Unfortunately, the case was settled before the issues at hand could be resolved with further clarification of just how free corporate speech can be on matters of public interest.

Despite some limited protection in narrow circumstances, there is strong judicial backing of the principle that companies cannot hide behind perceived First Amended rights to lie to or mislead investors. Some courts have found that outlining the factual basis for an opinion leads to First Amendment protection; however, Circuit Courts of Appeals have generally found that punishing securities fraud does not violate the First Amendment and laws punishing fraudulent speech survive constitutional scrutiny even when applied to pure, fully protected speech. In fact, in 2009, the Fourth Circuit explicitly found that "Punishing fraud, whether it be common law fraud or securities fraud, simply does not violate the First Amendment." The Supreme Court has also stated, as cited by Suffolk Superior Court Justice Karen Green in *Exxon*: "the First Amendment does not shield fraud."

It is well-settled law that the First Amendment does not protect fraud, and so courts are unlikely to prevent investors from enforcing their rights to be protected from false and misleading statements under the guise of free speech. Securities fraud defendants will certainly continue to use the tactic of improperly hiding behind the First Amendment to shield themselves from liability for false or misleading statements. However, they should be wary -- especially in the age when outspoken corporate officers can find themselves just one tweet away from destroying shareholder value with misguided, misleading, and potentially fraudulent comments.

The Government Should Tread Carefully in Its Short Seller Investigation

By Veronica V. Montenegro

In February 2022, it was revealed that the Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") commenced an investigation into dozen of investment firms and researchers engaged in short selling. It is not clear yet who on the list is considered a "target" of the probe and who might just have information relevant to the investigation, but the business of short selling in general has caught the attention of regulators.

Short sellers identify a stock that they believe will suffer a decline and borrow shares of that stock from a broker in order to sell them to buyers willing to pay the current market price. If the stock drops, the short sellers make a profit when they return the shares to the broker and buy them at a cheaper price. A short squeeze occurs if the price goes up, and the investors need to rush to buy the stock to cut their losses. Many of those under investigation have made a profession from exposing corporate fraud while betting that companies' share prices will fall. For their part, some executives, accusing short sellers of targeting their companies for profit, have put pressure on the DOJ and other financial regulators to investigate short sellers for market manipulation. During the early 2021 meme-stock mania, short sellers were especially vilified by retail investors and the Reddit

"Wall Street Bets" crowd who intentionally drove up the price of stocks of companies like GameStop and AMC Entertainment, which were heavily shorted at the time. The short squeeze on GameStop saw its share price jump from $17.25 to $325 over the course of just four weeks, posing the risk of catastrophic losses for short sellers as the share price skyrocketed.

It is not entirely clear what the DOJ's and SEC's specific allegations of wrongdoing might be, but *The Wall Street Journal* has reported that federal prosecutors are investigating whether short sellers conspired to drive down stock prices by engaging in illegal trading tactics such as "spoofing" and "scalping." Spoofing involves flooding the market with a series of fake orders in order to manipulate the stock price without the intention of actually buying the stock. Illegal scalping (as opposed to "legal scalping") is a short seller influencing investors or otherwise manipulating prices with the intent to sell the stock secretly and profit from the manipulation. U.S. prosecutors are reportedly exploring whether they can bring related charges under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

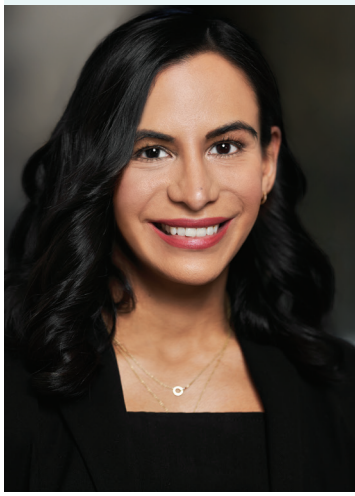
The short sellers' practice of publicizing negative research and profiting when the stock falls has been criticized by those who argue that the allegations can be false and that the traders are artificially deflating share prices to the detriment of shareholders. However, short sellers may be an invaluable source for uncovering corporate wrongdoing and outright fraud. Such short seller reports uncovered fraud at Enron and other corporations and warned of the impending financial crisis in 2008. While companies targeted by short sellers rejoice at the government's investigation, others believe that the inquiry is premised on the mistaken belief that abuse is widespread and distorting stock prices. Columbia Law Professor Joshua Mitts, one of the biggest critics of short selling, has proposed SEC rules which would require short sellers to hold their position for at least 10 days after releasing their negative research, or be accused of market manipulation for rapidly closing their positions. However, if such rules were to be implemented, they would deprive short sellers—who provide a vital service in policing the markets—of profiting from their research and short positions. In a 2018 research paper titled "Short and Distort," Professor Mitts looked at 1,720 negative short seller reports and found that the stock prices of targeted companies began to recover just one day after the negative research was published and continued to recover for three days thereafter.

