Debevoise & Plimpton

MARKETCHECK

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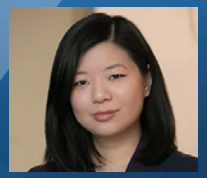

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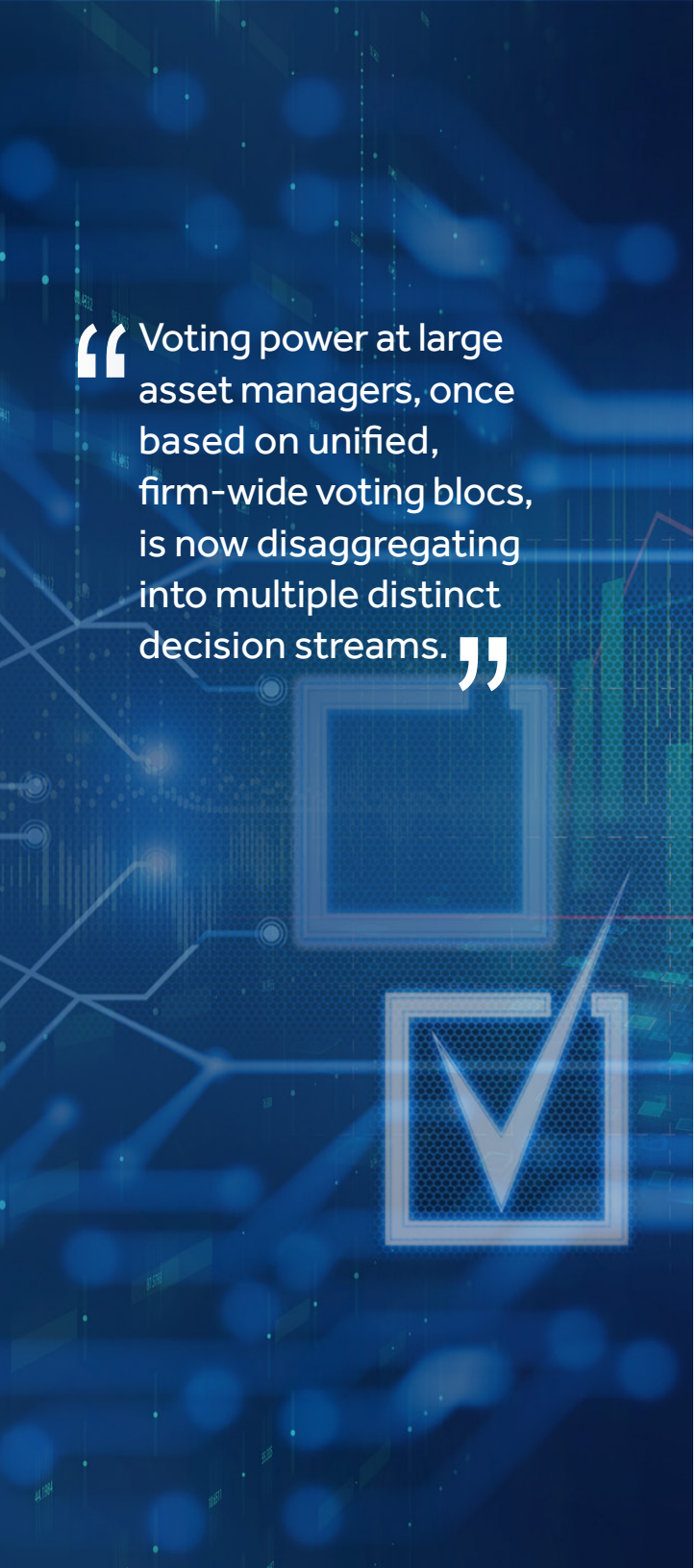

The Quiet Shift in Institutional Voting

An ongoing structural shift is taking place in the mechanics of institutional influence. Voting power at large asset managers, once based on unified, firm-wide voting blocs, is now disaggregating into multiple distinct decision streams. Institutions like BlackRock, Vanguard, and State Street, which together control roughly 20% of most large-cap companies, are increasingly allowing underlying clients to direct their portions of the funds' voting rights rather than voting on their behalf based in good part on recommendations made by proxy advisory firms like ISS and Glass Lewis. Once treated as predictable voting blocs, these institutions increasingly function as platforms through which dozens of different voting policies flow. Technology will deepen this fragmentation as automated voting systems and artificial intelligence enable institutional clients to adopt and apply ever-more granular preferences to their voting decisions.

This atomization of voting authority intersects with regulatory changes that have made proxy contests more nuanced and tactically demanding. The universal proxy card allows activists to target individual directors rather than mount full-slate challenges, turning each board seat into its own referendum. The compressed five-day window for disclosing a greater than five percent ownership stake in a public company together with the owner's investment intent, as well as tightened guidance where the investor is "passive," require faster positioning. The Securities and Exchange Commission's Staff Legal Bulletin Number 14M has facilitated the exclusion of ESG-related shareholder proposals, which has channeled advocacy pressure into director elections and deal votes. The cumulative effect of these regulatory developments and vote diffusion is to transform proxy contests from binary confrontations into multifaceted campaigns requiring precise choreography across an increasingly fragmented landscape.

The 2021 Engine No. 1 campaign against Exxon is a useful reference. When ISS recommended three of Engine No. 1's four nominees, the activist won those exact three board seats despite owning just 0.02% of shares. BlackRock and other major institutions largely aligned with ISS's guidance, voting for the same three candidates. Even then, however, signs of change were emerging, as BlackRock framed its decision as an independent judgment about the need for new energy industry experience rather than deferring to proxy advisor recommendations. This shift toward institutions

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The Quiet Shift in Institutional Voting (continued from page 1)

emphasizing their own rationale anticipated the more fragmented landscape that would follow. Today, with over $600 billion of BlackRock's assets following client-directed policies through its Voting Choice platform, what appears as BlackRock's vote represents multiple decision-makers applying different frameworks. ISS or Glass Lewis recommendations now reach only portions of each institution's holdings, acting as signal rather than verdict.

The divergent outcomes at Disney and Masimo during the 2025 proxy season illuminate how this complexity plays out. ISS recommended change at both companies: adding Nelson Peltz to the Disney board and replacing founder-CEO Joe Kiani at Masimo. Yet the same institutional investors, processing these recommendations through their increasingly fragmented decision frameworks, reached opposite conclusions. At Disney, management's ability to self-correct and implement operational improvements persuaded most voting streams to reject Peltz's nomination to the board despite ISS's governance concerns. At Masimo, years of challenged performance aligned the constituencies behind change. The key variable was how each company's fundamentals and governance track record resonated across the mosaic of decision rules within each institution.

The 2025 proxy season also saw proxy fight settlements occurring more quickly and more frequently than in prior years. Approximately three quarters of activist situations were resolved before a vote—often within weeks of the Schedule 13D filing. This phenomenon reflects not just the universal proxy card's power to enable campaigns to be more surgical, but also the increasing difficulty both sides face in predicting outcomes when voting authority is dispersed across multiple decision-makers within each institution. Boards that once could poll their top 10 shareholders and predict the result with confidence now face uncertainty about how various voting streams within those same institutions will break. This opacity changes the game theory of proxy contests, pushing both management and activists toward earlier negotiated outcomes in order to avoid risking increasingly unpredictable votes.

This pattern of disaggregated voting extends globally. Overseas, activists are finding ways to appeal to the many constituencies within a single asset manager and across managers. In 2023, Japan recorded over 20 shareholder proposals passing with majority support, compared with an average of very few per year in the prior decade. These victories result not from convincing a single institution but from activists building coalitions across the various voting streams within global asset managers. In Canada, recent proxy battles have seen activists succeed by building coalitions across the different voting policies within single institutions, recognizing that winning requires persuading multiple constituencies rather than a monolithic stewardship team.

The voting choice platforms built by asset managers and proxy processors like Broadridge are embedding these changes into the proxy voting architecture. These systems represent massive infrastructure investments that, once operational, create their own momentum—each new client taking up voting choice makes the platform more robust and encourages further adoption through network effects. Technology accelerates the trend as pension funds deploy machine learning models that analyze voting recommendations. Within several years, AI systems processing thousands of inputs may determine meaningful portions of institutional votes. The sheer volume of data points and decision nodes will make algorithmic analysis essential for both companies defending and activists attacking.

For boards and their advisors, success depends on fundamentals: performance, strategy and governance. But at the same time, boards must adapt to a more subtle and multifaceted

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environment. Companies must persuade decision-makers at multiple levels applying different metrics, from traditional stewardship teams to pension funds to algorithmic screens. Year-round engagement becomes essential as influential stakeholders multiply beyond the familiar institutional contacts. Boards benefit from maintaining the ability to respond to activism within hours rather than days. The landscape rewards those who recognize that "passive" investors are neither passive nor monolithic but platforms for underlying holders to channel their preferences. As voting authority continues to atomize and technology enables increasingly granular preference in voting, companies that blend operational excellence with sophisticated multi-level engagement while maintaining tactical readiness will continue to shape their own outcomes.

