

## The First Special Circumstance

### *Mandatory Arbitration, Engineered Litigation Immunity, and the Prudence of Holding SpaceX Under ERISA*

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#### ABSTRACT

*Fifth Third Bancorp v. Dudenhoeffer* permits an ERISA fiduciary to rely on the market price of a publicly traded security, but only “in the absence of special circumstances” affecting the reliability of that price. A decade later, no court has identified a qualifying circumstance. This essay argues that SpaceX’s June 2026 initial public offering supplies one.

The company went public with an architecture that independently disables nearly every private mechanism for surfacing and punishing inadequate disclosure: mandatory individual arbitration reached through a Texas forum-selection clause, class and collective waivers that apply regardless of forum, a three-percent derivative-standing threshold newly authorized by Texas law, narrowed inspection rights, and a dual-class structure vesting roughly 82.4% of the voting power in a single controller. Because private securities litigation—not public enforcement—is the principal mechanism forcing timely disclosure of adverse material information, that architecture degrades the informational conditions on which the *Dudenhoeffer* safe harbor depends. Parts I through III develop that argument: the premise beneath the safe harbor, the role of private litigation in forcing disclosure, and the provisions by which SpaceX has disabled it.

Part IV answers the efficiency objection—that reduced litigation exposure leaves more value for shareholders—which fails on this record, because the litigation the structure suppresses is the litigation that tested whether the controller’s compensation was fair to shareholders in the first place. Part V shows that ERISA’s own provisions treat access to enforceable process as something fiduciaries must preserve, from the prohibition on holding plan assets beyond the reach of the district courts to the voiding of exculpatory clauses. Part VI applies the analysis across three settings: the active manager holding an outsized position, the active manager holding on conviction, and—reaching the most money—the plan fiduciary who selects or retains passive investment options. That last discussion takes up index-provider accountability, the fiduciary character of benchmark selection, and the consequences of the methodology changes by which four major index providers admitted this issuer on compressed timelines while a fifth, after formal consultation, declined.

Part VII addresses public retirement systems, which sit outside ERISA but are measured against state fiduciary standards drawn from the same trust-law source, and which have served as lead plaintiffs in roughly forty percent of federal securities fraud class actions. The conclusion is that plan fiduciaries, and managers of collective investment trusts and separate accounts in which the security is a plan asset, face meaningfully elevated exposure in holding SpaceX, because the presumption that ordinarily protects such decisions has been forfeited by design.

## Introduction

When the Supreme Court decided *Fifth Third Bancorp v. Dudenhoeffer* in 2014, it gave retirement-plan fiduciaries what has functioned ever since as a near-categorical shield: where a stock is publicly traded, a fiduciary may generally rely on the market price as an accurate reflection of the security's value, and allegations that the fiduciary should have known better from public information alone are "implausible as a general rule."<sup>1</sup> But the Court was careful to state the limit of its own logic. That reliance is presumptively reasonable, it said, only "in the absence of special circumstances"—circumstances "affecting the reliability of the market price as an unbiased assessment of the security's value in light of all public information."<sup>2</sup> In the decade since, that reservation has remained an empty set. Courts have gestured at it; none has filled it.<sup>3</sup> The duty at issue throughout is ERISA's duty of prudence, which governs how a fiduciary must go about deciding what a retirement plan will own.<sup>4</sup>

SpaceX's June 2026 initial public offering may supply the first genuine candidate. This was no single arbitration clause. The company went public with a deliberately assembled, stacked architecture that independently disables nearly every mechanism by which private parties ordinarily surface and punish inadequate disclosure. Securities fraud claims are funneled through a Texas-forum-then-arbitration channel and stripped of the class, mass, and collective device that makes such claims economically viable.<sup>5</sup> The collective-action waiver, unusually, applies *regardless of forum*, so even a claim that reaches a courtroom may proceed only individually.<sup>6</sup>

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<sup>1</sup> *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 426 (2014) (holding that allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing a stock are "implausible as a general rule, at least in the absence of special circumstances").

<sup>2</sup> *Id.* at 426 (defining the reserved category as a "special circumstance affecting the reliability of the market price as an unbiased assessment of the security's value in light of all public information" that would render reliance on the market's valuation imprudent (cleaned up)).

<sup>3</sup> The Court declined to identify any qualifying special circumstance, and the courts of appeals have since treated the category as largely theoretical, repeatedly rejecting proffered special circumstances on the pleadings. *See, e.g.*, *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016); *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 65–66 (2d Cir. 2016) (rejecting the contention that SEC orders constituted a "special circumstance" under *Dudenhoeffer*); *Saumer v. Cliffs Nat. Res. Inc.*, 853 F.3d 855, 864 (6th Cir. 2017). *Cf. Amgen Inc. v. Harris*, 577 U.S. 308 (2016) (per curiam); *Ret. Plans Comm. of IBM v. Jander*, 589 U.S. 87 (2020) (per curiam). The reservation thus remains, as of this writing, an unfilled category—which is the opening this essay addresses.

<sup>4</sup> ERISA's central duty of care requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use." 29 U.S.C. § 1104(a)(1)(B). Courts assess prudence by the quality of the fiduciary's decision-making process rather than by investment results, so a fiduciary may be liable for failing to investigate a question even where the investment itself performs well.

<sup>5</sup> A securities-fraud claim by an individual shareholder is rarely worth bringing on its own: the loss attributable to any single holder is usually far smaller than the cost of litigating, which routinely runs into the millions once expert economic testimony is required. The class action solves that problem by aggregating many small claims into one proceeding with one set of costs. Eliminating the class device therefore does not merely make such claims harder; for most holders it makes them uneconomic, and so they are not brought at all.

<sup>6</sup> Space Exploration Technologies Corp., Amended and Restated Bylaws art. X, § 10.1(a)–(c), (e), § 10.2, filed as Exhibit 3.2 to Form S-1 (May 20, 2026). Section 10.1 defines "internal disputes" to include derivative proceedings, internal-affairs and fiduciary-duty claims, and "any action based on state or federal securities or trade regulation laws," designates the Texas Business Court as the sole and exclusive forum, and adds class-action and jury-trial waivers; section 10.2 provides for mandatory ICC arbitration, again restricting collective proceedings, where a covered dispute falls outside that forum. The provisions purport to channel federal securities claims to a state forum notwithstanding the exclusive federal jurisdiction over Exchange Act claims. *See* 15 U.S.C. § 78aa(a); *see also* Alan

Derivative litigation—the traditional instrument for policing fiduciary misconduct—is blocked by a three-percent ownership threshold newly authorized under Texas Senate Bill 29, a figure that at SpaceX’s valuation requires holdings in the tens of billions of dollars before a shareholder may even file; the same legislation supplies director- and officer-friendly presumptions, heightened pleading requirements, and narrowed books-and-records inspection rights that make the predicate investigation harder still.<sup>7</sup> An exclusive-forum bylaw and a broad jury-trial waiver round out the litigation provisions. And the internal remedy of last resort—replacing the board—is itself foreclosed: through a dual-class structure, a single insider holds roughly 82.4% of the voting power on about 42% of the economic equity, so that, as one large public fund put it, the chief executive cannot be removed without voting to remove himself.<sup>8</sup> With a public float of roughly four percent,<sup>9</sup> the result is a public company whose price is formed under conditions the disclosure system does not assume.

