



M&A, Activism and Corporate Governance

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Mergers and Acquisitions

The U.S Government as a partner: what you should know about M&A and the U.S. government

Under the Trump administration, the U.S. government has significantly shifted its industrial policy to act as a cornerstone investor in companies operating in sectors involving strategic assets, including energy, critical infrastructure, critical minerals, supply chain resilience, advanced technology and national security. Since the beginning of 2025, the U.S. government has invested, or committed to invest, \$20.9 billion in 16 transactions to acquire direct ownership stakes in companies operating in these sectors.^[1] However, these transactions do not fit squarely within a single investment category (e.g., a U.S. government partnership may include elements of a minority equity investment, project finance, grants, loans, guarantees, commercial arrangements, regulatory facilitation and strategic partnerships). The U.S. government may be “wearing many hats” in connection with making these investments, so companies should be careful not to characterize these transactions through a narrow lens at the outset and instead assess the full range of legal, regulatory and commercial considerations that may apply.

Recent examples illustrate the range of potential forms that a transaction with the U.S. government may take. In critical minerals and related supply chains, reported transactions involving MP Materials, Lithium Americas, Trilogy Metals, USA Rare Earth, Korea Zinc, Vulcan Elements and Atlantic Alumina have included combinations of equity stakes, warrants, loans, price support, offtake arrangements, project-level participation and other bespoke instruments. These transactions also have involved different federal agencies, authorities and funding sources, including the Department of Commerce, the Department of Energy, the Department of War (formerly the Department of Defense), CHIPS Act funding and other federal loan programs. While the details of each transaction vary by company, asset, agency and authority, these examples suggest that the government is not simply drawing on its traditional subsidy toolkit (i.e., grants, loans and tax incentives) but is instead actively shifting from a “government-as-grantor” model to a

“government-as-partner” model, seeking to participate in the business and economics of strategically significant assets.

Based on what we see in the market, U.S. government participation in these transactions follows an evolving playbook. Transaction structures may involve a newly formed project company or other special-purpose vehicle, contributions of assets and capital, private-party control, and third-party constituent and government participation through a combination of the instruments described above.

The economics often reflect dual objectives: downside protection and a path to upside. While the government generally does not appear focused on day-to-day operational control, it may seek visibility into the project/project company through information rights, observer rights, reporting covenants, audit rights, milestone updates, consultation rights or targeted consent rights (such as the “Golden Share” issued to the U.S. government by U.S. Steel in June 2025), together with financial alignment that allows it to benefit from project development and success. Although these transaction features may resemble minority investor protections, their purpose is directed less toward sponsor-style control protection and more toward monitoring execution, funding accountability, security, expanding domestic capacity/supply chain, support with domestic regulatory approvals, supply assurance and coordination with other stakeholders.

Because these transactions often involve unique and dynamic legal and practical considerations as compared to transactions with traditional commercial counterparties, a non-binding term sheet or letter of intent is helpful to establish early alignment on the principal commercial and structural points. That alignment is especially important because the ordinary M&A toolkit may not function in the usual way. Covenants, closing conditions, termination rights and remedies remain relevant to the transaction, though their utility is impacted by dealing with a government counterparty due to both legal limitations and practical considerations. Parties should therefore prioritize considering how the deal structure itself can perform part of the remedial function, including by aligning incentives, reducing discretion, mitigating funding risk, sequencing commitments and tying benefits to performance.

Implications for Deal Practice

1. Companies should clearly determine the government’s role before developing the transaction strategy or definitive documentation. Is the government acting as investor, lender, customer, grantor, guarantor, regulator, strategic partner or some combination thereof?
2. The transaction structure should be viewed as central to the value of the arrangement. Core economics, government support, incentive alignment and practical enforcement may all depend on the transaction structure selected.

3. The term sheet should be used to create alignment on the transaction architecture before process, precedent and stakeholder review make unresolved issues more difficult to address.
4. The definitive documentation for the transaction should preserve appropriate flexibility to address project evolution, changing capital needs, subsequent co-investors and developing regulatory facts.

Key Development in Delaware Case Law

DGCL Amendments Survive Challenges

***Rutledge v. Clearway Energy Group LLC*, C.A. No. 248, 2025 (Del. Feb. 27, 2026); *Moelis & Co. v. West Palm Beach Firefighters' Pension Fund*, C.A. No. 340, 2024 (Del. Jan. 20, 2026)**

In two decisions issued one week apart, the Delaware Supreme Court resolved significant challenges to the constitutionality of amendments to the Delaware General Corporation Law (“DGCL”) enacted in 2025 regarding controlling stockholder transactions and board governance arrangements and the validity of certain stockholder agreements.

In *Rutledge v. Clearway Energy Group LLC*, a stockholder of Clearway Energy, Inc. brought a derivative action, seeking, among other things, a declaration that portions of Senate Bill 21 (“SB 21”) violated the Delaware Constitution. SB 21, enacted in March 2025, amended Section 144 of the DGCL to establish procedural safe harbors for controlling stockholder transactions.^[2] The plaintiff argued that these amendments (1) improperly divested the Court of Chancery of its equitable jurisdiction and (2) retroactively eliminated accrued causes of action. The Court of Chancery certified both constitutional questions to the Delaware Supreme Court.

The Delaware Supreme Court answered both questions in the negative and upheld SB 21’s constitutionality. On the first question, the court held that SB 21’s safe harbor provisions—which generally shield directors, officers, controlling stockholders and members of control groups from equitable relief or damages when transactions are approved through prescribed procedures—merely create a new review framework rather than divest the Court of Chancery of jurisdiction (such as its jurisdiction to hear breach of fiduciary duty claims). On the second question, the court found that SB 21’s retroactive application did not impermissibly deprive the plaintiff of a vested property right because the plaintiff could still pursue his claims under the new statutory standards. The court further held that an expectation of “anticipated continuance of the existing law” does not constitute a vested right protected by due process.

In *Moelis & Company v. West Palm Beach Firefighters' Pension Fund*, a stockholder sought a declaratory judgment that provisions of a stockholders agreement, which had been entered into

nearly nine years earlier and granted entities controlled by Ken Moelis extensive pre-approval and consent rights, were facially invalid by virtue of interfering with the board’s management powers under Section 141(a) of the DGCL. The Court of Chancery agreed with the plaintiff, invalidating the provisions and rejecting timeliness defenses on the ground that the provisions were void at creation.

