CRAVATH

Q3 2025

M&A, Activism and Corporate Governance

QUARTERLY REPORT

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Contents

Mergers & Acquisitions

THE BIGGER THE BETTER: WHAT A SPIKE IN MEGA-DEALS IN Q3 MEANS FOR M&A PROFESSIONALS

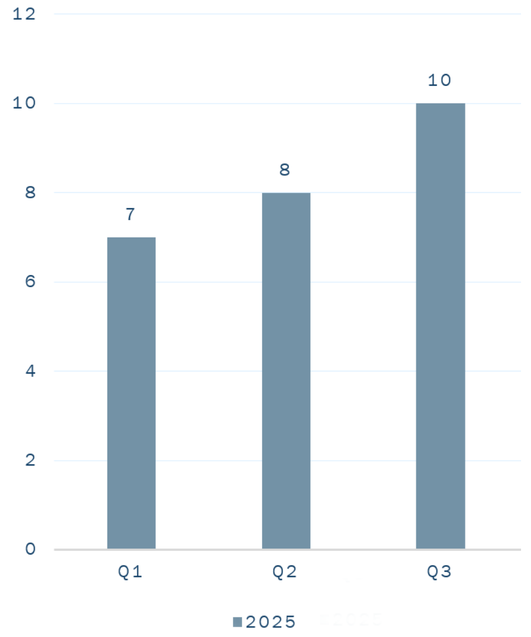
While every M&A lawyer, banker or corporate development professional knows that a $200 million carve-out M&A transaction or joint venture formation can often present even more complexity in structuring and negotiation than a $20 billion U.S. all-cash public M&A transaction, there are several factors unique to mega-deals that need to remain top of mind when embarking on an M&A transaction at sizes above $10 billion, which saw a significant increase in the third quarter of 2025.

Speed of Execution: Leak risk is always a primary concern for any M&A transaction, but the stakes are often much higher for large public companies evaluating a mega-deal. These transactions are by definition transformative and often represent the culmination of the strategy crafted by the management team that will instantly receive widespread public attention. As a result, everyone involved must be prepared to move twice as fast once a decision has been made to get to a signing and announcement. Advance preparation across all possible fronts (*e.g.*, due diligence, financial modeling, arrangement of financing, communications) is the only way to allow these deals to happen so quickly. For outside advisors, the premium is on bringing every resource to bear to quickly get to a signing, rather than a focus on efficiency and fees due to the size of the transaction.

Conviction and Materiality: Mega-deals only happen because of the vision and willpower of the board of directors and management on each side, as well as the buy-in of all other participants in the process to make it happen. Reaching alignment on a short list of key terms up front before expanding the circle and level of engagement can often reinforce a mutual sense of commitment between the two parties. Then, whether a hiccup in resolving certain social issues around governance arrangements or an unexpected twist in a due diligence finding, the individuals negotiating the transaction must continuously frame issues in the context of the size of the transaction. For M&A lawyers (both internal and external), this means providing clear and definitive advice on the materiality of any issues that may arise from diligence or contractual negotiations, raising questions like: What levers do we have to mitigate the issue? Do we often see these issues in our own business? And every lawyer's least favorite question, what is our maximum exposure here?

Regulatory Scrutiny: Almost by definition, mega-deals will receive more attention and focus from regulators (*e.g.*, antitrust, CFIUS/FDI, industry-specific regulators for banks, telcoms, railroads, etc.) than smaller M&A transactions due to their transformative nature and potential for overlaps or structural impacts on industries. As described in more detail later in this newsletter, U.S. antitrust regulators have returned to negotiating consent decrees and evaluating structural remedies that address overlaps or other competition concerns.

Deals with a Transaction Value Over $10 Billion—2025[1]



Data Source: S&P Global

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THE BIGGER THE BETTER: WHAT A SPIKE IN MEGA-DEALS IN Q3 MEANS FOR M&A PROFESSIONALS (CONTINUED)

When implemented using appropriate procedures, much of the work to scope antitrust or other regulatory risk can be done up front at an early stage of the negotiations. This work should always include not only an assessment of risk and alignment on the contractual risk-sharing provisions, but also the development of a strategy to engage with regulators, the press and other critical stakeholders from "day one" and convey consistent and convincing messaging on the transaction.

Financing Availability: Financing markets experienced a marked rebound in Q3 with robust issuance across the syndicated loan market, the high-yield bond market and private credit space. Q3 saw multiple private equity-driven leveraged buyouts in the mega-deal space as well, which required significant commitments from both equity and debt financing sources to finance. But between large banks' balance sheets and private credit funds' "dry powder," there is more than enough firepower to make these mega-deals happen. Financing presents another workstream that requires upfront investment to ensure that the deal is financeable and any impact on credit ratings, near-term investment plans and existing financing is scoped and addressed.

Cross-Border Complexity: Several of the mega-deals announced in Q3 were cross-border in nature, and the ever-changing landscape around tariffs, export controls, industrial policy and political uncertainty around the world only makes it more likely that companies will look at investment abroad to help mitigate or address these challenges.

