ON THE RECORD with Robbins Geller Rudman & Dowd LLP

1st Quarter 2016

20 Years of Litigation Reform for Accounting Firms

by Darren J. Robbins

December 22, 2015, marked the 20th anniversary of the enactment of the Private Securities Litigation Reform Act. Enacted at the behest of accounting firms, the PSLRA was crafted to immunize accountants from securities fraud liability. The result over the last two decades has been a substantial erosion in the ability of investors to hold accounting firms accountable.

Does it surprise anyone that, with auditors no longer concerned about liability for conducting defective public company audits, the quality of those audits has deteriorated?

According to a recently released study by the Public Company Accounting Oversight Board, one out of every four audits of a publicly traded company has "significant deficiencies." "Significant deficiencies" is a polite way of saying that the auditors didn't do a thorough job and the evidence does not support the auditor's opinion. The PCAOB is a nonprofit entity created by the Sarbanes-Oxley Act of 2002, legislation passed by Congress in the wake of the accounting scandal at Enron. PCAOB's mission: to oversee the audits of public companies in order to protect and further the public interest in the preparation of informative, accurate and independent audit reports.

So how does the PCAOB—a board that's supposed to protect investors' interests—characterize its findings? Well, the PCAOB was neither outraged, nor appalled, but rather just a bit "concerned."

As Auditor Immunity Rises, So Too Does the Rate of Defective Audits

In theory, investors should be able to trust that when they review a financial statement it's accurate. External auditors are charged by law with providing an independent assessment of a company's financial statements. Of course, the relationship between a publicly traded company and its auditor gives rise to an inherent conflict of interest as auditors need clients for revenue, and auditors know that unhappy clients won't be clients for long. Far too often, unfortunately, that means investors be damned.

Two decades ago, the U.S. Supreme Court ruled in the Central Bank of Denver case that investors cannot sue fraudsters who knowingly engage in securities fraud if the fraudster only aided and abetted the fraud. In other words, accounting firms that knowingly participate in a securities fraud, but only "aid and abet" that fraud, are free from liability. One year after Central Bank, the PSLRA was enacted into law over a presidential veto. The PSLRA made it even harder for investors to hold accounting firms liable for securities fraud. In fact, the scope of liability for accountants and other gatekeepers has been so narrowed it is easier for a proverbial camel to fit through the eye of the needle than it is to hold an accountant liable for securities fraud.

To be sure, an individual, company or accounting firm that has no role in the commission of a fraud should not be sued simply because a victim of securities fraud decides to cast a wide net. But one has to look no further than the Enron meltdown or Bernie Madoff's infamous Ponzi scheme to know we have gone too far when it comes to shielding gatekeepers from liability. The health of our securities

Continued on p. 10

Samuel H. Rudman

A Note to Institutional Investors from Samuel H. Rudman

The last quarter of 2015 concluded with excellent results for our clients, not just in the Delaware Supreme Court, where a trial win and damage award were affirmed, but also in *Overseas Shipholding,* where a standout settlement was reached that recovered a higher percentage of investors' losses than is typical for a securities case. Our Firm's achievements and resources continue to be widely recognized by our peers, legal publications, and professional groups. As the new year begins and the national and international legal landscape constantly changes, we continue to monitor, advise and advocate for our clients, consumers, and the investing community.

Whether representing working families and their children facing bureaucratic roadblocks or defrauded individual and institutional investors, our attorneys continue to bring to bear unparalleled resources that have restored rights and recovered multiple billions of dollars for those we represent. ■

In This Issue:

Features

Robbins Geller Recognized as One of the Nation's Top Securities Groups of the Year

Law360 named Robbins Geller as one of the nation's top Securities Practice Groups of 2015. The publication profiled practice groups that have come through for clients "by sealing the biggest deals and securing wins in high-stakes litigation," changing the legal landscape within the past year. The series drew in 730 submissions by firms detailing their major successes between October 1, 2014 and October 1, 2015.

As the publication noted, the Firm obtained the $400 million settlement against Pfizer Inc. on the eve of trial last January, "[a]nd over the rest of the year, Robbins Geller's securities group reached a handful of other [major] settlements, [including] Duke Energy Corp., Sprint Nextel Corp., JPMorgan Chase & Co. and Goldman Sachs Group Inc." Out of the eight firms recognized, the publication commended Robbins Geller for "strik[ing] almost half a dozen other settlements that at other firms might crown the year."

"[T]he year started with [the *Pfizer*] settlement that no one saw coming," noted *Law360*. In the *Pfizer* litigation, Robbins Geller attorneys were prepared to take the case to trial. Over the past five years, the Firm devoted thousands of hours to the case, took 65 depositions, and reviewed over 20 million pages of documents. Partner **Henry Rosen**, one of the lead attorneys on the case, noted that "[e]veryone was going on the assumption that the trial was definitely going to happen." Instead, Robbins Geller attorneys achieved this exceptional result after five years of hard-fought litigation against the toughest and brightest members of the securities defense bar, litigating all the way to trial in a case that no other law firm had bothered to file.

Of the many groundbreaking settlements achieved in 2015, the publication also commended the Firm and partner **Tor Gronborg** for "convinc[ing] Duke Energy to pay $146 million to settle claims it misled investors about the ouster of the former CEO of Progress Energy Inc. after a $32 billion merger," and the "big win [where] Sprint Nextel agreed to pay $131 million to settle a shareholder class action over Sprint's $37.8 billion merger with Nextel in 2005."

"Our firm has always prided itself on taking cases that were not front-page news, that were not filed within a day, that were not obvious big cases," said Gronborg, who led the litigation teams in both the *Duke* and *Sprint* actions.

Law360 also praised partner **Lucas Olts**, who "oversaw a suit and then a settlement with Goldman Sachs in which Goldman agreed to pay $272 million to end long-running litigation" involving Goldman's issuance of residential mortgage-backed securities in an offering. The settlement, assuming it's approved, finalizes the "litigation filed by the NECA-IBEW Health & Welfare Fund alleging that Goldman duped more than 400 investors by giving nearly identical misstatements about the loans underlying each offering." This remarkable result following seven years of extensive litigation shows the tireless commitment of the Robbins Geller Structured Finance Litigation Team. In addition, the Firm's Appellate Practice Group successfully briefed and argued an appeal in the matter before the Second Circuit Court of Appeals and helped secure a landmark victory that clarified the scope of permissible class action claims under the Securities Act of 1933. Specifically, in a case of first impression, the Second Circuit concluded that a lead plaintiff in a class action has class standing to pursue claims on behalf of class members who purchased not just the identical security purchased by a named plaintiff, but also those securities that involve "substantially similar" concerns. The landmark appellate decision favorably altered the landscape of mortgage-back securities-related litigation brought by institutional investors.

Partner **Darren J. Robbins** concluded that "[t]here are probably 15 lawyers in this firm who've recovered multiple billions of dollars for investors as lead counsel on a case. That's just unprecedented. You will not find that anywhere else."