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Trump Orders CFIUS to Unwind 2020 Chinese Acquisition of Jupiter Systems

On July 8, 2025, President Trump issued an Executive Order prohibiting the acquisition of Jupiter Systems, LLC (Jupiter), an audiovisual equipment technology company serving critical infrastructure and military-related customers in the United States, by Suirui International Co., Limited, a Hong Kong-based subsidiary of Suirui Group Co., Ltd., a Chinese entity (together, Suirui).[1] Because the acquisition was completed in 2020, the prohibition requires an unwinding of the transaction. This is the first Executive Order of the second Trump presidency prohibiting a transaction on national security grounds.

The decision to prohibit the transaction followed a review by the Committee on Foreign Investment in the United States (CFIUS). The review found "credible evidence" that continued Chinese ownership of Jupiter would have compromised the security of military and critical infrastructure environments that use Jupiter products. President Trump's Executive Order reflects a particular concern about exploitation of nonpublic source code, technical data, and customer contracts.

The Executive Order prohibiting the transaction was issued under the authority granted by Section 721 of the Defense Production Act of 1950 (50 U.S.C. § 4565). Section 721 empowers the president to order divestitures, prohibit future dealings, and impose other controls to mitigate national security risks. The Executive Order imposes a comprehensive set of mandates and deadlines for the unwinding of Suirui's acquisition of Jupiter, including divestment within 120 days of all interests in the U.S. company.[2] The Executive Order also prohibits Suirui from accessing Jupiter's U.S. systems, data, and facilities, restricts certain asset transfers, and imposes several compliance measures. While Jupiter stated that it "did not anticipate any disruptions to its business while the matter was adjudicated,"[3] unwinding a five-year-old transaction may be a resource-intensive and complex undertaking. In particular, any requirement to separate integrated databases, email, human resources, marketing, and customer-facing systems to the satisfaction of CFIUS can be expected to be expensive and can take years to complete.

The decision reflects a willingness to leverage the full scope of Section 721 authority, including mandatory divestiture, strict access controls, and the use of audits and legal enforcement. The parameters of the divestiture send a clear message that the Trump administration is willing to unwind foreign investments, perhaps even those that had once been welcomed, given the rapidly evolving geopolitical and security landscape. This move underscores that timing alone is no shield for foreign investment in U.S. businesses, as CFIUS and the president retain broad powers to act whenever a credible threat to national security is discovered.

Dealmakers—including foreign investors and U.S. businesses alike—must remain vigilant in identifying and mitigating potential national

1. Regarding the Acquisition of Jupiter Systems, LLC by Suirui International Co., Limited, 90 Fed. Reg. 31125 (July 11, 2025), https://www.federalregister.gov/documents/2025/07/11/2025-13123/regarding-the-acquisition-of-jupiter-systems-llc-by-suirui-international-co-limited.
2. For a detailed overview of the Executive Order, *see President Trump Uses CFIUS to Unwind 2020 Chinese Acquisition of Jupiter Systems*, Debevoise & Plimpton LLP (July 17, 2025), https://www.debevoise.com/insights/publications/2025/07/president-trump-uses-cfius-to-unwind-2020-chinese.
3. Kanishka Singh, *Trump blocks acquisition of equipment supplier Jupiter Systems by Hong Kong firm*, Reuters (July 11, 2025), https://www.reuters.com/world/china/trump-blocks-acquisition-equipment-supplier-jupiter-systems-by-hong-kong-firm-2025-07-11/.

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security issues. When a company has products and services tied to national defense, critical industries (which the Trump administration has notably expanded to include agriculture) or sensitive technologies, CFIUS is likely to scrutinize those companies' ownership structures and assess any foreign entanglements, particularly those with Chinese entities.

In addition to complying with any mandatory CFIUS filing requirements, dealmakers should consider the efficacy and benefit of making a voluntary filing to affirmatively receive safe harbor approval upon completion of a CFIUS review. Should CFIUS determine that there are no unresolved national security concerns arising from a transaction, CFIUS approves the transaction by informing the parties that it has concluded action, and the parties will then enjoy safe harbor from any further CFIUS scrutiny of the transaction. This safe harbor applies even if the business evolves into more sensitive sectors, geopolitical tensions increase, a new administration comes into office, or the national security landscape otherwise shifts in the future. By contrast, if a transaction proceeds without CFIUS review, the risk of subsequent regulatory intervention on the grounds of national security is real, even years after a deal closes.

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> "As the tariff landscape continues to shift, companies must be prepared to defend against breach claims and respond to changing circumstances in contractual and treaty-based relationships."

The U.S. Tariff Turmoil: Navigating the Potential Sources of Risk

Introduction

Since January 2025, the Trump administration's far-reaching tariff announcements and policies have precipitated seismic changes in global trade. The country-specific and product-specific tariffs, including on copper, aluminum, steel and automobiles, are leaving few companies untouched. Not to mention the announced tariff-related investigations—including into pharmaceuticals, semiconductors and lumber—which signal the likelihood that more product-specific tariffs are forthcoming.

Companies across industries have begun experiencing the commercial effects. They have projected increased costs and lower earnings, pulled earnings forecasts altogether, warned of potential supply disruptions or of buyers reneging on purchase commitments, and even declared *force majeure*.

Commercial contracts—the bedrock of business relationships—will play a major role in how these effects and their associated costs are ultimately allocated. They may be used as a sword (to seek compensation for nonperformance, uneconomic price increases, third-party liability, or defective goods and services) and also as a shield (to excuse nonperformance including on the basis of *force majeure*, impossibility or impracticability, or mitigate loss through liquidated damages, renegotiation, mediation, or termination). Investment treaties may provide additional protections for companies' business interests that may be affected by new tariffs. Understanding one's contractual and treaty-based rights and obligations will be key to effectively managing and mitigating any tariff-related dispute risks.

In this article, we (i) provide an overview of the prevailing U.S. tariff policies, including the various factors that may affect how they evolve; (ii) examine potential friction points arising out of common contractual provisions; and (iii) consider how the evolving tariff landscape may give rise to investment disputes.

The Tariff Landscape

The tariff landscape is constantly evolving. Frequent policy changes, ongoing domestic legal proceedings, issued or threatened retaliatory tariffs, and bilateral trade talks all contribute to the unpredictability of what tomorrow will bring. For purposes of understanding their impact and scope, however, it is useful to understand the Trump administration's tariffs in two broad categories—country-specific and product-specific.

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Country-Specific Tariffs

The Trump administration has imposed blanket tariffs on products from several major U.S. trading partners under the International Emergency Economic Powers Act of 1977 (IEEPA). The IEEPA grants the president the power to regulate importation to "deal with an unusual and extraordinary threat with respect to which a national emergency has been declared." Beginning in February this year, after declaring multiple national emergencies due to the flow of criminal activity and illegal drugs across U.S. borders, the Trump administration initially imposed a 25% tariff on all products from Canada and Mexico,[1] a 10% tariff on Canadian energy resources, and a 20% tariff on all products from China.

In April, citing the IEEPA again, the Trump administration ordered a 10% "reciprocal" tariff on all other countries, except for certain products explicitly exempted (e.g., pharmaceuticals and semiconductors). China's total tariff rate was also ultimately set at 30%—combining the 20% all products tariff with a 10% reciprocal tariff—after a series of larger reciprocal tariff increases.[2] The 10% reciprocal tariff rate was due to increase on August 12 but extended for an additional 90 days to allow the Trump Administration more time to negotiate a trade deal with China.

Also faced with the threat of higher reciprocal tariffs beginning on August 1, several countries have reached trade deals with the United States since April. For instance, on July 27, the Trump administration announced that it reached a trade deal with the European Union that would set a 15% base tariff rate on most EU exports to the U.S. and eliminate tariffs on certain products, including aircraft, certain pharmaceutical products and ingredients, and certain agricultural products. The announcement also stated that the EU had agreed to a $600 billion increase in its investment in the United States and to purchase $750 billion worth of American energy. The Trump administration also announced several similar deals prior to August 1, including with Japan (15% base tariff + a $550 billion investment), South Korea (15% base tariff + a $350 billion investment and $100 billion worth of liquefied natural gas purchases), Indonesia (19% base tariff + $19.5 billion worth of energy and agricultural product purchases), and Vietnam (20% base tariff + duty-free entry for U.S.). For some countries that failed to negotiate trade deals, their reciprocal tariff rates increased to as much as 41% on August 7, 2025, pursuant to the Trump administration's July 31, 2025 Executive Order. Canada, as well as Brazil and India, also saw their tariff rates increase to 35% and 50% respectively, pursuant to separate Executive Orders.

The viability of these country-specific tariffs, however, is uncertain. On May 28, 2025, the U.S. Court of International Trade (CIT) held that these tariffs exceed the president's authority under IEEPA and must be vacated. The CIT's ruling has been appealed to the U.S. Court of Appeals for the Federal Circuit, which is allowing the tariffs to remain in place and effective pending the appeal. On July 31, 2025, the Federal Circuit held an expedited *en banc* hearing before the full 11-judge Federal Circuit panel. A decision may still take several months to issue. Even if this or other challenges to the country-specific tariffs under IEEPA succeed, however, there are other statutes the Trump administration may rely upon. For instance, Section 122 of the Trade Act of 1974 allows the president to impose tariffs on countries, including to remedy "large and serious United States balance-of-payments deficits"; and Section 338 of the Tariff Act of 1930 allows the president to impose tariffs on countries that "discriminat[e] against the commerce of the United States."

