CRAVATH

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M&A, Activism and Corporate Governance

QUARTERLY REPORT

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Mergers & Acquisitions

Why Divisive Mergers Are Gaining Popularity and How They Can Be Structured to Mitigate Risk

Although spin-offs and asset sales are the traditional means of separating business lines, divisive mergers provide an attractive option for companies looking to achieve contractual continuity and a clean separation of assets and liabilities. A divisive merger is a statutory mechanism that divides a company's assets, liabilities and operations among two or more recipient entities, functioning in the reverse direction of a traditional merger. A key advantage is that divisive mergers allow complex businesses to avoid individually assigning each contract and obligation as required in traditional asset sales. However, this flexibility comes with unique risks of fraudulent transfer challenges and remedies.

Certain states, including Texas and Delaware, have statutory schemes that allow for divisive mergers. Texas first codified divisive mergers by broadening its definition of "merger" to include the division of one domestic entity into two or more organizations.[1] Under Texas law, all types of corporate entities—including corporations, partnerships and limited liability companies—may undergo a divisive merger, and the resulting entities may take any corporate form, even one different from that of the original entity.[2] Delaware, by contrast, allows only limited liability companies, limited partnerships and limited liability limited partnerships to effect divisive mergers, and the resulting entities must be of the same form as the original dividing entity.[3] Corporate entities may first undergo a change of corporate form in order to take advantage of the Delaware divisive merger statutes. In both states, divisive mergers are not considered assignments of assets or liabilities, potentially allowing companies to avoid triggering anti-assignment provisions,[4] reduce transaction costs and bypass third-party waivers or consents.

As with traditional asset sales and spin-offs, parties in a divisive merger can determine the allocation of assets and liabilities among the resulting entities.[5] The operative merger document, a "plan of division," will typically govern allocation. For divisive mergers, if the plan of division does not specify the allocation of a particular liability, that liability will be treated as the joint and several responsibility of all entities resulting from the merger.[6]

As with all types of asset transfers, allocation of assets and liabilities in a divisive merger can expose the dividing entities to risk of fraudulent transfer challenges. There are two types of fraudulent transfer claims: (1) actual fraud, which requires an intent to hinder, delay or defraud creditors; and (2) constructive fraud, which occurs when a transferor does not receive a "reasonably equivalent value" in a transaction and was insolvent at the time or became insolvent as a result.[7]

The typical remedy for fraudulent transfer is "avoiding" the transaction from the perspective of the creditor, which results in the creditor being allowed to recover against or be granted a lien on the transferred asset. Texas and Delaware divisive merger statutes expressly preserve creditor protections for fraudulent transfer claims. The Texas statute expressly provides that divisive mergers do not infringe on or limit any rights of creditors under the law or their contracts, including that creditors retain security interests in collateral.[8] The Delaware statute provides a unique remedy: if a court determines that a divisive merger constitutes a fraudulent transfer, the resulting entities have joint and several liability for the creditor's claims against the original entity.[9] Because divisive mergers result in the separation of assets and liabilities, they may be subject to constructive fraudulent transfer claims based on allegations that entities received less than a

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"reasonably equivalent value" as part of the exchange or were rendered insolvent as a result of the division.

Companies seeking to structure defensible divisive mergers should therefore ensure that division plans are comprehensive and provide for specific asset and liability allocation. Specificity is critical, as unintended joint and several liability for unaccounted assets or liabilities can undermine the entire purpose of the transaction.

To specifically mitigate exposure to fraudulent transfer challenges, companies should also seek to establish the solvency of all resulting entities. Obtaining a pro forma financial analysis prepared by management or advisors and ensuring adequate capitalization can help overcome claims that one entity is left with insufficient assets to bear its allocated liabilities.

> A plan of division that fails to allocate a liability may leave all resulting entities jointly and severally liable for that liability.

STRUCTURING DIVISIVE MERGERS

Companies may take several steps to structure defensible divisive mergers:

1. Document comprehensive and specific asset and liability allocation plans to avoid unintended joint and several liability.
2. Obtain a fairness opinion or a pro forma financial analysis prepared by management or advisors for resulting entities to mitigate exposure to fraudulent transfer claims.
3. Ensure adequate capitalization of resulting entities to avoid constructive fraudulent transfer challenges.
4. Document a legitimate business purpose for a divisive merger to strengthen the transaction's legitimacy and defensibility.

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KEY DEVELOPMENTS IN DELAWARE CASE LAW

Extra-Contractual Fraud Survives Where Earnout Claims Fail

Meyers v. Zimmer Biomet Holdings, Inc., C.A. No. 2025-0732-BWD (Del. Ch. May 1, 2026)

Embody, Inc. ("Embody") was founded in 2014 by Jeff Conroy and developed collagen-based medical devices to treat soft tissue injuries. Its three products, Tapestry, Tapestry RC and Activbraid, cleared the Food and Drug Administration's 510(k) pathway between 2020 and 2023, and the company began selling such products through a network of distributors and eight direct sales representatives. In the summer of 2022, Kristoff Goson, the Global Vice President and General Manager of Extremities and Sports Medicine at Zimmer Biomet Holdings, Inc. ("Zimmer"), a global medical device company, visited Embody's trade-show booth and later approached the company about a potential acquisition of Embody by Zimmer. As alleged, in acquisition discussions, Goson asserted that Embody would become the centerpiece of a sports medicine business that Zimmer was building into "the best in the industry".