In addition to this award, Robbins Geller received numerous accolades for its work last year, including being selected to the list of America's Elite Trial Lawyers by *The National Law Journal*, as one of the Most Feared Litigation Firms by *BTI Consulting* and Most Feared Plaintiffs' Firms by *Law360*, a top plaintiff firm by *The Legal 500*, a Band 1 firm by *Chambers USA*, a "Highly Recommended" plaintiffs' firm by *Benchmark Litigation*, and a national "Best Law Firm" by *U.S.News – Best Lawyers®*, to name a few. Additionally, Institutional Shareholder Services published its SCAS "Top 50" report in May 2015 and ranked Robbins Geller above all other plaintiffs' firms for the total number of securities class action settlements and amount of settlement money recovered for aggrieved shareholders. ■

The Rise of Global Securities Litigation

Each year, billions of dollars are recovered in legal proceedings brought by investors who have been the victims of securities fraud. These cases secure compensation for investment losses suffered as a result of misrepresentations made by issuers, their agents and third parties in connection with the issuers' publicly traded securities. The recoveries result from the fact that hundreds of millions – if not billions – of dollars are lost by investors each time a publicly traded company materially misleads financial markets about its true condition or performance, only for the truth to ultimately emerge.

Cases to recover such losses are pursued in just a small number of jurisdictions – predominantly in the United States, which also happens to be the world's deepest capital market. Cases are increasingly being brought in other jurisdictions as well, and recoveries won are divided in varying degrees amongst the participating investors. In some jurisdictions, so long as some proactive investors are willing to initiate lawsuits to recover their losses, other similarly situated investors can sit back passively and, if there is a recovery, claim a pro-rata share. In other jurisdictions, rather than rely upon the initiative of others, it may be necessary for any investor who wants compensation to actively bring proceedings and, in some cases, to present evidence of reliance upon the misrepresentations in issue.

Investors who suffer losses due to securities fraud possess valuable rights. When they buy publicly traded securities at fraudulently inflated prices and then either sell them at a loss or continue to hold the devalued assets after the truth has emerged, investors often have both statutory and non-statutory rights to recover compensation for their damage. In some circumstances, even those who purchased and sold before the truth emerged may have viable claims on the basis that defrauded investors should be allowed to recover the amounts of artificial inflation they were tricked into paying. Many investors whose portfolios are managed externally are entirely unaware of these rights.

This article provides an overview of the various opportunities available to investors to pursue legal claims against publicly traded companies acting in breach of anti-fraud laws. It briefly explores the class action opportunities available in the United States as well as the mechanisms available to seek recoveries in other jurisdictions, specifically Canada, Australia, the Netherlands, the United Kingdom, Germany, and Japan.

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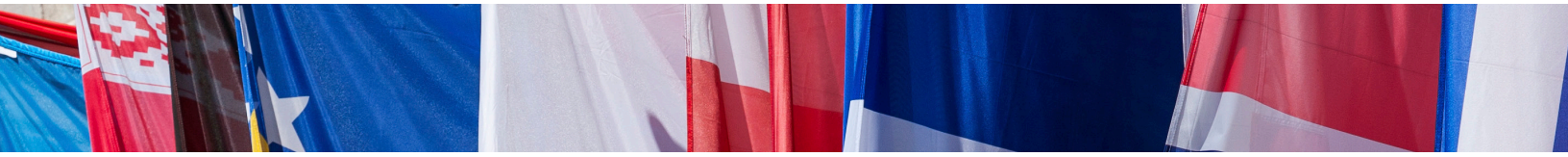


I. The Road to Multiple Jurisdictions

Securities fraud class actions – actions that can include the claims of all investors similarly damaged by the same misconduct – yield the vast majority of aggregate returns that are the product of securities litigation. The United States remains the most significant forum in the world for securities class actions, recovering an average of $4 billion annually.

But interest in remedies that can be achieved outside of the United States has increased in the past few years. That upswing in interest is largely attributable to the U.S. Supreme Court's 2010 decision in *Morrison v National Australia Bank*. The *Morrison* decision limited federal securities law protection to investors who engage in domestic U.S. transactions, prompting investors who engaged in non-U.S. transactions to look to the laws of the jurisdiction where the transactions occurred for their remedies.

At the same time *Morrison* limited the jurisdiction of U.S. federal courts to domestic U.S. transactions, the securities class action regimes enacted in Canada and Australia have matured to the point where litigation is generating significant recoveries in those jurisdictions. Consequently, Canada and Australia are becoming increasingly attractive venues for securities class actions after *Morrison*. Simultaneously, there is an ongoing debate within the European Union as to the merits of extending the scope for collective redress. While in the field of competition law the appetite for such redress appears high, there generally remains a lack of coordination or urgency that leaves collective redress efforts for securities fraud in their infancy.

II. Primary Jurisdictions

United States: Regardless of their nationality or domicile, investors who purchase securities on U.S. exchanges or in U.S. transactions are entitled to the protection of the U.S. anti-fraud provisions. That is the law of the land after *Morrison*. It is for those investors (or their trustees or other fiduciaries) to choose whether to initiate or participate in litigation to enforce U.S. anti-fraud provisions.

From a cost perspective, investors typically incur no out-of-pocket expenses to litigate securities class actions in the United States because most U.S. securities firms offer representation on a contingent fee (*i.e.*, no-win/no-fee) basis, and will also advance all expenses associated with the litigation. Nor, as is the case in most jurisdictions, do litigants assume the risk of paying their opponents' legal fees should their claims not be successful. Under the "American Rule," each party bears its own legal fees, win or lose.

Given the permissibility of contingent fee arrangements and the absence of fee-shifting risk, pension funds, with little appetite to spend large sums in legal fees to bring difficult cases, are able to regularly serve as lead plaintiffs in U.S. securities litigation. As global investors vital to the sustainability of the world and national economies, the participation of such investors in securities cases is highly valued and respected. Consequently, recoveries in U.S. securities fraud class actions are significantly higher when pension funds or institutional investors lead the charge.

Canada: Securities litigation in Canadian provinces has increased significantly over the last decade. There were 11 securities class actions filed in Canada in 2014, 11 in 2013, and 10 in 2012. Most of the cases were filed in Ontario, pursuant to Ontario's 2005 Bill 198, widely seen as a "pro-investor" piece of legislation.

By the end of 2014, there were 60 active securities cases pending in Canada – more than double the number in 2007 and more than four times the number in 2000. These active cases represent more than CAD$35 billion in total claims. The adoption of opt-out procedures, the jettisoning of reliance, and the fact that the courts are showing some willingness to certify worldwide classes (so long as the defendant has a sufficient connection to the jurisdiction) have helped spur interest in Canadian venues for securities class actions.

