CRAVATH

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M&A, Activism and Corporate Governance

QUARTERLY REPORT

Contents

Mergers & Acquisitions

BUYER BEWARE: RECENT DEVELOPMENTS IN CVRS AND EARN-OUTS

In recent years, contingent value rights ("CVRs") and earn-outs have become increasingly popular instruments in M&A. Such structures provide a solution for various elements of uncertainty impacting a target's valuation post-closing. The increase in CVRs in recent years has been especially strong in the biopharma sector, where a target company's value is often highly dependent on uncertain future outcomes of its therapies' clinical trial results, regulatory approvals and eventual sales.

Overview of Biopharma CVRs

Based on 54 U.S. public biopharma transactions with CVRs since 2015,[1] CVRs:

- typically have timeframes greater than four years, with the majority having a duration of six years or more;
- typically comprise less than 50% of total nominal consideration, with the average having nominal value of ~28% of total consideration; and
- most often have regulatory and sales-based milestones, with these types of milestones representing over 80% of CVR triggering events, followed by triggers tied to hitting certain stages of a clinical trial or study.[2]

With these instruments becoming increasingly prevalent, recent Delaware case law regarding CVRs and earn-outs has continued to develop, particularly around a buyer's efforts to achieve the triggering events under the CVR or earn-out post-closing.

How has recent case law shaped CVRs and earn-outs?

Unless there is an express disclaimer of any obligation on the part of the buyer to use its efforts to achieve the triggering events under the CVR or earn-out, buyers typically must exert some level of effort to do so. Parties can draft language that delineates the efforts expected, with the wording of efforts standards generally falling within two buckets: "inward-facing" or "outward-facing". Recent Delaware case law has provided some guidance regarding these two types of efforts standards.

An "inward-facing" efforts standard benchmarks a buyer's efforts relative to the buyer's usual practice, including with respect to similar products at similar stages. Courts will evaluate a buyer's decision-making and efforts based on its own past practices.[3]

Buyers should be aware of several considerations courts will apply when evaluating a CVR or earn-out with an "inward-facing" efforts standard. An "inward-facing" efforts standard does not provide a buyer with complete discretion over all decisions, as the buyer remains bound by its historical practices. Even where an efforts standard lists factors a buyer is required to take into account in setting its level of efforts in achieving the applicable contingency, a court may consider any other historical practices of the buyer if the list is not explicitly exhaustive. Whether a buyer has breached its efforts covenant remains a fact-intensive exercise where, if litigated, plaintiffs may seek extensive discovery around not only the efforts actually used by the buyer but also its historical practices.

4 years or more is the typical timeframe for CVRs in biopharma transactions

Mergers & Acquisitions

BUYER BEWARE: RECENT DEVELOPMENTS IN CVRS AND EARN-OUTS

How has recent case law shaped CVRs and earn-outs? (continued)

Alternatively, an "outward-facing" efforts standard may apply, which requires the buyer to use efforts consistent with those typically used by similarly situated companies. Courts typically consider the "outward-facing" efforts standards under two approaches:

1. Under the hypothetical company approach, courts compare the buyer's actions to an objective, hypothetical company of similar size and resources working under similar circumstances.
2. Under the yardstick approach, courts compare the buyer's actions to those of similarly situated companies and their actions in the real world.

Courts often favor the hypothetical company approach given that the yardstick approach can be unworkable due to a lack of adequate "exemplar" companies (*i.e.*, competitors that operate under the same conditions and circumstances as the buyer).[4]

However, the "outward-facing" efforts standard can create greater uncertainty for all parties, as the buyer does not have a firm reference point for its obligations—it is hard to predict how a court will think a hypothetical company would have acted.

Courts have found that if the agreement contains both a "commercially reasonable efforts" standard and a "buyer's discretion" clause (*i.e.*, that buyer has complete discretion with respect to all decisions related to the product), the burden will be on the seller to demonstrate that buyer's failure to take actions with respect to such product is commercially unreasonable.[5] Note, however, that courts do not view the "commercially reasonable efforts" standard to require actions against the company's own economic interests; the objective "similarly situated" standard that a court will use is whether a reasonable actor faced with the same restraints and risks would go forward in its own self-interest.[6]

Under either an "inward-" or "outward-" facing efforts standard, the court may apply a complex conditional probability analysis to calculate the amount of damages owed to the seller in an earnout dispute, with results that are difficult to predict given the vast uncertainties around whether CVR or earn-out milestones would have been achieved (and even greater difficulty of judging such probabilities in hindsight).[7]

All in all, while we fully expect that companies involved in M&A (and especially in the biopharma sector) will continue to find that a CVR or earn-out is the appropriate instrument to address the uncertain future value of a company or asset, companies should carefully assess and mitigate the potential risks and ensure that the drafting around the efforts standard accurately captures the parties' intentions in light of these recent developments in the case law.

