making such request now, however, will not receive anything back from the Staff.

As a result, the decision to exclude rests entirely with the company and its counsel, on the strength of Rule 14a-8, prior published guidance, and judicial decisions—the same authorities that have always governed the analysis.

Companies should also note some administrative housekeeping in the statement: the Staff's dedicated shareholder proposal email address is no longer functional, and notices and correspondence must now be submitted through the SEC's online Shareholder Proposal Form.

Practically, companies weighing exclusion this season and next should expect to:

- Build a clear, well-supported record for any exclusion, articulating the basis clearly, since that record may now be tested in litigation.
- Consider the decision to exclude a proposal or not taking into account the particular proponent and the nature of the proposal.
- Be prepared to explain the basis for exclusion to investors and proxy advisory firms, which have signaled that an unexplained or aggressive exclusion is more likely to draw an adverse reaction than the fact of exclusion itself.

Looking Ahead

The recent statement is another step in the Commission's broader reassessment of the shareholder proposal framework, a reassessment that Chairman Atkins has signaled will include Rule 14a-8 itself. "Shareholder Proposal Modernization" remains on the Commission's regulatory agenda, but formal rulemaking is unlikely to take effect in the short term.

For now, companies should assume that the Staff's hands-off posture will persist into the 2026-2027 proxy season.

Only time will tell whether this proves to be a durable feature of the proxy landscape or a stop along the way toward a more fundamental rewriting of Rule 14a-8.

ENDNOTES:

[1]*See* our client note: https://www.mofo.com/resources/insights/251118-sec-staff-suspends-no-action.

[2]*See* https://www.sec.gov/newsroom/speeches-statements/corpfin-statement-rule-14a-8-process-081426.

[3]*See* https://www.mofo.com/resources/insights/251010-sec-doubt-validity-precatory-shareholder-proposals.

CLASS CERTIFICATION BURDENS ARE REAL: THE FOURTH CIRCUIT REQUIRES SECURITIES FRAUD PLAINTIFFS TO CONNECT THEIR DAMAGES METHODOLOGY TO A VIABLE LIABILITY THEORY

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While securities fraud plaintiffs often think class certification follows reflexively if their claim of alleged misstatements or omissions survives dismissal, the United States Court of Appeals for the Fourth Circuit just issued a stark reminder that plaintiffs' evidentiary requirements to obtain class certification are real and fact specific. In *State of Rhode Island Office of the General Treasurer on behalf of Employees Retirement System v. Boeing Company*,[1] the court unanimously reversed a district court's order certifying a class of shareholders alleging securities fraud against Boe-

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ing, holding that plaintiffs failed to satisfy the class certification standards established by the Supreme Court in *Comcast Corp. v. Behrend*.[2] The Fourth Circuit held that plaintiffs must, at the class certification stage, present an actual damages methodology—not a menu of possibilities—that matches a specifically identified theory of liability. This decision provides a pathway for defendants to defeat class certification in securities fraud actions when plaintiffs fail to tie their theory of liability to a valid methodology for calculating damages.

Background

Following plane crashes in 2018 and 2019 involving Boeing's 737 MAX airplanes, Boeing officers made a series of public statements about the company's commitment to safety. According to plaintiffs, who sued Boeing and its senior officers under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 40 of those statements were false and misleading. Plaintiffs asserted that those challenged statements fell into four broad categories: (1) statements about safety and quality in manufacturing; (2) statements about Boeing's culture, including whether employees were encouraged to report safety concerns; (3) statements about the production of safe airplanes at a stable and growing rate; and (4) statements about regulatory compliance.

Plaintiffs advanced two distinct theories of liability based on Boeing's alleged misstatements. First, they asserted a price inflation theory, under which the alleged misstatements supposedly caused Boeing's stock to trade at prices higher than it otherwise would have. Second, plaintiffs asserted an inflation maintenance theory, under which the continued alleged misstatements purportedly worked to hide the truth and maintain an allegedly inflated stock price. The truth, plaintiffs alleged, emerged in January 2024, when a door plug detached mid-flight from a 737 MAX, after which Boeing's stock price fell 8%.