However, Canada's potential for securities fraud recoveries is limited. First, some Canadian provinces have caps on damages, which are determined by the level of misconduct a plaintiff is able to prove. In Ontario, for example, if the plaintiff is unable to prove intentional wrongdoing, damages are capped at the greater of 5 percent of the company's market capitalization (before the fraud was revealed) or CAD$1 million. Also, most Canadian provinces, like the United Kingdom, operate a "loser-pays" system, with fee-shifting. In such systems, the party that loses the case, or even a particular argument in the case, faces the risk of paying the winning side's legal fees. Accordingly, litigation has been difficult to fund because, given the size and complexity of securities class actions, those shifted fees may be enormous, posing an unacceptable risk to investors. After-the-event ("ATE") insurance and/or third-party litigation funding may help mitigate the downside risk, but will not always eliminate or sufficiently reduce it.

Australia: Securities class actions arrived in Australia in 1999. Although the number of class actions has been increasing, the overall numbers are dwarfed by those in the United States. In Australia, there were six securities class actions in 2014, five in 2013, two in 2012, and two in 2011.

Settlement amounts in Australian cases tend to be significant. In 2014, aggregate settlements in Australian securities class actions exceeded AUS$1 billion. Like Canada, Australia has adopted opt-out procedures for class actions. Also similar to Canada (and the United Kingdom), the Australian legal system operates as a "loser-pays" system. However, unlike most provinces in Canada, Australia has yet to affirm a fraud-on-the-market approach to proving reliance for misrepresentations or omissions. Additionally, contingency fees are limited to "conditional fees," with a permitted "uplift" upon success of no more than 25 percent.

Given the limits on the "conditional fee" that Australian lawyers can charge, litigation funding by professionals has become the norm. In fact, even though Australia is an opt-out jurisdiction, the legal uncertainties still present and the limitations on lawyers' fees have encouraged litigation funders to develop an opt-in process. Accordingly, in most Australian securities class actions, the funding of the litigation is only available to select investors who opt in by reaching a funding agreement with the entity funding the case. As a practical matter, therefore, many class action securities recoveries in Australia ironically may be limited to a small number of institutional investors.

The Netherlands: Although the Netherlands lacks a class action procedure, it may well become a destination of choice for parties simply wishing to obtain court approval and European-wide recognition of securities settlements reached outside the United States. The Netherlands owes this preferred status to its procedures for settling mass claims contained in the 2005 Wet Collectieve Afwikkeling Massaschade (the Collective Settlement Act, or "WCAM"). The WCAM was originally created to resolve mass claims around pharmaceuticals, but was also utilized to adjudicate the European settlement reached in the *Royal Dutch Shell* matter. The WCAM allows a settling defendant to negotiate a European-wide binding contract with a Dutch Stichting (*i.e.*, a foundation) formed of damaged investors, to provide the defendant "peace" regarding European claims.

Upon court approval of the settlement, investors who have chosen not to join the Stichting, or file their own case, are bound by the settlement and barred thereafter by the Netherlands court from filing their own case. While the procedure was first employed in a

securities context in 2009 for the *Royal Dutch Shell* matter (where a significant party was Dutch), it was unclear whether the procedure would be available where there was not a significant Dutch party/presence. The 2012 decision in a case against Converium Holdings AG confirmed that the WCAM does not require significant Dutch participation to be viable.

The *Converium* case, a U.S. class action against the Swiss company Converium Holdings AG, yielded an $85 million settlement for investors who purchased Converium Holding securities on a U.S. exchange. Investors who purchased their shares on the Swiss exchange were excluded from the U.S. action. However, because Converium sought a comprehensive resolution, Converium cooperated with a Stichting of Converium investors and sought court approval in the Netherlands of a settlement amounting to $58 million.

The Netherlands Court of Appeal approved the settlement. Notably, however, the $58 million paid to the investors who participated amounted to just a quarter of the compensation per share that investors in the U.S. settlement enjoyed, reflecting the relatively weaker investor protection laws in European jurisdictions. It should be noted that anyone can create a Stichting, and they are often formed by litigation promoters – not lawyers. Indeed, the Dutch landscape is littered with empty Stichtings, abandoned because their promoters could not make economic sense of their litigation plans: the overwhelming majority of Stichtings have never brought legal action, nor have they obtained any recovery for investors. Accordingly, each opportunity presented to join and commit to such a vehicle should be approached with great caution.

United Kingdom: In the wake of *Morrison*, investors who purchase their shares on the U.K. exchanges in circumstances where the same misconduct is the subject of litigation in the United States may sometimes persuade the U.S. courts to also hear their claims. In such circumstances, the U.S. court is likely to apply U.K. law to the claims based on the U.K. transactions. In other cases, where there is no jurisdictional hook, such investors can expect to be forced to pursue their statutory and common law claims in the High Court in London. However, for multiple reasons, including the lack of a class action mechanism, the presence of a "loser-pays" rule, the inability to utilize the "fraud on the market" theory of reliance, and the absence of juries in civil cases, the number of investor-led actions in the United Kingdom will continue to grow only slowly.

As a weak alternative to a class action procedure, the United Kingdom permits "group" actions, which require participants effectively to affirmatively opt in to the proceedings. The opt-in requirement, which necessitates not just adding your name to a list but being prepared to affirmatively prove your losses and other elements of the cause of action, rather than an opt-out mechanism, where you are included and must simply demonstrate your loss to a settlement or judgment claims administrator unless you choose to exclude yourself, severely limits the ability of investors to aggregate losses and generate sufficient leverage over defendants.

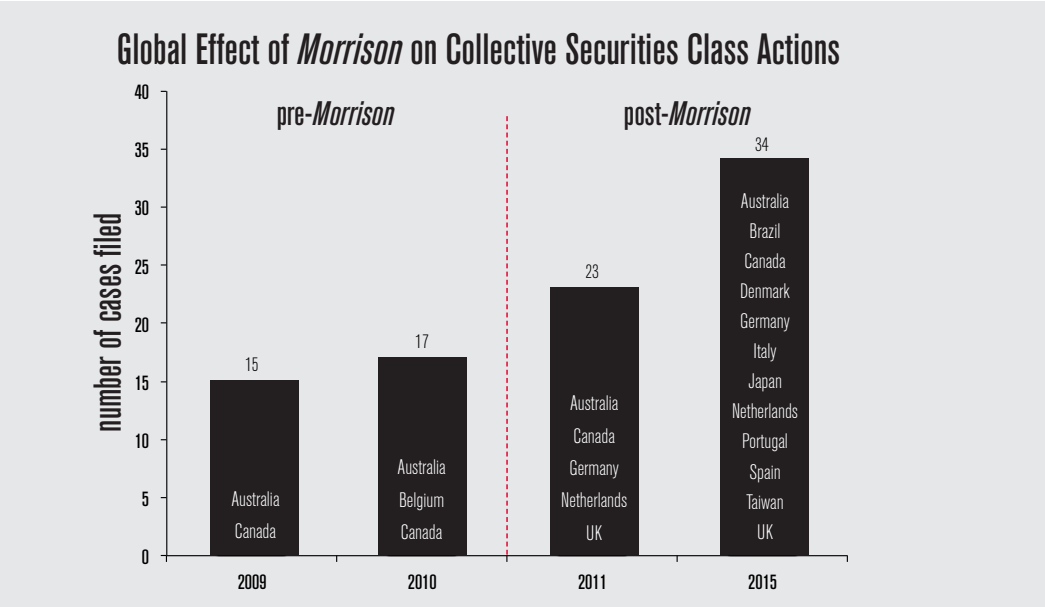
The opt-in approach also means that defendants are unable to settle all claims in one action, thereby precluding defendants from being able to obtain complete peace. Additionally, the "loser-pays" model typically means that plaintiffs must purchase ATE insurance coverage in order to mitigate the risk of having to pay the huge defense fees of both solicitors and barristers typically incurred during complex securities litigation cases.

