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MARKETCHECK

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Editorial Board

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No Matter the Climate, ESG Disputes Are the Forecast

Over the last several years, the global regulatory landscape with respect to environmental, social, and governance (ESG) issues—such as supply-chain and human-rights risks, climate-related matters, anti-corruption and other governance issues, and the reliability and accuracy of ESG metrics and commitments—has become increasingly fragmented and polarized. The backlash against ESG has led certain governments to roll back ESG regulations, state and private actors to challenge ESG policies and practices through litigation and enforcement, and companies to become more cautious about publicly articulating their ESG commitments. At the same time, ESG regulations continue to be proposed and enacted, and ESG issues remain a mainstream business concern for many as companies reassess their targets, supply-chain due diligence processes, and related contractual arrangements.

Amid these conflicting developments, dealmakers should remain clear-eyed that the risks of ESG-related disputes are increasing and proactively manage these risks throughout the transaction. This article describes three dynamics driving these risks and sets out some practical recommendations for risk management and mitigation.

The Current Landscape: Increased Risk of ESG-Related Disputes

First, ESG factors remain an important consideration in mergers and acquisitions, despite the headlines. Companies with strong ESG credentials continue to be attractive acquisition targets, as many consumers continue to favor sustainable supply chains, and many investors recognize that weak ESG practices can expose a company to operational, regulatory, and reputational risk. At the same time, new and existing ESG regulations demand sustainability reporting in California, the EU, and elsewhere. In response, many investors, particularly in Europe, are prioritizing ESG due diligence and seeking credible, data-based ESG performance from their targets.

This focus on ESG factors may give rise to increased M&A disputes. For example, parties may clash over purchase-price adjustments relating to the target's ESG performance during the pre-closing period, alleged gaps in ESG-related disclosures during due diligence, and alleged breaches of ESG-related representations and warranties. Contractual tools to allocate ESG risk, such as indemnities, earn-outs, and escrows, may also create additional opportunities for dispute.

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One of the few publicly available commercial arbitration awards involving ESG-related issues, for example, arose out of an M&A dispute. In *Solvay v. Edison*, Belgian-French chemicals company Solvay commenced an ICC arbitration against Italian power utility Edison for breach of environmental representations and warranties in a share purchase agreement, after Solvay discovered extensive contamination around the chemical plants it had acquired from Edison.[1] Among other things, the arbitral tribunal found that contemporaneous remediation and environmental recovery plans "clearly omitted important information that could and should have indicated serious contamination at the Sites owned by [the target company] and any surrounding areas affecting by it."[2] On this basis, the tribunal concluded that Edison breached its warranty because "by any standard of due care and diligence, at the time of the Closing," the target company was not in substantial compliance with all health, safety, and environmental laws relating to the operations and conduct of the chemical plants.[3]

Second, the prevailing ESG regulatory uncertainty will only exacerbate dispute risks. Unsettled and evolving ESG policies create challenges for dealmakers and their advisors in accurately pricing deals and allocating related risks. Take mandatory climate disclosures. Although we have seen a recent shift from voluntary disclosure and self-reporting towards mandatory and standardized reporting, jurisdictions around the world that are enacting or proposing these regulations are facing significant political and legal headwinds. As a result, even the timing and scope of adoption remain uncertain in some markets.

For example, California recently enacted two climate-disclosure laws—the Climate Corporate Data Accountability Act and the Climate Related Financial Risk Act (SB 261)—and covered entities were initially due to comply with SB 261 by January 1, 2026 (see our Debevoise Update for additional background). However, multiple parties have challenged these laws on First Amendment grounds, the U.S. Court of Appeals for the Ninth Circuit has now enjoined enforcement of SB 261, and the California Air Resources Board has announced that it is proposing to delay issuing implementing regulations under the California climate laws until the first quarter of 2026 due to the volume of public comments received (as we reported here, here and here). Among other things, concerns have been raised regarding the feasibility of disclosing accurate and reliable Scope 3 emissions data, the scope and content of the climate disclosure reports, and the extent to which the laws will align with other climate disclosure regimes. Across the Atlantic, the political and business backlash against ESG regulation combined with the EU's overriding objective to boost its competitiveness vis-à-vis the U.S. by reducing reporting and due diligence burdens is producing similar pressure to slow or narrow these initiatives. The application of the EU's Corporate Sustainability Reporting Directive has already been delayed for certain companies under the EU's "Stop-the-Clock" Directive, and further delays are reportedly being considered under the European Commission's 2025 Simplification Omnibus Package.

This uncertainty complicates investors' valuations and assessments of targets' reporting processes during due diligence, increasing the potential for breach of representation and warranty disputes. In addition, investors are likely to rely increasingly on complex valuations

1. ICC Case No. 18666/FM/MHM/GFG, *Solvay Speciality Polymers Italy v. Edison S.p.A.*, Partial Award, 22 June 2021.
2. *Id.* at 493.
3. *Id.* at 493.

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that attempt to price in ESG-related value, as well as risk-allocating mechanisms such as price adjustments and indemnities, which in turn could translate into more disputes.

Third, the risk of ESG impact litigation may be increasing in response to regulatory uncertainty and political pushback. Private litigants, regulators, and activists continue to pursue ESG-related claims. Plaintiffs' counsel are reframing traditional causes of action such as statutory misrepresentation, breach of fiduciary duty, or failure to warn through an ESG lens and leveraging public ESG statements, sustainability reports, and transaction-related disclosures as evidence. Claims around "greenwashing" and "social washing"—where companies overstate or misstate their environmental, labor, or broader social-responsibility performance and practices—are increasingly common across multiple jurisdictions. Indeed, the Berkeley Research Group found that ESG-related M&A disputes are on the rise "amidst a diverse range of environmental, social and governance challenges, from ESG claims around sale terms and greenwashing to data privacy and employment-related issues like fair pay and equal employment opportunities."[4]

Investors and acquirers may also find themselves defending inherited liabilities from target companies' historical ESG practices, ranging from legacy pollution to worker safety issues. A prominent example is Bayer's 2018 acquisition of Monsanto, after which Bayer inherited large-scale product liability exposure related to claims that Monsanto's glyphosate-based Roundup herbicides increase the risk of cancer. Bayer has faced approximately 192,000 claims to date, and multiple U.S. courts have upheld verdicts finding Monsanto liable for failure to warn.[5]

Looking Ahead: Strategies to Manage ESG-Related Disputes Risk

Amid this shifting political and regulatory climate, companies would benefit from an approach to ESG-related issues characterized by precision, pragmatism, and foresight. Specifically, in relation to mitigating the risk of ESG-related disputes, the following points will be important to keep in mind:

- **Integrate ESG into Due Diligence Early and Deeply.** As our ESG team sets out in detail in this article, ESG due diligence should be robust, targeted, and data-driven. Buyers should scrutinize the target's ESG representations and disclosures, assess legacy and contingent liabilities, and price in any exposure to evolving jurisdictional requirements.
- **Draft Precise and Robust Provisions.** ESG litigation risk can no longer be sufficiently managed through disclaimers or boilerplate language. Price adjustment and disclosure provisions, as well as representations and warranties tied to ESG matters, should be drafted with precision and clarity to reflect the transaction's specific risk profile, sectoral exposure, and regulatory environment. Consider building in mechanisms to verify ESG data, allocate compliance costs, or revisit ESG-linked price adjustments if regulatory conditions between signing and closing materially change.
- **Align ESG Disclosure and Governance Across the Enterprise.** M&A activity often surfaces inconsistencies between public ESG statements, internal practices, and deal disclosures. Ensuring consistency across these dimensions can mitigate greenwashing or statutory misrepresentation claims post-closing.

4. BRG, 2024 M&A Disputes Report, at v.
5. See, e.g., *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021), cert. denied, 142 S. Ct. 2834 (2022); *Pilliod v. Monsanto Co.*, 67 Cal. App. 5th 591, 647 (Cal. Ct. App. 2021).

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- **Plan for Integration and Oversight Post-Closing.** ESG risk management does not end at signing. Buyers should prioritize integration of ESG policies, controls, and reporting frameworks post-closing—particularly where targets operate in sectors or regions subject to divergent ESG expectations.
- **Anticipate Scrutiny.** Regulators, investors, and environmental NGOs will continue to test ESG commitments through both legal and reputational means. Companies that can substantiate their ESG positions with credible data and robust governance will be better positioned to defend against such challenges.

Ultimately, the lesson for dealmakers is clear: in an era of ESG polarization, clarity and credibility are the best defenses. Those who continue to integrate ESG factors thoughtfully into their M&A strategy—anchored in sound diligence and careful drafting—will be best equipped to navigate whatever disputes the current climate may bring.

