Debevoise & Plimpton

MARKETCHECK

The Debevoise M&A Report | Fall 2026

1 **PUBLIC M&A PLAYBOOK: Practical Tips for Preparing the Background of the Merger Section**
The "Background of the Merger" section is a critical component of merger disclosures and a frequent focus of regulatory and litigation scrutiny. We offer practical guidance for documenting negotiations, avoiding common disclosure pitfalls, and ensuring an accurate account of the transaction process.

4 **When Algorithms Set the Price: Antitrust, Algorithmic Price Fixing, Dynamic Pricing, and Surveillance Pricing**
As businesses increasingly rely on automated pricing, antitrust and consumer protection risks are drawing heightened scrutiny. We examine the legal landscape surrounding algorithmic, dynamic, and surveillance pricing and offer practical strategies for mitigating potential exposure.

9 **When Technology Becomes a Mass Tort Target: What Boards Need to Know**
We explore emerging litigation theories, expanding liability risks, and practical steps boards can take to strengthen oversight and risk management.

12 **Delaware Court Dismisses Boeing *Caremark* Claims, Demonstrating the Value of Engaged Board Oversight**
We examine how robust reporting structures, documented responses, and engaged directors can help protect against *Caremark* oversight liability.

14 **GUEST ARTICLE: Tax Receivable Agreements and Monetizing Tax Assets**
Growing investor interest in tax receivable agreements (TRAs) is creating new opportunities to unlock the value of tax assets and monetize these instruments. Our guest authors from Houlihan Lokey explore the evolving secondary TRA market and monetization strategies, including issuer buybacks, secondary sales, and structured financings.

18 **Banker's Corner**
Court's Decision to Uphold the Financial Advisor's Management of Conflicts

20 **The Blurbs**
Delaware Court of Chancery Issues First Significant Ruling on Amended Section 144

22 **Industry Updates**
AI Content Watermarks Are Coming: What Public Companies Should Know

24 **The Charts**

25 **Debevoise Quarter**

26 **Crossword Puzzle**

27 **M&A Partners**

*This report is a publication of **Debevoise & Plimpton LLP.***

The articles appearing in this publication provide summary information only and are not intended as legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed in these articles.

Editorial Board



Editor-in-Chief
Andrew L. Bab
albab@debevoise.com



Emily F. Huang
efhuang@debevoise.com



Andrew G. Jamieson
agjamieson@debevoise.com



Jonathan E. Levitsky
jelevitsky@debevoise.com



Gordon Moodie
gsmoodie@debevoise.com



Katherine Durnan Taylor
ketaylor@debevoise.com



Caitlin Gibson
cgibson@debevoise.com

> "Careful planning, contemporaneous documentation, and a disciplined drafting process can reduce SEC comments, minimize litigation risk, avoid unnecessary media coverage, and streamline preparation of the proxy statement."

PUBLIC M&A PLAYBOOK: Practical Tips for Preparing the Background of the Merger Section

The "Background of the Merger" section is one of the most intensely scrutinized portions of a merger proxy statement. Serving as the primary narrative of the transaction process, the section provides stockholders with the context necessary to understand the board's decision-making process, the negotiations between the parties, and the alternatives considered before approval of the transaction. As a result, the section is frequently reviewed by the SEC Staff, Delaware courts, investors, and plaintiffs' counsel to assess whether stockholders have been provided with a materially complete account of the events leading to the transaction.

Preparing the Background section can present practical challenges. Careful planning, contemporaneous documentation, and a disciplined drafting process can reduce SEC comments, minimize litigation risk, avoid unnecessary media coverage, and streamline preparation of the proxy statement.

Legal Framework

Item 14 of Schedule 14A, which incorporates Items 1005(b) and 1011(a)(1) of Regulation M-A, requires disclosure of material negotiations, transactions, and contacts between the parties and their representatives during the two years preceding the transaction, including discussions with other potential acquirors. The disclosure should identify who initiated material contacts and provide sufficient context for stockholders to understand the transaction process.[1]

In addition to these specific disclosure requirements, Rule 14a-9 under the Securities Exchange Act of 1934 prohibits proxy statements from containing any material misstatement or omitting material information necessary to make the statements made not misleading. As a practical matter, companies should not view the Background section as a mechanical chronology designed solely to satisfy Regulation M-A. Rather, the Background section should present a coherent narrative of the transaction, providing stockholders with an account of the material events leading to the transaction and sufficient context to permit an informed evaluation of the board's decision-making process.

State corporate laws also impose fiduciary disclosure obligations on directors in connection with a stockholder vote. Although the precise contours of those duties vary by jurisdiction,

1. For ease of reference, this article refers to the "Background of the Merger" section of a merger proxy statement. Similar disclosure requirements apply in other business combination disclosure documents, including Schedule TO and Schedule 14D-9 in tender offers, Schedule 13E-3 in going-private transactions, and registration statements on Form S-4 and Form F-4 in transactions involving the issuance of securities.

Continued on next page

directors are generally required to provide stockholders with the material information necessary to make an informed voting decision.

For example, Delaware courts have explained that, while a proxy statement need not provide a play-by-play account of every negotiation, "*when fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with an accurate, full, and fair characterization of those historic events*."[2] Complete disclosure may also be important in preserving the availability of the business judgment standard of review. The Delaware Supreme Court has held that business judgment review under *Corwin* will not apply to stockholder approved transactions where "*partial and elliptical disclosures*" leave stockholders less than fully informed.[3]

Practical Tips for Drafting

- **Begin documenting the process early.** Parties should consider the Background section from the beginning of a strategic review process or the initial contacts between parties. Companies should designate an individual to maintain a deal log recording key dates, participants, who initiated material contacts, the principal topics discussed, and significant developments in the negotiations.
- **Document strategic alternatives and bidder outreach.** The deal log should track strategic alternatives considered, outreach to potential bidders, and the rationale for decisions not to pursue particular opportunities. It should also document material confidentiality agreements, including the execution of NDAs, the existence of standstill provisions (particularly any "don't ask, don't waive" provisions), any subsequent waivers or modifications, and the extent to which those provisions affected the sale process.

  Delaware courts have held that standstill provisions may be material where they could affect a bidder's ability to submit or improve an offer, and the SEC Staff has requested additional disclosure where proxy statements reference standstill provisions without adequately explaining their operation or significance. Plaintiffs' counsel will frequently demand disclosure of such provisions in the demand letters sent to companies following announcement of a transaction. Companies should therefore maintain records identifying which bidders executed NDAs, the material restrictions they contained, when those restrictions were modified or waived, and whether they affected the bidding process or the reasons particular bidders did not continue to participate.
- **Educate transaction participants.** Ensure that all participants in the transaction, including senior management, directors, and advisors, understand that meetings, calls, informal discussions, emails, and text messages may later need to be described publicly in the Background section.

  Participants should assume that emails and text messages regarding the process— including those sent on personal devices—may be subject to discovery by plaintiffs' counsel even if not initially included in the Background section. Recent post-trial decisions have reconstructed the negotiation history largely from such communications and evaluated the proxy statement's narrative against them.
- **Consider whether disclosure is "complete."** Recent SEC Staff comment letters underscore that the Staff continues to review the Background section closely for completeness and context. Staff comments frequently request issuers to expand their disclosure to explain how negotiations evolved, why material terms changed, and the rationale for key decisions made by the parties and the board. For example, the Staff has asked companies to disclose changes between successive financial projections, explain negotiations over merger consideration and transaction structure, describe discussions regarding governance provisions and other material deal terms, identify the reasons certain alternatives or procedural safeguards were accepted or rejected, and provide additional detail regarding interactions with potential bidders, financial advisors, and management. The SEC Staff also frequently compares the

2. See *In re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149, at *3, *47 (Del. Ch. Mar. 15, 2023).
3. See *Morrison v. Berry*, 180 A.3d 1055 (Del. 2018).

Continued on next page

Background section to Section 13 filings by transaction participants, to police compliance with timely filing requirements.

Plaintiffs' counsel likewise scrutinize the Background section for potential or perceived omissions or incomplete descriptions that may obscure the significance of negotiations, changes in transaction terms, or the board's decision-making process.

- **Maintain accurate minutes.** Board and committee minutes should accurately reflect strategic alternatives considered, advice received, and material decisions made.
- **Cross-check the record.** Compare the Background section against board minutes, financial advisor presentations, management projections, merger agreement drafts, and other sections of the proxy statement for consistency. This exercise is important, as plaintiffs routinely use Section 220 books and records demands to obtain board materials before filing fiduciary duty claims. Once those materials are produced, plaintiffs frequently compare them line by line against the proxy statement in search of omissions, inconsistencies, or descriptions of the negotiation process that do not align with the underlying record.
- **Coordinate with transaction participants and build in sufficient review time.** A coordinated review by the principal participants in the transaction can help identify factual inaccuracies, resolve inconsistencies, and ensure that the final disclosure fairly reflects the contemporaneous record. This review should include close coordination with financial advisors and their counsel to ensure that the Background section, the summary of the financial advisor's fairness opinion, and related disclosure elsewhere in the proxy statement consistently describe the transaction process, financial projections, negotiations, and the analyses considered by the board. It should also confirm that the proxy statement accurately describes each financial advisor's material relationships with the counterparty and its affiliates, as well as the advisor's compensation arrangements—generic references to "customary compensation" and undisclosed concurrent engagements for a buyer or its consortium members can render stockholder approval uninformed.