Cross-border M&A volumes are up significantly in 2025 as compared to 2024 with both inbound and outbound U.S. cross-border activity experiencing large jumps. Cross-border mega-deals are more likely to involve targets that are viewed as "national champions" or critical to the local economy, which further exacerbates scrutiny from regulators. To address these complexities, companies must rely even more on their outside advisors to help navigate an M&A ecosystem in the target's country that may be vastly different than their own.

Overall, the resurgence of mega-deals so far in 2025 is a refreshing development and shows that a window is now open to execute on strategic priorities and transformative transactions. These stars may not all remain aligned for long, even though they have withstood uncertainty across geopolitics, international trade, interest rates, domestic politics/policy and just about any other area of risk one can name. With the right level of commitment internally and support externally, Q3 shows that these deals can and do get done and have returned to the realm of the possible.

ITEMS TO CONSIDER

- ☐ Speed of Execution
- ☐ Conviction and Materiality
- ☐ Regulatory Scrutiny
- ☐ Financing Availability
- ☐ Cross-Border Complexity

Mergers & Acquisitions

KEY DEVELOPMENTS IN DELAWARE CASE LAW

Bylaw Amendments and Activism Defense

Carroll v. Burstein, No. 2024-0317, 2025 WL 2446891 (Del. Ch. Aug. 25, 2025)

Prior to its IPO in 2019, a public life sciences company adopted bylaws containing an advance notice bylaw that outlined timing and notice requirements for stockholders nominating board candidates. While the company reviewed and, as a result of such review, amended and restated its bylaws in early 2023 in response to the SEC's universal proxy rules and other changes to the DGCL, the advance notice bylaw was retained and remained in effect under its 2023 amended and restated bylaws.

After another company's expansive advance notice bylaw was struck down by the Delaware Chancery Court ("*Kellner I*") as invalid and unenforceable in January 2024, a wave of similar stockholder lawsuits and demands challenging advance notice bylaws began, including from the plaintiff in this case. While no stockholder had submitted a director nomination, the plaintiff claimed that the advance notice bylaw served as an effective deterrent to stockholders exercising their rights to nominate board candidates and is unlawful under the Delaware General Corporation Law. Defendants moved to dismiss.

Given the advance notice bylaw was adopted on a "clear day" when the board did not face an "imminent threat" of stockholder activism or a proxy contest and enforcement was not at issue because no stockholder had submitted a director nomination, the court determined the plaintiff's challenge was subject to the high standard of needing to demonstrate facial invalidity of the bylaw (*i.e.*, that the bylaw cannot operate lawfully under *any* set of circumstances). Notwithstanding the possibility of hypotheticals in which the bylaw might be invalid, the court found that there were circumstances in which application of the bylaw would be lawful and therefore dismissed the facial validity challenge.

WHY IT MATTERS

- For public companies bracing for potential activism, well-drafted, advance notice bylaws adopted on a clear day continue to withstand scrutiny of their general validity.
- Companies considering amendments to their bylaws should proactively assess effecting any such amendments on a clear day, as Delaware has reiterated its unwillingness to strike down facially valid clear-day amendments.

Mergers & Acquisitions

KEY DEVELOPMENTS IN DELAWARE CASE LAW

Director Oversight and Reporting Systems

Giuliano v. Grenfell-Gardner, et al., No. 2021-0452, 2025 WL 2502176 (Del. Ch. Sept. 2, 2025)

Teligent, Inc. ("Teligent") was a U.S. generic pharmaceutical company that, after FDA compliance warnings mounted from 2016 through 2021, went bankrupt. As part of the bankruptcy process, the bankruptcy plan administrator caused the company's successor-in-interest to bring direct claims against Teligent's directors and officers under the *Caremark* doctrine, asserting alleged oversight failures bankrupted the company. By asserting direct claims, the plaintiff had certain procedural and informational advantages relative to more typical derivative claims. The defendants moved to dismiss.

Teligent required FDA approval to manufacture its products and generate revenue, making FDA compliance "mission-critical" to its business. However, the Teligent board neither had a committee overseeing FDA compliance nor instituted a management reporting system regarding FDA compliance even after, in 2017, the CEO informed the board of potential FDA violations, albeit with assurances that he "believed there would not be an adverse impact on future [FDA] approvals." The company also did not have training protocols designed to inform employees of central compliance risks. Although Teligent did hire consultants to address its FDA compliance issues, the Board did not ask the consultants to attend board meetings and did not supervise the consultants' work, which ultimately did not remediate the FDA issues.

For these reasons and citing Teligent's operation in a heavily regulated industry, the court ruled against dismissal of the claims that the directors failed to make a good faith effort to institute adequate information systems for overseeing "central compliance risks". The court also ruled against dismissal of the claims against the CEO and Chief Science Officer that such officers failed to report red flags of potential FDA violations to the board. However, the court ruled for dismissal of the claim that the CFO failed to raise such red flags because, among other reasons, FDA compliance was not considered a financial risk subject to the CFO's oversight and scope of responsibility.