The pension funds and governance bodies that objected before the offering priced grasped the cumulative effect: taken together, these provisions come close to eliminating shareholder litigation altogether, leaving the market to rely on what the company chooses to disclose, backed by little more than the comparatively selective threat of public enforcement. This architecture is more than a governance grievance for shareholder advocates. It is, or should be recognized as, precisely the “special circumstance” that *Dudenhoeffer* left open—a structural feature affecting the reliability of the market price as an unbiased assessment of value—and the structure of ERISA itself, which treats access to enforceable process as something fiduciaries must preserve, points the same way. My view, developed below, is that given what is already knowable about this company, holding SpaceX carries unusual risk under ERISA. Any plan fiduciary, and any investment manager holding the stock in a collective investment trust or separate account where the security is itself a plan asset, should think carefully before committing participants’ retirement savings to an enterprise that has gone to such lengths to insulate itself from accountability to the very investors whose capital it seeks—and should expect that choice to draw scrutiny it cannot answer by pointing, as fiduciaries ordinarily may, to the market price.

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S. Kaplinsky & Joseph J. Schuster, *SpaceX Becomes the First Major IPO Issuer to Implement the SEC’s New Shareholder Arbitration Policy*, Consumer Fin. Monitor (June 15, 2026).

<sup>7</sup> A derivative suit is brought by a shareholder on the corporation’s behalf, to remedy harm done to the company itself—typically by its own officers or directors. Because management will not ordinarily sue itself, the derivative action is the principal mechanism by which self-dealing at the top is tested in court. Tex. S.B. 29, 89th Leg., R.S. (2025) (authorizing, for eligible Texas corporations, derivative-action ownership thresholds of up to three percent of outstanding shares, along with liability presumptions favoring directors and officers, heightened pleading requirements, internal-forum provisions, jury-trial-waiver authority, and narrower inspection rights); see Tex. Bus. Orgs. Code § 21.552. Commentators have observed that, at a trillion-dollar-plus valuation, the three-percent threshold is “functionally prohibitive for nearly all shareholders.” See SpaceX and the New Geography of Corporate Governance, Truth on the Market (June 3, 2026); The SpaceX IPO and the New Frontier of Corporate Governance, Tex. Lawbook (June 10, 2026); see also SpaceX’s IPO Filing and the Expanding Use of Litigation Deterrence Provisions, D&O Diary (June 1, 2026).

<sup>8</sup> Space Exploration Technologies Corp. holds approximately 42% of the economic equity but roughly 82.4% of the voting power through a dual-class structure in which Class B shares carry ten votes each; the company qualifies as a “controlled company” under Nasdaq rules and is exempt from certain independent-director requirements. See SpaceX Registration Statement (Form S-1) (May 20, 2026), as amended (Form S-1/A) (June 3, 2026). The publicly tradable float at listing was approximately 4.3% of the equity.

<sup>9</sup> “Float” refers to the portion of a company’s shares actually available for public trading, excluding shares locked up by insiders and other restricted holders. A small float means that large index-driven demand must be satisfied from a thin supply, which can move the price substantially without any change in the company’s underlying prospects.

## I. The Premise Beneath the Safe Harbor

The *Dudenhoeffer* safe harbor is not a free-standing rule that fiduciaries may always trust a quoted price. It is a conclusion derived from a premise. The premise is the efficient-market hypothesis in its informational form: that the price of a security actively traded in a well-developed market rapidly incorporates all public information, so that the price operates as an “unbiased assessment” of value. The Court said as much when it explained that “a fiduciary’s failure to outsmart a presumptively efficient market is not a sound basis for imposing liability.”<sup>10</sup> The operative word is *presumptively*. The safe harbor holds because, and to the extent that, the market is doing the work of impounding information into price. Where that mechanism is compromised, the premise fails, and with it the conclusion.

This is why the “special circumstances” reservation is an integral feature of the holding rather than an afterthought. The Court did not carve out an exception to a rule; it acknowledged the boundary of its own reasoning. An efficient market can only price the information it receives. If some structural feature of a particular issuer systematically degrades the flow of material information into the market, then the price of that issuer’s stock is no longer an unbiased assessment of value “in light of all public information.” It is an assessment in light of a curated subset—the information the issuer has chosen, or been compelled, to release. The reservation flags precisely this situation: a case where the efficiency premise is in doubt.

The analytic move this essay urges is therefore a faithful application of *Dudenhoeffer*, not a departure from it. One need not quarrel with the safe harbor to conclude that it does not reach a case in which the issuer has deliberately disabled the machinery that makes market prices trustworthy. The question is simply whether such machinery exists, whether it matters to price reliability, and whether SpaceX has in fact disabled it. The next two Parts take up those questions in order.

## II. What Actually Forces Disclosure

Public companies disclose material information for several overlapping reasons: affirmative reporting obligations, exchange rules, auditor and gatekeeper pressure, reputational incentives, and the threat of enforcement. But among the mechanisms that specifically police *timely and complete* disclosure of adverse material facts—as opposed to the routine filing of periodic reports—private securities litigation does a disproportionate share of the work, for structural reasons. Public enforcement is resource-constrained and, by revealed preference, concentrated. The Securities and Exchange Commission brings a finite number of actions each year and tends to reserve them for the more blatant or provable violations, frequently resolving disclosure lapses without alleging fraud or scienter at all. Empirical survey work has long concluded that private plaintiffs’ attorneys supply at least as much deterrence against serious securities violations as the Commission, which tends to pursue comparatively weaker targets.<sup>11</sup> Cross-jurisdictional evidence points the same way: the intensity of private enforcement, more than the formal reach of public enforcement, tracks the development and reliability of securities markets.<sup>12</sup>

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<sup>10</sup> *Dudenhoeffer*, 573 U.S. at 426 (“A fiduciary’s failure to outsmart a presumptively efficient market is not a sound basis for imposing liability.” (internal quotation marks omitted)).

<sup>11</sup> See James D. Cox & Randall S. Thomas, *Mapping the American Shareholder Litigation Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Law*, 6 Eur. Co. & Fin. L. Rev. 164 (2009).

<sup>12</sup> See Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. Fin. Econ. 207 (2009).

The point is not that public enforcement is unimportant; it is that private litigation and public enforcement are complements, and that the private component is the one calibrated to the marginal case—the delayed disclosure, the softened risk factor that a class of injured purchasers has both the information and the financial incentive to pursue. The deterrent operates because the expected cost of nondisclosure is elevated by the credible prospect that a well-financed plaintiff will litigate it. Remove that prospect and the calculus shifts. The Under Armour episode is a compact illustration of the gap: the Commission resolved its disclosure charges for a nine-million-dollar penalty without alleging fraud, while private litigants, building on the same facts, ultimately recovered roughly fifty times as much.<sup>13</sup> The private mechanism was not redundant to the public one. It was doing different, and larger, work.

For present purposes the claim need not be that private litigation is the *only* disclosure-forcing mechanism, nor even that it is always the most important one. It is enough that private litigation is a principal enforcement channel for the timely disclosure of adverse material information, and that its credible threat is a significant part of what makes the *Dudenhoeffer* efficiency premise hold in practice. If an issuer can disable that channel, the informational environment in which its price is formed changes in a way the safe harbor did not contemplate.

### III. How SpaceX Dismantles the Mechanism

The stacked provisions catalogued above share a single practical consequence, and it is the consequence that matters for market efficiency. Following the Commission’s September 2025 reversal of its longstanding resistance to issuer arbitration provisions,<sup>14</sup> SpaceX became the first major issuer to implement the new policy, and the design shows it: by reaching arbitration through a forum-selection route rather than an express securities-arbitration mandate, the structure aims to present itself as ordinary forum selection while achieving the practical elimination of aggregate securities litigation. Layered atop the other provisions, the result is that no ordinary shareholder—and virtually no institutional holder short of the very largest index complexes, which as a historical matter do not bring such suits—possesses both the economic stake and the procedural standing to finance disclosure-forcing litigation. Every conventional private route for bringing nondisclosure to light and imposing a cost on it has been independently disabled.

