
CLEARY GOTTLIEB

# Selected Issues for Boards of Directors in 2026

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# Selected Issues for Boards of Directors in 2026

2026 promises to be a year that will demand both agility and strategic foresight from boards of directors and management as they navigate unprecedented challenges.

Drawing on insights from colleagues across Cleary Gottlieb's global offices, our 2026 edition of Selected Issues for Boards of Directors examines the critical issues that dominated board-room discussions in 2025 and identifies the emerging trends that will shape board agendas in the year ahead.

In 2025, we witnessed a resurgence in M&A, producing the biggest wave of mega-deals in a decade, while AI emerged as a transformative "super sector," reshaping business models across industries and pushing boards to revisit oversight of emerging risks and strategies. In addition, changes to crypto markets, as well as growth in private credit and capital markets, drove deal volumes and opened new opportunities for companies to raise capital, while capital solutions and liability management exercises saw heightened importance in frothy markets.

Against this backdrop of dynamic market forces, boards also grappled with rapidly shifting regulatory developments, including a renewed list of SEC priorities, a constantly evolving global trade landscape, changes to global tax policies and Executive Orders impacting companies in areas such as DEI, shareholder engagement and 401(k) plans.

With market, technology and regulatory landscapes in constant flux, 2026 will require boards to remain vigilant and adaptable. Our memo is designed to provide valuable insights as you guide your organizations through the challenges and opportunities ahead.

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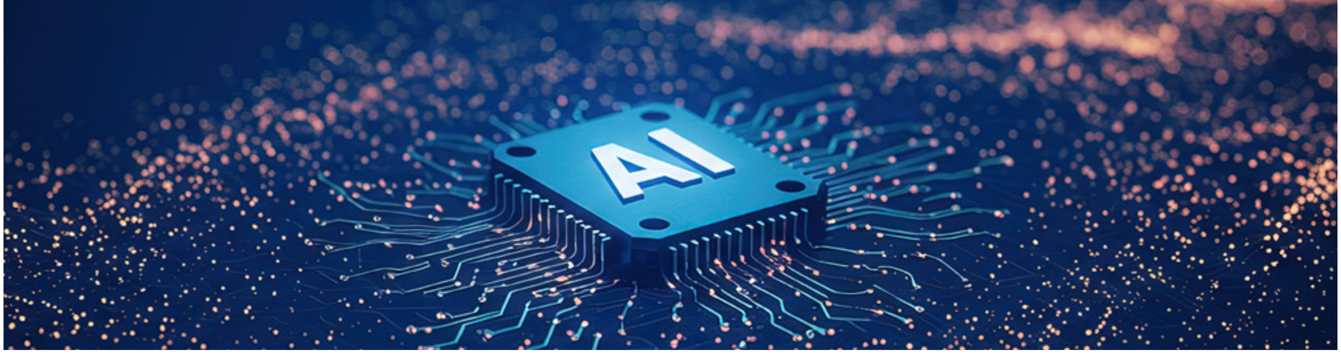


# Thoughts on Managing the AI Transformation

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Over the last nine years, during which I served as Cleary Gottlieb's Managing Partner, there have been significant, often unexpected changes in global politics, global markets and the legal industry. But the artificial intelligence (AI) transformation that is on the horizon is likely to have a more significant, and lasting, impact on lawyers and law firms, how they deliver services and how clients consume them than any of the changes that I experienced during my tenure.

This article offers some thoughts on the adoption of AI by law firms and other organizations, focusing on the institutional and cultural changes that will be a part of the successful navigation of the impending transformation.

- **Build Windmills**: "When the winds of change start to blow, some people build walls and others build windmills." This ancient proverb has great resonance for all businesses facing the implications of AI for their operations, customers and people. The opportunities created by this technology will be enormous. But effectively capitalizing on those opportunities will require affirmatively embracing these winds of change and finding ways to harness the opportunity rather than ways to protect preexisting business models or functions. This mindset can be difficult to embrace at a personal and organizational level, especially for those that have been very successful in their current structures and roles. AI leadership requires framing technological change as an opportunity to build windmills, and building the internal capabilities to design and build them.

- **Embrace a "Fail Fast" Approach**: One of the challenges of adopting AI broadly within an organization is the rapid—hypersonic—pace at which new AI platforms and tools are being introduced, and at which those platforms and tools are improving. This proliferation of available technology can create confusion and a sense of personal and organizational "overwhelm." It is difficult to keep up on the latest tools, or the way in which a tool introduced to the market six months ago may have been overtaken—or may have surpassed—by other options. Onboarding new tools can be time consuming, particularly given the information security and related concerns that must be addressed. Training people to use the tool, and developing mechanisms to monitor usage and provide ongoing support across an organization, requires time and resources. All of this can lead to a (very understandable) desire by leaders to make a product selection and commit to it; to do otherwise risks internal confusion and a perception that leadership lacks an "AI strategy."

  My suggestion is to avoid fully locking into a particular tool or platform as long as you can. We are too early in the AI transformation to make long-term decisions, and unless organizations remain open to shifting focus and resources they risk reliance on technology that quickly becomes "outdated." The present moment in the AI transformation calls for a "fail fast" approach. Encourage your teams to try tools and products, declare "failure" quickly and move on (including returning to a previously failed experiment if or when there has been an advance that justifies it). "Failing fast" is easier said than done, and the mentality is generally associated with start-ups rather than large, established businesses. It can be a difficult mindset to adopt in profit and success driven cultures. But recognizing and embracing the fact that we are in the very early days of the AI transformation will help organizations of every size navigate the pace of change we are experiencing.

- **Rethink Your Success**: History is littered with examples of highly successful organizations that experienced rapid declines when faced with significant changes in the landscape. (Think Kodak vs. Canon, Blockbuster vs. Netflix or BlackBerry vs. iPhone.) The most abrupt of these declines occur when highly successful organizations do not anticipate or embrace the need to change until it's too late. They become victims of their own success, losing their position to "upstart" competitors for whom a fundamental shift in approach is appealing precisely because it's the best way for them to challenge larger, more established rivals. The AI transformation calls for law firms and other businesses to peel back their currently successful models and ask themselves "what business are we in?"—not how they do things today, but fundamentally what is their purpose from the point of view of their customers/clients. Having an understanding of these "first principles" helps focus on what changes are likely to be desirable or required as AI permeates organizations across the economy.

  When we launched ClearyX four years ago,[1] we started with an intentionally provocative mission statement: "let's imagine the business that puts Cleary out of business, and try to build that business." Now, Cleary is not at meaningful risk of going out of business. But we, and every organization, should be thinking about how Gen AI could put them out of business and what they can do about that and how that can lead to change and growth.

- **Recruit and Train for the Future, Not the Past**: Law firms, and many other businesses, depend on their ability to train their people to do things that they haven't likely done before. This training focuses on substantive knowledge, as well as written and verbal communication, time management, team management, client management and many other skills that underpin professional excellence. Much of this training has long relied on an "apprenticeship" model in which junior professionals spend time with more senior people, performing supporting (and sometimes mundane) tasks. The combination of exposure to basic tasks and to senior professionals creates opportunities for learning through feedback and observational "osmosis." The AI transformation requires a reexamination of training models. Senior

[1] See our June 2022 ClearyX announcement here.

professionals will need to set aside their "nostalgia" for their own developmental experiences, and focus on training the next generation for what will best equip them to be successful over the long term. This is true not only for training but will mean a broader reexamination of how work is done.

What will be the attributes of highly successful senior professionals 10-15 years from now? I think the answer lies largely in the contrast between what AI will be good at, and what it will not. There is little doubt that AI will excel at "working memory" (for example, updating a checklist), or analysis and summarization of documents and information (without regard to volume), and it will have endless stamina, never tiring even after multiple "all-nighters." But senior professionals will excel at understanding situational dynamics, empathetic counseling and creating positive interactions that are at the heart of building team and client loyalty. Recruiting, training and rewarding people for these skills and attributes should shift to the center of all "talent" businesses.

Rooting the discussion about AI in an organization's positive cultural attributes—the ability to adapt, openness to learning and development, self-confidence and courage—will be key to managing expectations and mindset for the AI transformation.

- **Root Change in Your Organization's Culture**: The changes that will be required of individuals and organizations to successfully adopt AI can seem daunting, and may lead to a degree of "paralysis," particularly in areas where the technology shows (for the moment) limitations in capabilities or its implications for business models remain difficult to fully predict. For leaders, it will be important to remind key stakeholders that changes—whether triggered by technological advances or by changes in market environment—are not new. All successful organizations that have been around for more than a decade have experienced such changes, and the fact that they continue to thrive is testament to their ability to adapt. Rooting the discussion about AI in an organization's positive cultural attributes—the ability to adapt, openness to learning and development, self-confidence and courage—will be key to managing expectations and mindset for the AI transformation. At Cleary, we are also rooting our AI adoption in our commitment to excellence. We articulate our purpose as an organization as collaborating to deliver excellence to our clients and each other. Embedding AI across everything that we do will increasingly be at the core if we achieve that purpose. Much of the public discussion of the power of AI focuses on its ability to accomplish tasks "faster, cheaper and better." For us, faster and cheaper are important, but "better" is paramount.

- **People, Not Machines, Drive Success**: There's a lot of speculation about AI replacing people in organizations, and there's no doubt that some of this will happen. But I expect that for many organizations, the larger shift will be in what people are asked to do (and accordingly what types of experience and expertise are valued). This will pose some particular challenges for lawyers, who have ethical responsibilities and client expectations relating to the quality, suitability and judgment in providing legal advice. The work performed by lawyers will be substantially augmented by technology, and many of the "building block" tasks underlying legal advice will be replaced by AI. Technologists, data scientists and other professionals will become increasingly important in client relationships and within law firms and legal departments. Successful law firms and legal departments will deploy a broad range of skills and tools, and will need to think holistically about what their clients need and how best to deliver it. But the fundamental core of advising clients on legal issues will remain a human endeavor, and success will be driven through the quality of human interactions. Other organizations will see the same pattern in their businesses: the nature of the work may change but the need to deliver quality services (internally and externally) will remain the paramount driver of success and determine the best use of the technology.

# The Open Questions in U.S. Generative AI Copyright Litigation

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## Overview of AI Copyright Litigation

In 2026, we can expect important developments in the legal landscape of generative AI and copyright. Dozens of copyright infringement lawsuits targeting the training and development of AI models—capable of generating text, images, video, music and more—are advancing toward dispositive rulings. The central issue remains whether training AI models using unlicensed copyrighted works is infringing or instead constitutes fair use under Section 107 of the U.S. Copyright Act. Courts consider four factors in determining whether a particular use is fair: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used and (4) the effect of the use upon the potential market for or value of the copyrighted work. The thrust of this inquiry is whether the use is transformative—serving a different purpose or function from the original work—or merely usurps the market for the original by reproducing its protected expression. As courts establish legal frameworks for AI training and protection of AI-generated outputs, companies and boards should closely monitor developments to fully understand the risks and opportunities of AI implementation.

The first court to reach a substantive decision this year on fair use in the context of an AI-augmented platform was *Thomson Reuters Enterprise Center GmbH v. ROSS Intelligence Inc.*[1] Thomson Reuters sued ROSS Intelligence for allegedly copying headnotes from Westlaw, Thomson Reuters' legal research platform, to train ROSS's AI-based legal research platform. In February 2025, the district court sided with Thomson Reuters and rejected ROSS's fair use defense. Taking pains

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1 765 F. Supp. 3d 382 (D. Del. 2025), motion to certify appeal granted, No. 1:20-CV-613-SB, 2025 WL 1488015 (D. Del. May 23, 2025).

to note that ROSS's platform did not involve generative AI, the court found that factor four strongly favored Thomson Reuters because ROSS sought to create a platform that directly competed with Westlaw and thereby harmed both the market for its legal-research services and a potential derivative market for data to train legal AI systems. However, on April 4, 2025 the district court certified two questions for interlocutory appeal to the United States Court of Appeals for the Third Circuit: (1) whether Westlaw headnotes constitute original expression protectable under the Copyright Act; and (2) whether ROSS's use was fair. In a subsequent memorandum opinion explaining its reasoning, the district court described these as "hard" issues presenting substantial grounds for disagreement.[2]

In June 2025, two judges in the Northern District of California reached a different conclusion on fair use at summary judgment, finding that the use of copyrighted works to train generative AI models that do not substantially reproduce the content on which they were trained was a transformative fair use as a matter of law. In *Bartz v. Anthropic PBC*, Judge William Alsup held that Anthropic's use of copyrighted books to train Claude, Anthropic's large language model, was fair, calling the technology "spectacularly" transformative.[3] The court also rejected plaintiffs' contention that training LLMs on their books "will result in an explosion of works" that compete with theirs, finding that any competition arising from non-infringing outputs would not constitute cognizable market harm under the Copyright Act."[4]

However, Judge Alsup refused to grant summary judgment for Anthropic as to copies of books obtained from "pirate" websites and allegedly maintained in "a permanent, general-purpose resource even after deciding it would not use certain copies to train LLMs or would never use them again to do so."[5] The court expressed significant skepticism that such a use could be justified as transformative and fair and ordered that claim to trial. Shortly thereafter, the court certified a class consisting of book authors holding valid copyrights to works downloaded from certain specific "pirate" datasets.[6] Anthropic subsequently entered into a class wide settlement pursuant to which it agreed to pay class plaintiffs $1.5 billion, or an estimated $3,000 per book. The court granted preliminary approval for the settlement on October 17, 2025, and final approval remains pending.

Days after the summary judgment decision issued in Anthropic, Judge Vincent Chhabria granted summary judgment for Meta in *Kadrey v. Meta Platforms, Inc.* The court held that Meta's use of copyrighted books to train Llama was "highly transformative."[7] On factor four, Judge Chhabria rejected plaintiffs' harm theories as "clear losers,"[8] concluding that plaintiffs had failed to adduce any evidence that Llama's outputs reproduced plaintiffs' protected expression or had harmed sales of plaintiffs' books.[9] Similarly, Judge Chhabria rejected arguments that Meta's training without permission diminished plaintiffs' ability to license their works for training, noting that such a market is "theoretical" and that the market for a transformative use is not one plaintiffs have the right to monopolize in any event.[10] The court also rejected plaintiffs' argument that Meta's use of their books to train Llama could not be fair because it had acquired copies of those books from "pirate" websites in bad faith, finding that this factor did "not move the needle" given the transformativeness of the use and the lack of market harm.[11] Finally, the court identified a possible "market dilution" theory of harm—where AI outputs flood markets and thereby harm sales of the human-authored works on which

2 *Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc.*, No. 1:20-cv-00613-SB, Memorandum Opinion, ECF No. 804 at 1 (D. Del. May 23, 2025).

3 787 F. Supp. 3d 1007, 1019, 1021 (N.D. Cal. 2025).

4 *Id.* at 1031-32.

5 *Id.* at 1014.

6 *Bartz v. Anthropic* PBC, 791 F. Supp. 3d 1038 (N.D. Cal. 2025).

7 788 F. Supp. 3d 1026, 1044 (N.D. Cal. 2025).

8 *Id.* at 1036.

9 *Id.* at 1051.

10 *Id.* at 1052.

11 *Id.* at 1058.

they were trained—but found plaintiffs had proffered no evidentiary support for such a theory.[12]

While no Circuit Court has yet decided AI fair use or addressed the reasoning applied by the Judges in the Anthropic and Meta cases, the Second Circuit's 2025 opinion in *Romanova v. Amilus, Inc.* may provide guidance. Judge Pierre N. Leval—an authority on the modern fair use doctrine and author of several seminal decisions on transformative fair use—authored the opinion, which includes a comprehensive discussion of fair use principles.[13] In particular, the discussion of factor four (market harm) emphasizes the classic market substitution injury—whether the new use is substitutive because it makes "the protected expression of the original" available to the public for a non-transformative purpose.[14] This decision, along with Judge Leval's earlier decision in *Authors Guild v. Google*,[15] should provide substantial guidance to the United States District Court for the Southern District of New York, which is scheduled to reach summary judgment on issues of infringement and fair use in *In re OpenAI, Inc., Copyright Infringement Litigation*[16] in August. Dispositive motions are also expected this year in *In re Google Generative AI Copyright Litigation*,[17] *Andersen v. Stability AI*,[18] and *Nazemian v. NVIDIA Corporation*.[19]

The critical question in all of these cases will be whether generative AI models promote the creation of new, original expression and serve a distinct purpose from the works on which they were trained or instead substitute for those works by making accessible their protected expression. For practitioners on both sides of these disputes, 2026 will be a defining year as courts chart the boundaries of fair use in the AI era.

[12] *Id.* at 1036 (N.D. Cal. June 25, 2025).

[13] 138 F.4th 104 (2d Cir. May 23, 2025).

[14] *Id.* at n.9.

[15] 804 F.3d 202 (2d Cir. 2015).

[16] No. 25-md-3143-SHS (S.D. NY).

[17] No. 23-cv-03440-EKL (N.D. Cal.).

[18] No. 23-cv-00201-WHO (N.D. Cal.).

[19] No. 24-cv-01454-JST (N.D. Cal.).

The critical question in all of these cases will be whether generative AI models promote the creation of new, original expression and serve a distinct purpose from the works on which they were trained or instead substitute for those works by making accessible their protected expression.

## Regulatory Guidance on Copyright & AI

The U.S. Copyright Office has issued guidance on several AI-related intellectual property issues. The first installment of this guidance—on the use of digital technology to replicate an individual's voice or appearance—was released in July 2024.[20] In January 2025, it addressed copyrightability of AI-produced works, in particular how much human authorship is required for protection.[21] While applications to register AI generated outputs had previously been rejected on grounds that they lacked the necessary human authorship, the Office issued its first such registration in January 2025 for "A Single Piece of American Cheese."

Kent Keirsey, *A Single Piece of American Cheese* (2024).
Photo courtesy of Invoke.

[20] See U.S. Copyright Office, "Copyright and Artificial Intelligence Part 1: Digital Replicas" (July 2024), available here.

[21] See U.S. Copyright Office, "Copyright and Artificial Intelligence Part 2: Copyrightability" (January 2025), available here.

While holding fast to its position that human authorship is required, the Copyright Office determined in this instance that the process of selecting, arranging and coordinating different iterations of AI-generated material and piecing them together to make a composite work involved the requisite level of human control necessary to satisfy that requirement.

How much human authorship is required for registration, and what that authorship can properly consist of, remain open issues for the courts to decide. The first such case is set to be decided this year in *Allen v. U.S. Copyright Office*, pending in the District of Colorado.[22] It involves an author whose award-winning visual artwork, "Théâtre D'Opéra Spatial," was repeatedly rejected for registration by the Copyright Office for lack of human authorship.

Jason Allen, *Théâtre D'opéra Spatial*. Photo courtesy of Midjourney.

The artist sued to overturn the rejection, arguing that his creative decisions in crafting more than 600 iterative prompts constitute sufficient originality and human authorship to warrant copyright protection, analogizing his process to the creative choices photographers make in composing images. Summary judgment will be fully briefed in early 2026, and the outcome of this decision could have significant import for any company or individual author seeking to protect works created with the benefit of generative AI tools.

[22] No. 24-cv-02665-WJM (D. Colo.).

How much human authorship is required for registration, and what that authorship can properly consist of, remain open issues for the courts to decide.

In May 2025, the Copyright Office issued "prepublication" guidance addressing fair use in AI training,[23] noting that fair use outcomes will be highly fact-specific across different factors. In particular, training AI models can often be transformative (factor one)—particularly for research or non-substitutive uses—while uses aimed at generating substantially similar expressive outputs or occupying the same markets may be less so in its view.[24] Factor two (nature of the work) will weigh against fair use where "works involved are more expressive, or previously unpublished,"[25] and factor three (amount used) may weigh against fair use given wholesale copying, though it may favor fair use where such copying serves a transformative purpose and little protectable material is made accessible through outputs with effective guardrails.[26] While noting that this is "uncharted territory," the guidance also endorses a potential "market dilution" theory for factor four (market harm) similar to *Kadrey*, alongside traditional harms of lost sales and licensing opportunities for the works at issue.[27] The guidance is not controlling, however, as the question of when the training of generative AI models constitutes fair use is a highly case-specific one that will ultimately be determined by federal courts in the context of adjudicating actual disputes or by Congress, should it choose to step in.

[23] See U.S. Copyright Office, "Copyright and Artificial Intelligence Part 3: Generative AI Training (Pre-Publication Version)" (May 2025), available here.

[24] *Id.* at 45-46.

[25] *Id.* at 54.

[26] *Id.* at 59-60.

[27] *Id.* at 65.


# Managing AI Risk: Legal and Governance Imperatives for the Board

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AI adoption is now mainstream: 88% of businesses use AI in at least one function, with global spending expected to exceed $1.5 trillion in 2025 and approach $2 trillion in 2026. As organizations race to scale AI, many have relied upon traditional vendor risk management policies to vet third-party AI vendors and tools; however, implementation of third-party AI tools presents distinctive risks that require tailored due diligence, auditing, contracting and governance. Because businesses are accountable for outputs generated by third-party AI tools and for vendors' processing of prompts and other business data, boards and management should ensure legal, IT and procurement teams apply a principled, risk-based approach to vendor management that addresses AI-specific considerations.

## General Risks Inherent in AI Tools

The inherent nature of AI models presents unique risks beyond those addressed by typical vendor management:

- **Data Ingestion and Control Limitations**. Third-party AI vendors often require ingestion of substantial customer data to deliver personalized functionality. Once data is transferred to the vendor's environment, businesses face limited ability to control how that data is used, retained or incorporated into the vendor's broader operations, including potential use for model training that may benefit other customers.

- **Opacity and Lack of Transparency.** AI technology is inherently opaque, making it difficult to understand how data is processed and how or why output is produced. Vendors often incorporate third-party AI without customer awareness or may not fully disclose how AI is applied within their services; this lack of transparency creates significant data protection and confidentiality risks, as customer data may be transmitted to undisclosed third parties or used for training AI models without proper consent or contractual safeguards. The opacity of these systems may also impede a business' ability to fulfill regulatory obligations, including conducting required data protection impact assessments or bias audits.

- **Dynamic and Evolving Operation**. AI tools are not static. Instead, AI models often evolve continuously, making one-time due diligence insufficient. When AI is incorporated into existing services with existing contractual agreements, it may not trigger renewed risk management or contractual renegotiation processes, leading to gaps in coverage or insufficient protections for business data or intellectual property.

- **Inaccuracy, Bias and Hallucinations**. AI models are trained on data that may be incomplete, outdated or context-specific, creating accuracy risks. Generative AI may hallucinate, producing plausible-sounding but entirely or partially fabricated information that could mislead decision-makers or customers. Similarly, bias in training data can produce discriminatory outcomes with legal and reputational consequences in high-risk activities such as hiring decisions, credit assessments, insurance underwriting and customer profiling. These risks are amplified with third-party AI vendors, where limited transparency into proprietary training data creates significant challenges. Businesses often cannot conduct meaningful bias testing, audit algorithmic outputs for accuracy or provide explanations for automated decisions, undermining regulatory compliance and the ability to identify and remediate problematic outputs before they cause harm.

## Information Security Risks

AI systems face novel attack vectors (including prompt injection, data poisoning and model inversion), where attackers manipulate inputs or infer sensitive information from model behavior. Frequent model updates and opaque decision logic complicate security testing and auditing. These challenges are particularly acute with third-party AI vendors, where businesses often lack direct visibility into the vendor's security practices, model training environments and data handling procedures. Unlike internally developed systems, third-party AI tools often operate as "black boxes," preventing businesses from conducting comprehensive security assessments or verifying that security patches and model updates have not introduced new vulnerabilities.

The growth of agentic AI creates additional risks. Recent disclosures show that agentic AI can now independently execute complex offensive campaigns at nation-state scale, and enterprise assistants, once granted access and operational autonomy, can trigger actions that circumvent traditional enterprise controls.[1] When these agentic capabilities are embedded in third-party vendor solutions, businesses face compounded risk: they must trust not only the vendor's security controls but also their governance over autonomous agent behavior, with limited ability to monitor or constrain agent actions that occur within the vendor's infrastructure.

## Privacy Risks

Third-party AI tools pose privacy risks because sensitive, personally identifiable information (PII) may be shared, processed or stored outside the business' direct control. PII triggers specific legal obligations under data protection regimes such as Europe's General Data Protection Regulation (the GDPR), the California Consumer Privacy Act (the CCPA) and China's Personal Information Protection Law (PIPL) and other privacy

[1] For comprehensive analysis of the security implications of these incidents and recommended due diligence measures, see our November blog post available here.

laws that impose strict requirements on PII processing, retention and cross-border transfers.

Third-party AI tools pose privacy risks because sensitive, personally identifiable information may be shared, processed or stored outside the business' direct control.

When PII is input into AI tools provided by a third-party vendor, it may be retained, logged or reused for model improvement, increasing risks of inadvertent disclosure, unauthorized access and secondary use. Organizations may be unable to honor data subject rights requests (*e.g.*, rights to access, deletion and rectification) when data resides in opaque AI systems controlled by third parties or has been incorporated into training datasets. Data ingested in AI tools may also be transferred across jurisdictions, creating compliance challenges with privacy and data protection regulations.[2]

## Intellectual Property Risks

Use of third-party generative AI tools poses unique IP risks:

- **Ownership Challenges**. The U.S. Patent and Copyright Offices generally deny protection to AI-generated works without significant human contribution.[3] However, to the extent proprietary rights can be asserted in AI output, usage of vendor tools may give rise to disputes over who owns the IP in the output.
- **Open Source Software Risks**. Usage of third-party AI tools to write software code exposes businesses to open source software risks, as generative AI tools are often trained on open source software, which, if incorporated in the output, can trigger "copyleft" licensing requirements that hinder source code protection.
- **Confidentiality Risks**. Confidential or trade secret information input into a third-party AI tool can be retained, logged or reused by the vendor and incorporated into output for other users, resulting in potential loss of confidentiality or trade secret protection, as well as breach of contract claims.
- **Infringement Risks**. AI systems can generate output that infringes third-party IP, such as when prompts reference copyrighted materials, trademarks or patented inventions. Under typical AI vendor contracts, indemnification provisions are often limited or excluded entirely for AI-generated output, meaning the organization (not the vendor) bears responsibility for any liability arising from use of infringing output. This risk is compounded by the lack of transparency regarding training data, making it nearly impossible for organizations to conduct meaningful pre-use IP clearance.