WHY IT MATTERS

- Boards must take steps to implement appropriate means of oversight regarding critical areas of risk.
- In heavily regulated industries, a standing compliance committee or expanded audit committee mandate to encompass "central compliance risks," such as potential FDA violations in healthcare companies, may be prudent to ensure adequate oversight.
- Officers' oversight obligations and potential for exposure is dependent on the scope of their respective roles.
- "Mission-critical" compliance oversight claims can survive bankruptcy and be brought directly (as opposed to derivatively).

Activism

SEC GRANTS NO-ACTION RELIEF FOR EXXON MOBIL'S RETAIL VOTING PROGRAM

On September 15, 2025, the staff of the SEC's Office of Mergers & Acquisitions issued a no-action letter (the "No-Action Letter") to ExxonMobil Corporation ("Exxon") permitting the implementation of a retail voting program.[2] The program would allow Exxon's retail shareholders to automatically vote their shares in accordance with the board's recommendation.

The staff's conclusion was based on the following representations from Exxon:

- **Eligibility:** The program is available to all retail investors, including registered owners and beneficial owners, at no cost. Investment advisers registered under the Investment Advisers Act of 1940 are not eligible to participate.
- **Opt-in:** Participants can opt-in to have a standing voting instruction apply to: (1) all matters or (2) all matters except contested director elections or any acquisition, merger or divestiture transaction that, under applicable state law or stock exchange rules, requires the approval of Exxon's shareholders.
- **Opt-out:** At no cost, participants can opt-out at any time. Such opt-outs will only take effect at meetings for which Exxon has not yet filed a definitive proxy statement. Participants can also override any votes cast pursuant to the standing instruction by voting using the proxy materials provided.
- **Voting Mechanics:** Exxon will use a vote-processing agent that will manage the process and related administrative tasks. Information retained by the vote-processing agent will not be disclosed to Exxon.
- **Exxon Disclosure:** Exxon agreed to provide information about the program on its website and in its proxy statement. Participants will receive annual reminders of their enrollment in the program and their standing voting instructions.

In response to the No-Action Letter, the staff highlighted that different facts and program features may require additional no-action relief, as different circumstances may lead the staff to a different conclusion.

WHY IT MATTERS

- Companies should consider factors such as shareholder demographics, levels of shareholder participation, economic feasibility, and program design and timing, among others, to determine whether a retail voting program is appropriate for their investor base.
- Companies that wish to create similar programs should engage with the staff in advance if any feature departs from Exxon's model.

Restructuring

23ANDME CASE STUDY: CREATIVE STRUCTURING TO SHED LIABILITIES THROUGH A SECTION 363 SALE

Section 363 of the Bankruptcy Code is a powerful tool through which distressed businesses can sell their assets "free and clear" of creditors' claims. Such "363 sales" are used to cleanse overwhelming liabilities and maximize the value of otherwise healthy businesses. The recent 363 sale of 23andMe's business illustrates how distressed companies (and their acquirors) can obtain the benefits of "free and clear" relief in complex transactions through creative deal structuring.

Founded in 2006, 23andMe quickly became a leading personal genomics and biotechnology company best known for its direct-to-consumer DNA testing kits. The company's at-home testing kits enable customers to learn about their ancestry, genetic traits and health predispositions by analyzing saliva samples. Over the years, 23andMe built one of the world's largest genetic databases, which hosts genetic and other data for millions of customers. The company also partnered with pharmaceutical companies for research and drug development. Despite its pioneering role in consumer genetics, the company's performance began to decline as it struggled to expand its customer base and profitable product lines. 23andMe also faced mounting contingent liabilities tied to a cyberattack in October 2023 that exposed data belonging to millions of customers. State Attorneys General and private plaintiffs lined up with claims that resembled mass-tort litigation, further threatening the company's viability.

On March 23, 2025, 23andMe filed for chapter 11 protection in the Bankruptcy Court for the Eastern District of Missouri. Immediately after filing, the company commenced an expedited sale process that generated numerous bids, including from strategic bidders, financial bidders and a non-profit foundation (TTAM Research Institute) backed by Anne Wojcicki, the company's founder, controlling shareholder, CEO and board member. The company then conducted a competitive auction that lasted three days and culminated in the company selecting Regeneron Pharmaceuticals as winner, with a bid that was approximately 500% greater than the opening bid. The results of the auction were disputed by TTAM and followed by expedited litigation. Ultimately, the bankruptcy court ordered that the auction be reopened and TTAM emerged as the winning bidder.

The sale to TTAM was initially structured as an asset sale, under which the company's business assets—which for 23andMe included the genetic data of roughly 15 million customers—would be transferred to TTAM "free and clear" of creditors' claims. Bankruptcy sales are typically structured in this manner (*i.e.*, asset sales as opposed to equity sales) because the bankruptcy court generally can cleanse only those assets that are directly transferred to the buyer in a 363 sale. For example, if a bankruptcy sale is structured as a stock transfer, only the stock itself (but not the underlying assets) would be cleansed.

