

Delaware Case Challenges Forum Selection Provisions by Recent IPO Companies

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A complaint for declaratory judgment in the Court of Chancery of the State of Delaware is challenging the forum selection clauses in several recent IPOs. Plaintiff argues that the provisions adopted by Blue Apron, Stitch Fix and Roku are not permissible under Delaware law.

Unlike the *Chevron*-style forum selection clauses that make state courts the sole and exclusive forum for derivative actions, claims for breaches of fiduciary duties, claims arising under state law or incorporation documents, or claims governed by the internal affair doctrine of the state, the provisions in question at these IPO companies make federal district courts the exclusive forum for the resolution of complaints asserting causes of action under the Securities Act of 1933.

According to the complaint, the forum provision was first adopted by Snap in June 2017, after a series of decisions by California state courts refusing to remove securities law claims to federal courts.

Plaintiff argues that the purpose of the forum provision is to regulate choice of venue in actions that do not assert internal corporate claims governed by Delaware law, or in the alternative, if claims under the Securities Act are internal corporate claims, then these forum provisions are inconsistent with the DGCL. The DGCL provides that, with respect to internal corporate claims, "no provision of the certificate of incorporation ... may prohibit bringing such claims in the courts of this State."

The forum provision has been previously challenged in several California state court cases, which found it invalid for trying to create federal jurisdiction in a charter. One California court has determined that Snap's provision was invalid under Delaware law.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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