Mergers & Acquisitions

PRACTICE TIPS: SUCCESSFULLY EXECUTING CARVE-OUTS AND DIVESTITURES

Checklist for Structuring Divestitures

Carve-out, spin-off, split-off and Reverse Morris Trust (RMT) transactions all involve the separation of a business from the seller's control, which in practice is always quite a challenging exercise for the seller's entire organization. Each structure requires careful planning but can offer significant rewards, with the right choice of structure depending on the transaction's specific goals. The following is a checklist of key items to assess upfront prior to commencing work on a divestiture.

Scope

The company must define the scope of the divestiture by determining how the assets or liabilities of the divested business are defined, as well as whether any assets or liabilities are shared between the divested business and the retained business that need to be separated.

Operational Matters

Operational separation planning should address the separation and migration of IT, CRM and ERP systems and infrastructure. This includes developing a timeline and allocating resources for the separation and migration process. Interim arrangements, such as transition services agreements between the seller and the entity containing the divested business, may be necessary to ensure business continuity during the transition period.

Material Contracts

An analysis of material contracts for change-of-control and anti-assignment provisions should be undertaken to determine any third-party consents required and identify other consequences under such contracts. The seller should consider if there are any "mission critical" contracts without which the buyer may not close the transaction. The seller must prepare, in the event a third-party consent is not obtained, for practical work-arounds (if any) to pass the economic benefits and burdens of the contract to the buyer. Moreover, the seller should determine a strategy for approaching contract counterparties and obtaining third-party consents, including deciding which party (buyer or seller) will drive the process and what assistance that party may require from the other party. Additionally, the parties should determine in advance how the costs of contract separation will be allocated between the parties. If there are any commingled, "shared" or "master" contracts, the parties must determine which will be assigned, novated, split or bifurcated.

Intellectual Property

All intellectual property (IP) relevant to the divested business, including trademarks, patents, copyrights and software, should be identified, with a determination of whether such IP is used exclusively or primarily by the divested business. With respect to IP not exclusively used by the divested business, decisions must be made regarding the ownership and licensing or cross-licensing of such IP, as well as the terms of such arrangements. In-licensed IP should also be carefully reviewed to determine whether key licenses can be transferred with the divested business, as well as the ability of the divested business to continue operating if consents to assignment cannot be obtained. The handling of personally identifiable information (PII) should be reviewed to ensure that all transfers or continued processing are conducted in compliance with applicable data protection laws and contractual obligations. This includes executing appropriate data processing agreements and completing any necessary notifications or consents prior to separation.

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PRACTICE TIPS: SUCCESSFULLY EXECUTING CARVE-OUTS AND DIVESTITURES

Real Property

All real property used by the divested business, whether owned or leased, should be identified, with a clear understanding of each property's function (*e.g.*, manufacturing, distribution, office). Issues related to shared or co-located facilities must be addressed, including whether any property will be shared post-separation, along with any related requirements for physical separation, employee movement or security. The need for landlord or other third-party consents for lease transfers or subleases should be assessed, and any encumbrances, such as mortgages or liens, should be identified, noting that any non-permitted liens will need to be released upon the divestiture.

Tax Matters

Divestitures frequently raise important tax issues, both from a U.S. and non-U.S. perspective. From a U.S. perspective, the sensitivity of the analysis will often depend on the type of transaction being pursued:

- **Carve-outs** are typically (but not universally) taxable transactions in which the seller will recognize income based on the difference between the sales price and its tax basis in the divested assets. These transactions may still raise difficult non-U.S. tax issues.
- **Spin-offs and split-offs** are generally intended to be tax-free to both the parent company and its shareholders, who receive shares in the "spinco" as part of the transaction. Achieving tax-free treatment requires satisfying a complicated set of tax rules, while also presenting opportunities to extract value from the spun-off business in a tax-efficient manner.
- **Reverse Morris Trust (RMT) transactions** involve a normal spin-off/split-off followed by a merger between the spinco and a third party, such that parent's historic shareholders receive equity in the surviving corporation. This requires satisfying the rules governing tax-free spin-offs and tax-free mergers; in particular, for the spin-off to remain tax-free, parent's shareholders must generally own >50% of the surviving corporation post-merger.

Licenses and Regulatory Approvals

The divested business must have all necessary permits and licenses to operate. It is important to determine whether these are already held by the relevant entities being divested or if new licenses must be obtained or existing licenses transferred (as well as operating models for the divested business to operate pending replacement or transfer of permits).