While the recent advent of contingency fees in the United Kingdom may eventually encourage more securities fraud actions, the procedural impediments and consequent financial risks facing litigants in the United Kingdom remain daunting. That being said, there are large cases pending or threatened against the Royal Bank of Scotland, Lloyds and Tesco, which offer examples of scenarios where securities fraud litigation may arise in the United Kingdom. Because of *Morrison*, investors who purchased shares of these companies in the United Kingdom are no longer able to invoke the protection of U.S. anti-fraud provisions. Thus, they must either explore a remedy in the United Kingdom despite the impediments discussed above, or accept the losses and do nothing.

Germany: The massive fraud recently revealed at Volkswagen, regarding the dirty performance of its allegedly clean diesels, has generated significant interest in litigating securities fraud claims in Germany. While there is no general collective redress mechanism in the German legal system, there is legislation allowing capital market claims, where identical issues of law or fact exist, to utilize a model case proceeding. The legislation is the Kapitalanleger-Musterverfahrensgesetz (the Capital Market Model Claims Act, or "KapMuG").

Under the KapMuG, a minimum of 10 claimants who invoke the KapMuG is required to initiate the model case proceedings. Thereafter, the findings of the model case proceeding are binding on the other claimants, but the individual cases are each kept separate. Similar to proceedings under the WCAM in the Netherlands, proceedings under the KapMuG, although ultimately aimed at compensation of damages, are limited to a declaratory judgment on certain preliminary questions – for example, relating to the potential liability of the issuer of a financial product. The amount of damages is then determined in each individual case, once the test case has been successfully heard.

As to evidence, generally there is no pre-trial discovery in the German legal system. Yet, in some cases, findings of authorities are used as a basis for a trial. For example, liability may be established Continued on p. 12



Serving as a Fund Trustee: Effective Governance for Public Pension Funds

As a trustee for a public pension fund, you serve as a fiduciary over fund assets, often including shareholdings in thousands of publicly traded companies. The members of the boards of directors of each of those companies, in turn, act as fiduciaries for their shareholders. *This article is the second in a series of articles dedicated to providing you, as a fund trustee, insights into those best practices in corporate governance that may also apply to fund governance.*

In the first article in this series, we examined the general responsibilities you have as a fund trustee, including management oversight, strategy and risk management, culture and governance. Subsequent articles will focus specifically on the governance issues that are so important for the effectiveness of both pension fund and corporate boards. In this article, we discuss best practices related to board composition and education.[1]

Board Composition. Since both corporate and pension fund boards are effectively teams of people making important decisions, significant care must be given to the selection of those who will serve on the board. Many corporate board advisors suggest that a board first determine which skill sets should be represented among the board members. Once the list is created, a matrix is developed to assess what the current board members bring to the table, and which skill sets are not represented among the current board members. Then these are taken into consideration when future candidates are assessed for potential board membership. This approach may be challenging for pension fund boards because their membership is often dictated by law, with representatives who may be elected or appointed to the role. However, determining which skill sets are missing from the board can still be a valuable exercise for pension fund boards in order to determine where there are strengths and where additional expertise should be sought.

Board Member Education. Targeted and customized education programs can be used to address any areas that may be wanting on a pension fund or corporate board. Training can be sought by the entire board, or by specific board members, to address those areas where the board is lacking specific expertise. The *Clapman Report 2.0* suggests that pension board members regularly "obtain education that provides and improves core competencies, and that assists them in remaining current with regard to their evolving obligations as fiduciaries."[2] It is suggested that pension board members conduct a self-assessment of their "knowledge and understanding of the issues involved in the management of the system across the broad spectrum of pension-related areas."[3] It is also recommended that pension boards develop an Education Policy that documents the boards' "approach to educating pension fund trustees so that they can discharge their duties with the requisite knowledge, skills and abilities," and that this policy is made available to the public.[4] Similarly, corporate boards in the United States are encouraged to obtain training and education for their members on a regular basis. While the Securities and Exchange Commission has not made such training mandatory, the requirements for listing the stock of a publicly traded company on the NYSE calls for companies to provide a description of the educational opportunities for their board members in their corporate governance guidelines, which are posted on their websites.[5]

The next article in this series will address best practices in board committee structure and board self-evaluations. ■

1 An excellent source for more information regarding best practices for pension fund governance is the *Clapman Report 2.0*, published by the Stanford Institutional Investors' Forum Committee on Fund Governance, *available at* http://law.stanford.edu/wp-content/uploads/sites/default/files/event/392911/media/slspublic/ClapmanReport_6-6-13.pdf.

2 The Stanford Institutional Investors' Forum Committee on Fund Governance, *Clapman Report 2.0*, at 13.

3 *Id.* at 68.

4 *Id.* at 15.

5 *NYSE Listed Company Manual*, Section 303A.09, retrieved on 12/10/15 from http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F.

Governance Roundup

2016 forecast: Even more governance focus on and by institutional investors.

Dina Medland writes in *Forbes*:[1]

> Better corporate governance across the globe is likely to be in strong focus in 2016. Not only are investors increasing their scrutiny of boardrooms, but they are under pressure themselves....
>
> Institutional investors, reeling from a spate of corporate scandals, are more aware than ever before of their stewardship responsibilities amid the globalization of company investor bases.

Medland cites a new report from Russell Reynolds Associates that found:

> The Petrobras scandal in Brazil, Satyam and more recent incidents in India, Toshiba in Japan, and perhaps Volkswagen in Germany will have a substantial impact on corporate governance in those countries as legislators, regulators, and institutional shareholders demand more tools to promote accountability and transparency from companies and their boards of directors.

The report's findings and predictions for investor priorities include more focus on board effectiveness and the contributions and abilities of individual directors and a "trust but verify" emphasis on governance codes, transparency and ESG measures.