After the district court denied Boeing's motion to dismiss, plaintiffs moved for class certification. In support of their motion, they submitted an expert report from an economist who offered three potential methodologies for measuring how inflation changed over time: (1) "constant dollar inflation," which assumes the same dollar amount of inflation throughout the class period; (2) "constant percentage inflation," which assumes the price was inflated by a consistent percentage in the absence of additional disclosures; and (3) a third approach that could be necessary if inflation varied based on the nature and timing of specific misstatements or information obtained in discovery.

Boeing opposed class certification, arguing that the plaintiffs' expert had not provided a methodology for calculating damages, instead listing techniques he might employ, none of which were consistent with either of plaintiffs' theories of liability.

In plaintiffs' expert rebuttal report, the expert maintained his position that the chosen methodologies were appropriate and consistent with plaintiffs' theory of liability and again declined to commit to any specific approach for measuring the allegedly inflated stock price.

The district court certified the class and the Fourth Circuit accepted interlocutory review of the class certification decision.

Comcast's Requirements

The Fourth Circuit analyzed the district court's determination to certify the class under the framework set out in *Comcast*. There, the Supreme Court held that Rule 23 "does not set forth a mere pleading standard" but rather that plaintiffs must demonstrate with "evidentiary proof" that their damages methodology is consistent with their liability theory and that damages are measurable on a class-wide basis.[3] Absent such a showing, a plaintiff would be unable to demonstrate that issues common to the class predominate over individual issues, as required by Rule 23(b)(3). *Comcast* further demands that district courts conduct "a rigorous analysis" to determine that the prerequisites of Rule 23 have been met.[4]

The Fourth Circuit's Decision

The Fourth Circuit reversed the district court's class-certification order and explained that it understood *Comcast* to impose five requirements:

1. Plaintiffs must put forth a damages "methodology," rather than "a menu of options that the party will decide on later";

2. The damages methodology "must demonstrate how

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damages can be measured on a class-wide basis" so that the court "can determine if class-wide issues predominate over individual ones";

3. The "model supporting a plaintiff's damages case must be consistent with its liability case";

4. The damages methodology "must allow a just and reasonable inference of damages" rather than be "speculative"; and

5. Plaintiffs "must put forth evidentiary proof that their damages methodology satisfies all of the above requirements."

The court held that the plaintiffs failed to satisfy these requirements.

First, the court held that the plaintiffs' expert's initial report did not offer an adequate damages methodology. The "methodology" provided was at such a high level of generality that it described *all* securities fraud damages (*i.e.*, losses equal the difference between the artificially inflated purchase price and the price at which the stock was sold). The plaintiffs' expert "never committed to any methodology" but rather offered only a "non-exhaustive list of valuation techniques" without choosing one.

Second, plaintiffs failed to identify adequately their theory of liability. Plaintiffs had alleged theories of both price inflation and inflation maintenance, but declined to commit to either. The Fourth Circuit criticized plaintiffs' supposed "liability theory" (that Boeing's false statements caused its stock to trade at artificially high levels and that investors lost money when the truth emerged) as merely a generic description of liability that "would describe virtually all securities-fraud cases."

The Fourth Circuit held that Rule 23(b)(3) and *Comcast* require a comparison between two defined comparators—a theory of liability and a damages methodology—and "to conduct a comparison, you need to provide the necessary information about both comparators. Here, the plaintiffs provided neither."

Third, the court held that "[h]aving failed to properly identify the two comparators—the damages methodology and the legal liability theory—the district court's certification order necessarily failed to perform [the required] rigorous consistency comparison."

Fourth, the court rejected plaintiffs' argument that their expert's merits report—which was submitted after class certification—cured these deficiencies because it (finally) picked a theory of liability (an inflation maintenance theory) and a damages methodology (constant percentage inflation). According to plaintiffs' expert, "each of the numerous alleged misstatements over the three-year class period had the exact same effect—they maintained a price for Boeing stock that was at least 9.58% too high." The Fourth Circuit ruled that not only was it inappropriate "to let a class-certification decision stand based on a report which the district court didn't even consider in certifying a class in the first place," but even the information in plaintiffs' expert's merits report "isn't enough for the plaintiffs to achieve class certification." The court explained that it was "inconsistent with the plaintiffs' theory of liability" for the plaintiffs "to assert a damages methodology based on the conclusion that these varying statements—of different kinds, at different points in time, with different industry and macroeconomic conditions and with evolving investors' perceptions of the riskiness of a Boeing investment—would maintain the alleged fraud by an exact percentage that never changes."