An illustration of how distressed companies can obtain relief in complex transactions

Restructuring

23ANDME CASE STUDY: CREATIVE STRUCTURING TO SHED LIABILITIES THROUGH A SECTION 363 SALE (CONTINUED)

However, numerous State AGs objected to 23andMe's proposed sale to TTAM, arguing that their states' privacy statutes explicitly prohibited the sale or transfer of customer genetic data to an unaffiliated third party without the express approval by each customer. Practically speaking, requiring express customer approval would have materially degraded the value of 23andMe's assets, and TTAM would not have purchased the business at the purchase price offered at the auction. Therefore, 23andMe and TTAM needed to convince the bankruptcy judge that it had authority to approve the sale, even if the sale was in conflict with applicable state laws.

To mitigate the risk of an adverse judicial outcome, the parties engineered a novel two-step transaction to address the applicable state privacy regimes while also preserving TTAM's ability to acquire the company's assets, including genetic data, "free and clear" of claims. First, 23andMe transferred customer data into a newly formed, wholly owned subsidiary of 23andMe. Because the recipient was an affiliate, state privacy laws arguably did not bar the transfer. Importantly, executing this step as an asset transfer allowed the court to approve the transfer "free and clear," in effect cleansing the assets from virtually all liabilities, such as the prepetition data breach claims.

Second, TTAM purchased the equity of the new subsidiary. The equity transfer arguably did not violate the state statutes, which only prohibited the direct transfer of genetic data to third parties.

Further, the parties were able to avoid the usual disadvantage of equity deals in bankruptcy—*i.e.*, the risk of inheriting legacy liabilities—because the assets had already been "cleansed" in step one.

Certain State AGs challenged the two-step structure as a sham, urging the court to look through form to substance and treat the two steps as a de facto prohibited transfer. They argued that sanctioning such a maneuver would undermine state privacy protections and set a precedent enabling companies to sidestep statutory consent requirements. 23andMe and TTAM countered that the design complied with the letter of state law while furthering the Bankruptcy Code's goal of maximizing estate value and facilitating reorganizations, especially where a viable path preserves jobs, scientific research and consumer services.

The bankruptcy court sided with 23andMe and TTAM and approved the sale. It held that the two-step structure complied with applicable law and achieved a legitimate bankruptcy objective: transferring assets free and clear of claims to a capable owner without violating state prohibitions on third-party genetic data transfers. The parties then moved quickly to close the transaction before the states could obtain a stay pending appeal. The sale closed just three weeks after court approval on July 14, 2025.

Regulatory

ANTITRUST IN THE SECOND TRUMP ADMINISTRATION

When it comes to merger control, the second Trump Administration is proving to be substantially different from the Biden Administration. While the Biden administration sought to deter M&A through process, policy pronouncements, aggressive enforcement, and a refusal to adopt remedies, the current approach is characterized by a blend of continued vigilance and a return to more conventional, pragmatic enforcement.

New HSR Rules and the Return of Early Termination

A defining procedural shift in 2025 is the implementation of the new HSR rules, which took effect on February 10, 2025, following a bipartisan 5-0 vote by the Federal Trade Commission (the "FTC").

The revised HSR form requires parties to provide significantly more up-front information, including:

- Item 4(c)/(d) documents provided to the "supervisory deal team lead";
- Ordinary-course materials provided to the CEO/board related to competition in overlap areas;
- Narrative descriptions of deal rationale, overlaps and/or vertical relationships; and
- Expanded data on officers/directors, minority holders, customer/supplier relationships and certain foreign entity subsidies.[3]

At the same time, the agencies reinstated the practice of granting "early termination" of the initial 30-day HSR waiting period for transactions that clearly pose no competitive issues.[4]

Enforcement Continues, but with Different Instincts

The current antitrust leadership at both the DOJ and the FTC have endorsed the Biden-era 2023 Merger Guidelines as the analytical framework. But the agencies seem less keen on examining every deal that implicates the Guidelines, for example, deals that marginally trigger the structural presumptions. The agencies now appear less likely to issue Second Requests in marginal cases or pursue litigation to advance novel legal theories, and are open to ways (including staged compliance) to reduce costs of compliance.

There is greater openness to traditional economic arguments, including efficiencies, and a heightened sensitivity to litigation costs. The focus is now on cases that clearly threaten competition under traditional standards, with continued attention to criminal cartel enforcement, "Big Tech," healthcare and other areas of interest.

Antitrust policy remains vigilant but with new priorities.

Regulatory

ANTITRUST IN THE SECOND TRUMP ADMINISTRATION (CONTINUED)

The Return of Remedies—Especially Structural

The most notable substantive shift is the renewed willingness to resolve competition concerns through remedies rather than blocking deals outright. The DOJ and FTC are re-engaging on structural remedies, such as divestitures of standalone, viable businesses to credible buyers, and are closely vetting buyers and assets to avoid entanglements with the merged firm. Consent decrees are back in use when the relief matches what litigation would achieve.

While behavioral remedies (*e.g.*, non-discrimination clauses, access mandates) will now also be considered where appropriate, they continue to be treated with caution. Any such remedy must be able to be implemented and also more narrowly tailored than blocking the transaction. Recent cases, such as the DOJ's requirement for Keysight to divest assets to Viavi to clear its Spirent acquisition,[5] indicate that antitrust agencies still favor structural remedies over behavioral remedies.