The Delaware Supreme Court reversed, holding that a conflict with Section 141(a) should not automatically render contractual provisions void.

Focusing on whether the challenged agreement was within the corporation’s power to effect through charter amendment or other means, the court concluded that the plaintiff failed to carry its burden to prove the challenged provisions were void rather than voidable. Accordingly, timeliness defenses survived and ultimately barred the plaintiff’s claims. Notably, the court did not reach the question of, or rely on, Senate Bill 313 (“SB 313”), the bill the Delaware legislature enacted in 2024 in direct response to the lower court’s ruling.^[3] The court expressly stated that the amendment did not apply to the pending action and declined to consider its policy implications.^[4]

Why It Matters

- Although decided on different grounds, both *Rutledge* and *Moelis* reflect the Delaware judiciary’s broader pattern of statutory recalibration following periods of judge-led doctrinal change, providing additional certainty to practitioners structuring controlling stockholder transactions and governance arrangements.
- As commentators have observed, the Delaware legislature’s interventions in 2024–2025, enacted at unusual speed, were driven by concern that judicial decisions threatened established governance structures and the state’s chartering franchise. The Delaware Supreme Court’s validation of the reforms challenged in *Rutledge* reinforced Delaware’s institutional capacity to adapt its corporate law framework through independent but aligned legislative and judicial actions.

Key Development in Delaware Case Law

AI Misuse and Termination Provisions

***Fortis Advisors, LLC v. Krafton, Inc.*, C.A. No. 2025-0805-LWW (Del. Ch. Mar. 16, 2026)**

In 2021, South Korean gaming conglomerate Krafton, Inc. (“Krafton”) acquired video game studio Unknown Worlds Entertainment (“Unknown Worlds”) for \$500 million, plus up to \$250 million in contingent earnout payments tied to Unknown Worlds’ revenue through December 2025. The equity purchase agreement for the transaction (the “EPA”) guaranteed that Unknown Worlds’

founders, Charlie Cleveland and Max McGuire, and its CEO, Ted Gill (together, the “Key Employees”), would retain operational control of their studio and could only be terminated for cause.

In May 2025, as Unknown Worlds prepared to release its sequel titled *Subnautica 2*, Krafton’s internal projections showed the game generating revenue that would easily trigger the full earnout. Krafton’s CEO, Changhan Kim, who had personally led the acquisition, viewed the right to the earnout payment as evidence that he had overpaid. After a colleague warned Kim that terminating the Key Employees for cause would not eliminate the earnout entitlement and could expose Krafton to litigation and reputational risk, Kim turned to ChatGPT. At the chatbot’s suggestion, Kim formed an internal task force with a mandate to either negotiate a deal on the earnout or execute a “takeover” of the studio. Over the following month, Krafton followed most of ChatGPT’s recommendations, including preemptive public framing and securing control over publishing rights and code pipelines. When negotiations over a possible buyout stalled on July 1, 2025, Krafton terminated all three Key Employees from their leadership positions, citing a lack of game readiness for *Subnautica 2*. Nine days later, Fortis Advisors, LLC, representing the former stockholders of Unknown Worlds, filed suit against Krafton.

In the first phase of the bifurcated litigation, the court held that Krafton failed to prove its terminations of the Key Employees were for “cause” as defined in the EPA, which required an “intentional act of dishonesty”. Krafton had argued that Cleveland and McGuire had secretly entered semi-retirement, and that the Key Employees had executed large downloads of company data. The court also found that Krafton breached the EPA by seizing operational control of Unknown Worlds, which the Key Employees were contractually entitled to maintain. As a result, the court ordered specific performance, reinstating Gill as CEO with full operational authority and equitably extending the base earnout period by 258 days (the duration of Gill’s ouster).

Why It Matters

- AI-generated communications may be discoverable and could be subject to the same spoliation risks as any other relevant evidence. Specific ChatGPT chat logs that Krafton’s CEO admitted at trial to having deleted featured prominently in the court’s finding that Krafton executed a deliberate campaign to seize control of the studio.
- Negotiated for-cause termination provisions will be literally construed and rigorously enforced. The court held that the modifier “intentional” before “dishonesty” required proof that deception was the actor’s specific aim, not merely that the underlying act was deliberate, and that neither transparent role changes nor defensive data downloads met that bar.
- Specific performance remains a potent remedy to protect bargained-for operational and economic rights, including in transactions involving earnouts.

Key Development in Delaware Case Law

Conflicts Disclosures in Proxy Statements

In re EngageSmart, Inc. S'holders Litig., C.A. No. 2023-1093-JTL (Del. Ch. Feb. 27, 2026)

Following the 2021 initial public offering of software company EngageSmart, Inc. (“EngageSmart”), private equity firm General Atlantic (“GA”) held approximately 60% of EngageSmart’s voting power and possessed extensive governance rights in the company. Seeking to liquidate its investment, GA consummated a take-private recapitalization with Vista Equity Partners (“Vista”) in 2023, whereby Vista acquired 65% of EngageSmart and cashed out public stockholders at \$23 per share. GA sold some of its shares at this same price, but rolled over a substantial portion of its equity for a 35% post-transaction stake and received a \$500 million post-closing dividend on such rolled-over shares. The transaction was conditioned on the approval of EngageSmart’s special committee and a majority-of-the-minority stockholder vote. The special committee was advised by Evercore Inc. (“Evercore”), while Goldman Sachs & Co. (“Goldman”) served as EngageSmart’s financial advisor.

The plaintiffs, representing a putative class of former public stockholders, filed suit alleging that GA and the EngageSmart directors breached their fiduciary duties, including their duty of disclosure, in connection with the transaction, and that Goldman and Vista aided and abetted those breaches. The defendants moved to dismiss on the basis that the transaction satisfied the six conditions established in *Kahn v. M & F Worldwide Corp.*^[5] (“MFW”), which provides business judgment deference where a transaction’s approval is obtained from both an informed, independent special committee acting with the requisite duty of care and an informed, majority-of-the-minority stockholder vote that is not coerced.