Crucially for the *Dudenhoeffer* analysis, the accountability defect is not a matter of hindsight or of information available only to insiders. It was identified, in writing, by the most sophisticated fiduciaries in the country before the offering priced. In a joint letter, the New York City and New York State Comptrollers and the Chief Executive of CalPERS warned that mandatory arbitration “eliminates the class-action lawsuit structure essential to remedying widespread harms, keeps corporate law from developing through public court decisions, and shields the Company from the deterrents of sound judicial review.”<sup>15</sup> The Council of Institutional Investors and other large public funds raised materially identical objections. That the concern was

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<sup>13</sup> The Under Armour matter is illustrative. The SEC resolved its disclosure charges for a \$9 million civil penalty without alleging fraud or scienter; private litigants, building on the same facts, later settled related securities claims for \$434 million—roughly fifty times the public penalty. *See In re Under Armour Sec. Litig.*, No. 1:17-cv-00388-RDB (D. Md. 2024); Press Release, SEC, SEC Charges Under Armour Inc. for Disclosure Failures (May 3, 2021).

<sup>14</sup> *See* SEC, Statement on Shareholder Arbitration Provisions in Issuer Governing Documents (Sept. 17, 2025); *cf.* 15 U.S.C. § 78cc(a); 15 U.S.C. § 77n (anti-waiver provisions).

<sup>15</sup> Letter from Brad Lander, N.Y.C. Comptroller, Thomas P. DiNapoli, N.Y. State Comptroller & Marcie Frost, CEO, CalPERS, to SpaceX (2026); *see also* Council of Institutional Investors, Policies on Corporate Governance § 3.14 (opposing forced-arbitration and exclusive-forum bylaws).

articulated publicly, by fiduciaries, in advance of pricing is significant: it means the feature that undermines price reliability is knowable to any fiduciary exercising reasonable diligence. It is disclosed on the face of the prospectus and was flagged by the market's most capable participants.

The efficiency premise from Part I applies directly to these facts. A well-functioning market prices what it knows. It can, and does, discount for known governance defects—a control premium retained by an insider, the loss of aggregate litigation, the derivative-standing threshold, the absence of independent directors. All of that is public and can be built into price. What the market cannot price is the information it does not receive, on the schedule it does not receive it. The vice of the SpaceX structure is not only that it imposes a static governance discount; it is that it degrades the *ongoing* production of adverse material information by removing the enforcement threat that ordinarily compels timely disclosure. The quoted price of SPCX may efficiently reflect everything SpaceX has chosen to disclose. But “everything SpaceX has chosen to disclose” is no longer a reliable proxy for “all material information,” because the mechanism that narrows the gap between the two has been disabled. That is exactly a circumstance “affecting the reliability of the market price as an unbiased assessment of the security’s value in light of all public information.” It is, on its face, the reserved case.

Nor does the argument require a court to find that SpaceX has in fact withheld any specific material fact. The special circumstance is the compromised reliability of the price, which exists as soon as the enforcement mechanism is disabled and the control and threshold features are in place. The specific fraud, if any, is not the imprudence; ignoring the company’s structural unreliability is. This matters because it locates the fiduciary’s breach at the point of decision—the decision to acquire or, under the continuing duty, to retain—based on what is knowable then, rather than requiring the eventual emergence of concealed information. Liability, of course, still requires loss, and loss is an *ex post* event. But the breach is measured *ex ante*, by the prudence of relying on a price the fiduciary knew, or should have known, was formed under compromised conditions.

#### **IV. The Efficiency Objection to the Prudence Concern**

A fiduciary inclined to hold SpaceX might answer all of this with an efficiency argument, and it deserves a fair statement before it is answered. Shareholder litigation, the argument runs, is itself a cost. It generates defense fees, settlement payments, directors-and-officers insurance premiums, and the diffuse burden of management time spent on discovery rather than on the business, and it pressures managers to over-disclose defensively against the risk of a suit. A company that has contracted out of class litigation and derivative exposure has shed those costs. On this view the arbitration-and-waiver structure is not a red flag at all but a feature—a leaner company that retains for its shareholders value that would otherwise leak away to the plaintiffs’ bar. If reduced litigation risk lowers costs, the prudent fiduciary might conclude that SpaceX will, if anything, make its investors *more* money, not less.

The argument fails, and it fails first on its own facts before it fails on the economics. The single most consequential shareholder suit in the recent history of Musk-controlled companies was the challenge to his 2018 Tesla compensation package—a package the Delaware Court of Chancery, after an eight-week trial, found to be the product of a process Musk himself controlled and ordered rescinded as unfair to shareholders.<sup>16</sup> That litigation was not a deadweight tax on

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<sup>16</sup> *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024) (ordering rescission of the 2018 performance-based compensation award after finding that Musk controlled the approval process and that the terms were not entirely fair to Tesla’s stockholders). The Delaware Supreme Court later reversed the rescission remedy, reinstating the award

Tesla’s shareholders. It was the mechanism by which shareholders tested whether roughly fifty billion dollars of their equity had been handed to the controller without a fair process. Strip out that kind of scrutiny and a fiduciary does not save shareholders money; the fiduciary removes the one check on the largest single transfer of value away from them; the compensation package is money the shareholders no longer have. A governance structure whose defining purpose is to foreclose challenges to that transfer cannot be described, without contradiction, as one that protects shareholder value—the thing it protects is the controller’s ability to extract it.

This is not a hypothetical reconstruction of motive. It is the stated rationale. In the immediate aftermath of the Chancery ruling, Musk told his roughly 170 million followers to abandon the state whose courts had reviewed his pay:<sup>17</sup>

**Elon Musk** @elonmusk

“Never incorporate your company in the state of Delaware.”

January 30, 2024

He followed with a recommendation that tied the advice directly to shareholder power—framing the exit, remarkably, as the *pro*-shareholder choice:

**Elon Musk** @elonmusk

“I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters.”

January 30, 2024

And when SpaceX itself moved, he announced it and urged others to follow:<sup>18</sup>

**Elon Musk** @elonmusk

“SpaceX has moved its state of incorporation from Delaware to Texas! If your company is still incorporated in Delaware, I recommend moving to another state as soon as possible.”

2024

The reincorporation that laid the groundwork for SpaceX’s litigation-immunizing charter was thus tied, in the controller’s own account, to a judicial decision that had done nothing more exotic than subject his pay to a test of fairness. The banner under which he framed the exit—letting shareholders “decide matters”—sits awkwardly against a structure that strips shareholders of the litigation, derivative, and inspection tools by which they might decide anything, and that leaves

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and awarding one dollar in nominal damages, without disturbing the Court of Chancery’s findings on control and process. *See In re Tesla, Inc. Derivative Litig.*, No. 534, 2024 (Del. Dec. 19, 2025). That the controller ultimately prevailed on the remedy does not blunt the point: the structure at issue is designed to foreclose the *process* itself—the eight-week trial and fairness review—not merely to avoid an adverse judgment.

<sup>17</sup> Elon Musk (@elonmusk), X (Jan. 30, 2024); Elon Musk (@elonmusk), X (Jan. 30, 2024). *See* Christiaan Hetzner, ‘Never Incorporate in Delaware’: Elon Musk Sees His Record-Breaking \$56 Billion Tesla Pay Package Voided by Judge, *Fortune* (Jan. 31, 2024).

<sup>18</sup> Elon Musk (@elonmusk), X (2024). *See* Elon Musk Doubles Down on His Promise to Ditch Delaware; SpaceX Is Headed for Texas Incorporation, *Associated Press* (2024) (reporting that SpaceX’s reincorporation followed the Delaware ruling striking down the Tesla pay package).

82.4% of the vote with the controller. “Letting shareholders decide,” in this structure, means letting Musk decide.

