

Practice Update

Delaware Supreme Court Validates Cost Saving Federal Forum Selection Provisions in Corporate Charters

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By [Dustin B. Hillsley](#)

On March 18, 2020, the Delaware Supreme Court reversed a Chancery Court decision invalidating federal forum selection provisions contained in the certificates of incorporation of three Delaware corporations – Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. The provisions required claims by their stockholders under the Securities Act of 1933 (the “1933 Act”) to be filed in federal court. In reversing the Chancery Court, the Delaware Supreme Court held that such provisions are consistent with Delaware public policy, are a proper subject matter for corporate charters under 8 *Del. C.* § 102(b)(1), and that they “achieve judicial economy and avoid duplicative efforts among courts in resolving disputes.” *Salzberg et al. v. Blue Apron Holdings, Inc. et al.*, C.A. No. 2017-0931 (Del. 2020).

The Delaware Supreme Court noted that federal forum selection provisions “are a relatively recent phenomenon designed to address ... difficulties presented by multi-forum litigation of Securities Act claims.” The issue arose two years ago when the United States Supreme Court unanimously held that federal and state courts have concurrent jurisdiction over class actions based on claims brought under the 1933 Act, and that such claims are not removable to federal court. *See Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061 (2018). The

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Delaware Supreme Court noted that, as a result, the number of 1933 Act filings in state court increased by 40 percent from 2018 to 2019, and 45 percent of those cases had a parallel, duplicative action in federal court.

Prior to filing their initial public offerings, Blue Apron, Roku and Stitch Fix each adopted a federal forum selection provision likely to, in part, avoid the unnecessary expense of defending the same 1933 Act claims in both federal and state courts. Validated by the Delaware Supreme Court, these provisions should ensure that 1933 Act claims (which are of course claims under federal law) proceed in federal courts – which the Delaware Supreme Court notes are the “most experienced in adjudicating” such claims.

Delaware companies should review their corporate charters and assess whether federal forum selection provisions make sense for them. If you have questions, please contact any of the authors of this practice update.