In rare cases, the agencies may insist upon (or accept) non-standard remedies.

Revocation of Biden Administration Antitrust Policy

Several Biden-era policy initiatives have been revisited or unwound,[6] including the Executive Order 14036 of July 9, 2021 (Promoting Competition in the American Economy).[7]

Agency leaders have noted questions about the breadth of the 2023 Merger Guidelines and signaled openness to potential revisions, though no specific changes have been announced.[8]

IMPLICATIONS FOR DEAL PRACTICE

For dealmakers, the new environment means:

1. Allocating more time and resources for the expanded HSR process, but pursuing early termination where possible;
2. Shorter deal timelines in some circumstances;
3. Better agency engagement to avoid or narrow Second Requests;
4. Preparing remedy packages early and lining up credible divestiture buyers; and
5. Expecting genuine consent-decree negotiations, but limited patience for weak behavioral fixes.

Conclusion

Antitrust enforcement in the Second Trump Administration era is far from *laissez-faire*. For the most part, it is continued, serious enforcement—especially in tech and healthcare—tempered by more conventional economic analysis, a greater willingness to settle with strong remedies, and procedural adjustments that can speed along unproblematic deals. For many transactions, this means sharper front-end preparation, earlier remedy planning, and a clearer path to clearance than in recent years.

Regulatory

ANTITRUST – KEY DEVELOPMENTS

Grant of Early Termination of the FTC's Investigation of the Proposed Acquisition of Kellanova by Mars

On June 25, 2025, the FTC granted early termination of its review of Mars, Incorporated's proposed acquisition of Kellanova, concluding the deal does not violate Section 7 of the Clayton Act.[9]

After nearly a year of investigation—spanning extensive data analysis, sworn testimony, hundreds of thousands of documents, and numerous third-party interviews—the staff found no evidence of likely anticompetitive effects.

The FTC emphasized its U.S.-focused analysis, noting that Mars and Kellanova's product offerings and competitive dynamics differ abroad, including Kellanova's continued sale of breakfast cereals in certain foreign markets.

DOJ's Settlement of United Health / Amedisys Transaction

The DOJ settled with UnitedHealth and Amedisys, requiring UnitedHealth to divest 164 home health and hospice locations and Amedisys to pay a $1.1 million penalty for making false certifications during the HSR Act antitrust review of the merger (falsely certifying that it had provided "true, correct, and complete" responses to the requests made in accordance with the HSR), as announced in a press release dated August 7, 2025.[10]

The DOJ challenged the $3.3 billion acquisition due to concerns about reduced competition in the home health and hospice sector, but the settlement eventually allowed the deal to close after significant concessions from UnitedHealth.

WHY IT MATTERS

- The FTC stated its role is to *"get out of the way,"* allowing the transaction to proceed when there is no provable violation under U.S. law.
- The DOJ highlighted the critical importance of competition in the U.S. healthcare sector and indicated their commitment to ensuring that divestiture buyers receive the necessary assets to compete effectively against UnitedHealth.

Regulatory

CFIUS – ANNUAL REPORT FOR CALENDAR YEAR 2024

CFIUS publishes unclassified version of Annual Report

In August 2025, the Committee on Foreign Investment in the United States ("CFIUS") published the unclassified version of its Annual Report to Congress for the 2024 calendar year.[11] Key findings and insights from the report include:

- CFIUS received 209 notices (*i.e.*, long-form filings) and 116 declarations (*i.e.*, short-form filings), or 325 total filings. This marks a decrease from 2023's total of 342 filings (233 notices and 109 declarations).
- Of the 116 declarations, CFIUS approved 91 (~78%) in the 30-day assessment period, up slightly from 2023 (~76%) and the highest percentage since the advent of declarations in 2018. Further, CFIUS requested a notice in ~15% of the instances in which the parties initially filed a declaration, down from ~18% in 2023. This suggests that declarations continue to be a viable option for transaction parties to consider when the foreign investor is known to CFIUS and the transaction is unlikely to raise national security concerns.
- Of the 209 notices CFIUS reviewed in 2024, 116 (~56%) went to the second 45-day investigation period. This was comparable to 2023 (~55%) but still somewhat above historical norms. This indicates that transaction parties should still plan for an extended CFIUS process.
- CFIUS approved 16 notices (~8%) after adopting mitigation measures, down significantly from 2023 (~15%). This figure confirms that, even before President Trump issued the America First Investment Policy in February 2025 (which called for CFIUS to cease using mitigation agreements for transactions involving foreign adversary countries), CFIUS had begun to decrease its reliance on mitigation agreements.
- The number of "withdraw/re-files" ticked up slightly as compared to 2023 (~20% vs. ~18%) and still remains well above historical averages.
- CFIUS has improved its efficiency in starting its review of notices, providing comments to transaction parties on draft notices within 6.5 calendar days on average, a significant improvement over 2023 (~7.9 calendar days on average). Similarly, CFIUS decreased the time it took the Committee to accept a final notice, from ~5 calendar days on average in 2023 to 2.7 calendar days on average in 2024.