Even setting the compensation package aside, the efficiency argument has the economics backwards. If litigation exposure were a net drag on value, one would expect markets to reward its removal with higher valuations and lower costs of capital. The evidence runs the other way. A large body of work in law and financial economics finds that stronger investor protection—and private enforcement in particular—is associated with deeper markets, lower costs of equity capital, and higher valuations, and that firms from weak-protection regimes pay to “bond” themselves to stronger ones by cross-listing on U.S. exchanges, capturing a valuation premium because they submit to greater accountability.<sup>19</sup> The American markets that have outperformed and drawn capital from around the world for a century did not do so despite their investor protections and litigation exposure; they did so, in significant part, because of the confidence those protections create.<sup>20</sup> A fiduciary who treats SpaceX’s repudiation of that model as a cost-saving feature is betting against the single best-documented relationship in the field. The efficiency objection does not rescue the prudence of the investment. It restates the very problem—a company that has decided accountability is a cost to be shed—in the language of a benefit.

## V. ERISA’s Structural Concern With Enforceable Recourse

The argument to this point has run through *Dudenhoeffer* and the reliability of market price. There is a second line of support, independent of the safe harbor, that runs through the trust-law foundations of ERISA itself. It begins with the duty to enforce claims. A trustee holding a claim as trust property must take reasonable steps to realize on it.<sup>21</sup> The exception to that duty is what matters here. The Restatement excuses the trustee from suing where the expense would be disproportionate, where the action would probably fail, or where a judgment, if obtained, could not be collected. Trust law therefore already prices enforceability. A claim that cannot practically be brought, or that would yield nothing if won, is treated as worth nothing at all.

The same duty appears in modern practice under a different name. Institutional investors are expected to file claims in securities class action settlements, and the leading empirical study of the practice—which found that fewer than thirty percent of institutions with provable losses perfect

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<sup>19</sup> See Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. Fin. 1 (2006) (finding little evidence that public enforcement benefits stock markets, and strong evidence that laws mandating disclosure and facilitating private enforcement through liability rules do); Luzi Hail & Christian Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, 44 J. Acct. Rsch. 485 (2006); Craig Doidge, G. Andrew Karolyi & René M. Stulz, *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. Fin. Econ. 205 (2004); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007).

<sup>20</sup> The causal direction is contested—Coffee argues that enforcement intensity rather than legal origin drives development, and that markets may develop first and demand protections after. See Coffee, *supra*. The argument here needs only the well-supported proposition that robust investor protection and private enforcement are associated with stronger markets and lower capital costs. See also Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. Rev. 781 (2001).

<sup>21</sup> Restatement (Third) of Trusts § 76(2)(d) (2007); Restatement (Second) of Trusts § 177 (1959). The qualification appears in the comments: a trustee need not sue where it is reasonable to forbear “owing to the probable expense involved in the action or to the probability that the action would be unsuccessful or that if successful the claim would” prove uncollectible. Restatement (Second) of Trusts § 177 cmt. c; accord Restatement (Third) of Trusts § 76 cmt. d. ERISA’s fiduciary duties are drawn from this body of law. See *Tibble v. Edison Int’l*, 575 U.S. 523, 528–29 (2015).

their claims—concluded that they have a legal duty to do so.<sup>22</sup> An industry exists to discharge it: custodial claims units, specialist filing services, and law firms that market recovery work as fiduciary compliance. Trust law asks whether the trustee perfected the trust’s claims; securities practice asks whether the institution perfected its claims in settlement—the same obligation under two names. That supplies a concrete measure of what this structure removes. For every other constituent of every index a plan holds, the expected value of future settlement recoveries is a real component of return, and one the fiduciary is expected to pursue. For SpaceX there will be no settlement to claim against, because there will be no class. That is not a risk that recovery might fail but the permanent absence of any recovery to pursue.

If an unenforceable claim is worthless to a trust, may a fiduciary prudently acquire an asset whose defining feature is that claims arising from it cannot practically be brought? ERISA does not answer that question in terms. Its structure, though, answers a closely related one, and answers it firmly.

Section 1104(b) of ERISA provides that, except as the Secretary of Labor authorizes by regulation, no fiduciary may maintain the indicia of ownership of any plan assets outside the jurisdiction of the district courts of the United States.<sup>23</sup> This is a flat prohibition with narrow exceptions, not a factor to be weighed. Congress did not instruct fiduciaries to consider the risk that plan assets might drift beyond judicial reach; it forbade the arrangement. The premise is that plan assets must remain where a court can reach them, and that a fiduciary may not trade that protection away for convenience or return. Two neighboring provisions carry the same instinct. Section 1110(a) of ERISA voids as against public policy any provision purporting to relieve a fiduciary of responsibility or liability, and the Department of Labor reads it to void plan indemnification of fiduciaries as well. Section 1112 requires that those handling plan funds be bonded.<sup>24</sup> Across custody, exculpation, and bonding, the statute keeps returning to the same concern: a plan wronged by a fiduciary must have a forum in which to sue and assets from which to recover.

The federal courts have applied that instinct to the accountability structures now at issue. Eight circuits have now held that arbitration provisions in ERISA plans containing class or representative-action waivers cannot be enforced, because they strip participants of the plan-wide

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<sup>22</sup> See James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411 (2005) (finding that fewer than thirty percent of institutional investors with provable losses perfect their claims, and that custodian banks charged with filing have financial disincentives to do so); James D. Cox & Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?*, 80 Wash. U. L.Q. 855 (2002) (concluding that institutional investors have a duty to file claims in settlements absent a cost-benefit justification for forbearing).

<sup>23</sup> 29 U.S.C. § 1104(b) (“Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.”); see 29 C.F.R. § 2550.404b-1 (implementing regulation).

<sup>24</sup> 29 U.S.C. § 1110(a) (providing that any provision purporting to relieve a fiduciary of responsibility or liability under ERISA’s fiduciary-duty provisions “shall be void as against public policy”); 29 C.F.R. § 2509.75-4 (Interpretive Bulletin) (reading Section 1110(a) to void plan indemnification of a fiduciary); 29 U.S.C. § 1112 (bonding requirement); cf. 29 U.S.C. § 1110(b)(1) (permitting plan-purchased fiduciary insurance only where the insurer retains recourse against the breaching fiduciary).

remedies ERISA guarantees.<sup>2526</sup> The parallel is worth stating carefully, because it is easy to overstate. Those cases govern arbitration clauses inside ERISA plans, binding participants in claims against their own fiduciaries; they do not hold that a fiduciary may not invest in a portfolio company whose shareholders face arbitration. What they establish is a consistent federal policy. When a plan attempts to impose on its participants the structure SpaceX has imposed on its shareholders—individual arbitration, no aggregate remedy—courts refuse to enforce it, and ERISA declares such provisions void. A fiduciary is then asked to place participant savings into that same arrangement, on the theory that it is somebody else’s shareholders bearing it.

The limits of this argument should be stated plainly. Section 1104(b) governs custody. SpaceX shares held through a domestic custodian sit within the jurisdiction of the district courts, and the provision is satisfied; nothing here suggests a fiduciary holding SPCX violates it. The point is one of principle rather than prohibition. ERISA and the trust law behind it treat access to enforceable process as a thing of value that fiduciaries are expected to preserve, and SpaceX is an asset defined by the deliberate removal of that value. A fiduciary who would not dream of custodying plan assets beyond the reach of an American court should ask why the same instinct does not apply to a security whose issuer has placed itself beyond the reach of the litigation that ordinarily disciplines it.