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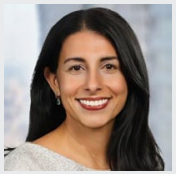

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Larger Banks Face Shareholder Activism

Shareholder activism, while pervasive across a broad range of industries, has been less common in banking, particularly at larger banks. M&A is perennially among the most common activist objectives, but the uncertainty of bank deal making, the relatively low premiums historically paid for targets, and concerns about the activist being deemed to "control" the bank, and thus becoming subject to banking law restrictions, all have impeded activist activity in banking relative to other sectors.

Although still not at the level some anticipated, a changing regulatory environment under the Trump administration is leading to a banking M&A uptick. The number of deals announced in the third quarter of 2025 was the highest since the fourth quarter of 2021,[1] and the recently announced Fifth Third/Comerica deal (which followed an activist intervention) suggests a strong 2026. The pricing on larger deals and changes to the Federal Reserve's "control framework" several years ago may encourage activists to become more involved with larger banks they perceive as likely sellers. This article discusses the reasons for the increasing bank M&A activity, why activists are becoming more focused on larger banking institutions, and ways banks can begin to prepare in case they need to defend against activist campaigns.

Increasing Deal Activity

Throughout much of the Biden administration's tenure, regulators restrained large bank M&A (defined for these purposes to involve one of the approximately three dozen banks in the United States with more than $80 billion of assets). In July 2021, President Biden issued an Executive Order calling on regulators to apply more scrutiny to mergers in general. Thereafter, both the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) issued M&A policies that raised the bar for obtaining necessary approvals for banks seeking to engage in large-scale mergers, and the timelines to obtain the necessary approvals lengthened materially. As significantly, the regulators heightened the examination scrutiny of large banks. The exam teams criticized bank leadership for, among other things, a broad range of nonfinancial issues (*e.g.*, perceived board oversight deficiencies), resulting in exam ratings that effectively barred approximately two-thirds of these large banks from engaging in any meaningful M&A activity. Finally, proposed regulations introduced under the Biden administration, such as the more burdensome capital and liquidity requirements, would have increased the regulatory costs for large banks to expand in any meaningful way.

These impediments are falling away under the Trump administration. President Trump rescinded Biden's Executive Order, and by the end of Q2 2025, the new banking agency leadership had replaced the burdensome M&A policies implemented by their predecessors with those in place before the Biden administration took office, paving the way for their approval of the Capital One/Discover deal in May 2025. More recently, the federal bank regulators are seeking to recalibrate bank exams to limit punitive exam treatment principally to those issues that create financial risk to the organization. These changes are expected to return banks to the regulatory standing necessary to pursue large-scale M&A. Indeed, the FRB's Supervision and Regulation Report issued on December 1, 2025, highlighted that as of June 30, 2025, the percentage of large financial institutions with strong exam ratings was the highest since 2021, and the report further noted that "Federal Reserve supervisors are reforming our supervisory practices and supervisory action framework."

The marketplace already is seeing the ramifications of these actions, with the Fifth Third/

1. S&P Capital IQ, "Data Dispatch-US bank M&A Activity surges to 4-year high in Q3" (Oct. 7, 2025).

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Comerica deal described above, and PNC and Huntington both announcing acquisitions that are among the largest over the past several years. These bank acquirers also felt comfortable disclosing anticipated closing dates for the transactions that are aggressive by banking industry standards. Some bank leadership has expressed concerns that this pro-M&A environment could quickly reverse itself after the Trump administration concludes. As a result, there may be only a further two-year window to complete the deals that many of these larger banks feel are required to generate the economies of scale needed to invest in technology, gather deposits, and more generally compete against the largest Wall Street firms. This desire to be a larger "survivor bank" means, in the words of PNC Chairman and CEO William Demchak, that "everyone's an acquirer, no one's a seller," which has resulted in buyers paying substantial premiums for target banks.

Shareholder activists such as HoldCo Asset Management and Driver Management see opportunities in this environment for substantial premiums and a significant mismatch between the number of large buyers and sellers. For example, HoldCo first announced its activist stake in Comerica at the end of July, with a merger announced in early October. HoldCo has identified other large and regional banks it may pressure to sell in the current environment.

Changes in Regulatory Framework Facilitate Activist Behavior

The changes in 2020 to the Federal Reserve Board's (FRB) bank regulatory control framework, which is relevant to many large-bank acquisitions, also have facilitated activist behavior. One key feature of the control framework is its transparency. The control framework sets forth a matrix of permissible and non-permissible activities from a control perspective tied to varying levels of voting equity ownership in a bank, thereby enabling an activist to act more confidently within the framework's parameters. For example, an activist knows that it has greatest flexibility to wage proxy contests, seat directors, and otherwise try to influence a target's approach if it owns less than 5% of the voting stock of the target (which is almost certainly to be the case with large banks in any event given the size of their market capitalization). Whereas, historically, the uncertainty as to how the FRB may react to a particular approach might have given an activist pause or caused it to moderate its approach, particularly in the face of a public response by the bank target, now the activist can develop and pursue a strategy with greater certainty that it will not become subject to the burdens of bank regulatory supervision and oversight.

The most common approach these activists have used to pursue their objectives under the current FRB control framework is the threat (or actual pursuit) of a proxy contest. Prior to the current control framework, the FRB's standards for "control" were much less clear. Thus, an investor may have had concerns it could be deemed in "control" of a bank for bank regulatory purposes (thus potentially subjecting itself to significant regulatory burdens) if it sought to seat directors on the board of a target bank. The FRB's current control framework, on the other hand, expressly allows an investor with less than a 5% voting stake to nominate—and to solicit proxies for—up to just under half the directors of a target. For example, HoldCo threatened to run a proxy contest to elect five of Comerica's 11 directors if Comerica did not pursue a sale. More recently, HoldCo has threatened a proxy contest at Massachusetts-based Eastern Bank and has stated that Columbia Banking System and First Interstate BancSystem avoided proxy contests after the banks made concessions to the activist's demands. More generally, S&P Capital reports that the primary objective of activist campaigns against banks since 2019 has been to replace directors, with dozens of threats and actual proxy fights in that regard.

This FRB control framework thus has enabled HoldCo and other activists to threaten reprisal through proxy contests, and, at least according to the activists, those threats have been effective in bringing about the desired change. While the importance of whether an activist has a single director

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representative or some larger (but still minority) number may be subject to debate, in our experience, an activist seeking to seat multiple candidates is viewed as a greater threat to a company than one seeking only a single director. Moreover, having multiple activist voices in the boardroom often has a real effect on board dynamics. Even though in most cases the activist is not successful in replacing directors, activists believe the threat of a public contest and its accompanying disclosures may lead a bank to seek to address its concerns.

Furthermore, although we have not yet seen an activist take this approach, the FRB's control matrix would also liberalize the ability of an investor to have management (as well as board) representatives. Below a 5% voting stake, under the control framework, there would be no numerical limits on senior management interlock. For instance, an activist with a less than 5% voting stake could seek to seat several directors and also seek to have representatives in management.

Preparing for an Activist

While there is no silver-bullet structural change banks can implement to eliminate the risk of activist interventions, there are steps they can take in peacetime that can meaningfully improve their chances of success in the event of a contest.

First, banks should review their bylaws to ensure they are up to date, including changes appropriate to address proxy rule 14a-19—the universal proxy rule—and the latest technology in advance notice bylaws, which are intended to give target boards enough time and information to react to stockholder nominations or other proposals for stockholder action.

Second, banks should have a program in place to alert them of unusual trading patterns or changes in their shareholder base. Activists frequently build economic positions using derivatives, which can be difficult to detect through conventional reporting means.

Third, banks should consider what an activist's goals would likely be for their company and what arguments an activist would likely make in support of those goals. Activists typically advance corporate governance arguments in support of their campaigns, even when those campaigns are primarily focused on an economic outcome such as an M&A transaction. Potential activist targets should consider, for example, the composition and tenure of their current board of directors and whether board refreshment is warranted. They may also wish to consider, through an activist lens, whether their compensation programs are appropriately aligned to corporate goals and whether previous or ongoing initiatives—such as M&A or other capital investment programs—have produced the desired outcomes.

Fourth, and perhaps most important, banks should carefully evaluate their shareholder engagement programs to ensure they are communicating clearly, on a regular cadence, with investors about the bank's strategy, as well as hearing meaningful feedback from investors. Being transparent about strategy, and about what is or is not working, can help build trust among investors whose support the bank may be calling upon in a future election contest. In contrast, arguments that stockholders first hear from a company only after an activist intervention may inherently be viewed with suspicion. Transparency about strategy can also help ensure that the bank's shareholder base is "bought in" to the bank's strategy and, therefore, is more likely to support it even if it is challenged by an activist.