During negotiations, Goson allegedly made two oral representations that would underlie the later dispute. First, at a September 2022 orthopedic conference in Boston that Embody, Embody's financial advisor and Zimmer attended, Goson told Embody representatives that Zimmer "was hiring, and already had budget approval to hire, 94 direct sports medicine sales representatives over the next two years" (the "Hiring Representation"). Then, in November 2022, Goson stated that Zimmer was "comfortable" with Embody's existing plans to develop Tapestry RC into second and third versions, that Zimmer "would make the changes work" and that Zimmer was "working on multiple ways" to accelerate that work (the "Development Representation").

On December 22, 2022, the parties signed a merger agreement, pursuant to which Zimmer agreed to acquire Embody for an initial cash payment of $155 million plus up to $120 million in earnout consideration, payable upon satisfaction of milestones during a three-year earnout period ending December 31, 2025. The merger agreement required the surviving entity ("New Embody") to use "commercially reasonable efforts to achieve the Milestones," while vesting New Embody with "sole discretion" to direct and control the production, marketing, promotion, sale and commercialization of the products (the "Efforts Covenant").

After the merger closed on February 14, 2023, Zimmer allegedly implemented an immediate hiring freeze, and, within months, Conroy had begun to raise concerns with Goson about Zimmer's delays in critical hiring and its failure to advance sales. Two years later, Timothy H. Meyers, the securityholder representative for the former Embody securityholders, sued Zimmer and New Embody, asserting fraud, breach of the Efforts Covenant and breach of the implied covenant of good faith and fair dealing. By the end of the three-year earnout period, Zimmer ultimately paid the former Embody securityholders $72,563,965 of the potential $120 million earnout.

Resolving the defendants' motion to dismiss, the court allowed only the fraud claim to proceed while dismissing the contractual claims. First, the court found that, even though the merger agreement did not contain anti-reliance language, which would have been necessary to bar fraud claims premised on misstatements of *present* fact, the merger agreement's standard integration clause was sufficient alone to bar

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fraud claims premised on future promises. On that basis, the court held that the Development Representation and most of the Hiring Representation were unactionable future promises on which the plaintiff could not have justifiably relied. That conclusion followed from the merger agreement itself, which gave New Embody sole discretion over product development and did not obligate Zimmer to follow Embody's plans. The narrow exception was Goson's statement that Zimmer "already had budget approval to hire" sales representatives, which the court treated as a statement of present fact that could support a claim of fraud, with the alleged post-closing hiring freeze supporting an inference of falsity and Goson's senior role supporting an inference that he knew the truth. Second, on the plaintiff's claim for breach of the Efforts Covenant, the court accepted as reasonable the plaintiff's argument that New Embody's obligation to use commercially reasonable efforts cabined the "sole discretion" standard to production, marketing and commercialization, but dismissed the claim because the plaintiff never tied New Embody's conduct to any relevant benchmark and effectively conceded that the challenged decisions fell within a range of commercially reasonable options. Finally, the court dismissed the implied covenant claim because the merger agreement "fully occupies the space" governing post-closing operations, leaving no gap to fill, and because the covenant does not require a buyer to do everything possible to maximize an earnout.

WHY IT MATTERS

- A standard integration clause without express anti-reliance language may not bar extra-contractual fraud claims premised on misstatements of present fact, so parties seeking to foreclose extra-contractual fraud must negotiate robust anti-reliance provisions.
- The line between a representation of actionable "present fact" and an unactionable "future promise" can turn on a single clause: a representation of existing budget approval survived a motion to dismiss while a parallel promise to hire "over the next two years" did not.
- A plaintiff challenging an efforts covenant with respect to an earnout must measure the buyer's conduct against a defined benchmark in order to adequately allege a breach.
- Where a merger agreement permits a buyer to exercise its sole discretion over post-closing operations subject only to an efforts standard, there remains no gap for the implied covenant of good faith and fair dealing to fill.

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KEY DEVELOPMENTS IN DELAWARE CASE LAW

Pleading a Stockholder Control Group and Cleansing Board Conflicts

Le Clair v. KnowBe4, Inc., C.A. No. 2024-1143-KSJM (Del. Ch. May 27, 2026)

KnowBe4, Inc. ("KnowBe4") provides security awareness training to manage cybersecurity risks. Sjoerd Sjouwerman founded the company in 2010, served as its CEO and, as of December 7, 2022, held stock representing roughly 4.2% of KnowBe4's voting power. From 2016 through 2020, KnowBe4's performance attracted investments from Elephant Partners ("Elephant") and KKR Knowledge Investors L.P. ("KKR"), in the form of preferred stock and common stock. These investments granted Elephant and KKR broad governance and consent rights over key corporate actions, including the hiring, termination and compensation of executives. In 2021, Vista Equity Partners Management LLC ("Vista") purchased some of the preferred shares from KKR and Elephant, as well as another institutional investor, for $300 million. This transaction gave Vista 12.4% of KnowBe4's Class A shares, representing 2.8% of KnowBe4's voting power, while KKR retained 9.1% and 31.6% of KnowBe4's Class A and Class B shares, respectively, representing 26.4% of KnowBe4's voting power. Elephant also continued to control 12.9% and 44.9% of KnowBe4's Class A and Class B shares, respectively, representing 37.5% of KnowBe4's voting power. Following Vista's investment, KnowBe4 completed an IPO and adopted a dual-class structure, with the newly issued Class A stock carrying one vote per share and all pre-IPO stock converting into Class B stock carrying 10 votes per share. Subsequently, in 2022, Vista agreed to acquire KnowBe4 for $24.90 per share, implying a total equity value of $4.6 billion. Vista conditioned the deal on an equity rollover by Sjouwerman, KKR and Elephant (the "Rollover Stockholders"), which would total roughly $682 million in equity value.