One objection deserves a direct answer. American plans hold Chinese issuers through variable-interest-entity structures in which shareholders own an offshore shell holding contractual claims against a mainland operating company—claims of contested validity, against defendants and assets that no United States judgment can reach. If enforceable recourse is a fiduciary concern, the objection runs, that problem dwarfs anything in SpaceX’s charter, and no fiduciary has ever been called to account for it. The premise is largely correct, and the distinction worth drawing is narrower than it first appears. The difficulty with the offshore structures is collectibility: the securities-fraud claim exists, the class is certified, the case is filed and litigated in an American court, and the disclosure-forcing pressure operates even where the ultimate recovery may prove unreachable.<sup>27</sup> SpaceX has removed the claim itself. The mechanism that produces reliable disclosure never engages, because no aggregate proceeding can be brought at all. A fiduciary

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<sup>25</sup> The effective-vindication doctrine holds that an arbitration agreement will not be enforced where it operates as a “prospective waiver of a party’s right to pursue statutory remedies.” *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 236 (2013). The circuits applying it in the ERISA context reason that a plan-wide remedy is what the statute provides, so a clause permitting only individual relief withholds the remedy Congress created.

<sup>26</sup> See *Smith v. Bd. of Dirs. of Triad Mfg., Inc.*, 13 F.4th 613, 621–22 (7th Cir. 2021); *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs.*, 59 F.4th 1090, 1106–07 (10th Cir. 2023); *Henry v. Wilmington Tr. N.A.*, 72 F.4th 499, 507 (3d Cir. 2023); *Cedeno v. Sasson*, 100 F.4th 386, 400–01 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 447 (2024); *Parker v. Tenneco, Inc.*, 114 F.4th 786, 793 (6th Cir. 2024), *cert. denied*, 145 S. Ct. 1060 (2025); *Platt v. Sodexo*, 148 F.4th 709, 721 (9th Cir. 2025); *Williams v. Shapiro*, No. 24-11192, 2025 WL 3625999 (11th Cir. Dec. 15, 2025); *Parrott v. Int’l Bancshares Corp.*, No. 25-50367 (5th Cir. Feb. 10, 2026). These decisions rest on the effective-vindication doctrine recognized in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235–36 (2013). *Parrott* also voided a standard-of-review provision as an unlawful exculpatory clause under Section 1110(a) of ERISA, to the extent it reached breach-of-fiduciary-duty claims, and remanded on severability. These cases address arbitration provisions within ERISA plans and are cited for the policy they express rather than for any holding on the prudence of a plan’s portfolio investments.

<sup>27</sup> Holders of American depositary shares in variable-interest-entity issuers retain access to the federal securities class action, and such actions are regularly filed and resolved. The Luckin Coffee litigation, which produced both a Commission enforcement action and a substantial private class settlement, is the familiar illustration. The point in the text is comparative: the offshore structures present a collectibility problem, while the structure examined here removes the aggregate proceeding itself.

weighing an offshore issuer confronts the risk that recovery may fail; a fiduciary weighing SpaceX confronts the absence of the process that makes disclosure trustworthy in the first place. If anything, the comparison suggests that recourse risk has been under-attended across the board, and that SpaceX presents the question in a form difficult to avoid.

## VI. Fiduciary Exposure Across Three Settings

The practical consequences of recognizing SpaceX as a special circumstance vary by the vehicle and the role. They are best understood along a spectrum defined by how much existing doctrine already supports the claim—from the setting where established law does most of the work to the setting where it does least. The theory is a single one throughout; what changes is the amount of settled authority a fiduciary can point to.

### A. *The active manager holding an outsized position where the security is a plan asset.*

The clearest exposure arises where a fiduciary exercises discretionary control over a vehicle in which the underlying securities are themselves plan assets—for example, a collective investment trust or separate account (as distinct from a mutual fund, whose shares, not its holdings, are the plan asset)<sup>28,29</sup>—and takes a position in SpaceX that exceeds passive-index weight on the strength of the manager’s own conviction. Here the manager has made an affirmative, discretionary investment decision to hold a security whose price reliability is knowably compromised, and to hold it in size. That posture sits close to the concentration cases, where the retention of a single volatile security—a decision distinct from any portfolio-wide diversification failure—has drawn fiduciary-breach exposure when the security’s value later collapsed amid disclosures of trouble.<sup>30</sup> The special-circumstance recognition does not create the theory of liability

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<sup>28</sup> A collective investment trust is a pooled fund maintained by a bank or trust company for retirement plans; a separate account is a comparable pool maintained by an insurance company. Neither is registered with the Securities and Exchange Commission in the way a mutual fund is, and—unlike a mutual fund—the securities held inside them are generally treated as assets of the participating plans themselves. That distinction determines who owes ERISA duties with respect to those securities.

<sup>29</sup> The distinction is central to which managers bear ERISA fiduciary duties. ERISA defines fiduciary status functionally, by the exercise of discretionary authority or control over plan management or plan assets. 29 U.S.C. § 1002(21)(A). Under the Department of Labor’s plan-asset regulation, when a plan acquires an equity interest in an entity that is neither publicly traded nor a registered investment company, the plan’s assets include an undivided interest in the entity’s underlying assets—the “look-through” rule. 29 C.F.R. § 2510.3-101(a); *see also* 29 U.S.C. § 1101(b)(1) (a plan’s investment in a security issued by a registered investment company does not, by itself, make the issuer’s assets plan assets). A registered mutual fund is thus expressly excepted: the plan asset is the fund share, not the securities inside the fund, and the fund’s manager is regulated under the securities laws rather than as an ERISA fiduciary. The underlying assets of a collective investment trust or an insurance-company separate account holding plan money generally *are* plan assets, so the trustee, sub-adviser, or separate-account manager acts as an ERISA fiduciary. *See* John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 96–106 (1993).

<sup>30</sup> *See* Ferguson v. Ruane Cunniff & Goldfarb Inc., No. 1:17-cv-06685, 2021 WL 3667979 (S.D.N.Y. Aug. 17, 2021) (certifying a mandatory, non-opt-out class under Rule 23(b)(1) on claims that the plan’s investment manager pursued an imprudent strategy by concentrating plan assets in a single security). The concentration in Valeant Pharmaceuticals stock grew to more than 45% of the plan’s assets before the stock collapsed. *See* Press Release, U.S. Dep’t of Labor, Emp. Benefits Sec. Admin. (July 17, 2023); *DOL Secures \$124 Million Settlement on Behalf of DST Systems Participants*, PLANSPONSOR (July 18, 2023). The case illustrates that retention of a *particular* security can generate fiduciary-breach exposure; it is not offered as authority for the special-circumstance theory advanced here.

in this setting so much as sharpen it: the manager cannot invoke the *Dudenhoeffer* price-reliance defense to justify the position, because the very premise of that defense is absent.<sup>31</sup>

***B. The active manager holding at meaningful weight on conviction.***

A step further from settled ground is the manager who holds SpaceX at a meaningful weight—perhaps not dramatically above index—as a considered stock-selection decision. Such a manager must be prepared to justify the prudence of relying on the quoted price notwithstanding the known structural defect. The manager need not refuse to hold SpaceX; prudence is a matter of process, not outcome. But the process must engage the question. A manager who acquires or retains the security while treating its market price as presumptively reliable—without confronting the disabled enforcement environment that the country’s largest fiduciaries publicly flagged—has failed to bring a prudent process to bear. The reliance is reflexive where *Dudenhoeffer*, properly read, calls for deliberation. That is the sense in which prudence here is procedural: the failure to *engage* the price-reliability question is itself a candidate breach, independent of whether the ultimate decision to hold turns out to be wrong.<sup>32</sup>

***C. The plan fiduciary selecting or retaining passive investment options.***

The third setting reaches the ordinary plan, and most of the money. The fiduciary who selects a passive vehicle does not pick its constituents, and that is usually thought to end the inquiry. It does not, and the reason returns to where this essay began. What makes index investing fiduciarily comfortable is not the mechanics of tracking but the price of the constituents. A fiduciary holding a broad benchmark need form no view about any individual constituent because the market has already formed one, and *Dudenhoeffer* permits reliance on it. That is the real content of “we just track the index”: not that tracking is itself a defense, but that every constituent is presumptively priced right, so there is nothing about which to have a view. Remove that premise for a given security and the comfort goes with it. The fiduciary is then holding something about which no one—not the provider, not the manager, and not the market—has made a judgment on which the fiduciary may rest.