Finally, if an activist does come forward, engaging with an open mind is usually the right thing to do, rather than raise the ramparts and prepare for war. Respectful dialogue can keep the temperature down and produce better outcomes for all parties.

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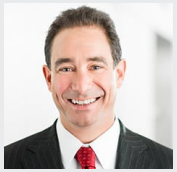

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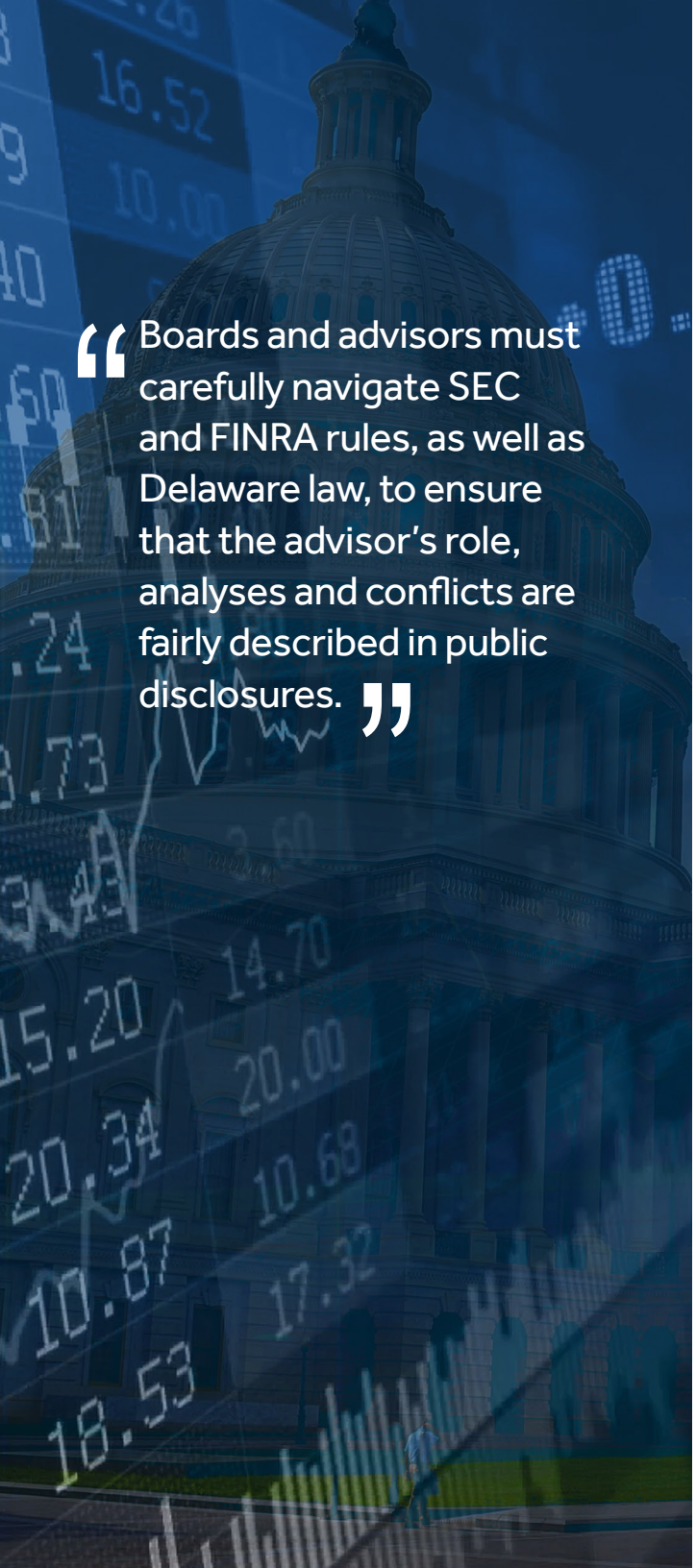

Financial Advisor Proxy Disclosures

Target company boards regularly engage financial advisors and obtain fairness opinions to help satisfy their fiduciary duties and mitigate stockholder litigation risk in connection with public M&A transactions. But just hiring an advisor and getting an opinion is not enough. Boards and advisors must also carefully navigate SEC and FINRA rules, as well as Delaware law, to ensure that the advisor’s role, analyses and conflicts are fairly described in public disclosures. Failure to do so can expose both the board and the advisor to litigation risk—including, in some cases, aiding-and-abetting claims against the advisor, even where the directors themselves are exculpated under Delaware law.[1]

This article provides a refresher on the framework and key considerations for financial advisor disclosures in public M&A transactions.

SEC Rules and Regulations

One-step Mergers (Schedule 14A; Form S-4)

In a one-step merger, the target company files a proxy statement with the SEC on Schedule 14A[2]. In stock-for-stock deals, the buyer—*i.e.*, the issuer of the stock consideration—will also be required to file a registration statement on Form S-4 containing a prospectus. In either case, if the proxy statement or the prospectus refers to a fairness opinion, then Item 1015 of Regulation M-A[3] requires disclosure of, among other things: (i) the identity of the financial advisor giving the fairness opinion; (ii) the financial advisor’s qualifications; (iii) the method used to select the financial advisor; (iv) a description of material relationships between the financial advisor and the target company during the past two years, including any related compensation; (v) whether the merger consideration was determined by the target company or the advisor; and (vi) a summary of the fairness opinion, including the procedures followed in connection with preparing the opinion, the financial advisor’s findings and recommendations, the bases for and methods of arriving at such findings and recommendations, the instructions received from the public company, and any limitations imposed by the board or company on the fairness opinion process.

Tender Offers (Schedule 14D-9)

In a tender offer (or two-step) structure, the target company files a solicitation/recommendation statement on Schedule 14D-9[4]. Although Schedule 14D-9 does not contain an express

1. Section 102(b)(7) of the Delaware General Corporation Law (DGCL).
2. 17 CFR § 240.14a-101.
3. 17 CFR § 229.1015.
4. 7 CFR § 240.14d-101 – Schedule 14D-9.

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line-item requirement regarding disclosure of fairness opinions, target companies do routinely disclose and describe fairness opinions when explaining the board's recommendation. The resulting fairness opinion summaries are often modeled on proxy statement disclosures and track the framework under Item 1015 of Regulation M-A, even though Item 1015 is not technically applicable to Schedule 14D-9.

Going Private Transactions (Schedule 13E-3)

For certain "going private" transactions (*e.g.*, an acquisition of a target company by an affiliated stockholder), Rule 13e-3 imposes heightened disclosure obligations, including the filing of a Schedule 13E-3, to mitigate the inherent disclosure imbalance that could disadvantage the unaffiliated stockholders.[5] Schedule 13E-3 disclosure requirements include an affirmative statement by the buyer regarding the fairness of the transaction and descriptions of (i) any transaction during the past two full fiscal years (and any subsequent interim period) between the buyer and the target company; (ii) any contacts, negotiations or transactions during that period between the buyer and the target company concerning M&A activity, the election of directors or a disposition of material assets of the target company; (iii) plans for certain post-closing actions (*e.g.*, material asset sales, changes in corporate structure, alterations to board composition); (iv) the purposes and reasons for the going private transaction, including a description of any alternative means that the buyer or the target company considered to accomplish those purposes and a description of the effects of the going private transaction; (v) any acquisition financing and a statement of sources and uses of the going private transaction; and (vi) contracts, relationships and arrangements in connection with the going private transaction between the buyer and any other person regarding any securities of the target company. Moreover, the SEC has taken a broad view in connection with Rule 13e-3 of the obligation to disclose every material "report, opinion or appraisal" under Item 1015. In practice, this can mean summarizing or filing even preliminary reports, draft copies of the final board book, and oral presentations made to the board.[6]

FINRA Rules and Regulations

FINRA Rule 5150[7] requires member financial advisor firms to make certain disclosures (either within the applicable fairness opinion, or otherwise to the stockholders) if, when the opinion is delivered to the board, the financial advisor has reason to know that the opinion will be provided or described to the company's public stockholders. Such disclosures include (i) the compensation paid to the financial advisor (and in particular, any compensation that is contingent upon the successful completion of the transaction); (ii) any material relationships existing in the past two years between the financial advisor and any of the transaction parties; (iii) if any information used to form a substantial basis for the fairness opinion was independently verified; (iv) whether a fairness committee (*i.e.*, a committee of individuals that are not on the applicable deal team of the financial advisor) approved the opinion; and (v) whether an opinion is made about the fairness of the compensation to any of the company's officers, directors or employees relative to public stockholders.