The Background section should also be reviewed by the directors of the company. Directors should carefully review the Background section to confirm that it fairly and accurately reflects the board's deliberations and the transaction process as a key element of their review of the proxy statement as a whole.

Acquirors and their counsel should likewise carefully review those portions of the Background section describing their interactions with the target, as disclosure claims can create litigation risk for the buyer, either directly through aiding-and-abetting claims or indirectly through the costs, delays, and potential liability associated with transaction litigation.[4]

Final Thoughts

Preparing the Background section requires careful coordination among management, directors, financial advisors, and counsel throughout the transaction process. We would be pleased to discuss these issues or other practical considerations relating to merger proxy disclosure and transaction planning.

4. See *In re Columbia Pipeline Grp., Inc. Merger Litig.*, No. 281, 2024 (Del. June 17, 2025).

Authors


Eric T. Juergens
Partner


Jonathan E. Levitsky
Partner


Gordon Moodie
Partner


Maeve O'Connor
Partner


William D. Regner
Partner


Amy Pereira
Associate

When Algorithms Set the Price: Antitrust, Algorithmic Price Fixing, Dynamic Pricing, and Surveillance Pricing

The antitrust laws prohibit competitors from fixing prices whether in person or through software. Pricing through software and algorithms is not *inherently* illegal; however, collusive pricing via software may be. Liability depends on the competitive sensitivity of data, the connection of the competitors using the software, the pricing independence that users retain, and an expanding patchwork of consumer-protection and state pricing laws.

Antitrust risk arises when technology replaces independent competitive decision-making with a shared process, particularly one involving current, nonpublic competitor data, a common vendor, a common algorithm, reciprocal participation by competitors, and limited deviation from pricing outputs. Dynamic pricing and surveillance pricing overlap with algorithmic pricing, but they frequently raise different concerns involving transparency, privacy, discrimination, price gouging, and consumer exploitation.

Introduction to Automated Pricing

There are three general categories of automated pricing, and the treatment of each under both antitrust and consumer protection laws may be different.

The first category, algorithmic pricing, involves the use by competitors of common data collection and pricing formulas. Software, artificial intelligence, machine learning, and revenue-management systems recommend, establish, or adjust prices and other commercial terms without human intervention beyond the initial coding. Typical inputs include the following: costs, inventory, capacity, and demand projections; publicly available market information; competitor prices; taxes and/or tariffs; and data contributed by other customers of a common vendor. A real-world example is apartment landlords who contribute nonpublic rent information into a common database and, with the knowledge that other competing landlords are doing the same thing, receive rent recommendations from revenue-management software.

The antitrust concern rises sharply when a common platform uses nonpublic competitor information or effectively substitutes a collective process for independent pricing judgment.

The second category is the use of nonpublic data to adjust prices based on fluctuating variables, which is referred to as dynamic pricing. The formula adjusts the price of goods sold based on the variables (e.g., time, demand, inventory, seasonality, congestion, capacity, or similar market conditions) and the formula employed. An example that has raised some legal skepticism is a grocery store changing shelf prices electronically as inventory and demand fluctuate. We often see dynamic pricing employed by airlines, hotels, rideshare services, event tickets, travel bookings, and online retail.

Dynamic pricing is ordinarily a unilateral practice and is not an antitrust violation merely because prices change frequently. It can become an antitrust violation if competitors are employing the same pricing formulas, using the same data set, and knowingly adjusting price in concert. The unilateral use of dynamic pricing may also raise antitrust concerns if a dominant player is using it to maintain or enhance a monopoly position.

The third category, called surveillance pricing, is individualized pricing based on a consumer's data. The price for different consumers may vary based upon their buying habits, income, need for the product, advertisement attention, etc. Individualized or segmented pricing is based on personal or inferred consumer information, such as location, browsing history, device data, purchasing behavior, household characteristics, or predicted willingness to pay. A real-world example

Continued on next page

is a rideshare platform where consumers request the same trip at the same time but obtain different prices (perhaps because their rideshare histories differ or their incomes differ or they are from a different demographic). Surveillance pricing can result in either different prices for the same product or "steering," in which consumers are shown different products, discounts, or offers.

Classification matters because algorithmic pricing is principally an antitrust problem, dynamic pricing often becomes a transparency or price-gouging problem, and surveillance pricing commonly implicates privacy, discrimination, and consumer protection concerns.

The Legal Background

The federal legal framework within which to analyze automated pricing primarily includes Sherman Act provisions prohibiting agreements that unreasonably restrain trade or that prohibit monopolization and attempted monopolization, as well as the FTC Act provision prohibiting unfair or deceptive trade methods or practices. Surveillance pricing may also implicate the Robinson Patman Act, which prohibits price discrimination. There are a myriad of state antitrust laws that essentially mirror the federal law, but in some cases have broader reach, including California's Cartwright Act and New York's Donnelly Act.

There are two standards for adjudication under the antitrust laws. Most conduct is assessed under the rule of reason—a balancing of the anticompetitive harms against the procompetitive benefits. Certain conduct that the courts have deemed so pernicious as to almost always violate the antitrust laws is adjudged as *per se* illegal; actual harm need not be proven under the *per se* standard.

The antitrust laws prohibit competitors from working together to fix the price of their products. Often a conspiracy violating the antitrust laws is described as a hub and spoke conspiracy; a central data collector (the hub) gathers competitively sensitive information (via the spokes) from competitors (the rim), who are aware that other competitors are contributing to the hub and getting pricing information and recommendations through the spokes.

Historically, price fixing among competitors occurred through human interaction along the spokes and at the hub. Today's algorithmic software replaces the human at the hub.

In assessing the legality of an automated pricing practice, the facts matter. Some of the key considerations include the following: who supplied the data; whether competitors knew they were participating in a common pricing process; whether one participant's information affects another participant's recommendations; and whether users retain meaningful independent pricing authority (or whether deviations from recommendations are unlikely).

Where Is Risk Highest?

Unilateral employment of automated pricing using in-house or publicly available data presents lower risk than multiple competitors providing competitively sensitive data to a common vendor who in turn utilizes a common formula for all customers. Examples that may lead to greater risk include, among others: sharing of current, granular, nonpublic competitor data; competitor-identifiable outputs; knowledge among the competitors that rivals use the same system; automatic implementation of pricing outputs or high adherence coupled with pressure among competitors not to deviate; and technical opacity that prevents users from understanding how recommendations are produced. Potential mitigating facts include the following: strict customer-data isolation; appropriately aged or aggregated data; easy overrides; documented efficiencies; absence of competitor communications; and auditable data lineage.

Automated Pricing Legal Developments

The case against RealPage was not the first antitrust automated pricing case, but it is one that has garnered substantial attention. RealPage

Continued on next page

collected nonpublic rental, occupancy, and related data from competing landlords. It employed a common revenue-management platform that processed that information, and it generated pricing recommendations for participating landlords. Landlords allegedly understood that competitors were participating. The government pursued both a coordination theory and a monopolization theory. Plaintiffs and the government survived motions for dismissal and the case continues, although several defendants have settled.

Yardi, another real estate case, demonstrates how treatment of the issue has not been uniform by the courts. In *Duffy v. Yardi Systems*,[1] the court held that plaintiffs plausibly alleged that landlords participated in a "give-to-get" arrangement: Each supplied competitively sensitive information knowing the system would use customer data to support recommendations for other landlords. In *Mach v. Yardi Systems*,[2] however, the court granted summary judgment to Yardi after reviewing source code and system architecture and finding that one customer's confidential information could not influence another customer's recommendations.

Similar conflicting decisions occurred in two cases involving hotels that were alleged to have used automated pricing software to set room pricing. Both cases involved the same software. In *Gibson v. Cendyn Group*,[3] dismissal was affirmed where the allegations did not show that one hotel's confidential information influenced another's recommendation. In *Cornish-Adebiyi v. Caesars*,[4] the appellate court reversed dismissal after finding that the allegations plausibly supported an inference that hotels agreed to use a dynamic-pricing algorithm to avoid competing.

The federal antitrust agencies have advocated for the position that plaintiffs do not necessarily have to allege direct competitor communications, binding recommendations, or complete delegation of pricing authority. They have also indicated the potential for criminal enforcement. In the online-poster criminal prosecutions, which was a cartel for posters sold online and prosecuted by the DOJ, human competitors entered an express price-fixing agreement and used algorithms to implement it. The technology operationalized a conventional cartel (i.e., one that existed via human interaction) rather than independently creating one. The defendants pled guilty, so a court review never occurred.

As indicated above, there is some precedent, but the precedent is not uniform. Some of the issues that are unresolved include the following:

- How much knowledge of the system's operation by competitors is required?
- Must the data be current and competitively sensitive?
- How much delegation of pricing authority is enough?
- Does meaningful human discretion undermine the inference of agreement?
- Are recommendations less problematic than automatically implemented prices?

Dynamic Pricing: Usually Lawful, but Not Risk-Free

Dynamic pricing can be performed manually or by software. The frequency of the price changes is not, standing alone, evidence of collusion. Dynamic pricing is likely to be adjudged under the rule of reason. Accordingly, it is important to think about the benefits and harms.