Because the proposed rollovers created potential conflicts, KnowBe4's board—a majority of whose members either would roll over their own equity in the merger or lacked independence from the investors who did—conditioned the merger on approval by an independent special committee and a majority-of-the-minority of KnowBe4's stockholders under *Kahn v. M & F Worldwide Corp.*[10] ("MFW"). The special committee oversaw the sale process, negotiated the price up from Vista's initial $24-per-share proposal and recommended the transaction. The proxy statement included disclosures regarding the transaction's negotiation history, including the process leading to KKR's final rollover amount, and certain fees the financial advisor to the special committee had previously received from entities related to Vista, KKR and KnowBe4. On January 31, 2023, stockholders approved the merger between KnowBe4 and Vista by overwhelming margins, including 99% approval from KnowBe4's disinterested stockholders, and the deal closed on February 1, 2023. Former stockholders Bill Le Clair and Joseph Pospisil brought suit against KnowBe4's directors, KKR and Elephant, alleging, among other things, that KKR, Elephant and Sjouwerman had formed a control group and breached their fiduciary duties and that the director-defendants breached their duty of loyalty in connection with the merger.

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Chancellor McCormick granted the defendants' motions to dismiss in full. First, the court found that the plaintiffs failed to plead a "legally significant connection" among the alleged group members, KKR, Elephant and Sjouwerman, sufficient to evidence the creation of a control group. Specifically, the plaintiffs did not allege that any written agreement existed among KKR, Elephant and Sjouwerman showing that they had agreed to work toward a shared goal, and the plaintiffs' theory that the parties maintained "historical ties" failed because such ties were not sufficiently "thick and long-standing". The court also rejected the argument that adopting MFW protections conceded the existence of a conflicted controller, reasoning that such a rationale would perversely discourage boards from using those protections. Second, as to the director-defendants, the court held that because a fully informed, uncoerced stockholder vote was achieved, the KnowBe4 board's conflicts arising from the rollover were cleansed and business judgment review, rather than entire fairness, applied. The court found that none of the asserted deficiencies—the alleged conflicts of the special committee or their advisors, KKR's rollover participation, the support agreement of a large but unaffiliated minority stockholder and alleged favoritism of Vista arising from the pace of the negotiations and treatment of other speculative bidders—rendered the vote uninformed or coerced. Accordingly, under the business judgment rule, the plaintiffs failed to state a claim against the directors.

WHY IT MATTERS

- Common participation in rollover arrangements is unlikely to constitute a control group by itself. Here, the court treated the Rollover Stockholders' parallel decisions to roll over equity and enter into support agreements as a classic example of aligned economic interests but not the legally significant connection required to plead collective control for conflict-of-interest purposes.
- A majority-of-the-minority vote cleanses assumed board conflicts only when advisor and rollover conflicts are affirmatively disclosed in enough detail to withstand later claims of defective disclosure.

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KEY DEVELOPMENTS IN DELAWARE CASE LAW

Interpreting Heightened Disinterestedness Presumption Under Amended Delaware Law

Ayers v. *Foley*, C.A. No. 2025-0650-LWW (Del. Ch. June 15, 2026)

Fidelity National Financial, Inc. ("FNF") trades on the New York Stock Exchange ("NYSE") and provides title insurance, mortgage loan servicing and other real estate services. FNF was a Delaware corporation until June 11, 2025, when it re-domesticated to Nevada. At the time relevant to this dispute, FNF's eleven-member board included nine non-employee directors that FNF's board deemed independent under NYSE rules, as well as founder and Non-Executive Chairman William Foley and Executive Vice Chairman Raymond Quirk. FNF's Compensation Committee is responsible for setting director and officer compensation and approving equity grants under the company's incentive plan (the "Incentive Plan"), which stockholders approved in 2016. The Compensation Committee engaged Strategic Compensation Group LLC ("SCG") as its outside compensation consultant in August 2022 and later determined SCG to be independent under NYSE rules. For equity awards under the Incentive Plan, the Compensation Committee used "title operating margin" as its key performance metric for measuring management's performance.

From 2022 through 2024, citing FNF's title operating margin, FNF's Compensation Committee raised the non-employee directors' cash retainers and equity grants, notwithstanding mediocre performance on other metrics such as market capitalization, revenue and net income. The Compensation Committee also increased Foley's equity grant in 2023, and, in October 2024, granted the non-employee directors a cash retainer increase and a one-time $100,000 special equity grant, from which Foley was excluded. Around the same time, following the October 2024 release of a news article in which Foley stated that he intended to transition away from his work with public companies, a member of the Compensation Committee discussed with Foley a potential equity award to retain him as Chairman through 2027. Consequently, the Compensation Committee negotiated and approved a $50 million equity grant to Foley (the "Equity Grant"), but conditioned its approval on further review by a separate board-authorized related person transaction committee (the "RPT Committee") given the size of the award. After holding multiple meetings and reviewing the independence and market research of SCG, as well as a legal memorandum it had requested from FNF's in-house counsel, the RPT Committee concurred with the Compensation Committee's determination that the Equity Grant was appropriate.

Stockholder Patrick Ayers filed a derivative suit against the director-defendants on June 10, 2025, the day before FNF's re-domestication took place, asserting breach of fiduciary duty and unjust enrichment claims arising out of the Equity Grant and the compensation awards granted to directors between 2022 and 2024. The defendants moved to dismiss under Delaware Court of Chancery Rules 23.1 and 12(b)(6), which the court granted in part and denied in part.