DIVESTITURE CHECKLIST

- ☐ Scope
- ☐ Operational Matters
- ☐ Material Contracts
- ☐ IP
- ☐ Real Property
- ☐ Tax Matters
- ☐ Licenses / Regulatory Approvals
- ☐ Employee and Benefit Plan Issues
- ☐ Insurance Arrangements
- ☐ Litigation Management
- ☐ Transition Services and Ongoing Commercial Arrangements
- ☐ Guarantees and Intercompany Agreements
- ☐ Financials

Mergers & Acquisitions

PRACTICE TIPS: SUCCESSFULLY EXECUTING CARVE-OUTS AND DIVESTITURES

Employee and Benefit Plan Issues

Labor and employment matters require careful attention, including the treatment of collective bargaining agreements, employee-related liabilities (including potential severance obligations) and the need for any consents or approvals (*e.g.*, works council, local law requirements). The scope of employees affected by the divestiture should be defined, including any necessary internal transfers and the treatment of shared-service employees. Parties should determine whether an acquiror must establish new plans or assume plans at the divested entity level with respect to employee-related liabilities, including health and welfare plans, cash compensation and retirement plans. In addition, parties should consider and determine the treatment of equity-based awards held by in-scope employees. U.S. and non-U.S. compensation and benefit plans should be considered in the context of applicable legal requirements, including with respect to assignment provisions and any consent requirements. Moreover, parties may need to negotiate a special pool of cash or equity that may be used to grant retention awards for the service of key service providers, or find other ways to maintain the workforce through closing and beyond to ensure that the business and critical functions can operate successfully both through and after closing.

Insurance Arrangements

The insurance coverage of the divested business should be reviewed to determine whether it is covered under the parent's policies or has its own coverage. Appropriate post-separation insurance arrangements should be put in place.

Litigation Management

Existing litigation must be addressed, including decisions regarding control of ongoing matters and the impact of the separation on the ability to settle disputes.

Transition Services and Ongoing Commercial Arrangements

Transition services agreements will likely be necessary to support the divested business (and, potentially, for the divested business to continue supporting the remaining business) during the transition period. The scope and duration of such services should be clearly defined. Other longer-term commercial arrangements required to support the divested or remaining business post-separation should also be considered.

Guarantees and Intercompany Agreements

Any guarantees or other credit support provided by the parent in favor of the divested business should be identified, with plans for their replacement or termination at closing. All intercompany agreements should be reviewed to determine which need to be terminated or modified in connection with the separation.

Financials

Preparation of divested business financial statements is often a major challenge in a divestiture transaction, particularly if the business to be sold is not a separate segment for reporting purposes. Important to the timing of signing and/or closing will be whether audited financial statements for the divested business are required at the signing and/or closing stages. The purchase agreement should be specific about what will be needed based on legal and marketing requirements, especially if needed for the buyer's financing or SEC reporting purposes.

Conclusion

By systematically addressing these key areas of concern, among others, companies can better manage the risks and complexities associated with divestitures, facilitating a smooth transition and positioning both the divesting and divested businesses for future success.

Mergers & Acquisitions

KEY DEVELOPMENTS IN DELAWARE CASE LAW

LLCS and Tag-Along Rights

Khan, et al. v. Warburg Pincus, LLC, et al., A.3d, C.A. No. 2024-0523-LWW (Del. Ch. April 30, 2025)

In an acquisition, the target, a Delaware LLC in the healthcare sector, was majority-owned by Warburg Pincus, with the remainder held by affiliated medical practitioners. The LLC agreement provided for "equal treatment" and tag-along rights for the practitioners in the event of a sale of the target or Warburg Pincus's interest. Warburg Pincus and the target negotiated a sale in which Warburg Pincus would receive all cash, while the medical practitioners would receive a mix of cash and acquiror equity, conditioned on an amendment to the LLC agreement to permit this differential treatment. The amendment required and was approved by a class vote of the practitioners. After closing, several practitioners sued Warburg Pincus and the target, alleging unfairness and coercion when the acquiror's equity declined in value.

The court found for the defendants on all claims at the motion-to-dismiss stage because the LLC agreement expressly contemplated amendments that might disadvantage a class. Additionally, the court gave full effect to the LLC agreement's broad waiver of fiduciary duties, leading the court to rule that there was no fiduciary obligation on the part of Warburg Pincus or the managers of the target to treat the medical practitioners fairly in any major transaction and no basis for a claim that the class vote was coerced.