The court found that the MFW conditions were not satisfied because the proxy statement filed in connection with the merger did not provide the stockholders with information required for them to cast informed votes to approve the transaction and declined to evaluate whether the other requirements of MFW were satisfied. In doing so, the court identified several material disclosure defects in the proxy statement, including (1) the failure to disclose GA’s desire to liquidate and the \$500 million post-closing dividend and (2) the use of vague language to describe Goldman’s and Evercore’s relationships with the counterparties to the transaction rather than disclosing specific engagements and fee amounts. Therefore, the entire fairness standard applied to the review of the transaction.

In addition to its refusal to dismiss the claims against three directors on the basis of the exculpatory provision under DGCL § 102(b)(7), the court sustained the aiding and abetting claims against Goldman. The court found the complaint adequately alleged that Goldman knowingly participated in the sell-side fiduciaries’ breaches through its role in designing the sale process, communicating pricing guidance to Vista and limiting Evercore’s involvement in its role as advisor to the special

committee. Notably, however, the court deferred ruling on the claim that Goldman aided and abetted

EngageSmart's disclosure breaches, noting the tension in recent Delaware case law regarding the level of participation required from a financial advisor to support such aiding and abetting claims. Lastly, the court dismissed all claims against Vista, finding that Vista's conduct did not support an inference that Vista had thought that its own actions were improper or believed that EngageSmart's fiduciaries were violating their duties. Critically, Vista's failure to correct the material omissions in the proxy did not rise to the level of "knowing participation" in the disclosure breaches, as Delaware law requires.

Why It Matters

- Even a well-structured process designed to meet the requirements of the MFW framework can be jeopardized by deficient proxy disclosures. In particular, boards and their advisors should ensure that proxy statements (1) candidly disclose all controller motivations (including post-closing dividends and any potential liquidity needs), (2) describe financial advisor conflicts and fee amounts with specificity and (3) accurately detail the roles played by committees and advisors.
- The law governing financial advisor liability for disclosure breaches remains unsettled. Financial advisors should expect continued judicial scrutiny of whether a knowing failure to disclose material information can satisfy the participation element of an aiding and abetting claim.
- The dismissal of the claims against Vista reaffirms that Delaware courts will continue to shield arm's-length buyers from aiding and abetting liability absent clear evidence that the buyer believed its own conduct was legally improper.

Activism

Key Development

U.S. Activism Campaigns Remain Elevated Despite a Global Pullback^[6]

Global activism campaign activity moderated in Q1 2026, declining 11% year-over-year (62 campaigns vs. 70 campaigns in Q1 2025), driven by sharp pullbacks in Europe (down 50% year-over-year) and APAC (down 28% year-over-year). Despite this global deceleration, U.S. activism remained strong in Q1. In total, the U.S. accounted for 41 campaigns in Q1 2026, up 3% year-over-year and representing 66% of all campaigns, well above the nine-year average of 54%. Activists most frequently targeted the technology and industrials sectors (49% of Q1 campaigns), while

M&A-related campaigns tempered in March, moderating the Q1 total to 29% of campaigns (up year-over-year but below the four-year average of 43%). Activists also demonstrated an increased focus on strategy and operations (32% of Q1 campaigns) and capital returns (27% of Q1 campaigns).

Activists won 45 board seats globally in Q1 2026, in line with the four-year average, with settlements remaining the primary avenue for board representation. Domestically, one-third of activist settlements were negotiated without prior public agitation, reflecting a continued trend of activists resolving campaigns privately. Additionally, as of Q1 2026, nine CEOs resigned within one year of an activist campaign (just below a year-to-date average of 10).

The influence of proxy advisors continued to be subject to scrutiny, with two major institutional investors, JPMorgan and Wells Fargo, introducing internal platforms to drive their own proxy voting recommendations. Meanwhile, SEC Chairman Paul Atkins reiterated his support for a tighter framework under Schedule 13G, which, if realized, would narrow the eligibility criteria for “passive investors” hoping to avoid additional disclosure burdens.

Why It Matters

- With M&A-related activism moderating amid market volatility, activists are increasingly pursuing strategic, operational and capital-return theses, suggesting campaigns may become more focused on near-term value creation rather than transformational deal-making.
- Private settlements continue to be a critical pathway for board change, with a significant share of U.S. settlements reached without any prior public agitation, underscoring both the opportunity for companies to resolve disputes efficiently and the importance of being prepared for private activist engagement.
- As regulatory and institutional skepticism toward proxy advisors continues, activists may approach contested elections and other campaigns by placing an even greater emphasis on direct investor engagement.

Restructuring

A How-to Guide to Hiring an Independent Director

Corporate boards at times face circumstances in which their usual governance framework may be insufficient to achieve the best outcome for the company and its stakeholders. In these situations, appointing a new independent director, a board member with no prior relationship to the company or its insiders, can be a helpful governance tool.

Independent directors can bring objectivity, specialized expertise and procedural protections that are particularly valuable when a company is navigating complex transactions, litigation risk or financial stress.

The When: Situations That Merit Appointment

Several common scenarios warrant consideration of appointing an independent director. First, when a company is contemplating an insider transaction, such as a sale of assets to a related party, a management buyout or a loan from an affiliate. These transactions may be subject to enhanced scrutiny by stakeholders and a heightened “entire fairness” standard of review if ever challenged in court. Prior to board approval and signing of transaction documents, an independent director can evaluate the transaction on behalf of disinterested stakeholders and help insulate the board’s decision from claims of self-dealing. Second, when a company is approaching potential insolvency or anticipates a bankruptcy filing, an independent director can oversee critical pre-filing work, including the evaluation of the company’s solvency at key decision points and the approval of pre-filing transaction agreements. A careful process overseen by an independent director can mitigate the risk of claims for fraudulent transfer or breach of fiduciary duty. Third, when circumstances call for a special investigation, such as an inquiry into potential misconduct, accounting irregularities or conflicts of interest among existing directors or officers, an independent director can lead or supervise that process with credibility. In each case, the earlier the appointment is made, the more effective it will be. A board that waits until litigation or insolvency is imminent risks the appearance that the independent director was installed as a post hoc justification rather than as a genuine governance enhancement.