Overall, the decrease in total filings may indicate that transaction parties are electing to forego voluntary CFIUS filings more often than in the past. For transactions that are notified to CFIUS, parties can expect a process that begins more quickly relative to prior years, but still bears a significant chance of extending through to the second-phase investigation period and may well require a "withdraw/re-file" if CFIUS identifies a substantive national security concern.

LESSONS FOR CFIUS PRACTITIONERS

- Although CFIUS is becoming more efficient in certain respects, transaction parties should still plan for lengthy reviews.
- If the foreign investor is known to CFIUS and the deal does not clearly involve U.S. national security considerations, filing a declaration (*i.e.*, a short-form filing) rather than a notice (*i.e.*, a long-form filing) is an increasingly attractive option for transaction parties to obtain CFIUS approval most quickly.

Regulatory

EMPLOYEE MATTERS – FTC DEVELOPMENTS ON NON-COMPETES

Targeted, Not Total: The FTC's Shift on Non-Competes

On September 5, 2025, the FTC voluntarily dismissed its appeals in *Ryan, LLC v. FTC* (5th Cir.) and *Properties of the Villages, Inc. v. FTC* (11th Cir.).[12] Previously, the U.S. District Court in *Ryan* had blocked nationwide the FTC's 2024 non-compete rule,[13] which would have broadly banned most employer non-compete agreements, while the Middle District of Florida in *Properties of the Villages* limited its injunction to the named plaintiff.[14] Consistent with the dissents of commissioners Ferguson and Holyoak, the decision to dismiss the appeals signals that the FTC has for now abandoned its non-competes rulemaking effort, and competition rulemaking more broadly. However, the FTC has expressed that it is committed to continuing its case-by-case enforcement against certain non-competes under Section 5 of the Federal Trade Commission Act.[15]

Consistent with that strategy, in September 2025 the FTC filed an administrative complaint and proposed a consent order against Gateway Services, Inc. and its subsidiary, challenging non-competes imposed on nearly 1,800 employees across job levels and geographies.[16] The agency simultaneously launched a public Request for Information on the scope, prevalence and effects of employer non-compete agreements—calling for input through November 3, 2025—and sent warning letters urging healthcare employers and staffing firms to review and narrow non-competes.[17] In short, while a nationwide ban is not currently proceeding, employers should still expect targeted enforcement against broadly scoped or indiscriminately applied non-competes, especially where less restrictive tools would suffice.

On the state level, the landscape remains fragmented — some states have strengthened enforceability with respect to higher-paid workers (*e.g.*, Florida, through the employer-leaning CHOICE Act), others have continued to restrict access through economic thresholds (*e.g.*, Washington), while others remain in flux or unchanged (*e.g.*, New York's pending 2025 bill, which would prospectively bar enforcement of non-competes, except for highly compensated individuals earning average annualized cash compensation of $500,000 or more, or in connection with the sale of a business).

WHY IT MATTERS

- While the FTC may have discarded prior actions regarding a nationwide non-compete ban, it appears still committed to targeted enforcement practices.
- On the state level, enforcement of non-competes remains splintered.

Regulatory

INVESTIGATIONS – DOJ AND HHS ENFORCEMENT COLLABORATION

DOJ and HHS Announce Return of False Claims Act Working Group

On July 2, 2025, the U.S. Department of Justice (the "DOJ") and the U.S. Department of Health and Human Services ("HHS") announced the return of the DOJ-HHS False Claims Act Working Group (the "Working Group").[18] The Working Group aims to strengthen ongoing collaboration between the DOJ's Civil Division and HHS to advance certain priority enforcement areas, with HHS referring potential violations of the False Claims Act (the "FCA") reflecting those priority areas to the DOJ.

In addition to the DOJ Civil Division's previously announced enforcement priorities,[19] additional Working Group priority enforcement areas include: (i) Medicare Advantage; (ii) drug, device and biologics pricing; (iii) barriers to patient access to care; (iv) kickbacks related to drugs, medical devices, durable medical equipment and other products paid for by federal healthcare programs; (v) materially defective medical devices that impact patient safety; and (vi) manipulation of electronic health records systems to drive inappropriate utilization of Medicare-covered products and services.

The press release announcing the Working Group also identifies the use of enhanced data mining and assessments, as well as whistleblower reports, to identify new cases and advance ongoing investigations.

WORKING GROUP PRIORITY ENFORCEMENT AREAS

(i) Medicare Advantage;

(ii) drug, device and biologics pricing;

(iii) barriers to patient access to care;

(iv) kickbacks related to medical products paid for by the federal government;

(v) defective medical devices impacting patient safety; and

(vi) manipulation of electronic health records systems.

WHY IT MATTERS

- Return of the Working Group suggests renewed focus on FCA investigations, with particular focus on the DOJ and Working Group priority enforcement areas.
- Companies operating in healthcare should be mindful of the priority enforcement areas and assess their compliance and diligence programs accordingly.