## Regulatory Risks

Regulatory risk associated with AI adoption is increasingly driven by the application of existing consumer protection, securities, civil rights and data protection laws to AI-enabled activities. Regulators have made clear that businesses deploying AI remain fully accountable for legal compliance, even where AI functionality is sourced from third-party vendors. Enforcement actions by the FTC and SEC demonstrate that reliance on vendor representations, without independent validation and governance, is insufficient and exposes businesses to enforcement risk.

Third-party AI tools materially amplify regulatory exposure because legal accountability remains with the deployer, while technical control, design decisions and underlying data inputs often sit with the vendor. Many AI vendors do not design products around a business' specific compliance obligations, making it difficult

[2] For example, where data, including PII, is hosted or stored in certain jurisdictions, particularly the United States, organizations may face additional legal complexities arising from government access laws such as the U.S. CLOUD Act and the concerns raised in the *Schrems* decisions regarding adequacy of data protection for EU PII transferred outside the EEA.

[3] For additional information, see our article on AI Copyright Litigation elsewhere in this memorandum.

to implement required transparency and consumer disclosures, explain automated decision-making outcomes, support consumer data protection rights or document how outcomes are generated. Limited audit rights, restricted access to training data and system logs and weak data provenance frequently leave businesses unable to substantiate compliance during regulatory inquiries or to remediate issues once identified.

Recent enforcement underscores these risks. The FTC's most impactful AI-related enforcement action against Rite Aid illustrates that businesses cannot outsource accountability for AI governance: the alleged failures stemmed from allegedly inadequate oversight, testing, monitoring and auditability of a third-party AI system. Similarly, SEC actions targeting AI washing reflect regulatory skepticism toward overstated AI claims where organizations lack demonstrable controls, validation or understanding of vendor-provided tools. In both contexts, regulators focused on the gap between marketing or deployment claims and the business' actual ability to govern and explain the AI system in use.

These risks are intensifying as AI-specific legislation emerges globally. In the United States, laws such as Colorado's AI Act, Texas's Responsible AI Governance Act and New York Local Law 144 impose affirmative obligations on AI deployers, including impact assessments, transparency obligations and safeguards against discriminatory outcomes, requirements that are difficult to satisfy without deep visibility into vendor systems. In the EU, the AI Act imposes stringent obligations on high-risk AI uses, with penalties of up to €35 million or 7% of global annual turnover. For boards, the key issue is structural: third-party AI can create a misalignment between regulatory responsibility and operational control, significantly increasing the likelihood of non-compliance, enforcement and reputational harm unless proactively governed.

It is worth noting, however, that despite these regulatory developments, significant political pressure exists in the U.S. to minimize regulatory burdens in favor of supporting innovation, as exemplified by President Trump's December 11, 2025, Executive Order, which escalates federal efforts to prevent state-level AI regulation in favor of a "minimally burdensome national policy framework," including through a task force empowered to challenge state laws inconsistent with federal innovation priorities.[4]

For boards, the key issue is structural: third-party AI can create a misalignment between regulatory responsibility and operational control, significantly increasing the likelihood of non-compliance, enforcement and reputational harm unless proactively governed.

## Recommendations for Board Action

Boards play a critical role in AI governance by setting strategic goals, supervising management and assessing organization-wide AI risks. Boards of companies that incur financial losses stemming from AI may face *Caremark* shareholder derivative suits alleging that directors breached their fiduciary duty of oversight with respect to AI-related risks. Given the rapid evolution of AI technology, the fragmented regulatory landscape and the significant legal and operational risks associated with third-party AI tools, boards and management should prioritize safe and compliant AI use by supporting centralized AI governing bodies subject to board-level oversight to guide implementation. Such steps may include:

- **Assessing whether AI is necessary** by evaluating whether proposed use cases genuinely require AI or whether traditional tools and existing resources can accomplish the same business objective with greater transparency and control, and properly defining anticipated use cases to calibrate risk and tailor diligence, testing and auditing accordingly,

[4] For analysis of the Executive Order, see our December blog post available here.

particularly distinguishing between internal functions and external customer-facing applications;

- **Establishing and approving an AI vendor risk management framework** aligned with recognized standards (*e.g.*, the NIST AI Risk Management Framework) that defines risk appetite and approval thresholds reflecting the business' tolerance for AI-related risks across different use cases, data sensitivity levels and regulatory environments;

- **Allocating resources for vendor diligence and monitoring**, recognizing that AI vendor assessment requires specialized expertise and ongoing oversight beyond traditional technology procurement, including budget for independent third-party auditors with AI expertise to conduct periodic reviews of vendor AI systems, data handling practices and security controls;

- **Implementing vendor transparency requirements**, including obtaining detailed model cards and technical documentation defining the AI system's category, algorithm type, learning methodology and capabilities; scrutinizing training data sources, ownership, legal authorizations and vendor practices for verifying accuracy, mitigating bias and managing model drift and confirming whether vendors use customer data to train models and requiring clear documentation of data handling practices and data reuse limitations;

- **Ensuring vendor contracts contain AI-specific protections,** including explicit restrictions on vendor use of business data for model training or improvement; clear ownership allocation for AI-generated outputs and custom models; robust audit rights permitting periodic review of AI systems, data handling practices and security controls; appropriate indemnification provisions addressing IP infringement and privacy violations and confidentiality protections with technical safeguards (such as data isolation and access controls) to prevent inadvertent exposure of proprietary information through outputs to other users;

- **Addressing AI-specific information security risks**, including vendor safeguards against novel attack vectors such as prompt injection, data poisoning and model inversion; security testing protocols that account for frequent model updates and opaque decision logic and governance controls over agentic AI capabilities to prevent autonomous actions that circumvent traditional enterprise security controls, with particular emphasis on visibility into vendor security practices, model training environments and data handling procedures; and

- **Requiring periodic reporting on high-risk AI vendors**, including updates on vendor security incidents, regulatory developments, contract negotiations and emerging risks that may require board attention or strategic adjustment.

# M&A: 2025 in Review and a Look Ahead to 2026


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At the end of 2024, predictions across the dealmaking industry were broadly optimistic: due to an anticipated combination of loosening financial conditions, a pro-deal regulatory environment from a change in administration and record levels of "dry powder" cash ready to deploy, 2025 was expected to be a transactional boom. While the year ultimately delivered strong (and in many cases, record-setting) results, the aggregate numbers somewhat obscure the more complex story of the 2025 M&A market. A series of fits and starts challenged M&A during the first half of the year, with slower than expected activity in the first two months before dealmaking began to pick up in March. Just as the recovery was building energy, fallout from tariff plans announced by the Trump administration in April created uncertainty across the globe that sidetracked deals, sparked worries about inflation and led to the Federal Reserve delaying its interest rate reduction program until September. Nevertheless, GDP and earnings growth proved resilient and eventual rate cuts plus broad easing of financing conditions lowered the opportunity cost of pursuing bold transactions. Volatility and uncertainty in the first half of 2025 gave way to resurgence and renewed confidence in the second half of the year, leaving the industry once again optimistic that the year ahead will be another for the record books.

- **Return of the Mega Deal**. The U.S. M&A market saw the biggest surge of mega deals (or transactions valued in excess of $10 billion) in the last decade. More impressively, 2025 saw 11 transactions announced with values upward of $30 billion, compared to seven transactions valued at $30 billion or more in 2024 and four in 2023. The aggregate value of deals surpassed $2 trillion in 2025, the highest in value terms since 2021. The boom in mega deals is an important signal that—beyond just executing on long-planned transactions—boards, investors and companies are seeing favorable conditions for the kinds of ambitious and imaginative deals that transform not just companies but the market as a whole. Mega deals boomed across industries—from media and entertainment (the $55 billion Electronic Arts buyout and the $80+ billion bidding war for Warner Bros. Discovery), to transportation (Union Pacific and Norfolk Southern's $85 billion merger) to tech (Google's $23 billion acquisition of Wiz and Palo Alto Networks' $25 billion acquisition of Cyberark)—signaling a fundamental shift in boardroom sentiment and willingness to take big swings boards otherwise may not have taken a year ago.

- **AI as "Super Sector."** While the technology, industrials and healthcare sectors all saw historic dealmaking levels in 2025, the year's biggest growth story was the artificial intelligence boom. From SoftBank's $40 billion investment in OpenAI to massive infrastructure commitments like the $500 billion Stargate Project, major AI-related transactions defined the year. Enthusiasm for AI-related investment and transactions does not appear to be slowing down, and AI infrastructure, platform consolidation and strategic partnerships are expected to continue to drive deal activity in 2026. The critical constraint for AI dealmaking has shifted from chip availability to power availability; as a result, M&A in the energy and utilities sectors has become intrinsically linked to the AI super sector's growth. AI's interconnectedness has also reached into the credit sector; the unprecedented wave of bond issuance by hyperscalers to fund data centers, exceeding $120 billion in 2025 (with over $90 billion in new debt since September 2025), adds a layer of credit risk and scrutiny that was less prevalent in 2024. This space warrants close attention as it continues to capture an increasingly large part of the economy.

- **Private Equity: Big Deals Return, but Exit Pressures Persist**. While sponsors continue to sit on significant dry powder and private equity transactions still fall short of the all-time high volume seen in the pandemic era, we are nevertheless seeing the return of mega deals in private equity as sponsors focus on larger, higher-value transactions. The $55 billion EA buyout led by Silver Lake, Saudi Arabia's Public Investment Fund and Jared Kushner's Affinity Partners—the largest private equity buyout of all time—and Sycamore Partners' $23.7 billion leveraged buyout of Walgreens Boots Alliance, taking the company private and ending its almost 100-year run as a public company, demonstrated that sponsors have more confidence in navigating the regulatory environment and are willing to pursue massive, complex, high-profile transactions. On the one hand, this momentum is a cause for confidence and, as we noted in our 2025 memo,[1] robust private equity activity is an important driver of overall M&A activity. On the other hand, there are reasons for caution; while exit values have begun to rise year-over-year since post-pandemic lows, the industry is still grappling with a record backlog of aging portfolio companies and median hold times that remain above historical norms, forcing sponsors to rely on continuation vehicles for liquidity more frequently than they (and their limited partners) might otherwise prefer.

  We expect 2026 to see continued pursuit of transformative transactions, particularly if interest rates continue to decline and the valuation gap between buyers and sellers continues to narrow. Sponsor-to-sponsor deals will remain critical to clearing the exit backlog and traditional exit channels—IPOs and strategic sales—should improve modestly as market conditions normalize. Alternative liquidity tools, including dividend recaps, NAV financing, large rollovers and single-asset and multi-asset continuation funds, will continue to play a supporting role but cannot fully substitute for traditional exits over the long term.

[1] Our 2025 memo on M&A and activism is available here.

- **Sovereign Wealth Funds: A New Force in Dealmaking.** Sovereign wealth funds appear to be changing their investment strategies and are more aggressive than they were two or three years ago, as Middle Eastern countries continue to diversify their holdings beyond oil. The EA deal was a bellwether: sovereign wealth funds are becoming more assertive players in large-scale M&A and are willing to deploy substantial capital alongside traditional private equity sponsors. Subject to CFIUS and other foreign direct investment regulatory considerations, sovereign wealth funds are looking to take a more active role in management commensurate with the size of their equity checks. This activity represents a substantial amount of capital that can reshape the deal market, and so far, these funds seem very comfortable deploying it, notwithstanding increasing FDI regulation.[2] This trend is likely to accelerate in 2026, potentially reshaping competitive dynamics for mega deals. Boards should anticipate sovereign wealth funds as increasingly common bidders and co-investors, particularly in technology, infrastructure and other strategic sectors.

- **Regulatory Landscape: Elevated Scrutiny with Practical Pathways.** Relative to the prior administration, antitrust regulators have generally moved toward a more pro-deal tenor. Regulators have returned to a more traditional antitrust agenda, with agency attention focused on market definitions, more traditional definitions of competitive harm and a renewed receptiveness to behavioral and structural remedies to problematic transactions (such as requiring the divestiture of specific assets or business units).

  Moreover, some dealmakers and executives have seen a benefit from advocating directly to the executive branch. With regulatory agencies being seen as increasingly responsive to political imperatives (including encouraging deals), companies are more willing to take a swing at deals that merge direct competitors. This dynamic creates both opportunity and risk. While there may be pathways to approval for deals that would have faced significant obstacles in the prior administration, parties should not assume that political intervention is a reliable strategy. Dealmakers should continue to expect rigorous antitrust enforcement, particularly in concentrated industries and transactions involving data, digital platforms or supply chain implications, and should continue to invest in "fix it first" strategies as they pursue their regulatory planning. Elevated antitrust reverse termination fees, long outside dates and heavily negotiated regulatory covenants, which became de rigueur in the prior administration, are likely to remain features of the current deal cycle.[3]

We expect 2026 to see continued pursuit of transformative transactions, particularly if interest rates continue to decline and the valuation gap between buyers and sellers continues to narrow.

As we enter 2026, the momentum from 2025's M&A boom is expected to continue, supported by improving macroeconomic conditions (including anticipated further interest cuts), more predictable regulatory enforcement, substantial private equity dry powder, a spike in lending as Wall Street's appetite for debt increases, increased boardroom confidence and enthusiasm and the potential emergence of sovereign wealth funds as major players. Yet challenges remain: circular AI deal structures warrant scrutiny, exit pressures persist for private equity and the regulatory environment—while more deal-friendly—remains rigorous and at times unpredictable. Ultimately, the leading catalyst for near-term activity is the desire to move decisively on strategic priorities and complete transactions while the current environment remains favorable. This sense of urgency, fueled by the perception that the current window may not remain open indefinitely, is likely to drive deal velocity through the first half of 2026.

2 For additional information on CFIUS and FDI, see our trade controls article elsewhere in this memorandum.

3 For additional information on antitrust regulation, see our antitrust article elsewhere in this memorandum.

# 2025 Shareholder Activism Trends and What to Expect in 2026


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From an activism perspective, 2025 was a record-breaking year, with more campaigns waged than ever across an increasingly diverse spectrum of public companies. While many themes continued from years prior, various regulatory and structural changes have shifted the landscape for companies and shareholders alike. Shareholder activism has become a feature of the public markets that almost all issuers have to deal with at some point, regardless of their size, reputation, maturity or corporate governance structure.

In 2025, dissidents targeted boards and executives in elevated numbers: activist hedge funds and other investors using activist tactics waged a record number of activism campaigns.

- **Board and Executive Refreshment.** Activists continued to seek and secure board seats at a high rate, the vast majority through settlement agreements, including in the U.S., where over 90% of board seats designated by activists were pursuant to a negotiated arrangement, reflecting a continuing trend following the adoption of the universal proxy rules in 2023. A significant number of these settlements led to swift CEO resignations, regardless of whether the CEO had been specifically targeted by the activist. In 2025, 32 CEOs resigned within one year of an activist campaign, which is the highest number on record and a 60% increase from the previous four-year average.[1]

[1] Barclays Shareholder Advisory Group, "2025 Review of Shareholder Activism" (January 9, 2026), available here.

In 2025, 32 CEOs resigned within one year of an activist campaign, which is the highest number on record and a 60% increase from the previous four-year average.

- **M&A**. Global campaign activity generally surged in the second half of the year and 61% of activist campaigns in Q4 2025 had an emphasis on M&A, which is the highest portion in five years.[2] Given the robust M&A market that closed 2025 and widespread calls for companies to streamline corporate structures, we believe activists will continue pressuring companies with M&A-focused demands in 2026.[3]

- **"Vote No" Campaigns**. During 2025, there was also a notable increase in "withhold" or "vote no" campaigns relative to prior years. While this type of campaign often is not as an impactful as a full-scale proxy contest, it is an inexpensive and disruptive way for activist investors and disgruntled shareholders to exert pressure on boards, sending a strong message that they are dissatisfied with the status quo. In 2025, several such campaigns led to board and/or executive level changes as well as pushes for M&A.

- **Investor Day Campaigns**. 2025 also saw a number of investor day-focused activist campaigns, where the activist sought to influence a company's direction by leveraging the attention and company platform of an investor day event. Increasingly, activists have also asked for various forms of contractually mandated board access arrangements.

The results from the high profile contested elections in 2025 marked an increased divergence between proxy advisor recommendations and institutional shareholder support. In 2025, leading proxy advisors generally increased their support for dissident nominees in contested elections. Such support did not, however, necessarily translate to success at the ballot box. Activists suffered losses and split votes in many of the highest profile proxy fights of the year due to the failure to secure the support of key institutional shareholders. In that respect, 2026 may prove to be a pivotal year for companies seeking to build credibility and strengthen long-term relationships with institutional shareholders, as investors adjust how they structure and operate their stewardship programs and proxy advisors continue to face greater scrutiny (and potentially greater regulation) with respect to their recommendations generally.

Activists suffered losses and split votes in many of the highest profile proxy fights of the year due to the failure to secure the support of key institutional shareholders.

In preparation for shareholder activism in 2026, boards and management teams should consider the following key takeaways from 2025:

- **Prepare for more and increasingly focused campaigns, sometimes seeking incremental change**. The universal proxy rules continue to favor settlements and decrease the likelihood of full victories by either side. Activists have responded to the new rules by assembling higher quality slates and targeting fewer but often obviously vulnerable directors (in terms of age and tenure). The leading activist hedge funds are also showing an increased appetite and patience for multi-year campaigns to accomplish their goals. Issuers can stay ahead of activist demands by continually assessing director profiles and potential vulnerabilities, refreshing their boards and maintaining a strong pipeline of potential director candidates, while enhancing director biographies and proxy disclosures to show that the board possesses the skills and qualifications necessary to oversee execution of the company's strategic priorities.

[2] *Id.*

[3] For additional information on M&A trends for 2026, see our M&A article elsewhere in this memorandum.

- **Proxy advisors are under unprecedented pressure and their support does not predetermine meeting outcomes—revisit your approach with institutional shareholders**. The most effective activism defense starts long before there is an activist shareholder knocking on the door. Companies can repel activist shareholders—even when they get the support of proxy advisors—by earning the support of significant institutional shareholders through regular engagement with their stewardship teams and responsiveness to their concerns. In 2026, proxy advisors could face increased SEC scrutiny following the Executive Orders from the current administration, which could potentially lessen their impact. Meanwhile, major institutional investors are increasingly splitting their stewardship teams to separate the functions and priorities of index funds and actively managed funds, allowing for more specialized and potentially divergent approaches to corporate governance. Many institutional investors have also taken a more passive approach to shareholder engagement given recent 13D guidance from the SEC.[4] In light of these trends, companies should reassess and refresh their shareholder engagement programs to maintain an active dialogue with their institutional shareholders, while reflecting their voting guidelines and concerns.

- **Regularly reexamine your business portfolio and capital allocation**. Resurgent M&A activity coupled with increased scrutiny of complex corporate structures will likely lead to greater risk for multi-dimensional businesses. Continuous review of a company's portfolio and capital allocation policies, coupled with proactive communication plans, will help to maintain positive relationships with shareholders and can avoid surprise attacks by activists.

- **Refresh communication strategies**. Issuers suffering from poor performance often benefit from communicating to shareholders the reasons for the strategic decisions made to date, and how such decisions will be accretive to the company's long-term value. In addition to consulting counsel, companies may want to engage communications advisors to help tell their story. Consistency, clarity and brevity should characterize all corporate communications, and getting an early start can help avoiding sounding defensive.

- **Be prepared for off-cycle activism**. Campaigns by top-tier activist investors are no longer confined to the annual meeting cycle. In fact, large activist hedge funds increasingly attack issuers long before nomination windows open. Therefore, we encourage and work with boards to always "think like an activist" and proactively identify potential strategic, governance or personnel issues that an activist may seize upon in the "off-season." Conducting activism vulnerability assessments and refreshing activism preparedness plans on an annual basis has become necessary and essential.

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4 For additional information on the SEC's 13D guidance, see our February alert memo available here.

# Navigating the Evolving Global Antitrust Landscape


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Antitrust in 2025 was marked by policy developments and antitrust enforcement that, while remaining aggressive, became less overtly anti-business. The U.S. continued a number of cases from the Biden administration, but became more open to settlements, while continuing implementation of the new and more burdensome HSR merger notification form and of the more aggressive and less economically focused 2023 Merger Guidelines. The European Commission conducted a series of DMA enforcement actions and launched a broad-sweeping consultation on the Merger Guidelines. The UK CMA continued a tack toward a more restrained approach to enforcement, taking greater account of growth and suggesting it would allow greater flexibility in merger remedies. The Chinese State Administration for Market Regulation started to intervene in transactions below the filing thresholds and continued to keep antitrust in its toolbox for tackling geo-political tensions.

## U.S. Antitrust Developments

2026 is unlikely to bring dramatic changes to the U.S. antitrust landscape. As we predicted in last year's memo, aggressive enforcement continued. However, the tone became more accommodating of settlements and less overtly anti-business.

As described in more detail below, the Trump administration continued holdover conduct cases from the Biden administration, but dismissed a merger challenge to American Express Global Business Travel's (Amex GBT) acquisition of CWT, a rival travel agent. On Big Tech conduct cases, the Trump administration had two trial victories (Google Search, Google Ad Tech), but lost its retrospective challenge to Meta's acquisitions of WhatsApp and Instagram. On mergers, the Trump administration lost its first fully litigated challenge (GTCR/Surmodics), won its second (Edwards Lifesciences/JenaValve) and settled several cases. The Trump administration has also been subject to allegations about increased political influence in the merger review process.

In part due to a relatively slow M&A market in the early to middle part of 2025, we have seen relatively few investigations that started during the Trump administration make it all the way through the process. Thus, 2026 will be an important year to see the ultimate direction of antitrust under the Second Trump administration.

### Shift to a Slightly More Favorable Deal Atmosphere, Especially on Settlement, and to More Traditional Theories Outside of Politically Charged Areas

President Trump's key appointees are Andrew Ferguson as Chairman at the FTC and Gail Slater as Assistant Attorney General (AAG) at the Antitrust Division. Both are close to Vice President JD Vance and associated with the pro-enforcement Republican populist faction. Chairman Ferguson and AAG Slater kept the much-criticized Biden administration changes to the HSR notification form and to the Merger Guidelines. Chairman Ferguson explained the decision as driven by stability, stating "[i]f merger guidelines change with every new administration, they will become largely worthless to businesses and the courts."[1]

Nonetheless, we expect continued movement toward more traditional theories of harm, focusing on horizontal overlaps and traditional vertical cases. The Trump administration has also been willing to resolve cases through settlement. Biden DOJ AAG Jonathan Kanter in particular had denounced settlements as tools of "creeping concentration." In contrast, AAG Slater stated

[1] Chairman Andrew N. Ferguson "Merger Guidelines" (February 18, 2025), available here.

the DOJ is "willing[] to settle merger reviews with targeted and well-crafted consent decrees."[2] The DOJ and FTC have settled several significant cases, including HPE/Juniper and Synopsys/Ansys. Although the FTC rejected a divestiture in GTCR/Surmodics, which Cleary successfully defended, the court accepted the divestiture, continuing a string of recent cases where courts accepted party-proposed settlements over agency objection.

We expect continued movement toward more traditional theories of harm, focusing on horizontal overlaps and traditional vertical cases.

Notwithstanding the overall more traditional approach, the agencies have signaled hostility to DEI, ESG and the potential censorship of conservative voices. For example, the FTC issued a CID to Media Matters over alleged advertiser boycotts of X and secured a provision barring viewpoint discrimination in ad spending in a consent decree related to the Omnicom Group/IPG merger. Thus, companies should be particularly cautious about DEI and ESG initiatives that involve agreements with other companies.[3]

### Continued Staff and Organizational Challenges

From a staff perspective, morale declines—which started in the Biden administration—continued and staff continued to depart. Due to the departures, the agencies have a more junior and less experienced staff, potentially resulting in less feedback during the merger review process and more unpredictability in enforcement.

The FTC also continues to see constitutional challenges to its authority and organization, though the practical effect on deals and investigations will be limited. In March 2025, President Trump fired the FTC's two Democratic Commissioners, resulting in a pending Supreme Court challenge to *Humphrey's Executor*, which upheld the constitutionality of for-cause removal protections on the grounds that the FTC exercised "quasi-legislative and quasi-judicial power." A Supreme Court decision is likely in mid-2026, but the FTC is now operating with only two Republican Commissioners. There are also Constitutional challenges pending involving the FTC's internal court system. The FTC now seems to be trying to avoid this issue by suing only in federal court as it did in its case against Henkel/Liquid Nails filed in December 2025.

### Continued Aggressive Litigation, but a Mixed Record

The Trump administration's cases, several of which were hold-overs from the Biden administration, had success on conduct matters, but a mixed record on mergers.

- **Google Search (conduct, DOJ win on merits, without requested remedy).** The First Trump administration sued Google in 2020 for monopolizing online search through agreements requiring Google to be a device's default search engine. In August 2024, the court ruled for DOJ on the merits, but rejected the DOJ's request to break up Google, instead mandating certain data sharing and restricting exclusive contracts.

- **Google Ad Tech (conduct, partial DOJ win, pending remedies).** The Biden administration sued Google in 2023 for monopolizing the publisher ad server and ad exchange markets through tying Google's publisher ad server to its ad exchange (AdX) and other conduct such as a first right of refusal and the ability to see other AdX bids. In April 2025, the court ruled for the DOJ, and a decision on remedies is pending.

[2] U.S. Department of Justice Office of Public Affairs, "Statement on Revocation of Biden-Harris Executive Order on Competition" (August 13, 2025), available here.

[3] For additional information, see our article on DEI-related risks elsewhere in this memorandum.

- **Meta/WhatsApp/Instagram (mergers, FTC loss).** The First Trump Administration sued Meta in 2020 for monopolizing personal social networking by acquiring Instagram and WhatsApp many years earlier, even though neither deal was challenged at the time. In November 2025, the court ruled for Meta, finding the FTC had not demonstrated Meta has a monopoly in personal social networking.