WHY IT MATTERS

- Courts will typically affirm the express contract language in an LLC as drafted
- Always consider whether a waiver of fiduciary duties should be included in a private LLC – and pay attention to the specific drafting
- Amendments modifying minority owners' express contractual protections upheld if approved in accordance with the terms of the LLC Agreement

Mergers & Acquisitions

KEY DEVELOPMENTS IN DELAWARE CASE LAW

Fiduciary Duties and Controlling Stockholders

Ban v. Manheim, 2025 WL 1431203 (Del. Ch. May 19, 2025)

West 36th, Inc. ("WestCo") owned a 10% member interest in Delaware Valley Regional Center, LLC ("DVRC"), an LLC that managed an investment business. WestCo was the sole manager of DVRC with full operating control, while the other 90% of the business was owned by a passive non-managing member. Manheim owned 70% of WestCo, with 15% owned by Ban, the plaintiff. In a contest for control of WestCo and DVRC, Manheim unilaterally adopted a bylaw that granted holders of a majority of WestCo's shares a call right to require any other stockholder to sell its shares to the majority. Although the call right required the payment of fair value, Manheim arbitrarily set the value at $100 per share. Ban sought damages for the loss of his ownership interests.

The court held for the plaintiff that the call right over outstanding shares was invalid. The court reasoned that a bylaw may not impose a transfer restriction on already-issued shares in the absence of actual consent from the bound stockholder under DGCL § 202. The court also concluded that the appropriate standard for review in Manheim was entire fairness and that the amended bylaw did not meet the entire fairness standard.

WHY IT MATTERS

- May signal broader application of entire fairness review to self-interested amendments to bylaws by a controller
- If so, potential for many bylaw amendments to be characterized as self-interested by plaintiffs even in more innocuous circumstances than this case

Mergers & Acquisitions

KEY DEVELOPMENTS IN DELAWARE CASE LAW

Tolling Periods and Drafting Ambiguities

LGM Holdings, LLC v. Schurder, 2025 WL 1162999 (Del. Sup. Ct. April 22, 2025)

Certain buyers, including LGM Holdings, LLC, agreed to acquire companies owned by the sellers, including Schurder, for $35 million, with Schurder and another individual seller continuing to manage the target business after closing. The purchase agreement included a five-year survival period for breaches of relevant representations and warranties, including a broad representation that the companies complied with "all Health Care Laws". Within the five-year period, a significant FDA issue surfaced in the target business, which the buyers argued had been fraudulently concealed. The parties agreed to a letter agreement that amended the purchase agreement to address the issue and related investigation. After the five-year period, the buyer made an indemnification demand based on the purchase agreement related to this issue, which the sellers argued was time-barred and precluded by the previous amendment. The buyers argued that the survival period had been tolled on grounds of fraudulent concealment. At the trial level, the Delaware Superior Court, on a motion to dismiss, found for the sellers and dismissed the buyers' claim. The Delaware Supreme Court reversed in favor of the buyers on the basis that the survival period had been tolled as a result of fraudulent concealment.

The letter agreement included a provision that the buyers and sellers may have intended to impose a new $6 million indemnity cap for breaches of the representations and warranties related to the FDA issue. As part of the controversy, the parties disagreed about the meaning of a clause stating that "no claim with respect to [the FDA issue] shall include a claim regarding fraud, intentional misrepresentation, or willful misconduct". The buyer claimed it meant that claims for fraud were not subject to the $6 million cap. The sellers claimed that this sentence meant that claims for fraud were waived in their entirety. The Supreme Court concluded that the sentence was ambiguous and remanded to the Superior Court to engage in fact-finding.

WHY IT MATTERS

- Under Delaware law, contractual survival periods for breach of representations and warranties may be tolled on the grounds of fraudulent concealment
- However, courts have not addressed whether this default rule can be modified by contract (*i.e.* waiving any right to tolling on the basis of fraudulent concealment)
- Ambiguous language in a contract cannot be resolved at a motion to dismiss stage, highlighting the risks of imprecise drafting

Activism

KEY DEVELOPMENTS - MORE SELECTIVE BUT SUCCESSFUL CAMPAIGNS

Increased Proxy Fight Success and Negotiated Settlements[8]

While total global activism campaigns have decreased slightly in 2025 compared to the record year in 2024, U.S. activism campaigns have continued at elevated levels seen in recent years. Activists have continued to focus their campaigns on board change (43% of global campaigns in H1 2025) and M&A theses, including whole-company sales and carve-out sales (33% of global campaigns in H1 2025), despite market volatility and a challenging M&A environment for small- and mid-cap targets.