Delaware Law

The Materiality Standard (Generally)

Under Delaware law, directors must disclose fully and fairly all "material" information when seeking stockholder action.[8] This duty is especially important in conflicted transactions, where a fully informed uncoerced approval by a majority of

5. 17 CFR § 240.13e-3 – Going private transactions by certain issuers or their affiliates.
6. Ephraim, Charles L., SEC No-Action Letter, Applicability of Item 9 of Schedule 13E-3 to Certain Reports, 1987 SEC No-Act. LEXIS 2687 (Sept. 30, 1987). requested
7. https://www.finra.org/rules-guidance/rulebooks/finra-rules/5150.
8. *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1997).

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votes cast by disinterested stockholders provides statutory safe harbor protection from most legal challenges stemming from the transaction.[9]

Satisfying SEC and FINRA requirements does not, by itself, satisfy the board's fiduciary duties of disclosure. Delaware law requires more than just completing a "checklist of the sorts of things that must be disclosed."[10] To evaluate materiality, Delaware courts apply the following standard: an omitted fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote and that its disclosure would significantly alter the "total mix" of information available.[11] This standard is applied from a reasonable stockholder's perspective, not from the perspective of directors, management, or advisors, and is similar to the standard applicable to SEC Rule 10b-5.[12] Recent cases emphasize how such a reasonable stockholder-centric lens operates in practice. For example, last year in City of Dearborn Police, the court determined that it was reasonably conceivable that a stockholder would consider it material that the financial advisor held $470 million of investments in funds affiliated with the controller, even though that amount represented only about 0.1% of the advisor's total assets under management.[13] The court focused on the perspective of the stockholder over the board's judgment in the determination of materiality.

Delaware courts have also stressed that disclosure must be balanced, and that partial disclosure can be materially misleading if reliable countervailing information is omitted.[14] In *Lynch v. Vickers Energy Corp.*, for example, the court found disclosure inadequate where a conservative "floor" asset valuation was disclosed, but a more optimistic (but still reliable) "ceiling" valuation was not.[15] In *Arnold v. Society for Savings Bancorp, Inc.*, where a proxy statement used "vague language" to generally describe the pre-merger sale process without expressly disclosing information about a contingent bid for the target company's subsidiary,[16] the court found that a reasonable stockholder could infer from this language that there were no "genuine" bids for actual dollar amounts.[17] While the contingent bid itself "may or may not have been material," its disclosure became material in the context of addressing the potentially misleading impression created by the proxy statement.[18] The court reasoned that, once the proxy statement had "traveled down the road of partial disclosure of the history leading up to the merger," there was an "obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[19]

Disclosure of Fairness Opinion and Projections

Once a fairness opinion is referenced in disclosure materials, Delaware courts require a "fair summary" disclosure of the financial advisor's substantive analysis and the key facts underlying that opinion; disclosing only the bottom-line conclusion is not enough.[20] In practice, a fair summary generally includes descriptions of: (i) the basic valuation exercises undertaken, (ii) the key assumptions applied, and (iii) the resulting value ranges.[21]

Delaware courts also expect disclosure of any material management projections relied upon by the financial advisor.[22] If a financial advisor is directed to consider multiple projection cases

9. 8 Del. C. § 144.
10. *In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007).
11. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 46 U.S. at 449, 96 S. Ct. at 2132 (1976)).
12. *See generally Zirn v. VLI Corp.*, 681 A.2d 1050 (Del. 1996).
13. *City of Dearborn Police v. Brookfield Asset Management Inc.*, No. 241, 2023 (Del. Mar. 25, 2024).
14. *Clements v. Rogers*, 790 A.2d 1222, 1240-1243 (Del. Ch. 2001); *see also Zirn*, at 1056.
15. *Lynch v. Vickers Energy Corp.*, Del. Supr., 383 A.2d 278, 281 (1977).
16. *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).
17. *Id.* at 1282.
18. *Id.* at 1277.
19. *Id.* at 1280.
20. I*n re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002).
21. *Id.*
22. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 200 (Del. Ch. 2007); *see also PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006).

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(*e.g.*, base, upside, and downside), it is common to disclose each material set used in its analysis. Projections generally are considered material only if they are "reliable enough to aid … stockholders in making an informed judgment."[23] However, the reverse is not true: even if projections are reliable, they may not be material and thus would not need to be disclosed. Materiality remains a fact-specific inquiry that turns on whether disclosure would have "significantly altered the total mix of information made available."[24] For example, in *Netsmart*, the court found that certain projections did not need to be disclosed because they "would not have a material effect on a rational shareholder's impression of the proposed Merger."[25] Unreliable projections (*e.g.*, stale projections or projections that are superseded by more current forecasts) are also less likely to be material, and thus may not need to be disclosed.[26] Indeed, disclosure of unreliable projections may be misleading and in many cases should be avoided. Related facts, such as whether projections were used by a financial advisor or shared with bidders/buyers, may be relevant, but are not dispositive absent a showing of reliability and materiality in the circumstances.[27] In any event, where projections are omitted from disclosure due to immateriality or unreliability, their role in the process, if any, should be explained to avoid any misleading partial disclosure.

Contingent Fees

Disclosure relating to financial advisor compensation remains a recurring focus of Delaware courts, with two distinct topics being (1) disclosure of the nature and amount of the advisor's compensation (especially contingent compensation) and (2) disclosure of prior compensation received from transaction parties.

Advisors typically structure some or all of their fees to be contingent upon closing. Given the potential misalignment of interests, Delaware courts generally expect disclosure of the existence of any contingent fees and their relative size and nature, to the extent material.[29] Delaware courts have made clear that there is no rigid rule that advisors must disclose the specific amount of every fee from every counterparty, and they have accepted descriptions of fees as "customary" where such fees were not exorbitant (or otherwise improper) and could, in fact, be fairly described as customary.[30] At the same time, context matters. Courts have questioned whether a bare reference to "customary" fees is meaningful if stockholders do not know what would in fact be customary for the work performed.[31] In *In re Atheros Communications, Inc. Shareholders Litigation*, where approximately 98% of the total fee was contingent on closing, the court held that it was inadequate to describe that fee simply as a "substantial portion" of the overall fees.[32] More recently, Inovalon illustrated that describing fees as "customary" may be insufficient.[33] There, the proxy statement disclosed that the financial advisor had received approximately $15.2 million in fees from the buyer and described additional unquantified fees from co-investors as "customary compensation," without disclosing that those fees

23. *PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006).
24. *In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007) (quoting *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 199 (Del.Ch.2007) (quoting *Zirn v. VLI Corp.*, 621 A.2d 773, 778-79 (Del.1993)); accord TSC *Indus., Inc. v. Northway, Inc.*, 436 U.S. 438, 449 (1976)).
25. *In re Netsmart Technologies, Inc, Shareholders Litig.*, 924 A.2d 171, 200 (Del. Ch. 2007).
26. *See Simonetti; Van de Walle v. Unimation, Inc.*, C.A. No. 7046, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("Because neither set of figures was intended to serve as a valuation of the company, they were not sufficiently reliable evidence of value to be the subject of mandated disclosure to stockholders."); *Clements v. Rogers* (holding that the financial advisor to the company doing a valuation that was not presented to the board and was only done for purposes of preparing for future negotiations was not required to be in the proxy).
27. *In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007).
28. *See generally Arnold.*
29. *See generally In re Del Monte Foods Co. S'holders Litig.* (Del. Ch. 2011).
30. *Globis Partners, L.P. v. Plumtree Software, Inc.*, No. CIV.A. 1577-VCP, 2007 WL 4292024, at *13 (Del. Ch. Nov. 30, 2007).
31. *Rodden v. Bilodeau*, No. 2019-0176 (Del. Ch. Jan. 27, 2020).
32. C.A. No. 6124-VCN (Del. Ch. Mar. 4, 2011).
33. City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc., 319 A.3d 271, 297 (Del. 2024).

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Financial Advisor Proxy Disclosures (continued from page 11)

totaled approximately $400 million. The court held that stockholders could reasonably have been misled into believing that the undisclosed fees were of a similar order of magnitude as the disclosed amount, rather than roughly 25 times that amount. Even where exact amounts are not disclosed, stockholders should understand the scale of the fee.[34] The central question remains whether the nature and extent of any material conflicts—by amount, structure, or alignment—are fairly presented to stockholders.