Critics have argued, however, that Professor Mitts did not examine a representative sample of activist short sellers and their reports. For example, *Dealbook* reported that an analysis shared by Carson Block, the activist short seller who founded Muddy Waters Capital, found that 75% of the negative reports analyzed in "Short and Distort" are not in a database of activist short seller campaigns compiled by Activist Insight, a leading provider. Additionally, only 20% of the authors of those reports stated that they were shorting the stock of the companies on which they were reporting. Professors Frank Partnoy (Law School at the University of California, Berkley) and Peter Molk (University of Florida Levin College of Law) analyzed 825 negative research reports located in the Activist Insight database between 2009 and 2016 and found that, four years after the release of the reports, the average stock price decline of 573 targeted companies was more than 20%.

The SEC has not indicated whether it will adopt Professor Mitts' proposed rules, but the government should move carefully when designing rules that can hamstring short selling as a viable profession. Many respected professionals in the securities field believe short selling plays an important role in public markets by improving price discovery and rational capital allocation, preventing financial bubbles, and finding fraud. In the securities class action space specifically, negative research reports authored by short sellers may play a vital role in alerting the market and investors that fraud has been committed by the company. These reports are often cited in class action lawsuits as revealing the truth of the fraud to the market, thereby serving as the "corrective disclosure"—a necessary component of a securities class action. Defendant companies frequently move to dismiss short seller claims, arguing that loss causation cannot be predicated on their reports as corrective disclosures because, among other reasons, the authors had a financial incentive to convince others to sell.

Unfortunately, various federal courts have sided with defendants on this point, with or without the existence of a financial incentive. Even though the information contained in such reports is revelatory of a previously undisclosed fraud, the reports should nevertheless qualify as corrective disclosures. If government action makes short selling a nonviable profession, class action investors would no longer be able to count on their reports to help make their case against fraudulent companies. Additionally, government action that further stigmatizes the role of short sellers could cause federal courts to take an even more skeptical view of short seller reports when analyzing the loss causation element of a securities class action lawsuit. To be clear, securities fraud, in whatever form it takes, should be prosecuted and punished—short selling firms should not be the exception. If the government investigation reveals that the targeted short selling firms have in fact engaged in illegal trading tactics, prosecution is warranted. However, it cannot be denied that short sellers and their reports have aided defrauded investors in prosecuting their cases.

The government should be diligent in ensuring that its investigation targets actual potential market manipulation and is not influenced by disgruntled corporate executives who are simply upset that their companies were subjects of hard-hitting research that revealed fraudulent activity.



Veronica V. Montenegro, Of Counsel

Proposed Expanded Scope of Insider Trading Liability

By Terrence W. Scudieri

Terrence W. Scudieri, Associate

On February 15, 2022, the U.S. Securities and Exchange Commission (the "SEC") published a Proposed Rule in the Federal Register that, if adopted, will significantly expand the scope of liability for insider trading under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), by limiting the scope of the current affirmative defense provided under SEC Rule 10b5-1 (the "Proposed Rule"). In general, to qualify for the Rule 10b5-1 affirmative defense, a corporate insider may avoid liability for trading on the basis of material, non public information ("MNPI") if its trade is pursuant to a contract, instruction, or plan that is adopted prior to the insider becoming aware of MNPI (a "Plan"), which either (1) specifies the amount, price, and date of securities to be traded; (2) provides written instructions or a formula that would trigger a trade of securities; or (3) does not allow the insider to influence whether, how, or when trades are made after the Plan is effective. The Proposed Rule signals a revival of the remedial intent of the securities laws: "to insure honest securities markets and thereby promote investor confidence" (*United States v. O'Hagan*). Indeed, "[a] significant purpose of the Exchange Act was to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office" (*In re Cady, Roberts & Co.*).

Background

Under Section 10(b), it is unlawful to use or employ, in connection with the purchase or sale of any security, "any manipulative or deceptive device or contrivance in contravention of [the SEC's regulations]." For decades, courts have held that insider trading on the basis of MNPI is a "deceptive device" within the meaning of Section 10(b) and Rule 10b-5.