Corporate Governance

SEC DEVELOPMENTS

Margaret Ryan Named Director of the Division of Enforcement

On August 21, 2025, the SEC announced that Margaret Ryan had been named Director of the Division of Enforcement, effective September 2.[20] Ryan previously served as a senior judge on the U.S. Court of Appeals for the Armed Forces, appointed by President George W. Bush and confirmed by the Senate in 2006. Ryan served the entirety of her term through July 2020 before reaching senior status in August 2020.

Sam Waldon, who has served as Acting Director of the Division of Enforcement since January 2025, will return to his role as Chief Counsel for the Division of Enforcement.

James Moloney Named Director of the Division of Corporation Finance

On September 10, 2025, the SEC announced that James Moloney was named Director of the Division of Corporation Finance.[21] Moloney previously served at the SEC for six years, from 1994–2000, first as an attorney-advisor and later as a special counsel in the Office of Mergers & Acquisitions. Moloney assumed his role in early October.

Cicely LaMothe, who has served as Acting Director of the Division of Corporation Finance since December 2024, will return to her role as Deputy Director for Disclosure Operations.

SEC Issues Spring 2025 Reg Flex Agenda

On September 4, the Office of Information and Regulatory Affairs released the Spring 2025 Unified Agenda of Regulatory and Deregulatory Actions (the "Reg Flex Agenda").[22] New proposals included Rule 144 safe harbors, crypto assets and market structure, updating exempt offering pathways, and the rationalization of disclosure practices. Several items from the prior administration, such as human capital management disclosure and corporate board diversity, were eliminated from the agenda.

WHY IT MATTERS

- Ryan does not have prior SEC experience; however, her background as a federal judge and as a military officer is expected to bring a refocused enforcement approach to the Division, returning to a focus on traditional fraud and market manipulation.
- Moloney was the primary author of Regulation M-A and is expected to lead the Division's efforts to simplify and streamline required disclosures.
- The Reg Flex Agenda reflects the new administration's emphasis on deregulation and disclosure simplification, as well as a notable focus on crypto rulemaking and regulation.

Corporate Governance

SEC DEVELOPMENTS

ISS v. SEC

On July 1, 2025, the U.S. Court of Appeals for the District of Columbia Circuit (the "Court") affirmed the judgment of the District Court, ruling that proxy advisory firms' voting advice is not a "solicitation" under the Securities Exchange Act of 1934 (the "Exchange Act") in *Institutional Shareholder Services Inc. v. SEC*.[23] The Court's decision is the latest development in more than five years of litigation. In 2020, the SEC adopted amendments to the proxy rules that deemed proxy voting advice for a fee to be a solicitation under Section 14(a) of the Exchange Act. The Court's decision voided those rules.

Policy Statement on Mandatory Arbitration

On September 17, the SEC released a policy statement (the "Policy Statement") clarifying that the inclusion in a company's governance documents of mandatory arbitration provisions for shareholder claims will not, by itself, affect the staff's decision to accelerate a registration statement's effectiveness.[24] The staff will focus on the adequacy of the registration statement's disclosures, including those relating to any mandatory arbitration provision.

The Policy Statement reversed the SEC's longstanding stance that effectively banned public companies from having mandatory arbitration clauses. The SEC also stated that the analysis applies to decisions about whether to declare post-effective amendments to registration statements effective and whether to qualify an offering statement or a post-qualification amendment under Regulation A.

Preliminary Injunction Halts Enforcement of Texas's Anti-ESG Law

On August 29, a federal judge granted a preliminary injunction in two cases brought by proxy advisory firms, Institutional Shareholder Services ("ISS") and Glass Lewis, that sought to block Texas's enforcement of a new state law that would have restricted proxy advisory firms when providing advice to shareholders on diversity, equity and inclusion ("DEI") and environmental, social and governance ("ESG") issues.[25, 26] The law, SB 2337, was set to take effect on September 1, 2025, and would have required proxy advisors to make certain disclosures when their recommendations considered DEI or ESG factors.

The trial is scheduled for February 2026; however, Attorney General Ken Paxton has the option to appeal to the Fifth Circuit for an emergency stay of the injunctions.

WHY IT MATTERS

- The Court's decision significantly limits the SEC's authority to regulate proxy advisors under Section 14(a).
- The Policy Statement refocuses acceleration and effectiveness decisions on the adequacy of disclosures and simplifies timing decisions by registrants; however, the practical effects will depend on the enforceability of such provisions under the Federal Arbitration Act and state corporate laws.
- Similar state laws and proposals are likely to follow, potentially creating a patchwork of rules that may introduce increased compliance costs and challenges.

Citations

1. Audrey Elsberry and Umer Khan, *Four $10B M&A Deals in September Push Q3 to 2025 High* (Oct. 8, 2025), https://www.spglobal.com/market-intelligence/en/news-insights/articles/2025/10/four-10b-m-a-deals-in-september-push-q3-to-2025-high-93605742.

2. Exxon Mobil Corp., SEC No-Action Letter, Division of Corporation Finance (Sept. 15, 2025), https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525.