Begin with who owes what. Index providers—Nasdaq, FTSE Russell, CRSP, S&P Dow Jones—decide what enters a benchmark. They are not ERISA fiduciaries, and they are not investment advisers: they rely on the Advisers Act’s publisher’s exclusion, and an entity within that exclusion sits outside the entire Act, antifraud provisions included.<sup>33</sup>

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<sup>31</sup> A related question, which to the author’s knowledge has not been litigated in this posture, arises within collective vehicles that must strike a net asset value. Marking a position to a price the fiduciary knows to be of compromised reliability presents a valuation-prudence problem distinct from the decision whether to hold the security at all.

<sup>32</sup> See *Dudenhoeffer*, 573 U.S. at 428; *Hughes v. Nw. Univ.*, 595 U.S. 170, 177 (2022) (reaffirming the ongoing, holding-by-holding character of the monitoring duty under *Tibble*).

<sup>33</sup> Index providers rely on the Advisers Act’s publisher’s exclusion, 15 U.S.C. § 80b-2(a)(11)(D), as construed in *Lowe v. SEC*, 472 U.S. 181 (1985). An entity within the exclusion is outside the Act entirely, including its antifraud provisions. The Commission has asked whether that treatment remains appropriate. See SEC, Request for Comment on Certain Information Providers Acting as Investment Advisers, Release No. IA-6050, File No. S7-18-22 (June 15, 2022) (inquiring, among other things, “to what extent providers view themselves as having fiduciary obligations to any investors that rely on the information they provide”). No rulemaking followed.

The consequence is not that no one owes a duty. It is that index *composition* is owned by the fiduciary who chooses the benchmark. That fiduciary cannot delegate the question.

Which is why the industry has never treated benchmark selection as automatic. SageView publishes a two-part fiduciary's guide to passive fund selection, devoting the first installment to benchmark selection and the second to manager selection—two analyses, not one. UBS Asset Management publishes a framework for index selection spanning construction, governance, and commerciality, with separate treatment of choosing a benchmark and choosing a provider. The CFA Institute observes that passive strategies require numerous active decisions, benchmark selection and oversight of replication methodology among them. Fi360 found 17.3% of index funds in the bottom quartile of its fiduciary scoring.<sup>35</sup> The proposition that selecting a passive vehicle involves no fiduciary judgment is not one the fiduciary-services industry itself accepts.

What does that judgment consider? Vanguard, the largest index manager in the world, publishes its standards: a benchmark should rest on “objective rules, not subjective judgment,” and should include only shares “available on the open market.”<sup>36</sup> At the level of the provider, the international standard is IOSCO's Principles for Financial Benchmarks, adopted in the wake of LIBOR. Principle 3 requires administrators to mitigate conflicts arising from their ownership structure or from other interests of the wider corporate group. Principle 12 requires consultation procedures for material methodology changes. Principles 6 and 11 govern benchmark design and the content of the methodology. Administrators publish statements of compliance, which makes this something a fiduciary can actually ask for and read.<sup>37</sup>

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<sup>34</sup> See Adriana Z. Robertson, *Passive in Name Only: Delegated Management and “Index” Investing*, 36 Yale J. on Reg. 795 (2019) (analyzing the methodology documents of hundreds of indices and concluding that index investing entails substantial delegated discretion to index providers, and proposing enhanced disclosure concerning the underlying index).

<sup>35</sup> See SageView Advisory Group, *A Fiduciary's Guide to Passive Fund Selection—Benchmark Selection* (Aug. 2017); SageView Advisory Group, *A Fiduciary's Guide to Passive Fund Selection Part II—Manager Selection* (Apr. 2018); UBS Asset Mgmt., *A Short Guide to Index Selection* (framework spanning index construction, index governance, and commerciality, with separate treatment of benchmark selection and index provider selection); *Passive vs. Active Management: Three Myths in DC Plan Strategy Selection*, CFA Inst. Enterprising Investor (Nov. 30, 2021) (noting that passive strategies “also require numerous ‘active’ decisions and comparable due diligence regarding benchmark and share class selection and fees, as well as knowledge and oversight of replication methodology”); Michael Limbacher, *Do Bad Index Funds Exist?*, Fi360 (Feb. 2018) (reporting that 17.3% of index funds scored in the fourth quartile of Fi360's Fiduciary Score rankings).

<sup>36</sup> Vanguard, *Benchmarks* (stating that benchmarks should “be based on objective rules, not subjective judgment” and should “include only shares and bonds that are available on the open market”); see also Vanguard, *When Index Funds Mix but Don't Match* (June 4, 2025) (differences in index construction methodology create unintended active risk that is “often invisible until market volatility occurs”).

<sup>37</sup> IOSCO, *Principles for Financial Benchmarks: Final Report*, FR07/13 (July 2013). Principle 3 requires administrators to identify and mitigate conflicts of interest “created by the ownership or control structure or due to other interests arising from the Administrators' staff or wider group” in relation to benchmark determinations; Principle 12 requires stakeholder consultation procedures for methodology changes deemed material; Principles 6 and 11 address benchmark design and the content of the methodology. Administrators publish statements of compliance with the Principles, which a fiduciary may request. In the United Kingdom and European Union, comparable obligations are binding on benchmark administrators under the Benchmarks Regulation.

The last several months measure poorly against those standards. Nasdaq amended its rules to admit large IPOs to the Nasdaq-100 after fifteen trading days, and SpaceX joined on July 7, 2026.<sup>38</sup> FTSE Russell adopted a fast-entry rule in May 2026 admitting qualifying IPOs after five trading days and relaxed its minimum float requirement; SpaceX entered the Russell 1000 in June. Morningstar's CRSP indexes added an alternative liquidity screen on the same five-day timetable, and MSCI added SpaceX at the end of June.<sup>39</sup> S&P Dow Jones Indices ran a formal consultation on whether to shorten seasoning, waive profitability, and drop the float minimum—and on June 4, 2026 retained all three, without change, for all new listings regardless of market capitalization.<sup>40</sup>

Two features of that record deserve attention. FTSE's consultation document stated that the proposed rule responded to client feedback regarding the projected listing of several large IPOs in 2026, naming SpaceX, OpenAI, and Anthropic. A rule drafted with named beneficiaries is difficult to describe as objective rules rather than subjective judgment. And Nasdaq operates both an exchange and an index business. The New York City Comptroller, writing to the London Stock Exchange Group, put the concern directly: the changes appear to have been made on the index side of Nasdaq's business to benefit the exchange side.<sup>41</sup> That is the conflict IOSCO Principle 3 exists to address.

S&P's decision supplies the control case. Presented with the same company and the same commercial pressure, the largest index provider in the world ran a consultation and kept its seasoning, profitability, and float requirements intact. The changes elsewhere were not compelled by market necessity. They were choices, and one major provider made the opposite one.

The screens that were relaxed are also not arbitrary. A seasoning period exists so that a security trades long enough for price discovery to occur—a proposition courts have accepted in holding that the market for a newly public security has not yet become efficient during the weeks immediately following an offering.<sup>42</sup> A float minimum exists so that price reflects genuine supply

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<sup>38</sup> Space Exploration Technologies Corp. joined the Nasdaq-100 Index effective July 7, 2026, under Nasdaq's 2026 "Fast Entry" framework, which permits eligibility after fifteen trading days for issuers ranking within the top forty by market value. *See* Press Release, Nasdaq, Inc., Space Exploration Technologies Corporation to Join the Nasdaq-100 Index Beginning July 7, 2026 (June 26, 2026).

