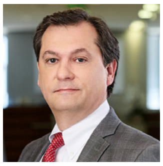
Investor protection thirty years after the PSLRA: a creeping immunity for corporate misconduct



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Since the beginning of 2025, U.S. policymakers have been systematically rolling back investors' ability to challenge corporate misconduct. The SEC has purported to limit institutional investors' ability to propose matters for a shareholder vote, to engage directly with management on issues of concern, and even to access the courts to seek relief for fraud. In the race to attract more corporations to their jurisdictions, states such as Delaware, Texas, and Nevada have dramatically limited shareholders' rights to govern corporations organized there.

Taken together, these policy shifts seek to immunize corporations from accountability to their shareholders. If history teaches us anything, this trend is a recipe for disaster. And it ignores a core tenet of America's financial markets: investors serve as a critical check on corporate power. One need not be intimately familiar with the market debacles of 1929, 1987, 2000, or 2008 to recognize the wisdom in Sir Edmund Burke's obvious, yet poignant observation that those who don't know history are destined to repeat it.

The PSLRA and Immunity for Corporate Fraud

In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") to empower institutional investors to hold corporate fraudsters accountable while limiting weak lawsuits.[1] The new law tightened pleading standards, limited discovery before resolution of a motion to dismiss, and added a safe harbor for issuers. The PSLRA also created a lead plaintiff selection process expressly to "increase the likelihood that institutional investors will serve as lead plaintiffs," aligning litigation with the interests of those who have "the largest financial stake" in the outcome.[2] Critically, institutional investors were encouraged to no longer rely exclusively on government regulators for relief, but rather lead securities class actions as they were deemed "an essential supplement to criminal prosecutions and civil enforcement actions."[3] Subsequent decisions by the U.S. Supreme Court, such as Amgen and Halliburton II, kept the courthouse doors open for investors to check corporate fraud.[4]

Since then, investors have successfully prosecuted historic cases of corporate abuse, holding accountable those whom the government could not. One recent example is the Under Armour litigation, where a public pension fund led a class action case that recovered $434 million (€372 million) for investors and secured fundamental corporate governance reforms at Under Armour.[5] By contrast, the government secured a mere $9 million penalty for the same misconduct. There are countless similar examples. In 2024 alone, institutional leadership proved its unique value in several cases where there was no meaningful corresponding government action: Apple ($490 million investor recovery), Alphabet ($350 million investor recovery), and TuSimple ($189 million investor recovery).

These cases are not outliers; they reflect a system working as Congress intended.

Federal and State Rollback

So, investors were understandably concerned with the SEC's most recent announcements. In recent weeks, the SEC announced that it will permit IPOs to move forward even if the issuer adopts a mandatory arbitration clause for fraud claims.[6] The guidance, if upheld, raises significant efficiency concerns for corporations and institutional investors alike, suggesting that investors will raise their claims in thousands of individual arbitrations, rather than aggregating their claims in a single action. In addition, the SEC sought public comment on proposals to deregulate residential mortgage-backed securities offerings.[7] Anyone with even a casual understanding of recent financial history might wonder about this proposed change, for it was less than 20 years ago in the wake of the Great Financial Crisis that the SEC adopted extensive registration and disclosure requirements for RMBS offerings to protect investors, which the Commission is now proposing to revisit.[8]

These announcements are the latest in a series of efforts to diminish investor protections and limit shareholders' right to participate in governance of the companies they own.

In February, the SEC's Staff Legal Bulletin No. 14M made it easier for companies to exclude shareholder proposals from the ballot.[9] In March, the Commission's new guidance on Schedules 13D and 13G treats more investors who engage directly with their portfolio companies on issues of concern as "activists" seeking to influence or control the company, rather than long-term investors with concerns about investment risk.[10] This guidance immediately had a chilling effect on institutional investors from engaging with companies they own.[11]

Key state laws are trending in the same direction.[12] Delaware, the incorporation state of most U.S. public companies, recently enacted a package of corporate governance reforms known as S.B. 21.[13] These new provisions seek to diminish shareholder rights, insulate various insider or interested party transactions from legal scrutiny, and limit the ability of shareholders to inspect corporate books and records. Likewise, Texas adopted a sweeping set of corporate liability protections to entice businesses to incorporate there. Texas now allows companies to establish minimum share ownership thresholds (no less than 3%) for initiating shareholder litigation for breaches of fiduciary duty and permits companies to set minimum shared ownership thresholds to make even a shareholder proposal.[14] Nevada joined the party with A.B. 239, which limits the definition of "controlling stockholder[s]" and their fiduciary responsibilities, and narrows the types of financial conflicts of interest that can disqualify a director and trigger heightened board duties.[15]

These actions, taken together, constitute a sort of creeping amnesty from corporate accountability to shareholders.

In an Era of Corporate Power, Shareholders Are a Critical Check

Shareholders must retain their power to check corporate abuse at the companies they own. This is especially important in an era in which companies wield state-like economic, political, and social power. As just one example, Nvidia's market capitalization (as high $4.4 trillion recently) exceeds the GDP of every country except the five largest – the United States, China, Germany, India, and Japan.[16] When companies with this kind of power engage in misconduct, the consequences for investors – and society – are multiplied. Shareholders' role in checking abuse is even more important in this season of concentrated corporate power, and there are numerous recent examples where shareholders have taken impactful action against corporate abuse.