1. Products covered under United States-Mexico-Canada Agreement are exempt.
2. The Trump Administration increased China's reciprocal tariff rate dramatically in April in response to Chinese retaliatory tariffs. It was initially set at 34% on April 2, then raised to 84% on April 8, then to 125% on April 9, before being reduced down to 10% on May 12, where it has remained.

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Product-Specific Tariffs

The Trump administration has also issued product-specific tariffs applicable without regard to the country of origin, pursuant to the president's authority under Section 232 of the Trade Expansion Act of 1962. Section 232, as well as certain other legal bases for tariffs—including Sections 201 and 301 of the Trade Act of 1974—require a government agency investigation before the president may impose such tariffs. Because these tariffs are supposed to be preceded by a formal investigation and findings, they may take longer to be enacted, but they are also more likely to survive judicial review.

The Trump administration executed an Executive Order on July 30, 2025 imposing a 50% tariff on copper and derivative product imports, in response to a Section 232 investigation that copper imports are entering the U.S. in quantities and under circumstances that threaten to impair national security. To the extent that a bilateral trade deal has not been reached to lower or eliminate tariffs, as with the United Kingdom, a 25% tariff also remains in effect for all aluminum, steel, automobile and auto part imports with some limited exceptions.

These and other tariffs issued under the Trade Expansion Act or the Trade Act are not impacted by the CIT litigation, which applies only to the tariffs issued under IEEPA. Several more product-specific tariffs are anticipated in the coming months as ongoing investigations into those products and sectors conclude. For instance, the Trump administration ordered the Commerce Department to conduct formal investigations into whether imports of timber and lumber, pharmaceuticals, and critical mineral products (e.g., semiconductors) threaten U.S. national security, and should be subject to tariffs, quotas or other import restrictions. The results of these investigations are expected between October and December of this year. The Trump Administration has, however, recently threatened tariffs as high as 250% on pharmaceuticals, and 100% on semiconductor imports to be applied to any importer that does not commit to increase U.S.-based semiconductor manufacturing.

Potential Friction Points in Commercial Contracts

While every commercial contract contains unique language and a distinct governing law framework, there are certain common clauses that are likely to give rise to a handful of dispute scenarios—each of which we consider in this section.

Fixed Obligations

Tariffs may cause delays and increase costs along a company's supply chain. This may affect the ability of companies to meet contractual delivery, payment or timing obligations.

To assess risks in this scenario, companies should identify any price, delivery, timing or payment obligations in their contracts that may expressly allocate tariff risks to any given party. Some contracts, for example, may provide that the purchase price is inclusive of all applicable tariffs, whether existing or imposed during the term of the contract, thereby allocating tariff risks to the seller. Other contracts may establish procedures for determining which party bears the risk of any material change in circumstances, including tariff increases. For example, the seller may be given an opportunity to propose an adjusted price to reflect an increase in tariffs, after which the parties are to negotiate an equitable adjustment in good faith.

But not all fixed price, delivery or timing clauses will account for tariff risk. In many cases the clauses will impose hard deadlines and firm prices with clear consequences if an obligation is not met. Fixed delivery or "time is of the essence" provisions, for example, could allow the buyer to cancel the order, seek liquidated damages, or claim nonperformance for any late deliveries regardless of the cause. Some contracts may account for such risks in other types of clauses, which we describe below. However, where there is any ambiguity in the contract's accounting of such risk, parties should expect dispute vulnerability to increase.

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The U.S. Tariff Turmoil: Navigating the Potential Sources of Risk (continued from page 8)

Indemnity & Pass-Through

If not in fixed obligations clauses, parties may have expressly allocated tariff risk in indemnity or pass-through clauses. A particular clause may, for example, either hold the seller responsible for, or require the buyer to indemnify the seller against, future applicable tariffs.

Even where such clauses do not explicitly cover tariffs, broad terms may be argued to encompass such costs. This may include, for example, a general pass-through clause allowing the seller to adjust pricing in the event of regulatory changes, or significant increases in the cost of materials or an indemnity clause requiring one party to hold the other harmless for legal compliance costs arising out of the commercial relationship. Companies should also be aware of potential complications that may arise from passing on the costs of tariffs that are later retroactively invalidated. Depending on whether the party to whom that cost was passed is entitled to a government refund, they may seek compensation from the counterparty instead, which may lead to a dispute.

If relying on indemnity or pass-through clauses, parties should also take care to understand and comply with any notice or other formal procedural requirements, any liability caps, or any indemnitor rights to control the defense or seek settlement where third-party claims are involved.

Force Majeure & Excuses for Nonperformance

Most contracts contain force majeure clauses that excuse nonperformance upon the occurrence of certain unforeseeable events. However, they do not usually expressly account for tariff risk and should be carefully analyzed to determine whether the text may arguably encompass tariff-related events. For instance, change-in-law clauses included in a *force majeure* provision may provide a strong basis to argue that tariffs are *force majeure* events, but these clauses are uncommon. The governing law of the contract is also an important component of this analysis. Some jurisdictions may construe these provisions narrowly and exclude economic hardship, thus potentially excluding any tariff-related impacts.

Non-contractual excuses for nonperformance, such as commercial impracticability, impossibility or frustration of purpose, may also be available. The availability and scope of such non-contractual excuses will depend on the governing law of the contract, including any transnational legal principles or treaties, such as the United Nations Convention on Contracts for the Sale of International Goods (CISG).

Liquidated Damages

Some contracts may contain liquidated damages clauses that explicitly provide for payment in the event of contractual nonperformance. Companies should look for these types of provisions in their contract to assess whether they may be liable for, or may be entitled to receive, liquidated damages resulting from tariff-related delays or nonperformance. Companies should also pay close attention to any exceptions provided in liquidated damages clauses, which may be interpreted to excuse delays or nonperformance.

A party facing the prospect of liquidated damages should assess that amount against the costs of performing. If the former is lower, it may be cost-efficient to breach the contract by not performing. However, this will be a fact-specific inquiry that must also take into account the complicated interplay of contractual obligations and potential liabilities—both financial and strategic—outside the liquidated damages clause itself, including the nature of the commercial relationship between the parties.

Contract Termination & Renegotiation

A party may attempt to terminate or renegotiate a contract as a result of tariff-related events. Whether this tactic may be properly deployed either offensively or defensively will depend, in large part, on the relevant preconditions and any cost and liability implications.

Some contracts may expressly allow termination in the event of a change in law, such as tariffs, but many do not. Instead, a party would

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typically only be allowed to terminate a contract after giving written notice, after a stipulated period of time, and upon the occurrence of a particular event—for instance, if the counterparty breaches the agreement and fails to cure the breach. Given the fast-moving and volatile nature of these tariffs, notice and cure periods may result in significant ongoing costs, and unduly delay a resolution to the dispute.

Termination may also have material cost implications, such as penalties, liquidated damages, or the costs of replacing the goods or services the breaching party was obligated to provide under the contract. These costs should be taken into account in determining whether termination can help mitigate tariff risk.

Renegotiation clauses are less common than termination clauses, but where present also typically require the same kind of notice, timing and substantive preconditions. Some contracts may provide for periodic and regular renegotiation, which may provide opportunities to mitigate anticipated tariff risk. Companies should be aware of and look for these options in their contracts, while ensuring compliance with timing and notice requirements.

Companies may also consider renegotiating the terms of their commercial relationships outside of the formal contractually prescribed process, such as through meditation. Especially if companies expect to be on both the buy- and sell-side of transactions, mediation allows for multiple parties in a supply chain to collectively find a fair and reasonable way of allocating tariff costs, aided by a neutral third party. This could increase predictability, improve outcomes in appropriate scenarios, and help maintain important trading relationships.

Investment Treaty Disputes

Tariffs may lead to treaty-based disputes between foreign companies and host governments if they violate investment protections guaranteed under bilateral investment treaties (BITs) or free trade agreements (FTAs). Depending on a company's nationality and other qualifying investment characteristics, a company may have claims against the government where it conducts business. For example, BITs and FTAs may protect against sudden or retroactive regulatory impositions that violate foreign investors' legitimate expectations; proscribe discriminatory or arbitrary treatment of foreign companies; and prohibit government policies that may amount to an expropriation of the foreign company's investment. Foreign companies whose operations are affected by tariffs should seek to understand whether their investments qualify for protection under any BITs or FTAs, how any parallel contractual claims may affect their treaty claims, and whether it is in their long-term strategic interest to pursue claims against a host government.

Conclusion

More likely than not, the interpretation of and interplay between the above types of contractual and treaty provisions will not be straightforward, and there will be significant ambiguity in their applicability to a tariff-related breakdown in commercial or bilateral relationships. Such ambiguities and breakdowns may lead to disputes, including international commercial or investment arbitration where the relevant contracts or governing treaties include arbitration clauses. As always in high-risk dispute scenarios, these are situations that must be navigated strategically, taking into account all legal options, commercial goals, and long-term business considerations. As the tariff landscape continues to shift, companies must be prepared to defend against breach claims and respond to changing circumstances in contractual and treaty-based relationships.