- **GTCR/Surmodics (merger, FTC loss).** In March 2025, the FTC challenged GTCR's acquisition of Surmodics. The companies made different types of hydrophilic coatings for lubricating medical devices. Cleary, representing GTCR, successfully defended the merger. The court found several arguments persuasive, but most notably accepted a divestiture and license back arrangement. The case continues a trend of parties successfully "litigating the fix," where parties offer commitments and litigate their sufficiency despite agency objections.

- **AMEX/CWT (merger, DOJ withdrew challenge).** In July 2025, DOJ dismissed a Biden administration case to block the merger of Amex GBT and CWT, two of the largest travel management services companies. Unusually, AAG Slater pointed to limited enforcement resources as the reason for withdrawing the challenge.

- **HPE/Juniper (merger, DOJ settled).** In June 2025, DOJ settled a suit to block the acquisition of Juniper Networks Inc. by HPE, alleging that the transaction would combine the second- and third- largest providers of enterprise-grade WLAN solutions in the U.S. The settlement required HPE to divest its "Instant On" WLAN business.

- **Edwards Lifesciences/JenaValve (merger, FTC win).** In August 2025, the FTC challenged the combination of two pre-commercial devices for treating heart conditions.

The FTC also has two pending litigations, signaling continued aggressiveness in enforcement. In Zillow/Redfin, the FTC challenged the strategic partnership and licensing agreements entered into between Zillow and Redfin, with trial expected in the early summer. In Henkel/Liquid Nails, the FTC challenged a merger of construction adhesive providers, with trial expected in summer 2026. Cleary is defending both litigations.

### Allegations of Political Influence at DOJ

DOJ's settlement of the HPE/Juniper merger challenge resulted in allegations of political influence. Many accusations have been made but few concrete details are currently available.

The circumstances of the proposed settlement were unusual. Reportedly, AAG Slater rejected the proposed settlement, but following meetings with Chad Mizelle, then Chief of Staff to AG Pam Bondi, the AG's office overruled the Antitrust Division's opposition. Unusually, the settlement was not signed by Antitrust Division staff.

Shortly after the settlement was proposed, two deputies to AAG Slater, Roger Alford and Bill Rinner, were fired for "insubordination." Alford has since cited the settlement as a "pay-to-play" approach to antitrust enforcement that he says he witnessed at DOJ.[4]

In November 2025, a court allowed 13 states to intervene in its settlement review required under the Tunney Act. This intervention could lead to more information about how the settlement came to be.

More recently in another merger, Compass / Anywhere Real Estate, public reporting suggested that the Antitrust Division had decided to issue a "Second Request" to investigate the transaction in depth. However, that was reportedly overruled by the Deputy Attorney General. A spokesperson for the Deputy Attorney General confirmed that the investigation had been closed and noted that the DOJ could investigate after closing if it anticompetitive effects were observed.[5]

[4] See Roger Alford, "The Rule of Law Versus the Rule of Lobbyists" (August 18, 2025), available here; Wall Street Journal, "Bondi Aides Corrupted Antitrust Enforcement, Ousted DOJ Official Says" (August 18, 2025), available here.

[5] Wall Street Journal, "Real-Estate Brokerages Avoided Merger Investigation After Justice Department Rift" (January 9, 2026), available here.

Although these events should be carefully watched, companies should be thoughtful about engaging lobbying efforts. The vast majority of transactions are being cleared without any lobbying, and lobbying efforts also have their own complexities.

### State Enforcement

This year, a few states adopted laws requiring parties with connections to the state to also send their HSR form to the state. These laws went into effect in Washington in July and Colorado in August; California and New York are also considering merger notification laws.[6] Thus far, these laws have had little impact.

State AGs have also asserted they will aggressively pursue merger enforcement, but states have not independently brought a significant merger challenge since TMobile/Sprint, which closed in 2020 following Cleary's litigation victory. States often file cases alongside the federal government under the federal antitrust laws, but they can also file their own lawsuits under either federal or state law. For example, in a challenge to the Kroger/Albertsons transaction, Colorado filed a case in Colorado state court. We expect challenges in multiple states to remain rare and confined to transactions with high political salience.

## European Antitrust Developments

2025 marked the first year of Executive Vice President Ribera's leadership and was characterized by robust behavioral and transactional enforcement. 2025 also saw wide-ranging consultations and reviews of the Commission's principal enforcement tools, including merger control. Uncertainty about the scope for call-in and referral of deals below notification thresholds continued to impact M&A.

2026 will see publication of several (draft) revised guidelines setting out the Commission's enforcement priorities. We anticipate more flexible, policy-aware merger control. Early, comprehensive deal planning will remain critical in 2026. Companies should proactively assess call-in and referral risks, potential exposure arising from existing minority shareholdings in competitors, and, where possible, ensure that transaction rationales are well aligned with wider EU policy objectives.

With respect to conduct enforcement, companies should expect continued intervention, including based on novel theories of harm, such as algorithmic collusion.

> Companies should proactively assess call-in and referral risks, potential exposure arising from existing minority shareholdings in competitors, and, where possible, ensure that transaction rationales are well aligned with wider EU policy objectives.

### Renewed Interest in Minority Shareholdings

In 2025, the Commission raised concerns that minority shareholdings in rivals could facilitate collusion.

- **Delivery Hero/Glovo.** In June, the parties were fined €329 million for a cartel facilitated by Delivery Hero's 15% non-controlling stake in Glovo, an online food delivery rival. Delivery Hero's representation on Glovo's board enabled the two firms to regularly exchange sensitive information, allocate geographic markets and strike a no-poach deal not to solicit each other's employees. This marks the first fine involving the anticompetitive use of minority shareholdings and the first labor market infringement under EU competition rules.

- **Naspers/Just Eat Takeaway (JET).** In August, the Commission approved Naspers' acquisition of JET on the condition it divest within 12 months most of its subsidiary Prosus' 27.4% shareholding in food delivery rival Delivery Hero. Prosus may not expand

[6] For additional information, see our May alert memo on Washington, available here, and our June alert memo on Colorado, California, and New York, available here.

its shareholding beyond a specified percentage, vote related voting rights or appoint/recommend board members related to its portfolio companies or itself.

The Commission had concerns that the structural links between JET and Delivery Hero would decrease JET's incentive to compete with Delivery Hero and make tacit coordination more likely, which could lead to higher prices, market exits or prevent entry.

These cases show that, while owning a stake in a rival firm is not in itself illegal, the Commission will assess whether such stakes will lead to collusion.[7] Minority shareholdings will be carefully reviewed in merger control. And, where they are permitted, companies should put clear guardrails in place to prevent the exchange of commercially sensitive information or coordination of activities.

### Increased Scrutiny of Public Statements and Earnings Calls

The Commission has long taken the view that companies who signal future strategies to one another via public statements can infringe competition law. In 2025, the Commission defended launching inspections in the tire industry based on suspected unlawful signals in earnings calls detected by the Commission via an extensive AI review of earnings call transcripts.

In 2024, the Commission had conducted unannounced inspections at several tire manufacturers, suspecting that they had exchanged strategic signals through earnings calls. Michelin challenged the inspection, arguing that unilateral statements made in earnings calls could not infringe competition law and therefore did not justify an inspection.

In July 2025, the General Court rejected the challenge, finding that statements by multiple companies in the same industry such as "we expect the industry to follow," "we will maintain pricing discipline," "we want to send a signal," and "we strive to stick to [the price increase]," often in response to others' statements, were "sufficiently serious evidence to support suspicions" of illegal coordination, justifying the Commission's inspection.

The Court did not decide whether the statements actually violated the law, only whether an inspection was justified—a lower standard. It was nonetheless clear that the Court considered public statements intended to reduce market uncertainty or signal strategies to competitors as potentially unlawful.

During the proceedings, the Commission revealed its use of AI to analyze a purpose-built database of 100,000s of earnings call transcripts across industries and geographies. The Commission examined transcripts more closely where the algorithm found a high incidence of statements related to forward-looking strategic business decisions or referencing competitors' behavior to assess whether statements were signals to competitors.

Companies should carefully review any public forward-looking strategic or pricing statements, even when previously considered neutral or typical. Avoid language that could be perceived as signaling or reducing uncertainty on competitive parameters such as "we will follow our competitors," "the industry must" or "we must avoid a price war," and do not comment on competitors' future conduct, even when prompted by analysts or investors.[8]

### Uncertainty Around Below-Threshold Transactions

The Commission formally lacks jurisdiction over mergers below EU and national notification thresholds, but the Commission and national competition authorities have pursued workarounds to review such deals.

First, there has been a proliferation of national authorities that can call-in below-threshold deals. Once called in, the authority can refer these to

[7] For additional information, see our June alert memo available here.

[8] For additional information, see our December alert memo available here.

the Commission for review. The Commission has encouraged this practice, although this is currently being challenged in court.

Second, several national authorities have challenged proposed and completed below-threshold transactions citing authority under behavioral antitrust rules.[9]

Together, these trends add complexity to M&A review. Companies should carefully assess call-in, referral and antitrust risk in transaction planning, even where deals are below thresholds.

**EU Merger Guidelines Review: What to Expect**

In May 2025, the Commission launched a broad consultation on the 20-year-old EU Merger Guidelines, which set out its analytical framework for assessing mergers. The review responds to calls for more forward-looking and agile merger control.

Draft revised guidelines are expected in spring 2026, with final guidelines by late 2026 at the earliest. We do not expect any radical reforms, but merger assessment will likely be more nuanced and policy-aware going forward. This creates openings for companies to highlight innovation, efficiencies and other policy-related benefits. Taking advantage of these openings requires incorporating them early in deal planning, including by developing a clear and well-documented transaction rationale aligned with these considerations.

**EU Digital Enforcement: Transatlantic Friction and Robust Enforcement**

The Commission remained active in traditional antitrust enforcement—fining Google €2.95 billion for abusing its dominance in online advertising by favoring its own ad tech services—but the spotlight shifted to formal enforcement of the EU's Digital Markets Act (DMA) in 2025.

[9] For additional information on one such example, see our November alert memo available here.

In April 2025, the Commission adopted its first decisions, fining Apple €500 million based on findings that it breached the DMA's rules against preventing business users from steering end users to third-party distribution channels in relation to App Store, and Meta €200 million based on findings that it failed to ensure effective user choice under its "consent or pay" model for Facebook and Instagram.

The Commission also launched a public consultation on the DMA in July and consulted on the draft DMA privacy guidelines in October, signaling closer scrutiny of data-related compliance. In November, it opened investigations into whether the DMA applies to AWS and Microsoft Azure' cloud computing services. 2025 also featured parallel national actions leading to fragmentation and duplication, outcomes the DMA was intended to avoid.

2026 will be marked by continued scrutiny and enforcement of antitrust rules and the DMA. Further guidance should clarify key obligations' scope, but may be challenged in court. Greater alignment among Member States will be essential.

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**Strong FSR Enforcement**

2025 marked the second year of foreign subsidy enforcement in Europe, with the review of approximately 90 mergers. The Commission's first in-depth merger decisions focused on unlimited UAE state guarantees to acquirers and potential subsidies to EU targets. Both were cleared with behavioral remedies eliminating those guarantees; *e&/PPF* also required ring-fencing of EU targets; while *ADNOC/Covestro* included commitments to share sustainability patents. Looking ahead, new FSR enforcement guidelines expected early 2026 should bring greater clarity.

## UK Antitrust Developments

### A Recalibrated UK Regulator, Aligned with Growth Objectives

In 2025, the CMA adjusted both its tone and its priorities following the UK Government's strategic steer and changes in its leadership. While the CMA continues to emphasize promoting competition and protecting consumers, it now frames its work more explicitly in terms of supporting economic growth. This has translated into greater selectivity in enforcement, clearer prioritization and an explicit commitment to faster and more proportionate outcomes.

The recalibration points to a regulator that is more conscious of the costs of intervention—particularly in mergers—while remaining prepared to act decisively where it sees clear harm to UK consumers or competition.

### UK Merger Control: Flexibility and Restraint

UK merger control has seen the most visible shift. The CMA signaled greater willingness to step back from global transactions where UK-specific issues are minimal and effective remedies are imposed overseas. This new "wait-and-see" approach reduces the likelihood of duplicative UK intervention in multinational deals where the merger parties have limited UK presence.

The CMA has also reset its approach to remedies, moving away from a preference for structural divestments and being more open to behavioral and hybrid remedies.[10] Recent cases show the CMA is willing to resolve issues in Phase 1 and to align with other authorities on remedies.

Over the coming year, institutional reform may further reshape UK merger control. The government is consulting on whether to increase the influence of CMA staff over merger and market-investigation outcomes by abolishing the existing independent panel of decision makers and centralizing authority.

Companies should address UK merger risk early and systematically—by identifying UK issues upfront, coordinating across jurisdictions and developing credible non-divestment remedies where appropriate. While the CMA may be more open to negotiated outcomes, it will still intervene where UK interests are at stake, making early planning and execution discipline critical.

### Consumer Protection: A New Enforcement Model with Material Upside Risk

The DMCC Act came into force this year and fundamentally changed UK consumer enforcement. The CMA can now take infringement decisions itself—instead of having to take defendants to court—and impose significant financial penalties of up to 10% of global turnover. This administrative model is designed to deliver faster, more visible enforcement and stronger deterrence.

The CMA has stated that it will initially prioritize the most egregious breaches, with particular attention to practices that exploit consumer vulnerability. It has made transparent pricing a strategic priority, launching a cross-economy review of online pricing practices and opening investigations across live events, services and retail. For boards, this is not a narrow legal issue. Pricing architecture, subscription models, cancellation mechanics and online choice design can be core to commercial strategy. Companies must be prepared to explain who owns consumer compliance across the customer journey, how digital experimentation is constrained by legal guardrails and what metrics are used to identify potential harm before it escalates into enforcement action.

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[10] For additional information, see our November alert memo available here.

### Market Investigations: Sharper Focus and Increased Use of this Tool

The CMA is making greater use of market studies and investigations, particularly in consumer-facing sectors linked to cost-of-living pressures. In 2025, this included work on veterinary services, infant formula and private dentistry, continued monitoring of retail petrol prices and a market study into civil engineering focused on public infrastructure and economic growth. Market investigations are increasingly used to push for legislative reform and shape outcomes across whole sectors of the economy.

The CMA has signaled that it intends to rely more heavily on this tool as part of a more proactive and coordinated regulatory strategy. Companies should treat market studies as strategically significant events: early engagement, a clear evidence-based narrative on consumer outcomes and investment incentives, and coordinated regulatory and public-policy responses will be critical once a market study or investigation is launched.

### Private Damages: Maturing Regime, Persistent Exposure

Collective proceedings—the UK version of class actions—continued to mature in 2025. Outcomes were mixed, with several high-profile claims failing at trial or at certification, reflecting more rigorous scrutiny of class representatives, funding arrangements and legal foundations. The Competition Appeal Tribunal took a closer interest in how settlements are structured and damages distributed.

Although new claims slowed during the year, uncertainty around litigation funding is easing, and new actions continue to be filed. Companies should assume collective actions—both follow-on and standalone—remain a live risk, and that procedural discipline and early assessment of litigation strategy are increasingly important.

## China Antitrust Developments

### Active Intervention in Below-Thresholds M&A Transactions

China's antitrust authority SAMR has actively intervened in transactions below the Chinese filing thresholds, including by exercising its discretionary power to call in such transactions. This trend became particularly evident following the increase in Chinese filing thresholds in 2024. Since then, SAMR has intervened in at least five below-thresholds transactions, of which, three were approved with conditions, one was prohibited, and one remains pending. Notably, SAMR exercised its call-in power against Yongtong Pharmaceuticals/Huatai Pharmaceutical, a domestic pharmaceutical merger, nearly six years after the deal closed, ultimately issuing its first-ever unwinding order to a closed transaction. These five cases involved either semiconductors or pharmaceuticals, industries critical to China's national economic interests and technological autonomy.

SAMR's increased use of its call-in power creates significant uncertainty for transaction parties, particularly given that several aspects of the mechanism remain unclear, including evidentiary standards for a call-in, procedural rights and available judicial remedies for the relevant parties, and the statute of limitations on SAMR's authority to review closed transactions. Companies should analyze potential substantive even for below-threshold deals.

### Rising Personal Liability Risks

In 2025, SAMR imposed fines of RMB 500,000 (~$70,000) or RMB 600,000 (~$85,000) on individuals in two landmark cartel cases in the pharmaceutical industry, about half the maximum.

China introduced personal liability for anticompetitive agreements in the 2022 amendments to its Anti-Monopoly Law. SAMR can fine relevant employees up to RMB 1 million (~$140,000). Relevant employees include legal representatives, principal persons-in-charge, and other directly responsible personnel. These two cases were the first to apply this new provision.

Companies should pay particular attention to work their employees and agents do with groups of competitors. The law imposes liability up to RMB 5 million (~$704,000) for "organizing or providing substantial assistance to" other undertakings to reach anticompetitive agreements. In one of the two cases, SAMR imposed this maximum penalty on an individual (not an affiliated employee) who coordinated communications between competitors and leveraged industry resources and capital to facilitate price coordination.

### Rulemaking: Toward Greater Enforcement Predictability?

In 2025, SAMR issued new guidelines to promote transparency, including:

- **Antitrust Guidelines for the Pharmaceutical Sector;**
- **Discretionary Criteria for Administrative Penalties for the Illegal Implementation of Concentrations of Undertakings;**
- **Non-Horizontal Merger Review Guidelines;**
- **Draft Antitrust Compliance Guidelines for Internet Platforms**; and
- **Amendments to Provisions on Prohibition of Monopoly Agreements**, which introduce a new safe harbor regime for vertical agreements, applicable to both RPM and non-price related vertical agreements.

SAMR also began publishing decision summaries for unconditional approvals in selected "typical" cases to provide greater insight into SAMR's decision making.

### Continued Antitrust Scrutiny of U.S. Firms Amid Geopolitical Tensions

During the larger part of 2025, as the trade geopolitical tensions intensified, SAMR launched and pursued investigations into several large U.S. firms, including NVIDIA, Google, DuPont and Qualcomm. Following the trade détente reached between Beijing and Washington at different points during 2025, including most recently in October 2025, these investigations have been either suspended or maintained at a lower profile. However, should trade tensions escalate again, SAMR may resume its assertive antitrust enforcement against U.S. companies as a retaliatory mechanism or strategic lever.

# Trade Controls, Foreign Investment and National Security: New Regimes and Continuing Changes for 2026

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In 2026, boards of directors will continue to navigate a shifting U.S. regulatory environment shaped by an assertive and transactional approach to trade and national security. Uncertainty surrounding the most significant U.S. trade development in decades continues into the new year as the U.S. Supreme Court is expected to rule in the coming weeks on the validity of the "reciprocal tariffs" imposed by the second Trump administration against most U.S. trading partners.

Beyond tariffs, 2025 included the introduction of new regulatory regimes restricting U.S. outbound investment and cross-border data flows involving China and other so-called "countries of concern," while the sanctions and export control environment intensified in late 2025, with the introduction (and subsequent one-year suspension) of the "Affiliates Rule" and sanctions against Russian oil producers Rosneft and Lukoil. Taken together, these developments may require companies and their boards of directors in 2026 to fundamentally reassess supply chain and investment strategies, compliance architectures and vendor relationships.

## Evolving U.S. Tariff Landscape

At the start of the second Trump administration, the U.S. government enacted sweeping tariffs on a significant portion of imports entering the United States. These measures included an initial reciprocal tariff framework supplemented by targeted country-specific escalations. Although the most expansive of these tariffs—the so-called "reciprocal tariffs"—are expected by many to be overturned by the Supreme Court in early 2026, President Trump and senior members of his administration have signaled their commitment to an expansive tariff agenda, potentially relying on alternative legal authorities to reinstate any tariffs that may be overturned. Concurrently, the Trump administration has continued to advance tariffs under more conventional statutory authorities, a practice expected to continue into 2026.

In addition, the U.S.-Mexico-Canada Agreement (USMCA) requires the three countries to review the agreement by July 1, 2026. How the review will unfold is uncertain, but the U.S. Trade Representative (USTR) reported to Congress that "a rubberstamp of the Agreement is not in the national interest" and that the USTR would consider both bilateral and trilateral arrangements to address a list of Trump administration concerns, including rules of origin, critical minerals and economic security alignment.[1]

In light of the above, boards may consider assessing exposure to potential changes in tariffs across key products, suppliers and markets, as well as mitigation strategies such as supply-chain diversification, tariff evaluations, supplier negotiations, cost reductions, exclusion requests and use of foreign trade zones.

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## Inbound and Outbound Investment Restrictions

In February 2025, President Trump issued the America First Investment Policy, which set forth a policy to "cease the use of overly bureaucratic, complex, and open-ended 'mitigation' agreements" in reviews conducted by the Committee on Foreign Investment in the United States (CFIUS). The Trump administration also has advanced a new expedited "fast-track" process for investments from certain investors in allied countries. CFIUS currently is conducting a pilot program for the fast-tack process by using a "Known Investor Portal" to gather information and reduce filing burdens for low-risk, repeat investors. Furthermore, CFIUS has demonstrated a willingness to revisit the need for existing mitigation agreements, which could provide investors from allied countries with an opportunity to terminate or restructure costly mitigation compliance obligations.

As of January 2025, U.S. persons are now subject to the U.S. Outbound Investment Security Program (OISP), which prohibits or requires notification of certain types of outbound investments by U.S. persons into entities with links to specified semiconductor, AI or quantum computing activities in China, Hong Kong or Macau. The 2026 National Defense Authorization Act (2026 NDAA), signed into law in December 2025, provides a statutory basis for the regime and directs the U.S. Department of the Treasury to issue new rules, subject to notice and comment, including a few notable changes such as the addition of certain targeted countries (Cuba, Iran, North Korea, Russia

1 Ambassador Jamieson Greer, USTR, "Opening Statement for House Ways and Means and Senate Finance Committees" (December 16 17, 2025), available here.

and Venezuela "under the regime of Nicolas Maduro"[2]) and activities (high-performance computing / supercomputing and hypersonic systems).

## Sanctions and Export Controls

The latter half of 2025 saw a resurgence of sanctions activity. In July, comprehensive territory-wide sanctions against Syria were formally terminated, followed by the repeal of remaining broad-based secondary sanctions against Syria with the passage of the 2026 NDAA. In October, the United States imposed sanctions on major Russian oil producers Rosneft and Lukoil, marking one of the most significant escalations in energy sector sanctions since the start of the war in Ukraine. Later that month, the United States sanctioned the President of Colombia, Gustavo Petro and certain of his associates. Notwithstanding the recent removal of Nicolás Maduro, U.S. sanctions against Venezuela should be expected to remain in effect in the near future until the U.S. government determines how to move forward given recent developments. Boards of companies with touchpoints in Latin America or the energy sector should continue to closely monitor the U.S. sanctions posture against Venezuela, Cuba and other Latin American countries.

In September, U.S. export controls administered by the U.S. Department of Commerce, Bureau of Industry and Security (BIS) were significantly, albeit temporarily, reshaped by the introduction of the "Affiliates Rule," which expanded the application of the Entity List and Military End-User List restrictions to foreign entities that are 50% or more owned by such listed entities. However, following negotiations with China, the White House announced that it would suspend implementation of the Affiliates Rules until November 10, 2026. Boards of directors should anticipate continued evolution in both the sanctions and export controls landscape, particularly as U.S.-China trade negotiations continue and other geopolitical tensions persist.

[2] Although Nicolás Maduro has since been removed from power (discussed in greater detail below), the situation in Venezuela remains fluid and it remains to be seen how Treasury will implement this provision.

## Bulk Data Restrictions

In December 2024, the U.S. Department of Justice (DOJ) issued, as part of a new Data Security Program, a final rule implementing a new regulatory program designed to prevent certain countries (China, Cuba, Iran, North Korea, Russia and Venezuela) and related foreign entities and individuals from having access to Americans' bulk sensitive personal data and U.S. government-related data (the Bulk Data Rule). The rule restricts, and in some cases prohibits, U.S. persons from engaging in "covered data transactions," which include transactions that involve any access by a country of concern or covered person to any bulk U.S. sensitive personal data or government-related data and that involve data brokerage or certain types of agreements. Unlike regulations such as HIPAA, the Bulk Data Rule does not contain a consent exemption or individual opt-out mechanism. After a period of limited enforcement concluded on July 8, 2025, regulators now expect individuals and entities to be in full compliance with the Bulk Data Rule.

Boards of companies possessing data potentially implicated by the Bulk Data Rule should ensure that contracts and other arrangements with service providers, cloud vendors, business partners, employees and other parties are assessed by management for potential data flows to countries of concern. To the extent they have not already done so, affected companies should develop an appropriate compliance program including cybersecurity protocols and recordkeeping procedures to facilitate compliance with the Bulk Data Rule.

# The Shifting SEC Enforcement Landscape: 2025 Year-in-Review


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Fiscal year 2025 was a year of extremes in terms of the number of enforcement actions brought by the Securities and Exchange Commission (SEC). During the first quarter of fiscal year 2025 (October through December 2024), the SEC reported a record-breaking number of enforcement actions.[1] However, for the remainder of the fiscal year, the SEC's enforcement numbers significantly declined. Despite the reduction in enforcement actions seen in the second half of the year, there are early indications that enforcement under the second Trump administration is not disappearing but instead shifting focus. Public companies should expect continued SEC enforcement focused on fraud and harm to investors, and should remain mindful of the SEC Enforcement Division's emphasis on voluntary report and cooperation.

## By the Numbers: A Year of Transition

Following the election of President Donald Trump, Republican Commissioner Mark Uyeda served as Acting Chairman until Paul Atkins was sworn in on April 21, 2025. Judge Margaret "Meg" Ryan was not installed as Director of Enforcement until September 2025—after which a weeks-long government shutdown ensued. Although the SEC has not yet announced its official fiscal year

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[1] Press Release, "SEC Announces Record Enforcement Actions Brought in First Quarter of Fiscal Year 2025," (Jan. 17, 2025), available here.