First, as to the Equity Grant, the court provided the first judicial interpretation of the heightened presumption of disinterestedness prescribed by Section 144(d)(2) of the Delaware General Corporation Law ("DGCL"), which applies to any director whom the board has determined satisfies national exchange independence criteria and may be rebutted only by "substantial and particularized facts" that the director has a material interest in the challenged transaction or a material relationship with an interested person. Notably, the court held that the presumption is not confined to Section 144's enumerated safe harbors and that the statute's use of "substantial" requires facts significant enough to evidence a disabling conflict, not merely a large

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volume of tangential allegations. Applying this standard to three of the directors challenged by the plaintiff, the court held that overlapping board service with Foley at other Foley-affiliated companies, aggregated director fees earned over the course of a decade and minority co-investments alongside Foley in professional sports franchises did not, in the absence of particularized facts showing that these relationships were bias-producing, rebut the presumption of independence. With a majority of the board thus remaining disinterested, and with the plaintiff failing to separately plead a substantial likelihood of liability in light of the safe harbor provided by Section 144(a)(1) of the DGCL and FNF's Section 102(b)(7) exculpatory charter provision, the court held that demand was not excused and dismissed the claims premised on the Equity Grant.

Second, as to the other director compensation awards at issue, the court subjected the awards to entire fairness review because the approving committee members were interested in setting their own pay, and held that the plaintiff alleged both unfair dealing and an unfair price based on FNF's underperformance on certain financial metrics and director compensation relative to industry peers. The fiduciary duty claims therefore survived against the directors who approved the compensation awards but were dismissed as to those who merely benefitted from such awards. The related unjust enrichment claim survived against all director-defendants who received the challenged compensation.

WHY IT MATTERS

- The Delaware Court of Chancery's interpretation of Section 144(d)(2) of the DGCL, which was enacted by Delaware in March of last year, is the first instance in which a Delaware court has addressed the heightened presumption of disinterestedness. In doing so, the court confirmed that the presumption is not confined to the safe harbors set out in Section 144(a), (b) and (c) but instead applies broadly, including in the demand-futility context.
- The court held that the "substantial and particularized facts" threshold requires allegations of genuine qualitative significance sufficient to evidence a disabling conflict before an exchange-determined independent director's impartiality can be called into doubt. For boards, this suggests that common director relationships—such as overlapping board seats, accumulated director fees and minority co-investments, all of which were at issue here—are unlikely, standing alone, to be treated as disqualifying.

Activism

KEY DEVELOPMENTS

Campaign Activity Accelerates Amid M&A Surge[11]

Global shareholder activism accelerated meaningfully in the second quarter of 2026, with 74 campaigns launched worldwide, up 19% quarter-over-quarter, and marking the busiest quarter in two years. This increase broke from the typical slowdown that follows the U.S. nomination window. The U.S. remained the most active market, with 27 campaigns launched in Q2, although APAC activity also surged. In total, APAC campaign volume rose 138% from Q1 (from 13 campaigns to 31 campaigns), driven by increased activist engagement tied to Japan's June-heavy annual general meeting season. Europe's 14 Q2 campaigns also tied for its busiest quarter over the past eight quarters. M&A-related demands drove much of the quarter's acceleration, with the share of campaigns featuring an M&A demand jumping from 29% in Q1 to 47% in Q2 (a 63% quarter-over-quarter increase), as activists capitalized on a robust transaction and capital markets environment. Of these M&A demands, a broader trend of activists calling for outright sales developed. This includes Ananym Capital, which reportedly urged Bio-Techne to consider selling itself in June before the company subsequently agreed to be acquired by Merck. Likewise, after initially rejecting an acquisition bid, Intertek drew the attention of several activists across April and May, before the company ultimately agreed to the acquisition at an improved price.

Activists won an implied 26 board seats in Q2 2026, contributing to the 17% year-over-year decrease between H1 2026 and H1 2025 (71 vs. 86, respectively). This was in part attributable to a relatively muted U.S. proxy season, with just three U.S. proxy fights and major "withhold" campaigns occurring in Q2. Among those contests, only one activist captured a single board seat (Summer Road at Ingles Markets). In addition, activist settlement activity declined in the U.S., and the number of activists launching campaigns continued to track below the four-year average. Through the first half of 2026, there have been 19 CEO resignations globally within 12 months of an activism campaign.

Federal policymakers continue to scrutinize the influence of proxy advisors. On April 1, the U.S. Department of Labor published Technical Release 2026-01, raising the prospect that certain proxy advisory services must satisfy ERISA's functional fiduciary requirements. Meanwhile, at the state level, ISS and Glass Lewis secured preliminary injunctions blocking new Kansas and Indiana proxy advisor disclosure laws ahead of their July 1, 2026 effective dates. These judgments illustrate the limits of states' efforts to restrict proxy advisor recommendations.

M&A-related demands appeared in 47% of campaigns in Q2 2026, up 63% quarter-over-quarter.

WHY IT MATTERS

- With M&A demands surging 63% quarter-over-quarter and activists increasingly agitating for outright sales, boards should expect continued pressure to pursue or defend against strategic transactions heading into the second half of the year.
- Despite an active proxy season taking shape, activists appeared less inclined to seek board representation, with settlements and contested votes both declining in the second quarter.
- As federal and state governments alike champion policies designed to limit proxy advisor influence, new governance tools and disclosure regimes may fill in the gaps.