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New York Applies Internal Affairs Doctrine to Shareholder Derivative Claims

In a key decision for foreign corporations that do business in New York, the state's highest court recently confirmed that foreign substantive law governing shareholders' standing to pursue derivative litigation displaces New York law in the event of a conflict. On May 20, 2025, the New York Court of Appeals in *Ezrasons, Inc. v. Rudd*[1] affirmed the dismissal of a derivative suit filed by a beneficial owner of shares in Barclays PLC based on an English law limiting standing for derivative suits to a company's registered members. The Court of Appeals held that New York's Business Corporation Law (BCL) did not displace the internal affairs doctrine—a common law choice-of-law rule mandating that the substantive law of a company's place of incorporation generally governs disputes concerning its internal affairs—with respect to questions of shareholder standing under BCL Section 626.

Background

Barclays is a bank holding company incorporated under the laws of England and Wales and headquartered in London. In 2021, Ezrasons Inc., a beneficial owner of Barclays shares, filed suit in New York's Supreme Court on behalf of Barclays against dozens of its current and former directors and officers and a local affiliate. Ezrasons asserted claims for breach of the directors' and officers' fiduciary duties under English law and sought billions of dollars in damages by reference to various governmental investigations and civil suits lodged against Barclays over the course of the preceding decade in the United States and the United Kingdom.

Ezrasons's suit against Barclays formed part of a larger trend of shareholders seeking to pursue derivative litigation on behalf of foreign companies in New York. The New York Court of Appeals had issued two important decisions concerning the applicable law in such cases over the past decade.

In May 2024, in *Eccles v. Shamrock Cap. Advisors, LLC*, the Court of Appeals reaffirmed and clarified New York's application of the internal affairs doctrine in a suit concerning a Scottish company, holding that, "with rare exception, the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation."[2] Quoting the United States Supreme Court, the Court of Appeals explained that the "policy underlying the internal affairs doctrine" is to ensure that "only one state should have the authority to regulate a corporation's internal affairs… because otherwise a corporation could be faced with conflicting demands."[3] The Court of Appeals then clarified that, in order to overcome that presumption and "establish the applicability of New York law, a party must demonstrate both that (1) the interest of the place of incorporation is minimal— i.e., that the company has virtually no contact with the place of incorporation other than the fact of its incorporation, and (2) New York has a dominant interest in applying its own substantive law."[4]

Several years earlier, in a case involving a company incorporated in the Cayman Islands, the Court of Appeals had already confirmed that the internal affairs doctrine applies only to substantive law because, "under New York common-law principles, procedural rules are governed by the law of the forum."[5]

1. 2025 N.Y. Slip. Op. 03008, 2025 WL 1436000 (N.Y. 2025).
2. 42 N.Y.3d 321, 328 (2024).
3. *Id.* at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)).
4. *Id.* at 339.
5. *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247, 253 (2017).

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New York Applies Internal Affairs Doctrine to Shareholder Derivative Claims (continued from page 11)

The defendants in *Ezrasons* had moved to dismiss the claims on several grounds, including that under English law Ezrasons lacked standing to sue derivatively on behalf of Barclays because it was only a beneficial owner of Barclays shares, and not a registered member of Barclays. According to the defendants' English law expert, English statutory and common law permits only registered members of a corporation who legally own shares and are recorded on the company's official register to sue derivatively on its behalf. Ezrasons admitted that it was not a registered member of Barclays, but argued that it had standing for a shareholder derivative action under BCL Sections 626(a) and 1319(a)(2) and that these provisions of the BCL displaced the common law internal affairs doctrine and mandated application of New York law. The Supreme Court granted the defendants' motion to dismiss and the Appellate Division unanimously affirmed.

The Decision by the New York Court of Appeals

In a six-to-one decision, the New York Court of Appeals held that BCL Sections 626(a) and 1319 do not override the internal affairs doctrine, such that foreign substantive law concerning shareholders' standing to pursue a derivative action displaces those provisions in the event of a conflict.

As a preliminary matter, the Court concluded that "[f]ew principles are more firmly entrenched in corporate law than the internal affairs doctrine" and that New York courts had applied different iterations of this common law choice-of-law rule for over a century.[6] Accordingly, it assessed whether BCL Sections 626(a) and 1319(a)(2), which were enacted in their current form in 1961, evinced the requisite "clear," "specific," and "unambiguous" legislative intent to override the common law, and concluded that they did not.

The Court of Appeals first examined BCL Section 626(a), which provides that an "action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor" by a beneficial owner of shares in the corporation, among others. The Court concluded that "the text of Section 626(a) does not clearly indicate that it was intended to serve as both a New York standing rule *and* a choice-of-law directive." Instead, the Court held, the legislature "established a baseline New York standing rule" and, under the internal affairs doctrine, "foreign substantive law controls in the event of any conflict between New York law and the law of a company's place of incorporation." That Section 626(a) "authorizes actions to be brought on behalf of either 'a domestic or foreign corporation' may set the stage for a conflict between New York and foreign standing law, but it does not suggest that New York law should prevail in the event of such conflict."

The Court next concluded that BCL Section 1319 "is not a choice-of-law provision either." As the Court explained, Section 1319 "merely sets forth a list of various BCL articles and sections, including Section 626, and provides that each, '*to the extent provided therein*, shall apply to a foreign corporation doing business in this state.'" The Court distinguished BCL Section 1317, which provides that "directors and officers of foreign corporations" are subject to certain provisions of the BCL "to the same extent as directors and officers of a domestic corporation." The Court suggested that Section 1317 reflects the express legislative intent to displace the internal affairs doctrine and apply New York substantive law that is lacking in Section 1319(a)(2).

The Court did not assess Ezrasons's argument that the provisions of English law limiting derivative actions to registered members were procedural rather than substantive—such that New York choice of law principles would mandate the application of forum law—because the Court concluded that Ezrasons had not properly preserved that argument. Assuming that the

6. *Ezrasons*, 2025 WL 1436000, at *5-7.

Continued on next page

New York Applies Internal Affairs Doctrine to Shareholder Derivative Claims (continued from page 12)

English membership requirement is substantive, and is therefore subject to the internal affairs doctrine, the Court of Appeals concluded that the Appellate Division had properly dismissed the complaint for lack of standing under English law.

Chief Judge Rowan Wilson wrote a dissenting opinion arguing that the internal affairs doctrine "did not exist as a choice of law rule in 1961," such that Sections 626(a) and 1319(a)(2) did not need to evince any clear intent to displace the non-existent common law. Judge Wilson would have held that the "plain text" of Section 626(a) indicates that it "applies to foreign corporations to the exclusion of foreign law."

On the same day that it decided *Ezrasons*, the Court of Appeals also affirmed the dismissal of a shareholder derivative action brought on behalf of Bayer AG, a German corporation, in *Haussmann v. Baumann*.[7] The Supreme Court had dismissed the case for lack of standing to pursue a derivative action under German law (applying the internal affairs doctrine), for *forum non conveniens*, and for lack of personal jurisdiction. The Appellate Division unanimously affirmed, discussing only the dismissal for lack of standing. The Appellate Division determined that, pursuant to the internal affairs doctrine, German law requiring a shareholder to seek leave from a German court before filing a derivative action applied and that plaintiffs had concededly not complied with the German law.[8] The Court of Appeals affirmed the Supreme Court's dismissal on the grounds of *forum non conveniens*, without expressly addressing the Appellate Division's discussion of the internal affairs doctrine.

What's Next

The Court of Appeals' recent decision in *Ezrasons* and the Appellate Division's decision in *Haussmann* should discourage derivative litigation on behalf of foreign corporations in New York courts. The courts' holdings make clear that New York courts will enforce foreign substantive law that imposes stricter requirements for shareholders seeking to establish standing to sue on behalf of the corporation than New York's BCL does. We also anticipate that shareholders will now argue that any such foreign laws are procedural, rather than substantive, such that the internal affairs doctrine does not apply—and that the shareholder need only satisfy Section 626 of the BCL to bring a derivative claim.

7. 2025 N.Y. Slip Op. 03009, 2025 WL 1435989 (2025).
8. *Haussmann v. Baumann*, 217 A.D.3d 569, 51 (1st Dep't 2023).

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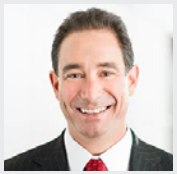
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The Blurbs

Delaware Supreme Court Reverses Court of Chancery's Aiding and Abetting Finding

Earlier this year, in *In re Columbia Pipeline Group, Inc. Merger Litigation*,[1] the Delaware Supreme Court reversed a Court of Chancery decision which found TC Energy Corp. (TransCanada) liable for aiding and abetting fiduciary breaches by directors and officers of Columbia Pipeline Group, Inc. (Columbia) in connection with Columbia's 2016 sale to TransCanada. The lower court's decision preceded the Delaware Supreme Court's decision in *In re Mindbody, Inc. Stockholder Litigation*,[2] which held that, to prove that a buyer aided and abetted a fiduciary breach, the plaintiff must show that the buyer[3] (i) *actually knew* of the sell-side breach and that its own conduct was improper and (ii) actively and substantially assisted in the breach.[4] Prior to the Supreme Court's decision in *Mindbody*, it was arguable that constructive knowledge, rather than actual knowledge, of a fiduciary's breach, was sufficient to prove the knowledge element of an aiding and abetting claim.[5]

The facts of *Columbia Pipeline* are intricate and involve target officers motivated by a desire to retire and collect change of control benefits, a sale process that involved numerous breaches of a "don't-ask-don't-waive" standstill and a buyer business development officer's extraction of information from a target CFO with whom he had a prior relationship, re-trading on price by the buyer when it sensed weakness on the part of the target, and failure of the buyer to correct proxy disclosure inadequacies despite a contractual obligation to do so. The lower court found these actions sufficient to support a finding of aiding and abetting liability, but the Supreme Court disagreed.