2025 enforcement results, analysis by the NYU Pollack Center for Law & Business and Cornerstone Research shows the SEC initiated 56 actions against public companies and subsidiaries in 2025—a 30% decrease from 2024.[2] Most of these actions occurred under outgoing Chairman Gary Gensler in late 2024, with only four initiated under Acting Chairman Uyeda and Chairman Atkins.[3] These results reflect not only shifting enforcement priorities but also unique challenges of the 2025 transition. While all administration transitions involve temporary delays while agencies fill leadership positions, the departures in 2025 reduced the SEC's headcount by approximately 15% and the surge of enforcement actions filed in the prior administration's final months left few mature investigations in the pipeline.[4]

How much of the reduction in number of new enforcement actions is likely to persist for the coming three years remains to be seen. However, now that Chairman Atkins and Judge Ryan are firmly established in their roles and new investigations are in progress, we expect 2026 will bring a rise in enforcement actions in core areas such as insider trading, accounting fraud and material misrepresentations that harm investors. In terms of priorities, Chairman Atkins has emphasized that the SEC will return to its core mission "to hold accountable those who lie, cheat, and steal."[5]

We expect 2026 will bring a rise in enforcement actions in core areas such as insider trading, accounting fraud and material misrepresentations that harm investors. In terms of priorities, Chairman Atkins has emphasized that the SEC will return to its core mission "to hold accountable those who lie, cheat, and steal."

## Enforcement Trends to Watch in 2026

### Back-to-Basics: Core Enforcement Areas

The SEC is expected to continue prioritizing enforcement actions focused on insider trading, accounting and disclosure fraud, offering fraud, Ponzi schemes, market manipulation and breaches of fiduciary duties by investment advisers. Conversely, Chairman Atkins has advised that SEC resources should not go toward "enforcement actions in areas, such as retention of books and records, that consume excessive Commission resources not commensurate with any measure of investor harm."[6] In other words, as noted by then-Acting Director of Enforcement and now Principal Deputy Director Sam Waldon, the Enforcement Division is focused on "perennial areas of enforcement," and is no longer in the business of pursuing "[c]reativ[e]" enforcement actions.[7]

So far, the enforcement data supports these statements by SEC leadership. According to data from the 2025 Cornerstone Report, three out of four actions brought against public companies under the new administration alleged issuer reporting and disclosure violations.[8] And the Commission has closed

[2] Cornerstone Research & NYU Pollack Center for Law & Business, "Fiscal Year 2025 Update SEC Enforcement Activity: Public Companies and Subsidiaries," (Nov. 19, 2025), available here. The report analyzes information from the Securities Enforcement Empirical Database (SEED), which is based on available data on the SEC's website as of November 14, 2025. The data only includes enforcement actions with public companies or their subsidiaries as identified defendants. For purposes of the dataset, public companies are defined as "those that traded on a major U.S. exchange as identified by the Center for Research in Security Prices (CRSP) at the time the enforcement action was initiated, or otherwise within the five-year period preceding the initiation."

[3] *Id.* at 3.

[4] Speech, Chairman Paul S. Atkins, "Opening Remarks at the SEC Town Hall," (May 6, 2025), available here. According to Chairman Atkins, in 2024, the SEC had approximately 5,000 employees plus 2,000 contractors and was down to approximately 4,200 employees and 1,700 contractors as of May 2025.

[5] *Id.*

[6] Speech, Chairman Paul Atkins, "Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law," (Oct. 7, 2025), available here.

[7] Reuters, "SEC to Focus on Traditional Cases Under New Leadership, Acting Director Says," (Mar. 24, 2025), available here.

[8] Cornerstone Research & NYU Pollack Center for Law & Business, "Fiscal Year 2025 Update SEC Enforcement Activity: Public Companies and Subsidiaries" at 3, (Nov. 19, 2025), available here.

investigations and voluntarily dismissed in court many of the more novel enforcement actions focused on the crypto industry.[9] Additionally, although we anticipate that the SEC will actively pursue traditional insider trading cases, it may be less likely to bring cases asserting novel insider trading theories, such as "shadow trading."[10]

Further, the reduced headcount at the SEC means that enforcement actions will likely be more focused on cases involving significant harm or risk of harm to investors, especially retail investors. We expect to see these priorities translate into a rise in enforcement actions involving significant accounting errors and restatements, especially if accompanied by a large drop in stock price. The recently announced priorities of the Division of Examination indicate that the SEC will also prioritize investment adviser and broker-dealer activity that relates to retail investors, a likely signal that the Enforcement Division will focus on such cases as well.[11]

The reduction in staff provides an opportunity for entities under investigation to earn cooperation credit and shape the narrative of an investigation by thoughtfully engaging with SEC staff, such as by giving an early presentation on the issues or providing key documents early in an investigation. In a recent keynote address, Chairman Atkins announced significant defense-friendly reforms to the "Wells" process, which is often the last opportunity for potential defendants to persuade SEC staff to close an investigation.[12] The reforms provide potential defendants with additional time to prepare Wells submissions and require enforcement staff to provide the evidentiary basis for potential charges, including testimony transcripts and key documents.[13]

## Cybersecurity and Emerging Technologies

- **Fraud Committed Using Emerging Technologies**. Shortly after the transition, the SEC rebranded its Crypto Assets and Cyber Unit as the Cyber and Emerging Technologies Unit (CETU), whose mission is "combatting cyber-related misconduct and to protect retail investors from bad actors in the emerging technologies space."[14] The CETU will utilize the staff's substantial fintech and cyber-related experience to combat misconduct across seven priority areas focused on cybersecurity and incident response and the use of technology to commit fraud.[15] Public companies can expect to see the SEC pursue enforcement actions against entities that fraudulently misrepresent their artificial intelligence (AI) capabilities (known as "AI washing") or use AI technologies to perpetrate fraud. We also expect to see enforcement cases involving registered entities, such as broker-dealers and investment advisers, arising from the Examination Division's announced focus in 2026 on registrants' use of automated investment tools, AI technologies and associated risks.[16]

- **Cybersecurity**. Cybersecurity remains top of mind for the SEC. The CETU's focus on fraudulent disclosure of cybersecurity issues indicates that the SEC will pursue cases involving public company disclosures related to cybersecurity incidents that involve deceptive statements and real harm to a company's investors or customers. However, the SEC has sent a clear signal that it is backing away from the prior administration's more aggressive approach to cybersecurity disclosures. Immediately after the government shutdown ended, the SEC announced

9 *See, e.g.*, Press Release, "SEC Announces Dismissal of Civil Enforcement Action Against Coinbase," (Feb. 27, 2025), available here; Law360, "Kraken Joins Crypto Cos. Announcing SEC Case Dismissals," (Mar. 3, 2025), available here.

10 For further discussion on shadow trading, see our April 2024 alert memo available here.

11 For further discussion of the SEC Exam Priorities for 2026, see our November blog post available here.

12 Speech, Chairman Paul Atkins, "Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law," (Oct. 7, 2025), available here.

13 *Id.*

14 Press Release, "SEC Announces Dismissal of Civil Enforcement Action Against Coinbase," (Feb. 27, 2025), available here.

15 *Id.*

16 SEC Division of Examinations, "Fiscal Year 2026 Examination Priorities," (Nov. 17, 2025), available here.

that it was voluntarily dismissing its case against SolarWinds Corp. and its Chief Information Security Officer for allegedly misleading disclosures and deficient cybersecurity controls in connection with the "SUNBURST" cyberattack.[17] The SEC's Division of Examinations also identified cybersecurity, particularly defenses and incident response plans, as a "perennial examination priority" in its 2026 Exam Priorities.[18] In anticipation of an active enforcement environment around cybersecurity defenses, responses and disclosures in the wake of significant cybersecurity incidents, public companies should consider reviewing their cybersecurity compliance and controls, incident response procedures and maintaining effective internal and disclosure controls related to cybersecurity incidents. Entities that establish good governance procedures and follow them in the wake of an incident are less likely to be second-guessed than in the past.

Three out of four actions brought against public companies under the new administration alleged issuer reporting and disclosure violations.

- **Technology Advancements at the SEC**. In addition to regulating the misuse of AI, the SEC has also looked to enhance its own use of AI for regulatory oversight and investigations with the launch of the AI task force charged with "accelerat[ing] AI integration to bolster the SEC's mission."[19] One example of the SEC's successful integration of technology for enforcement purposes is its longstanding use of data analysis tools to uncover anomalous trading patterns indicative of insider trading. With insider trading remaining a focus of the SEC and AI-enhanced detection capabilities improving, public companies should ensure robust insider trading policies, including policies related to blackout periods and material nonpublic information stewardship.

## Market Volatility and Economic Dislocation

Economic volatility due to tariffs and other market-moving policies as well as potential workforce reductions can often put strain on companies and present additional incentives and opportunities for securities violations and thus lead to an increase in enforcement activity. Where workforces are under pressure to meet financial targets in the face of economic winds, they are more likely to turn to high-risk tactics such as "channel stuffing," managing earnings by adjusting accounting entries near the end of a quarter or even resorting to aggressive revenue recognition tactics or outright accounting fraud.

With the SEC focused on cases of fraud that harm investors, companies would do well to foster a robust compliance environment by ensuring strong controls and properly trained staff in areas that can have an outsize impact on financial statements, such as revenue recognition, review of assets for potential impairment and valuations. If companies do discover accounting errors, they should carefully document a thorough consideration, in consultation with outside auditors, of whether those errors are material and require restatement or revision of prior financial statements. Risks of economic dislocation and concern about operational disruptions due to factors such as geopolitical events, extreme weather and cyber-attacks, underscore the continued need both for operational resilience and planning, but also disclosure controls to consider whether existing and emerging risks warrant new or additional disclosure.

[17] Litigation Release, "SEC Dismisses Civil Enforcement Action Against SolarWinds and Chief Information Security Officer," (Nov. 20, 2025), available here. For further discussion on SolarWinds, see our July 2024 alert memo available here and the enforcement article in the 2025 edition of Selected Issues for Boards of Directors, available here.

[18] SEC Division of Examinations, "Fiscal Year 2026 Examination Priorities," (Nov. 17, 2025), available here.

[19] Press Release, "SEC Creates Task Force to Tap Artificial Intelligence for Enhanced Innovation and Efficiency Across the Agency," (Aug. 1, 2025), available here.

## Key Takeaways

Despite the reduced enforcement numbers in 2025 and Chairman Atkins's efforts to make it "cool" again to take a company public,[20] boards of directors should be prepared for investigations and enforcement actions in the coming year that focus on traditional fraud enforcement, technology and cybersecurity and harm to retail investors.

- This is an opportune time for companies to conduct a comprehensive tune-up of their internal controls and disclosure controls, as history demonstrates that lax practices during one administration can result in significant penalties years later. Companies that establish sound internal reporting and disclosure policies and ensure Sarbanes Oxley compliant whistleblower programs that can catch early warning signs of fraud will be well-positioned to achieve favorable outcomes if subject to enforcement actions in the future. Strong compliance programs and proactive risk management remain essential regardless of the enforcement climate. With the SEC focused more on material risks, companies would be wise to also take a risk-based approach and focus on getting big things right.

- While the political landscape may shift over the next several years, core enforcement priorities around financial reporting and accounting persist. Moreover, because the statutes of limitation for securities violations extend at least five years and thus beyond administrations, a company's conduct today may be scrutinized under a future administration.

[20] Speech, Chairman Paul Atkins, "Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law," (Oct. 7, 2025), available here.

# Significant Developments in DOJ Enforcement Priorities


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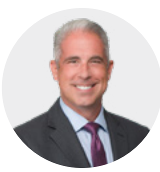

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The past year brought significant changes to the Department of Justice (DOJ) following the changeover to the new administration in late January. New DOJ leadership shifted priorities toward areas more aligned with the broader goals of the administration, including investigations focused on violent crime, narcotics trafficking and immigration. We summarize key developments in DOJ's white collar enforcement landscape, including the White Collar Enforcement Plan, important revisions to the Corporate Enforcement and Voluntary Self Disclosure Policy (CEP), the resumption of Foreign Corrupt Practices Act (FCPA) enforcement, heightened focus on trade and customs fraud and the multi-pronged approach to national security prosecutions, and the likely implications for in-house investigations and corporate compliance departments in the coming year.

## White Collar Enforcement Plan

In May 2025, the DOJ Criminal Division announced several policy changes related to its approach to white-collar criminal enforcement. Matthew R. Galeotti, the then head of the Criminal Division,[1] noted that DOJ would be "turning a new page on white-collar and corporate enforcement" and emphasizing the principles of "focus, fairness and efficiency" in its investigations and prosecutions.[2] As part of this policy roll-out, DOJ issued a new White Collar Enforcement Plan and key revisions to the CEP, Monitor Selection Policy and Whistleblower Awards Pilot Program.

The White Collar Enforcement Plan highlights 10 specific "high impact" areas for the DOJ Criminal Division, suggesting heightened enforcement activity in the coming year:[3]

1. Government waste, fraud and abuse, including healthcare fraud.
2. Customs fraud and tariff evasion.
3. Market manipulation schemes, securities fraud and fraud with tangible harm to U.S. investors or markets.
4. Conduct that jeopardizes consumer health and safety.
5. Threats to national security by Cartels, Transnational Criminal Organizations (TCOs), hostile nation-states or Foreign Terrorist Organizations (FTOs).
6. Material support to Cartels, TCOs and FTOs.
7. Complex money laundering.
8. Controlled Substances Act Violations, including those related to the production and distribution of Fentanyl and other opioids.
9. Bribery and money laundering that impact U.S. national interests.
10. Digital asset related crime.

> Matthew R. Galeotti, the then head of the Criminal Division, noted that DOJ would be "turning a new page on white-collar and corporate enforcement" and emphasizing the principles of "focus, fairness and efficiency" in its investigations and prosecutions.

In announcing these priority areas, DOJ's Criminal Division noted that companies are often the "first line of defense" against criminal schemes and misconduct, and underscored the importance of effective corporate compliance programs and their "unique role to play in this fight" against crimes that threaten U.S. economic and national security interests—areas on which the Criminal Division is "laser-focused."[4] As part of this approach, the White Collar Enforcement Plan outlines enhanced incentives for individuals and companies that report misconduct while lessening the burden on companies that self-disclose and cooperate.[5] DOJ noted the need to strike an appropriate balance between investigating and prosecuting wrongdoing while minimizing unnecessary burdens on U.S. enterprise. These developments reinforce that a commitment to compliance remains a critical factor for DOJ in assessing how it will resolve criminal matters. DOJ also continues

[1] Andrew Tysen Duva, confirmed by the Senate on December 18, 2025, is the new Assistant Attorney General for the Criminal Division. U.S. Senate Committee on the Judiciary, "Senate Republicans Confirm 14 Law and Order Nominees to Deliver Safer Streets for Americans" (Dec. 19, 2025), available here.

[2] Matthew R. Galeotti, "Head of the Criminal Division, Matthew R. Galeotti Delivers Remarks at SIFMA's Anti-Money Laundering and Financial Crimes Conference" (May 12, 2025), available here (Galeotti SIFMA Speech).

[3] Memorandum from Matthew R. Galeotti, Head of Crim. Div. of U.S. Dep't of Just. to All Crim. Div. Personnel (May 12, 2025), available here, (White Collar Enforcement Plan), at 2.

[4] Galeotti SIFMA Speech, *supra* note 2.

[5] White Collar Enforcement Plan, *supra* note 3.

to emphasize the importance of its compliance guidance (known as the Evaluation of Corporate Compliance Programs or ECCP) in assessing the strength and implementation of a company's compliance function.[6]

## Revisions to the Corporate Enforcement and Voluntary Self-Disclosure Policy

With its rollout of the White Collar Enforcement Plan, the DOJ Criminal Division also announced significant revisions to the CEP, through which DOJ seeks to incentivize companies to self-report misconduct. The updated CEP also provides a greater guarantee of benefits for companies that voluntarily self-disclose and otherwise meet the requirements of the policy, and where no "aggravating circumstances" exist related to the nature and seriousness of the offense, pervasiveness of the misconduct within the company, severity of the harm or prior criminal recidivism.[7] As explained by Galeotti, the "primary message" on the revised CEP is that "[s]elf-disclosure is key to receiving the most generous benefits the Criminal Division can offer."[8] Companies discovering misconduct may have a significant opportunity to self-report and walk away with a declination (or no criminal charges) related to the misconduct. Specifically, pursuant to the revised CEP, companies that voluntarily self-disclose, fully cooperate and timely and appropriately remediate *will* receive a declination absent aggravating circumstances, not just a *presumption* of a declination, as under the prior policy.[9] Moreover, a "near miss" provision in the policy provides that the DOJ will offer non-prosecution agreements in certain circumstances where companies cannot benefit from full declination because of aggravating circumstances or because self-disclosure was not reasonably prompt, so long as there is full cooperation and appropriate remediation.[10]

## New FCPA Guidelines: Strategic Focus on U.S. National Interests

In June 2025, DOJ unveiled new guidelines for FCPA enforcement, marking the end of a temporary "pause" imposed by an Executive Order earlier in the year. The guidelines mirror the overall criminal enforcement priorities and direct DOJ to focus FCPA investigations and prosecutions on cases that implicate certain characteristics, such as threats to U.S. national security or economic competitiveness, threats posed by cartels and TCOs, schemes utilizing money launderers or shell companies, schemes linked to employees of state-owned entities and schemes involving, or demands from, corrupt foreign officials. The guidelines also instruct DOJ prosecutors to prioritize investigations of serious misconduct, substantial bribe payments or sophisticated efforts to conceal bribery schemes, and less on allegations involving more routine, lower-dollar business practices.[11]

Consistent with its approach in other areas, the DOJ has provided benefits to companies that timely self-disclose, cooperate and take appropriate remedial action. In August 2025, DOJ issued a CEP declination with disgorgement to Liberty Mutual following DOJ's investigation of less than 18 months. In declining to prosecute Liberty Mutual, DOJ highlighted the company's timely self-disclosure, full cooperation and rapid remediation, as well as the internal investigation that enabled the self-report and the company's enhancements to its compliance program and internal controls.[12]

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6 U.S. Dep't of Just., Criminal Division, "Evaluation of Corporate Compliance Programs" (Sep. 2024), available here.

7 For additional information, see our May alert memo available here.

8 Galeotti SIFMA Speech, *supra* note 2.

9 Matthew R. Galeotti, "Acting Assistant Attorney General Matthew R. Galeotti Delivers Remarks at the Global Investigations Review Annual Meeting" (Sep. 18, 2025), available here (Galeotti Annual Meeting Remarks).

10 U.S. Dep't of Just., Just. Manual 9-47.120 (May 12, 2025). Additionally, the resolution will include a term shorter than three years (the typical length of a criminal corporate resolution), a 75% reduction off the low-end of the U.S. Sentencing Guidelines fine range, and no requirement for an independent compliance monitor. *Id.*

11 Memorandum from the Deputy Att'y Gen. of the U.S. Dep't of Just. to the Head of the Crim. Div. (June 9, 2025), available here. *See also* our June alert memo available here.

12 Letter from the U.S. Dep't of Just. Crim. Div. (Aug. 7, 2025), available here.

Consistent with its approach in other areas, the DOJ has provided benefits to companies that timely self-disclose, cooperate and take appropriate remedial action.

In November 2025, DOJ reached the first criminal FCPA corporate resolution following the issuance of the new guidelines. In that matter, Comunicaciones Celulares S.A. (Comcel d/b/a TIGO Guatemala), a subsidiary of Millicom International Cellular, entered into a deferred prosecution agreement to resolve a criminal investigation related to conduct by employees and executives of TIGO Guatemala. We published an in-depth analysis of the resolution in November 2025.[13] In brief, the criminal resolution highlighted numerous themes and priorities seen in the new FCPA guidelines and in other DOJ policy announcements: (1) DOJ is prioritizing investigations involving serious misconduct and "strong indicia of corrupt intent" including evidence involving substantial bribe payments, sophisticated efforts to conceal and fraudulent conduct in furtherance of bribery schemes; (2) highlighting DOJ's interest in identifying potential links to cartels or transnational criminal organizations, or misconduct involving money launderers or shell companies tied to cartel activity or organized crime, which often intersects with foreign bribery and corruption; and (3) the premium DOJ places on voluntary self-disclosure, including in cases such as the one involving TIGO Guatemala in which the company did not meet the requirements for a declination under the CEP, but otherwise obtained other benefits as part of the resolution.[14] We expect all these themes to remain throughlines in FCPA enforcement this year.

## Individual Enforcement

Individual accountability also continues to be a major theme for DOJ. Under the White Collar Enforcement Plan, DOJ noted that its "first priority" remains prosecuting individuals—whether executives, officers or other employees—who commit white collar offenses.[15] In September 2025, the DOJ Criminal Division announced white collar charges involving more than 200 individuals and 140 criminal convictions by the DOJ Fraud Section.[16] With the DOJ's priorities set, more individuals may find themselves in the crosshairs moving forward, while companies may be expected to identify and discipline employees and executives engaged in misconduct in order to obtain meaningful cooperation and remediation benefits.

The second-half of 2025 also brought a number of individual prosecutions including: the conviction of Carl Alan Zaglin, a U.S. businessman involved in a years-long scheme to bribe Honduran government officials and launder money to secure business for a Georgia-based manufacturer[17] and the sentencing of Glenn Oztemel, a former senior oil and gas trader to 15 months in prison for money laundering and bribing Brazilian officials.[18]

Looking briefly beyond DOJ enforcement, we will be keeping a close eye on investigations and prosecutions by authorities in other countries in 2026. Last March, we wrote about the nascent International Anti-Corruption Taskforce founded by prosecutors in the

13 For additional information, see our November alert memo available here.

14 Deferred Prosecution Agreement, *United States v. Communicaciones Celulares S.A., d/b/a TIGO Guat.*, No. 25-CR-20476-JB (S.D. Fla. Nov. 10, 2025), Dkt. No. 17.

15 *See* White Collar Enforcement Plan, supra note 2 at 5 ("The Department's first priority is to prosecute individual criminals.").

16 Galeotti Annual Meeting Remarks, *supra* note 8. The Fraud Section usually publishes a full year in review in January or February. The 2025 full year numbers are not yet available. U.S. Dep't of Just., Crim. Div., "Fraud Section Year in Review" (Oct. 15, 2025), available here.

17 Zaglin was sentenced to eight years in prison and ordered to forfeit over $2 million. Press Release, U.S. Dep't of Just., "Georgia Businessman Sentenced In International Bribery and Money Laundering Scheme" (Dec. 3, 2025), available here. The third-party money launderer, Aldo Nestor Marchena, earlier pled guilty and was sentenced to 84 months for conspiracy to commit money laundering. *Id.*

18 Press Release, U.S. Dep't of Just., "Connecticut-Based Oil Trader Sentenced to 15 Months in Prison in International Bribery and Money Laundering Scheme" (Dec. 9, 2025), available here.

United Kingdom, France and Switzerland.[19] The recent FCPA enforcement guidelines direct DOJ prosecutors to "consider the likelihood (or lack thereof) that an appropriate foreign law enforcement authority is willing and able to investigate and prosecute the same alleged misconduct," indicating that the U.S. may defer to other authorities depending on the circumstances.[20]

## Focus on Trade and Customs Fraud

Trade and customs fraud enforcement, one of the "high impact" areas identified in the White Collar Enforcement Plan, already has shown an increase in activity. In August 2025, DOJ launched a cross-agency Trade Fraud Task Force (TFTF), signaling a likely increase in scrutiny for companies frequently engaged in cross-border operations.[21] Recently, DOJ's TFTF announced its resolution of an investigation related to MGI International, a global plastic resin distributor, and its two subsidiaries for falsifying country of origin declarations to avoid paying duties on China-originated products.[22] In line with the updated CEP discussed earlier, DOJ declined to prosecute MGI and its subsidiaries based on MGI's timely voluntary self-disclosure and proactive cooperation. As part of the declination, DOJ also credited $6.8 million previously paid by MGI to resolve potential civil liability under the False Claims Act concerning its failure to pay customs duties on certain plastic resins imported from China. Separately, MGI's former Chief Operating Officer was charged and pleaded guilty to conspiracy to smuggle goods into the United States. According to DOJ, the former CCO had instructed subordinates to misrepresent the manufacturer and country of origin on paperwork submitted to U.S. customs authorities to avoid paying the required Section 301 duties. Another recent prosecution underscores the potential intersection between trade and customs fraud and foreign bribery. In October 2025, a customs broker and owner of a U.S. freight forwarding business pleaded guilty to conspiring to violate the FCPA.[23]

DOJ also continues to focus on national security-related prosecutions promoting U.S. interests and fighting cartels, both common themes for the Department. As part of this approach, DOJ may use FTO designations, sanctions and export controls, as well as new data protection rules to achieve its goals.

Trade and customs fraud enforcement, one of the "high impact" areas identified in the White Collar Enforcement Plan, already has shown an increase in activity

## Foreign Terrorist Organizations (FTO)

From the earliest days of the new administration, DOJ has taken aggressive action against cartels and TCOs. One of the very first memos issued under new leadership was on the "Total Elimination of Cartels and Transnational Criminal Organizations."[24] The administration acted quickly to designate multiple cartels as FTOs and bring indictments under 18 U.S.C. § 2339B against individuals accused of providing material support.[25] We expect the material support statute to continue serving as a basis for prosecutions of cartel members. It also serves as a cautionary warning to third parties—such as financial services firms that may have touches to funds related to cartels or companies engaged in transactions with individuals or entities with potential

[19] For additional information, see our March blog post available here.

[20] Memorandum from the Deputy Att'y Gen. of the U.S. Dep't of Just. to the Head of the Crim. Div. at 4 (June 9, 2025), available here.

[21] Press Release, U.S. Dep't of Just., "Departments of Justice and Homeland Security Partnering on Cross-Agency Trade Fraud Task Force" (Aug. 29, 2025), available here.

[22] Press Release, U.S. Dep't of Just., "Justice Department Resolves Criminal Trade Fraud Investigation with Plastic Resin Distributor; Former Executive Agrees to Plead Guilty" (Dec. 18, 2025), available here.

[23] R&R of Mag. J. Upon Def.'s Plea of Guilty, *United States v. Alvelais*, No. 3:25-cr-02512 (W.D. Tex. Oct. 24, 2025), Dkt. No. 19.

[24] Memorandum from the Att'y Gen. of the U.S. Dep't of Just. to All Dep't Employees (Feb. 5, 2025), available here.