Tax

KEY DEVELOPMENTS

Continuing Evolution of IRS Ruling Practice for Spin-Offs

On May 5, 2026, the Internal Revenue Service ("IRS") reinstated a policy allowing taxpayers to seek an IRS ruling on narrow legal issues raised by corporate spin-offs and other reorganizations.[12]

- Prior to the reinstatement of this "significant issue" ruling practice, taxpayers were only able to obtain IRS rulings on the entirety of a transaction.

The announcement continues the IRS's recent efforts to provide flexibility to taxpayers pursuing spin-off transactions, including through the withdrawal of 2024 guidance and 2025 Proposed Regulations that had attracted substantial industry comment.

- In public statements, IRS officials have said the more recent, flexible approach is designed to incentivize participation in the ruling process, particularly because "there is currently no plan to issue additional formal guidance" on spin-off transactions.[13]

Taxpayers may once again seek an IRS ruling on a single significant issue raised by a spin-off or other reorganization.

WHY IT MATTERS

- The ability to request a ruling on a single significant issue enables taxpayers to receive guidance from the IRS while reducing delay and administrative burdens.
- The greater flexibility and certainty provided by recent guidance may open up new opportunities for taxpayers considering a spin or split-off transaction.

Regulatory

ANTITRUST – KEY DEVELOPMENTS

Supreme Court Ends For-Cause Removal Protection for FTC Commissioners

As discussed in further detail in the section titled "The Supreme Court Expands Presidential Power Over Independent Agencies" below, on June 29, 2026, the Supreme Court struck down for-cause removal protection for FTC Commissioners as unconstitutional in *Trump* v. *Slaughter.*[14] Although unlikely to have immediate effects on merger review and antitrust enforcement given the Commission's current Republican-majority composition, the Court's decision did eliminate a key difference between the FTC and DOJ Antitrust Division: formerly, FTC Commissioners enjoyed for-cause removal protection, while the Assistant Attorney General for Antitrust did not. Because the President now controls both agencies directly, alignment on merger enforcement policy should be even closer (although it has largely been in the last few administrations). Future Presidents may also fire FTC Commissioners, in particular of the opposing party; in which event FTC decisions will not come with the potential for associated dissents from minority commissioners.[15] It remains to be seen what impact the decision—and the expected new make-up of the Commission going forward—will have long-term on merger review.

Leadership Changes at DOJ

The DOJ Antitrust Division has seen multiple leadership changes over the past few months. In February, Assistant Attorney General Gail Slater resigned as head of the Division.[16] At the end of June, Acting Assistant Attorney General Omeed A. Assefi also departed the Division.[17]

On July 21, 2026, President Trump nominated Adam Candeub to be the Assistant Attorney General for the Antitrust Division. Mr. Candeub, who is currently the general counsel of the Federal Communications Commission, has been critical of the technology sector, but it remains to be seen how that could translate into antitrust enforcement if he is confirmed.[18] Until he is confirmed, Associate Attorney General Stanley Woodward will lead the Division.[19]

WHY IT MATTERS

- DOJ and FTC merger and antitrust policy may be more likely to align with each other and with the White House.
- With reduced independence, enforcement priorities at the FTC may shift more quickly across administrations, so parties should account for the possibility of greater volatility in agency policy when planning transaction timing and remedy strategy.
- Leadership changes at DOJ could impact enforcement priorities, including increased scrutiny of the technology sector.

Regulatory

ANTITRUST – KEY DEVELOPMENTS (CONTINUED)

Update on HSR Rule Changes

On February 12, 2026, a federal district court vacated[20] the new HSR form that took effect on February 10, 2025.[21] The U.S. Court of Appeals for the Fifth Circuit subsequently denied the FTC's motion for a stay pending appeal; as a result, the FTC has been accepting HSR filings using the pre-February 2025 Form and Instructions since March 23, 2026.[22] On March 26, 2026, the Fifth Circuit granted the FTC's motion to hold its appeal in abeyance, pausing the proceedings until December 31, 2026.[23]

On March 25, 2026, the FTC and DOJ launched a joint public inquiry seeking comment on the "effectiveness" of the updated HSR premerger notification form, which took effect on February 10, 2025.[24] In announcing the inquiry, the FTC noted that it "continues to believe that the prior, nearly 50-year-old form is insufficient to review modern mergers and acquisitions".[25] The FTC also noted that it is considering engaging in a new HSR rulemaking process.[26]

Continued Acceptance of Remedies by the Agencies

The FTC continues its active acceptance of merger remedies—particularly divestitures—to resolve deals across a range of industries, including healthcare,[27] community living,[28] self-service food and beverage vending solutions,[29] pharmaceuticals[30] and automotive service centers.[31]

State AGs' Increased Interest in Merger Enforcement

In May 2026, five Democratic state attorneys general ("AGs") announced a joint effort to expand enforcement of their states' antitrust laws to fill a perceived federal enforcement gap. State AGs from California, Oregon, Washington, Nevada and New York plan to increase state scrutiny of mergers and acquisitions.[32] This announced partnership comes after certain state AGs have taken an increasingly active role in merger enforcement. For example, eight state AGs sued to block the merger of Nexstar and Tegna,[33] two of the largest broadcasters in the United States, even though DOJ had allowed the deal to close.[34] The states obtained a preliminary injunction halting the deal while the litigation proceeds.[35] After obtaining the preliminary injunction, additional state AGs joined the lawsuit, and now a bipartisan coalition of 13 state AGs is challenging the Nexstar/Tegna merger.[36]

> The Fifth Circuit has paused the appeal of the new HSR rules until December 31, 2026, while the agencies consider a new rulemaking process.