Delaware courts have also questioned, in certain conflicted transactions, the basis on which a financial advisor's contingent consideration would be calculated, and in at least one case, whether it was proper for a special committee's advisor to receive contingent compensation at all.[35] In *Foundation Building Materials*, the financial advisor was entitled to a contingent fee, payable upon closing, that was a function of the total deal price and a change of control payment that was payable to the buyer under a tax receivable agreement.[36] Although the change of control component only represented approximately 5.4% of the total fee, the court said that the conflict of interest created by the change of control payment should have been disclosed along with the advisor's extensive relationship with the private equity fund that was the controller.[37] The court reasoned that "it is one thing to pay contingent compensation to the financial advisor charged with securing the best deal reasonably available," but that "it is another thing to pay contingent compensation to the financial advisor who is supposed to be willing to tell the special committee that the deal should not happen."[38]

Affiliate Fees, Repeat Players and Industry Relationships

Delaware courts have scrutinized both compensation received by affiliates of advisors, as well as the "repeat player" role that transaction parties often occupy in M&A markets. Work performed by an affiliate can create conflicts where the counterparty itself is a repeat player that has used and could continue to use the advisor's services.[39] In that setting, the incentive for the advisor to preserve goodwill with a client could become material.

Delaware decisions have encouraged accurate disclosure of all material facts about these relationships, which can include (i) fees (including in connection with arranging or providing financing) payable to advisor affiliates, (ii) the existence of past advisory fees from a transaction party, (iii) overlapping board service involving individuals at the advisor and a transaction party, and (iv) the existence of personal relationships between the advisor and a transaction party.[40]

In *Vento v. Curry*, an affiliate of a fairness opinion provider was expected to receive financing-related compensation of a magnitude similar to the contingent advisory fee.[41] The court held it was inadequate to disclose only that the affiliate would receive additional compensation as a financing source without quantifying those fees. The court has also noted that stapled financing arrangements can create an "appearance of impropriety" and should be clearly disclosed.[42]

In *David P. Simonetti Rollover IRA v. Margolis*, the court held that the advisor should have

34. *Assad v. Botha*, 2023 WL 7121419 (Del. Ch. 2023).
35. *Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105, 1173 (Del. Ch. 2024).
36. *Id.*
37. *Id.*, at 1171
38. *Id.*, at 1173.
39. *In re Rural Metro*, 88 A.3d 54 (Del. Ch. 2014).
40. *See generally Richard Vento v. Robert J. Curry, et al.*, 2017 WL 1076725 (Del. Ch. Mar. 22, 2017); *Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021); *In re Art Tech. Grp., Inc. S'holders Litig.* C.A. No. 5955-VCL (Del. Ch. 2010).
41. 2017 WL 1076725 (Del. Ch. Mar. 22, 2017).
42. I*n re Toys "R" Us, Inc. Shareholder Litig.*, 877 A. 2d 975, 1006 & n.46 (Del. Ch. 2005). *See also In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011) (In the context of stapled financing, that because of the "central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."); *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch.) (explaining that the financial advisor should have disclosed that it sought to leverage its sell-side advisory role to secure buy-side financing for a potential transaction involving the competitor of the target company it was advising).

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Financial Advisor Proxy Disclosures (continued from page 12)

quantified the range of value of notes and warrants of the target company it held, along with the fact that the closing would trigger cash payments on those securities.[43] In *Inovalon*, affiliates of the special committee's advisor were concurrently representing the primary buyer in an unrelated transaction. The proxy disclosed only that affiliates of the advisor "may" provide services to the buyer.[44] The court held that this was materially misleading because the relationship was already in place and the applicable fees were not disclosed.[45] These cases reinforce the need to describe both the existence and, where material, the magnitude of affiliate relationships and repeat-player dynamics, rather than relying on vague references.

Avoiding Buried Facts

Although this refresher highlights key areas of potential under-disclosure, Delaware courts have also warned against material information becoming "buried" in disclosure. This can result from over-disclosure or framing the information in a way that makes it unlikely that stockholders would appreciate its significance. "A stockholder should not have to go on a scavenger hunt to try to obtain a complete and accurate picture of [the disclosure]."[46]

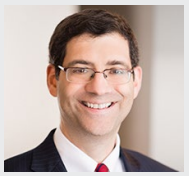
In *Blanchette*, for example, the court found that certain material facts were buried when they appeared only in a note to the consolidated financial statements on the penultimate page of the prospectus.[47] By contrast, in *Weingarden*, the court found that certain stock option disclosures were not buried since the disclosure appeared under an appropriate heading and the proxy's early pages directed stockholders to that section for further details.[48]

The practical takeaway is that material advisor-related conflicts, compensation, and roles should be presented clearly, under obvious headings, and in proximity to the main discussion of the advisor's engagement and analyses.

Conclusion

Financial advisor disclosures for public M&A deals sit at the intersection of SEC, FINRA, and state corporate law disclosure regimes. For boards and advisors, the practical task is not to check a series of boxes, but rather to apply these disclosure regimes (and the standards thereunder) to the specific transaction at hand, identifying where advisor incentives may diverge from stockholders' interests, calibrating fee and conflict disclosure to their real-world significance, and presenting that information clearly to stockholders.

Authors



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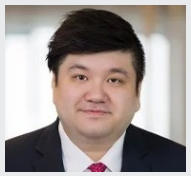

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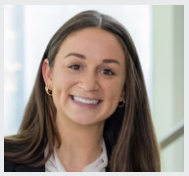

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43. C.A. No. 3694-VCN, WL 5048692 (Del. Ch. 2008).
44. 319 A.3d 271, 294 (Del. 2024).
45. *See Brookfield*, at 1133 (holding that the proxy stating the advisor "may" have committed or will commit in the future to invest in funds managed by the controller or its affiliates when it already had was misleading).
46. *Vento v. Curry*, No. CV 2017–0157–AGB, 2017 WL 1076725, at *4 (Del. Ch. Mar. 22, 2017).
47. *Blanchette v. Providence & Worcester Co.*, 428 F. Supp. 347, 353 (D.Del.1977) ("It was not until the next to the last page of the Prospectus, in a note to the consolidated financial statements of Railroad that the Railroad stockholders were told for the first time that pursuant to the Chancery decision each share of their stock was entitled to one vote. This was information which was important for the stockholders to have in deciding whether to accept the tender offer. Being information which was buried it did not satisfy the clarity of disclosure which the Act requires.").
48. *See, e.g., Weingarden v. Meenan Oil Co.*, 1985 WL 44705, at *3 (Del. Ch. Jan. 2, 1985); *Kohn v. American Metal Climax, Inc.*, 322 F. Supp. 1331 (E.D. PA. 1970).

The Blurbs

Delaware's Court of Chancery Confirms that *Revlon* Is Alive and Well

In early October, the Court of Chancery issued an opinion[1] in the long-running litigation occasioned by Activision's 2022 sale to Microsoft.[2] Applying enhanced scrutiny under *Revlon*, the Court of Chancery declined to dismiss claims that Activision's CEO and other directors breached their fiduciary duties by agreeing to the Microsoft merger and, a year later, in extending the drop-dead date under the merger agreement.

Background. In late 2021, Activision was contending with regulatory scrutiny and reputational fallout stemming from widely publicized workplace-misconduct issues, which Activism's CEO was allegedly aware of. Shortly after the misconduct issues became public, a Microsoft executive called Activision's CEO and raised the idea of Microsoft acquiring Activision. The complaint alleged that Microsoft informed Activision's CEO that it intended to keep him on as CEO post-merger—a commitment that stood in contrast to the growing external pressures on Activision's board to remove him given his alleged knowledge of the company's pervasive workplace misconduct issues. After receiving Microsoft's outreach, Activision's CEO assumed a leading role in shaping the company's response, briefing only a small group of directors and personally conducting substantial portions of the preliminary negotiations. Negotiations progressed on an expedited timetable, with discussions focusing on a valuation range below the company's recent internal projections of $113–$128 per share. Ultimately—and only 12 days after first learning of Microsoft's interest—the board approved an all-cash merger agreement at $95 per share.

Legal Analysis. The court framed its analysis squarely through *Revlon*, emphasizing that once a board enters "end-stage" negotiations for a change-of-control transaction, its mandate is singular: maximize immediate value for stockholders. Applying enhanced scrutiny under *Revlon* as the standard of review, the court found it reasonably conceivable that Activision's CEO, beset by allegations of pervasive sexual harassment at Activism, pursued a rushed sale to Microsoft to keep his job, secure his change-of-control payments, and insulate himself from liability. The stockholder plaintiff alleged that the CEO tilted the playing field toward Microsoft by establishing a low negotiating range that was beneath the range of values implied by Activision's long-term plan, brushing off other potential bidders to enter into exclusivity with Microsoft, and lowering the company's projections (twice) to justify the agreed merger price—all while controlling, delaying, and limiting information to the board. *Corwin*[3] was not available to cleanse the transaction, first because it was reasonably conceivable that the stockholder vote did not comply with statutory requirements (as previously litigated)[4] and second because it was reasonably conceivable that the proxy statement was misleading and incomplete, including by failing to mention the sexual harassment scandal as a reason for the transaction. Plaintiff's *Revlon* claims regarding the letter agreement under which Activision extended the drop-dead date for the deal likewise were not obviated by *Corwin* because the agreement was entered into after the stockholder vote. The court found non-exculpated claims not just against the CEO but also against the other directors based on their knowledge of the CEO's conflicts and their failure to take control of the process, which created a reasonable inference that they acted in bad faith.