The Who: Selecting the Right Candidate

The right independent director will have both fitting substantive expertise and genuine independence. Companies and their advisors should look for candidates who have no prior business, financial or personal relationship with the company, its officers or its controlling stakeholders. Beyond independence, the ideal candidate will possess experience relevant to the specific challenge at hand. For distressed companies, this often means a background in restructuring, turnaround management or insolvency law. For transactions requiring valuation analysis, experience in corporate finance or mergers and acquisitions is valuable. For investigations, a candidate with a legal or regulatory compliance background may be most appropriate. The human element also is critical. For a company experiencing operational or financial challenges, an experienced independent director can provide invaluable support and guidance to senior management. It is important to identify a director who will have the right “chemistry” with the other personalities involved. Professional placement firms, financial advisory networks and existing relationships are common sources for identifying qualified candidates, and

legal counsel should play a role in vetting any candidate's independence before the appointment is finalized.

The How: Key Provisions in Independent Director Agreements

The agreement governing an independent director's appointment should be carefully tailored. The scope of duties should be defined to correspond with the independent director's specific mandate, whether that is oversight of a transaction, an investigation or pre-filing planning, so that the role is clear and does not conflict with the responsibilities of existing board members. The agreement will often require the company to procure additional directors' and officers' insurance to ensure that the independent director has adequate coverage for claims arising from their service. Where appropriate to the scope of duty, the independent director (or a board committee on which the independent director will serve) should also have the express authority to retain independent professionals, including legal counsel, financial advisors and/or valuation experts, at the company's expense. Receiving independent advice can be critical to protecting the process conducted by the independent director in the face of future challenges. Finally, the agreement should address the treatment of corporate privilege, including the independent director's control over privileged communications with retained professionals to safeguard both the company's broader privilege rights and the credibility of the tailored processes run by the independent director.

The What: Delegated Processes and Decisions

The independent director's scope of authority should be clearly delineated in writing by the board. An independent director's grant of authority may include overseeing or commissioning independent valuations of company assets or proposed transactions, conducting or supervising internal investigations and making findings of fact and approving or recommending insider transactions. In the restructuring context, independent directors may be empowered to negotiate with creditors, evaluate alternatives and approve restructuring transactions. In some instances, an independent director's authority may be limited to developing and recommending transactions to the full board for approval. Clearly delineating these delegated functions helps ensure that the independent director's role is fully understood by relevant parties and that the process conducted by the independent director will be better able to withstand later scrutiny. Indeed, if a transaction is subject to litigation, the scope of authority exercised by the independent director can make the difference between whether a court will apply a heightened "entire fairness" standard of review or a more deferential "business judgment" standard of review.

The Why: Benefits of Hiring an Independent Director

The appointment of an independent director offers several tangible benefits. It adds specialized knowledge and experience to the board at a time when such expertise is most needed. It

strengthens the company’s ability to invoke the business judgment rule as a defense if a transaction or board decision is later challenged, because the involvement of a disinterested, informed director supports the argument that the board acted in good faith, without conflicts and on a reasonable basis. An independent director can be instrumental in the lead-up to a complex transaction or bankruptcy filing, such as obtaining solvency opinions, completing asset valuations, negotiating with stakeholders and performing independent investigations. The functions position the company for a more efficient process and can provide strong litigation defenses. In the aggregate, the cost of appointing an independent director is often modest relative to the legal and financial risks it helps mitigate, making it a prudent measure for boards to consider when facing challenging circumstances.

Regulatory

Antitrust – Key Developments

HSR Requirements

- The HSR requirements that originally became effective in February 2025 have been vacated by a federal court. Effective March 20, 2026, filings may be prepared and submitted under the pre-February 2025 requirements.
- In January 2025, following the announcement of the new HSR requirements, the Chamber of Commerce sued the FTC in the U.S. District Court for the Eastern District of Texas alleging several violations of the Administrative Procedure Act (“APA”).
- On February 12, 2026, the District Court issued its opinion vacating the FTC’s rule changes to the HSR pre-merger notification process, explaining that “the Final Rule exceeds the FTC’s statutory authority because the agency has not shown that the Rule’s claimed benefits will ‘reasonably outweigh’ its significant and widespread costs”, that while “the FTC asserts that the Rule will detect illegal mergers and save agency resources, the FTC fails to substantiate these assertions”, and that “[t]he Final Rule is also arbitrary and capricious for largely the same reason”, with the FTC failing to “adequately explain its rejection of less costly and burdensome alternatives”.^[7]
- On March 19, the Fifth Circuit denied the FTC’s motion for a stay pending appeal. As a result, while the appeal proceeds, the pre-February 2025 requirements are in effect.

New HSR Thresholds for 2026 Pre-merger Notification Filings

- In January 2026, the FTC approved revised jurisdictional thresholds for Section 8 of the Clayton Act, revised jurisdictional thresholds under Section 7A, and a revised filing fee schedule.

- The size of transaction threshold increased from \$126.4 million to \$133.9 million for 2026; the size of person thresholds increased from \$252.9 million to \$267.8 million and from \$25.3 million to \$26.8 million; and prohibitions on certain interlocking memberships on corporate boards of directors are \$54,402,000 for Section 8(a)(1) and \$5,440,200 for Section 8(a)(2)(A) for 2026.[8]

Updates on DOJ and FTC Remedies

The agencies have returned to actively pursuing remedies to address competitive issues in deals.