Eugene McErlean argues in the *Irish Examiner* that government intervention is needed to strengthen corporate governance.[2]

McErlean was Allied Irish Banks' ("AIB") former group internal auditor who warned in 2001 about a major overcharging problem at the bank. Now recognized as a whistleblower, he is expected to receive a formal apology from the authorities who did not listen to his concerns. He is raising concerns now about the rising level of corporate failures and abuses that are considered almost routine:

> The current system of self-regulated corporate governance does not appear to be working and does not appear to be capable of reforming itself.
>
> Assurances that lessons have been learned and that it won't happen again appear hollow when confronted with the evidence. We have become accustomed to corporate bad behaviour and inured to the absence of accountability.
>
> Perhaps most concerning of all, we appear to have accepted that the extreme has become routine.
>
> The obvious conclusion must be that self-regulation and voluntary codes of practice have run their course and that it is time for governments to step in and referee the match.

Barclays fined by FINRA for mutual fund switching.[3]

Barclays Capital, Inc. has been ordered by the Financial Industry Regulatory Authority ("FINRA") to pay more than $10 million in restitution, including interest, to affected customers for mutual fund-related "suitability violations," and was also censured and fined $3.75 million. The bank failed to act on automated alerts warning it of "potentially unsuitable transactions"; failed to review some transactions for suitability; and did not send letters to customers regarding the transaction costs. Barclays also failed to offer eligible customers "breakpoint discounts" – discounted fees on larger investments.

JP Morgan was fined $307 million for steering clients to its own funds.[4]

Violations include moving client funds to in-house funds that provide no additional benefit to the client but direct all of the management fees to JP Morgan. This is exactly the kind of failure of fiduciary duty that is at the heart of the current industry-led efforts to allow fund managers to benefit from their own fees regardless of client interest.

Political contribution disclosure suffers a setback in the United States.[6]

The hard-fought budget bill passed by the U.S. Congress just before the end of the year had a provision that specifically prohibits the SEC from enacting regulations requiring public companies to disclose their political contributions, despite the fact that a petition for this rulemaking received 1.2 million comments with record-breaking support. Democratic Senators have urged the SEC to move forward anyway. In an op-ed, the professors who originally petitioned for the rule argue that thwarting it through the budget process is wrong on substance and process:[7]

> The rider included in the omnibus budget bill reflects opponents' interest in avoiding a debate on the merits of disclosure to investors....
>
> The rider also undermines the standing of the S.E.C. It reflects a judgment that the commission and its staff, which have served the investing public well for generations, cannot be trusted to reach an appropriate decision about whether and how to develop rules in this area. Legislators should not tie the hands of independent and expert regulators and prevent them from doing their job.
>
> And the rider undermines the critical premises on which the Supreme Court has relied in its Citizens United decision. In this consequential decision, the court reasoned that "the procedures of corporate democracy" would ensure that political spending by public companies does not depart from shareholder interests. Without disclosure to investors, however, such procedures cannot be expected to limit or prevent such departures.

The Ford Foundation shifts to "impact investing." [8]

Ford Foundation President Darren Walker has announced several important changes, including integration of investment and program goals:

> Reflecting common practice at most large legacy foundations, the Ford Foundation has maintained the position that our policy is to maximize endowment returns, except in our screening out certain industries. This position, that we maximize returns, has been a source of questioning, discontent, and frustration among those we support, as well as among staff at Ford.
>
> …I no longer find it defensible to say that our investment strategy is only to maximize the value of our endowment—just as it's no longer defensible for a corporation to say its only responsibility is to maximize shareholder value. There is growing evidence that it is possible to find impact investing opportunities that deliver financial and social, double bottom-line returns.
>
> In light of new regulations from the Obama administration, which encourage mission-related investment, now is an opportune time for foundation boards to confront the endowment question.

FASB tries to cut back on "material" information.[9]

Gretchen Morgenson reports in *The New York Times*:

> The proposal[10] would effectively change the definition of materiality, a mainstay of corporate financial disclosure that determines what a company must tell investors about its operations and results.
>
> On its surface, that sounds tame enough. But bear with me: If you own stock in corporate America in any form, you need to understand what FASB is thinking of doing.
>
> For decades information was deemed material if it could influence decisions made by users of financial statements, a.k.a. current and prospective shareholders or lenders.
>
> But now, accounting standard-setters have proposed a new meaning for material information, one that some investors say will give far more discretion to companies in deciding what to disclose in their financial statements. The trouble with more discretion, the critics say, is that it usually means less information.

The comment period has ended, but objections filed so far will likely mean that FASB will hold a hearing on the proposed revisions before making a final decision.

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Robbins Geller Obtains Class Certification for Children with Disabilities

On January 4, 2016, the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York issued a 48-page opinion allowing the claims asserted on behalf of children with disabilities in a lawsuit against the New York City Department of Education, the New York State Education Department and the Commissioner of Education to proceed as a class action.

Robbins Geller attorneys **Samuel H. Rudman**, **David A. Rosenfeld** and **Andrew L. Schwartz**, along with Elisa Hyman, Of Counsel to Friedman and Moses LLP ("F&M"), are representing the classes and subclasses. According to Rudman, "Ms. Hyman has worked tirelessly on behalf of these children for years and we are happy to bring our firm's talents and resources to join her in this effort." Robbins Geller was brought into the case to assist the plaintiffs on a pro bono basis as it approached the class certification stage. F&M had initiated the suit, which evolved out of the firm's practice on behalf of low and middle income families of children with disabilities.

As discussed in the opinion, the litigation was brought on behalf of children in New York City who have been diagnosed with Autism Spectrum Disorder ("ASD"), as well as children with other significant disabilities who have been placed by New York City in specialized private schools (non-public schools, or "NPS"). Both classes of students allege that the defendants adopted certain systemic policies that impede the provision of adequate special education services to students in violation of federal and state law.

Children in the ASD class seek to change existing policies that deny them the individualized special education services they are afforded under the law; children in the NPS class similarly seek fair access to the special education and related services that they are entitled to under the law.

Plaintiffs allege that the number of children diagnosed with ASD in New York City has grown significantly over the years. Despite this, New York City's special education services and programs for children have not subsequently expanded and adapted to meet their obligations under state and federal law to provide a free and appropriate public education to children and offer their parents appropriate procedural protections. To date, children with ASD in New York City are unable to access certain specialized services, such as one-on-one instruction, research-based instructional methods (such as Applied Behavior Analysis) and after-school services, without individually bringing their own lawsuits. Unfortunately, for most families insurance does not cover these services, and the out-of-pocket expenses are far too burdensome.

Partner **David A. Rosenfeld** hailed the opinion as "a major victory for New York City children with disabilities and a critical step in ending the constant litigation cycle that these children and their parents have had to endure."

With respect to the class of children in NPS programs, plaintiffs allege that the defendants implemented policies that resulted in a loss of special education services that were offered by the school district but not the individual schools.

The case was filed under various federal and state laws and includes alleged violations of the Individuals with Disabilities Education Improvement Act, the federal special education law, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination based upon disability. The suit was also filed under 42 U.S.C. §1983, the Fourteenth Amendment of the U.S. Constitution, the New York State Constitution, and New York State Education Law.