Dynamic pricing offers the potential for procompetitive benefits, including the following: matching supply with changing demand; encouraging additional supply during peak periods; managing inventory and reducing waste; responding quickly to cost changes; offering lower off-peak prices; and allocating scarce goods or services more efficiently.

On the other side of the equation, dynamic pricing could create consumer confusion and

1. No. 2:2023cv01391 (W. D. Wash).
2. No. 24CV063117 (Cal. Super. Ct. Alameda Cnty).
3. No. 24-3576 (9th Cir).
4. No. 24-3006 (3rd Cir.).

 (continued from page 6)

reduce comparison shopping; advertise prices that differ from the final total; automate price increases during emergencies; surge pricing to enable price gouging; and use consumer-specific variables turning the practice into surveillance pricing. Some of these may be consumer protection harms and others competition harms and often there is a blurring of the two legal frameworks.

Federal and state scrutiny focuses primarily on transparency, but dynamic pricing becomes a conventional antitrust issue when competitors share data, use the same coordinating system, or intentionally move prices together.

Surveillance Pricing: When Consumer Data Determines the Offer

Surveillance pricing triggers significant scrutiny because of the use of personal data and individualized prices, discounts, promotions, or product offerings. The concern is not that competitors are coordinating, but that the seller possesses enough information to estimate the maximum amount a particular consumer will pay. Moreover, consumers may not know that a price is individualized, what information was used, or whether another consumer received a better offer. Some consumers may receive lower prices even if total consumer surplus declines, making the effects highly fact-dependent.

The FTC, given its concurrent antitrust and consumer protection roles, has taken the lead at the federal level on enforcement in the surveillance pricing space. Two years ago, the FTC studied third-party pricing and companies gathering pricing data for redistribution, issuing investigative demands to eight companies. The study examined data collection, pricing inputs, consumer effects, and potential discrimination, and identified as areas of potential concern privacy, opacity, discrimination against a protected class, consumer-surplus,[5] and common-intermediary risks. Importantly, the FTC did not determine that the examined companies had violated the law.

In March 2026, the House of Representatives began investigating Booking Holdings, Expedia, Uber, Lyft, and Instacart regarding their market-responsive pricing, consumer-specific pricing, pricing models, and disclosures. Senator Mike Lee, who heads the antitrust subcommittee, also sent information and document demands to Uber and Lyft focusing on their pricing practices following a June 2026 Consumer Reports report of disparate pricing among individuals taking the same ride-sharing trip.

On August 19, 2026, the FTC released its Proposed Enforcement Policy Statement Regarding Personalized Pricing, in which it describes certain surveillance pricing practices as violating the FTC Act, which prohibits unfair and deceptive trade practices. As explained therein: "Where consumers reasonably expect that prices for a product or service will not vary based on their personal data, businesses that engage in personalized pricing should clearly and conspicuously disclose not just that the price is personalized, but also the basis for that personalization and the types of data on which the personalization is based. The failure to make these disclosures is likely to constitute an unfair or deceptive act or practice." The FTC has sought comments on the proposed policy.

Enforcement at the state level appears to be ahead of the federal level but also raises the potential for differing enforcement regimes and standards. The states have employed three different approaches to regulation and enforcement. Some states are focused on disclosure. New York, for example, requires businesses to notify consumers when an algorithm uses their personal data to set a price. A second approach is focused on privacy enforcement. California examines whether personal information is being used consistently

5. Consumer surplus is the economic benefit or monetary gain a consumer receives when they purchase a product or service for a price lower than the maximum price they would have been willing to pay.

 (continued from page 7)

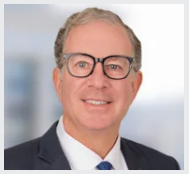
with disclosed purposes. Lastly, some states are simply banning surveillance pricing or at least banning it in some sectors of the economy. Maryland and Connecticut laws limit or prohibit specified individualized pricing practices, while retaining exceptions for cost, supply, demand, loyalty programs, consent, or similar circumstances.

While the above tend to be consumer protection enforcement-focused, surveillance pricing may fall afoul of the antitrust laws when several competing sellers rely on the same data intermediary or targeting system and that common infrastructure begins to align their conduct.

Compliance Best Practices

With the increased focus of enforcers on the use of AI and algorithms in pricing, we recommend that clients: (1) map how their data is deployed outside the company; (2) understand the inputs used to train, calibrate, benchmark, or operate any internal or external pricing system employed, and identify whether data used is internal, public, purchased, competitor-contributed, inferred, personal, or protected-class-related; (3) preserve decision-making over price, output, discounts, occupancy, and capacity, or monitor recommendation acceptance, overrides, rollbacks, and unexplained price convergence; (4) where feasible, contract for data segregation, audit rights, retention limits, model documentation, and regulatory cooperation; and (5) match consumer disclosures and privacy policies to the system's actual operation and build controls for state-specific disclosure rules, personalized-pricing restrictions, and emergency price-gouging laws.

Author



Tim Cornell
Partner



When Technology Becomes a Mass Tort Target: What Boards Need to Know

Technology companies are facing a wave of litigation over the design and operation of their products, including high-profile lawsuits targeting social media companies, gaming platforms, and prediction markets—and the social harms they have supposedly caused. Plaintiffs are drawing from a playbook crafted across earlier consumer mass tort litigation (including tobacco and opioids), alleging that defendants encouraged compulsive use, targeted vulnerable users, knew of associated risks, failed to provide adequate warnings or safeguards, and caused widespread harm—especially to children. Notably, in August 2026, Meta Platforms, Inc. (Meta) reached a landmark agreement with state attorneys general (AGs) providing for payments of up to approximately $18 billion, together with significant changes for the protection of minors. The new generation of cases is based on the proposition that software interfaces, algorithms, and engagement features can themselves constitute products—and that their design can give rise to traditional tort liability. As we discuss below, directors should consider developing governance practices to oversee this risk.

New Developments in Mass Tort Litigation

State Attorneys General Are Jumping into the Fray

AGs are increasingly asserting claims under consumer protection statutes. AGs find these statutes attractive because, in their view, they need only prove that the defendant company made statements that had a tendency to mislead and that those statements were material to consumers. Under these statutes, AGs can seek large statutory fines (typically in the six-figure range) for each violation, along with equitable remedies including disgorgement of profits. AGs typically allege an enormous volume of violations, driving significant financial exposure. In the *Meta* case, for example, a group of AGs alleged that Meta designed social media platforms in a manner that was harmful to minors and then inaccurately represented that those platforms were safe. Meta subsequently resolved those AG claims in a settlement in which Meta was required to make approximately $12.7 billion in payments over 10 years, with up to an additional $5.3 billion contingent on actions by other major social media platforms, and to implement significant product changes for users

Continued on next page

under 18, including default daily time limits, nighttime access restrictions, enhanced age-assurance measures, and greater parental controls. It appears the AGs intended to set standards for other technology companies as well as Meta. In addition, governmental plaintiffs, including school districts and municipalities, have brought litigation alleging that the defendants created a public nuisance by causing a public health crisis among minors—and have sought large "abatement" funds to support social programming.

Mass Tort Plaintiffs Are Seeking to Circumvent Traditional Defenses

Traditionally, two important tools available to technology companies have been Section 230 of the Communications Decency Act[1] and mandatory arbitration clauses. Recently, plaintiffs have attempted to circumvent these defenses (at least in part).

Section 230. Section 230 provides limited federal immunity to providers of interactive computer services, generally shielding them from liability for information provided by users. Social media companies have frequently avoided liability for third-party posts under Section 230. Plaintiffs in technology litigation have sought to circumvent this immunity by framing their claims not as challenges to third-party content, but as challenges to companies' own conduct—including the design of algorithms and platform features, advertising practices, and alleged failures to warn.

Mandatory arbitration clauses. Mandatory arbitration clauses are under increasing pressure in mass tort litigation against technology companies. Courts, for example, have refused to enforce mandatory arbitration clauses because there was not sufficient evidence of assent to the terms and conditions, particularly in cases brought by or on behalf of minors.

Expanding Zones of Risk

Leading mass tort plaintiff lawyers typically begin by filing suit against the most prominent targets in an industry—but over time develop new theories aimed at companies with a more peripheral connection to the alleged conduct. Mass tort plaintiff lawyers pursuing asbestos, tobacco, and opioid litigation all expanded beyond manufacturers to reach distributors, retailers, service providers, and other participants in the relevant ecosystem. A similar pattern could emerge in technology litigation. For example, app-store operators have been named as defendants in cases involving harms allegedly facilitated by social media apps. Other targets may include advertising and data intermediaries, software vendors, and infrastructure providers that distribute, monetize, or enable the challenged products.

Derivative Litigation Risk

Mass tort litigation can generate follow-on stockholder derivative suits alleging that directors failed to oversee mission-critical risks. Although *Caremark* oversight claims remain challenging to plead and prove, they can survive where plaintiffs adequately allege that directors failed to establish appropriate reporting structures or consciously ignored red flags.