In the context of several recent deals, the agencies have pursued remedies to resolve antitrust concerns surrounding deals. On January 30, 2026, the FTC required Sevita Health to divest more than 100 healthcare facilities to resolve antitrust concerns surrounding its proposed \$835 million acquisition of BrightSpring Health Services, Inc.'s community living business.[9] Similarly, on February 17, 2026, the FTC finalized a consent order involving the Boeing Company's acquisition of Spirit AeroSystems Holdings, Inc., which requires Boeing to divest significant Spirit assets and also requires Boeing and Spirit to continue to provide aerostructures and aerostructure services to competing contractors for military aircraft programs.[10]

Similarly, the DOJ has also sought divestitures before allowing certain acquisitions to proceed. On February 2, 2026, in connection with the DOJ's review of the acquisition by Columbus McKinnon, a leading designer, manufacturer and marketer of intelligent motion solutions for material handling, of Kito Crosby Limited from funds managed by global investment firm KKR, Columbus McKinnon entered into a consent decree with the DOJ, pursuant to which it agreed to divest its U.S. power chain hoist and chain operations.[11] On February 18, 2026, Reddy Ice, LLC announced the successful closing of its acquisition of Arctic Glacier, LLC, a North American provider of premium ice products and services, from Carlyle, after Reddy Ice agreed with the DOJ to divest four of its facilities and associated customer contracts in Mukilteo and Lakewood, Washington, Coeur d'Alene, Idaho, and Brawley, California, as well as customer contracts in Oregon and in the New York and Boston metropolitan areas.[12]

Why It Matters

- The agencies have exhibited a renewed willingness to pursue remedies to resolve competitive issues, instead of blocking deals.

Exceptions

- The agencies will still seek to block deals where appropriate. For example, the FTC sued to block Edwards Lifesciences Corp.'s proposed acquisition of JenaValve Technology, Inc. On January 9, 2026, after a six-day trial, the U.S. District Court for the District of Columbia granted the FTC's request for a preliminary injunction to temporarily prevent Edwards from acquiring JenaValve, leading the parties to abandon the deal. [13]

Employee Matters – Key Developments

Recent State Actions on “Stay-or-Pay” Arrangements

New York and California have both recently taken action to regulate so-called “stay-or-pay” arrangements, including arrangements that would require the repayment of a sign-on or prepaid retention bonus. Both states also target other arrangements that provide for repayment obligations, such as apprenticeship and tuition reimbursement programs, which are beyond the scope of this note.

In New York's case, the Governor signed the “Trapped at Work Act” into law on December 19, 2025,[14] which was subsequently amended on February 13, 2026 following concerns that it was overly broad and employers would not have time to adequately prepare for its implementation.[15] As amended, the act will go into effect on December 19, 2026 and only applies to “employees”, excluding directors, independent contractors and consultants from its coverage. New York's act prohibits what it refers to as “employment promissory notes”, which are generally defined as agreements that require the employee to pay the employer if the employment relationship ends prior to a specified date. Financial bonuses, relocation assistance payments, noneducational incentives and payments and benefits not tied to specific job performance are exempt from the prohibition unless the employee is terminated for reasons other than “misconduct” or the duties or requirements of the job were misrepresented to the employee. While “misconduct” is not defined and the act does not provide details regarding what would constitute a misrepresentation, the key takeaway is that common sign-on and retention bonuses subject to repayment upon a voluntary termination are still generally permitted in New York. Moreover, enforcement of the act is through the New York Department of Labor, without a private right of action, and penalties range from \$1,000 to \$5,000 per violation, plus attorneys' fees for employees who successfully defend against a prohibited agreement.[16]

In California, Assembly Bill 692 took effect on January 1, 2026 and more specifically addresses sign-on bonuses.^[17] California's prohibition is also broader than New York's in that it applies to "workers", which include any individual who works for a business entity. In California, sign-on bonuses are exempt from the law's prohibition if they meet the following criteria: (1) the repayment terms are set forth in a separate agreement from the primary employment^[18] contract; (2) the worker is given at least five business days to consult an attorney (and is notified they have the right to consult an attorney); (3) any repayment obligation is prorated, occurs only at the worker's election or due to the worker's termination for "misconduct" and is not subject to interest; (4) the repayment/retention term cannot exceed two years; and (5) the worker is given the opportunity to defer payment to the end of a retention period with no repayment obligation. Note that California's law is stricter than New York's in that, even upon a voluntary termination or one for misconduct, the worker can only be required to repay a prorated portion of the sign-on bonus. California also provides for a private right of action, with damages deemed to be the greater of actual damages or \$5,000 per worker, plus injunctive relief and attorneys' fees.^[19]

Since both laws are relatively new, and only California's has gone into effect, we expect additional details will be provided and practices regarding their interpretation will eventually develop. In the meantime, employers considering offering sign-on or prepaid retention bonuses to employees or potential employees located in California or New York should consult with an attorney in connection with such offers.

Investigations – Key Developments

New DOJ-Wide Corporate Enforcement and Voluntary Self-Disclosure Policy

- On March 10, 2026, the DOJ released a DOJ-wide corporate enforcement and voluntary self-disclosure policy ("CEP") for criminal matters.
- As described by the DOJ, the CEP is intended to "(1) drive early, voluntary self-disclosure of criminal conduct; (2) promote timely and effective enforcement of criminal laws, including holding culpable individuals accountable; (3) reduce harm;(4) facilitate prompt remedial action, including requiring companies to compensate victims and address corporate deficiencies; (5) help ensure consistency across the DOJ; and (6) transparently describe the DOJ's policies and decision making".
- The CEP explains that the DOJ will decline to prosecute a company for criminal conduct when four factors are met: (1) the company voluntarily self-disclosed the misconduct; (2) the company fully cooperated with the DOJ's investigation;(3) the company timely and appropriately remediated the misconduct; and (4) there are no aggravating circumstances.

- The CEP further explains that if a company fully cooperated and timely and appropriately remediated, but is ineligible for a declination because its self-reporting did not qualify as a self-disclosure (a “near-miss” self-report) and/or there were aggravating circumstances, the DOJ shall, instead of a declination: (1) provide anon-prosecution agreement (absent egregious/ multiple aggravating circumstances); (2) allow a term length of fewer than three years; (3) not require an independent compliance monitor; and (4) provide a reduction between 50% and 75% off the low end of the applicable fine range. To qualify as a voluntary self-disclosure, a self-report must be made: (1) to the appropriate DOJ criminal component; (2) of misconduct previously unknown to the DOJ; (3) without any preexisting obligation to disclose the misconduct to the DOJ; (4) prior to an imminent threat of disclosure or government investigation; and (5) within a reasonably prompt time after becoming aware of the misconduct. If any of these five elements are not satisfied, a self-report will not be considered a voluntary self-disclosure.
- The CEP also expressly preserves the DOJ’s Merger & Acquisition (M&A) Policy, which applies to disclosure of misconduct uncovered in the context of M&A pre- and post-acquisition due diligence.