[25] *See, e.g.*, Press Release, U.S. Dep't of Just., "High-Ranking Tren de Aragua Member in Custody on Terrorism and International Drug Distribution Charges" (Apr. 23, 2025), available here; Press Release, U.S. Dep't of Just., "Sinaloa Cartel Leaders Charged with Narco-Terrorism, Material Support of Terrorism and Drug Trafficking" (May 13, 2025), available here.

ties to newly designated FTOs—which could face potential investigations by the DOJ under the same law.[26]

Bearing in mind the DOJ's messaging around "focus, fairness, and efficiency," voluntary self-disclosure in the right circumstances could provide an avenue worthy of consideration for companies facing FTO-related liability in 2026. Accordingly, we are closely monitoring Kodiak Gas Services (Kodiak), which is testing the waters. In November, Kodiak publicly disclosed that it had retained outside counsel to conduct an internal investigation of whether any payments made in connection to its recently acquired Mexican affiliate, may have indirectly benefitted individuals associated with criminal cartel organizations or designated as foreign terrorist organizations. Kodiak self-reported its ongoing investigation to several U.S. authorities, including DOJ, SEC and OFAC, and we will be closely monitoring how the early disclosure strategy plays out.[27]

## Sanctions and Export Controls

Another area where DOJ has advanced administration priorities is in addressing sanctions and export control violations by companies and affiliated individuals that compromise national security, particularly those involving sensitive technologies.[28] As mentioned previously, trade-related enforcement is expected to be a focus for years to come.

Just as DOJ's Criminal Division has demonstrated a willingness to reward self-reporting and cooperation, DOJ's National Security Division (NSD) has issued declinations under its Enforcement Policy for Business Organizations, demonstrating the potentially significant benefits available for companies that voluntarily self-disclose sanctions and export control violations. For instance, in April 2025, NSD declined to prosecute the Universities Space Research Association (USRA) for criminal export control violations committed by a former employee who unlawfully exported controlled software to a Chinese entity on the U.S. Department of Commerce's Entity List.[29] NSD's declination letter cited "timely and voluntary self-disclosure of the misconduct" and "exceptional and proactive cooperation" as the basis for its decision.[30]

Trade-related enforcement is expected to be a focus for years to come.

One of the most interesting national-security related resolutions in 2025, however, was with White Deer Management in June 2025. This marked the first application of DOJ's merger-related safe harbor provision, where a private equity firm received a declination after discovering and promptly reporting sanctions violations committed by an acquired company.[31] Normally, the involvement of senior management in misconduct—as there was in this matter—would preclude such an outcome. But this resolution underscored the potential value of self-reporting and cooperating in an effort to earn a declination, or at least a penalty reduction even where aggravating factors may be present.

[26] This theme has also made its way into a series of Treasury's Financial Crimes Enforcement Network (FinCEN) and Office of Foreign Asset Control (OFAC) orders. These include prohibiting transactions with three Mexico-based financial institutions connected with laundering money on behalf of Mexico-based cartels, and sanctions against affiliates of Tren de Aragua in Venezuela. *See, e.g.*, Press Release, U.S. Dep't of the Treasury, "Treasury Issues Historic Orders under Powerful New Authority to Counter Fentanyl" (June 25, 2025), available here; Press Release, U.S. Dep't of the Treasury, "Treasury Targets Money Laundering Network Supporting Venezuelan Terrorist Organization Tren de Aragua" (Dec. 3, 2025), available here.

[27] Kodiak Gas Services, Inc., "Quarterly Report (Form 10-Q)" (Aug. 7, 2025), available here. Treasury may give some indication of the willingness for the administration to quickly settle this type of matter when there is timely self-disclosure. *Cf.* Press Release, U.S. Dep't of the Treasury, "Key Holding, LLC Settles with OFAC for $608,825 Related to Apparent Violations of Cuban Assets Control Regulations" (July 2, 2025), available here.

[28] Press Release, U.S. Dep't of Just., "Cadence Design Systems Agrees to Plead Guilty and Pay Over $140 Million for Unlawfully Exporting Semiconductor Design Tools to a Restricted PRC Military University" (July 28, 2025), available here; Press Release, U.S. Dep't of Just., "North Carolina Man Pleads Guilty to Attempting to Illegally Export Sensitive Technology to China" (Feb. 28, 2025), available here; Press Release, U.S. Dep't of Just., "Evolutions Flooring Inc. and Its Owners to Pay $8.1 Million to Settle False Claims Act Allegations Relating to Evaded Customs Duties" (Mar. 25, 2025), available here.

[29] Letter from U.S. Dep't of Justice, Nat'l Sec. Div. (Apr. 30, 2025), available here (USRA Declination Letter); see also our May blog post, available here.

[30] USRA Declination Letter, *supra* note 32, at 2.

[31] Press Release, U.S. Dep't of Justice, "Justice Department Declines Prosecution of Private Equity Firm Following Voluntary Disclosure of Sanctions Violations and Related Offenses Committed by Acquired Company" (June 16, 2025), available here; see also our June blog post, available here.

## Bulk Data Rule

A new frontier in the realm of national security is the promulgation of the Bulk Data Rule. Pursuant to Executive Order 14117, DOJ promulgated the rule in December 2024[32] and released a "Compliance Guide" and "Frequently Asked Questions" document after it took effect on April 8, 2025.[33] The Bulk Data Rule restricts U.S. persons from certain data transactions that would give "countries of concern" (China, Cuba, Iran, North Korea, Russia and Venezuela) or "covered persons" access to sensitive personal data or U.S. government-related data.[34] Violations of the rule can result in civil penalties up to the greater of $368,136 or twice the transaction amount, while criminal penalties for willful violations can result in fines up to $1 million and/or imprisonment for up to 20 years for individuals.

DOJ has not yet initiated any enforcement actions under the Bulk Data Rule. However, in light of guidance directing U.S. persons to "know their data," companies should expect heightened scrutiny in 2026 and maintain effective compliance programs addressing how their data is collected, preserved and used.[35]

[32] "28 C.F.R. § 202 (2025); see our blog post, available here.

[33] U.S. Dep't of Just., "Data Security Program: Compliance Guide" (Apr. 11, 2025), available here (Compliance Guide); U.S. Dep't of Just., "Data Security Program: Frequently Asked Questions" (Apr. 11, 2025), available here.

[34] 28 C.F.R. § 202 (2025).

[35] Compliance Guide, *supra* note 36.

# Navigating Governance in Turbulent Times

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Big changes to disclosure and other governance rulemaking from the SEC, and potentially Congress and the Trump administration, are coming in 2026. These changes will affect how companies disclose information; how they engage with investors, proxy advisors and other stakeholders and how boards and management think about governance. Already on the SEC's September regulatory agenda is the modernization of shareholder proposal rules and the rationalization of disclosure practices.[1] The SEC has also indicated that it is pursuing and considering President Trump's suggestion to move from quarterly to semi-annual reporting and has declined to defend the prior administration's climate-related disclosure rules in the Eighth Circuit, effectively abandoning them.

The traditional notice and comment rulemaking process will be forthcoming in some areas, likely with a phase-in period that affords companies time to adapt. However, companies also face the potential of fast paced changes based on legal or administrative developments. For example, the SEC's recent changes to the shareholder proposal no action process following the government shutdown, legislative adoption of Section 16 reporting requirements for officers and directors of foreign private issuers[2] and the Trump administration's Executive

1 SEC, "Agency Rule List – Spring 2025," available here.

2 Holding Foreign Insiders Accountable Act (HFIAA), S. 1071, 119th Cong. § 8103(b)(1) (hereinafter HFIAA) (engrossed amendment as passed by House, December 10, 2025). For additional information, see also our December alert announcing this change available here.

Orders on diversity, equity and inclusion (DEI) policies all arrived with little notice or guidance. State regulators have also been more vocal and active in pushing for governance changes, as well as changes in how investors and other stakeholders engage with companies. Potential future developments in macro trends and economic policies will further necessitate changes in governance and disclosure throughout 2026.

One area in particular that will bring change and a new focus on governance is AI. It is emerging as a megatrend of its own (bigger, but not unlike prior topics such as climate change and ESG). Outside of the expected regulatory changes, AI will continue to dominate the discussion of business opportunities and operations, as the potential benefits of AI are tangible. Boards and management will need practical tools to address the accompanying risks, uncertainties and changes to work and business that AI will bring. Companies will have to grapple with vendors and customers who will want to understand how AI is being utilized, and with investors who will take policy positions on AI use and its cost and benefit analysis.[3] In particular, boards of directors should focus on oversight of AI and understanding how management is thinking about both the benefits and risks to the overall business.

When rules, legal interpretations and administrative imperatives change rapidly, responding to normal governance matters with nuanced interpretation and sound judgment becomes harder. Going back to core governance and disclosure principles can help companies prepare for and navigate legal compliance and differing stakeholder pressures. We offer reminders on how to approach governance for the year ahead:

- **Tailored Board Structures**. *Continue to tailor board and committee structures to what is important for your company.* The annual review of charters, policies and delegations of authority should include discussions with board committees and management on current assignment of duties and any changes stemming from evolving practices or emerging board oversight topics. Clear delineation and agreement on oversight responsibilities allows management to quickly address developments with the right board constituents and enables directors to make decisions quickly, without confusion over who is responsible.

- **Director Education and Engagement**. *Prepare directors and relevant committees for change to create a culture of adaptability.* Many companies regularly brief boards on corporate governance updates. With new laws, rules, and interpretations and growing divergence in stakeholder positions, it is all the more important for companies to consider how best to educate the board of new developments and set expectations for change. Board presentations and updates on new rules or developments may need to be more frequent than in prior years and may need to include broader discussion of the governance environment and differing stakeholder positions. Frequent advance communication helps directors anticipate changes and new rules or developments and allows boards to consider actions in advance. This creates a more flexible governance environment when changes are presented.

Going back to core governance and disclosure principles can help companies prepare for and navigate legal compliance and differing stakeholder pressures.

- **Benchmarking and Supplemental Analysis**. *Annual benchmarking is an important exercise, but it only goes so far.* For example, in 2025, many companies updated policies, programs and disclosures to align with the Trump administration's Executive Orders relating to DEI. Companies followed different approaches given differing interpretations of the legality of these new executive pronouncements and their specific risk profiles (for example, government contractors may have

[3] For additional information on AI, see our AI articles available elsewhere in this memorandum.

additional risks to navigate).[4] Benchmarking against peer charters, governance policies and practices and disclosures, and reviewing governance trend studies can help companies see how other public companies are addressing change. These can be useful touchpoints as companies consider their own approaches. However, where rules or the legal landscape are still developing, companies must go beyond benchmarking alone (which could be out of date or still shifting) and consider the nuanced application to their internal circumstances and strategies.

- **Long-Term Strategic Focus**. *Remain focused on core company strategies and developments.* Shifting dynamics and divergent views on topics ranging from exercise of fiduciary duties to what constitutes shareholder value and the importance of ESG/DEI initiatives to long term success have created a landscape where investors, lawmakers, regulators, consumers and other stakeholders push companies in conflicting directions for information and action. In 2025, many multinational companies grappled with inconsistent climate disclosure regimes that conflicted across jurisdictions. Companies and boards facing conflicting pressures should focus on the underlying risks, opportunities and strategies for their business and embed the key factors into their long-term plans where possible rather than focusing on hot topics and buzz words. In general, compliance with conflicting legal regimes is difficult to manage. A focus on oversight and long-term imperatives will help boards and management make risk-based decisions amid shifting rules and stakeholder pressures.

- **Stakeholder Engagement**. *Refine messaging to stakeholders and update engagement.* Companies should remain engaged with investors and other stakeholders. The SEC's February 2025 guidance on control for purposes of Schedule 13D[5] and some political backlash against large institutional investors has shifted how some investors engage with companies, prompting certain investors to adopt a more listen-only posture. At the same time, the Trump administration and Congress have been critical of and directed executive action to investigate proxy advisors. With institutional investors taking a calibrated approach, the slow but growing use of fund pass through voting, proxy advisors in the administration's focus and other investors and stakeholders across the political spectrum speaking up, companies should refine strategic messages, have clear and tailored talking points and consider their core investors.[6] Companies will want to revisit institutional investor guidelines and speak to key elements of governance and strategy. Companies should also follow developments relating to proxy advisory firms and innovations by high profile, well-resourced companies to redefine the proxy voting and shareholder engagement processes. ExxonMobil's novel retail voting program is an example of a company that considered its investor base and modified its outreach and voting program in a manner intended to boost voting rates.[7] In another development, in January 2026, JPMorgan Chase announced its asset management division would cut ties with proxy advisors, instead relying on a new in-house AI powered tool to help it manage votes and analyze company proxies and disclosures.

4 For additional information, see our article on DEI-related risks available elsewhere in this memorandum.

5 SEC Staff Guidance, "Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting" (last updated July 11, 2025), available here. For additional information, see our February alert memo available here.

6 For additional information, see our shareholder engagement article available elsewhere in this memorandum.

7 For additional information non applying a retail voting program in practice, see our October blog post available here.

- **Materiality-Focused Disclosure**. *Take a back-to-basics approach on disclosure.* The SEC is expected to propose rollbacks of some disclosure rules, including requirements around human capital and compensation disclosures. The SEC is also expected to limit detailed guidance on hot topics, like AI, outside of general materiality considerations. In the absence of more prescriptive guidance, companies should be ready to consider materiality to investors based on prior SEC guidance and interpretation, focusing on risks, opportunities and business trends. Similarly, when faced with economic and policy developments from military conflicts to international trade policies, companies should focus on the materiality to their business.

- **Flexible Disclosure Controls**. *Review and consider changes to disclosure controls and committee structures to stay flexible in light of fast-moving changes.* What can companies learn from disclosures around tariff "Liberation Day," changes to DEI policies during proxy season and similar administrative shifts? Companies should consider how their disclosure processes worked in 2025 and consider changes to address gaps or create flexibility needed to quickly assess materiality, both qualitatively and quantitatively, for when future developments arise. Companies should also confirm the right internal constituents are on the disclosure committee and that mechanisms exist for quick review and response to new developments.

- **Crisis Management Lessons**. *Borrow from crisis management.* Many companies have crisis policies (like cybersecurity incident response policies and emergency succession plans). Consider whether mechanisms from these policies or lessons from tabletop exercises can apply more broadly to governance. For example, identify a clear individual or management team to lead and guide in times of fast moving legal or market change.

- **Monitoring Regulatory Developments**. *Last, it is more important than ever to follow various legal update channels and reporting and to partner with outside counsel and advisors.* This helps companies stay abreast of legal updates and market insights and make informed decisions on whether and how to adopt changes as new rules and trends appear.

Take a back-to-basics approach on disclosure. The SEC is expected to propose rollbacks of some disclosure rules, including requirements around human capital and compensation disclosures.

Boards and management will need to use all of these tools in the governance playbook—tailored board structures, director education and engagement, benchmarking and supplemental analysis, long-term strategic focus, stakeholder engagement, materiality-focused disclosure, flexible disclosure controls, crisis management and monitoring for regulatory developments—to successfully navigate the changes that are expected in the year ahead from the SEC and other regulators, the administration, investors and other stakeholders.

# Considerations in Advising Boards of Directors on DEI-Related Risks

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Recent executive orders and agency actions have altered the risk assessment of corporate diversity, equity and inclusion (DEI) programs, creating a complex compliance environment that requires board oversight. In the coming year, boards of directors, particularly of public companies, will find it necessary to focus on a number of key considerations regarding DEI-related risks.

## The Shifting Enforcement Landscape

Over the course of 2025, the Trump administration issued a series of directives targeting the use of DEI programs and policies (which we refer to broadly as DEI Programs).[1] On January 21, 2025, President Trump issued Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity,"[2] which requires federal contractors to certify that they do not operate DEI programs that violate federal anti-discrimination laws and that such certification is a material contract term, triggering risks under the federal False Claims Act (FCA). It also requires federal agencies to identify "the most egregious and discriminatory DEI practitioners" for potential civil compliance investigations. Agencies have since taken actions to enforce this Executive Order. The Department of Justice (DOJ) announced a Civil Rights Fraud Initiative[3] targeting federal funding recipients, directed the Civil Division to pursue affirmative litigation

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[1] For additional information about these directives, please see our March alert memo available here.

[2] The White House, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (January 21, 2025), available here.

[3] U.S. Department of Justice Office of the Deputy Attorney General "Civil Rights Fraud Initiative" (May 19, 2025), available here.

against discriminatory practices and established a DOJ-HHS False Claims Act Working Group.[4]

The administration has also issued guidance describing its view of what constitutes unlawful discrimination in the Attorney General's memorandum "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination."[5] Although there continues to be uncertainty regarding how the administration will seek to enforce its directives against "illegal" DEI programs—and how courts will respond—the risk considerations regarding such programs have substantially increased.

Although there continues to be uncertainty regarding how the administration will seek to enforce its directives against "illegal" DEI programs—and how courts will respond—the risk considerations regarding such programs have substantially increased.

## The Statutory Framework

The statutory backdrop to the Trump administration's DEI efforts consists of three primary statutes: Title VII, Section 1981 of the Civil Rights Act of 1866 (Section 1981) and the FCA.

Title VII prohibits U.S. employers from discriminating based on race, color, religion, sex or national origin and also applies to U.S. citizens who are employed in foreign countries by a U.S. employer as well as to employers who are controlled by a U.S. employer.[6] The administration interprets Title VII expansively, asserting that it can bar any "initiative, policy, program, or practice" where an employment action is "motivated—in whole or in part—by race, sex, or another protected characteristic."[7]

Section 1981 also protects against discrimination, but more narrowly applies to intentional racial discrimination, while more broadly applying to all contract formation and enforcement, not just employment.[8]

The FCA imposes liability on persons and companies who knowingly submit, or cause to submit, false claims to the government.[9] Although not specifically linked to discrimination, the FCA could be a potent enforcement tool for the Trump administration in its DEI efforts, because of the certification requirement contemplated by Executive Order 14173.

Together, these three statutes provide both the government and private parties with multiple tools to challenge DEI Programs.

## Risk Considerations for Boards of Directors in the DEI Space

Understanding the legal landscape is only the first step for boards of directors to address DEI-related risks. Directors must then fulfill their fiduciary oversight obligations with respect to these risks under state law. Under the seminal Delaware Court of Chancery decision *In re Caremark Int'l Inc. Deriv. Litig.* (*Caremark*),[10] boards are required to exercise reasonable oversight of the company's affairs. Directors may be held liable for breach of this duty if they either: (1) "completely fail to implement any reporting or information systems or controls"; or (2) "having implemented such a system or controls, consciously fail to monitor or oversee its operations."[11]

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4 U.S. Department of Justice, Civil Division "Civil Division Enforcement Priorities" (June 11, 2025), available here; U.S. Department of Health and Human Services "DOJ-HHS False Claims Act Working Group" (July 2, 2025), available here.

5 Office of the Attorney General, "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (July 29, 2025), available here.

6 *See* 42 U.S.C. §§ 2000e, 2000e-1(c), 2000e-2.

7 *See* U.S. Equal Employment Opportunity Commission, "What You Should Know About DEI-Related Discrimination at Work," available here.

8 *See* 42 U.S.C. § 1981.

9 *See* 31 U.S.C. §§ 3729–3733.

10 698 A.2d 959 (Del. Ch. 1996). Due to potential nuances in state law, it is important for non-Delaware incorporated companies to work with outside counsel to ensure a proper understanding of what is required for board oversight, even if the state in which the company is incorporated borrows from or applies *Caremark*. For additional information on Caremark claims and Section 220 demands, see our January 2021 alert memo available here.

11 *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) (internal citations omitted).

Companies should expect that any significant negative event connected to their DEI Programs may be followed by demands for books and records by shareholders, potentially followed by *Caremark* claims alleging that the board failed to exercise adequate oversight over these programs.

To ensure directors meet their fiduciary duties and to prevent successful *Caremark* claims related to DEI compliance, there should be documentary evidence of the board's oversight of DEI Programs, including changes to those programs. This is particularly important given that the Trump administration's public pronouncements indicate that many DEI Programs that were widely implemented in corporate America over the past few years may, in the administration's view, violate federal anti-discrimination laws, especially those involving perceived preferential treatment based on race, sex or other protected characteristics.

## Critical Considerations for Protecting Boards of Directors

Although the specifics of board-level oversight should be tailored to the nature of the company and the board, there are some actions that virtually all boards should take to ensure directors have fulfilled their fiduciary duties and to further protect companies and their stakeholders from DEI-related risks. Boards should consider retaining outside counsel to assist in the below actions, particularly in identifying areas of risk. Board communications regarding DEI programs should also be structured to maintain privilege, when appropriate and possible.

### Undertake an Inventory of DEI Programs

As an initial step, it is critical for management to conduct a thorough inventory of all aspects of the company's DEI Programs to evaluate any potential risks and raise them with the board (as discussed below).

To aid in this inventory, management should work with business unit leaders and outside counsel to ensure comprehensive coverage of DEI Programs and to build buy-in for subsequent risk mitigation efforts. In doing so, management should also consider risks associated with rolling back DEI programs, including traditional discrimination claims, employee retention impacts, implying that past programs were unlawful and risking non-U.S. legal scrutiny. All of these countervailing risks should be considered and reported on to the board.

It is critical for management to conduct a thorough inventory of all aspects of the company's DEI Programs to evaluate any potential risks and raise them with the board.

Some targeted areas for changes based on guidance from the current administration and observing their guidance in practice are identified below.

#### *Have a Thoughtful Approach to Targets, Aspirations and Demographics Tracking*

Setting targets (or goals), whether phrased as such or not, could bring scrutiny, as such targets risk being characterized as a quota system and imply decision-making that uses protected characteristics as factors in employment decisions. Any demographic targets should be truly aspirational—not linked to performance requirements—and accompanied by clear guidance that no employment decisions may be made based on protected characteristics. Similarly, demographics tracking, while required for certain companies by the EEOC, risks being characterized as used for employment decisions based on protected characteristics. Companies should ensure that self-identification requests are voluntary and that guidelines clearly specify who can and cannot access demographics data and for what purpose.

#### *Evaluate Compensation Committee Metrics*

In 2020, after the death of George Floyd, many U.S. public companies began tying compensation for executives to the achievement of certain demographic benchmarks in the workforce, whether expressly or through a bonus structure informed by DEI targets. The administration has been clear that any DEI-related disparate treatment connected with compensation is a violation of Title VII, and likely views compensation tied to DEI-related metrics as incentivizing unlawful discrimination based on protected characteristics.[12]

For multinational companies whose human capital-related goals are established outside the U.S., this risk extends even where the compensation related to DEI targets is only for non-U.S. employees. What matters is whether the compensation is tied in any way to diversity levels of U.S. employees. For example, the administration may view skeptically arrangements where global executive compensation is tied to diversity metrics that include U.S. workforce data, as this could be argued to motivate employment actions at U.S. subsidiaries that are based on protected characteristics. Counsel should assist compensation committees in undertaking a comprehensive review that includes auditing existing incentive plans that tie compensation to diversity metrics.

### Ensure that DEI-Related Risks Are Raised with the Board of Directors and Reflected in the Minutes

Once a thorough inventory and analysis of a company's DEI Programs and associated risks is completed, the board should be informed of all material, identified risks, mitigation steps as to such risks and whether such mitigation is future proofing only or addresses prior risk. Such information should be properly recorded in the minutes. Although the minutes of board meetings should not be overly detailed, they should reflect a summary of the DEI-related risks brought to the directors' attention, the fact that directors asked questions and a robust discussion occurred and summaries of any guidance or decisions the board makes. As a best practice for raising DEI-related risks with boards (and ensuring reflection in the minutes), it is helpful to consider a regular reporting schedule that ensures DEI-related risks are systematically addressed at board meetings, rather than handled on an *ad hoc* basis, given the current environment.

Directors should also review the "best practices" recommendations for DEI compliance outlined in the Attorney General's July 29 guidance[13] and inquire as to whether management has considered implementing any recommendations not already in effect at their company. Although these recommendations have not been tested in court and their applicability will vary by company, directors should be informed of these recommendations when assessing DEI-related risks.

### Review D&O Insurance Coverage for False Claims Act Investigations

Counsel should review the board's director & officers (D&O) insurance policy, especially given the administration's directives regarding prosecuting false representations about DEI Programs through the FCA. Counsel should work with insurance brokers to ensure policy language adequately covers DEI-related risks and consider whether additional coverage or higher limits are necessary given the heightened enforcement environment.

For example, D&O insurance policies should be carefully reviewed to ensure that there is coverage for FCA investigations (especially since some D&O policies specifically exclude coverage for FCA claims) and related civil enforcement actions, whistleblower and retaliation claims arising from DEI-related complaints, shareholder derivative actions alleging breach of fiduciary duties related to DEI oversight, employment discrimination claims including "reverse discrimination" allegations, regulatory investigations by the DOJ and other federal agencies and criminal fraud investigations based on false representations about DEI compliance.

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Monitoring legal developments, conducting and updating privileged risk assessments and reporting in a privileged but documented way are key to ensuring a board fulfills its fiduciary duties as they relate to the changing DEI environment.

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12 *See, e.g.,* U.S. Equal Employment Opportunity Commission, "What You Should Know About DEI-Related Discrimination at Work," available here.

13 Office of the Attorney General, "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" (July 29, 2025), available here.

# Shareholder Engagement: Is the Power of Proxy Advisors and Institutional Investors Shifting?


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Proxy advisory firms—principally ISS and Glass Lewis—and large institutional investors, such as Blackrock, Vanguard, State Street and Fidelity, have long played a central role in shaping shareholder voting outcomes at U.S. public companies. Historically, for a significant portion of U.S. public company shares, especially retail holders and mutual fund and ETF investors, shareholder voting decisions are not made by the beneficial owners of the stock, but rather their investment advisers, who often follow the voting recommendations of proxy advisory firms and may use the voting principles of large institutional investors as guidance.

Recent backlash targeting proxy advisory firms and large institutional investors, like the executive order issued by President Trump in December 2025, as well as a litany of committee hearings in the House of Representatives scrutinizing the influence and power of proxy advisory firms and various state Attorneys General investigations and lawsuits against ISS and Glass Lewis may result in a shift in how voting decisions may be made going forward. Against the backdrop of these developments, the key question for U.S. public companies and their boards is, "who will be driving voting outcomes—and how should companies respond?"