Practical Implications

Boeing raises the bar for plaintiffs seeking class certification in securities fraud actions. In the Fourth Circuit, plaintiffs can no longer simply invoke a common damages measure and assert generally that it fits their case. Instead, they must identify their specific theory of liability with factual particularity, commit to a damages methodology at the class certification stage, and demonstrate—with evidentiary proof—that the methodology is actually consistent with that theory. Courts following the Fourth Circuit's guidance should no longer find that a rote recitation of securities-fraud principles that would apply equally in any Section 10(b) case is sufficient—plaintiffs must instead rigorously tie a damages framework to the particular facts and theories driving their case.

Moreover, *Boeing* has important implications for cases alleging multiple, varied misstatements made over extended periods. The court made clear that, even had the plaintiffs' expert's merits report been considered at class certification,

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it would not have satisfied *Comcast* because the expert's constant-percentage-inflation methodology was inconsistent with the theory on which plaintiffs had built their case. We expect that plaintiffs in many future cases may face similar obstacles.

ENDNOTES:

[1]*Office of General Treasurer on behalf of Employees Retirement System v. Boeing Company*, 182 F.4th 422, Fed. Sec. L. Rep. (CCH) P 102318 (4th Cir. 2026).

[2]*Comcast Corp. v. Behrend*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515, 2013-1 Trade Cas. (CCH) ¶ 78316, 85 Fed. R. Serv. 3d 118 (2013).

[3]*Comcast*, 569 U.S. at 33.

[4]*Id.* at 35.

REGULATION CRYPTO ASSETS: THE SEC MAKES ITS MOVE

On August 18, the Securities and Exchange Commission announced that it has proposed a set of new rules, entitled "Regulation Crypto Assets," to create what it termed "a clear and fit-for-purpose framework for certain investment contracts involving crypto assets."[1]

Following upon the Commission's March 2026 interpretation, which clarified how federal securities laws apply to specific crypto assets and certain transactions that involve crypto assets, Regulation Crypto Assets is nothing less than, in the SEC's words, "a comprehensive, tailored securities offering regime intended to address long-standing barriers to responsible capital formation and innovation within domestic crypto asset markets, while preserving the investor protections at the core of federal securities laws."

In a fact sheet that it issued to accompany the rules proposal, the SEC broke down how Regulation Crypto Assets would operate:[2]

- A "startup exemption," which would exempt offerings of up to $5 million from the registration requirements of the Securities Act of 1933 ("Securities Act") during a four-year period;
- A "fundraising exemption," which would exempt offerings of up to $75 million from the registration requirements of the Securities Act during each 12-month period;
- An "investment contract safe harbor," which would provide a conditional safe harbor from the term "investment contract" in the definitions of "security" in the Securities Act and the Securities Exchange Act of 1934; and
- A definition of "qualified purchaser" for purposes of the Securities Act, which would preempt state securities law registration and qualification requirements with respect to offers and sales of covered investment contracts issued pursuant to Regulation Crypto Assets, as well as certain secondary market transactions.

Under the proposed exemptions, issuers would be required to make certain principles-based narrative disclosures available to their investors, the SEC said. Further, issuers under the second exemption must provide financial statements and will be subject to ongoing reporting requirements.

"Without fit-for-purpose rules, existing regulatory requirements, many of which were adopted well before the proliferation of crypto assets, could complicate an issuer's transaction planning and, in turn, impede capital formation and innovation in the crypto asset markets," as per the SEC's proposed rules.[3] "Furthermore, in response to these regulatory challenges, some issuers may choose to conduct their crypto asset transactions offshore, limiting investment options (and, therefore, the ability to diversify) for U.S. investors or exposing them to additional risks from participating in markets with less robust investor protections."

In its proposed rules, the SEC notes that it "recently took steps to address these issues by clarifying its views on the application of the *Howey* test to crypto assets and transactions involving crypto assets. These proposed rules are intended to complement those efforts."

The public comment period will remain open for 60 days following the date of publication of the proposing release in the Federal Register.

Along with the announcement of Regulation Crypto Assets, the three current SEC Commissioners—Chairman Paul

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