M.G., et al. v. New York City Department of Education, et al., No. 1:13-cv-04639-SAS, Opinion and Order (S.D.N.Y. Jan. 4, 2016). ■

Overseas Shipholding Group Senior Notes Purchasers Recover 87% of Damages in Securities Class Action; Class Obtains $31 Million Settlement

On December 2, 2015, United States District Court Judge Shira A. Scheindlin granted final approval of a $31.676 million settlement on behalf of class members in the securities class action *In re OSG Securities Litigation*. The settlement resolves allegations that defendants misled investors regarding Overseas Shipholding Group, Inc.'s ("OSG") $463 million tax liability. The recovery represents approximately 87% of the maximum Section 11 damages that purchasers of OSG's 8.125% Senior Notes, Due 2018, issued or traceable to OSG's $300 million public offering on March 24, 2010 ("Senior Notes"), could reasonably expect to recover at trial, and approximately 26% of the maximum Section 10(b) damages that purchasers of OSG common stock could reasonably expect to recover at trial. "These are phenomenal recoveries for class members, and well above the average recovery when compared to actual investor losses," said Robbins Geller partner **David A. Rosenfeld**. The settlement is unique for the additional reason that OSG – a bankrupt entity – contributed $15.426 million to resolve the class's claims. In addition to the monetary recovery from OSG, the class received a contingent right to 15% of the net proceeds of OSG's pending professional liability action against its outside tax counsel, Proskauer Rose LLP. "We are very proud to have successfully negotiated a creative resolution of the class's bankruptcy claim against OSG that provides substantial benefits to the class," said Rosenfeld.

The case was filed on October 25, 2012, and was brought on behalf of purchasers of OSG Senior Notes and common stock during the October 29, 2007 to October 19, 2012 class period. Investors were represented by lead plaintiffs **Stichting Pensioenfonds DSM Nederland**, **Indiana Treasurer of State**, and **Lloyd Crawford**. The complaint names as defendants (1) OSG's former CEO, Morten Arntzen; (2) OSG's former CFO, Myles Itkin; (3) eleven non-management members of OSG's Board of Directors; (4) PricewaterhouseCoopers LLP; (5) Ernst & Young LLP; and (6) seven underwriters of the Senior Notes offering. Because OSG filed a voluntary petition for bankruptcy relief, it was not named as a defendant.

The complaint alleges that from 2000 through 2011, OSG entered into $4.5 billion in credit agreements for which OSG's foreign subsidiaries were jointly and severally liable. This joint-and-several liability arrangement resulted in OSG International, Inc., OSG's wholly owned subsidiary, guaranteeing the loans to OSG. Consequently, pursuant to Section 956 of Subpart F of the Internal Revenue Code, the accumulated earnings from OSG's foreign shipping income were deemed to have been distributed to OSG and were therefore subject to U.S. income taxation, subjecting the company to an enormous tax liability – in the amount of $463 million – that was not reported at the time. As a result, and as OSG has now acknowledged, there were material misstatements in OSG's previously issued financial statements for each of the twelve calendar years in the twelve-year period ended December 31, 2011, and for the first two quarters of 2012. The complaint alleges that these risks were consciously recognized internally, and/or recklessly and/or negligently disregarded by the defendants at the time that each defendant made public statements to class members.

Lead plaintiffs and Robbins Geller aggressively litigated this action for three years. They defeated six motions to dismiss the Section 11 claims and two motions to dismiss the Section 10(b) claims. After resolution of the motions to dismiss, the attorneys from Robbins Geller engaged in expansive discovery, developing evidence that would demonstrate securities-law violations at trial. Robbins Geller analyzed more than two million pages of documents obtained from defendants, OSG, and 20 third parties, and deposed 10 fact witnesses to develop the evidence needed to prove the class's claims at trial.

Attorneys **Samuel H. Rudman**, **David A. Rosenfeld**, **Alan I. Ellman** and **Christopher T. Gilroy** led the Robbins Geller team in litigating this action on behalf of lead plaintiffs.

In re OSG Securities Litigation, No. 1:12-cv-07948-SAS (S.D.N.Y.). Continued on p.10

Delaware Supreme Court Affirms Shareholder Win at Trial Over Rural/Metro Buyout

On November 30, 2015, the Delaware Supreme Court affirmed Chancery Court judgments holding RBC Capital Markets ("RBC") liable for nearly $100 million to a class of former Rural/Metro Corp. shareholders in a case *The New York Times* wrote "shows just how greedy investment bankers can be." The Delaware Supreme Court's decision came after appeals of multiple Chancery Court opinions in the class action, including a March 2014 post-trial decision holding RBC liable to the class and an October 2014 decision setting RBC's liability for 83% of the total damages suffered by the class.

While the class action over the buyout of Rural/Metro by Warburg Pincus LLC at an allegedly inadequate price was initially filed by another firm, Robbins Geller and their co-counsel at Friedlander & Gorris, P.A. were appointed as lead counsel (along with a new lead plaintiff) for the class after objecting to a proposed disclosure-only settlement as inadequate. After adding RBC, who was both advising Rural/Metro and trying to make even more money from Warburg if the merger went forward, as a new defendant in the amended complaint, lead plaintiff settled with other defendants as the case neared trial. The action went to trial in late 2013 with RBC as the remaining defendant. Vice Chancellor J. Travis Laster's March 7, 2014 ruling held that RBC was liable and that "plaintiffs proved that 'the adequacy of the decisionmaking process [and the] information on which the directors based their decision' fell outside the range of reasonableness. . . . On the facts of this case, RBC acted with the necessary degree of *scienter* and can be held liable for aiding and abetting." Laster added that "RBC *created* the unreasonable process and informational gaps that led to the Board's breach of duty. . . . [B]ut for RBC's actions, a fully-informed Board would have had numerous opportunities to achieve a superior result."

On October 10, 2014, Vice Chancellor Laster found that the Rural/Metro shares that Warburg paid shareholders $17.25 for were actually valued at $21.42, for a difference of $4.17 per share. Laster set RBC's share of liability to the class at $75.8 million, or 83% of the total damages, plus pre- and post-judgment interest from the date of the merger in June 2011. *The Wall Street Journal* noted that "[t]he damages ruling appears to be one of, if not, the largest against a bank over its role as a deal adviser."

In the 107-page November decision, the Delaware Supreme Court found little to disagree with in the lower court's orders, writing that "[t]he record evidence supports the trial court's factual finding that, on the deal front, RBC worked to lower the analyses in its fairness presentation so Warburg's bid looked more attractive," and that "[h]ere, the evidence fully supports the trial court's findings that the solicitation process was structured and timed in a manner that impeded interested bidders from presenting potentially higher value alternatives."

In affirming that aiding and abetting liability had been sufficiently alleged, the Delaware Supreme Court wrote that RBC's conduct "fell outside the range of reasonableness," and that "RBC knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum.... The result was a poorly-timed sale at a price that was not the product of appropriate efforts to obtain the best value reasonably available and, as the trial court found, a failure to recognize that Rural's stand-alone value exceeded the sale price."