WHY IT MATTERS

- While the agencies have reverted to the "old" HSR form and instructions, dealmakers should be aware that the agencies are still considering potential changes to the HSR process that could affect the timing, cost and complexity of M&A transactions subject to HSR filing requirements.
- The FTC continues to scrutinize deals for competitive harm and is willing to impose significant structural conditions as a prerequisite to clearing transactions.
- Resolving federal merger scrutiny does not eliminate the risk of state challenges, which can result in injunctions or other remedies.
- Parties should factor state-level antitrust review into deal planning, including the possibility that a coalition of state AGs may challenge a transaction even after it has cleared federal review.

Regulatory

EMPLOYEE MATTERS – KEY DEVELOPMENTS

SEC Proposal to Reduce Executive Compensation Disclosure for Most Companies

As discussed more broadly in the section titled "The SEC Reopens the Public Company Playbook" below, on May 19, 2026, the SEC proposed to extend the "emerging growth company" disclosure regime to all companies that qualify as "non-accelerated filers" or "NAFs," generally companies with less than $2 billion of public float or less than 60 consecutive months of SEC reporting.[37] Such proposed changes would significantly reduce executive compensation disclosure requirements for most public companies.

In short, companies that qualify as NAFs would be able to benefit from the following accommodations:[38]

- The following disclosures can be omitted: Compensation Discussion and Analysis, CEO pay ratio, pay-versus-performance, director compensation and all compensation tables other than the summary compensation table and outstanding equity awards table;
- Remaining disclosure would cover three named executive officers instead of five;
- Summary compensation table only covers two years instead of three; and
- No requirement to conduct say-on-pay or say-on-frequency votes.

For additional details regarding the SEC's proposed changes, including proposed changes outside of executive compensation, please see Cravath's prior memos on the topic.[39]

Considerations of Proposed Changes

The obvious impact of the proposed amendments would be to significantly reduce the time, effort and cost NAFs would spend preparing the annual proxy. Most importantly, these companies would be excused from conducting shareholder votes on executive compensation and the associated effort to align shareholders in support of the company's say-on-pay proposal.

However, companies will still want to give careful consideration to whether unintended consequences may result from fully embracing the reduced executive compensation requirements, if adopted by the SEC. For instance, shareholders may expect that certain compensation information will be disclosed, even if not required. This can be analogized to the financial reporting context, where covenants in credit agreements may require companies to provide quarterly financial statements, even if no longer required by the SEC. It is possible that proxy advisory firms and shareholders may push NAFs to provide disclosures that they have become accustomed to receiving. There are some examples of this already in the compensation space, such as the Compensation Discussion and Analysis section and proposals for equity plan approval, where voluntary disclosure has become the norm.

Under the SEC's proposal, non-accelerated filers could omit CD&A, CEO pay ratio, pay-versus-performance and certain director compensation disclosures, and they would no longer need to hold say-on-pay votes.

Regulatory

EMPLOYEE MATTERS – KEY DEVELOPMENTS (CONTINUED)

SEC Proposal to Reduce Executive Compensation Disclosure for Most Companies

More importantly, the say-on-pay vote currently functions as a pressure valve, allowing shareholders to vent frustrations they have with a company's compensation practices. Without say-on-pay as an outlet, proxy advisory firms and shareholders may instead target compensation committee members in director elections, a step that is generally only taken after the company has been unresponsive to low levels of say-on-pay support. Another possible target for shareholders who want to send a message would be equity plan proposals, which will still be required if the SEC's proposed changes are implemented.

This is not to say that companies that would qualify as NAFs will necessarily be stuck maintaining current levels of compensation disclosure and holding say-on-pay votes. Companies that currently qualify as emerging growth companies do not, in our experience, receive any adverse reactions from shareholders for maintaining reduced disclosure and not providing say-on-pay votes.

Either way, the SEC's proposal would result in an unprecedented reduction in executive compensation requirements for public companies. It would not be surprising if proxy advisory firms and shareholders respond by looking for a way to preserve some of the current disclosure they are accustomed to receiving from NAFs, as well as say-on-pay votes. Board members, in-house counsel and investor relations teams should therefore be prepared for questions from investors on whether the company will take advantage of the proposed regime if enacted and for requests to not fully do so. More importantly, companies that no longer provide a say-on-pay vote will want to ensure that they maintain a dialogue with their shareholders on their executive compensation program, so any shareholder concerns can be surfaced and addressed before directors find themselves targeted.

Regulatory

INVESTIGATIONS – KEY DEVELOPMENTS

State Department Designation of Brazilian Criminal Organizations Underscores Expanding Risk in the Americas

In May and June 2026, the State Department designated two Brazilian criminal organizations (Comando Vermelho and Primeiro Comando da Capital) as Specially Designated Global Terrorists ("SDGTs") and Foreign Terrorist Organizations ("FTOs"). These designations of Brazilian organizations follow on the 2025 designations of 15 drug cartels as FTOs.

The legal risks associated with dealing with FTOs and SDGTs are not new, but extending these designations to drug cartels and Brazilian criminal organizations has brought these risks into new markets and commercial relationships across the Americas.

As a result, a risk area that companies once considered—if at all—through a sanctions, bribery or AML lens now also raises counter-terrorism financing considerations, which can include significant legal and reputational consequences, including potential criminal liability for the provision of "material support" to an FTO.

