

How Have Companies Responded to Delaware Supreme Court Upholding Federal Forum Provisions

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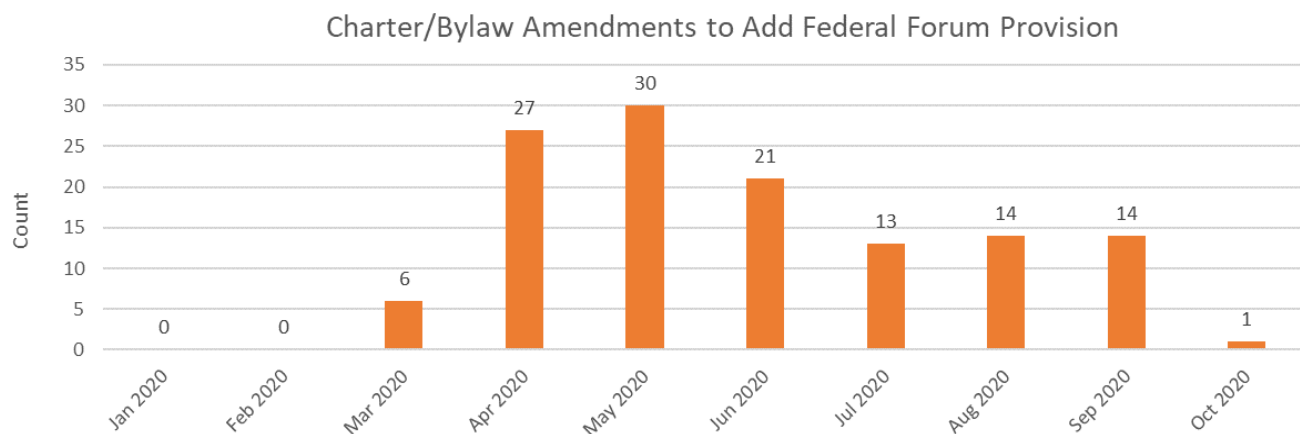
A review of charter and bylaw filings in the six months since the Delaware Supreme Court upheld federal forum provisions ("FFP") shows that FFPs are becoming standard in the governing documents of IPO companies and among existing companies, an initial spike of adoptions that has steadily leveled off. On March 18, 2020, the Delaware Supreme court ruled in *Salzberg v. Sciabacucchi* that FFPs are facially valid under Delaware law. Securities Act of 1933 claims arising from public offerings can be brought in state or federal courts. FFPs require the federal courts be the exclusive forum for the resolution of these claims. FFPs can reduce the costs and burdens from facing multi-jurisdictional litigation and provide more predictability regarding the outcome of these disputes. FFPs can also prevent state court forum shopping by plaintiffs.

Recent IPOs

Of the 49 companies in Deal Point Data's coverage universe (i.e., companies included in major indices) that completed their IPO since the March 18 decision, 84% of the companies have included FFPs in their governing documents, most frequently in the charter (68% in charter or in both charter and bylaws). For the Delaware incorporated IPO companies, 89% have included FFPs.

Existing Public Companies

Among existing companies, several took advantage of the court's validation of FFPs soon after the ruling. Within two weeks of the decision, five companies in Deal Point Data's coverage universe filed bylaw amendments to add FFPs. The number companies adopting FFPs quadrupled to 27 in April and increased again in May to 30. However, beginning in June the adoption rate has steadily declined and only one company added an FFP through the first half of October. The companies adopting FFPs tend to be younger presumably more likely to face Securities Act litigation. Of the 126 companies that added an FFP, 16% completed their IPO in the 12-month period before the decision and almost a third of the companies had IPOed within 3 years. Overall, 8% of the Russell 3000 now include an FFP in their charter and/or bylaws.



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Few Seek Shareholder Approval

Few companies are seeking shareholder input on this issue. Of the 126 companies that added an FFP from March 18 to October 15, only 6 companies including one company with a majority holder and two others with officer and director majority ownership, put the issue to a vote. All six of charter amendments to add the FFP were approved. Almost all of the companies (i.e., 90%) adopting an FFP over the period added the provision to its bylaws so that the amendment would not require shareholder approval (the power of Delaware Boards to unilaterally amend bylaws is nearly universal). The lack of shareholder approval is noteworthy considering Institutional Shareholder Services' (ISS) recently announced proposed policy change that would consider unilateral adoption of an FFP a one-time failure under its Unilateral Bylaw/Charter Amendments policy potentially triggering a vote against recommendation on directors. However, the overall proposed ISS policy is in support of FFPs that specify "the district courts of the United States" as the exclusive forum for federal securities law matters. With this uncertainty removed, more companies may be compelled to adopt FFPs and those that do more likely to put the provision to a shareholder vote.