3. Final Rule on Premerger Notification; Reporting and Waiting Period Requirements, FTC (November 12, 2024), https://www.federalregister.gov/documents/2024/11/12/2024-25024/premerger-notification-reporting-and-waiting-period-requirements.

4. *See, e.g.*, Statement of FTC Commissioner Melissa Holyoak, Final Premerger Notification Form and the Hart-Scott-Rodino Rules, Commission File No. P239300 (October 10, 2024), p. 2, https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-hsr-rule-statement.pdf.

5. Press Release, Justice Department Requires Keysight to Divest Assets to Proceed with Spirent Acquisition, DOJ (June 2, 2025), https://www.justice.gov/opa/pr/justice-department-requires-keysight-divest-assets-proceed-spirent-acquisition.

6. Initial rescissions of harmful executive orders and actions, The White House (January 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/.

7. Revocation of executive order on competition, Executive Orders, The White House (August 13, 2025), https://www.whitehouse.gov/presidential-actions/2025/08/revocation-of-executive-order-on-competition/.

8. Memorandum from Chairman Andrew N. Ferguson to FTC Staff Regarding Merger Guidelines (February 18, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf.

9. Statement on the Grant of Early Termination of the FTC's Investigation of the Proposed Acquisition of Kellanova by Mars, FTC (June 25, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/06/statement-grant-early-termination-ftcs-investigation-proposed-acquisition-kellanova-mars.

10. Justice Department Requires Broad Divestitures to Resolve Challenge to UnitedHealth's Acquisition of Amedisys, DOJ (August 7, 2025), https://www.justice.gov/opa/pr/justice-department-requires-broad-divestitures-resolve-challenge-unitedhealths-acquisition.

11. Annual Report to Congress, CY 2024, Committee on Foreign Investment in the United States, https://home.treasury.gov/system/files/206/2024-CFIUS-Annual-Report.pdf.

12. Statement of Chairman Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, *Ryan, LLC v. FTC* (Sept. 5, 2025); *Ryan, LLC v. Federal Trade Commission*, Case No. 24-10951 (5th Cir. 2025); *Properties of the Villages, Inc. v. FTC*, No. 24-13102 (11th Cir. 2025).

13. *Ryan LLC v. Federal Trade Commission*, Case No. 3:24-cv-00986-E (N.D. Tex. Aug. 20, 2024).

14. *Properties of the Villages, Inc. v. Federal Trade Commission*, No. 5:24-cv-316, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024).

15. Press Release, FTC Announces Rule Banning Noncompetes, F.T.C. (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

16. Press Release, FTC Takes Action to Protect Workers from Noncompete Agreements, F.T.C. (Sept. 4, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-takes-action-protect-workers-noncompete-agreements; Complaint, *In re Gateway Pet Memorial Servs.*, FTC Matter No. 2210170 (Sept. 4, 2025).

17. Request for Information Regarding Employer Noncompete Agreements, F.T.C. (Sept. 4, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2025-Noncompete-RFI.pdf; Press Release, FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies, F.T.C. (Sept. 10, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-chairman-ferguson-issues-noncompete-warning-letters-healthcare-employers-staffing-companies.

18. Press Release, DOJ-HHS False Claims Act Working Group, DOJ (July 2, 2025), https://www.justice.gov/opa/pr/doj-hhs-false-claims-act-working-group.

19. Memorandum from Brett A. Shumate to DOJ Civil Division Employees Regarding Civil Division Enforcement Priorities, DOJ (June 11, 2025), https://www.justice.gov/civil/media/1404046/dl?inline.

20. Press Release, SEC Names Judge Margaret Ryan as Director of the Division of Enforcement, SEC (August 21, 2025), https://www.sec.gov/newsroom/press-releases/2025-108-sec-names-judge-margaret-ryan-director-division-enforcement.

21. Press Release, James Moloney Named Director of Division of Corporation Finance, SEC (September 10, 2025), https://www.sec.gov/newsroom/press-releases/2025-115-james-moloney-named-director-division-corporation-finance.

22. Press Release, Statement on the Spring 2025 Regulatory Agenda, SEC (September 4, 2025), https://www.sec.gov/newsroom/speeches-statements/atkins-2025-regulatory-agenda-090425.

23. *Institutional Shareholder Services, Inc. v. SEC*, No. 24-5105 (D.C. Cir. July 1, 2025), https://media.cadc.uscourts.gov/opinions/docs/2025/07/24-5105-2123183.pdf.

24. Press Release, SEC Issues Policy Statement Clarifying that Mandatory Arbitration Provisions Will Not Affect Effectiveness of Registration Statements, SEC (September 18, 2025), https://www.sec.gov/newsroom/press-releases/2025-120-sec-issues-policy-statement-clarifying-mandatory-arbitration-provisions-will-not-affect.

25. *Institutional Shareholder Services Inc. v. Paxton*, No. 25-01160 (W.D. Tex. filed July 24, 2025).

26. *Glass Lewis & Co. v. Paxton*, No. 25-01153 (W.D. Tex. filed July 24, 2025).

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