In 1997, the Supreme Court set forth two "theories" of MNPI insider trading liability under Section 10(b) and SEC Rule 10b-5. The first, known as the "traditional" or "classical theory," is relevant here, while the second, known as the "misappropriation theory," does not target unlawful trading by insiders, but instead "outlaws trading on the basis of nonpublic information by a corporate 'outsider' in breach of a duty owed not to a trading party, but to the source of the information."

The classical theory posits that "Section 10(b) and Rule 10b-5 are violated when a corporate insider trades in the securities of his [or her] corporation on the basis of material, nonpublic information. Trading on such information qualifies as a 'deceptive device'" within the meaning of Section 10(b) because "a relationship of trust and confidence exists between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation," such that an insider owes a fiduciary "duty to disclose or to abstain from trading" on the basis of MNPI. This theory of liability "applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, and others who temporarily become fiduciaries of a corporation."

In August 2000, the SEC promulgated Rule 10b5-1, which clarifies whether an insider's purchase or sale of an issuer's securities was "on the basis of" MNPI and under what circumstances such a transaction was tantamount to a "manipulative and deceptive device," thus giving rise to liability for securities fraud under Section 10(b). In doing so, the current Rule 10b5-1(c)(1) expressly excludes from its definition such insider trades as are made pursuant to a Rule 10b5-1 "plan;" that is, pursuant to a "binding contract to purchase or sell the security" or a "written plan for trading securities" that was ostensibly adopted before an insider became aware of MNPI. These "10b5-1 trading plans are designed to allow corporate insiders to 'plan future transactions at a time when he or she is not aware of material nonpublic information without fear of incurring liability'" (*Sec. & Exch. Comm'n v. Mozilo*).

Problematically, current Rule 10b5-1 trading arrangements are often abused "to conduct share repurchases to boost the price of the issuer's stock before sales by corporate insiders" (Proposed Rule, 87 Fed. Reg. at 8688). Accordingly, the SEC has published the Proposed Rule "to address apparent loopholes in the rule that allow corporate insiders to unfairly exploit information asymmetries."

Three Key Proposed Changes

The Proposed Rule offers several amendments. This article addresses three of the most beneficial proposed changes for investors: the Proposed Rule would (1) add a 120 day mandatory "cooling off" period before any trading can commence under a Rule 10b5-1 trading arrangement after its adoption, cancellation, or modification; (2) require officers and directors to certify in their SEC filings that they are not aware of any MNPI before adopting a Rule 10b5-1 trading arrangement; and (3) require each issuer to disclose in their annual reports whether it has adopted insider trading policies and procedures, and to disclose such policies and procedures (or the lack of such policies and procedures and the reasons why).

First, at present, there is no mandatory waiting period between the time an issuer adopts a Rule10b5-1 plan and when an officer or director makes a trade pursuant to that plan. The Proposed Rule would prohibit officers and directors from making any trades pursuant to a Rule 10b5-1 plan within 120 days of adopting, cancelling, or modifying such a plan (Proposed Rule, 87 Fed. Reg. at 8689 90). This change is critical, as it should work to solve the current problem of insiders adopting a Rule10b5-1 plan and making trades pursuant to that plan on the same day.

Second, at present, there is no current requirement that officers or directors certify their ignorance of any MNPI before invoking a Rule10b5-1(c) affirmative defense. The Proposed Rule would require officers and directors to certify, at the time of the adoption of the trading arrangement," that "they are not aware of [MNPI] about the issuer or its securities" and that "they are adopting the [Rule 10b5-1 plan] in good faith and not as part of a plant or scheme to

Continued on page 7

Gustavo F. Bruckner, Partner

Q&A

Gustavo F. Bruckner

Gustavo F. Bruckner leads Pomerantz's Corporate Governance practice group, enforcing shareholder rights and litigating against corporate actions that harm shareholders.

***Monitor*: What is a shareholder derivative case?**

Gustavo Bruckner: Whether an investor owns one share or one million shares, they are an owner of that company. The company itself is just a legal creation, an inanimate object that cannot respond when it is harmed or wronged. But a shareholder, as an owner, can take action on behalf of the company to remedy that harm. And that's what a shareholder derivative action is. It's usually directed against the officers and directors who sit at the top of the company and wouldn't otherwise take action against themselves.

M: One share versus one million shares… Is weight given to that in court in corporate governance cases?

GB: The other side often tries to make it an issue. There was a recent hearing where a shareholder owned a fractional share of Tesla in one account and many more in another. Tesla argued that the shareholder didn't own enough to review its books and records. The Vice Chancellor of Delaware's Chancery Court shut down that argument very quickly. There are jurisdictions where you need to own a certain minimum threshold of the shares to pursue derivative litigation – 5% in Nevada, for example – but not in Delaware, which is the most common forum for these kinds of actions. The law does not specify a minimum; the only thing the law specifies is the ownership stake at the time the litigation is brought. For the most part, one share or a million shares is the same under the law.