Activists have also been increasingly successful in winning board seats in H1 2025, with 86 total seats won (an increase of 16% over H1 2024). This increase in seats won has been driven by an uptick in settlements, as well as increased success in proxy fights that went to a vote. Nearly half of all settlements announced in H1 2025 were negotiated privately before the activist announced a public campaign, suggesting that activists have been more successful in private negotiations. This trend may be driven in part by macroeconomic uncertainty and market volatility in early 2025, encouraging both companies and activists to resolve disputes and focus on execution without the distraction of a public fight. In proxy fights, activists were successful in winning a total of 38% of contested seats in H1 2025, with one or more activist nominees being elected in nearly half of all proxy fights. Activists' success in contested votes was bolstered by proxy advisors' increased support for activist nominees in 2025. In particular, ISS recommended for activist nominees / proposals in 69% of campaigns in H1 2025 (vs. 29% in FY 2024) and Glass Lewis recommended for activist nominees / proposals in 85% of campaigns in H1 2025 (vs. 37% in FY 2024). While this may be a temporary phenomenon based on a small sample size of proxy fights that went to a vote so far this year, this shows a continued willingness for the proxy advisors to back activist slates (in full or in part) in the "universal proxy" era.

16% more board seats won through activist campaigns in H1 2025 than in H1 2024

WHY IT MATTERS

- Privately negotiated settlements (announced before the activist has otherwise publicly launched a campaign) have become increasingly common, as companies and activists seek to avoid the cost and distraction of public campaigns
- Proxy advisors continue to be highly influential in contested elections, with ISS and Glass Lewis showing increasing willingness to back activist proposals (in whole or in part) in the "universal proxy" era

Tax

KEY DEVELOPMENTS – ONE BIG BEAUTIFUL BILL ACT

Changes Under the One Big Beautiful Bill Act

On July 4, 2025, President Trump signed the budget reconciliation legislation (H.R. 1) commonly known as the "One Big Beautiful Bill Act" into law.[9] It includes a number of tax provisions especially pertinent to business and M&A:

- Makes permanent several provisions intended to spur domestic investment originally enacted as part of the 2017 Tax Cuts and Jobs Act, including immediate expensing for most tangible property, immediate deductibility for domestic R&D costs and EBITDA (rather than EBIT)-based limitations on business interest deductions. These changes may benefit companies considering M&A transactions by enhancing the tax benefits of acquisition financing and "basis step-ups" from taxable acquisitions.
- Replaces GILTI with a 14% tax rate on overall income earned outside the United States reduced by creditable foreign taxes. Other changes in the Act enhance the creditability of these taxes, including by eliminating worldwide interest and stewardship expense apportionment that had previously reduced the availability of foreign tax credits.
- Introduces accelerated phase-outs and more stringent foreign component and entity of concern requirements to the clean energy tax credits established by the Inflation Reduction Act of 2022. For more information on changes to these tax credits, please see our July 7, 2025 memo.[10]

Note that lawmakers ultimately did not enact several provisions the business community had focused on, including the Section 899 tax intended to combat "unfair" foreign taxes, taxes on litigation financing arrangements, changes to the treatment of carried interest and the curtailment of "PTET" arrangements for passthrough entities.

WHY IT MATTERS

- Passage of the One Big Beautiful Bill Act should provide businesses greater certainty regarding the U.S. tax landscape going forward
- In particular, it makes permanent several provisions of note for the business community that had already expired or were expected to expire shortly and may help facilitate or support M&A transactions
- Meanwhile, provisions related to combatting "unfair" taxes, the taxation of litigation finance, carried interest and the curtailment of "PTET" were not included

Regulatory

ANTITRUST – UPDATES ON DOJ AND FTC REMEDIES

FTC's Investigation of Advertising Agencies

The Federal Trade Commission ("FTC") recently approved global advertising company Omnicom's $13.5 billion acquisition of one of its rivals, Interpublic.[11] Then-FTC Commissioner Andrew Ferguson, who was officially designated as chairman of the FTC by President Trump in January 2025, expressed his intention to "end Big Tech's vendetta against competition and free speech".[12] In Omnicom-Interpublic, the FTC's order imposes certain conditions, one of which prevents the merged entity from boycotting platforms because of their political content by refusing to place their clients' ads on them.[13]

Merger Remedies

Bill Rinner, the new Deputy Assistant Attorney General in charge of merger enforcement at the Department of Justice ("DOJ"), reaffirmed in a speech at George Washington University that the agency is prepared to accept remedies as part of the merger review process.[14] Rinner further emphasized the need for public transparency on any proposed remedies to ensure compliance with the Tunney Act, a 1974 law that mandates federal court review of DOJ antitrust consent decrees.[15] On June 5, 2025, Commissioner Melissa Holyoak discussed the FTC's approach to merger enforcement at USC Gould School of Law, and highlighted a policy shift away from the FTC's previous skepticism toward remedies.[16] Holyoak stated that the FTC will consider divestiture proposals as a means to resolve competitive concerns.