The Supreme Court focused first on the knowledge requirement of an aiding and abetting claim. Per the standard articulated in *Mindbody*, for a third party to be found liable for aiding and abetting a fiduciary's breach, a plaintiff must show that the third party had "two types of knowledge": (i) actual knowledge that the fiduciary was committing a breach and (ii) knowledge that its own conduct regarding the breach was improper. The Court emphasized the substantial hurdles facing a plaintiff seeking to prove such a claim, noting that the parties were unable to cite to another Delaware decision where a third-party buyer has been found liable for aiding and abetting such a breach. Because the lower court did not find that TransCanada had actual knowledge

1. No. 281, 2024 (Del. June 17, 2025).
2. No. 484, 2023 (Del. Dec. 2, 2024).
3. The Supreme Court's decisions in *Mindbody* and *Columbia* involved aiding and abetting claims against buyers, but the articulated standard for proving an aiding and abetting claim, which is derived from general tort principles, should apply to any third party. While the standard applies to all third parties, it is arguably more difficult to prove that a third-party buyer—who often has limited visibility into a target's internal processes and conflicts—has the requisite knowledge to satisfy such a standard. There would arguably be fewer obstacles in demonstrating that a target's financial advisor, who is more likely to be deeply involved in a target's sale process, has actual knowledge of a target fiduciary's breaches given its role in the process.
4. For a more detailed discussion of the Delaware Supreme Court's decision in the *Mindbody* litigation, see our article "Neither an Aider nor an Abettor Be: Risks for Advisors and Acquirors" in Issue 9 of our Special Committee Report.
5. *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

Continued on next page

that Columbia's fiduciaries were committing a breach, but rather constructive knowledge, the Supreme Court reviewed the record to determine whether the record could support a finding of actual knowledge, ultimately finding that it did not. The Court did indicate that circumstantial evidence "such as the defendant's possession of documents or presence during relevant conversations" might be sufficient to prove actual knowledge, but such circumstantial evidence was not provided here.

As to the participation requirement, the Supreme Court reiterated that an aider and abettor's participation in a primary actor's breach of fiduciary duty must be of an active and substantial nature. It must include something more than taking advantage of the other side's weakness and negotiating aggressively for the lowest possible price. Per this articulated legal standard, "a bidder who has not colluded or conspired with its negotiating counterpart, who does not create the condition giving rise to a conflict of interest, who does not encourage his counterpart to disregard his fiduciary duties or substantially assist him in committing the breach, does not aid and abet the breach." According to the Court, a bidder's aggressive bargaining tactics, however disquieting, do not constitute aiding and abetting a target fiduciary's breach unless the bidder has actively and substantially assisted in the breach.

The standstill breaches might have presented a harder issue, but the Court was persuaded that, although the standstill was, in fact, repeatedly breached, both sides appeared to believe, albeit incorrectly, that informal negotiations and proposals were permissible. And, consistent with its holding in *Mindbody*, the Court found that the buyer's contractual obligation to correct proxy misstatements or omissions was insufficient to support aiding-and-abetting liability where the buyer, although commenting on the proxy, did not propose any misleading statements or suggest omitting any material information.

The Court's decision makes clear that plaintiffs face a high bar in proving that a buyer aided and abetted a target insider's breach of fiduciary duties in a sales transaction: the buyer must *actually know* that the insider was breaching its fiduciary duties and must have *actively and substantially* participated in that breach.

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AI Can Draft Board Minutes—But Should It? Considerations for Public Companies

The proliferation of AI recording, transcription, and summarization features within video conferencing platforms ("AI meeting tools") has led many public companies to consider adopting AI meeting tools to assist with the drafting of board and committee meeting minutes. While AI meeting tools offer several practical benefits, evaluating the potential risks associated with the use of these features is crucial from a risk oversight, governance, and controls perspective.

Debevoise's Capital Markets, White Collar and Regulatory Defense, and Data Strategy and Security Practices held a webinar on July 29, 2025 at 12:00 pm ET discussing best practices and risk considerations for public companies considering the adoption of AI meeting tools.

Key Considerations

Below we outline certain important considerations that should be top-of-mind for public companies that are considering the use of these types of AI applications in board and committee meetings.

- **Confidentiality and Cybersecurity.** Companies using AI meeting tools should confirm with the AI provider that: (i) company data will remain confidential and will not be used to train any AI model; (ii) humans at the AI provider will not have access to company data; (iii) the AI provider will not share company data with any other third parties absent specifically agreed extraordinary circumstances; and (iv) the AI provider has an effective cybersecurity program reasonably designed to protect company data.
- **Notice and Consents**. Some jurisdictions, including certain U.S. states, require the consent of all parties to lawfully record meetings. Regardless of the jurisdiction, meeting participants should receive a notification that a transcription or summary is being generated and be afforded the opportunity to raise concerns. Certain AI meeting tools can create summaries without generating any recording.
- **Accuracy.** AI-generated meeting transcripts and summaries may contain inaccuracies and should not be considered final. Such materials should be reviewed and revised by the secretary of the board meeting (or the secretary's delegate) prior to circulation and entry into the company's official records. The secretary should adopt the materials as accurate, complete, and fit for purpose.
- **Privileged and Confidential Information.** Use of AI meeting tools may not be appropriate if a meeting involves privileged or highly confidential information, such as discussions about ongoing litigation, strategic initiatives, or sensitive regulatory compliance matters. To reduce the risk of a privilege waiver or loss of confidentiality, access to and dissemination of AI-generated materials that may contain privileged or highly confidential information should be limited to the meeting participants and others within the scope of the privilege or confidence.
- **Circulation and Retention.** Companies should take care to understand where the AI-generated materials for board and committee meetings

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are stored and how they are circulated, as well as any automatic deletion schedule and preservation obligations. Consideration should be given to the risk/reward balance of creating, retaining, and distributing large volumes of AI-generated recordings, transcripts, and summaries of board and committee meetings.

- **Litigation Holds**. Companies should consider whether AI-generated materials may contain information that is subject to any litigation holds, and if so, how that information is preserved and reviewed for discovery.
- **Information Barriers.** Many companies have controls in their information systems to restrict access to, and prevent the impermissible disclosure of, sensitive information. Companies should ensure that the use of AI meeting tools is consistent with existing information walls and permissions.

Final Thoughts

When considering the use of AI meeting tools in the boardroom, it is important to identify and acknowledge the potential risks associated with these applications and to establish policies, procedures, and effective controls to mitigate such risks. Doing so will allow companies to take advantage of the many benefits promised by AI, without exposure to undue risk. Please reach out to any of the Debevoise attorneys below if you would like to discuss these matters further.

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Failure to Adequately Disclose Financial Advisor Conflicts Leaves Special Committee Members at Risk for Breach of Fiduciary Duty Claims

In 2021, Inovalon Holdings was sold to a third-party buyer consortium in a transaction in which Inovalon's controller rolled over a portion of his equity interest. Because the transaction was approved by a special committee of independent directors and a majority-of-the-minority stockholder vote, the business judgment standard of care applied rather than the exacting entire fairness standard, and the Delaware Court of Chancery dismissed breach of fiduciary duty claims brought against Inovalon's controller and directors. The Delaware Supreme Court reversed[1] the lower court's decision, finding that inadequate disclosure of financial advisor conflicts rendered the minority stockholders' vote ineffective.[2]

Background and Delaware Supreme Court Analysis

Inovalon had engaged two financial advisors to provide sell-side advice in connection with its 2021 sale process. Each advisor provided relationship disclosure to the special committee, specifying work they had done with the buyer on unrelated matters, but the Delaware Supreme Court found that Inovalon's proxy statement did not adequately disclose those conflicts. The Court found that language stating that the second advisor "may provide" services to the buyer and its co-investors was misleading given that the advisor was in fact *concurrently* providing such services. In the case of the first advisor, the Court held that disclosure that the bank would receive "customary compensation" in connection with disclosed concurrent representations was insufficient because it kept stockholders from "contextualizing and evaluating" the conflicts. The Court contrasted the $15.2 million of disclosed fees paid to the first advisor by the buyer with the nearly $400 million of undisclosed fees paid to the advisor by the other members of the buyer's equity consortium. It found the overall disclosure to be misleading because it could have led stockholders to believe that the undisclosed fees paid by buyer's co-investors were of a similar magnitude to the disclosed fees paid by the buyer.

The Court stated that while "there is no hard and fast rule that requires financial advisors to always disclose the specific amount of their fees from a counterparty in a transaction," the question is subject to a materiality standard. The Court found that in this case the materiality standard was met, noting that the undisclosed compensation paid to the first advisor by the members of the buyer consortium on unrelated transactions was roughly 25 times the amount disclosed by the buyer and 10 times the amount of fees that the advisor received in the transaction, thus creating a misleading picture.