> The designation of two Brazilian criminal organizations as foreign terrorist organizations follows the designation of 15 drug cartels in 2025.

WHY IT MATTERS

- Companies operating in the Americas should reassess whether their compliance programs, controls and escalation processes are calibrated to this new risk environment and whether they fully understand their exposure to this evolving risk area.

Regulatory

CYBERSECURITY – KEY DEVELOPMENTS

HHS' Office for Civil Rights Settles Five HIPAA Security Rule Ransomware and Risk Analysis Investigations

In April and June 2026, the Department of Health and Human Services' ("HHS") Office for Civil Rights ("OCR") settled five investigations (four in April and one in June) related to alleged violations of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") Privacy, Security, and Breach Notification Rules arising from ransomware attacks.

These settlements bring the total of OCR's completed ransomware breach investigations to 20, and the total of completed investigations in OCR's Risk Analysis Initiative to 14.

The individual settlements involved potential impact to protected health information of approximately 9,000 to 245,000 individuals, with settlement payments ranging from $225,000 to $450,000, and corrective action plans agreed in each settlement.

In the press releases announcing each of the settlements, OCR emphasized the regulated entities' failure to conduct an accurate and thorough risk analysis, in addition to other violations of HIPAA Privacy, Security, and Breach Notification Rules.

Recent OCR settlements involved payments ranging from $225,000 to $450,000.

WHY IT MATTERS

- These settlements demonstrate OCR's continued focus on investigations in the ransomware context and its emphasis on the importance of regulated entities' completion of accurate and thorough risk analyses.

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The SEC Reopens the Public Company Playbook

Following its January request for comment on Regulation S-K reform, the SEC has now advanced a broader package of rulemakings that would recalibrate public company disclosure, reporting frequency and registered offering access around materiality, issuer flexibility and capital formation. The proposals are only proposals which still remain subject to the notice and comment process, but together they suggest a meaningful shift away from prescriptive disclosure mandates and toward a framework intended to make becoming and remaining a public company more attractive.

On May 5, 2026, the SEC proposed rule amendments that would permit public companies to elect to satisfy interim reporting obligations by filing a semiannual report, on new Form 10-S, instead of three quarterly reports on Form 10-Q.[40] Under either option, public companies would continue to file annual reports on Form 10-K. The election to adopt semiannual rather than quarterly reporting would be made by checking a box on the cover page of a company's Form 10-K for the applicable fiscal year, and companies that elect semiannual reporting could revert to quarterly reporting the following year by leaving the box unchecked. Form 10-S would be due 40 or 45 days after the end of the first half-year period, depending on filer status, consistent with current Form 10-Q filing deadlines. The proposal also would amend Regulation S-X to reflect the new semiannual reporting option and simplify existing financial statement requirements.

Public comments on this proposed rulemaking were due by July 6, 2026 and have been voluminous.[41] Chairman Atkins framed the proposal as part of his "Make IPOs Great Again" agenda and identified potential considerations for companies, including preparation costs, management time, investor expectations, cost of capital, business model, earnings calls, Form 8-K disclosure and research coverage.[42] For more discussion on this proposal, please see our May 19, 2026 memo.[43]

On May 19, 2026, the SEC proposed the Registered Offering Reform Proposal, which, if adopted, would be the most significant modernization of the securities offering framework in more than 20 years.[44] Key changes include: eliminating the one-year "seasoning" requirement and the $75 million public float threshold for Form S-3 (shelf registration) eligibility; extending forward incorporation by reference to all Form S-1 issuers; preempting state securities law registration and qualification requirements for all registered offerings; and expanding to certain other issuers the communication exemptions and registration benefits currently available only to well-known seasoned issuers. The SEC estimates that the amendments could increase by more than 60 percent the number of issuers eligible to offer an unlimited amount of securities on Form S-3.[45] For more discussion on this proposal, please see our June 15, 2026 memo.[46]

Also on May 19, 2026, the SEC proposed a companion Filer Status Proposal, which would consolidate the current five overlapping filer status categories (large accelerated filers, accelerated filers, non-accelerated filers, smaller reporting companies

Corporate Governance

and emerging growth companies) into two principal categories: large accelerated filers ("LAFs") and non-accelerated filers ("NAFs").[47] The proposal would raise the public float threshold for LAF status from $700 million to $2 billion, require two consecutive years above or below the threshold before transitioning filer status and extend the seasoning requirement for LAF status from 12 to 60 consecutive calendar months. Under the proposal, NAFs would benefit from scaled disclosure and reporting standards that are currently available only to smaller reporting companies or emerging growth companies.[48] The SEC has estimated that the proposal would extend disclosure scaling and other accommodations to approximately 81 percent of public companies, while the companies remaining subject to the most extensive disclosure requirements would account for approximately 94 percent of total public market float.[49] For more discussion on this proposal, please see our June 15, 2026 memo.[50]

These proposals, if adopted, would alter both the cadence and content of public company reporting and the mechanics of accessing registered capital markets. Companies considering semiannual reporting, if adopted by the SEC, will need to evaluate not only compliance cost savings, but also investor relations expectations, analyst coverage and trading window practices. Companies should evaluate the two proposals alongside each other as filer status has implications for scaled disclosure availability, filing deadlines and auditor attestation obligations.