<sup>39</sup> FTSE Russell adopted a fast-entry rule on May 26, 2026, admitting IPOs with investable market capitalization above the Russell Top 500 cutoff after five trading days, and relaxed its minimum free-float requirement; SpaceX was added to the Russell 1000 and Russell Top 200 effective after the close on June 26, 2026. Morningstar's CRSP indexes introduced an alternative liquidity screen permitting inclusion on a comparable five-day timetable, and MSCI added SpaceX to its standard and large-cap indexes effective June 29, 2026. *See* FTSE Russell, Index Notice (June 2026); *How Index Funds Are Adapting to Mega-IPOs*, Morningstar (July 14, 2026).

<sup>40</sup> S&P Dow Jones Indices conducted a formal consultation on whether to shorten its seasoning period, waive its GAAP-profitability requirement, and eliminate its minimum float requirement for megacap companies, and announced on June 4, 2026 that it would retain all three requirements without change, effective immediately and applicable to all new listings regardless of market capitalization. SpaceX accordingly remains ineligible for the S&P 500 until at least mid-2027. *See* SpaceX to Join the Nasdaq-100 in a Fast-Tracked Process That Will Drive Huge ETF Buying Demand, CNBC (June 26, 2026).

<sup>41</sup> Letter from Brad Lander, N.Y.C. Comptroller, to London Stock Exchange Group & FTSE Russell (June 2026) (noting that the FTSE consultation document acknowledged the proposed rule was developed in response to "client feedback" regarding "the projected listing of several large IPOs in 2026 (e.g., SpaceX, OpenAI, Anthropic)"; observing that "because Nasdaq operates both an exchange and an index business, we are deeply concerned that those changes appear to have been made on the index side of Nasdaq's business to benefit the exchange side"; and requesting that FTSE Russell reconsider the rule and disclose the analysis supporting it).

<sup>42</sup> *See In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 576–77 (S.D.N.Y. 2008) (relying on SEC regulatory history and trading-volume data to conclude that during the twenty-five-day post-IPO period the market

and demand rather than mechanical imbalance in a thin market. A profitability requirement exists so that there is a financial record against which price can be assessed. These are proxies for the reliability of a constituent's price—the very assumption on which the passive fiduciary rests. SpaceX was admitted with roughly four percent of its stock trading, under a waived float requirement, into forced buying by every fund tracking the index.<sup>43</sup> Whatever else that price reflects, it is not the product of the conditions those screens were designed to ensure.

That yields a conclusion requiring no novel theory. A fiduciary selecting a benchmark made a determination, at the time of selection, that the vehicle was appropriate for the plan. The Department's prudence regulation describes that determination as requiring consideration of "the risk of loss and the opportunity for gain" associated with the investment.<sup>44</sup> When the benchmark rewrites its admission criteria, that determination was made against facts that no longer obtain: the fund the fiduciary evaluated is not the fund it now holds. *Tibble* establishes that retention is a fiduciary act separate from selection, and that the duty to monitor is continuing.<sup>45</sup> A material change in index methodology is the kind of changed circumstance that duty exists to catch. The fiduciary need not conclude that the benchmark has become imprudent, but it must look at the question again. Nor is a fund's stated mandate merely aspirational: courts have allowed index-fund investors to pursue claims against advisers and trustees for managing a fund inconsistently with its stated index-tracking objective, and for disclosures that no longer matched the portfolio.<sup>46</sup>

Nor is looking through a fund to what it holds a novel demand. The Department's proposed prudence rule—designed, pointedly, to reduce fiduciary litigation risk—assumes throughout that a fiduciary evaluating a fund examines its underlying holdings: how the securities inside are valued, and whether the benchmark against which the fund is measured actually resembles what the fund holds. The proposal singles out cap-weighted construction, an index that "only adjusts its constituents" as market capitalizations change, as a poor comparator for that reason. The Ninth Circuit took the same approach in assessing whether including a fund holding hedge-fund and private-equity positions was prudent.<sup>47</sup> If a fiduciary must look through a target-date fund to its

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for a newly public security "has likely not yet become 'efficient'" because information may not yet be broadly disseminated and aftermarket trading may not yet have stabilized).

<sup>43</sup> Because SpaceX's public float is small relative to its capitalization, commentators observed that mechanical passive demand—rather than fundamentals—would materially drive early price formation. *See* The SpaceX Mega-IPO: Why Index Choice Matters, CME Grp. (June 10, 2026).

<sup>44</sup> 29 C.F.R. § 2550.404a-1(b)(2)(i) (defining "appropriate consideration" to include a determination that the investment or investment course of action is reasonably designed, as part of the portfolio, to further the purposes of the plan, "taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action").

<sup>45</sup> *Tibble v. Edison Int'l*, 575 U.S. 523, 529–30 (2015) (holding that ERISA imposes a "continuing duty to monitor trust investments and remove imprudent ones" that is "separate and apart from the [fiduciary's] duty to exercise prudence in selecting investments").

<sup>46</sup> *See* *Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1050–62 (9th Cir. 2015) (holding that an index fund's shareholders stated direct claims against the adviser and trustees for breach of fiduciary duty and contract for failing to manage the fund in accordance with its stated index-tracking objective); *In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534 (N.D. Cal. 2009) (certifying Securities Act classes where funds' portfolios allegedly diverged from their stated investment objectives and risk disclosures).

<sup>47</sup> *Fiduciary Duties in Selecting Designated Investment Alternatives*, 91 Fed. Reg. 16088 (proposed Mar. 31, 2026) (to be codified at 29 C.F.R. pt. 2550) (RIN 1210-AC38). The proposed rule's valuation factor requires the fiduciary to look through a fund to how its underlying non-publicly-traded securities are valued, *id.* at 16100–01 (proposed § (j)(2)), and its benchmarking factor treats a large-capitalization index as an unmeaningful comparator for a target-date fund in part because such an index "only adjusts its constituents over time due to changes in the constituent

private-equity sleeve, the same fiduciary cannot treat an index fund's constituents as beyond its concern.

The analysis tightens where a plan runs its own passive book. A large public system replicating an index internally is not buying someone else's product; it is deciding, security by security, what the plan will own. It can deviate—screened index variants and exclusion overlays are ordinary and widely used. For that fiduciary neither answer is available: not “we hired a manager,” because there is none, and not “we had no choice,” because the choice is exercised daily. A plan that replicates a benchmark internally makes an affirmative decision to buy SpaceX, and should be prepared to explain the basis on which it did.

None of this requires a fiduciary to abandon indexing. It is worth noting that engagement with index providers is ordinary practice for the largest managers: Vanguard states publicly that it works with providers on their construction methodologies, including how they include IPOs.<sup>48</sup> What the analysis requires is that the fiduciary recognize which decisions remain its own. The choice of benchmark is one of them.