M: #MeToo issues like sexual harassment are sensitive matters to the victims involved. How do you maintain discretion and confidentiality?

GB: Our goal is not to promote ourselves. Our goal is to forcefully and effectively represent our institutional and individual clients. If the best way to address the misconduct, remedy the harm, and bring about change is to do it privately, then we will do so. And we've had many, many such resolutions. No one will ever know except the parties involved that Pomerantz, on behalf of its clients, caused those changes. It won't appear in any court docket or in the news. But we cause real substantive, meaningful change through our prosecutions and through the cudgel of litigation.

M: This misconduct is often hidden from public view. How can shareholders gain insight into concealed wrongdoing?

GB: It sometimes comes to our attention through aggrieved parties or whistleblowers. Stockholders may reach out to us based on their feeling that something just doesn't pass the smell test. And I've even had more than one experience where a competitor has said that a situation is worthy of investigation. When you've been doing this long enough, you know what doesn't seem right.

M: What do you foresee being the most important governance matter facing corporations over the next decade?

GB: There are several things at play. We mentioned fractional investing earlier. Robin Hood and other similar services have democratized investing even further so shareholder ownership will continue to evolve and look very different from the past. This is already leading to very strong pushes for activism in areas such as climate change, diversity, executive compensation and social action. Companies will have to figure out how to balance the need to maximize stockholder profit while also achieving the social goals of its ownership. Often, maximizing profit for shareholders is at direct odds with achieving ESG goals.

And then there are the rules governing corporate behavior. We are already seeing a couple of instances where corporations are trying to avoid or preempt state oversight by adopting bylaws that limit the kinds of actions that can be brought. That may be something that will come to a head in the next few years.

M: On the topic of executive compensation, can you speak to the importance of clawbacks?

GB: The clawback is a tool that every corporation should avail itself of when there is harm caused by executive misconduct but, for a multitude of reasons, companies refuse to both adopt and implement clawback and fallback policies. They claim that if they adopt policies that are too strong, they won't be able to attract the best and brightest executives. That seems ridiculous to me. Are you recruiting from the white-collar section of the prison to hire your executives? We're intentionally pretty forceful in looking at clawback policies whenever we investigate a company for misconduct. Many clawback policies only kick in if there's a financial statement. The largest securities action of the last five or so years was *Petrobras*. There was no financial restatement in that, so that situation would not have allowed shareholders to go after company executives even after decidedly corrupt and illegal behavior.

M: Over the course of your career, what is the most important corporate governance reform that you have achieved?

GB: It's actually confidential, but what I can say is that Pomerantz sent a litigation demand to a major entertainment company after reports of sexual harassment. As a result, we were able to negotiate reforms that included formation of a special committee of the company's board and creation of a Fair Employment Practices Group, along with complete retraining of all of their U.S. employees. The company also agreed to institute increased opportunities for reporting of harassment via the web and phone and we required that reports of harassment reached the highest levels at the company. I am quite proud of this one, feeling it has made a difference for the people there.

NOTABLE DATES ON THE POMERANTZ HORIZON


Jeremy A. Lieberman


Jennifer Pafiti


Austin P. Van


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.

AUSTIN VAN will speak at the **Practicing Law Institute's Securities Litigation 2022 program** in New York, NY on March 28. The panel, **"Prosecuting and Defending the Civil Action: Class Certification, Fact Discovery, Experts and Summary Judgment Motions in Securities Litigation,"** can be viewed by registered attendees via live webcast at www.pli.org.

JENNIFER PAFITI and **JANALEE SPENCER** will attend the **TEXPERS Annual Conference** in Fort Worth, TX from April 3-6, the **IPPFA Pension Conference** in East Peoria, IL from April 27-29, and the **SACRS Spring Conference** in Rancho Mirage, CA from May 10-13.

On May 18, **POMERANTZ** will sponsor a luncheon conference in London for institutional investors from the United Kingdom. Special guest speaker will be racing driver and six-time Olympic gold-winning and eleven-time world champion track cyclist, **Sir Christopher Hoy**. **JEREMY LIEBERMAN** and **JENNIFER** will host.

JEREMY, **JENNIFER** and **JANALEE** will attend the **NCPERS Annual Conference & Exhibition** in Washington, DC from May 22-25. **JENNIFER** will speak at the conference on May 23, on a panel titled **"A Fiduciary's Guide to Securities Litigation."**

CORPORATE GOVERNANCE ROUNDTABLE EVENT

WITH SPECIAL GUEST SPEAKER

PRESIDENT BILL CLINTON

HOSTED BY

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Corporate Governance Institute, Inc.

