Debevoise & Plimpton

Governance Round-Up | March 2026

GOVERNANCE ROUND-UP

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Third Circuit Confirms Limits of the Best Price Rule

On February 3, 2026, the U.S. Court of Appeals for the Third Circuit issued a decision in *Abramowski v. Nuvei Corp*, holding that the "Best Price Rule"—a tender offer rule intended to prevent differential treatment among similarly situated security holders—does not require an offeror to purchase tendered shares it cannot lawfully acquire under the terms of the tender offer or applicable private agreements. Rules 14d-10 and 13e-4(f)(8) under the Exchange Act are referred to as the "Best Price Rule," which requires that the consideration paid to any security holder for securities purchased pursuant to the tender offer be at least equal to the highest consideration paid to any other security holder for securities purchased in the tender offer.

In Nuvei Corporation's $9.75-per-share acquisition of Paya Holdings, Inc. structured as a two-step merger under DGCL Section 251(h), the tender offer required that shares tendered be freely transferable and outstanding at the time of acceptance. The plaintiffs subsequently attempted to tender earnout shares subject to transfer restrictions and forfeiture provisions, and Nuvei rejected the tender.

The Third Circuit affirmed the District Court's dismissal, holding that the Best Price Rule applies only to shares that are actually "taken up and paid for" in a tender offer. The Rule does not require an offeror to purchase shares that it cannot lawfully acquire, including shares that are non-transferable or forfeited pursuant to pre-existing contractual arrangements.

Judge Porter noted that the Best Price Rule is "silent as to when, if ever, an offeror must purchase tendered shares" and permits offerors to impose reasonable conditions on acceptance, such as requiring that tendered shares be freely transferable and outstanding at the consummation of a change of control. Because federal securities law does not address whether or when particular tendered shares must be purchased, the court held that the issue is governed by the parties' private agreements under state law—the sponsor support agreement provided for forfeiture of the earnout shares prior to the change of control, and federal law did not override that contractual arrangement.

The decision of the Third Circuit is available here. For more information, see our Debevoise Debrief – Third Circuit Confirms Limits of the Best Price Rule.

Delaware Supreme Court Reverses Court of Chancery's Ruling in *Moelis*

On January 20, 2026, the Delaware Supreme Court reversed the Delaware Court of Chancery's judgment in *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.* (Feb. 22, 2024) ("*Moelis*"), finding that the plaintiff's challenge to the stockholder agreement between Moelis & Company and Ken Moelis was time-barred under the equitable doctrine of laches because the plaintiff filed its complaint nearly 10 years after the signing of the stockholder agreement. Because the Supreme Court ruled on the basis of timeliness, it did not address whether the stockholder agreement provisions were facially valid. The Supreme Court also avoided substantively addressing the amendment to Section 122 of the DGCL that was enacted in response to the Court of Chancery's decision because the amendment carved out then-pending litigation.

In *Moelis*, the Court of Chancery held that certain provisions of the stockholder agreement granting the stockholder approval rights over key corporate actions were void as an unauthorized delegation of the board's managerial powers under DGCL Section 141(a).

In reversing, the Supreme Court held that the challenged stockholder agreement provisions were merely "voidable," rather than void because the company could have implemented substantially the same arrangements through its certificate of incorporation or other authorized mechanisms. In other words, the provisions were not beyond the corporation's power altogether. As a result, the plaintiff's claim that the provisions were invalid was subject to equitable defenses, including laches.

The plaintiff had knowledge of the challenged provisions in 2014, delayed unreasonably in asserting its claims, and Moelis would be prejudiced by having to defend a long-standing governance arrangement years after it was adopted and relied upon. The Supreme Court therefore reversed the Court of Chancery's judgment and vacated its orders.

On July 17, 2024, the governor of Delaware signed into law an amendment to Section 122 of the DGCL expressly allowing corporations to enter into the types of stockholder contracts that the Court of Chancery struck down, if the provisions are not contrary to the certificate of incorporation or would not violate Delaware law if included in the charter. The amendment, effective August 1, 2024, applies retroactively to all contracts, whether entered into prior to the effective date, with the important exception of agreements—such as that at issue in *Moelis*—subject to pending litigation.