Recent Boeing litigation illustrates how this doctrine works in practice. In the 2021 derivative litigation,[2] claims arising from the 737 MAX crashes survived dismissal where plaintiffs alleged that the board lacked meaningful airplane-safety oversight—including that no board committee was specifically charged with responsibility for airplane safety. By contrast, in the 2026 derivative litigation,[3] the Delaware Court of Chancery dismissed a subsequent *Caremark* suit after finding that Boeing's enhanced safety committee, reporting, and remediation structures reflected active board engagement. And in 2023,[4] the Delaware Supreme Court sustained *Caremark* claims against directors of AmerisourceBergen concerning alleged failures to oversee the company's opioid-distribution operations. Together, these decisions underscore

1. 47 U.S.C. § 230.
2. *In re Boeing Co. Derivative Litigation*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).
3. *In re Boeing Co. Derivative Litigation*, C.A. No. 2024-1210-MTZ (Del. Ch. Aug. 13, 2026).
4. *Lebanon County Employees' Retirement Fund v. Collis*, 311 A.3d 773 (Del. 2023).

Continued on next page

the importance of board oversight structures that expressly address risks central to the company's business and the safety of its users or customers.

Board Oversight and Risk Mitigation Strategies

In light of the significant litigation risk facing consumer-focused technology companies, boards should consider whether appropriate governance and risk management structures are in place. Steps may include the following:

- **Assign governance responsibility for product and user-safety risks.** Boards should consider expressly assigning oversight of key risks—such as addiction, harms to minors, privacy, and other risks associated with product design—to an appropriate existing committee (such as the audit or risk committee) or, where warranted, a dedicated trust-and-safety or product-safety committee. The relevant committee charter should clearly identify its responsibilities and provide for escalation of material issues to the full board.
- **Establish regular reporting and escalation mechanisms.** The board or designated committee should receive information from management sufficient to understand significant product and user-safety risks, including relevant internal safety metrics, significant complaints or incidents, and material litigation and regulatory developments. It may also be prudent for the board or designated committee to receive periodic litigation updates from experienced defense counsel. Reporting protocols should identify the types of issues that warrant escalation and enable directors to understand how management is investigating, remediating, and monitoring significant concerns.
- **Respond to, and document, material red flags.** When significant concerns come to the board's attention, directors should ensure that management is responding appropriately and should follow up where warranted. Board and committee materials should appropriately document consideration of material issues, management's response, and subsequent follow-up. As recent *Caremark* decisions illustrate, evidence that a board received information, engaged with management, and monitored remediation can be critical in demonstrating active oversight.
- **Discuss with management the potential use of third-party services to facilitate child safety and other risks.** The *Meta* settlement requires Meta to apply child-age verification procedures using methods developed and licensed from third-party vendors. Directors may want to consider discussing with management whether it would be prudent for the company to consider licensing third-party products for age verification or other safety-related purposes. Third parties may have unique expertise in such areas and can continue developing the efficacy of their products over time. Additionally, the use of respected third-party vendors may help insulate the company from concerns about it potentially gathering sensitive data from minors to conduct age verification or that it is not engaged in rigorous measures because it would prefer to continue benefiting from inappropriate youth engagement.
- **Review insurance coverage before claims arise.** Boards should periodically assess whether the company's D&O and general liability coverage appropriately addresses the evolving risk landscape, including policy limits, exclusions, retentions, and potential gaps between policies. Recent coverage disputes involving social media litigation highlight the importance of considering how allegations concerning intentional product-design decisions may affect coverage under occurrence-based policies.

Authors


Morgan A. Davis
Partner


Josh Lerner
Partner


Maura Kathleen Monaghan
Partner


Jacob W. Stahl
Counsel


Kimberly Anker
Associate

Delaware Court Dismisses Boeing *Caremark* Claims, Demonstrating the Value of Engaged Board Oversight

Earlier this year, the Delaware Court of Chancery dismissed a derivative suit brought against Boeing's directors and officers following a January 2024 incident in which a Boeing jet's door plug separated from the hull at 15,000 feet. The court held that the plaintiffs failed to plead that a majority of Boeing's board faced a substantial likelihood of liability on their *Caremark* oversight claims.[1]

Caremark is the Delaware doctrine under which directors and officers may face liability for a bad faith breach of the duty of loyalty if they either fail to establish a reasonable information and reporting system or, having established one, consciously fail to monitor it or respond to red flags. The recent *Boeing* decision is a valuable authority in demarcating *Caremark*'s boundaries.

Background

The case arose approximately five years after the 737 MAX crashes of 2018 and 2019, which led to a wave of litigation and enforcement matters, including *Caremark* claims against Boeing's board. Those *Caremark* claims survived dismissal because the court found that the board had no committee responsible for airplane safety and no regular safety reporting, and they were ultimately settled. As described in the settlement, subsequent to the crashes, Boeing created an independent Aerospace Safety Committee, committed that at least three directors have aviation, engineering, or product-safety expertise, tasked the Audit Committee with monitoring legal and regulatory compliance, separated the CEO and Chair roles and made safety a standing item at every board meeting. The record in *Boeing II* showed that these structures were in regular use.

On January 5, 2024, a mid-cabin door plug separated from a 737 MAX 9 during flight, in an incident involving a manufacturing and mechanical issue rather than the software design and engineering issues involved in the 2018 and 2019 737 MAX crashes. Among other proceedings related to the incident, stockholders made books and records requests under Section 220 and sued Boeing's directors and officers for failure to adequately oversee mission-critical risks.

The Decision and Its Context

The core question before the court in *Boeing II* was the same as in *Boeing I*: whether the directors adequately discharged their oversight duties related to airplane safety risks. The plaintiffs did not contend that Boeing lacked a reporting system because of the significant oversight structures established under the 2021 settlement. Rather, the plaintiffs advanced a red-flags theory, namely that the extensive reporting the board received on manufacturing and compliance risks constituted a set of warnings the board consciously ignored. They also alleged that the board consciously "shirk[ed] regulatory compliance in favor of higher profits" by pursuing production targets that could not be met safely and lawfully.

The court rejected both theories. In rejecting the first argument, the court explained that a report is a red flag only if it actually reaches the directors, signals illegality or impending corporate trauma clearly enough that the need to act is evident, is consciously ignored and is closely connected to the harm that follows. The court found that, despite 95 pages of allegations of purported "red flags," the plaintiffs failed to provide grounds to infer a bad faith dereliction of duty. According to the court, the breadth of the

1. *In re The Boeing Co. Derivative Litigation*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. Aug. 13, 2026). The 2021 decision is *In re The Boeing Co. Derivative Litigation*, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021).

Continued on next page

Delaware Court Dismisses Boeing *Caremark* Claims, Demonstrating the Value of Engaged Board Oversight (continued from page 12)

plaintiffs' theory "risks recasting the volume and depth of Boeing's reporting from a best practice into evidence of disloyalty."

The court also rejected the plaintiffs' second argument, stating that the plaintiffs had not alleged that Boeing's production targets violated the law or that the board's decision to maintain them despite knowing that the company faced general safety risks is sufficient to overcome Delaware's good faith presumption.

The decision should give comfort to companies that set ambitious targets tied to informed assessments of risk and feasibility and monitor them rigorously, because neither good faith though challenging targets nor candid related reporting standing alone creates risk of oversight liability.

Putting the decision in context, in the two years following the 2019 *Marchand* decision, several motions to dismiss *Caremark* claims were denied. Since 2023, the Court of Chancery has dismissed *Caremark* claims against the directors of several companies, while allowing complaints to proceed where the plaintiffs set out particularized factual allegations that boards allegedly failed to respond to red flags that the corporation was "violating the law or otherwise headed for a corporate trauma." *Boeing II* clarifies that recurrence of safety-related concerns, even where the underlying risks differ, such as software design and engineering issues versus a manufacturing and mechanical issue, does not lower the bad faith standard or turn robust reporting into evidence of disloyalty.[2]

Practical Implications

The opinion is among the most detailed descriptions a Delaware court has given of adequate oversight of a mission-critical risk. For directors, rather than prescribing a fixed analytical framework, the decision points more generally to clear responsibility for each mission-critical risk, appropriate escalation, tracking remediation and regular review of the assumptions underlying significant business targets. For in-house counsel, a high-quality, contemporaneous record of board deliberations remains important. The 2025 amendments to Section 220 make formal board materials especially important. In *Boeing*, recording not only the risk reported but also the diagnosis, owner, and response helped demonstrate that the oversight system was functioning properly.

Boeing II is reassuring to engaged boards. Delaware law does not ask boards to prevent every failure but rather requires directors to identify risks that could truly hurt the company, develop an appropriate oversight structure, engage with the resulting reporting stream and maintain a record of having done so. Boards that follow these principles, even if their companies suffer a bad outcome, can expect strong protection from oversight claims.

2. *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019).

Authors


Eric T. Juergens
Partner


Matthew E. Kaplan
Partner


Jonathan E. Levitsky
Partner


Gordon Moodie
Partner


Maeve O'Connor
Partner


William D. Regner
Partner

> "The rise of structured financing transactions has further diversified the options available to sponsors and other TRA holders seeking liquidity."