On June 2, 2025, the DOJ cleared Keysight's acquisition of Spirent Communications plc, subject to divesting Spirent's high-speed ethernet and network security business lines. And, in May 2025, the FTC approved Synopsys, Inc.'s $35 billion purchase of Ansys, Inc., requiring the parties to divest three semiconductor design software tools to Keysight Technologies, Inc.

WHY IT MATTERS

- Omnicom-Interpublic consent decree includes a rare "behavioral remedy" (*i.e.*, not a divestiture) and applies the antitrust theory of "coordinated effects" in a novel manner
- The DOJ and FTC's willingness to consider remedies, including divestitures, to resolve competitive concerns is a departure from the prior administration's general hostility to any form of merger remedy

Regulatory

CFIUS – NEW FAST-TRACK PROCESS; NEW CFIUS HEAD

CFIUS Announces Intention to Create Fast-Track Process and Known Investor Portal

On May 8, 2025, the U.S. Treasury Department issued a press release announcing its intent to launch a "Fast-Track" within the CFIUS review process to facilitate greater investment in U.S. businesses from ally and partner sources.[17]

The new program, which will include the launch of a "Known Investor" portal, will allow CFIUS to collect information from foreign investors in advance of a specific transaction with the goal of increasing efficiency for vetted persons (somewhat akin to Global Entry or other "trusted traveler" border-crossing programs, but for foreign investment). Initially, Treasury will implement the new process through a pilot program, which Treasury plans to build on over time.[18] The announcement is concrete evidence that CFIUS agencies are taking steps to implement directives set forth in President Trump's America First Investment Policy, which was issued in February.[19] The policy indicated that the United States would facilitate and expedite foreign investment from allied and partner sources that does not raise national security concerns. No additional details regarding the fast-track process have been released (including a timeline for implementation), but we expect to see rulemaking in the coming months.

Nomination of Assistant Secretary of the Treasury for Investment Security

On June 2, 2025, President Trump nominated Christopher Pilkerton of Maryland to be Assistant Secretary of the Treasury for Investment Security, the political appointee who oversees the day-to-day operations of Treasury's Office of Investment Security, including CFIUS and the U.S. outbound investment security regime.[20]

> The "Known Investor" portal is akin to Global Entry for foreign investment.

WHY IT MATTERS

- Intent to create a "Fast-Track" CFIUS review process highlights the Trump Administration's interest in facilitating foreign investment from vetted sources
- Pilkerton, if confirmed, will head the office overseeing CFIUS and supervise CFIUS priorities and activities

Regulatory

CFIUS – NIPPON STEEL-U.S. STEEL AND "GOLDEN SHARES"

President Trump Approves Nippon Steel Acquisition of U.S. Steel with Groundbreaking Mitigation

On June 13, 2025, President Trump issued an order approving, with groundbreaking conditions, the proposed acquisition of U.S. Steel Corporation ("U.S. Steel"), the third-largest domestic steel producer, by Nippon Steel Corporation ("Nippon Steel"), a global steelmaker headquartered in Japan.[21]

Then-President Biden initially prohibited the transaction in January 2025 after a nine-month review and investigation by CFIUS.[22] President Biden found credible evidence that Nippon Steel might take action that threatens to impair U.S. national security and that such threatened impairment could not be adequately mitigated.[23]

Following a de novo review, President Trump re-affirmed President Biden's finding that Nippon Steel, through the transaction, might take action that threatens to impair U.S. national security.[24] President Trump did not, however, agree with President Biden's finding regarding mitigation. Rather, President Trump found that the threat arising from the transaction can be adequately mitigated by the parties entering into a contract with the U.S. Government known as a national security agreement, or NSA.

On June 13, 2025, U.S. Steel and Nippon Steel entered into an NSA that, in a first for CFIUS, required U.S. Steel to issue a "golden share" to the U.S. Government.[25] This golden share—one share of preferred stock that, according to media reports, will not hold any economic rights—affords the U.S. Government veto rights over a range of U.S. Steel's business decisions, including relocating its headquarters, changing the name of the company, closing or idling plants before certain timeframes and reducing investments, among other matters.[26] In addition, the U.S. Government will have the right to directly appoint one of U.S. Steel's three independent directors, and will have an approval right with respect to the other two.[27]

WHY IT MATTERS

- Introduction of a golden share marks a significant departure from CFIUS norms, although it remains to be seen whether CFIUS will require golden shares in other NSAs going forward
- Expectation is that golden shares will not become commonplace, but rather will be reserved for transactions meeting certain criteria, such as a high-profile or highly sensitive U.S. target, or where CFIUS has particularly strong concerns regarding non-compliance with an NSA