For more information, see our Debevoise Debrief – Delaware Supreme Court Reverses Court of Chancery's Ruling in *Moelis*.

SEC Drops Remaining Cybersecurity Charges Against SolarWinds and Its CISO

On November 20, 2025, the SEC filed a joint stipulation with SolarWinds Corp. and its chief information security officer, Timothy G. Brown, to dismiss, with prejudice, the SEC's civil enforcement action pending in the Southern District of New York.

The SEC charged SolarWinds and its CISO with violations of the anti-fraud provisions of the federal securities laws in connection with alleged disclosure and internal controls violations related both to a cyberattack and to alleged undisclosed weaknesses in SolarWinds' cybersecurity program dating back to 2018. This was the first time the SEC brought civil fraud claims in federal court against a public company that suffered a cyberattack and the first time the SEC charged a CISO in connection with alleged violations of the federal securities laws occurring within the scope of the CISO's cybersecurity functions.

In July 2024, Judge Engelmayer of the SDNY dismissed nearly all of the SEC's claims, finding that they did not plausibly plead actionable deficiencies in SolarWinds' reporting of the cyberattack and relied on hindsight and speculation, and that the cybersecurity controls at issue in the suit, such as password and virtual private network protocols, are "outside the scope" of the internal accounting controls requirements of Section 13(b)(2)(B) of the Exchange Act. The court permitted a limited number of claims to proceed based on alleged misstatements about SolarWinds' cybersecurity practices and risks made before the cyberattack.

Though the statement notes that the decision "does not necessarily reflect the Commission's position on any other case," the SEC's choice to dismiss the case "in the exercise of its discretion" rather than proceed to trial or finalize a settlement may indicate a shift in enforcement priorities, consistent with Chairman Atkin's stated focus on financial materiality in mandated disclosures.

For more information, see our Debevoise Debrief – Internal Accounting Controls Claim Rejected in SolarWinds Case.

SEC Policy Statement Concerning Mandatory Arbitration Provisions

On September 17, 2025, the SEC issued a policy statement concerning the presence of mandatory arbitration provisions in issuer governance documents in connection with requests to accelerate the effectiveness of registration statements. As set out in the statement, the SEC's position is now that provisions requiring arbitration of investor claims arising under federal securities laws will not alter the SEC's decision whether to declare a registration statement effective, representing a reversal of its prior policy position.

Instead, the statement emphasizes that the SEC's primary role is evaluating the adequacy of disclosure, including with respect to such provisions, and that the permissibility of mandatory arbitration provisions will depend upon various factors, including restrictions under applicable state law, questions of enforceability generally, and adverse stockholder and proxy advisor reactions.

For more information, please see our Debevoise Debrief – SEC Policy Statement Concerning Mandatory Arbitration Provisions.

Delaware Chancery Declines to Bar Claims Based on Prior Settlement Release

On December 10, 2025, in *Marchand v. Barnhill*, the Delaware Court of Chancery denied a motion for judgment on the pleadings, allowing the action against Blue Bell Creameries' directors to proceed. The decision addresses the scope and enforceability of derivative settlement releases and highlights the potential limits of using prior settlements to bar parallel claims.

The case arose from the 2015 listeria outbreak at Blue Bell's manufacturing facilities, which led to a nationwide recall and several deaths. A shareholder derivative action alleged that the company's directors breached their fiduciary duties by failing to implement and oversee a board-level system for monitoring food safety risks. The Court of Chancery initially dismissed the complaint in 2018. In 2019, however, the Delaware Supreme Court reversed in a landmark decision, holding that the plaintiff had adequately pleaded a *Caremark* claim by alleging the board failed to establish any reasonable monitoring system for a "mission critical" risk.

In the latest phase of the litigation, defendants argued that the claims were barred by a release contained in a 2020 settlement of a separate shareholder derivative action. According to defendants, that settlement extinguished the remaining claims in *Marchand*.