1. *Sjunde AP-fonden v. Activision*, C.A. No. 2022-1001-KSJM (Del. Ch. Oct. 2, 2025).
2. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).
3. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).
4. *Sjunde AP-fonden v. Activision*, C.A. No. 2022-1001-KSJM (Del. Ch. Feb. 29, 2024).

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The court dismissed the aiding and abetting claims against Microsoft, citing *Mindbody*[5] and *Columbia Pipeline*,[6] reiterating the high bar plaintiffs must clear to plead knowing participation. Even assuming a flawed process, the complaint did not allege that Microsoft sought to exploit a breach of duty or manipulated negotiations to induce one. The opinion reinforces that aiding and abetting liability requires more than aggressive bargaining or acceptance of deal protections advantageous to a buyer; plaintiffs must plead facts supporting an inference of intentional participation in a fiduciary breach.

Key Takeaways

- **Independent Directors Must Provide Active Oversight.** The court emphasized that enhanced scrutiny under *Revlon* is not satisfied merely by the presence of independent directors on the board or transaction committee. Rather, directors must actively supervise the sale process, critically evaluate management's recommendations, and ensure that negotiations and strategic judgments are not driven by conflicted interests. The complaint plausibly alleged that Activision's directors ceded substantial control over the process to management—particularly with respect to negotiations with Microsoft and the framing of valuation expectations—raising a reasonable inference that the board failed to exercise the level of informed and engaged oversight required under *Revlon* and warranting further factual development.
- **Deal Protections Should Be Reasonable.** The court found the challenged standstills and deal protections sufficiently restrictive at the pleadings stage to question whether the board meaningfully preserved the possibility of a competitive auction. The court stressed that *Revlon* tolerates protections designed to capture deal certainty but not those that functionally ensure a single outcome before the board has explored alternatives.
- **Use of Projections.** The court focused on the board's understanding of Activision's long-term projections. Although *Revlon* does not require clairvoyance about strategic upside, it does require boards to ground their decisions in a solid informational foundation. Allegations that management selectively emphasized downside risks while under-disclosing bullish internal forecasts raised questions suitable for discovery.

The decision reinforces that *Revlon* remains a powerful organizing principle in Delaware deal jurisprudence. Boards navigating competitive landscapes must actively supervise management, retain flexibility to entertain higher bids, and ensure their advisors have—and share—a complete view of the company's prospects. The decision highlights the court's willingness to probe sale processes that appear superficially robust but may mask structural or informational deficits. For practitioners, the message is clear: disciplined process design and meticulous board engagement remain the best defenses against post-closing litigation risk.

5. *In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. Dec. 2, 2024).
6. *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2025 Del. LEXIS 226 (Del. June 17, 2025).

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Industrial Policy Meets Public Markets: The Federal Government's Stake in Intel

Secretary of Commerce Howard Lutnick announced in August an $8.9 billion investment in Intel Corporation common stock at an approximate 17.5% discount to market, representing a post-money equity stake in the company of nearly 10% based on the total number of Closing Shares and Escrowed Shares (each defined below). The direct investment was funded by amounts made available through a combination of government programs and underscores a broader effort by Washington to domesticate the semiconductor and microchip manufacturing industries. Intel's stock price has surged since the August announcement, surpassing the Department of Commerce's $20.47 per share purchase price and reaching a 52-week high of $44.57 on January 7, 2026.

Both Secretary Lutnick and Intel CEO Lip-Bu Tan have described the investment as a strategic move by the Trump administration to bolster the nation's geopolitical, technological, economic and national security interests at home. But while proponents praise the transaction as an effective delivery of critical federal funding to research and development in a key growth sector, critics contend that the unusual investment is premised on disproportionate financial risk for taxpayers. If Intel underperforms, the government's concentrated investment in a single company socializes losses that would otherwise be diversified across the market. Critics also argue that the investment distorts the private market by entangling federal interests in a public company and eroding the distinction between policymaking and market participation.

The Warrant and Common Stock Agreement (the Purchase Agreement) governing the transaction provides that in exchange for the nearly $8.9 billion in government disbursements, Intel has issued to the Department of Commerce (DOC) 433,323,000 shares of new common stock, along with a five-year warrant exercisable at $20 per share for an additional 5% of Intel common shares if Intel ceases to own at least 51% of the foundry business.

The Purchase Agreement provides that of the 433,323,000 common shares issued to the DOC, 274,583,000 were issued on the closing date (the Closing Shares), while 158,740,000 were issued into escrow for the benefit of the DOC, to be released concurrently with disbursements under the Secure Enclave program based on a $20.00 per share price (the Escrowed Shares). Funding for the Closing Shares was drawn from the acceleration of $5.7 billion in grants previously awarded, but which had not yet been paid, to Intel under the U.S. CHIPS and Science Act. The government released Intel from the associated timing and performance conditions. The funding for the Escrowed Shares will be drawn from the $3.2 billion awarded to Intel as part of the Pentagon's Secure Enclave Program.

Disbursements in respect of the Secure Enclave Program are subject to certain conditions and Intel's obligations applicable to the program, but details regarding such conditions and obligations remain largely classified. As soon as practicable following receipt by Intel of a Secure Enclave disbursement, Intel will release from escrow a number of Escrowed Shares equal to the quotient of the amount of such disbursement divided by $20.00.

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At the close of business on the last date on which the Secure Enclave disbursements may be received by Intel, the escrow will automatically terminate, and half of the remaining Escrowed Shares shall be delivered to the DOC, while the other half shall be automatically forfeited and cancelled.

The Purchase Agreement includes built-in public policy-based protections such as a requirement that the DOC vote its shares of common stock only at the direction of Intel's Board of Directors with limited exceptions, principally for votes that would impact Intel's relationship with the federal government. The novel corporate transaction is governed not by Delaware law but by federal law under the exclusive jurisdiction and venue of the United States District Court for the District of Columbia and the United States Court of Federal Claims for civil actions. And while it may seem atypical today, the DOC under the Trump administration is already seeking to enter similar arrangements with other major participants in key industries. Practitioners should anticipate that large federal-funding-linked transactions will increasingly require fluency in public policy objectives, regulatory considerations and bespoke deal structures for government counterparties.

1. E.g., the DOC's latest agreement with XLight: https://www.wsj.com/tech/trump-administration-to-take-equity-stake-in-former-intel-ceos-chip-startup-9dcd9367?gaa_at=eafs&gaa_n=AWEtsqdkQyycxT-t1nlor5t1IQvMZgbWHU5d9JZE3sexDcOV7qNR5ixHCnMi&gaa_ts=6933248f&gaa_

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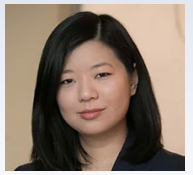

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Rising Buyer Challenges to Banker Indemnities

Recently, a growing number of buyers, particularly private equity sponsors, have been taking issue with the indemnification provisions in the sell-side banker's engagement letter. The core objection is straightforward: buyers dislike inheriting an obligation to insure the banker who just negotiated against them. Often, the buyer tells the sellers that they must convince the banker to drop the indemnity entirely, or in the case of a private target, to take over the indemnification obligations themselves. This can create unwanted tension between the banker and its clients, particularly where the sellers are founders who may not have the necessary liquid assets to backstop the indemnity, or where the founders' ongoing relationship with the buyer makes them reluctant to push back.

What should the banker do? The argument that this is the way it has been for decades does not always fly, but pointing out that the banker's delicate risk-reward balance would be upset if the tail risk is heightened without a concomitant increase in reward may have some persuasive power, particularly with the banker's client. Investment banking operates on a model of capped fees against theoretically uncapped liability; without indemnification, a single lawsuit could wipe out the economics of a dozen transactions. In a private sale, the tail risk is probably not too significant, and the buyer should focus on bigger concerns. The buyer's counterpoint—that the most likely plaintiffs are the sellers themselves, and why should the buyer protect the banker against its own clients?—is theoretical at best—there is scant precedent for sellers suing their banker in a private deal.