Why It Matters

Although different components of the DOJ have previously announced enforcement and self-disclosure policies that vary in the factors that they consider and the benefits available, this is the first DOJ-wide CEP and seeks to establish a uniform approach across all components (except for the Antitrust Division, which will retain its policy). While the incentives available to companies that self-disclose are not new, the broad application of the policy across components is.

Investigations – Key Developments

SEC Enforcement Division Revises Enforcement Manual

On February 24, 2026, the SEC’s Division of Enforcement (the “Division”) announced revisions to its Enforcement Manual, which was last revised in 2017, and announced an annual review of the Enforcement Manual moving forward. In its release, the SEC highlighted changes to seven areas of the Enforcement Manual: (1) updates to the Wells process; (2) consideration of settlement recommendations and waiver requests; (3) provision of detail regarding the Division’s view of cooperation; (4) changes to encourage internal collaboration; (5) updates regarding the formal order process; (6) updates to cravath.com the criminal referral framework; and (7) other best practices changes. Among other updates to the Wells process, the Enforcement Manual now specifies that Wells submissions are subject to a standard four-week deadline, with post-Wells submission meetings to occur within four weeks, and directs Division staff, during the Wells

process, to inform the recipient “of the salient, probative evidence that the staff has gathered or received”, including evidence that may not be known to the recipient.[20]

Why It Matters

The revisions suggest that the Division is attempting to take a more transparent, predictable and consistent approach to enforcement.

Corporate Governance

Rule 14A-8 Litigation

In November 2025, the SEC staff announced that it would no longer provide substantive review of Rule 14a-8 no-action requests, other than a request to exclude under Rule 14a-8(i)(1) (improper under state law).[21] [22] This policy shift sparked an unprecedented wave of shareholder proposal litigation. The litigation has taken two forms: challenges to individual company exclusions and a broader administrative challenge against the SEC’s revised policy.

In the span of one month, shareholders filed five lawsuits against companies challenging the exclusion of their proposals and one company filed suit against the SEC challenging its change in procedures. Three of these cases have since settled, with one involving a procedural dispute (over Rule 14a-8), and two, as discussed below, involving challenges based on the ordinary business exclusion under Rule 14a-8(i)(7).

One case was also voluntarily dismissed following the denial of a request for a preliminary injunction. Only one of the individual company exclusion suits remains in active litigation.

Individual Company Lawsuits

On February 17, 2026, shareholders filed two separate lawsuits against AT&T and Axon. AT&T sought to exclude a shareholder proposal from the NYC Comptroller on behalf of four NYC pension funds under Rule 14a-8’s ordinary business exclusion. AT&T ultimately settled with the proponent soon after the lawsuit was filed and agreed to include the proposal in its proxy materials.

The Nathan Cummings Foundation filed suit against Axon for the company’s exclusion of a political spending disclosure proposal. Axon, unlike AT&T, provided a detailed exclusion notice that argued that the proposal was an effort to micromanage the company. The Nathan Cummings Foundation still filed suit, which signals that exclusion notices do not alone eliminate the risk of litigation. The case was ultimately settled in March with Axon agreeing to provide certain public disclosures over a five-year period.

The AT&T and Axon cases suggest that even large public companies with significant resources to litigate and a strong basis for exclusion may conclude that settlement is the preferred path under the SEC’s revised no-action policy.

Institutional Shareholder Organization Lawsuits Against the SEC

Interfaith Center on Corporate Responsibility v. SEC

In addition to company-level suits, two major shareholder organizations—the Interfaith Center on Corporate Responsibility (“ICCR”) and As You Sow—filed suit against the SEC itself. ICCR is a coalition of more than 300 investors that represents more than \$4 trillion in managed assets, and As You Sow is one of the largest activist shareholder groups in the country.^[23]

On March 19, 2026, the shareholder groups filed suit in federal court alleging the SEC violated the APA by implementing “a new de facto rubber-stamp process that allows companies to exclude proposals without any analysis by the staff”.^[24] Plaintiffs further allege that the SEC staff’s implementation of this new policy constitutes a “legislative rule that alters proponents’ legal rights” and that it did so without the notice and comment rulemaking process required by the APA.^[25]

These cases may signal an emerging trend in which litigation over the application of Rule 14a-8 proposals becomes increasingly common. They also raise important and unresolved questions concerning Rule 14a-8 and the SEC staff’s administration of the rule. For more discussion of the SEC’s action, please see our November 21, 2025 memo.^[26]

SEC Developments

SEC Seeks To Reform Regulation S-K

On January 13, 2026, SEC Chairman Paul Atkins issued a statement announcing the review of Regulation S-K and requesting public comments. Regulation S-K is the SEC’s principal framework for non-financial disclosure requirements.²⁷ Chairman Atkins stated that the goal of reform is to “focus on eliciting disclosure of material information and avoid compelling the disclosure of immaterial information”. The comment period ended on April 13, 2026.^[28]

SEC Charges Archer-Daniels-Midland (“ADM”) with Accounting and Disclosure Fraud

On January 27, 2026, the SEC announced settled charges against ADM and two former executives, and a litigated action against one former executive for materially overstating the performance of ADM’s Nutrition segment. The SEC alleged that the executives directed improper intersegment adjustments to make it appear as if the Nutrition segment was meeting the 15%–20% annual operating profit growth that they had projected to investors.

ADM agreed to pay a \$40 million civil penalty. In accepting ADM's settlement offer, the SEC credited ADM's cooperation and significant remedial measures (e.g., voluntary self-reporting, conducting an internal investigation and implementing new internal accounting controls).[29]

Why It Matters

The statement signals the SEC's intent to scale back disclosure requirements, with substantive reform likely to follow.

The enforcement action serves as a reminder that the SEC continues to closely scrutinize segment-level financial reporting, including the use of internal adjustments and intersegment transactions, and the importance of maintaining robust internal accounting controls and accurate segment-level disclosures.