Vice Chancellor Cook declined to resolve that issue at the pleadings stage, concluding that it is reasonably conceivable that the settlement did not validly release the *Marchand* claims. The court emphasized that Blue Bell's special litigation committee for the action did not participate in the settlement negotiations or approve the settlement, and that the purported release was not raised or evaluated at the settlement hearing.

The court also found it reasonably conceivable that equitable doctrines, including acquiescence, could preclude the defendants from relying on the alleged release, given that they continued litigating the case for more than five years before asserting the defense. Because unresolved factual and legal questions remain regarding the scope and effect of the prior settlement, Vice Chancellor Cook held that judgment on the pleadings was inappropriate and allowed the action to proceed.

The court's opinion is available here.

JPMorgan and Wells Fargo to End Use of Proxy Advisors for U.S. Voting

On January 7, 2026, JPMorgan announced that its asset management business will discontinue the use of third-party proxy advisory firms for U.S. proxy voting and instead rely on an internal, AI-enabled platform, "Proxy IQ," to support its voting process. JPMorgan described the move as the first by a major asset manager to fully eliminate the use of external proxy advisory firms for U.S. voting.

According to JPMorgan, Proxy IQ is designed to manage the end-to-end voting process, aggregate and analyze proprietary data from more than 3,000 annual meetings, and generate voting recommendations for portfolio managers. In doing so, the platform replaces functions traditionally provided by proxy advisory firms such as Institutional Shareholder Services (ISS) and Glass Lewis.

The announcement comes amid increased scrutiny of proxy advisory firms and their influence on shareholder voting. On December 11, 2025, President Trump signed an Executive Order directing the SEC, Federal Trade Commission, and Department of Labor to take actions "to end the outsized influence of proxy advisors that prioritize radical political agendas over investor returns." The Executive Order instructed these agencies to review and, as appropriate, revise or rescind guidance, bulletins, and other interpretive materials that are viewed as inconsistent with the order's stated objectives.

Although the Executive Order does not directly affect the current proxy season, it is expected to heighten regulatory scrutiny of proxy advisory firms and could lead to near-term agency action affecting proxy advisory and voting practices.

In a similar development, on January 29, 2026, Wells Fargo announced that its Wealth & Investment Management division has launched a proprietary proxy voting system and will no longer use external proxy advisory services. The firm stated that it will direct proxy voting for index funds and other managed products where it votes on behalf of clients using custom policies focused on clients' long-term economic interests. Wells Fargo Wealth & Investment Management oversees approximately $2.5 trillion in client assets.

These developments suggest a potential shift among large asset managers toward greater internalization of proxy voting functions, including the use of AI-enabled tools, at a time of increased political and regulatory attention on proxy advisory firms. We will continue to monitor regulatory developments and market responses, including whether other institutional investors follow suit and how agencies respond to the Executive Order.

Chair Atkins Advocates Reassessment of Regulation S-K Disclosure Requirements

On January 13, 2026, Chair Atkins issued a statement that Regulation S-K has expanded dramatically since 1982 and now often compels both material and "undisputably immaterial" disclosure—risking an "avalanche" of information that can obscure what a reasonable investor would find important and thereby undermine investor protection and capital formation.

Chair Atkins directed the Division of Corporation Finance to conduct a comprehensive review of Regulation S-K. He described the review as already underway, referencing prior public engagement on Item 402 executive compensation requirements and indicating that the next phase would turn to other Regulation S-K requirements. Chair Atkins also invited public input on how to recalibrate Regulation S-K toward material disclosure and set an April 13, 2026 comment deadline. Chair Atkins' statement also highlighted potential areas of focus, including:

- rationalizing and scaling disclosures, such as reconsidering the number of executives required to be covered in executive compensation tables and focusing disclosures on genuinely material matters;
- simplifying complex measures, including pay-versus-performance disclosures, to make information more intelligible for investors and less burdensome and costly to produce;
- modernizing outdated rules, including requirements that may no longer reflect current practices; and
- a broader shift toward materiality, away from prescriptive governance disclosure requirements and toward more material, investor-centric information.

For more information, see Chair Atkins' statement on reforming Regulation S-K.

Please contact any of the editors if you would like to provide input for consideration in comment-letter drafting efforts in which Debevoise is participating.

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