## The Traditional Framework

ISS and Glass Lewis have historically dominated the proxy advisory industry: according to statements made at a hearing before the Subcommittee on Capital Markets of the Committee on Financial Services of the House of Representatives on April 29, 2025 (the April Committee Hearing), ISS and Glass Lewis collectively "control 97 percent of the proxy advisory market."[1] Their voting recommendations have had significant influence over shareholder voting decisions in connection with director elections, say-on-pay advisory proposals, shareholder proposals and contested matters. They are viewed as a primary input for many institutional investors, which own an overwhelming majority of outstanding shares of publicly traded companies in the United States and have significantly higher rates of voting participation than their retail investor counterparts.[2] According to statements made at the April Committee Hearing, "when ISS or Glass Lewis recommend voting against a director, their clients are over 30 percent more likely to follow suit than nonclients." Furthermore, according to a sample of voting records from 2017:

> "95 percent of institutional investors vote in favor of a company's 'say on pay' proposal when ISS recommends a favorable vote while only 68 percent vote in favor when ISS is opposed (a difference of 27 percent). Similarly, equity plan proposals receive 17 percent more votes in favor; uncontested director elections receive 18 percent more votes in favor; and proxy contests 73 percent more votes in favors when ISS also supports a measure. . . . Glass Lewis favorable votes are associated with 16 percent, 12 percent, and 64 percent increases in institutional investor support for say on pay, equity plan, and proxy contest ballot measures. Furthermore, some individual funds vote in near lock-step with ISS and Glass Lewis recommendations, correlations that suggest that the influence of these firms is substantial."[3]

As a result of their influence over voting outcomes for proposals presented at a shareholder meeting, ISS's and Glass Lewis' voting guidelines and principles have had lasting impacts on public company governance profiles, as companies regularly tailor their governance decisions after considering how ISS and Glass Lewis may view such decisions.

## What Is Changing?

Scrutiny of proxy advisory firms is not new and has been contentious. The SEC's attention on proxy advisory firms and related regulatory oversight has been building for the past two decades, culminating in rules and interpretive guidance published in July 2020 that imposed moderate additional requirements on proxy advisory firms.[4] This guidance was later vacated by the U.S. Court of Appeals for the D.C. Circuit affirming a lower court's decision in July 2025. More recently, scrutiny over the influence of proxy advisory firms has moved from the SEC to the executive and legislative branches of the U.S. federal government—and with it, we are seeing reactionary changes from proxy advisory firms, institutional investors and companies alike.

### Executive Orders

On December 11, 2025, President Trump issued an Executive Order, "Protecting American Investors From Foreign-Owned and Politically Motivated Proxy Advisors," to "increase oversight of and take action to restore public confidence in the proxy advisor industry, including by promoting accountability, transparency, and competition."[5] The Executive Order mandates the Chairman of the Securities and Exchange Commission to "review all rules, regulations, guidance, bulletins and memoranda relating to proxy advisors . . . and consider

[1] House Financial Services Committee, "Exposing the Proxy Advisory Cartel: How ISS & Glass Lewis Influence Markets" (April 29, 2025), available here.

[2] *See* David F. Larcker, Brian Tayan and James R. Copland, "The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry" (June 14, 2018), available here.

[3] *Id.*

[4] For more information, see our July 2020 alert memo available here.

[5] The White House, "Protecting American Investors From Foreign-Owned and Politically Motivated Proxy Advisors" (December 11, 2025), available here.

revising or rescinding . . . [any] that are inconsistent with the purpose of th[e] order, especially to the extent that they implicate 'diversity, equity, and inclusion' and 'environmental, social, and governance' policies." The Executive Order follows a series of committee hearings in the House of Representatives that have heightened scrutiny on proxy advisors, including the April Committee Hearing, which described ISS and Glass Lewis as "the proxy advisory cartel" and was intended "to shine a light on how the proxy of [sic] process is functioning and, in many ways, failing today's markets."

### Investigations and Lawsuits

Various state Attorneys General, including from Texas, Florida and Missouri, have initiated investigations, launched enforcement actions and filed lawsuits against ISS and Glass Lewis, alleging that the proxy advisory firms have been misleading investors by pushing ESG and DEI agendas instead of basing voting recommendations on impartial factors relating to financial performance and principles.[6] ISS and Glass Lewis have also been facing antitrust/regulatory pressure as the U.S. Federal Trade Commission is investigating them for potential antitrust concerns—namely whether their dominant market positions and their influence over shareholder votes constitute anti-competitive behavior. Of particular concern to the FTC are conflicts of interest where a firm might both (1) advise a company's shareholders on how to vote, and (2) simultaneously provide consulting services to the company (*e.g.*, say-on-pay, equity plans)—raising "pay-to-play" or vote-influence issues.

[6] *See* Ken Paxton, Attorney General of Texas, "Attorney General Ken Paxton Investigates Proxy Advisors Glass Lewis and ISS for Misleading Public Companies to Push Radical Agenda" (September 16, 2025), available here; James Uthmeier, Attorney General of Florida, "Attorney General James Uthmeier Sues Proxy Advisory Giants for Deceiving Investors and Manipulating Corporate Governance" (November 20, 2025), available here; Missouri Attorney General, "Attorney General Bailey Leads Fight Against Hidden ESG And DEI Agendas In Corporate America" (July 11, 2025), available here.

### Policies and Business Model Changes

ISS, Glass Lewis and certain institutional investors have recently pared back their voting principles and guidelines relating to ESG shareholder proposals and DEI proposals in response to the current political climate. For example, in response to President Trump's executive order, "Ending Radical And Wasteful Government DEI Programs And Preferencing," from January 20, 2025, and to the rise of anti-ESG shareholder proposals in recent years, these firms and institutional investors have changed previous brightline guidelines to more nuanced case-by-case analyses on many ESG and DEI related proposals.

ISS, Glass Lewis and certain institutional investors have recently pared back their voting principles and guidelines relating to ESG shareholder proposals and DEI proposals in response to the current political climate.

Furthermore, business model changes are underway for proxy advisor services, driven by a mix of factors, including investor demand for tailored voting strategies, regulatory/legislative scrutiny of the proxy advisor model over recent years and profit incentives (the ability to command premium pricing for customized reports). For example, Glass Lewis is moving away from its longstanding "benchmark" or "house policy" voting recommendation model. Starting in 2027, it will offer customizable perspectives (*e.g.*, management-oriented, governance-oriented, activism-oriented, sustainability-oriented) instead of a one-size-fits-all recommendation. We expect the business model and custom services to continue to evolve, with many mechanical details still to come. For example, ISS has already introduced services (*e.g.*, "Gov360," "Custom Lens") that decouple pure voting recommendations from its research, shifting toward more customizable client offerings rather than default advice.

### Institutional Investor Voting Practices and Engagement

In recent years, institutional investors like Blackrock and Vanguard have expanded their in-house governance and stewardship teams. Where historically voting guidelines and recommendations came from ISS and Glass Lewis, many institutional investors now have their own voting guidelines and are becoming less reliant on and more skeptical of proxy advisor recommendations.

Taking this one step further, on January 7, 2026, JPMorgan Chase's asset management unit announced that it would be "cutting all ties with proxy advisory firms, effective immediately" and is purported to be "the first large investment firm to entirely stop using external proxy advisors."[7] JPMorgan's asset management unit is one of the largest investment firms in the world, with more than $7 trillion in client assets, and had previously stopped using proxy advisors for voting recommendations in favor of using its own internal stewardship team.

In tandem with investors becoming more sophisticated and evaluating proposals on their own merits instead of fully relying on ISS and Glass Lewis for recommendations, companies are increasing direct shareholder engagement off-season and in proxy season with institutional and key investors. The increase in shareholder engagement has resulted in enhanced governance and compensation disclosure, as well as higher rates of withdrawn shareholder proposals during the proxy season.

## The Influence of Proxy Advisors is Evolving, Not Disappearing

For all the reasons noted above, the market has seen reduced automatic reliance on proxy advisor recommendations, and a growing divergence between proxy advisor recommendations and investor voting outcomes. In recent years, there has been a greater emphasis on a company's shareholder engagement history and responsiveness to shareholder feedback in the evaluation of whether to vote with management.

On the other hand, while proxy voting recommendations may not be as influential as they once were, ISS and Glass Lewis continue to be relevant as sophisticated research tools for their clients. Their new products and business strategies, as discussed above, focus on customizable research support and resources, rather than on strict voting recommendations. Over time, we expect that proxy advisors will become one data point for consideration in investors' evaluations of proposals instead of the final decision-maker.

## Key Takeaways for U.S. Public Companies and Boards

With this evolution, individual company shareholder engagement will become more crucial in persuading shareholders to support the recommendations of management and work with the company on governance and other changes that stakeholders believe to be beneficial. In fact, shareholder engagement should be considered by U.S. public companies as a core governance function, and engagement strategies should keep in mind that proactive engagement can shape voting outcomes before the proxy season even begins. Shareholders may request engagement with members of the board in certain circumstances, and we may see directors playing a more visible role in shareholder dialogue going forward.

Investors have differing priorities, policies and decision-making frameworks, and they are increasingly exercising greater independent judgment. As such, a company's engagement strategies should focus on key holders, not just proxy advisors, and disclosure and engagement presentations should be customized to focus on key issues for individual investors, including retail investors. Companies that invest in thoughtful, credible engagement will be better positioned for the proxy season, instead of solely relying on shaping their governance and other practices around one-size-fits-all voting recommendations of proxy advisors.

[7] Jack Pitcher, Wall Street Journal, "JPMorgan Cuts All Ties With Proxy Advisers in Industry First" (January 7, 2026), available here.

# Rethinking Compensation Disclosure


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A number of changes to executive compensation disclosure may occur in 2026, reflecting potential Securities and Exchange Commission (SEC) rulemaking previewed during a July 2025 roundtable discussion as well as separate updates to guidance from ISS and Glass Lewis.

## Executive Compensation Roundtable: SEC Signals Potential Future Changes to Compensation Disclosure Rules

On June 26, 2025, the SEC hosted an Executive Compensation Roundtable[1] (the Roundtable) to conduct a retrospective review of its executive compensation disclosure rules. Roundtable panelists included representatives from public companies, investors, compensation advisors and other experts in the field. The discussion focused on the question of whether the current disclosure regime accomplishes its intended goal of providing investors with material information related to executive compensation.

The SEC has stated that the Roundtable is an initial step in its review of the existing executive compensation disclosure framework, and the Staff has solicited public comment on the disclosure requirements.[2]

1 SEC Press Release, "SEC Announces Roundtable on Executive Compensation Disclosure Requirements" (May 16, 2025), available here.

2 SEC, "Submit Comments on 4-855" (May 15, 2025), available here.

### Roundtable Discussion Highlights

The Roundtable discussion primarily examined the impact of the current executive compensation disclosure rules and suggested several potential areas for improvement. While some panelists emphasized the importance of these disclosures, the majority expressed the opinion that much of the required compensation disclosure is overly complex, expensive and burdensome, especially in light of the minimal benefit it provides investors. Relatedly, panelists expressed an overarching concern that the disclosure rules are dictating and distorting company decisions on executive compensation and most indicated that some level of reform would be welcome. The SEC Chair and Commissioners generally agreed that the existing executive compensation disclosure rules are ripe for review, acknowledging that the current regime is complex and financially burdensome for public companies.[3]

- **Say-on-Pay.** Panelists acknowledged say-on-pay as a useful tool in promoting shareholder engagement.

- **Compensation Discussion & Analysis (CD&A).** Panelists noted that disclosure reforms have resulted in increasingly lengthy CD&A disclosure and indicated that it is unclear whether these additional disclosures actually provide investors a more comprehensive understanding of a company's compensation practices.

- **Summary Compensation Table.** Panelists generally expressed the view that the Summary Compensation Table (SCT) could benefit from simplification to address only what a company is targeting to pay their executives and what they actually paid their executives, particularly with respect to the disclosure of equity awards. Some panelists suggested limiting disclosure to the CEO and CFO, on the basis that existing disclosure rules tend to impact compensation decisions and strategy as companies try to avoid certain individuals' inclusion in the SCT and vice versa.

- **Perquisites.** Panelists generally agreed that SEC guidance on what qualifies as a perquisite should be updated. While executive security was widely considered to be improperly classified as a perquisite, the panelists also acknowledged that companies are unlikely to be making decisions as to whether to provide security benefits to their executives based on the need to disclose these benefits, and investor representatives suggested they would not penalize a company for providing and disclosing such security benefits.

The SEC Chair and Commissioners generally agreed that the existing executive compensation disclosure rules are ripe for review, acknowledging that the current regime is complex and financially burdensome for public companies.

- **Pay vs. Performance.** Panelists agreed that providing disclosure that maps a company's performance against CEO pay is appropriate, but raised issues with the burden of preparing this disclosure, the excess measures the rule requires and the inclusion of NEOs other than the CEO in the table.

- **Clawbacks.** While panelists did not object to the clawback rules in principle, there was a general consensus that it remains too early to assess the full scope of issues arising from their implementation. Panelists expressed particular concern regarding the unexpected extension of the rules to "little r" restatements, noting that these restatements often involve judgment-based, non-material accounting corrections and may trigger mandatory clawbacks even in the absence of misconduct. As a result, panelists cautioned that the rules could lead to

[3] *See* Paul S. Atkins "Remarks at the Executive Compensation Roundtable" (June 26, 2025), available here; Hester M. Peirce, "Spare the Trees So Investors Can See the Forest: Remarks before the Executive Compensation Roundtable" (June 26, 2025), available here; Caroline A. Crenshaw "Statement at the Executive Compensation Roundtable" (June 26, 2025), available here; Mark T. Uyeda "Remarks at the Executive Compensation Roundtable" (June 26, 2025), available here.

unnecessary compliance costs, more complex disclosure judgments and a significant chilling effect on executives and executive compensation programs, given the uncertainty and long-term personal exposure associated with the potential recovery of incentive compensation years after it is awarded.

- **Pay Ratio**. Panelists noted that comparing pay ratios across companies is not a useful data point for investors. Instead, it is more meaningful to have this data over time for one company or to limit the employee population to workers in the United States. Company representatives also indicated that this disclosure is burdensome to prepare.

### Additional Consequences of the Current Disclosure Framework

The discussion as to unintended consequences of the compensation disclosure rules has been ongoing even prior to the SEC's Roundtable. These conversations and supporting evidence have focused on how the rules have impacted decisions on executive compensation.

- **Rate of Executive Pay**. Median CEO pay, as measured by actual total direct compensation, increased year over year from 2012 to 2019; though median pay remained flat in 2020 during the COVID-19 pandemic, there were significant increases in 2021, no increase for 2022, and another significant increase in 2023.[4] Even more notable is the fact that, in the years since outsized CEO pay compensation packages have come to light, the number of CEOs of S&P 500 companies who received pay packages valued at $50 million or more increased from nine to thirty-six.[5] This may suggest that publicity around large CEO pay packages, driven in part by the disclosure rules, has impacted and, somewhat paradoxically, increased executive pay more generally.

- **Harmonization of Executive Pay Programs**. Since 2006 (which marked a shift in disclosure requirements), CEO compensation has become more similar across public firms, regardless of company size, strategy or sector, by 24%, according to a measure that tracks pay structure, including salary, bonus, stock awards and other incentives.[6] Analysis of this data points to pressure on boards from institutional investors and proxy advisors to standardize their compensation programs rather than to design a strategy that aligns with their business goals.[7] This trend is also one that was raised at the Roundtable by public company representatives, who pointed to the pressure to standardize as a factor in compensation decisions.

- **Shift Toward Equity Compensation and Resulting Dilution**. Stock awards accounted for 71.6% of the median pay package for CEOs in 2024 and the median value of stock awards rose 14.7%.[8] CEO pay growth is largely being driven by increases in the value of stock and option awards—as median base salaries saw a modest increase of 2.7% from the prior filing period, the median stock award and median option award saw increases of 6.9% and 6.0%, respectively, from award values in the previous year.[9] This topic was also raised at the Roundtable, specifically by investor representatives who noted the current difficulties in determining target pay from existing disclosures and in tracing an equity award through its entire lifecycle.

- **Prevalence of "Status Symbol" Perquisites**. Perquisites have also increased in recent years, both in value and in terms of public scrutiny. The exclusivity offered by perquisites, like the use of private planes, can result in these benefits serving as status symbols for executives. Particularly as the COVID-19 pandemic

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4 Aubrey Bout, Perla Cuevas, and Brian Wilby, Pay Governance LLC "S&P 500 CEO Compensation Trends" (January 28, 2025), available here.

5 The Wall Street Journal, "Musk Effect Drives Spread of Supersize CEO Pay Packages" (May 20, 2024), available here.

6 Whitney Slightham, "Executive Pay is Starting to Look the Same Everywhere: That Could Hurt Performance, Study Suggests" (May 16, 2025), available here.

7 *Id.*

8 Amit Batish, "S&P 500 CEO Compensation Saw a Near 10% Rise in 2024" (May 29, 2025), available here.

9 Subodh Mishra, "2025 Filings Show Robust CEO Pay Increases at U.S. Large Cap Companies" (May 8, 2025), available here.

realigned norms regarding remote working and travel, and as companies focus more on security measures for their executives, the value of benefits granted under this category has continued to balloon.[10]

- **"Noise" in the Proxy.** As companies attempt to explain how their executive compensation programs align with their corporate strategy through the mandatory disclosures, the average word count of the CD&A of a sample of 100 companies increased every year from 2013 to 2017 for a total of a 3.7% increase.[11] This data echoes the opinions voiced among many of the Roundtable panelists, who noted that it has become difficult for investors to glean material information from often lengthy, repetitive disclosures.

### An Opportunity for Change

While the SEC has not yet taken action in the wake of the Roundtable, its willingness to reflect on the existing executive compensation disclosure regime, together with the consensus among panelists that there is room for improvement in the rules, suggests that a rulemaking proposal or additional SEC guidance may be forthcoming, though the timing and substance of any such proposal remains unclear.

## ISS and Glass Lewis Benchmark Policy Updates – What Boards and Compensation Committees Need to Know

On November 25, 2025, ISS Governance (ISS) announced updates to its 2026 benchmark proxy voting policies, effective for shareholder meetings that take place on or after February 1, 2026.[12] This update included key changes to guidelines for certain compensation items described below, which boards and compensation committees should be aware of moving into 2026.

Glass Lewis also made updates to its guidelines, effective beginning with shareholder meetings in 2026, with the most significant changes for compensation coming in the form of changes to its quantitative pay-for-performance methodology, which serves as one part of its say-on-pay analysis.[13] Whereas Glass Lewis previously conducted this evaluation using letter grades, their updated format uses a 0-100 numerical scorecard with each company being evaluated by up to six weighted tests, the intent of the change being to eliminate confusion created by the prior scoring system.[14] While the weighting of the tests is not disclosed, Glass Lewis has provided information on what each of these tests are intended to measure, as summarized below.

### ISS Policy Updates

#### *Say-on-Pay Responsiveness.*

ISS amended their guidelines on say-on-pay responsiveness to remove certain disclosure requirements, such as specific documentation of engagement efforts or itemized shareholder concerns.[15] The updated guidelines take a more nuanced approach, adding that "if the company discloses meaningful engagement efforts, but in addition states that it was unable to obtain specific feedback, ISS will assess company actions taken in response to the say-on-pay vote as well as the company's explanation as to why such actions are beneficial for shareholders." This update acknowledges the reality that, despite best efforts, companies may be unable to obtain detailed feedback from shareholders.

The updated guidelines also expand the factors to be considered when evaluating compensation committee actions, including recent mergers, proxy contests and other compensation developments.

[10] Krishna Shah, "The Resurgence of Executive Perquisites" (May 7, 2025), available here.

[11] Equilar, "Executive Compensation Filings Grow to Nearly 10,000 Words on Average" (February 7, 2018), available here.

[12] ISS Governance, "ISS Governance Announces 2026 Benchmark Policy Updates" (November 25, 2025), available here.

[13] *See* Glass Lewis, "Pay-for-Performance Methodology Overview" (2025), available here.

[14] *See* Compensation Advisory Partners, "Glass Lewis Releases Updates to 2026 Pay-for-Performance Model & Methodology" (July 16, 2025), available here.

[15] *See* ISS Governance, "Americas: Proxy Voting Guidelines" (November 25, 2025), available here.

***Non-Employee Director Compensation.***

ISS will generally recommend against responsible directors where there is a pattern of excessive or otherwise problematic non-employee director compensation and the company fails to disclose a compelling rationale or other mitigating factors. Problematic compensation includes performance awards, retirement benefits or certain perquisites, though the type of perquisites that would be considered problematic is not specified. The updated guidelines specify that adverse recommendations may be made in response to a pattern, even if the pattern does not appear in consecutive years, to address issues in which problematic pay is granted non-consecutive years. The update also clarifies that adverse recommendations may be made in the first year of occurrence if a pay practice is considered especially problematic.

***Pay-for-Performance Evaluation.***

The updated guidelines extend the time period over which pay-for-performance is evaluated. The measurement periods for evaluating (1) the degree of alignment between a company's annualized total shareholder return rank and the CEO's annualized total pay rank within their peer group and (2) the ranking of CEO total pay and company financial performance within a peer group are both extended from three to five years. Additionally, the multiple of CEO total pay relative to the peer group median will now be measured over one and three years, rather than only the most recent year.

***Time-Based Equity with Extended Vesting.***

ISS maintains a list of qualitative factors relevant to the analysis of how various pay elements may support or undermine long-term value creation and alignment with shareholder interests. ISS updated its policy to include the addition of a factor for vesting and/or retention requirements for equity awards that demonstrate a long-term focus.

***Equity Plan Scorecard.***

ISS maintains a scorecard against which it evaluates equity plan proposals in order to make case- by-case voting recommendations. ISS has modified the scorecard by (1) adding consideration of whether there are cash-denominated award limits for non-employee directors within the Plan Features pillar and (2) providing that plans should generally receive an against vote if the plan lacks sufficient positive features under the Plan Features pillar. ISS indicated that it considers award limits to be best practice, and noted that the second change was driven by the fact that historically, plans could receive an overall passing score despite receiving a poor or zero Plan Features pillar score.

## ISS Governance –Frequently Asked Question Updates

In addition to its benchmark policy updates, ISS also updated its U.S.-specific Frequently Asked Questions (FAQs) for Executive Compensation Policies on December 9, 2025.[16] A few key takeaways include:

***Company Responsiveness to Say-on-Pay.***

Corresponding to the ISS Benchmark Policy Updates described above, the updated ISS FAQs address how ISS will assess board actions taken in response to a say-on-pay vote that receives low support (less than 70% or less than 50%, respectively). For companies whose say-on-pay proposal receives less than 70% support, ISS will conduct a qualitative review, considering factors such as: the disclosure of details on the breadth of engagement, disclosure of specific feedback received, actions taken to address issues that contributed to low support, whether the issues are recurring, the company's ownership structure, significant corporate activity, and any other recent compensation action or factor that could be relevant. In situations where the proposal receives less than 50% support, ISS notes that this would warrant the highest degree of responsiveness, using

[16] ISS Governance, "Executive Compensation Policies – Frequently Asked Questions" (December 9, 2025), available here.

the same determining factors. If a company discloses meaningful engagement efforts but also discloses that it was unable to obtain specific negative feedback, ISS will still assess the company actions taken in response to the vote. ISS will generally recommend a vote against the say-on-pay proposal and against the compensation committee members of companies who demonstrate poor responsiveness. In the event of multiple years of poor responsiveness, ISS may recommend a vote against the full board.

These updates demonstrate ISS's focus on say-on-pay responsiveness and, more specifically, how they evaluate responsiveness and related disclosure. While this guidance acknowledges that companies may be unable to garner specific negative or constructive feedback, it maintains that they have the obligation to disclose their specific efforts and continue to meaningfully engage with investors on this issue.

***Time-Based Equity Awards.***

ISS has updated its approach to evaluating equity pay mix for regular long-term incentive programs, such that a mix consisting primarily or entirely of time-based awards will not in itself raise significant concerns, so long as the time-based award design uses a sufficiently long time horizon (at least five years). A five year time horizon can be demonstrated several ways, including a five-year vesting period, a four-year vesting period with at least a one-year post-vesting share retention requirement covering at least 75% of net shares, or a three-year vesting period with at least a two-year post-vesting share retention requirement covering at least 75% of net shares. ISS continues to consider well-designed and clearly disclosed performance-based equity awards as a positive factor.

***Security-Related Perquisites.***

Given the increased focus on security-related perquisites in the past year, ISS has indicated that it is unlikely that high value security-related perquisites will raise significant concerns, as long as a reasonable rationale for such costs is disclosed. ISS notes an internal or third-party assessment or a broad description of the security program and its connection to shareholder interests as examples of a reasonable rationale. However, ISS confirms that extreme outliers in security-related perquisite costs could still raise concerns, particularly if there is inadequate disclosure in the proxy.

**Glass Lewis New Pay-for-Performance Methodology.**

Glass Lewis introduced an updated series of tests that will be used in its pay-for-performance methodology, summarized below.

***Granted CEO Pay vs. Total Shareholder Return (TSR).***

This test is intended to evaluate the difference between granted pay and TSR performance by comparing against a company's Glass Lewis peers, using the percentile rank of five-year weighted average granted CEO pay to percentile rank of five-year weighted average of annualized TSR growth.[17] The intent is to evaluate whether a company's CEO pay aligns with the company's relative TSR performance. A low score on this test would result if a company's performance ranking was significantly lower than their ranking for pay—meaning companies will score poorly here if they pay more than their peers but do not perform better.

***CEO Granted Pay vs. Financial Performance.***

This test measures the gap between granted pay and financial performance, comparing against Glass Lewis peers using the percentile rank of five-year weighted average granted CEO pay to the percentile rank of five-year weighted average of several financial metrics. Similar to the first test, the intent is to determine whether a company's CEO pay aligns with the company's relative financial performance. The financial metrics Glass Lewis uses include: all sector metrics

[17] *See* Glass Lewis "Pay-for-Performance Methodology Overview" (2025), available here.

(revenue growth, return on equity and return on assets) and certain sector-specific metrics.