SEC Personnel Changes

On March 16, 2026, the SEC announced that Margaret Ryan was resigning as Director of the Division of Enforcement. Ryan had served in the role since September 2025. On April 8, the SEC announced that David Woodcock would assume the position, effective May 4.[30] [31] On January 20, 2026, the SEC announced that Keith E. Cassidy was appointed Director of the Division of Examinations.[32] On January 15, 2026, J. Russell "Rusty" McGranahan was named SEC General Counsel.[33]

On May 5, the SEC proposed amendments that would give public companies the option to file one semiannual report in lieu of the three quarterly reports currently required. For more discussion on this proposal, please see our [May 19, 2026 memo](#).[34]

ESG Litigation

Vanguard Settles Antitrust Litigation

On February 25, 2026, Vanguard agreed to pay \$29.5 million as part of a settlement with 13 state attorneys general to settle lawsuits brought against the asset manager. The antitrust suit, filed in 2024 in the Eastern District of Texas, alleged that several major asset managers violated antitrust laws through their participation in climate-focused industry groups. Plaintiffs claimed that the firms' participation in these groups, combined with their holdings in coal-company stock, reduced coal production and increased energy prices. Without admitting liability, Vanguard agreed to "strict passivity commitments", limiting the funds' ability to influence corporate strategy or promote shareholder proposals regarding social or environmental issues.[35]

Texas Judge Strikes SB 13

On February 3, 2026, the U.S. District Court for the Western District of Texas held that Texas Senate Bill 13 (2021) (“SB 13”), an “anti-ESG” law, was unconstitutional under the First and Fourteenth Amendments.^[36]

SB 13 was one of the first notable anti-ESG laws passed in the United States. SB 13 prohibited Texas entities from investing in or contracting with financial institutions that the state deemed to have “boycotted energy companies”. The law broadly defined boycotting as refusing to deal with, ending business with or taking any action intended to penalize or inflict economic harm on fossil fuel energy companies.^[37]

The ruling enjoined the enforcement of SB 13, but Texas officials have already indicated the decision will be appealed.

Why It Matters

Companies and asset managers continue to come under fire at the state level. With claims against the asset managers other than Vanguard still pending, the ESG landscape remains in flux. Companies should continue to monitor state-level developments targeting ESG commitments, as Texas and other states seek to enact or defend similar anti-ESG legislation.

¹Jonathan E. Hillman, Washington's Growing Portfolio: Tracking U.S. Government Investments, Council on Foreign Relations (Apr. 22, 2026, at 10:45 AM), <https://www.cfr.org/articles/washingtons-growing-portfolio-tracking-u-s-government-investments>.

²For additional background on SB 21, see the discussion under the "What the Changes in Delaware Mean for You – Senate Bill 21" section in our M&A, Activism and Corporate Governance Quarterly Report for Q1 2025.

³For additional background on SB 313, see the related discussion under the "Delaware Corporate Law Amendments" section in our M&A, Activism and Corporate Governance Quarterly Report for Q2 2024.

⁴The court noted that the amended statute, DGCL § 122(18), does "not apply to or affect any civil action or proceeding completed or pending on or before such date".

⁵88 A.3d 635 (Del. 2014).

⁶Jim Rossman, Q1 2026 Review of Shareholder Activism, Barclays (Apr. 10, 2026), https://www.ib.barclays/content/dam/barclaysmicrosites/ibpublic/documents/our-insights/Q1_26_Shareholder_Activism/Barclays_Q1_2026_Review_of_Shareholder_Activism.pdf.

⁷Chamber of Commerce of the United States of America v. Federal Trade Commission, No. 6:25-cv-9-JDK (E.D. Tex. Feb. 12, 2026), stay denied, No. 6:25-cv-9-JDK (E.D. Tex. Feb. 18, 2026), admin. stay granted, No. 26-40094 (5th Cir. Feb. 19, 2026), stay pending appeal denied, No. 26-40094 (5th Cir. Mar. 19, 2026).

⁸Federal Trade Commission, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 91 Fed. Reg. 2133 (Jan. 16, 2026), <https://www.federalregister.gov/documents/2026/01/16/2026-00877/revised-jurisdictional-thresholds-for-section-7a-of-the-clayton-act>; Press Release, FTC Announces 2026 Update of Jurisdictional and Fee Thresholds for Premerger Notification Filings, Federal Trade Commission (Jan. 14, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/01/ftc-announces-2026-update-jurisdictional-fee-thresholds-premerger-notification-filings>; Press Release, FTC Announces 2026 Jurisdictional Threshold Updates for Interlocking Directorates, Federal Trade Commission (Jan. 14, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/01/ftc-announces-2026-jurisdictional-threshold-updates-interlocking-directorates>.

⁹Press Release, FTC Takes Action to Prevent Anticompetitive Healthcare Services Merger, Federal Trade Commission (Jan. 30, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/01/ftc-takes-action-prevent-anticompetitive-healthcare-services-merger>.

¹⁰Press Release, FTC Finalizes Consent Order in Boeing, Spirit Acquisition, Federal Trade Commission (Feb. 17, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/02/ftc-finalizes-consent-order-boeing-spirit-acquisition>.

¹¹Press Release, Justice Department Requires Columbus McKinnon to Divest Assets to Proceed with Acquisition of Kito Crosby, U.S. Department of Justice (Jan. 29, 2026), <https://www.justice.gov/opa/pr/justice-department-requires-columbus-mckinnon-divest-assets-proceed-acquisition-kito-crosby>; Columbus McKinnon Corporation, Columbus McKinnon Receives Clearance from the DOJ for Pending Acquisition of Kito Crosby, PR Newswire (Feb. 2, 2026, at 9:15 AM ET), <https://www.prnewswire.com/news-releases/columbus-mckinnon-receives-clearance-from-the-doj-for-pending-acquisition-of-kito-crosby-302676363.html>.

¹²Press Release, Justice Department Requires Reddy Ice to Divest Assets to Proceed with Proposed Acquisition of Arctic Glacier, U.S. Department of Justice (Jan. 30, 2026), <https://www.justice.gov/opa/pr/justice-department-requires-reddy-ice-divest-assets-proceed-proposed-acquisition-arctic>; Reddy Ice, LLC, Reddy Ice Announces Successful Closing of the Acquisition of Arctic Glacier, PR Newswire (Feb. 18, 2026), <https://www.prnewswire.com/news-releases/reddy-ice-announces-successful-closing-of-the-acquisition-of-arctic-glacier-302691882.html>.