"This is a phenomenal result for former Rural/Metro shareholders, as well as all shareholders of public corporations going forward. After four years of hard-fought litigation, we're pleased that the Delaware Supreme Court affirmed the Chancery Court's decisions and shareholders can finally recoup what they were owed when Rural/Metro was sold in 2011," said Robbins Geller partner **Randall J. Baron**, one of the lead plaintiff's attorneys on the case.

Robbins Geller attorneys **Randall J. Baron**, **David A. Knotts** and **David T. Wissbroecker** obtained this result for shareholders.

In re Rural/Metro Corp. Stockholders Litig., No. 6350-VCL (Del. Ch.). ■

20 Years of Litigation Reform for Accounting Firms continued from page 1

markets demands that accountants do not perceive themselves as immune from liability for securities fraud.

Which brings us back to the PCAOB report. The board examined hundreds of audits from 2012-14, with a particular focus on whether auditors complied with Auditing Standards No. 8 through No. 15, collectively known as the risk assessment standards. According to the PCAOB:

"The procedures required by these standards underlie the entire audit process, including the procedures that the auditor performs to support the opinion expressed in the auditor's report. For that reason, non-compliance with these standards can have serious implications for the audit of internal control over financial reporting or the audit of the financial statements and may affect whether the auditor performs enough work to support the auditor's opinion."

The board found that in 26 percent of the 2012 audits and 27 percent of the 2013 audits, auditors failed to adhere to the standards. Shortcomings included "failing to perform substantive procedures specifically responsive to fraud risks and other significant risks identified, not evaluating the accuracy and completeness of financial statement disclosures, and not testing the accuracy and completeness of information produced by the company." Preliminary indications are that 2014's audits are also problematic.

In plain English, one in four audits can't be trusted. While a 73 or 74 percent success rate may sound good, think of it this way: You have better odds playing a game of Russian roulette.

If you think a 26 percent failure rate is bad, consider this: Each year, the PCAOB spot checks a sample of accounting firm audits. In 2012, one accounting firm received a failing grade on 65 percent of the audits the PCAOB reviewed—the highest failure rate ever recorded. The following year the same firm earned a failing grade on 55.6 percent of the audits the board inspected. An improvement indeed—but hardly reassuring. (The PCAOB's inspection report of 2014 audits has not yet been released.)

Auditors Must Be Held Accountable

Ideally, our laws and the regulators empowered to enforce them should ensure that publicly traded companies and the accountants who audit those companies' financial statements are truthful in their public representations.

But one need only glance at today's headlines to know that we don't live in an ideal world, which is why the U.S. legal system has traditionally provided the victims of wrongdoing with the legal right to hold wrongdoers accountable. Civil suits have a powerful influence over human behavior. Often it is the potential of a lawsuit that is sufficient to dissuade people from engaging in dishonest or unethical behavior.

The role of independent audit firms in protecting investors is fundamental to the wellbeing of our financial markets. The PCAOB report underscores the fact that the specter of a federal securities lawsuit no longer represents a meaningful threat to accounting firms. That reality continues to adversely impact audit quality and the integrity of our financial markets.

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CalPERS is calling on boards to find younger and more diverse directors.

Comstock's reports:[11]

> The $294 billion California Public Employees' Retirement System is taking aim at older, white men on corporate boards with a proposed policy aimed at adding more women, minorities and gays to key positions at the largest U.S. companies. . . .
>
> "We've got board stagnation," said Anne Simpson, director of corporate governance at Sacramento-based Calpers. "We're not going to create an opportunity for new members for diversity to progress unless there's some space."

SEC approves shareholder proposals on climate change.

U.S. investor efforts to push companies to act on climate change have been strengthened by a Securities and Exchange Commission ruling that Franklin Resources, which manages the Franklin Templeton family of mutual funds, will be required to include a shareholder resolution on its 2016 ballot focusing on its poor voting record on climate change proposals. The resolution was filed by Zevin Asset Management, an independent, socially responsible investment management firm, to highlight the contradiction between Franklin's voting practices and its policy positions regarding climate change. A similar proposal has also been filed by Zevin at T. Rowe Price. Research conducted by Fund Votes, on behalf of Ceres, shows that Franklin Templeton mutual funds' voting record on climate change issues is near the bottom of the pack among mutual funds. Franklin's voting record is all the more striking given that Franklin Templeton Investments has been a signatory to the United Nations Principles for Responsible Investment since 2013.

Will Japan's new corporate governance reforms work?

Columbia Business School professor Bruce Greenwald is skeptical that structural reforms can surmount cultural and systemic forces in Japan. He writes in *East Asia Forum*:[12]

> As part of Abenomics' third arrow of structural reform, Japan recently adopted a new corporate governance code. The new code focuses on making Japanese corporations more transparent, more responsive to shareholders — including minority shareholders — and subject to more effective oversight by boards of directors, especially outside directors. It seeks to make boards of directors not only more active and independent, but more diverse. In most respects the code moves Japan toward Western, especially US corporate governance practices. . . .
>
> . . . Corporate cultures completely dominate corporate behaviour in the United States. Formal governance rules have an effect that is an order of magnitude smaller. This shows up most obviously in differences in performance across US corporate managements.
>
> Despite the widespread adoption of 'shareholder friendly' governance principles, many US managements perform poorly. They fail to manage costs efficiently and seek to grow in areas where they enjoy no competitive advantages (or worse, suffer from significant disadvantages) with disastrous consequences for returns on investment. They have self-indulgent capital structures (low debt and lots of cash accumulated at the expense of shareholder distributions) and pay limited attention to effective succession planning. And they hire and fire workers promiscuously in response to short term fluctuations in market conditions (a costly practice for workers and shareholders) and pay themselves generously without regard to their performance.
>
> US corporate managements are able to achieve this by observing the letter, but not the spirit of corporate governance rules.
>
> * * *
>
> On the positive side, this means that the strong Japanese emphasis on social cohesion and discomfort with extreme individual distinctions means that the effect on differences in compensation and employment security within firms will also be minimal. On the negative side, hopes of significantly enhanced management performance and innovation are likely to be disappointed.

What is the Alpha of ESG?