GUEST ARTICLE: Tax Receivable Agreements and Monetizing Tax Assets

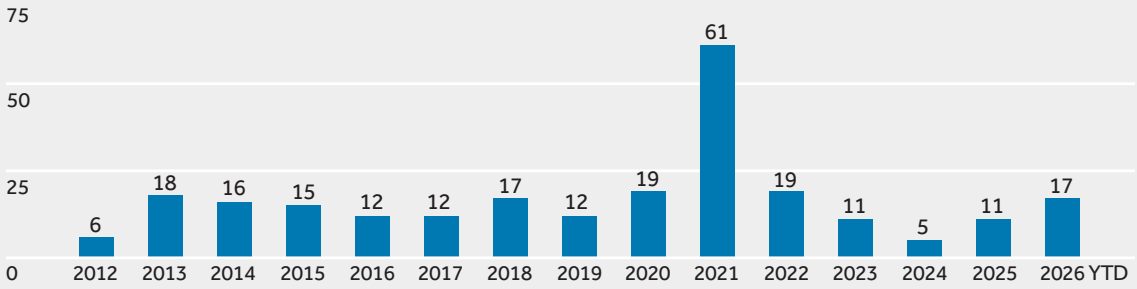
Tax receivable agreements (TRAs) are harvestable assets that give sponsors incremental returns on equity. Increasing interest in the market for TRAs is providing sponsors flexibility to monetize them ahead of their forecasted contractual payment streams, potentially improving distributions to paid-in capital (DPI) and returns to investors. This article provides an overview of the TRA market, how TRAs are created, and how they can be monetized via a negotiated sale. For more in-depth analysis on the mechanics of Up-C structures and TRAs, refer to the *MarketCheck* two-part series published in Spring 2024 and Summer 2024.

Although TRAs have existed for more than 20 years, investor interest has increased in recent years. In the past five years, TRAs have been sold to third-party investors, pledged as collateral in structured financings, repurchased by issuers at negotiated discounts, amended in connection with M&A, and waived outright to clear the path for a sale. The growing number of paths to unlock the value of tax assets with observable clearing prices has in turn allowed sponsors to bring a greater variety of tax assets within the scope of TRAs and to pursue different monetization opportunities.

TRA Market Overview

Based on a review of publicly disclosed SEC filings and other disclosures, there are approximately 150 TRAs currently outstanding across U.S. public companies. Annual TRA issuance in connection with go-public transactions spiked to 61 in 2021 and has since ranged from five to 19 per year, as shown in Figure 1. TRAs are a common feature

Figure 1: Number of TRAs Entered Into per Year[1]



1. Data as of September 2026.

Continued on next page

GUEST ARTICLE: Tax Receivable Agreements and Monetizing Tax Assets (continued from page 14)

of de-SPAC transactions, so a portion of the 2021 increase reflects greater SPAC activity. Although new TRAs enter the market each year, the total number of outstanding TRAs generally remained stable between 2021 and 2025 as many TRAs were terminated, bought out, or waived in connection with three broad corporate events: (i) a change-of-control of the TRA issuer; (ii) bankruptcy or restructuring; and (iii) settlement of the TRA liability via buyback by the issuer. For discussion of the implications of a TRA in connection with bankruptcy proceedings, refer to the MarketCheck publication as of Summer 2026.

TRA use has generally been agnostic to an issuer's business or size. TRA issuers span a wide range of industries and market capitalizations, as shown in Figures 2 and 3.

TRA Creation and the Underlying Tax Assets

A TRA is a contractual tax-sharing arrangement under which the issuer agrees to pay the TRA holder a share of the cash tax savings it realizes when specified tax attributes reduce its tax liability. The payout percentage is typically 85%, and TRA cash flows typically run 15 years or longer.

In the public markets, TRAs are most often created at an IPO or de-SPAC business combination involving an Up-C structure. At the time of an Up-C IPO, a newly listed public company acquires partnership interests in an operating partnership (either via primary subscription for partnership

Figure 2: TRAs by Industry Sector

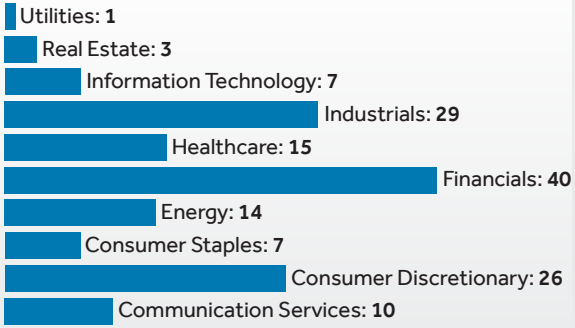
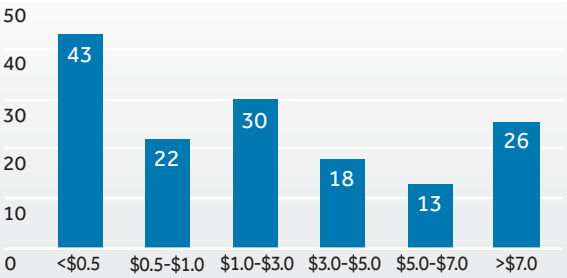


Figure 3: Implied Market Cap of Companies with TRAs ($ in Billions)



equity or secondary purchase from legacy owners), with legacy owners retaining the residual equity in the operating company's partnership interests. Over time, legacy owners sell their partnership interests for cash or equity in the public company to achieve liquidity on their equity holdings. Each sale or exchange of partnership interests generates a tax basis step-up. Through a TRA between the public company and pre-IPO owners, the tax benefits from the deduction generated by the tax-basis step-up are shared between the public company and legacy owners.

Although most TRAs are associated with tax basis step-ups on Up-C exchanges, they are not limited to Up-C structures. TRAs are often structured to cover other tax assets as well, which makes them a potential component of a traditional IPO when the newly listed public company has significant pre-IPO tax attributes. Tax attributes underlying TRAs in the market today include:

- Section 743(b) basis adjustments, which provide for adjustments to the tax basis in partnership interests when such interests are transferred, exchanged, or sold;
- net operating loss (NOL) carryforwards;
- disallowed interest expense carryforwards under Section 163(j), which allows previously limited business interest expenses to be deducted in future tax years;
- capital loss carryforwards;
- tax credit carryforwards;
- depreciable and amortizable common basis;
- capitalized research and development costs; and
- basis in non-amortizable assets.

Notably, over the past few years, Birkenstock Holding plc; Global Medical Response, Inc.; Arxis, Inc.; and

Continued on next page

GUEST ARTICLE: Tax Receivable Agreements and Monetizing Tax Assets (continued from page 15)

York Space Systems, Inc. have each undertaken a traditional IPO listing while implementing a TRA between the public company and the pre-IPO owners to share in pre-IPO tax attributes.

Negotiated Sale Structures

Transacting with the Issuer

TRAs generally provide that, at the issuer's election, the issuer may terminate the TRA by paying each TRA holder an early termination payment equal to the present value of all unpaid TRA payments. The discount rate differs for each TRA but is generally structured as a margin above Secured Overnight Financing Rate. In addition, most TRAs call for similar contractual obligations to TRA holders upon a change of control of the issuer. Although most TRAs contain an early termination clause, TRA holders do not always receive the full early termination payment as the form of final settlement. In both M&A transactions and issuer buybacks, the payment is often negotiated down and, at times, waived entirely. The following excerpts from public company filings and press releases illustrate this.

PowerSchool Schedule 8-K, June 6, 2024	"On June 6, 2024, concurrently with the execution of the Merger Agreement, the Company and the TRA Holders... entered into Amendment No. 1 to the Tax Receivable Agreement (the "TRA Amendment")... to (i) amend the Company's existing Tax Receivable Agreement, dated July 27, 2021 (the "Tax Receivable Agreement"), such that the Tax Receivable Agreement will automatically terminate upon the Effective Time and (ii) the TRA Holders agreed to waive certain Tax Benefit Payments (as defined in the TRA Amendment) pursuant to the Tax Receivable Agreement, including all amounts that would have otherwise become payable to the TRA Holders in connection with the consummation of the Merger. From and after the Effective Time, no Early Termination Payment (each as defined in the TRA Amendment) or Tax Benefit Payment will be made to the TRA Holders pursuant to the Tax Receivable Agreement."
Clarivate™ Press Release, August 22, 2019	"Clarivate Analytics plc announced today that it has entered into an agreement to pay $200 million to terminate the [TRA] that was established on May 10, 2019 with the shareholders of the company prior to Clarivate's initial listing on the NYSE . . . As of June 30, 2019, Clarivate carried a TRA liability of $264.6 million."
paya Form 8-K, January 8, 2023	"On January 8, 2023, in connection with the execution and delivery of the Merger Agreement, the Company and Ultra Holdings entered into an agreement (the "Termination Agreement") with respect to the termination of the tax receivable agreement by and among the Company, Ultra Holdings and certain other parties dated as of October 16, 2020 (the "TRA"). The Termination Agreement implements certain provisions of the TRA in connection with the occurrence of the transactions contemplated by the Merger Agreement, including the acceleration of all obligations under the TRA pursuant to its terms resulting in the payment of an early termination fee of approximately $19.5 million to Ultra Holdings."

A TRA holder may be motivated to pursue a negotiated settlement or full waiver of the early termination payment when the TRA holder also holds significant equity in the issuer and the TRA liability is impacting the equity value of the issuer. A holder whose equity recovery in an M&A transaction exceeds what it would gain under the TRA has a rational interest in accepting a reduced TRA payment to complete the broader transaction. In situations in which TRA holders no longer retain equity in the issuer, TRA holders may still nonetheless be motivated to pursue settlement on the TRA on a discounted basis in order to accelerate a long-dated payment stream into a short-term return to accelerate DPI, to close out investment vehicles, or because the TRA holder believes they can generate a higher rate of return in another asset class. The issuer is a logical counterparty in these circumstances because the issuer has the greatest insight into the future performance of the business and typically has a lower cost of capital than investors in the secondary market.