¹³Press Release, Statement on FTC Victory Halting Anticompetitive Medical Device Deal, Federal Trade Commission (Jan. 12, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/01/statement-ftc-victory-halting-anticompetitive-medical-device-deal>.

¹⁴S. 4070A, 2025–2026 Reg. Sess. (N.Y. 2025) (Trapped at Work Act), <https://legislation.nysenate.gov/pdf/bills/2025/S4070A>.

¹⁵A. 9452, 2025–2026 Reg. Sess. (N.Y. 2026) (amending the Trapped at Work Act), <https://legislation.nysenate.gov/pdf/bills/2025/A9452>.

¹⁶Trapped at Work Act, N.Y. Lab. Law § 1053, as amended by A. 9452.

¹⁷A.B. 692, 2025–2026 Reg. Sess., ch. 703 (Cal. 2025) (Employment: contracts in restraint of trade) (adding Cal. Bus. & Prof. Code § 16608 and Cal. Lab. Code § 926; effective Jan. 1, 2026), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260AB692.

¹⁸Although the law states that it applies to “workers” and not just “employees” in several places, the law refers to employment contracts.

¹⁹Cal. Lab. Code § 926(b)-(c).

²⁰Securities and Exchange Commission, Division of Enforcement, Office of Chief Counsel, Enforcement Manual (Feb. 24, 2026), <https://www.sec.gov/>

[divisions/enforce/enforcementmanual.pdf](#). For additional analysis on the Division's recent changes to its Enforcement Manual, see our Finance & Capital Markets Quarterly Report for Q1 2026.

²¹Securities and Exchange Commission, Statement Regarding the Division of Corporation Finance's Role in the Exchange Act Rule 14a-8 Process for the Current Proxy Season (Nov. 17, 2025), <https://www.sec.gov/newsroom/speechesstatements/statement-regarding-division-of-corporation-finance-role-exchange-act-rule-14a-8-process-current-proxy-season>.

²²Cravath, Swaine & Moore LLP, SEC's Division of Corporation Finance Significantly Reduces Staff's Role in the Rule 14a-8 Process for the 2025-2026 Proxy Season (Nov. 21, 2025), <https://www.cravath.com/a/web/nM3EjJEnRMcqAraoqJNoYM/aYk2tv/secs-division-of-corporation-finance-significantly-reduces-staffs-role-in-the-rule-14a-8-process-for-the-2025-2026-proxy-season.pdf>.

²³Interfaith Center on Corporate Responsibility, Homepage, <https://www.iccr.org/>.

²⁴Complaint, Interfaith Ctr. on Corp. Resp., et al. v. Sec. & Exch. Comm'n, et al., No. 1:26-cv-00957 (D.D.C. Mar. 19, 2026).

²⁵Id.

²⁶Cravath, Swaine & Moore LLP, SEC's Division of Corporation Finance Significantly Reduces Staff's Role in the Rule 14a-8 Process for the 2025-2026 Proxy Season (Nov. 21, 2025), <https://www.cravath.com/a/web/nM3EjJEnRMcqAraoqJNoYM/aYk2tv/secs-division-of-corporation-finance-significantly-reduces-staffs-role-in-the-rule-14a-8-process-for-the-2025-2026-proxy-season.pdf>

²⁷Paul S. Atkins, Chairman, Securities and Exchange Commission, Statement on Reforming Regulation S-K (Jan. 13, 2026), <https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326>.

²⁸For additional analysis on the SEC's position regarding reform to Regulation S-K, see our Finance & Capital Markets Quarterly Report for Q1 2026. ([go back](#))

²⁹Securities and Exchange Commission, SEC Charges ADM and Three Former Executives with Accounting and Disclosure Fraud, Release No. 2026-15 (Jan. 27, 2026), <https://www.sec.gov/newsroom/press-releases/2026-15-sec-charges-adm-three-former-executives-accounting-disclosure-fraud>.

³⁰Securities and Exchange Commission, SEC Announces Enforcement Division Director Judge Margaret A. Ryan Has Resigned From Agency, Release No. 2026-27 (Mar. 16, 2026), <https://www.sec.gov/newsroom/press-releases/2026-27-sec-announces-enforcement-division-director-judge-margaret-ryan-has-resigned-agency>.

- ³¹Securities and Exchange Commission, SEC Appoints David Woodcock as Director of the Division of Enforcement, Release No. 2026-35 (Apr. 8, 2026), <https://www.sec.gov/newsroom/press-releases/2026-35-sec-appoints-david-woodcock-director-division-enforcement>.
- ³²Securities and Exchange Commission, Keith E. Cassidy Named Director of the Division of Examinations, Release No. 2026-6 (Jan. 20, 2026), <https://www.sec.gov/newsroom/press-releases/2026-6-keith-e-cassidy-named-director-division-examinations>.
- ³³Securities and Exchange Commission, J. Russell McGranahan Named SEC General Counsel, Release No. 2026-5 (Jan. 15, 2026), <https://www.sec.gov/newsroom/press-releases/2026-5-j-russell-mcgranahan-named-sec-general-counsel>.
- ³⁴Cravath, Swaine & Moore LLP, SEC Proposes Rule Amendments To Permit Optional Semiannual Reporting (May 19, 2026), <https://www.cravath.com/a/web/ansv5vmPshiHQudD2fCgd1/e7S9Ua/sec-proposes-rule-amendments-to-permit-optional-semiannual-reporting.pdf>.
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- ³⁶Am. Sustainable Bus. Council v. Hegar, No. 1:24-cv-01010-ADA, 2026 WL 300001 (W.D. Tex. Feb. 3, 2026).
- ³⁷Mollie H. Duckworth, Betty M. Huber & Austin J. Pierce, Texas Judge Strikes Down Anti-ESG “Boycott” Law, Harvard Law School Forum on Corporate Governance (Mar. 1, 2026), <https://corpgov.law.harvard.edu/2026/03/01/texas-judge-strikes-down-anti-esg-boycott-law/>.

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