1. *City of Sarasota Firefighters' Pension Fund, et al. v. Inovalon Holdings, Inc.*, No. 305, 2023 (Del. May 1, 2024).
2. The Supreme Court's decision is discussed in greater detail in the July 2024 issue of our *Special Committee Report*.

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The Court also took issue with the disclosure about the second advisor's role in the bidder outreach process, which the plaintiffs claimed had been overstated in the proxy. The Court observed that the disclosures about the second advisor's role "do not sit comfortably" with corresponding accounts in the minutes, and it cautioned boards, committees and their advisors to take care in accurately describing events and roles played by board and committee members and their advisors. The Court remanded the dispute to the lower court for further proceedings consistent with its opinion.

Court of Chancery's Letter Decision on Remand

On remand, in a letter decision,[3] the Court of Chancery addressed the special committee members' motion to dismiss for failure to state a non-exculpated claim. Because the court had initially dismissed the entire complaint on the grounds that the transaction complied with *MFW* and was therefore afforded deference under the business judgment rule, the court had not previously addressed arguments by the special committee. The court denied the motion to dismiss, finding that plaintiffs adequately alleged that the special committee members acted in bad faith. The court found it reasonably conceivable that the defendants knowingly failed to disclose material information regarding the first financial advisor's conflicts, particularly with respect to the amount of fees to which it was entitled and knowingly made false disclosures regarding the other financial advisor's participation in market outreach. In reaching the latter conclusion, the court placed particular emphasis on discrepancies between the special committee's meeting minutes and the proxy statement.

Key Implications

These decisions reinforce the importance of ensuring that financial advisor conflicts are accurately and comprehensively disclosed. While there is no rule requiring financial advisors to disclose the specific amount of fees from a transaction counterparty in every instance, the question is subject to a materiality standard. Where the undisclosed compensation significantly exceeds the disclosed compensation, the undisclosed compensation is likely to be deemed material under *Inovalon*. Parties should also bear in mind that the courts will pay close attention to discrepancies between board / special committee minutes and a target company's proxy statement, in determining whether the parties acted in bad faith as it relates to disclosure of advisor conflicts.

It is worth noting that a majority-of-the-minority vote likely would not have been required had the transaction been announced following this year's enactment of amendments to the Delaware General Corporation Law, which changed the safe harbor requirements for non-take private transactions involving a conflicted controller.[4] However, even under the new statute, robust disclosure of financial advisor conflicts to the relevant decisionmakers—whether stockholders or a special committee—remains critical.

3. *City of Sarasota Firefighters' Pension Fund, et al. v. Inovalon Holdings, Inc.*, C.A. No. 2022-0698-KSJM (Del. Ch. June 10, 2025) (Letter Op.).
4. For more information on these amendments and their implications for conflicted transactions, see our Debevoise Update, "Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions."

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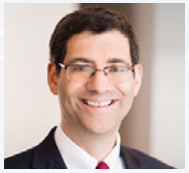

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Industry Updates

Oregon Strengthens Existing CPOM Laws, Imposing New Restrictions on MSOs

Recent legislative activity has changed the tenor of Oregon's longstanding, moderately permissive approach to regulating the corporate practice of medicine (CPOM). Historically, Oregon law has allowed unlicensed individuals and entities to hold a minority, non-controlling share of a professional medical corporation (PC), so long as licensed physicians control the board and clinical operations.[1] In this way, Oregon safeguarded physicians' clinical independence while allowing significant flexibility for a PC and a management service organization (MSO) to pursue alignment, supporting the long-term growth of both entities. With the rise of private equity (PE) investment in healthcare, however, lawmakers on both sides of the aisle have expressed concern that MSOs have emerged as a mechanism for PE to exert control over physician groups and clinical decision-making, pushing the legislature to adopt additional CPOM restrictions to ensure that "every Oregonian [knows] that decisions in exam rooms are being made by doctors, not corporate executives."[2]

On June 9, 2025, Governor Tina Kotek signed Senate Bill 951 (SB 951)[3]into law, curtailing PE investment in healthcare by imposing significant restrictions on MSOs, a common PE investment vehicle.[4] Recognizing that SB 951 risked upending nearly all standard MSO models operating in the state, including legitimate physician-aligned ventures, on June 26, 2025, the Oregon legislature passed thoughtful amendments to portions of SB 951, which amendments went into effect on July 24, 2025.

While the amendments leave SB 951's central prohibition against clinical interference intact—and, in some cases, broaden its predecessor's restrictions—they narrow certain prohibitions that had threatened to disrupt long-standing management arrangements between MSOs and PCs. Taken together, SB 951 and the amendments (the companion bills) strengthen Oregon's

1. O.R.S. 58.375; O.R.S. 677.080.
2. Press release from the offices of Representative Ben Bowman (D-Tigard, Metzger, S Beaverton), Representative Cyrus Javadi (R-Tillamook, Clatskanie), and Representative Lisa Fragala (D-Eugene, Creswell) available here.
3. For additional background on SB 951, please see our Debevoise Debrief—Oregon Imposes Significant Restrictions on Private Equity Investment in Healthcare.
4. A copy of SB 951 can be found here.

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existing CPOM laws by imposing new restrictions on PC-MSO arrangements. A majority of such restrictions will take effect on January 1, 2026, for MSOs and PCs incorporated or organized in Oregon on or after June 9, 2025. Existing MSOs and PCs will not be impacted by these restrictions until January 1, 2029, providing current investors with an opportunity to exit the Oregon market.

Key Provisions

PC-MSO Dual Affiliations Allowed. The companion bills prohibit an MSO and its shareholders, directors, members, managers, officers, employees and contractors (MSO Representatives) from owning or controlling a majority of shares in a PC under contract with the MSO. However, Oregon will not prohibit dual affiliations, allowing an MSO or an MSO Representative to serve as a director, officer, employee or contractor of a PC under contract with the MSO.

Physician Participation in MSO Governance Narrowed. A physician shareholder, director or officer of a PC may only serve as a director or officer of an MSO provided that such physician owns less than 10% of the PC, or if the PC-MSO arrangement meets all the following criteria: (i) the physician does not receive compensation from the MSO for the board position; (ii) the physician owns less than 25% of the PC; (iii) the PC owns less than 49% of the voting interest in the MSO; and (iv) the PC-MSO governance structure and contract existed prior to January 1, 2024, and the physician, PC and MSO complied with these limits before, on and after that date.

Restrictive Covenants Generally Prohibited. For contracts with medical licensees[5] entered or renewed on or after June 9, 2025, restrictive covenants are generally prohibited, with limited exceptions.[6] However, certain noncompetition agreements that meet the requirements set forth under ORS 653.295 may be enforced against a practicing medical licensee where:

- the medical licensee has an ownership or membership interest of at least 1.5% in the other party to the agreement; or
- the noncompetition agreement is with a PC that provides the medical licensee with documentation of its "recruitment investment,"[7] and is for a term of five years, if the licensee provides clinical care in a designated health professional shortage area (HPSA).

Allowing noncompetition agreements to be enforced against medical licensees with a 1.5% ownership interest in the employing entity covers individuals that hold minor interests via phantom equity or stock grants. Additionally, the lengthy five-year noncompetition term for the recruitment and retention of physicians to HPSAs should give comfort to employers that make the recruitment investments necessary to bring physicians to underserved areas of Oregon.

Transfer Restrictions Allowable in Certain Narrow Circumstances. Traditionally, MSOs use equity transfer restriction agreements (ETRAs) to ensure continuity of PC ownership and operation through a "friendly physician." The companion bills

5. A "medical licensee" includes an individual licensed in Oregon to practice medicine or naturopathic medicine, or a nurse practitioner or physician associate.
6. *See* ORS 653.295. We note that existing law allows noncompetition agreements to be enforced against a medical licensee who does not engage directly in providing medical services, healthcare services or clinical care.
7. "Recruitment investment" is a "protectable interest" that includes costs for marketing and recruiting, sign-on or relocation bonuses, employee education and training, support staff and technology and similar or related items. The recruitment investment amount must be equivalent to at least 20% of the licensee's annual salary.

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prohibit MSOs from utilizing an ETRA to require or prevent a shareholder's sale of equity in a PC, except under extremely narrow circumstances.[8] This prohibition materially narrows an MSO's ability to exercise important guardrails around management of a PC, creating an obstacle to the use of the ubiquitous "friendly physician" model.

Looking Ahead

Arrangements formed prior to January 2024 may qualify for limited safe harbor treatment, but future transactions will remain subject to newly enacted restrictions. Healthcare investors, MSOs and physician groups should reassess their existing governance models and service contracts to ensure alignment with both the letter and spirit of Oregon's evolving CPOM framework.

In addition to Oregon's recent CPOM-focused legislation, Oregon is one of a string of states seeking to establish greater oversight and control over healthcare transactions, adding a layer of regulatory complexity to healthcare transactions that investors in this space will need to consider. In 2022, Oregon increased its general oversight over healthcare transactions through establishment of the Health Care Market Oversight (HCMO) program. Among other things, the HCMO program endows the Oregon Health Authority with the authority to block healthcare-related transactions outright or impose conditions to mitigate the potential for adverse effects to address the rise in consolidation and the downstream impacts on cost, access, equity and quality.