In a public sale, the risk of public stockholders suing the bankers for aiding and abetting a breach of fiduciary duty or some other form of secondary liability or instituting litigation requiring the bankers to be called as witnesses is much greater than in private sales. Buyers can complain that in public deals, they would be taking on much greater risk when they directly or indirectly inherit the banker's indemnity. But it is precisely in these situations that bankers most need their indemnities—and unlike in the private context, there is generally no one else who can take over the indemnification responsibility; asking dispersed public shareholders to indemnify the banker is a practical impossibility.

We have not yet seen clients preemptively seek to address the question with their bankers, but if the trend continues, we might expect to. Banks would be wise to adopt a strong, defensible and consistent policy on the subject sooner rather than later. Once a bank has agreed in one case to drop its indemnity or make other compromises (*e.g.*, capping the amount, shortening the tail, or expanding excluded conduct), it is that much harder to resist similar asks; buyers compare notes, and precedent travels quickly. A set policy, consistently applied, is often the best defense against nontraditional requests from clients or buyers.

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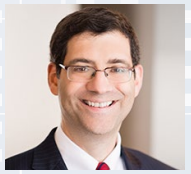

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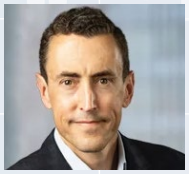

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Industry Updates

Treasury Releases Final Regulations Limiting Scope of 1% Stock Buyback Excise Tax

In November 2025, the Treasury Department released Final Regulations providing guidance on the rules governing the nondeductible 1% excise tax on corporate stock buybacks by publicly traded companies (the Buyback Tax). The Buyback Tax applies to repurchases of public company stock made after December 31, 2022.

In a taxpayer-favorable turn, the Final Regulations pare back many provisions of the 2024 Proposed Regulations that attracted comments. Most notably, the Final Regulations remove the "funding rule," which applied to non-U.S. public corporations, and cease applying the Buyback Tax to take-private transactions and most tax-free reorganizations. The Final Regulations position the Buyback Tax more directly towards regular-way stock repurchases by publicly traded companies and exempt a number of non-ordinary-course transactions and issuances.

Public Foreign Corporations—End of the Funding Rule

- The Final Regulations limit the international reach of the Buyback Tax by removing a controversial "funding rule," which appeared nowhere in the statute and applied the Buyback Tax to the repurchase of public foreign stock by a foreign issuer if the proceeds of the repurchase were sourced from its U.S. affiliates.
- **Comment:** The removal of the "funding rule" is a welcome relief, as it might have applied to buybacks that were determined to be funded with distributions from U.S. subsidiaries and ordinary-course cash-management and treasury functions. However, the Buyback Tax still applies to purchases of public foreign corporation stock by the corporation's U.S. affiliates.

Preferred Stock Purchases and PIPES

- While the Final Regulations continue to apply the Buyback Tax to repurchases of preferred stock, they exempt the redemption of nonvoting, debt-like preferred stock from the application of the Buyback Tax.
- The Final Regulations also exempt the redemption of stock issued prior to the passage of the Buyback Tax on August 16, 2022, if such stock is subject to a mandatory redemption by the issuer or a unilateral put by the holder.

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- **Comment:** Public issuers of PIPEs or SPACs with redeemable shares that were issued prior to August 16, 2022, will now be able to redeem such shares without paying the Buyback Tax.

Take-Private Acquisitions; Tax-Deferred Transactions

- The Final Regulations exempt take-private and leveraged buyouts from the Buyback Tax if the transaction results in the public company ceasing to be publicly traded.
- **Comment:** The application of the Buyback Tax to leveraged buyouts may have increased the tax cost of borrowings by target corporations in take-private transactions if acquisition debt was incurred by the target corporation. This exemption will help acquirors optimize a formerly public target's state-tax profile and avoid special structuring.
- For tax-free acquisitive reorganizations, the Final Regulations allow taxpayers to receive cash boot without triggering the Buyback Tax. Upstream reorganizations or liquidations of subsidiaries with minority public stock are similarly no longer subject to the Buyback Tax.
- **Comment:** Cash boot received in split-off transactions is still subject to the Buyback Tax. Cash boot received in a spin-off transaction may avoid the Buyback Tax if the boot is treated as a dividend.

Presumption Against Dividend Treatment

- The Buyback Tax does not cover buybacks that are treated as dividends for U.S. tax purposes. While the Final Regulations retain a presumption against treating repurchases as dividends, they relax the rules regarding rebuttal of the presumption.
- Under the Final Regulations, a public corporation may use its own information to rebut the presumption that buybacks are not taxed as dividends. This is an improvement from the Proposed Regulations, which required a certification from the shareholder that the shareholder would treat the repurchase as a dividend for U.S. tax purposes.

Tax Refunds

- A corporation that has previously paid the Buyback Tax but would not be required to do so under the Final Regulations may receive a refund by filing an amended quarterly return after the effective date of the Final Regulations.

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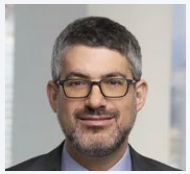
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FDA Year-End Review: Life Sciences Companies and Investors Navigate an Uncertain FDA Regulatory Environment

The past year has been tumultuous for the U.S. Food and Drug Administration (FDA), creating significant regulatory uncertainty for the life sciences industry. Staffing reductions, leadership transitions, and shifting policy priorities have affected the agency's operational efficiency and made it more difficult for the industry to anticipate future regulatory actions. Moreover, because many of these policy changes have been implemented without new legislation or formal rulemaking, life sciences companies and investors face limited assurance that they will endure beyond the current administration.

Health & Human Services (HHS) Secretary Robert F. Kennedy Jr. is playing an unprecedented role in day-to-day policymaking at FDA. Many of FDA's most notable 2025 policy initiatives—reducing the use of certain food additives, questioning vaccine safety, and cracking down on direct-to-consumer drug advertising—clearly emanate from RFK Jr.'s own list of priorities.

The revolving door among FDA's top leaders has contributed to the unstable environment. Approximately half of FDA's senior leadership has departed this year. Three different directors have led FDA's Center for Drug Evaluation and Research (CDER) over the last few months, subjecting FDA's largest center to regulatory uncertainty. Combined with significant staffing cuts implemented by the Department of Government Efficiency (DOGE) early in the year (roughly 20% of the agency's workforce or approximately 3,500 full-time employees were cut), FDA has lost a significant amount of institutional memory and capacity.

These developments have impacted the drug approval process. One analysis found a significant drop in drug approvals in the third quarter of 2025 (before the government shutdown, which has presumably driven the numbers down further). Sponsors have also seen increased delays in FDA meeting its own deadlines, adding considerable uncertainty to the approval process.

On the other hand, FDA leaders have signaled a more permissive approach to approvals for some medications and a desire to accelerate the drug approval process. In early December, Commissioner Marty Makary said FDA plans to require just one pivotal trial—instead of the standard two—before approval consideration for many types of drugs. His stated goal is to accelerate review times and eliminate bureaucracy. Some have criticized the move as lowering FDA's standards for evidence on safety and efficacy. This policy change could impact stakeholders beyond the sponsor filing the application—for example, it may reduce the work required by contract research organizations (CROs) and other entities involved in the clinical research ecosystem.

FDA has taken other steps this year to accelerate the approval process. One major initiative is the Commissioner's National Priority Voucher (CNPV) program, a pilot fast-track review pathway that has already yielded its first approval in just two months—a dramatic reduction from the typical 10-to-12-month review timeline for standard applications. Approval was issued December 9th for an oral antibacterial used to treat pneumonia and bacterial sinus infections, underscoring FDA's commitment to accelerated decision-making for products that address critical public health needs. Commissioner Makary has also signaled a greater

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willingness to switch prescription drugs to over-the-counter (OTC) status, with the stated goal of increasing consumer access to a wider range of medications.

As 2026 begins, life sciences companies and investors will be watching closely to see whether FDA can rebuild internal capacity and deliver clearer, more consistent regulatory signals to industry. The coming year will test whether recent initiatives to accelerate approvals reflect a durable shift that meaningfully supports innovation or whether those gains will be offset by continued unpredictability within the agency. Opportunities are most likely to emerge in areas that align with administration priorities, including prescription-to-OTC switches, therapies addressing critical public health needs or rare diseases, expanded use of big data and real-world evidence, and efforts to strengthen domestic pharmaceutical manufacturing.

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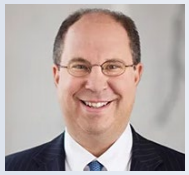

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Below are links to articles and publications of interest.

