

**\* American Federation of Labor and Congress of Industrial Organizations \*  
American Federation of State County and Municipal Employees \* American  
Federation of Teachers \* Delaware State American Federation of Labor and  
Congress of Industrial Organizations \* International Brotherhood of  
Electrical Workers \* National Conference on Public Employee Retirement  
Systems \* National Education Association \* Service Employees International  
Union \* United Food and Commercial Workers International Union \***

December 3, 2014

The Honorable Jack Markell  
Office of the Governor  
150 Martin Luther King Jr. Blvd. South  
2<sup>nd</sup> Floor  
Dover, DE 19901

Re: Swift Action Required to Restore Shareholder Rights

Dear Governor Markell:

We, the undersigned organizations, represent over 16 million public and private sector workers including current and retired teachers, first responders, government employees, food and commercial workers, electrical workers and health care service employees. We write to express our serious concerns regarding the national and sweeping implications of a recent Delaware Supreme Court decision which eviscerates investors' rights and threatens the security of US capital markets.

Our members contribute to their retirement accounts, pension plans, and private investments. These contributions, when invested in a sound and stable market, have helped provide retirement security for our members and their families. A recent decision by the Delaware Supreme Court, however, has severely limited shareholder rights by effectively eliminating the authority of shareholders to bring private enforcement actions for violations of state and federal securities laws. Without private enforcement of our nation's corporate governance and securities laws, violations of the law go unchecked, investor confidence diminishes and market participation suffers, hurting investors, pensioners, and the very businesses in which they invest.

The reaches of this case go far beyond the state of Delaware; the majority of Fortune 500 corporations are governed by Delaware law, which impacts shareholders across the globe.

In *ATP Tour, Inc. et al v. Deutscher Tennis Bund* 91 A.3d 554 (Del. 2014) the Court held, for the first time, that the directors of a corporation may unilaterally, without shareholder approval, adopt immunity-granting bylaws requiring all investors who bring suit against a corporation to be **personally liable for all of a corporation's legal expenses** unless an investor is entirely successful on virtually every claim alleged. Where an investor is successful on most but perhaps

not all counts alleged in their complaint, he/she still faces substantial financial liability to the wrongdoers. Thus, even when an investor wins, he/she loses.

No rational investor, even those with a sizable investment and claims involving clear violations of state and federal law, would be willing to risk facing this type of uncontrollable financial exposure.

These bylaws, which are now being interpreted as “contracts” between shareholders and the companies in which they invest, effectively foreclose the ability of investors to enforce our nation’s securities and corporate governance laws. Immunity-granting bylaws provide corporations a way to insulate their directors, officers, and any potential wrongdoer from accountability to their investors.

Reflecting an aggressive but predictable response to the *ATP Tour* decision, at least 34 corporations have already adopted bylaws virtually identical to or even more extreme than those approved by the Delaware Supreme Court since it handed down its decision last May. Notably, scores of publicly-traded companies that have recently completed their IPO processes, including Alibaba Group Holdings, Ltd., have included these immunity-granting provisions in their corporate governing documents in the wake of the Delaware Supreme Court’s decision, showing the severe and direct impact this has already had on national policy.

We ask that swift action be taken to restore confidence in Delaware’s corporate law, preserve investors’ rights to enforce the nation’s securities laws, and make clear that corporations and their directors and officers cannot immunize themselves from accountability.

We thank you for your consideration of this issue of critical importance to our organizations’ members.

*Sincerely,*

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State County and Municipal Employees (AFSCME)

American Federation of Teachers (AFT)

Delaware State American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

International Brotherhood of Electrical Workers (IBEW)

National Conference on Public Employee Retirement Systems (NCPERS)

National Education Association (NEA)

Service Employees International Union (SEIU)

United Food and Commercial Workers International Union (UFCW)

Cc: Norm Monhait  
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