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Please join institutional investors and corporate governance professionals to discuss the evolving landscape of institutional investors, ESG risks and governance challenges, featuring remarks by President Bill Clinton.

Seating is limited. To express interest in attending, please email:
pomerantzroundtable2022@pomlaw.com

Continued from page 4

evade [Section 10(b) or Rule 10b-5]" (Proposed Rule, 87 Fed. Reg. at 8691). If adopted, this change may provide an additional basis for Section 10(b) liability.

Third, at present, there is no requirement that issuers disclose in their SEC filings whether they have enacted policies and procedures to protect MNPI from misuse by insiders. The Proposed Rule would require all issuers to disclose (1) their insider trading policies and procedures in their annual SEC reports and (2) whether an issuer, officer, or director used a Rule 10b5-1 trading plan during a reportable quarter in their quarterly SEC reports (Proposed Rule, 87 Fed. Reg. at 8693 94). If adopted, this change may provide an additional basis for Section 10(b) liability.

Conclusion

The Proposed Rule would make many positive changes, and investors are encouraged to review it in full. The SEC is accepting public comments until April 1, 2022, after which it is expected to adopt a Final Rule.

Pomerantz Corporate Governance Roundtable

WITH SPECIAL GUEST SPEAKER PRESIDENT BILL CLINTON

Pomerantz, in association with The Corporate Governance Institute, Inc., is pleased to announce the agenda for the upcoming Corporate Governance Roundtable Event on June 14, 2022, that it will host at the Waldorf Astoria Hotel in Beverly Hills, California. We are honored that President Bill Clinton will be the special guest speaker.

President Clinton served as the 42nd President of the United States and is the founder of the Clinton Foundation. During his time in office, President Clinton led the U.S. to the longest economic expansion in American history, including the creation of more than 22 million jobs. He was also the first Democratic president in six decades to be elected twice. Roundtable attendees can look forward to hearing President Clinton, widely renowned as a gifted speaker, share his perspectives and experiences.

The Roundtable will gather institutional investors from around the globe to discuss their evolving role in managing the risk of governance and ESG challenges under the theme: The Collective Power to Make Change. This one-day event will combine the knowledge and experience of fiduciaries, legal counsel and governance professionals with the opportunity to discuss important matters that affect the value of the funds they represent.

This year's panels and presentations include the following topics:

Covid-19 and the Litigation Pandemic: The COVID-19 pandemic has produced a tidal wave of new litigation. This session will provide insight into this evolving legal landscape.

Corporate Governance Developments: A discussion of current global trends in corporate governance and a look forward at emerging issues that governance professionals may face in the coming year.

Jennifer Pafiti, Partner and Head of Client Services

Forced Arbitration and the Repercussions for Institutional Investors: Over the last several years, there have been indications that the SEC is considering allowing corporations to use forced arbitration clauses to curtail investors' rights to bring securities class actions. This panel will discuss Colorado PERA's and the CII's decision to intervene in an action in which a shareholder, represented by an anti-class action activist, seeks to have Johnson & Johnson shareholders vote on a contentious proxy proposal. The proposal concerns a corporate bylaw that would require all securities fraud claims against Johnson & Johnson to be pursued through mandatory arbitration, thus waiving shareholders' rights to bring securities class actions.

Fiduciary Duty & ESG Priorities in 2022: This session will explore how institutional investors can balance their interest in promoting adherence to good ESG principles at the companies in which they invest with their fiduciary duties to protect investments and maximize fund performance.

Securities Litigation Update: Engagement & Litigation: General Counsel from some of the most influential global institutional investors will discuss their attitudes toward securities litigation and what other tools they employ to hold corporations accountable.

Inside the Boardroom: This panel will discuss how directors address board diversity within their own organizations and how their internal approach impacts their interactions with the boards of companies with which they entrust their investments.

Jennifer Pafiti, Partner and Head of Client Services at Pomerantz, has been involved in organizing the Firm's Roundtable Events since 2015: "These events bring peers together to discuss current issues that directly affect the asset value of the funds they represent. More importantly, though, this setting allows experts within their field to share ideas, opinions and best practices, which adds real value to fiduciaries' day-to-day roles."

To express your interest in attending this special event, please email PomerantzRoundtable2022@pomlaw.com.

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THE LAW FIRM THAT INSTITUTIONAL INVESTORS TRUST FOR SECURITIES LITIGATION AND PORTFOLIO MONITORING

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 $7.3 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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