The Secondary Market

As the TRA market has evolved, TRA holders seeking liquidity now have a variety of options for monetizing their TRAs in the secondary market, which provides a competitive dynamic among market participants, including the issuer.

Continued on next page

GUEST ARTICLE: Tax Receivable Agreements and Monetizing Tax Assets (continued from page 16)

TRAs have several appealing characteristics: public company exposure at attractive yields, low correlation with the issuer's equity securities, no mark-to-market against public valuations, and an acceleration feature that can pay a contractual premium on a change of control. As a result, TRAs appeal to both credit and opportunistic investors and have garnered interest from a broad set of financial buyers, including large diversified alternative asset managers, specialized credit funds, insurers, and family offices. The two primary means to invest in TRAs include an outright purchase of a TRA from a pre-IPO founder or private equity sponsor, or a structured financing transaction in which a lender issues a loan facility that is repaid using the TRA's future cash flows.

Outright purchases of TRAs have been more prevalent and more straightforward than structured financings because TRA holders generally will seek liquidity ahead of an end-of-life to their fund in an all-cash transaction. In an outright sale, most buyers underwrite their investments by assessing the subject company's business model, industry dynamics, and nuanced tax position to evaluate each TRA's cash flow profile.

With the proliferation of private credit over the past several years, we are seeing more investors now express willingness to provide structured financing against TRAs. In structured financing transactions, credit-focused investors looking for TRA exposure issue loans for which principal repayment and interest obligations are funded by future TRA payments. These facilities generally include a variety of lender protections and covenants, effectively leaving some of the risk of the underlying cash flows with the TRA holders while at the same time allowing TRA holders to find investors with costs of capital that are lower than those of investors in outright sales of their TRA ownership. The rise of structured financing transactions has further diversified the options available to sponsors and other TRA holders seeking liquidity.

Recently, investment banks and financial advisors have facilitated both of these approaches by running competitive processes and sourcing potential investors when selling a TRA, and assisting with due diligence and valuation for investors wishing to buy one. In the event TRA holders are contemplating a buyback transaction with the public company issuer, the potential of a secondary market transaction may also improve the TRA holder's negotiating position and improve pricing.

Looking Forward

Many private equity funds that hold TRAs from the robust IPO and de-SPAC activity of 2020 and 2021 are approaching the end of their lives. We therefore expect TRA monetization events to continue, through either secondary market trades or issuer buybacks, as sponsors seek to wind down older-vintage funds and return capital to investors. In addition, TRAs will likely continue to be issued covering a broad set of tax assets, providing the opportunity for incremental liquidity to owners who would otherwise receive no value for those assets.

Statements and opinions expressed herein are solely those of the authors and may not coincide with those of Houlihan Lokey.

Guest Authors



Michael Mulkerin
Managing Director
Houlihan Lokey



Tom Goldrick
Managing Director
Houlihan Lokey



Ben Chiu
Vice President
Houlihan Lokey

BANKER'S CORNER

Court's Decision to Uphold the Financial Advisor's Management of Conflicts

In granting the defendants' motion to dismiss fiduciary and aiding and abetting claims at the pleading stage, the Delaware Court of Chancery upheld the financial advisor's management of conflicts and approved the proxy disclosure of those conflicts. *Berger v. Fox*[1] involved the 2024 acquisition by funds affiliated with Bain Capital Private Equity L.P. (Bain) of Envestnet, Inc. (the Company or Envestnet) in an all-cash, $63.15 per share deal approved by holders of more than 75% of the shares entitled to vote. Stockholder plaintiffs alleged that the Company's independent directors acted in bad faith by engaging a conflicted financial advisor and then "stood idly by while the advisor steered a deal to favor its preferred bidder." In order to bypass *Corwin* cleansing,[2] the plaintiffs argued that the stockholders were not fully informed, because the proxy failed to disclose important details about the conflicts.

The Company's financial advisor presented the board with five separate relationship disclosure letters, each updating the prior letter as more facts became known. Collectively, the letters disclosed the following (among other things), and these matters were then disclosed in the proxy without significant change:

- in the prior two years, the advisor earned approximately $5-$6 million in advisory and financing fees from the Company
- in the prior two years, the advisor earned approximately $30-$40 million in advisory and financing fees from Bain
- in the prior two years, the advisor earned approximately $15-$30 million in fees from a competing bidder (GTCR)
- the advisor was advising Bain-related entities on a large number of advisory and financing assignments unrelated to the current deal, for customary fees that "[w]e expect… would be significantly more, in the aggregate, than the fees [we] would receive from the Company in the [t]ransaction."

The disclosure letters also disclosed that the advisor had shared materials the prior month with Bain, including an illustrative leveraged buyout analysis of the Company using an assumed purchase price range of $60-$80 per share, but this was not noted in the proxy.

Among the alleged disclosure deficiencies that the plaintiffs identified were two related to the financial advisor: (1) there should have been more information in the proxy about the advisor's concurrent representations of Bain affiliates, including details of the specific fees to be earned,

1. C.A. No. 2025-1183-BWD (Del. Ch., July 24, 2026).
2. *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015). "Corwin cleansing" refers to the application of the business judgment rule in non-control transactions where the transaction was approved by "a fully informed, uncoerced vote of the disinterested stockholders."

Continued on next page

and (2) the proxy should have disclosed that the advisor shared an illustrative LBO analysis with Bain prior to its engagement by the Company.

The court found that, contrary to the plaintiffs' claims, the proxy provided sufficient disclosure surrounding the advisor's relationships with Bain by highlighting the existence of the relationships and explaining that the fees from those relationships would be "significantly more" than the fees it would receive from the Company. Greater precision was not required. Quoting *Assad v. Botha*,[3] the court noted that "the disclosure of the specific fees a financial advisor received from unrelated work for a transactional counterparty is immaterial where the relationship and its rough scale are disclosed." In this case, where the precise amount of future fees may be hard to determine, imprecision itself could be misleading. More generally, "Delaware law requires stockholders to be fully informed, not 'infinitely informed.'"[4]

Plaintiffs also claimed that the financial advisor tilted the playing field in favor of Bain, its alleged preferred bidder, citing among other things the lucrative relationships between Bain and the financial advisor. After rejecting plaintiffs' other arguments, the court noted that the financial advisor's contingent fee arrangement incentivized it to maximize the purchase price, and that the financial advisor had similarly lucrative arrangements with the other bidders.

The court also easily dismissed the aiding and abetting claims against the financial advisor, but not before noting that although the alleged fiduciary breaches by the board were all exculpated,[5] an aiding and abetting claim may be premised on an exculpated claim for breach of fiduciary duty.[6] But none of the pled facts supported an inference that the advisor had knowingly participated in the board's alleged breaches of fiduciary duty. For instance, the court pointed to the advisor's five relationship disclosures to the board to discredit the claim that the advisor aided and abetted the board's inappropriate hiring of conflicted advisors (which the court did not believe was the case in any event).

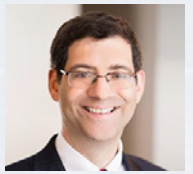
The decision is a welcome reminder that a financial advisor who is aware of its conflicts, discloses them promptly and thoroughly to the board and in the proxy, and properly manages those conflicts is unlikely to be the cause of fiduciary breaches by the board, and is unlikely to be tagged with aiding and abetting liability. Thoughtful updating of disclosure as facts unfold and the nature of the transaction develops will go a long way to defeat a claim that the board made decisions about hiring and monitoring advisors without the benefit of available information about potential conflicts that could taint the advisor's advice.

3. 2023 WL 7121419 (Del. Ch. Oct. 30, 2023).
4. *Teamsters Loc. 677 Health Svcs. & Ins. Plan v. Martell*, 2023 WL 1370852 (Del. Ch. Jan. 31, 2023).
5. The Company's certificate of incorporation included an exculpatory provision under Section 102(b)(7) of the Delaware General Corporation Law.
6. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 862 (Del. 2015).

Authors


Benjamin P. Collins-Wood
Partner


Gordon Moodie
Partner


Andrew L. Bab
Of Counsel


Sarah R. Jacobson
Counsel

The Blurbs

Delaware Court of Chancery Issues First Significant Ruling on Amended Section 144

On August 26, 2026, the Delaware Court of Chancery handed down the first decision analyzing whether a transaction qualified for protection under the new safe harbors of amended DGCL Section 144, and the win at the pleading stage went to the plaintiff.[1] In reaching the conclusion that the transaction did not qualify for a safe harbor, Vice Chancellor Will emphasized that the complaint describes an "extreme scenario" in which the board "acted with reckless indifference to its own safeguards against a known leak" by a fiduciary, "putting the integrity of the process at risk."

The case arose from the acquisition of Whole Earth Brands by affiliates of Sababa Holdings. According to the complaint, which was accepted as true for purposes of the court's decision on August 26, 2026, Whole Earth's CEO leaked material, nonpublic information (MNPI) to Sababa, his father's company, in which the CEO had a financial interest. Sababa then submitted a merger proposal. The board discovered the leak, and the audit committee investigated. The CEO refused to cooperate with the investigation. The board then demanded that he sign a confidentiality undertaking. The CEO refused and was placed on leave as CEO, and he ultimately resigned from that role. Following his resignation, he remained on the board, which restored his access to confidential information without any safeguards. The now-former CEO continued to leak MNPI to his father's company, and the proxy said, incorrectly, that the CEO had been entirely walled off from the process.