Key Considerations for the 2026 Proxy Season

Section 16(a) Reporting Obligations to Be Extended to Directors and Officers of Foreign Private Issuers

2026 Executive Compensation Reminders for Public Companies

Debevoise Digest: Securities Law Synopsis: December 2025

Key Considerations for the 2025 Annual Reporting Season

The Road to Exit and Liquidity: Understanding Registration Rights

2026 SEC Division of Examination Priorities

Merger Remedies and Prior Approval Requirements: Policy Reversals Bring Opportunity

Governance Round-Up Issue 17

From Persuasion to Enrollment – The ExxonMobil Retail Voting Program

Key Governance Considerations in PIPE Transactions

Considerations for Senior Executive Transactions

"Pharm-to-Table": The Impact of Direct-to-Consumer Pharmaceutical Sales on Patient Access, Market Dynamics and Investor Strategy

Schedule 13D Amendments in Take-Private Transactions: Three Considerations

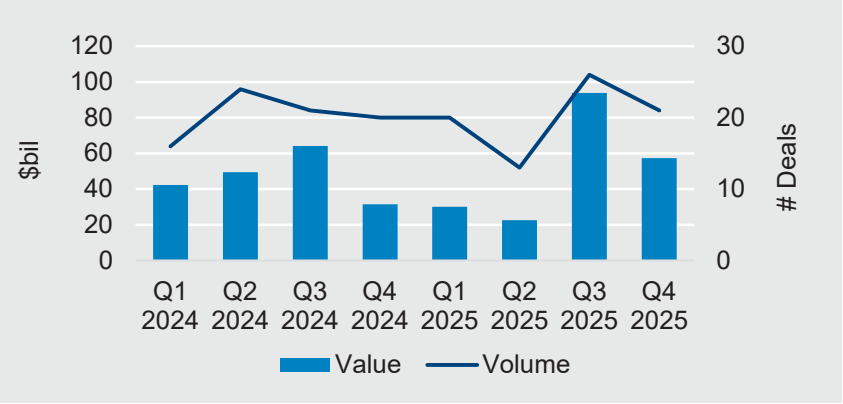
CFIUS 2024 Annual Report in Context: Calm Before the "America First" Storm?

Springing Into a New SEC: What Investment Advisers Should Know About the New Reg Flex Agenda

The Charts

Going Private Transactions: Deal Volume & Equity Value ($b)

The first two quarters of 2025 saw slightly fewer going private transactions and lower total deal value than the same period in 2024, but by year-end the total volume was nearly identical to 2024 and the total deal value was slightly higher ($204B in 2025 compared to $187 billion in 2024), indicating a strong public-to-private deal market.

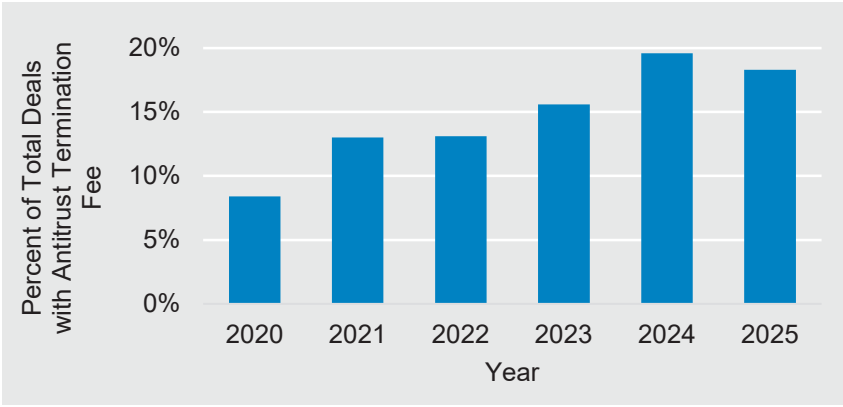


Going Private Transactions: Buyer Type – Volume

Similar to 2024, the vast majority of going private transactions announced in 2025 were backed by private equity sponsors (approximately 74% in 2025 compared to 78% in 2024).

Percentage of Deals with Antitrust Termination Fee (Public Target Only)

Similar to 2024, antitrust termination fees continue to remain a popular option for target companies seeking to mitigate the risk of regulatory scrutiny, with nearly 20% of public target deals in 2025 containing an antitrust termination fee.



Source: *Deal Point Data*

Crossword Puzzle

Across

1 Former CEO of Saks

3 Excessive praise of AI

5 Leaving Delaware?

6 Largest IPO of 2025

9 Hizzoner's school

11 Delaware SupremeCourt justice who will be stepping down in2026

14 Kushner's vehicle

Down

1 Netflix/Warner Bros or Union Pacific Norfolk Southern, *e.g.*

2 Government investee of 2025

4 Company fined more than 500 million euros under the GDPR

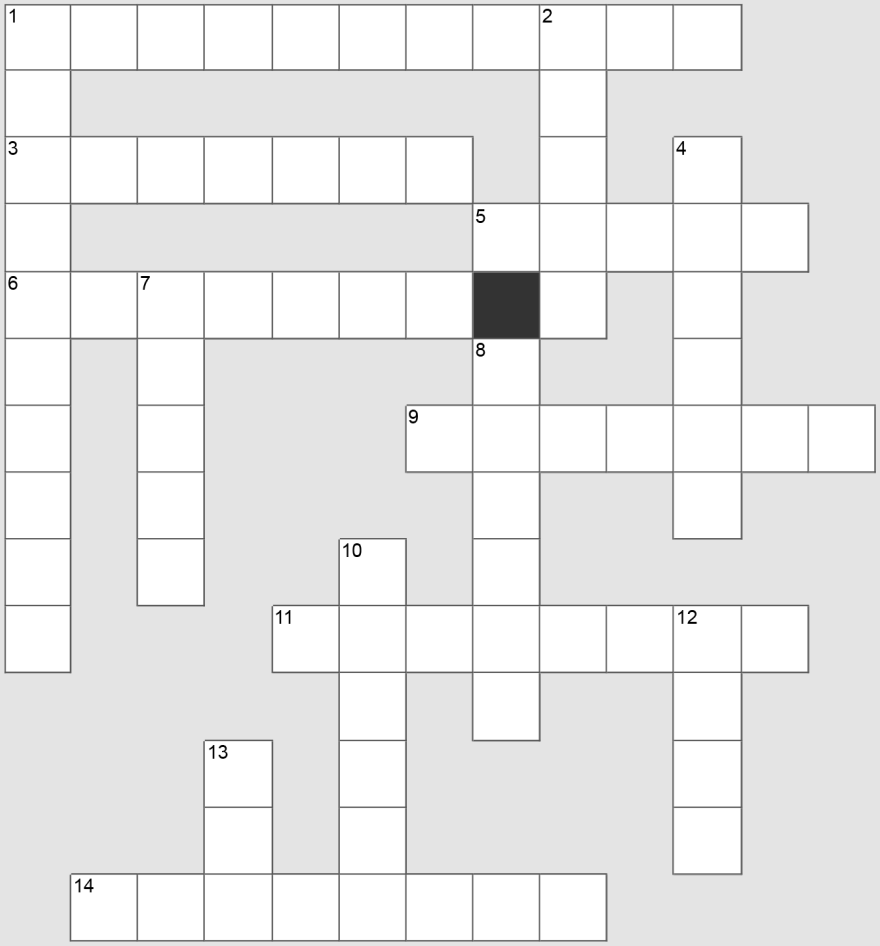
7 Nicolas' successor

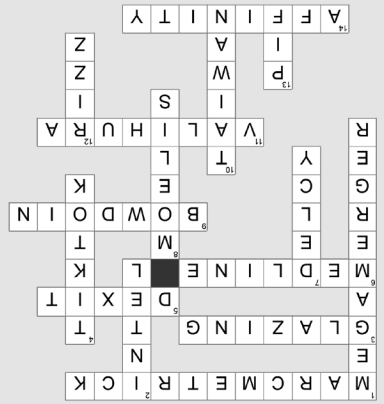
8 Financial advisor whose case triggered legislative changes in Delaware

10 Country that produces more than half of the world's semiconductors

12 Gen Zer's charm

13 Leader in Electronic Arts buyout





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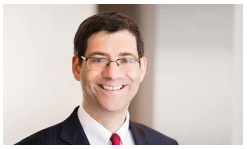

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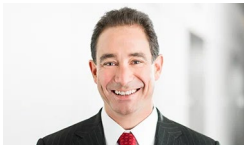

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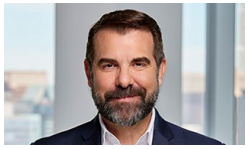

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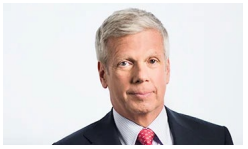

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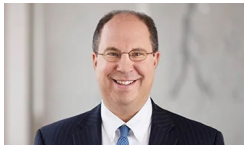

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