***CEO Short-Term Incentive (STI) Payouts vs. TSR.***

This test compares CEO STI payout percentage with TSR over five one-year periods measured against broad market benchmarks. Unlike the two tests described above, this test is not mandatory to receive a pay-for-performance score, and excluding the test, whether due to non-disclosure of target or actual STI payout for the CEO or the CEO's non-participation in a STI plan, does not negatively impact a company's overall score.

***Total Granted Named Executive Officer (NEO) Pay vs. Financial Performance.***

This test evaluates the gap between total pay granted to NEOs and financial performance relative to Glass Lewis peers by comparing the percentile rank of the five-year weighted average of granted NEO pay to the percentile rank of the five-year weighted average of several financial metrics. The intent of this test is to confirm whether executive pay aligns with the company's financial performance.

***CEO Compensation Actually Paid (CAP) vs. Reported Cumulative TSR.***

Applicable only to companies in the United States, this test compares the five-year aggregate CEO CAP-to-TSR ratio against a company's market capitalization peers, as determined using Glass Lewis bands. The peer group for this test is based on market capitalization. The calculation takes into account CAP from the past five years, as disclosed in the company's proxy statement. A poor score on this test results when a company's ratio is above median of its peers, with penalties implemented, increasing the likelihood of a negative recommendation from Glass Lewis, when a company is more than 50% above median. Like the CEO STI Payouts vs. TSR test, this test is not mandatory to receive a pay-for-performance score, and excluding the test does not negatively impact a company's overall score.

***Realized CEO Pay vs. TSR.***

Applicable only to companies in Canada, this test evaluates the gap between realized CEO pay and TSR performance, using a comparison to a company's Glass Lewis peers. The intent of this test is to determine whether a CEO pay is aligned with the company's TSR performance relative to its peers. As with the above test, this is not a mandatory test, and its exclusion does not negatively impact a company's overall score.

***Qualitative Factors.***

Functioning only as a downward modifier, meaning it can only serve to reduce a company's score, this test includes a series of questions, answering yes to which results in penalties to varying degrees for the company. This list includes questions such as "were there any one-time awards granted?" and "was upward discretion exercised?" and "is fixed pay greater than variable pay?", each of which are intended to evaluate various factors Glass Lewis deems significant to evaluating whether company pay practices are aligned with long-term shareholder interest.

***Next Steps for Boards and Compensation Committees.***

In light of these developments, boards and compensation committees should begin evaluating how the updated ISS and Glass Lewis policies may affect their executive compensation programs and related proxy disclosures for the 2026 proxy season. In particular, companies should assess pay-for-performance alignment under the revised methodologies, review the use and disclosure of perquisites—especially those that may draw heightened scrutiny—and consider whether existing CD&A disclosures clearly and concisely communicate the rationale for compensation decisions. Given the increased emphasis on responsiveness to say-on-pay outcomes and the evolving expectations around disclosure quality, early engagement with advisors and a proactive review of compensation practices and proxy narratives may help mitigate adverse voting recommendations and enhance investor understanding.

# Alternative Assets in 401(k) Plans: What Boards Need to Know in 2026

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On August 7, 2025, the Trump administration issued an executive order titled "Democratizing Access to Alternative Assets for 401(k) Investors" (the Executive Order), marking a step toward facilitating greater inclusion of investment options with exposure to alternative assets in defined contribution plans, including 401(k) plans (collectively 401(k) plans).[1] This development is noteworthy heading into 2026 for boards of directors overseeing companies that sponsor 401(k) plans, as well as those in the asset management industry.

## Why this Matters Now

More than 90 million Americans participate in employer-sponsored defined contribution plans, representing over $12 trillion in investment capital. Yet unlike high-net-worth individuals and institutional investors, most 401(k) plan participants have historically been largely precluded from accessing exposure to private equity, private credit, real estate, infrastructure and digital assets.

Throughout the years, there has been a slow but steady move toward enabling 401(k) plans access to alternative assets. The recent Executive Order is reflective of a position that has been gaining momentum—without greater access to investments in alternative asset classes, 401(k) plan participants are missing out on "potential

[1] The White House, "Democratizing Access to Alternative Assets for 401(k) Investors" (August 7, 2025), available here.

growth and diversification opportunities associated with alternative asset classes."[2] Despite these growing sentiments, many 401(k) plan fiduciaries and sponsors have been slow to incorporate exposure to alternative assets as part of investment line-ups due to a lack of clear guidance from the Department of Labor (the DOL) and concerns about liability (*e.g.*, from participant lawsuits alleging imprudent selection based on higher risks, lower liquidity and/or excessive fees).

Many 401(k) plan fiduciaries and sponsors have been slow to incorporate exposure to alternative assets as part of investment line-ups due to a lack of clear guidance from the Department of Labor and concerns about liability.

## What the Executive Order Does

While there has been significant media coverage of the Executive Order, it is important to keep in mind that it does not usher in any immediate regulatory changes. The Executive Order directs the DOL to reexamine its guidance regarding the investment of 401(k) plans in alternative assets and, to the extent deemed appropriate by the DOL, to issue clarifying guidance by early February 2026. The Executive Order also directs the Securities and Exchange Commission (SEC), in consultation with the DOL, to consider ways in which to facilitate the investment by 401(k) plan participants in alternative assets.

While there are quite a few outstanding questions to be addressed by the DOL and the SEC before we see significant regulatory changes in this space, there are still timely considerations to keep in mind going into 2026.

## What Boards Should Consider in 2026

Below is a high-level overview of some general considerations for 2026:

1. **Action by the DOL and SEC:** In response to the Executive Order's directive, the DOL may issue a notice of proposed rulemaking in the early days of 2026. Companies should be on the lookout for DOL and/or SEC rulemaking.

2. **Determining the Board's Role:** Consider what role (if any) the board will play in determining next steps (if any) relating to alternative assets and the 401(k) plan.

3. **Assessing Current Plan:** Encourage management to review the current governing documents, investment policy statement and investment line-up for the company's 401(k) plan to determine whether investment options with exposure to alternative assets are permitted and/or currently held by the plan.

4. **Evaluating Fiduciary Capabilities:** Consider evaluating whether the 401(k) plan's current fiduciaries (*e.g.*, retirement committee or third-party investment advisor/manager) have the requisite expertise to select, evaluate and monitor investment options with exposure to private equity.

## Looking Ahead: The 2026 Landscape

In addition to the foregoing general considerations, there are several trends that will bear watching in 2026:

1. **Industry Innovation:** While there have been steady developments relating to increased participation by 401(k) plans in alternative asset classes, we expect to see increased partnerships between private fund sponsors, investment managers and traditional 401(k) platform providers in this space.

[2] The Executive Order.

2. **Potential Safe Harbors:** The DOL and SEC may memorialize and expand upon past guidance to provide conditions relating to a safe harbor for fiduciaries selecting investment options with exposure to alternative assets.

3. **Litigation Trends:** We may also see regulations from the DOL aimed at reducing the risk of ERISA litigation relating to the selection of investment options with exposure to alternative asset classes.

## The Bottom Line

Boards may wish to consider (and may encounter questions from participants regarding) the inclusion of alternative assets as part of the 401(k)-plan lineup. As we await further guidance, members of boards of directors should take a measured approach in response to the Executive Order: educate yourselves on the issues, monitor regulatory developments closely and assess current plan framework and fiduciary capabilities.[3]

[3] For more detailed analysis and information, see our August alert memo available here.

# A Sea Change in Shareholder Litigation, or More of the Same? What to Expect in 2026


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Two significant developments during 2025—one in Delaware corporate law and the other in federal securities law—could materially impact shareholder litigation in 2026 and beyond. In March 2025, following a number of controversial Delaware Court of Chancery decisions, the Delaware legislature passed S.B. 21, establishing safe harbors from litigation for certain board decisions and transactions that might otherwise be evaluated under the demanding entire fairness standard of review. Then, in September 2025, the SEC issued guidance permitting for the first time U.S. listed companies to include mandatory arbitration provisions in their bylaws or charter for federal securities law claims. S.B. 21 currently faces a constitutional challenge before the Delaware Supreme Court, and because Delaware law prohibits corporations from requiring investors to arbitrate securities claims, any Delaware corporation adopting mandatory arbitration will likely face legal challenges. While each of these developments have the potential to significantly change the legal landscape for Delaware and listed companies, their full impact remains uncertain and will likely gradually come into focus in 2026.

Below, we summarize these key developments and preview what to expect in the year ahead.

## Delaware Developments: S.B. 21 Adoption and Constitutional Challenge

To address criticisms of several high-profile Court of Chancery decisions and maintain Delaware's preeminence in corporate law, the Delaware legislature enacted S.B. 21 in March 2025. The legislation amended Section 144 of the Delaware General Corporation Law (DGCL) to provide three safe harbors exempting from legal challenge transactions or board decisions involving interested or conflicted directors or controlling stockholders when structured to meet certain conditions:

- The first safe harbor concerns transactions not involving a conflicted controlling stockholder where a majority of the directors are interested or conflicted, and is satisfied when material facts of the transaction and the directors' interest are disclosed to, and the transaction is approved by, either a majority of disinterested directors or a majority of the disinterested stockholders.
- The second safe harbor concerns transactions involving controlling stockholders (other than go-private transactions), and is satisfied when material facts are disclosed and the transaction is approved in good faith by a majority of disinterested directors on a special committee or by a majority of the minority stockholders.
- The third safe harbor concerns go-private transactions involving a controlling stockholder; it is satisfied when material facts are disclosed and the transaction is approved in good faith by a majority of disinterested directors on a special committee and a majority of the minority stockholders.

S.B. 21 also provides statutory definitions of critical much-litigated terms, including "controlling stockholder," "control group," "interested" and "disinterested," and it provides a heightened presumption of director independence for any director that the board has determined satisfies applicable stock exchange rules. The legislation further amends Section 220 of the DGCL to limit stockholders' inspection rights to a narrow set of categories of books and records, and codifies caselaw on some procedural requirements and protections favorable to Delaware corporations providing books and records.

Amid the legislative change and ongoing uncertainty as to the ultimate impact of S.B. 21, 2025 saw a slight uptick in corporations reincorporating from Delaware to other jurisdictions.

The Delaware legislature acted swiftly in passing S.B. 21 in order to halt the threatened exodus of Delaware companies to states perceived to be more corporate-friendly.[1] Meanwhile, amid the legislative change and ongoing uncertainty as to the ultimate impact of S.B. 21, 2025 saw a slight uptick in corporations reincorporating from Delaware to other jurisdictions, with 18 companies offering reincorporation proposals during the 2025 proxy season[2] (compared to about five reincorporation proposals per year in prior years).[3] Still, the unusually high number of companies leaving Delaware in 2025 does not meet the predicted impending outflow of companies, which seems, in spite of the continued

[1] Jai Ramaswamy, Andy Hill and Kevin McKinley, "We're Leaving Delaware, And We Think You Should Consider Leaving Too" (July 9, 2025), available here; *see also* Madlin Mekelburg, "Musk Shifts Tesla Incorporation to Texas After Investor Vote" (June 14, 2024), available here.

[2] Companies mostly contemplated reincorporating to other U.S. jurisdictions, with the majority proposing relocating to Nevada (12), followed by Florida (2), Texas (1), and Indiana (1). See Sam Nolledo, Sarah Wenger and Aaron Wendt, "The State of US Reincorporation in 2025: The Growing Threat and Reality of 'DEXIT'" (October 9, 2025), available here; *see* also ISS Insights "The U.S. Reincorporation Race: Who's in the Lead?" (July 16, 2025), available here.

[3] *See* Stephen M. Bainbridge "DExit Drivers: Is Delaware's Dominance Threatened?," pgs. 18-19, available here.

uncertainty may have been largely exaggerated.[4] Further, on December 19, 2025, the Delaware Supreme Court reversed the Court of Chancery's rescission of Elon Musk's Tesla compensation plan—a ruling many viewed as a significant impetus for S.B. 21's passage.

Almost immediately upon its enactment, S.B. 21 was challenged on constitutional grounds. The Delaware Supreme Court took an interlocutory appeal in *Thomas Rutledge v. Clearway Energy Group, et al.*, certifying two questions:

- Does Section 1 of S.B. 21—eliminating the Court of Chancery's ability to award "equitable relief" or "damages" where safe harbor provisions are satisfied—violate the Delaware Constitution by divesting the Court of Chancery of equitable jurisdiction?

- Does Section 3 of S.B. 21—applying safe harbor provisions retroactively to breach of fiduciary claims arising before enactment—violate the Delaware Constitution by eliminating causes of action that had already accrued or vested?

On November 5, 2025, the Delaware Supreme Court heard oral argument on this challenge, focusing primarily on whether the legislature exceeded its constitutional powers by restricting the Court of Chancery's jurisdiction. As of the date of this publication, the Court's decision remains pending. Meanwhile, other cases pending in the Delaware Court of Chancery in which S.B. 21 is implicated have been stayed until the Delaware Supreme Court issues its decision on the constitutional challenge. As a result, the Delaware courts have not yet started to grapple with how to apply S.B. 21 in practice, making it unclear exactly how much of an impact it will have on shareholder litigation in Delaware going forward. For example, will the Delaware courts apply the safe harbors as written to dismiss cases where the statutory conditions are met, or will the courts find "fact issues" as to whether those conditions were fully satisfied, thus allowing cases to proceed to discovery and potentially trial? If the latter, will S.B. 21 lead to different case outcomes, or will shareholder litigation in Delaware continue much as it looked before S.B. 21 was passed? Assuming the Delaware Supreme Court upholds S.B. 21, Delaware courts will start providing the answers to these and other questions as they decide cases in 2026.

## Federal Securities Law Developments: Mandatory Arbitration Clauses

In September 2025, the SEC issued a policy statement clarifying that the inclusion of a mandatory arbitration provision for investor claims under federal securities laws in an issuer's charter, bylaws, or securities-related agreements will not affect whether the Commission accelerates effectiveness of that issuer's registration statement.[5] This reflects a significant policy shift, as the SEC has historically opposed provisions in governing documents that risk waiving or impairing federal securities law protections. SEC Chairman Paul S. Atkins stated the Commission was not taking a position on whether companies should adopt mandatory arbitration, but providing clarity on the SEC's position that such provisions are not inconsistent with federal securities laws.[6]

The SEC's revised position rests on its review of Supreme Court jurisprudence addressing the intersection of federal securities laws and the Federal Arbitration Act of 1925 (the FAA), which "establishes 'a liberal federal policy favoring arbitration agreements.'"[7] The SEC concluded that the anti-waiver provisions of the federal securities laws, which void any provision

[4] Lora Kolodny, "Despite the highly publicized departure of Coinbase, only 28 companies have left Delaware this year" (November 14, 2025), available here; Gaurav Jetley and Nick Mulford, Analysis Group, Inc., "DExit: Reincorporation Data Seem to Support the Hype" (September 23, 2025), available here.

[5] SEC "Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory Arbitration Provisions, Securities Act Release No. 33-11389, Exchange Act Release No. 34-103988 90 Fed. Reg. 45125" (September 19, 2025), available here (Policy Statement).

[6] *Id.*

[7] *CompuCredit Corp. v Greenwood*, 565 U.S. 95, 98 (2012).

that waives compliance with the securities laws,[8] do not preempt the FAA's policy in favor of arbitration agreements. In support, the SEC pointed to two Supreme Court decisions from the 1980s, *Shearson/American Exp., v. McMahon,*[9] and *Rodriguez de Quijas v. Shearson/American Exp., Inc.*,[10] both of which held that the anti-waiver provisions of federal securities law do not affect agreements to arbitrate. The SEC further concluded that there was no right to proceed through a class action under the federal securities statutes that would preempt application of the FAA, relying on the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* that no such right existed under federal antitrust statutes.[11]

However, the SEC's position does not resolve whether companies can or should implement mandatory arbitration provisions. State law generally governs a corporation's internal affairs and stockholder relationships, and enforceability of mandatory arbitration is a state contract law question.[12] The SEC acknowledged that the interaction of the FAA and state law with respect to mandatory arbitration provisions was outside the scope of its role, but did highlight Supreme Court jurisprudence suggesting that state laws that explicitly target the enforceability of mandatory arbitration agreements, or implicitly do so by "interfering with fundamental attributes of arbitration,"[13] could "be preempted by the [FAA]."[14]

The SEC's change in position comes amid other recent changes to Delaware law. DGCL Section 115 historically allowed forum selection clauses in charters and bylaws for internal corporate disputes, provided claims could be brought in Delaware courts.[15] As part of a separate package of reforms passed in Senate Bill 95 (S.B. 95), which became effective as of August 1, 2025, these safeguards were extended to intra-corporate claims, which would arguably include securities claims brought by investors.[16] The SEC expressly noted that these amendments "may prohibit certificates of incorporation or bylaws from including an issuer-investor mandatory arbitration provision."[17] In an October speech, SEC Chairman Atkins expressed disappointment with these amendments and encouraged Delaware to revisit the changes to DGCL Section 115.[18] While it has not yet issues a formal statement to the effect, the SEC has also suggested that the FAA may preempt state laws limiting mandatory arbitration clauses, rendering the Delaware prohibition irrelevant.

To date no Delaware company has tried to adopt a mandatory arbitration provision.

While it is too early to say how these issues will play out, further litigation in this area over such changes seems inevitable. A November letter from the Council of Institutional Investors—representing over 135 public pension funds, corporate and labor funds, and foundations and endowments—emphasized the group's "long-standing membership-approved policy" opposing mandatory shareholder arbitration clauses.[19] The group highlighted that arbitrations are disfavored because they place limits on the discovery of evidence, in many cases take away the right to appeal, limit class-wide actions and the proceedings rarely enter the public record.[20] Perhaps because of these issues, to date

8 15 U.S.C. 77n contains the Securities Act's anti-waiver provision, and reads "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void. 15 U.S.C. 78cc(a) contains the Exchange Act's anti-waiver provision, and reads "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void."

9 482 U.S. 220, 220 (1987).

10 490 U.S. 477, 482 (1989).

11 570 U.S. 228.

12 *See,* generally, Meyer v. Uber Technologies, Inc., 868 F.3d 66, 73 (2d Cir. 2017)

13 *Epic Systems Corp. v. Lewis,* 584 U.S. 497, 498 (2018).

14 Policy Statement, at 6.

15 80 Del. Laws, c. 40, § 5.

16 85 Del. Laws, c. 48, § 4.

17 Policy Statement, at 3.

18 Paul S. Atkins, " Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala" (October 9, 2025), available here.

19 Jeffrey P. Mahoney, General Counsel of the Council of Institutional Investors, "Letter to Chairman Atkins" (November 6, 2025) at 2, available here.

20 *Id*. at 4-5.

no Delaware company has tried to adopt a mandatory arbitration provision. The only company to do so is Zion Oil & Gas, a Texas corporation, which changed its bylaws without need of a shareholder vote. Texas has no prohibition like the one in Delaware. Once a Delaware corporation adopts a similar provision, we would expect litigation challenging it.

### Key Takeaways:

- **S.B. 21 Constitutionality and Application:** The Delaware Supreme Court should issue its decision on the constitutionality of S.B. 21 shortly. We expect it will uphold the legislation. Even if upheld, future litigation will likely challenge whether companies and boards have adequately satisfied the safe harbor requirements, leading to decisions that will provide further clarity to boards, management teams and their advisors as they consider how to manage potential conflicts in various contexts.

- **Mandatory Arbitration Challenges:** If companies adopt mandatory arbitration provisions following the SEC's new policy, expect investor litigation challenging whether Delaware law permits such provisions and whether Delaware law is federally preempted.

- **Consider Carefully:** While many corporations no doubt find the idea of adopting mandatory arbitration of federal securities claims tempting (including because it would remove any class claims), such corporations should carefully assess whether requiring arbitration of investor claims serves the company's best interests. Arbitration, for all its upsides, also has numerous downsides for issuers, including those identified by the Council of Institutional Investors.[21] Additionally, significant opposition from institutional investors and proxy advisors could harm the company's reputation and affect the business overall. While mandatory arbitration, if widely adopted, has the potential to fundamentally change the face of securities litigation that has existed for decades, there are numerous reasons why companies might not adopt it all.

[21] For additional information on mandatory arbitration, see our September blog post available here.

# Global IPO Market Trends: 2025 Review and 2026 Outlook


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Drawing on activity across the United States, Europe, East Asia, the Middle East and Latin America, we examine the market dynamics and complimentary regulatory and macro-economic settings that drove IPO volume and valuations to surge in 2025 and offer insights for the year ahead.

Overall, while 2025 IPO activity remained uneven across regions, the IPO landscape at a global level saw a year of robust growth in terms of number of issuances and deal values, even amid policy and geopolitical uncertainties.[1] As the market conditions underpinning 2025's IPO surge continue into 2026, and regulatory reforms around the world continue to encourage more issuances, it is likely that 2026 will continue to see a remarkable level of IPOs. As such, issuers contemplating IPOs in the next 12 to 24 months may find increasingly receptive markets, though geopolitical and regulatory uncertainties continue to require thoughtful preparation and strategic flexibility.

As the market conditions underpinning 2025's IPO surge continue into 2026, and regulatory reforms around the world continue to encourage more issuances, it is likely that 2026 will continue to see a remarkable level of IPOs.

[1] Globally, IPO proceeds totaled $143.3 billion from 1,014 IPOs, a 21% increase compared to 2024, which saw $118.1 billion proceeds raised from 984 IPOs. *See* PwC, "London has strongest year for IPOs since 2021 with a strong Q4 for Europe signaling momentum for 2026" (December 31, 2025), available here.

Key themes across markets include:

- **Strength in Finance, Technology, AI, Infrastructure and Defense.** These sectors show outsized investor interest globally, often serving as the backbone of regional IPO pipelines.
- **Private Equity as a Persistent Catalyst.** Sponsor-backed IPOs continue to anchor issuance windows, especially in the United States and Europe.
- **Improved Issuance Conditions as Rates Decline.** Easing monetary policy across multiple jurisdictions is lifting valuations and reducing financing costs, enabling issuers to revisit delayed listings.
- **Regulatory Transformations.** Around the world, regulators implemented reforms in 2025 aimed at strengthening capital markets and attracting IPOs.

# United States

U.S. IPO activity accelerated in 2025. Approximately 202 companies with a market capitalization over $50 million priced IPOs in the United States in 2025 compared to 150 in 2024.[2] In a year marred by episodic volatility stemming from tariff policy uncertainty, geopolitical tensions and the late-year U.S. government shutdown, the surge in IPO activity in 2025 demonstrated the strength of investor demand for new issuances.

Technology-driven companies, particularly those specialized in digital infrastructure and cybersecurity, consistently priced at the top of their ranges and delivered strong post-IPO performance, producing multiple notable IPOs in 2025. The year also saw a resurgence in sponsor-backed IPOs and SPACs, each rising to levels not seen since 2021 in terms of number of issuances.[3]

In a year marred by episodic volatility stemming from tariff policy uncertainty, geopolitical tensions and the late-year U.S. government shutdown, the surge in IPO activity in 2025 demonstrated the strength of investor demand for new issuances.

A notable market narrative is the continued interest in public company reincorporation out of Delaware, spurred by concerns over litigation trends and high-profile cases. In response, Delaware enacted reforms to the Delaware General Corporation Law in 2025 aimed at mitigating perceived litigation risk and reinforcing the state's leadership position for corporate domicile.[4]

## 2026 Outlook for the United States

Market dynamics largely underpinned the surge in U.S. IPO activity in 2025. Namely, a backlog of sponsor and VC-backed companies that had reached maturity coincided with a pent-up demand for IPO-ready companies with strong growth profiles. Going into 2026, this supply and demand dynamic is expected to continue. IPOs will likely be bolstered further by anticipated deregulation by the Securities and Exchange Commission (SEC) and forecasted declines in interest rates.[5] Moreover, the late 2025 U.S. government shutdown resulted in deferred IPOs from well-known issuers that will now likely occur in 2026. Databricks, Canva and Plaid are among those anticipated to test the market.

2 IPO figures as of December 31, 2025 by date of IPO pricing. *See* Renaissance Capital, "2025 IPO Market Stats," available here.

3 *See, e.g.*, PwC, "IPO markets look primed to accelerate in 2026" (December 12, 2025), available here.

4 For a discussion of the forces driving companies to consider reincorporation out of Delaware, *see* our January 16, 2025 publication "Delaware's Rocky Year–What Lies Ahead?" available here.

5 The SEC announced intention to bolster IPOs through reducing disclosure requirements, de-politicizing shareholder meetings and reforming securities litigation, which may also provide headwinds for an active 2026. *See, e.g.*, Atkins Speech, "Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala" (October 9, 2025), available here.


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# Europe

In 2025, European IPO volume dropped 20% to 105 deals, and proceeds decreased 10% year-over-year to $17.3 billion.[6] Yet issuance strengthened meaningfully later in the year as monetary easing supported valuations. Switzerland, Sweden, Spain and Germany saw several large, high-quality listings. Additionally, a surge in London IPOs in Q4 lifted hopes for an IPO revival that may continue into 2026.

[6] *See* EY, "2025 Global IPO market key highlights and 2026 outlook" (December 17, 2025), available here.

Private equity-backed IPOs more than doubled year-over-year, aided by anchor investors and early book momentum, features increasingly central to European execution strategies.[7] While cross-border listings declined, Europe produced several notable U.S. listings, including the $1.4 billion IPO of Klarna Group.[8]

Regulatory recalibration across the UK and EU, including reforms to listing and prospectus regimes, tax incentives for post-IPO trading and relaxed French and Belgian disclosure rules, reflects an ongoing effort to enhance the competitiveness of European capital markets. In Italy, policymakers are advancing proposed capital markets reforms, including an optional, simplified governance regime for newly listed issuers, that aim to reduce administrative burdens and enhance the attractiveness of Italian exchanges for domestic and cross-border IPO candidates.[9]

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## 2026 Outlook for Europe

Banks anticipate a strong start for European IPOs in 2026, with active pipelines building across defense, industrials, financials and technology. Dual-track processes are expected to increase as private equity sponsors seek liquidity in a favorable macro environment. The effectiveness of the EU Listing Act in 2026, as well as adjustments to ESG reporting frameworks, may further reduce compliance burdens and facilitate capital formation. Geopolitical risks and trade tensions remain risks to European IPO activity in 2026.