In TuSimple, a Chinese-controlled company traded in the United States was accused of misleading investors while diverting proprietary self-driving technology to another company; the case secured $189 million for investors in less than a year of litigation, demonstrating that private enforcement can move faster and have greater impact than agency action alone.[17] Likewise, in American Realty, an institutional investor led a securities class action that recovered more than $1 billion for investors, where the SEC only recovered an $8 million fine for the same conduct.[18] Similarly, in Valeant – a case described by observers as the "corporate scandal of its era" – a large institutional investor led the class action case against the company and recovered over $1 billion for investors.[19]

These matters underscore what my colleagues Bobby Henssler and Alex Folkerth recently called a "[n]ewfound appreciation" for private rights of action: when public resources are stretched, investors finish the job.[20]

The PSLRA's promise was not merely to deter weak lawsuits. It was to put sophisticated, long-horizon owners in charge of holding corporations accountable. Thirty years on, we should reaffirm that design, especially in a moment when individual companies control more capital than entire nations. Taken together, narrowed shareholder rights and broader liability shields increase the cost of capital, undermine confidence in U.S. markets, and encourage capital flight from the United States.

History tells us that markets work best when truth has a champion. Institutional investors are that champion, and with the courts' continued recognition of the central role of private actions, they will continue to protect capital, deter fraud, and keep America's markets worthy of the public's trust.

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[1] 15 U.S.C. §78u-4.
[2] S. Rep. No. 104-98, at 10–13 (1995) (Conf. Rep.) (lead plaintiff purpose to encourage institutional investors).
[3] Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007).
[4] Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014).
[5] In re Under Armour Sec. Litig., No. 1:17-cv-00388-RDB (D. Md.).
[6] Acceleration of Effectiveness of Registration Statements of Issuers With Certain Mandatory Arbitration Provisions, 17 CFR Parts 231 and 241 Release No. 33-11389 (Sep. 17, 2025).
[7] Concept Release on Residential Mortgage-Backed Securities Disclosures and Enhancements to Asset-Backed Securities Registration at 5, 17 CFR Parts 229, 230, 239, 240, and 249 Release No. 33-11391 (Sep. 26, 2025) ("a robust registered [asset-backed securities] market offers benefits such as increased transparency and protections, greater liquidity, and potentially lower costs of capital, this assessment includes consideration of whether there are any regulatory impediments to issuer and investor access to the registered ABS market").
[8] For a contemporaneous account of rampant fraud in the RMBS market that catalyzed the Great Financial Crisis, see Gretchen Morgenson's article, Crisis Looms in Market for Mortgages, N.Y. Times (Mar. 11, 2007) ("Owners of mortgage securities that have been pooled, for example, do not have to reflect the prevailing market prices of those securities each day, as stockholders do. Only when a security is downgraded by a rating agency do investors have to mark their holdings to the market value. As a result, traders say, many investors are reporting the values of their holdings at inflated prices. 'How these things are valued for portfolio purposes is exposed to management judgment, which is potentially arbitrary,' Mr. Rosner said.'").
[9] SEC Staff Legal Bulletin No. 14M (CF) (Feb. 12, 2025); see also Melissa Hodgman, Elizabeth Bieber & Erik Gerding, Proxy Voting Advice No Longer a Solicitation Under the Exchange Act, Harvard Law School Forum on Corporate Governance (Jul. 28, 2025) (documenting a 35% increase in "no-action" requests filed in less than six months of 2025, over the entirety of 2024).
[10] SEC Compliance and Disclosure Interpretation Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting (Jul. 11, 2025) (if a shareholder merely "exerts pressure," if the shareholder "implies" that their director vote will be conditioned on management "mak[ing] changes to align with the shareholder's expectations," the shareholder may be disqualified from using the short-form 13G).
[11] Ronald O. Mueller, et al., The Passive/Aggressive Investor: Significant New SEC Staff Interpretive Guidance on Schedule 13G Eligibility (Feb. 18, 2025).
[12] Niko Gallogly, New Texas Laws Open a Wild West for Corporate Governance, N.Y. Times (Aug. 16, 2025) ("The state has handed big business a series of legislative wins as it races to woo corporations from Delaware, including a law that helped pave the way for Elon Musk's big Tesla payday.").
[13] Del. Code Ann. tit. 8, §144, et seq. (as amended by S.B. 21).
[14] Texas Senate Bill 1057 (2025); Texas Senate Bill 29 (2025).
[15] Nevada Assembly Bill 239 (2025) (as amended by Amendment No. 289), https://www.leg.state.nv.us/App/NELIS/REL/83rd2025/Bill/12259/Text#.
[16] If its stock price rises another 5% from a recent peak, the company's market cap would exceed all countries' GDP other than the United States and China.
[17] Dicker v. TuSimple Holdings, Inc., No. 3:22-cv-01300-BEN-MSB (S.D. Cal.).
[18] Securities and Exchange Commission, "SEC Settles Fraud Charges with Vereit," File No. 3-19831, June 23, 2020 ($8 million penalty paid by company, despite criminal conviction of key executive).
[19] Bethany McLean, Wall Street's Drug Problem, Vanity Fair, Summer 2016; In re Valeant Pharms. Int'l, Inc. Sec. Litig., No. 3:15-cv-07658 (D.N.J.).
[20] Robert R. Henssler, Jr. & T. Alex B. Folkerth, Newfound appreciation for private securities-fraud rights of action to protect the public, Daily Journal (Apr. 14, 2025).