8. As amended, Oregon law allows the following transfer events: (i) suspension or revocation of a professional license; (ii) disqualification from holding stock or interest in the PC; (iii) exclusion, debarment, or suspension from a federal health care program; (iv) indictment for a felony or crime that involves fraud or moral turpitude; (v) breach of the management services agreement; and (vi) death, disability, or permanent incapacitation.

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Historic DOJ Takedown and New FCA Working Group Signal Rising Enforcement Risk for Health Care Industry

Recent actions by the Department of Justice (DOJ) confirm that regulatory risk in the health care sector continues to rise. On June 30, 2025, DOJ announced the largest health care fraud takedown in history, alleging schemes involving more than $14.6 billion in intended losses. Just two days later, on July 2, DOJ launched a new False Claims Act (FCA) Working Group to enhance its health care fraud enforcement efforts. Together, these developments signal escalating scrutiny and highlight DOJ's evolving strategies and increasingly sophisticated enforcement tools.

Record-Breaking Health Care Fraud Takedown

On June 30, 2025, DOJ announced a sweeping set of health care fraud actions across the country. The operation spanned 50 federal districts and 12 State Attorneys General's Offices across the United States, demonstrating enhanced government coordination between DOJ and state regulators. The takedown resulted in criminal charges against 324 defendants, including 96 doctors, nurse practitioners, pharmacists, and other licensed medical professionals.

The centerpiece of the enforcement action, dubbed *Operation Gold Rush*, stemmed from a multi-agency investigation that uncovered the largest health care fraud scheme in DOJ history. The operation targeted a network that allegedly submitted $10.6 billion in fraudulent Medicare claims through dozens of medical supply companies. The scheme allegedly exploited stolen identities of over one million Americans, laundered proceeds via crypto and offshore shell companies, and was orchestrated by individuals using encrypted communications and foreign straw owners. Nineteen individuals were charged, and twelve were arrested in jurisdictions across the United States and internationally, including at border crossings and in Estonia.

In bringing these actions, DOJ relied on its enhanced investigation capabilities, including a newly formed Health Care Fraud Data Fusion Center. The Data Fusion Center aims to merge resources across agencies, employing AI, cloud computing, and shared analytics platforms to improve the detection and prevention of fraudulent activities. This initiative was part of a broader effort to modernize fraud detection systems and ensure a robust defense against sophisticated criminal networks exploiting the health care system. By integrating these advanced technologies, DOJ and its partners were able to intercept over 99% of the fraudulent Medicare payments associated with Operation Gold Rush, demonstrating the effectiveness of this tech-driven approach in detecting health care fraud.

While the takedown primarily focused on criminal prosecutions, it also included significant civil enforcement under the FCA. As part of the nationwide action, DOJ filed civil charges against 20 defendants involving $14.2 million in alleged fraud and reached civil settlements with 106 additional defendants totaling $34.3 million. The FCA allegations centered on fraudulent billing for durable medical equipment, illegal kickback arrangements, telemedicine, and laboratory fraud.

DOJ-HHS FCA Working Group

Just two days after the takedown, on July 2, 2025, DOJ announced the formation of the DOJ-HHS False Claims Act Working Group, which formalizes interagency coordination to combat health care fraud. The group will be jointly led by HHS General Counsel, Chief Counsel to HHS-OIG and the Deputy Assistant Attorney General of

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DOJ's Commercial Litigation Branch. The Working Group's priority enforcement areas include:

- **Medicare Advantage**, building on recent settlements like Oak Street Health's $60 million resolution.
- **Drug, device, and biologics pricing**, encompassing rebates, service fees, and formulary placement arrangements that may mask illegal remuneration.
- **Barriers to patient access to care**, including network adequacy violations.
- **Electronic manipulation**, including attempts to inflate Medicare reimbursements.

The Working Group also explicitly encourages whistleblower reports, reflecting DOJ's continued reliance on *qui tam* relators in FCA enforcement. Historical data shows approximately 65% of FCA settlement value stems from relator-initiated cases.

Compliance Implications for Health Care Organizations

As we previewed in June, and as further detailed in our recent article on DOJ's new white collar enforcement strategy, health care FCA cases have remained a dominant focus under the new administration. Recent DOJ enforcement actions serve as a reminder that health care providers may also face criminal liability. These developments create immediate compliance imperatives. Health care organizations across the spectrum should anticipate increased scrutiny, particularly in the Working Group's identified priority areas.

- **Medicare Advantage organizations** face particular exposure given the emphasis on risk adjustment fraud. Organizations must scrutinize their risk adjustment practices and ensure that documentation supports accurate diagnoses and coding decisions. Periodic internal audits and provider training on risk documentation standards can mitigate exposure.
- **Pharmaceutical and device manufacturers** should assess their pricing and rebate arrangements for potential FCA exposure, particularly arrangements potentially masking illegal remuneration.
- **Health care providers** must evaluate their electronic health records practices given the government's focus on manipulation designed to inflate Medicare reimbursements. Organizations should implement technical assessments of billing system integrity.

Finally, DOJ's ability to detect and block over 99% of allegedly fraudulent Medicare payments underscores a new standard in the use of data analytics in fraud enforcement—and presents a strategic opportunity for health care organizations. Providers should consider leveraging internal analytics tools to mirror DOJ's methodologies, proactively identifying billing anomalies, outliers, and patterns that could trigger regulatory scrutiny. By using their own data in this way, organizations can strengthen compliance monitoring, detect risk in real time, and demonstrate a commitment to integrity that may help mitigate enforcement exposure.

In sum, these developments underscore DOJ's intensified focus on health care enforcement and the growing importance of sophisticated compliance programs. To mitigate heightened regulatory risk, organizations should take proactive steps to align internal practices with DOJ's priorities and data-driven approach.

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New Combination Drugs: Assessing the Potential Impact of New CMS Draft Guidance on Pharmaceutical Companies and Investors

On May 12, 2025, the Centers for Medicare and Medicaid Services (CMS) issued draft guidance for the Medicare Drug Price Negotiation Program (the Program). This guidance sets forth policies that would be implemented with respect to those drugs to be selected for price negotiations in 2026, with negotiated prices effective in 2028. Included in the draft guidance is a proposal that, if implemented, would be of critical importance to innovator pharmaceutical companies because it would potentially subject certain drugs to price controls immediately upon introduction to the market. The key issue is CMS's interpretation of "qualifying single source drugs" (QSSDs) eligible for price negotiations.

The Inflation Reduction Act (IRA) fundamentally changed how the Medicare program provides reimbursement for prescription drugs through the creation of the Program. The IRA requires CMS to "negotiate" the price of many of the Part B and Part D drugs that account for the highest Medicare spending, provided they are eligible. QSSDs eligible for negotiations are chosen from a list of drugs with the highest total Medicare Part B spending and/or Medicare Part D spending. Drugs are only subject to negotiations if they are not subject to generic competition and have been on the market for a designated period (nine years for small molecules and 13 years for biologics). At the conclusion of the negotiation process, the drug company may either: (i) accept the government's offer or (ii) decline to accept the offer. If the company chooses the second option, it will face the dire choice of paying a punitive excise tax on the drug or withdrawing from participation in the Medicare and Medicaid programs.

CMS explained in the new guidance that it is generally appropriate to treat different combinations of active ingredients as separate, individually qualifying drugs for purposes of determining eligibility for negotiation. For example, a combination of two active ingredients would be considered a different QSSD than a combination of those same active ingredients together with an additional active ingredient. However, CMS stated that there may be circumstances where two related drugs are treated as the same QSSD, particularly when the modified version's additional active ingredient is not "biologically active" against the disease state for which the drug was indicated—and therefore does not result (according to CMS) in a "clinically meaningful difference." The upshot is that CMS may not need to wait nine or 13 years to select and negotiate the price of a modified version of a drug containing an additional active agreement that is not "biologically active."

This proposal could adversely impact combination drugs where a second ingredient is added for bioavailability or other purposes. For example, certain companies have developed new injectable versions of their oncology drugs, which allow patients to avoid hours-long intravenous chemotherapy sessions. To effectively deliver the drug in this new dosage form, an active ingredient that increases the bioavailability of the drug must be added. Under CMS's new guidance, an injectable version of the drug could be considered the same QSSD as the intravenous version, subjecting the new drug to negotiations and price controls. This would likely disincentivize the development of these new formulations.

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If CMS finalizes its guidance and acts upon it, it will inevitably trigger lawsuits by innovator drug companies. Innovators with drugs impacted by CMS guidance will likely argue, for example, that CMS is improperly seeking to regulate through guidance and that CMS's position is not statutorily authorized under the IRA. Notably, because of the Supreme Court's *Loper Bright* opinion, CMS's interpretation of the applicable statutory language will not be afforded deference by the courts.[1]

As of this time, it is unknown what position CMS will ultimately take regarding what constitutes a QSSD or whether its position will succeed in court. The draft guidance will have no impact unless and until finalized, and timing for issuance of final guidance is uncertain. However, where a pharmaceutical company has a modified version of a drug subject to negotiations in its pipeline, the company and/or potential investors will want to carefully assess when that modified drug is likely to become subject to negotiations.

1. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

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Summary of Key State Pre-Transaction Notification Laws

State	Regulator(s)	Notice Period	Authority	Additional Notes
California	Office of Health Care Affordability (OHCA)	90 days prior to closing	Notice. Following its initial review, OHCA may require a cost and market impact review (CMIR), which could extend the review period to 8+ months.	A pending bill, Assembly Bill 1415, seeks to subject MSOs, PE groups, hedge funds, and certain newly created business entities to notice requirements.
Colorado	State Attorney General (AG)	60 days prior to closing	Notice. Following review, AG may challenge.	Passed May 2025, the law takes effect August 6, 2025. Like Washington, Colorado has modeled its law after the Uniform Antitrust Pre-Merger Notification Act, which serves as model legislation for states seeking to leverage federal Hart-Scott-Rodino (HSR) filings, ensuring only limited additional burdens on transacting parties.
Connecticut	AG	30 days prior to closing	Notice. Following review, AG may challenge.	Review may take 200+ days from receipt of notice. Several pending bills would significantly impact healthcare transactions in the state, including Senate Bill 567, which would expand the authority of the AG to regulate PE ownership of hospitals, radiology groups, and drug rehabilitation facilities.
Hawaii	AG; Hawaii Health Planning and Development Agency	90 days prior to closing	Approval.	Applies only to hospitals; specifically excludes public health facilities.
Illinois	AG	30 days prior to closing	Notice. Following review, AG may challenge.	A pending bill, Senate Bill 1998, would require PE firms and hedge funds to obtain consent from the AG if they provide financing for certain covered healthcare transactions.
Indiana	AG	90 days prior to closing	Notice. Following review, AG may challenge.	Requires notice from a PE firm, regardless of where the PE firm is located, seeking to enter into a transaction with a healthcare entity (defined broadly to include, e.g., medical and dental providers, pharmacy benefit managers).

Continued on next page

Summary of Key State Pre-Transaction Notification Laws (continued)

State	Regulator(s)	Notice Period	Authority	Additional Notes
Massachusetts	AG; Health Policy Commission (HPC); Center for Health Information and Analysis (CHIA)	60 days prior to closing	Notice. Following initial review, HCP may initiate a CMIR, which may delay closing for 215 days.	Aims to increase transparency and accountability for PE firms involved in healthcare transactions; empowers HPC and CHIA to collect detailed information about PE investments and their impact on costs, quality, and access. A pending bill, Senate Bill 868, would (i) prohibit PE firms from engaging in transactions likely to cause financial distress to a healthcare provider due to debt placement and (ii) create requirements for how PE firms direct healthcare providers to pay fees and issue dividends.
Minnesota	AG; Commissioner of Health (COH)	30 days prior to closing ($10–80M revenue); 60 days prior to closing (≥ $80M)	Notice. Following review, AG may challenge.	Limited to transactions that result in a physician group practice or health carrier capturing ≥ 50% of any service within a geographic market. Nevada also imposes a 60-day post-closing notice requirement for (i) hospital transactions and (ii) certain transactions involving a physician group practice that represents ≥ 20% of a specialty within a primary service area.
Nevada	AG; Nevada Department of Health and Human Services	30 days prior to closing	Notice. Following review, AG may challenge.	Limited to transactions that result in a physician group practice or health carrier capturing ≥ 50% of any service within a geographic market. Nevada also imposes a 60-day post-closing notice requirement for (i) hospital transactions and (ii) certain transactions involving a physician group practice that represents ≥ 20% of a specialty within a primary service area.
New Mexico	Office of the Superintendent of Insurance (OSI)	Pre-closing (no set timeframe)	Approval.	A pending bill, SB 14, would require PE transactions involving certain healthcare entities to provide notice to OSI 60 days prior to closing; following initial review, OSI may require a CMIR.
New York	New York State Department of Health	30 days prior to closing	Notice.	The term "healthcare entities" is defined to include MSOs.
Oregon	Oregon Health Authority	180 days prior to closing	Approval.	Includes parent organizations or entities closely related to healthcare entities (including PE). Parties can expect a filing to delay closing by 180 days or more.

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Summary of Key State Pre-Transaction Notification Laws (continued)

State	Regulator(s)	Notice Period	Authority	Additional Notes
Rhode Island	AG; Rhode Island Department of Health	180 days prior to closing	Approval.	Applies only to hospitals.
Vermont	AG	90 days prior to closing	Notice.	Applies only to hospitals that are acquiring medical practices. A pending bill, House Bill 71, would require healthcare entities to provide 180 days' notice prior to entering a material change transaction. Following initial review, regulators may require a CMIR, which would extend the review process by 90 days. Regulators may then approve, approve with conditions, or block.
Washington	AG	60 days prior to closing	Notice.	A pending bill, Senate Bill 5561, would require healthcare entities to disclose information on entities, including PE firms, with a controlling interest or ownership stake in healthcare providers, including financial and organizational information.

Crossword Puzzle

Across

1 Startup with a big IPO pop

3 Acquirer of Cox Communications

7 Activist that waged a proxy fight at Phillips 66

8 Secretary of Commerce

9 Members' club that is going private

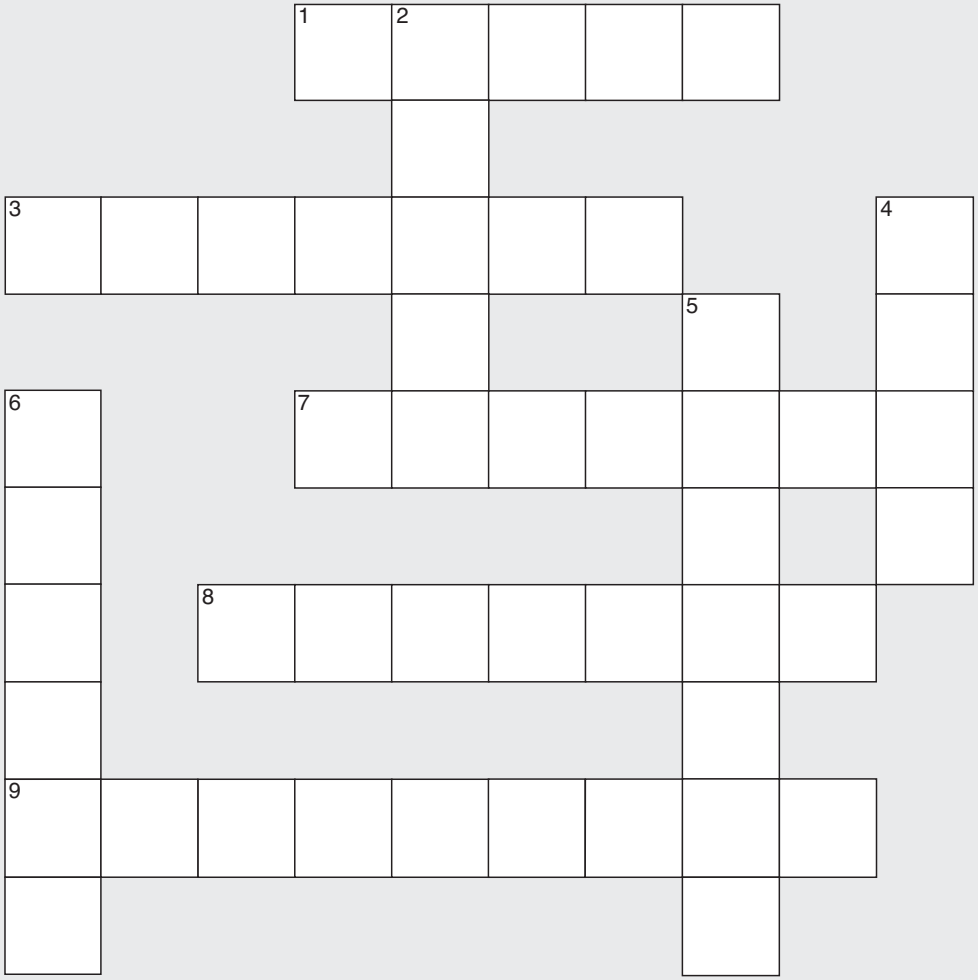
Down

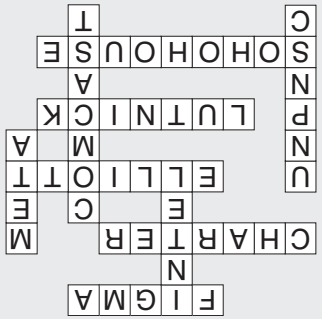
2 Recipient of equity investment from the US government

4 Tech giant that went on a recent AI hiring spree

5 Corporation spinning off MSNBC and CNBC

6 Stocks involved in railroad mega-merger





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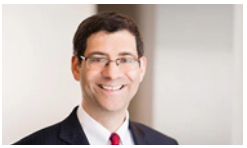

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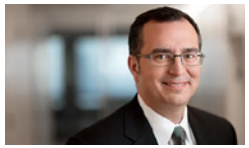

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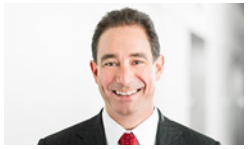

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