On May 29, 2026, the SEC proposed to rescind in their entirety the climate-related disclosure rules it had adopted in March 2024 (the "Climate Rules"), which required public companies to disclose information regarding climate-related risks, greenhouse gas emissions and related financial statement impacts.[51] The Commission identified several rationales for the proposed rescission, including that the Climate Rules exceed the Commission's statutory authority, are unnecessary and inconsistent with a registrant-specific, materiality-based approach to disclosure, stray beyond the policy concerns of the federal securities laws, impose substantial costs not justified by informational benefits and are at odds with the Commission's policy objectives of facilitating capital formation. The proposed rescission follows the Commission's March 2025 vote to end its defense of the Climate Rules in litigation before the Eighth Circuit and a subsequent September 2025 order from the Eighth Circuit holding its review of the consolidated petitions for review in abeyance until the Commission reconsiders the rules.[52]

The proposed rescission, if adopted, would eliminate the Climate Rules at the federal level, but companies may still face climate-related disclosure requirements under state laws (such as California's SB 253 and SB 261) and international regimes. The public comment period ended August 3, 2026.

> The SEC estimates that its filer status proposal would extend scaled disclosure and reporting accommodations to approximately 81% of public companies.

Corporate Governance

KEY DEVELOPMENTS

CFTC Proposed Rulemaking on Event Contracts

Regulation of so-called prediction markets has emerged as a significant development driven by the explosive growth of exchange-traded event contracts (total trading volume across platforms registered with the Commodity Futures Trading Commission ("CFTC") exceeded $25 billion in 2025).[53] In February 2026, the CFTC formally withdrew the prior administration's June 2024 proposed rulemaking that would have broadly categorized political and sports-related event contracts as "contrary to the public interest," citing state regulatory actions and litigation concerning the Commission's exclusive jurisdiction.[54] The CFTC then issued an Advance Notice of Proposed Rulemaking on March 16, 2026, seeking input on statutory core principles, potentially prohibited contracts and cost-benefit considerations. Public comments were due by April 30, 2026.[55] On June 10, 2026, the CFTC published a formal Notice of Proposed Rulemaking titled "Prediction Markets; Public Interest Determinations," proposing amendments to establish a structured framework for evaluating whether event contracts involve an "enumerated activity" (terrorism, assassination, war, gaming or conduct unlawful under federal or state law) and, if so, whether such contracts are contrary to the public interest. Comments on the June proposed rulemaking were due July 27, 2026.[56]

SDNY and CFTC Bring First Insider Trading Actions Involving Prediction Markets

In April 2026, the U.S. Attorney's Office for the Southern District of New York ("SDNY") and the CFTC brought the first criminal and civil insider trading prosecutions involving prediction markets. U.S. Army Master Sergeant Gannon Ken Van Dyke was charged for using classified military information about "Operation Absolute Resolve" (the capture of Venezuelan President Maduro) to purchase event contracts on Polymarket, allegedly profiting over $400,000 when the operation was executed on January 3, 2026.[57, 58] Van Dyke allegedly created a Polymarket account on or around December 26, 2025, funded it through a cryptocurrency exchange, and made approximately 13 bets, all taking the "Yes" position on Venezuela- and Maduro-related contracts, before any public disclosure of the sensitive military operation.[59]

On May 27, 2026, the SDNY and CFTC brought a second case against Google software engineer Michele Spagnuolo, who allegedly accessed internal Google tools to inform his trades in more than 20 event contracts tied to Google's "Year in Search 2025" rankings, resulting in near-perfect accuracy and generating approximately $1.2 million in profits.[60, 61]

WHY IT MATTERS

- The proposed rulemaking and Van Dyke and Spagnuolo actions show that event contracts are moving from regulatory novelty to an enforcement focus. The CFTC's proposed framework would provide more transparent standards for evaluating whether particular event contracts may be listed, while the enforcement actions underscore that enforcement authorities may apply traditional antifraud and insider trading concepts to prediction market activity involving material nonpublic information. Companies should consider whether their policies addressing confidential information, personal trading and digital asset activity adequately cover event contracts and prediction markets.

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KEY DEVELOPMENTS (CONTINUED)

The Supreme Court Expands Presidential Power Over Independent Agencies

Trump v. Slaughter

On June 29, 2026, the Supreme Court ruled in *Trump* v. *Slaughter* that removal protections for members of the FTC are unconstitutional, formally overturning the Court's 1935 decision in *Humphrey's Executor* v. *United States*. *Humphrey's Executor* allowed Congress to shield members of certain independent agencies from being fired by the President at will and laid the groundwork for the independent agency structure across the executive branch that has prevailed for over 90 years.[62] The case arose when President Trump fired FTC Commissioner Rebecca Kelly Slaughter, a Democratic appointee, for not sharing the administration's policy priorities; a federal district court ordered her reinstatement, and the D.C. Circuit agreed she could continue in her position. The Supreme Court, however, intervened and allowed for her termination while it considered the legality of removal protections for FTC members, ultimately ruling against Slaughter.[63]

The decision calls into question the constitutionality of for-cause removal protections for boards across the federal government and represents a major expansion of presidential authority over independent agencies.

Notably, the Court simultaneously ruled 5-4 that Federal Reserve Board Governor Lisa Cook can remain in her position while litigation over her termination is resolved in the lower courts, effectively creating, at least temporarily, a "Federal Reserve exception" to its general holding that congressional restrictions on presidential removal power are unconstitutional.

WHY IT MATTERS

- The Court's decision expands presidential control over independent agencies that exercise executive power, including agencies with authority to bring enforcement actions and issue binding rules. Although the case involved the FTC, its reasoning may affect other commission-style agencies with similar removal protections. We may begin to see agency enforcement priorities and rulemaking agendas become even more closely aligned with presidential policy preferences.

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