Regulatory

PRIVACY/CYBERSECURITY – PARTNERSHIPS AMONG REGULATORS

State Consortium of Data Privacy Regulators

On April 16, 2025, regulators of seven states (the state Attorneys General from California, Colorado, Connecticut, Delaware, Indiana, New Jersey and Oregon and the California Privacy Protection Agency) announced the formation of the Consortium of Privacy Regulators (the "Consortium"). The regulators entered a memorandum of understanding that sets forth the Consortium's objectives. Those objectives include facilitating discussions regarding privacy law developments and shared priorities, with a specific focus on consumer protection, sharing of expertise and resources, and coordination of investigative efforts. The Consortium plans to hold regular meetings.[28]

Cooperation Agreement Between CPPA and UK ICO

On April 29, 2025, the California Privacy Protection Agency ("CPPA") entered into a declaration of cooperation with the UK Information Commissioner's Office ("UK ICO"). The declaration of cooperation will allow the agencies to: (i) facilitate joint research and education relating to new technologies and data protection issues; (ii) share best practices, knowledge and investigative methods; (iii) convene meetings with staff members; and (iv) share relevant experiences and develop appropriate mechanisms for mutual cooperation. This is the third collaboration between the CPPA and international data protection authorities, after announced collaborations with South Korea's Personal Information Protection Commission in January 2025 and France's Commission Nationale de l'Informatique et des Libertés in June 2024.[29]

7 states whose regulators formed the Consortium of Privacy Regulators

3 collaborations between the CPPA and international data protection authorities

WHY IT MATTERS

- Companies can expect increased coordination between Consortium states with respect to investigations, enforcement and resources
- May signal a push by state-level regulators to increase investigations and enforcement activity in the absence of a broad, federal privacy regime

Corporate Governance

IS DELAWARE LOSING ITS CROWN? – REDOMESTICATION TRENDS

Delaware has long held the crown as the corporate capital of the U.S., with more than two thirds of Fortune 500 companies and over a million business entities domiciled there.[30] But recent legal and legislative developments, in addition to notable redomestications to Texas and Nevada, have caused many to wonder: is Delaware at risk of losing its crown as the corporate capital of the U.S.?

A turning point came in February, when the Delaware Supreme Court in *Maffei v. Palkon* ruled that TripAdvisor's redomestication to Nevada should be reviewed under the business judgment rule, and not the more stringent entire fairness standard.[31] The case effectively lowered the legal barriers to exit, opening the door for high-profile redomestications by companies. For more discussion of *Maffei v. Palkon*, please see our Q1 quarterly report.[32]

In response to the Delaware Supreme Court's decision (as well as other recent Delaware decisions and corporate developments), Delaware enacted Senate Bill 21 ("SB 21") in March, which made several notable changes to the Delaware General Corporation Law. SB21 notably expands safe harbor protections for directors, officers and controlling shareholders for conflicted and controlling shareholder transactions and limits inspection rights for shareholders by limiting the scope of books and records. Some have argued that SB21 undermines shareholder protections and shifts greater power towards corporate insiders. For more discussion of SB21, please see our Q1 quarterly report.[33]

Meanwhile, Texas and Nevada have continued to aggressively position themselves as preferred destinations for incorporation. Some notable redomestications to date include Tesla's move to Texas, TripAdvisor's move to Nevada, Dropbox's move to Nevada and Andreessen Horowitz's move to Nevada.

Texas notably launched its own business court in 2024, in an attempt to "compete" with the Delaware Court of Chancery in providing specialized corporate law adjudication.[34] In May, Texas twice amended its corporate code to codify the business judgment rule, permit charter-specified minimum ownership thresholds (up to 3%) for bringing derivative suits, permit enforceable jury-trial waivers in governing documents for internal entity claims, and allow Texas-based public companies to impose higher ownership thresholds for shareholder proposals than the thresholds under the SEC's Rule 14a-8.[35, 36]

Nevada followed suit in May by passing legislation that also amended its corporate laws to streamline approval of mergers, permit companies to include in their charters opt-outs of jury trials for certain internal actions, define a controlling shareholder and limit controllers' fiduciary duties, and clarify appraisal rights as the exclusive remedy for certain shareholders.

The recent domestication trend highlights a changing corporate governance landscape, where states like Texas and Nevada seek to offer attractive alternatives by rewriting statutes to attract companies with lower litigation risks and greater officer, director and controlling shareholder protections.