Mackenzie Weinger asks for the *FT*'s *Alphaville* blog whether there is Alpha in the ESG (environmental/social/governance indicators):[13]

> Barclays analysts have come away with what they've dubbed a "surprising conclusion" in a recent report assessing the US corporate bond market in light of ESG ratings.
>
> * * *
>
> "We find evidence that a **high ESG rating has been a source of modest incremental return in corporate bond portfolios**. This is a **surprising conclusion given that ESG investing is typically seen as a constraint on bond portfolio construction** and so could be expected to have a cost. Also, the fact that bonds with high ESG scores tend to trade at slightly lower than-average spreads has not translated into a return penalty in the period under consideration.
>
> While ESG as a whole has benefited investors, individual Environment, Social and Governance attributes have all helped improve performance from 2007 to 2015. **Governance appears to have been the largest contributor, while the effects of Environmental and Social scores have been weaker.**" (Emphasis added by *FT*.)
>
> * * *
>
> ESG isn't meant to just be about feel good, seemingly ethical investments, according to its backers, although the lens does attract investors who want to make a "positive impact" as MSCI's Laura Nishikawa, head of fixed income ESG research, told FT Alphaville last week…. ESG is meant to be good risk management, Nishikawa says: "It's not a magic fairy dust you can sprinkle on your portfolio. But it might tell you where some outliers are on your portfolio."

Similarly, Martin Gilbert, chief executive of Aberdeen Asset Management, writes in *City A.M.* that governance is a key indicator of risk:[14] "[A]mong 300 global financial decision-makers, governance was found to be an integral factor when selecting and analysing investments. Almost 90 per cent of respondents considered effective governance to be a critical driver of investment performance." He notes that "[g]ood governance involves a qualitative, rather than mechanical, evaluation of corporate practices and of the people carrying them forward. It evaluates complex issues as broad as the quality of management to effective risk management." ■

For more information on these and other cases, please visit: www.rgrdlaw.com

1 http://www.forbes.com/sites/dinamedland/2016/01/02/institutional-investors-in-2016-seek-to-trust-but-verify-on-governance/
2 http://www.irishexaminer.com/business/corporate-governance-codes-are-not-working-361517.html
3 http://www.streetinsider.com/Corporate+News/
4 http://www.nytimes.com/2015/12/19/business/dealbook/jpmorgan-to-pay-307-million-for-steering-clients-to-own-funds.html?_r=1
5 http://socialinvesting.about.com/od/Sustainable-Investing/fl/BlackRock-Fidelity-and-Vanguard-Exposed-on-Climate-Change.htm
6 http://www.uspirg.org/news/usp/94-lawmakers-urge-sec-pursue-rules-strengthening-political-spending-disclosure
7 http://www.nytimes.com/2015/12/22/business/dealbook/hindering-the-sec-from-shining-a-light-on-political-spending.html?_r=2
8 http://us10.campaign-archive1.com/?u=3f89269c6132144b6f1c5ce78&id=4fe9d631dc
9 http://www.nytimes.com/2016/01/03/business/fasb-proposes-to-curb-what-companies-must-disclose.html
10 http://www.fasb.org/jsp/FASB/Document_C/DocumentPage&cid=1176166402203
11 http://www.comstocksmag.com/bloomberg/calpers-pushes-boards-clear-room-young-and-ethnic
12 http://www.eastasiaforum.org/2015/11/29/will-japans-corporate-governance-reform-work/
13 http://ftalphaville.ft.com/2015/11/26/2145911/nothing-but-a-g-thang/
14 http://www.cityam.com/229383/why-good-governance-now-key-investment-differentiator

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Robbins Geller Rudman & Dowd LLP ("Robbins Geller" or the "Firm") represents plaintiffs in litigation involving securities fraud, corporate takeovers, shareholder derivative claims, intellectual property, consumer and insurance fraud, and antitrust claims, as well as whistleblower protection and qui tam suits. With 200 lawyers in 10 offices, Robbins Geller has obtained many of the largest securities class action recoveries in history and was ranked number one in both the total amount and number of shareholder class action recoveries in ISS's most recent *SCAS Top 50* report. The Firm not only secures recoveries for defrauded investors, it also strives to implement corporate governance reforms, helping to improve the financial markets for investors worldwide. Please visit rgrdlaw.com for more information.

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The Rise of Global Securities Litigation continued from page 5

in antitrust law via a finding of cartel activity by the European Commission. Some public authorities, such as the Bundesanstalt für Finanzdienstleistungsaufsicht (the German Federal Financial Supervisory Authority, or "BaFin"), have a duty of disclosure of information within certain limits. As to costs, Germany follows the "loser-pays" system. However, there are specific rules that allow for splitting costs of the KapMuG model proceedings among all claimants. Lastly, contingency fees for lawyers are no longer generally excluded in Germany. The former prohibition was struck down as unconstitutional, thus contingency fees are now permissible, though only under exceptional circumstances.

Japan: Historically, the concept of securities litigation arising from misstatements as defined by Japan's Financial Instruments and Exchange Act ("FIEA") has been unfamiliar to investors. However, after amendments in 2004, reducing the burden of proof for plaintiffs and introducing the presumptive rule for damages related to continuous disclosure (*i.e.*, estimated damages are the difference in the one-month average of a stock price before and after the disclosure in question), the volume of litigation increased dramatically—and this increase occurred despite the fact that Japan's legal system does not provide for class-action lawsuits. Indeed, the FIEA may lead to more favorable outcomes for plaintiffs in Japan than they could realize under the U.S. securities laws. Not only has the presumptive rule significantly reduced the plaintiff's burden of proof, but also the FIEA stipulates no-fault liability on the part of corporations for their misstatements, thereby making it easier to file a lawsuit and claim damages under the FIEA.

Although the number of Japanese court decisions on filings related to misstatements decreased to 7 in 2012 from 11 in 2011, 2012 will perhaps be remembered as the year when Japanese securities litigation was "discovered" by foreign investors. In prior years, plaintiffs had been mostly domestic – typically groups of individuals or institutional investors such as pension funds. The *Olympus* action became the first major litigation in Japan to be initiated by foreign institutional investors. Following lawsuits filed by domestic investors, 48 institutions and overseas pension funds filed a lawsuit on June 28, 2012. Later, 68 foreign institutions filed a collective lawsuit against the company. As a result, those investors have recovered $92 million in aggregate from Olympus. It remains to be seen whether recent allegations of securities fraud against Toshiba and Takata will lead to similar litigation in Japan by non-Japanese institutional investors.

III. INFORMED DECISION MAKING

Owing to the fact that there are multiple jurisdictions that may be utilized by investors seeking to recover losses caused by financial misconduct, it is now more desirable than ever for institutional investors to be properly informed of the extent to which the fund assets may be diminished because of financial misconduct. In pursuit of that objective, nearly 1000 institutional investors worldwide ensure they are properly informed by retaining Robbins Geller to monitor their securities portfolios for such financial misconduct, at no cost. Through the Firm's Portfolio Monitoring Program℠, investors can promptly understand the amount of losses sustained – and available litigation options – when an investment is damaged by misconduct, no matter where the underlying transaction took place. By providing this information and the means to pursue recoveries, in the last decade alone, Robbins Geller has been able to help its clients obtain recoveries in multiple jurisdictions.

The above article summarizes the *2015 Securities Fraud and Investor Remedies Made Simple Guide* with content provided by Robbins Geller partner **Mark Solomon**, and such information is printed with the permission of the UK's National Association of Pension Funds. For a copy of the guide, please contact Robbins Geller. ■