In the ensuing litigation, the defendants asserted that dismissal was required because the safe harbors of DGCL Sections 144(a)(1) and 144(a)(2) applied and because the plaintiff did not plead a non-exculpated claim. The Section 144(a)(1) safe harbor applies (in relevant summary) where the material facts as to the director/officer's conflict are disclosed or known to the board, and the board (or a specially designated committee), "in good faith and without gross negligence," authorizes the transaction by the affirmative vote of a majority of disinterested directors. The court concluded that the CEO's conflict was known to the board and that the transaction was approved by a disinterested majority but that the board's failure to take steps to protect confidential information from a leak to the buyer by a deeply conflicted fiduciary was "so extreme that it is reasonably conceivable the Board's authorization of the merger was grossly negligent."

The Section 144(a)(2) safe harbor applies where a transaction is approved by an informed, uncoerced affirmative vote of a majority of the votes cast by disinterested stockholders. The court concluded that this safe harbor did not apply because the proxy stated that the CEO was walled off from the transaction after the initial proposal "and as a result did not receive from the Company any information with respect thereto." This was allegedly false because some months after his recusal, he received additional confidential materials, including Special Committee materials, and attended a board meeting where the Special Committee reported on the negotiations. The court found that a reasonable stockholder "would want to know whether the former CEO and son of the acquirer continued to receive confidential updates about the transaction process after his leak was uncovered."

Notably, apart from the former CEO and another director who secretly negotiated a $1.4 million consulting contract with the surviving company, the court dismissed the claims against the directors on the ground that the plaintiff failed to plead non-exculpated claims against them. The court

1. *Dodiya v. Franklin*, C.A. No. 2025-0932-LWW (Del. Ch. Aug. 26, 2026).

concluded (among other things) that the board's efforts to exclude the then-CEO from discussions and to require a confidentiality undertaking "proved inadequate, but such inadequacy points to a breach of the duty of care—not bad faith."

Other Notable Aspects of the Decision

- **Director Independence Under the Amended Statute.** Vice Chancellor Will analyzed disinterestedness under the heightened statutory standard and concluded, among other things, that a 10-year-old business relationship between one director and an interested person, in which the director was employed by the interested person and was paid over $12 million over the course of about 10 years, was too insubstantial to impugn the director's independence at the time of the transaction. The decision may suggest a different approach from some pre-amendment precedent, although the significance of the court's conclusion remains to be seen.
- **Section 203 Does Not Require an Informed Vote.** The plaintiff also asserted a claim under Section 203 and argued that the favorable stockholder vote of more than 80% did not cure the breach because it was not adequately informed for the same reasons that the amended Section 144 vote was not adequately informed. The court dismissed the claim, holding that the text of Section 203 "does not require that a stockholder vote be 'informed' or that stockholders receive any particular information before the vote."
- ***Revlon* Remains Relevant to the Section 144 Safe Harbor.** The court, addressing the intersection between *Revlon* and the amended Section 144 safe harbor, held that *Revlon* "is not entirely absent" from the safe harbor analysis in a change of control transaction: "To defeat the safe harbor in this context, the plaintiff must show that the directors were grossly negligent in discharging their fiduciary responsibilities to pursue the best price reasonably available or acted in bad faith by 'knowingly and completely fail[ing] to undertake their responsibilities.'"

Key Takeaway

Although this first significant decision applying amended Section 144 found that the statutory safe harbors did not apply, the court repeatedly emphasized the extreme nature of the alleged facts, stating that "[t]hese are not the ordinary imperfections of a sale process." At the same time, Delaware's director protections proved robust: The court dismissed the claims against all directors (apart from the former CEO and one other director) because the plaintiff failed to plead non-exculpated claims against them. Taken as a whole, the decision appears less a signal that the amended safe harbors will be construed especially narrowly than a reminder that they will not protect the type of grossly negligent process, or materially misleading stockholder disclosure, alleged in this case.

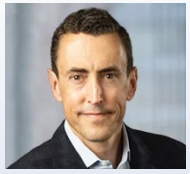
Authors


Susan Reagan Gittes
Partner

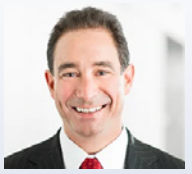

Eric T. Juergens
Partner


Matthew E. Kaplan
Partner


Jonathan E. Levitsky
Partner


Gordon Moodie
Partner


Maeve O'Connor
Partner


William D. Regner
Partner



Industry Updates

AI Content Watermarks Are Coming: What Public Companies Should Know

Outside parties may soon be able to check whether content produced by companies was created or materially altered using AI. While not inherently problematic, transparency regarding AI-generated content will have practical implications for public companies, particularly where the use of AI may invite greater regulatory or public scrutiny of the accuracy, authenticity, or reliability of AI-generated content.

What Are AI-Content Watermarks?

Under Article 50(2) of the EU AI Act, AI system providers (including frontier model providers) must now ensure that AI-generated or -manipulated outputs from their systems—including text—are marked in a machine-readable format and can be detected as AI-generated or manipulated unless exempt. This AI-content watermarking requirement has been effective since August 2, 2026; however, providers of AI systems placed on the market before the effective date must comply by December 2, 2026.

Anthropic was the first major frontier model provider to publicly announce plans for incorporating watermarks into text—a feature that it will release globally, not just within the EU. OpenAI has similarly announced plans to introduce watermarking for ChatGPT and Codex outputs, with the feature enabled automatically for users in the EU and available on an opt-in basis for users elsewhere. Other major providers are expected to follow suit. Consequently, a company using an AI system that leverages a major frontier model may receive watermarked output, even if the company is not itself directly subject to the EU AI Act.

In practice, watermarks within AI-generated text will not, in most cases, be visible to the reader. Instead, providers will likely embed imperceptible statistical patterns into text outputs that can be identified using specialized detection tools, allowing users of the tools to assess whether the AI system in question was involved in generating that text. Although detection tools may be made publicly available, access will depend on the arrangements adopted by individual AI providers, meaning not all readers will necessarily be able to verify the presence of a watermark themselves. However, companies should prepare for the possibility that regulators, law enforcement, media, researchers, and auditors will have access to watermark detection tools. In practical terms, the aim of the AI watermarking requirement is to establish a free, publicly accessible, and reliable way to check whether content was produced or materially altered by an AI system.

Continued on next page

Implementing the watermarking requirements for text has proven technically challenging, particularly because watermarks may become less reliable for shorter passages if detection methods rely on statistical signals that require larger sample sizes for accuracy or where AI-generated text is subsequently edited. As a result, the EU regulatory framework contemplates that AI model developers will configure their models such that watermarks would flow to downstream AI systems and tools.

Why Does This Matter for Public Companies?

An AI watermark does not, in itself, affect the validity of a document. Watermarks could, however, create an additional source of scrutiny for regulated companies or those that provide external-facing materials that are AI-generated. For example, if a compliance, governance, or risk management policy can be identified as being substantially (or wholly) AI-generated, a regulator, auditor, or market participant may question how carefully the policy was tailored to the company's business and risks, who reviewed it, and whether its adoption reflected substantive human judgment.

Similarly, if a company uses generative AI to prepare a substantial portion of an earnings release, risk factors in an offering memorandum, or other market disclosures, and the language later proves inaccurate or misleading, an AI watermark could lead to questions regarding disclosure controls, factual verification, senior management review, and the extent to which the company applied independent judgment to the final text.

Finally, using AI to generate marketing content may also have commercial implications. Platforms through which companies advertise their products and services are increasingly seeking to reduce the distribution of generic or repetitive content that lacks meaningful original thought. Although this approach is directed at content quality rather than the presence of a legally mandated watermark, it illustrates the broader risk that AI-generated marketing materials may receive less reach, engagement, or audience impact where they are perceived as lacking a distinctive human perspective.

Practical Takeaways

Many companies already apply heightened review and approval procedures where AI is used in drafting legal or regulatory filings, investor documents, external communications, or other material disclosures. The introduction of detectable AI-content watermarks simply reinforces the importance of those controls and oversight.

As it becomes easier for regulators, auditors, investors, and other external parties to test whether content was generated or materially shaped by AI, companies should be prepared for greater scrutiny of how those tools were used, what review was undertaken, and who approved the final output. Maintaining a clear record of AI use, human review, and final approval can help demonstrate that a company's AI governance processes were meaningful, substantive, and appropriately tailored to the nature and importance of the content.