Delaware remains the most common state of incorporation for existing and newly launched corporations (including ~75% of companies that publicly filed for IPOs so far in 2025). However, entrepreneurs founding new enterprises and boards of directors evaluating IPOs are critically assessing the perceived costs and benefits of incorporation in various states, rather than selecting Delaware by default.

Of note, Texas and Nevada captured a combined ~19% share of the companies that publicly filed for IPOs so far in 2025—indicating that while Delaware continues to reign supreme in corporate formations, efforts by competing states to attract companies have begun to show results.

Corporate Governance

2025 PROXY SEASON RECAP

The 2024-2025 proxy season unfolded amid growing uncertainty under the new presidential administration. Paul Atkins's appointment as SEC Chairman likely also signaled upcoming shifts in the SEC's regulatory agenda and enforcement priorities. Support for environmental and social proposals declined, while governance and executive compensation remained key focus areas and garnered relatively high levels of support. Companies also faced scrutiny on redomestication proposals; supermajority voting provisions; special meeting rights; board diversity disclosures; environmental, social and governance (ESG) metrics and reporting; and diversity, equity and inclusion (DEI) metrics and reporting, among others.

The number of shareholder proposals submitted to companies during the 2024-2025 proxy season declined as compared to the prior year. A key development this season was the issuance of Staff Legal Bulletin No. 14M ("SLB 14M"). As a result, no-action requests rose by roughly 38% this year, with the SEC granting about 69% of those requests. The most common exclusion bases were the ordinary business exception and substantial implementation. For more discussion on SLB 14M, please see our Q1 quarterly report.[37]

Say on Pay votes continued to receive strong approval, averaging about 90% support across Russell 3000 and S&P 500 companies.[38] Director election support remained high as well, with average support around 95%; in contrast, the number of environmental and social-related proposals received declined sharply as compared to the prior year, down approximately to the level received in 2021.[39]

Corporate governance-related shareholder proposals continued to be the most common proposals received, including calling for the adoption of or amendment to special meeting rights, modified ownership thresholds and the removal of supermajority voting provisions.

As companies prepare for the 2025-2026 proxy season, they should expect continued focus on traditional considerations and performance alignment. Given the new administration's focus on evaluating and reshaping disclosure rules related to ESG and executive compensation, among other areas, the 2025-2026 season could also usher in significant policy shifts that warrant increased attention. Companies should monitor regulatory developments closely as shifting enforcement priorities and rulemaking will likely alter the landscape of shareholder proposals, proxy voting and reporting disclosures in the coming year.

ESG proposals declined sharply in 2025.

Corporate Governance

SEC DEVELOPMENTS – FPI DEFINITION AND EXEC COMP

SEC Solicits Public Comment on the Foreign Private Issuer Definition

On June 4, the SEC published a concept release to seek public comment on whether and how it might revise the definition of "foreign private issuer" ("FPI").[40]

The concept release was issued with unanimous support from the four commissioners and calls for a sweeping, data-driven re-examination of FPI eligibility criteria, the first such review in half a century. The FPI regime is intended to attract foreign companies to the U.S. markets, enabling U.S. investors to trade in securities under the protection of U.S. laws and regulations. The SEC originally created the FPI framework to accommodate the different legal and regulatory environments foreign issuers faced, offering over 20 exemptions from standard U.S. reporting and governance requirements.

A 2024 SEC staff survey found that, in stark contrast to the FPI landscape 40 years ago, FPIs today are most frequently incorporated in the Cayman Islands, headquartered in China, and have their securities traded almost exclusively on U.S. exchanges, a pattern that has raised concerns, as it is seen by some to disproportionately benefit FPIs by providing reduced oversight while allowing them to compete with domestic issuers subject to more burdensome regulations.[41]

The comment period will be open for a 90-day period ending on September 8, 2025. For a deeper dive into FPI status and the concept release, see our memo.[42]

SEC Holds Roundtable on Executive Compensation Disclosure Requirements

On June 26, the SEC held a roundtable on executive compensation disclosure requirements.[43] At the roundtable, panelists explored how public companies set compensation for their executive officers, the evolution of executive compensation disclosure and challenges in preparing required disclosures, and the types of disclosure that investors find material. In announcing the roundtable, Chairman Paul Atkins acknowledged that disclosures have grown in length and complexity, and questioned whether they offer investors information that is material to investment and voting decisions.

WHY IT MATTERS

- May be a precursor to potentially fundamental changes to the eligibility criteria for the FPI definition or to the exemptions available to FPIs under the U.S. securities laws, as proposed rulemaking will likely follow
- Roundtables are often a precursor to rulemaking activities, and this roundtable signals the SEC is likely to explore executive compensation disclosure reform

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