One further point of exposure runs across all three settings. A plan fiduciary who appoints and monitors an investment manager that imprudently holds SpaceX may face derivative exposure under ERISA's co-fiduciary provisions, which widen the field of potential defendants beyond those who exercise investment discretion directly.<sup>49</sup>

## VII. The Standard Governing Public Plans

Most of the money that will hold SpaceX through an index is not governed by ERISA. Public retirement systems—state and municipal—sit outside the statute. They are also, and this is not incidental, the institutions that have built the private-enforcement mechanism this essay describes. Public pension funds have served as lead plaintiffs in roughly forty percent of federal securities fraud class actions, including the Enron, WorldCom, and Wells Fargo actions, and in a comparable share of transactional class actions in Delaware; empirical work associates their participation with higher settlements and lower attorney's fees.<sup>50</sup>

That makes this structure a matter of direct concern for them. The class mechanism SpaceX has eliminated is the instrument through which public systems have historically enforced the securities laws on behalf of investors generally. A public system holding SPCX holds a security

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securities' market capitalizations,” *id.* at 16101–02 (proposed § (k)(1)). *See also* Anderson v. Intel Corp. Inv. Pol’y Comm., 137 F.4th 1015, 1024 (9th Cir. 2025) (treating the composition and characteristics of a target-date fund’s underlying hedge-fund and private-equity holdings as the material a court examines in assessing whether the fiduciary’s process for including the fund was prudent), *cert. granted*, No. 25-498 (U.S. Jan. 16, 2026) (on the separate question whether an underperformance claim must plead a “meaningful benchmark”). The Ninth Circuit affirmed dismissal; *Anderson* is offered for its premise, not its result.

<sup>48</sup> Vanguard, *Bringing the Shareholder Voice to Benchmark Methodology* (describing Vanguard’s practice of encouraging index providers to adopt construction best practices, and stating that it is “working with index providers to address how they include IPOs, with the intention of providing investors with more accurate market exposure”).

<sup>49</sup> *See* 29 U.S.C. § 1105(a) (co-fiduciary liability); *cf.* 29 U.S.C. § 1104(a)(1)(B) (the prudent-person standard).

<sup>50</sup> *See* David H. Webber, *Reforming Pensions While Retaining Shareholder Voice*, 99 B.U. L. Rev. 1001, 1013–14 (2019) (reporting that public pension funds have served as lead plaintiffs in approximately forty percent of federal securities fraud class actions, including the Enron, WorldCom, and Wells Fargo actions, and in approximately forty percent of transactional class actions in Delaware, and collecting empirical research associating public pension lead plaintiffs with higher settlements and lower attorney’s fees).

engineered to disable the specific tool that system has used more than any other class of institutional investor.

The fiduciary standard governing that holding is, in most states, ERISA's. At least thirty-one states have adopted fiduciary standards derived from ERISA's prudent-man rule, fifteen of them verbatim.<sup>51</sup> California's Constitution requires retirement board members to discharge their duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims"—the language of 29 U.S.C. § 1104(a)(1)(B), reproduced—and to diversify "so as to minimize the risk of loss and to maximize the rate of return." Minnesota's Chapter 356A copies not only the prudent-person standard but ERISA's architecture: fiduciary status, general standard, investment duties, breach and remedies, co-fiduciary liability, indemnification.<sup>52</sup>

The funds say so themselves. CalSTRS's published investment policy states that as a public pension fund it is not subject to ERISA, and that its investment decision-making criteria rest on the prudent-expert standard, "for which the ERISA prudence standards serve as a basis."<sup>53</sup>

The convergence is not merely a matter of borrowed language. ERISA's duty of prudence is itself absorbed from trust law; the statute is, in its most important dimension, federal trust law.<sup>54</sup> State public-pension prudence standards descend from the same source. Federal decisions construing prudence are therefore persuasive for public systems not because legislatures copied Congress, but because both bodies of law are working out a single trust-law duty. A public trustee asking what prudence requires when a benchmark's admission standards change, or when a constituent's price reliability is compromised, is asking a question ERISA courts have been answering for fifty years.

A public system cannot treat the analysis above as somebody else's problem. It is not bound by ERISA. It is measured against a standard drawn from the same trust-law source, in a matter where it has more at stake than anyone.

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<sup>51</sup> Nationwide Retirement Inst., *Governmental Plan Fiduciary Duties* (reporting that at least 31 states have adopted fiduciary standards derived from ERISA's prudent-man standard, with 15 adopting the standard verbatim).

<sup>52</sup> Cal. Const. art. XVI, § 17(b)–(d) (requiring retirement board members to discharge their duties "solely in the interest of, and for the exclusive purpose of providing benefits to, participants and their beneficiaries"; with "the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims"; and to "diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so"); compare 29 U.S.C. § 1104(a)(1)(B)–(C). See also Minn. Stat. ch. 356A (Public Pension Fiduciary Responsibility), §§ 356A.02 (fiduciary status), .04 (general standard of fiduciary conduct; prudent person), .05 (duties applicable to all activities), .06 (investments), .09 (fiduciary breach; remedies), .10 (cofiduciary responsibility and liability), .11 (fiduciary indemnification).

<sup>53</sup> CalSTRS, *Investment Policies* ("As a public pension fund, the California State Teachers' Retirement System is not subject to ERISA, which governs corporate pension plans. The CalSTRS investment decision-making criteria are based on the 'prudent expert' standard, for which the ERISA prudence standards serve as a basis.").

<sup>54</sup> See John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great-West*, 103 Colum. L. Rev. 1317, 1318–19 (2003) ("ERISA is, in its most important dimension, federal trust law"; the statute "absorbs the core fiduciary duties of loyalty and prudence from trust law"); *Tibble v. Edison Int'l*, 575 U.S. 523, 528–29 (2015) (looking to the law of trusts to determine the contours of ERISA's fiduciary duties).

## Conclusion

An ERISA lawsuit bringing such a claim would face obvious challenges. No court has yet recognized *any* special circumstance under *Dudenhoeffer*; a fiduciary-breach theory built on the reservation would be asking a court to populate a category the Supreme Court left deliberately empty, and courts have set the bar for displacing the efficiency presumption very high. The damages inquiry is hard: proving loss “resulting from” the breach would require a counterfactual valuation—what SPCX would trade for under ordinary disclosure-enforcement discipline—and would demand that an expert disentangle the arbitration-and-control discount from ordinary business and sector risk.<sup>55</sup>

What the analysis asks of a fiduciary is also narrower than it may appear. It does not ask any fiduciary to divest, to abandon indexing, or to predict that SpaceX will disappoint. It asks four things. Confront the price-reliability question rather than resting on the quoted price, and record having done so. Where a benchmark has rewritten its admission criteria, treat that as the changed circumstance the continuing duty exists to catch, and evaluate the vehicle again against the plan’s objectives. Ask an index provider for its statement of compliance with the IOSCO Principles, and read what it says about conflicts and methodology changes. And where a plan replicates a benchmark on its own book, recognize the decision as the plan’s own and make it deliberately. A fiduciary who does those things may still hold the security. A fiduciary who does none of them will have no answer beyond the one this essay contends is no longer available.

These are reasons for care, not reasons for silence. I will state the conclusion more plainly than doctrine yet permits a court to, because the situation warrants it. On what is already public, SpaceX is a genuinely difficult holding to justify under ERISA. The problem is not the soundness of the business; it is that the company has engineered away nearly every mechanism through which the reliability of its disclosures, and thus of its price, is ordinarily assured. A plan fiduciary who allocates participant assets to SpaceX, and an investment manager who holds it in a collective investment trust or separate account where the security is a plan asset, are exposed to a meaningfully elevated risk of fiduciary liability, precisely because the *Dudenhoeffer* presumption that ordinarily protects such decisions is, for this security, forfeited by design. One is entitled to ask whether any fiduciary charged with the prudent care of other people’s retirement savings should stake those savings on an enterprise so determined to preserve its ability to disadvantage its own investors without consequence. The honest answer, on this record, is that the burden should rest heavily on the fiduciary who says yes.

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<sup>55</sup> The measure of loss would require a counterfactual valuation—what the security would command in a market subject to ordinary disclosure-enforcement discipline—and would need to disentangle the arbitration-and-control discount from ordinary business risk. That difficulty is real but not unique; ERISA courts routinely resolve valuation disputes through expert evidence. *See* 29 U.S.C. § 1109(a).