Authors



Kendall Howell
Counsel



Martha Hirst
Associate

The Charts

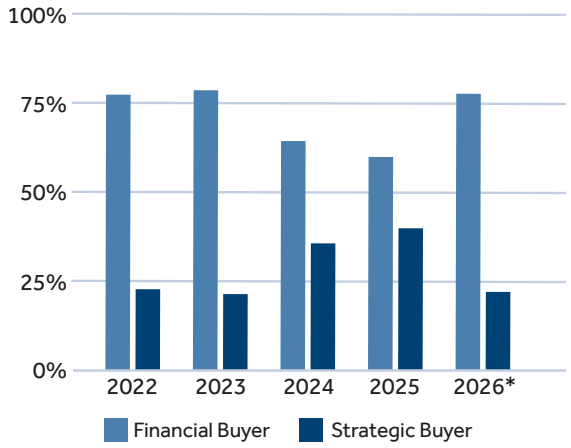
Percentage of Deals with a Go-Shop

	Percentage	# of Deals
2022	10.3%	22 of 213
2023	6.8%	14 of 205
2024	7.0%	14 of 199
2025	6.3%	15 of 239
2026*	5.8%	9 of 155

**First Three Quarters*

Source for all information: dealpointdata.com

Percentage of Deals with a Go-Shop by Buyer Type



**First Three Quarters*

Average and Median Termination Fee Metrics for Deals Announced Between January 1, 2022, and September 30, 2026

	Average	Median
Go-Shop Termination Fee as % of Equity Value	1.73%	1.70%
Go-Shop Termination Fee as % of Target Termination Fee	50.74%	50.00%
(Target) Termination Fee as % of Equity Value in Deals With a Go-Shop	3.46%	3.40%
(Target) Termination Fee as % of Equity Value in Deals Without a Go-Shop	3.51%	3.50%

Debevoise Quarter

Below are links to articles and publications of interest.

Delaware Court Addresses Contractual Control Under Section 144

SEC's 2027 Exam Priorities: What Registrants Should Know

DOJ and HHS Launch Healthcare False Claims Act Self-Disclosure Pilot Program

No Client Harm, but SEC Still Charges Investment Adviser with Reg S-ID Failures

OCC Finalizes GENIUS Act Rulemaking: Considerations for PPSIs, FPSIs, and Custodians

A Spin in the Right Direction: Treasury Issues Partial Withdrawal of Proposed Section 355 Device Rules

SEC Report Highlights Beneficial Ownership Reporting Risks for Investor Organizations

Delaware Court Enjoins Cloudflare Recapitalization, Emphasizing Section 144 Good-Faith Requirement

SEC Issues Further Relief for Retail Voting Programs

Delaware Chancery Decision Highlights Risks of AI-Generated Transcripts of Board Meetings

SEC Provides Additional Clarification Around Schedule 13G Eligibility for Shareholder Engagements

SEC Proposes to Rescind Rule 14a-8, Returning Focus to State Law

Harvard Corporate Governance Blog: FDA and SEC Open a New Information-Sharing Channel: Implications for Public Life Sciences Companies

GLI Mergers & Acquisitions 2026: Addressing ESG Considerations in the M&A Context

Debevoise & Plimpton Special Committee Report Issue 12

Crossword Puzzle

Across

1 An unsolicited public letter proposing a takeover at a premium

4 A shareholder rights plan with a toxic nickname

7 The original barbarian at the gate who took RJR Nabisco private

8 A board comprised of directors up for election in different years

9 A stake accumulated by a bidder before launching an offer

Down

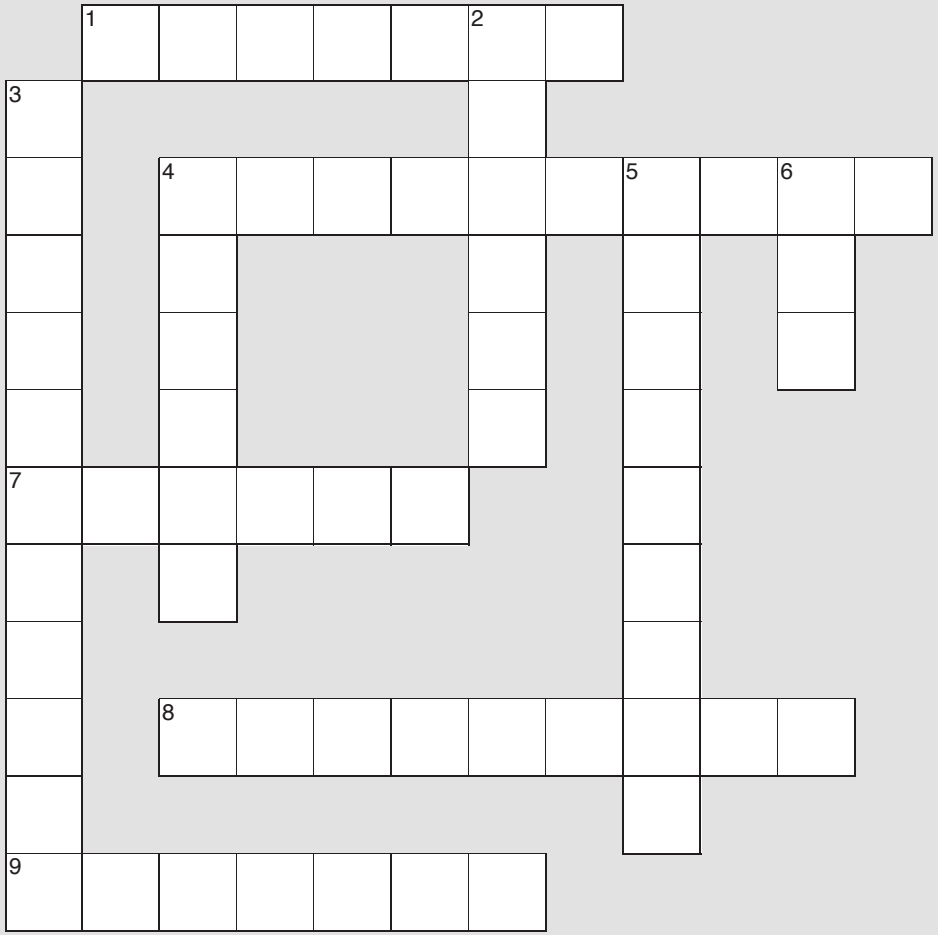
2 Delaware test for takeover defenses

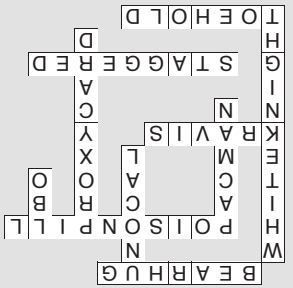
3 A friendly alternative to an unwelcome suitor

4 A defense that turns the tables on a hostile bidder

5 Campaign mailer in corporate contests

6 A takeover using debt financing, for short





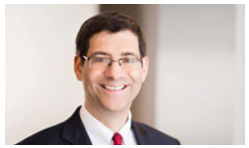
M&A Partners



Erik J. Andrén
New York
ejandren@debevoise.com
+1 212 909 6431



Christopher Anthony
New York
canthony@debevoise.com
+1 212 909 6031



Andrew L. Bab
Of Counsel, New York
albab@debevoise.com
+1 212 909 6323



E. Raman Bet-Mansour
London
rbetmansour@debevoise.com
+44 20 7786 5500



Paul S. Bird
New York
psbird@debevoise.com
+1 212 909 6435



Dominic Blaxill
London
dblaxill@debevoise.com
+44 20 7786 5497



Ezra Borut
New York
eborut@debevoise.com
+1 212 909 7271



Ian N. Bushner
New York
inbushner@debevoise.com
+1 212 909 6491



E. Drew Dutton
London / New York
eddutton@debevoise.com
+44 20 7786 3005
+1 212 909 6718



Spencer K. Gilbert
New York
skgilbert@debevoise.com
+1 212 909 6265



Jake Grandison
London
jgrandison@debevoise.com
+44 20 7786 5477



David Grosgold
New York
dgrosgold@debevoise.com
+1 212 909 6203



Uri Herzberg
New York
uherzberg@debevoise.com
+1 212 909 6342



Emily F. Huang
New York
efhuang@debevoise.com
+1 212 909 6255



Andrew G. Jamieson
New York
agjamieson@debevoise.com
+1 212 909 6250



Alan Kartashkin
London
akartashkin@debevoise.com
+44 20 7786 9096
+44 20 7786 9000



Jonathan E. Levitsky
New York
jelevitsky@debevoise.com
+1 212 909 6423



John R. Love
New York
jrlove@debevoise.com
+1 212 909 6988



Gordon Moodie
New York
gsmoodie@debevoise.com
+1 212 909 6946



Nicholas F. Potter
New York
nfpotter@debevoise.com
+1 212 909 6459



Neal J. Reenan
New York
njreenan@debevoise.com
+1 212 909 6927



William D. Regner
New York
wdregner@debevoise.com
+1 212 909 6698



Kevin Rinker
New York
karinker@debevoise.com
+1 212 909 6569



Paul D. Rubin
Washington, D.C.
pdrubin@debevoise.com
+1 202 383 8150



Rebekah T. Scherr
Washington, D.C.
rtscherr@debevoise.com
+1 202 383 8002



Kevin M. Schmidt
New York
kmschmidt@debevoise.com
+1 212 909 6178



Katherine Durnan Taylor
New York
ketaylor@debevoise.com
+1 212 909 6426



Sergio Torres
New York
storres@debevoise.com
+1 212 909 6276



Dominique Trudelle
San Francisco
dtrudelle@debevoise.com
+1 415 738 5710



Benjamin P. Collins-Wood
New York
bpwood@debevoise.com
+1 212 909 6724



Jillian Mulroy Wright
New York
jwright@debevoise.com
+1 212 909 6630