7 In 2025, UK IPO proceeds totaled £1.9 billion, of which £1.3 billion was raised from IPOs that occurred in Q4. While this figure is more than double the amount of proceeds from IPOs in 2024, it is much lower than 2021's IPO proceeds, which totaled £16.8 billion. *See* MorningStar, "Late spurt of IPOs drives strongest year for London since 2021" (December 31, 2025), available here.

8 *See* EY, "How can you navigate your IPO planning with confidence? EY Global IPO Trends Q3 2025", *supra* Note 3.

9 For a discussion of capital markets reforms in Italy, *see* our November 12, 2025 publication "Listed Companies and Corporate Governance: Highlights from the Capital Markets Reform," available here.

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# East Asia

## Korea

Bolstered by a Q4 surge in IPOs, the Korean IPO market reversed an early-year lull in 2025 and produced year-over-year gains in net IPO proceeds.[10]

Regulatory reforms accelerated in 2025 as the government undertook multiple amendments to the Korean Commercial Code, expanding shareholder rights, strengthening board independence requirements, mandating hybrid shareholder meetings and advancing cumulative voting standards.

## Hong Kong

In the 25th anniversary of the Hong Kong Stock Exchange's founding, Hong Kong reestablished itself as one of the world's leading IPO fundraising venues in 2025.[11] Over the course of the year, multiple IPOs on the Hong Kong Stock Exchange each generated proceeds of over $1 billion.

Multiple factors contributed to the Hong Kong Stock Exchange's banner year in terms of IPOs. Supported by the Chinese Securities Regulatory Commission to pursue listings on the Hong Kong Stock Exchange, multiple leading Chinese companies launched IPOs in Hong Kong in 2025. Institutional investors provided ample demand for new issuances supported by new exchange rules.[12] Additionally, financial collaboration between Hong Kong and Middle Eastern regulators further strengthened demand for Hong Kong IPOs.

[10] IPO proceeds increased year-over-year to 14.6 trillion, a 15% prior year. *See* MSN, "IPO proceeds in S Korea rise 14.9 pct on-year in 2025: data" (December 29, 2025), available here.

[11] Hong Kong IPOs raised proceeds of approximately HK$259.4 billion in the first eleven months of 2025, an increase of 228% when compared with the same period in 2024. *See* HKEX, "HKEX Monthly Market Highlights: November 2025," available here.

[12] In August 2025, the Hong Kong Stock Exchange implemented a new rule requiring at least 40% of the shares initially offered in an IPO to be allocated to the IPO's bookbuilding placing tranche went into effect. *See* HKEX, "HKEX Concludes Consultation on IPO Price Discovery and Open Market Requirements; Launches Further Consultation on Ongoing Public Float Proposals" (August 1, 2025), available here.

### 2026 Outlook for Asia

In Korea, while macro risks remain, a combination of governmental reform efforts and a growing IPO pipeline, including companies such as Kbank, Musinsa and Goodai Global, positions Korea for a potential rebound in IPO activity in 2026.

In Hong Kong, analysts predict another impressive year for IPO fundraising numbers, based on the confluence of interest rate cuts in the United States, the global expansion of Chinese enterprises, China's domestic consumption policies and Hong Kong's ongoing capital markets reforms.

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### United Arab Emirates

The UAE experienced a notable slowdown in 2025 IPO volume after several blockbuster years, with IPOs raising $1 billion in 2025 compared to $6 billion in 2024 and a high of $12 billion in 2022. The UAE also saw high-profile companies suspend IPO plans, including those of Etihad, one of two flag carriers of the UAE. Regulatory focus in the UAE shifted toward market conduct in 2025, including extensions for internal-control reporting implementation and a new licensing requirements for financial influencers.

### Saudi Arabia

Saudi Arabia maintained its regional leadership in IPO activity in 2025. Large-cap listings such as Flynas and Umm Al Qura, as well as high volumes of mid-cap issuances, underscored breadth in the market. However, while IPO issuances in Saudi Arabia remained consistent in volume and deal value as in 2024, share performance of companies that listed on Saudi Exchange in 2025 have been mixed. Saudi Arabia also saw ongoing regulatory reforms in 2025, including the introduction of Saudi Depositary Receipts and ongoing liberalization of foreign investor access.

### 2026 Outlook for the Middle East

Across the Middle East, the 2026 pipeline for IPOs is strong, driven by postponed 2025 deals, continued sovereign asset monetization and new frameworks enabling international and dual-listing structures. Technology and fintech issuers represent a growing share of the regional pipeline.


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# Latin America

## Brazil

After a prolonged capital markets freeze, Brazil has seen no traditional IPOs since 2021. The number of companies listed on the Brazilian stock exchange (the B3) has declined to levels last seen before 2020, underscoring the severity of the slowdown.

## Mexico

Mexico emerged as one of the most active and dynamic jurisdictions for IPOs in 2025. Notable transactions in 2025 included the IPO of Fibra Next, a spin-off of Fibra Uno, which completed a $431 million IPO. As the owner of the largest industrial real estate portfolio in Mexico, this listing was a direct play on nearshoring demand for logistics and manufacturing space. Additionally, the private equity-backed natural gas pipeline operator Esentia Energy Development raised $630 million in the largest Mexican energy infrastructure IPO since 2018.

## 2026 Outlook for Latin America

Looking to 2026, optimism is improving in Brazil. Equity indices have reached all-time highs, the securities regulator has introduced a simplified issuance framework for SMEs and expected interest-rate cuts may reopen the IPO window, particularly for growth-oriented issuers targeting international markets. Still, persistently high real interest rates, macro-fiscal uncertainty and strong competition from fixed-income products are likely to temper a rapid recovery.

In Mexico, the expected IPO of Banamex in the second half of 2026 is positioned to be one of the year's most anticipated global offerings. Furthermore, forecasted interest-rate cuts and regulatory reforms are likely to support valuations and broaden issuer eligibility, although the scheduled 2026 U.S.-Mexico-Canada Agreement review may introduce potential volatility.

# Significant Tax Measures Remain in Flux for Large Multinational Groups


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The international tax landscape is increasingly fractured. Boards of multinational companies may want to pay particular attention to the impact of and ongoing developments with respect to (i) the OECD's Base Erosion and Profit Shifting (BEPS) Pillar Two rules, and (ii) the "One Big Beautiful Bill Act" (OBBBA).

## BEPS and Pillar Two

The OECD's BEPS Pillar Two rules and their implementation continue to dominate the agenda on global tax reform as we head into 2026.

The Pillar Two rules—agreed in principle by nearly 150 countries and jurisdictions (the so-called "Inclusive Framework")—are designed to ensure that large corporations (*i.e.*, those with annual consolidated revenue of at least €750 million) are taxed on their profits at a minimum rate of 15% in every jurisdiction in which they operate. Where their effective tax rate falls below 15% in any such jurisdiction, the group may be liable for a top-up tax, collected in one of the following three ways:

- First, in the low-taxed entity's own jurisdiction, if it has a "qualified domestic minimum top-up tax" (QDMTT);
- Second, in the absence of a QDMTT, from a parent of the low-taxed entity via the application of the "income inclusion rule" (IIR); or
- Third, in the absence of a QDMTT and where the relevant parent's jurisdiction does not enforce or has not implemented the IIR, from another group entity in any jurisdiction where the group has assets and/or employees via the application of the "undertaxed profits rule" (UTPR).

Although the UK, EU member states and many other jurisdictions have already adopted or taken steps toward adopting all or part of the Pillar Two rules, the Trump administration is hostile to them (particularly the UTPR). Thus, in January 2025, the Trump administration confirmed that the Pillar Two rules (and related commitments by the Biden administration) had no force or effect in the United States, and issued an Executive Order directing the U.S. Treasury Secretary to review other tax regimes for any "discriminatory" or "extraterritorial" tax practices that may have arisen as a result of those regimes' implementation of the Pillar Two rules and propose any necessary countermeasures in response.

One such proposed countermeasure included in draft legislation that became the OBBBA was a "Revenge Tax," which would have imposed onerous retaliatory taxes (*e.g.*, additional withholding taxes on U.S.-source payments) on non-U.S. corporations and individuals resident in jurisdictions that subjected U.S. Multinational Enterprises (MNEs) to any "unfair foreign taxes" (such as the UTPR).

The proposal understandably caused alarm in jurisdictions that had begun implementing the Pillar Two rules. Significant discussions at the G7 Summit in June 2025, resulted in a joint statement announcing that the G7 had reached a shared understanding on global minimum tax. That understanding was based on the idea of a "side-by-side" solution to the application of the Pillar Two rules to U.S. MNEs, whereby:

- In recognition of certain existing U.S. minimum tax rules, U.S. MNEs would be fully excluded from the UTPR and IIR as applied by the non-U.S. G7 countries in respect of their global profits.
- In return for this exclusion, the proposed Revenge Tax was dropped from the draft legislation that became the OBBBA.

Six months of OECD negotiations followed and, on January 5, 2026, the Inclusive Framework published an agreed package of new Pillar Two measures including a safe harbor which in effect exempts U.S.-headquartered MNE groups from the scope of the UTPR and IIR (although not from QDMTTs). In addition to this "side-by-side" safe harbor, the agreed package includes simplifying measures and other safe harbors, and measures to provide greater alignment in the treatment of tax credits.

The "side-by-side" safe harbor has effect for fiscal years beginning on or after January 1, 2026 and covers approved jurisdictions that meet certain conditions as to their domestic and worldwide tax systems—at present, only the United States has been approved, although other Inclusive Framework members are entitled to apply as well if they meet the relevant criteria.

The United States appears pleased with this outcome. U.S. Treasury Secretary Scott Bessent hailed the safe harbor as a "historic victory in preserving U.S. sovereignty." However, more work will need to be done for Inclusive Framework countries to implement the agreement, and questions have been raised by critics as to whether the "side-by-side" safe harbor effectively undermines some of the fundamental objectives of the Pillar Two initiative.

Given the work still to do in fleshing out and implementing the new measures, remaining gaps in the "side-by-side" safe-harbor coverage (including in relation to U.S. subsidiaries of non-U.S. ultimate parent companies) and lingering threats of revenge taxation from some quarters in the United States if progress on the ground is slow, large multinational groups should continue to monitor developments and the implications for their operations.

## OBBBA

The OBBBA introduced changes to U.S. tax law that may have a significant impact on large multinational groups and particularly companies with large domestic research and experimentation (R&E) activities, significant international operations or renewable energy investments.

On the U.S. domestic side, the OBBBA made a number of taxpayer-favorable adjustments to sting rules. Among them was the restoration of an immediate deduction for domestic R&E and qualified production property expenses, which is intended to make U.S.-based R&E and capital investment more attractive. Another was to increase the cap on interest deductibility (by reverting to a cap based on EBITDA-like, rather than EBIT-like, concepts), which can benefit companies with significant capital investment and amortizable intangibles.

On the U.S. foreign side, the OBBBA made changes to the rules affecting the taxation of income from controlled foreign corporations (CFCs). For instance, it replaced the GILTI regime with the so-called Net CFC Tested Income (NCTI) regime. Under the NCTI rules, a U.S. multinational will be taxed on all of its income from CFCs (thereby eliminating an exemption that existed for a base amount of non-passive income) at a rate of at least 12.6%. The effect of these changes will depend on a company's foreign asset base, foreign tax rates and ownership structure.[1]

On the U.S. domestic side, the OBBBA made a number of taxpayer-favorable adjustments to sting rules.

Another area of significant change made by the OBBBA is renewable energy related activity and investment. In particular, the new law has accelerated phase-outs for solar and wind energy tax credits and created a new "Prohibited Foreign Entity" (PFE) regime designed to reduce the involvement by China, Russia and certain other prohibited countries in the U.S. renewables supply chain. Under the PFE rules, no credits will be available for components or projects that involve material assistance from a PFE.[2]

Finally, as discussed in more detail above, the OBBBA's proposed Revenge Tax did not make it into the final legislation. While the proposal was dropped from the OBBBA, the administration's stated intent to use tariffs as an alternative negotiation tool signals that U.S.-international tax policy conflicts will continue. With changes from the OBBBA and an active discourse on Pillar Two continuing, companies should monitor both tax and trade policy developments closely.

[1] For additional information on these rule changes, see our July alert memo available here.

[2] For additional information on OBBBA's changes to renewable energy incentives, see our July alert memo available here.

# 2026 Digital Assets Regulatory Update: A Landmark 2025 . . . But More Developments on the Horizon


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The U.S. regulatory and enforcement landscape for digital assets and distributed ledger technology changed dramatically in 2025. Virtually overnight, U.S. regulators shifted from an enforcement-heavy crypto-skepticism that effectively outlawed the participation of traditional financial institutions in digital asset and tokenization markets and threatened the core business of many fintech companies (Fintechs), to a determined focus on flexibility for market participants to engage with digital assets and distributed ledger technology. Most notably in 2025:

- The SEC dropped nearly all of the enforcement actions commenced under the Biden administration against Fintechs that were based on allegations of unregistered broker-dealer, issuance, exchange or clearing agency activities, without accompanying fraud allegations.
- In conjunction with a new "Crypto Task Force," the SEC and its staff adopted a variety of no-action letters, interpretative statements and FAQs to clarify the interplay of U.S. securities laws and distributed ledger technology, including that:
  - Payment stablecoins are not securities,
  - Certain utility coins may not be securities,
  - Staking and liquid staking do not involve the offer of securities,
  - Registered investment companies and registered investment advisors may use state trust companies for purposes of custodying crypto assets,
  - Broker-dealers may hold crypto and tokenized assets subject to prescribed requirements, and
  - Meme coins purchased for entertainment or cultural purposes typically do not involve the offer and sale of securities.
- The CFTC withdrew guidance imposing stricter requirements on regulated entities related to digital assets and distributed ledger technology, adopted no-action relief permitting commodity brokers (called "futures commission merchants") to accept digital assets as collateral and issued guidance outlining how regulated entities may be able to accept tokenized assets as collateral for regulatory purposes.
- The CFTC also took a number of steps to facilitate the trading of event contracts, increase retail access to markets without intermediation and allow futures exchanges to list spot purchases and sales of digital assets.
- The U.S. banking regulators withdrew prior guidance that constrained the ability of banks and bank affiliates to engage with digital assets and distributed ledger technology, and then proceeded to adopt a bevy of new guidance that clarifies and expands the ability of banks to engage in such activities.
- The Office of the Comptroller of the Currency (OCC) also granted a number of Fintech firms national trust bank charters to allow further interaction with digital assets and distributed ledger technology together with the benefit of federal preemption and comprehensive federal regulation.
- President Trump convened a Working Group on Digital Assets that issued a series of recommendations designed to strengthen American leadership in digital financial technology and make the United States the "crypto capital of the world."

Topping off these regulatory efforts, the U.S. Congress enacted the GENIUS Act, which sets forth a comprehensive federal regulatory framework for payment stablecoins. The legislation makes clear that permitted payment stablecoins are not securities, commodities or deposits, but instead part of a separate regulatory regime administered principally by the OCC, along with the Federal Deposit Insurance Corporation, the Federal Reserve Board, the Secretary of the Treasury and state banking regulators. The GENIUS Act will likely not only legitimate stablecoins and give the market confidence that they can use and transact in such instruments subject to a comprehensive federal regulatory framework, but it will also create a blueprint to incorporate them into everyday transactions throughout the U.S. financial system.

Looking ahead to 2026, we expect this trend to continue. Of particular note:

- The U.S. Congress appears poised to adopt a so-called "market infrastructure" bill that would set out a comprehensive regulatory regime for digital asset brokers, dealers and exchanges, and would bring greater clarity to when transactions in crypto assets may be regulated as offers or sales of securities.

- The SEC will likely continue adopting no-action relief, interpretations, guidance and possibly exemptions and rulemakings that will open new pathways for market participants to engage in digital asset activities and tokenization arrangements. We may also see the adoption of an "innovation exemption" that would create a "sandbox" for market participants to provide services related to digital assets or tokenized securities with fewer regulatory restrictions than generally apply to securities activities, as well as a "super app" registration regime that would allow market participants to obtain a single license to engage in all regulated securities activities. There could also be additional efforts to facilitate 24/7 trading for both digital assets and traditional equity securities.

- Notwithstanding the confirmation of the new CFTC Chairman and anticipated nominations of further Commissioners, we expect the CFTC to continue allowing futures exchanges to list new kinds of contracts, including digital asset derivatives, event contracts and spot purchases and sales of digital assets. The CFTC will also likely explore further ways for commodity brokers, swap dealers and derivatives clearing organizations to accept crypto and tokenized cash and securities as collateral for regulatory purposes, as well as for retail customers to access clearing organizations with no or more limited intermediation.

- The U.S. banking regulators will likely continue their trend of expanding the permissible digital assets and distributed ledger activities of banking organizations, while also considering new trust bank charters and other new ventures and tie-ups for digital asset service providers. We expect to see significant rulemaking and interpretive activity by the banking regulators, at both the federal and state levels, as they take steps to implement the GENIUS Act. The Federal Reserve Board is also considering development of a central bank account for certain types of non-depository charters that would facilitate direct access by certain Fintechs to the U.S. payment rails.

The U.S. Congress appears poised to adopt a so-called "market infrastructure" bill that would set out a comprehensive regulatory regime for digital asset brokers, dealers and exchanges, and would bring greater clarity to when transactions in crypto assets may be regulated as offers or sales of securities.

Against this backdrop, we expect market participants to continue investing and innovating dynamically in the digital assets and distributed ledger space in 2026. In particular:

- Fintechs and traditional financial institutions will likely continue to develop new products and services related to digital assets and distributed ledger technology, including new stablecoins; tokenized deposits, securities and other real world assets;

new prime brokerage, cross-margining and other financing arrangements and complex derivatives and financial products tied to digital assets and tokenized instruments.

- We expect there to be further proliferation of decentralized exchanges (DEXs) and decentralized finance (DeFi) protocols that may offer new venues to transact in both digital and traditional financial assets. In addition, there may be more venues and operators seeking to offer retail clients disintermediated access to financial markets. We may also see expanded roles for non-custodial wallet providers.

- Fintechs and traditional financial institutions will likely continue the trend of tie-ups, joint ventures and other arrangements that further serve to integrate distributed ledger technology into the traditional financial system.

- Corporate entities and investment funds will likely face questions about steps they are or should be taking to facilitate trading of their securities, whether through tokenization or other arrangements. We also expect corporates to be pushed to accept, or engage intermediaries to develop, new and faster payment methods, including through the use of stablecoins and other digital assets.

- There will likely be more integration and connection between AI services and digital assets offerings.

Many questions lie ahead. We expect there to be robust policy debates in the coming year on many critical issues that could have a dramatic effect on digital assets, distributed ledger technology and tokenization. These include:

- Whether stablecoin issuers can pay “rewards” and if so to whom,

- What requirements should (or will) apply to DeFi protocols and DEXs that offer tokenized securities as well as their associated intermediaries,

- The ability of federal regulators to take actions that effectively preempt state securities, gaming and banking law,

- How quickly traditional financial institutions will adapt to competition from, including whether traditionally regulated financial institutions will be allowed to compete fully with, Fintechs, new payment services providers and newly created charter types, and

- The interaction of AI and distributed ledger technology.

How market participants and policymakers engage and respond to these debates will likely affect the way the digital assets and distributed ledger environments look at this time next year.

# Outlook for Private Credit in 2026


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The private credit market has reached a pivotal stage in its growth, with direct lending now matching the broadly syndicated loan market at $1.5-2 trillion in size and forecast to reach $3 trillion by 2028. Furthermore, private credit has expanded beyond direct lending to include other strategies including asset-backed finance and debt-equity hybrid capital. What began as an alternative to traditional bond and syndicated loan markets for smaller deals or where those markets were not available has evolved into a key segment of global capital markets, reshaping how companies, including large public companies, access financing.

## The Broadening Scope of Private Credit

While private credit historically originated as direct lending in senior loan format to middle market, below-investment-grade companies, the market has undergone a transformation in both scope and sophistication.

- **Up and down the capital structure:** The private credit market now extends beyond senior loans to include junior lending (often with equity upside), mezzanine financing, infrastructure debt, real estate lending and asset-backed finance. For companies, this means access to an expanded menu of financing alternatives, including tailored solutions that traditional bank lenders historically would not provide.

- **Companies of all sizes:** Private credit serves the full spectrum of companies, from venture-backed growth firms to middle-market enterprises and large-cap corporations, encompassing both private and public entities. This breadth reflects the market's maturation and the growing recognition among CFOs and treasurers that private credit can offer advantages such as speed, flexibility and confidentiality.

- **Across the credit spectrum:** Private credit lenders are active across the credit rating spectrum from investment-grade borrowers to leveraged credits and stressed or distressed situations. The emergence of investment-grade private credit, in particular, opens up potential alternatives to the long-standing dominance of public bond markets and commercial bank lending for highly-rated issuers.

Private credit is not typically top of mind for investment-grade companies, who enjoy ready access to financing on attractive terms through relationship commercial banks and the investment grade bond market. However, recent private credit deals by Rogers Communications, Intel and Meta, among others, demonstrate the evolution of this market. Private credit won these deals in the digital infrastructure space by providing sophisticated joint-venture financing structures that did not require consolidation of the financing as "debt" from an accounting or credit rating agency perspective. Meta also pursued its private credit financing alongside a large public bond issuance.

## The Evolving Role of Banks in Credit Markets

Banks remain critical players in credit markets, operating simultaneously as competitors to private credit firms and as essential providers of liquidity to private credit asset managers through fund finance facilities.

- **Banks versus private credit:** On the competitive front, banks have demonstrated their continued relevance in large-cap financing. JPMorgan's recent $20 billion acquisition financing for Electronic Arts exemplifies banks' enduring capability to underwrite and syndicate jumbo acquisition finance transactions, particularly for large strategic deals involving household-name companies. In these situations, banks retain advantages: balance sheet capacity, established syndication networks, integrated advisory relationships and pricing that can undercut private credit when market conditions permit. Recent easing of bank regulations may further enhance bank appetite to compete head-on with private credit lenders.

- **Banks provide private credit:** Many major banks have an asset management division to manage and invest third-party funds into private credit. These asset management teams are walled-off from the traditional commercial lending operations, essentially constituting private credit lending teams housed within a bank. Some other major banks that don't have their own private credit operations have entered into joint ventures with asset managers to team up on originating and investing in private credit opportunities.

- **Banks lend to private credit lenders:** Banks serve as crucial enablers of the private credit industry through debt finance they provide to the private credit funds themselves in what is referred to as fund financing. Subscription facilities (revolvers to funds backed by limited partner commitments), NAV facilities (Net Asset Value facilities, where existing investments serve as collateral new lending) and other lending structures provide private credit managers with leverage and liquidity, enhancing returns and enabling more aggressive deployment of capital.

While private credit historically originated as direct lending in senior loan format to middle market, below-investment-grade companies, the market has undergone a transformation in both scope and sophistication.

## Focus on Credit Quality and Diligence

Given recent headline bankruptcies including First Brands and Tricolor, market participants are increasingly focused on credit quality in the private credit market, both in the context of potential defaults as well as reliability of the internal valuations ("marks") of private credit investments held by large asset managers.

This heightened scrutiny reflects the market's maturation and the inevitable reality that not all private credit investments will perform as underwritten. As the asset class has grown, so too has the population of borrowers, and with greater volume comes greater dispersion in credit outcomes. High-profile defaults or restructurings, while still relatively rare, have prompted investors and commentators to question whether private credit's historical performance will prove sustainable. Competition among lenders also can increase the risk for a due diligence or underwriting miss or documentation gap.

In response, it remains to be seen whether private credit lenders will tighten due diligence requirements or apply more conservative underwriting standards. Should companies expect more detailed information requests, stricter covenant packages and potentially higher pricing for credits perceived as carrying execution risk? The market for debt financing remains highly competitive, so borrowers will continue to enjoy negotiating leverage to set terms, particularly in the large-cap segment of the market.

## Private Credit Trading

Market participants are making efforts to develop secondary trading in private credit, particularly in the investment-grade segment. While some indicators suggest modest progress—with increased trading activity and the emergence of market-making capabilities—this market remains in its early stages. Significant challenges remain as trading practices are still not fully standardized. Secondary trading poses some fundamental challenges in private credit, as borrowers value the relationship stability and confidentiality that private markets provide relative to public markets. Moreover, private credit lenders may not want to mark their loan portfolios to reflect "market" prices, particularly where the market is not liquid or transparent. In 2026, this nascent secondary market will represent both an opportunity and a challenge for the industry as it matures.

## Private Credit in Distressed Situations

Given their broad and flexible lending mandates, private credit lenders are often the lender of choice for rescue financings to stressed and distressed companies. Private credit's advantages in distressed situations are manifold: speed of execution, certainty of funding, flexibility in structuring, greater risk appetite and willingness to provide capital when traditional lenders retreat.

Liability management exercises (LMEs)—where borrowers use new private credit facilities to refinance or restructure existing obligations—have become particularly prevalent. These transactions often involve complex intercreditor arrangements, creative collateral packages and sophisticated legal structures designed to maximize flexibility for borrowers while protecting new lenders' positions. In the meantime, this activity has not been without controversy. Existing creditors have increasingly challenged aggressive LMEs as improper, leading to litigation and regulatory scrutiny.[1]

With a few notable exceptions, LMEs have occurred in companies with broadly syndicated capital stacks rather than private credit. Distressed companies that have only private credit debt are less likely to need divisive LMEs or full-blown Chapter 11 processes. The concentrated, often "clubby" lender base that private credit provides can make it easier for distressed companies to settle a consensual process to either obtain more runway (via waivers and extensions) or else hand over the keys to lenders.

[1] For additional information on LMEs, see our liability management transactions article elsewhere in this memorandum.

## The Retail Frontier

We expect to see further development of private credit firms offering products to retail investors, in light of the Trump administration's Executive Order in August 2025 opening the door to alternative assets in 401(k) plans.[2] This regulatory shift potentially unlocks trillions of dollars in retail capital that has historically been confined to traditional stocks and bonds.

For private credit managers, retail distribution offers a vast new pool of permanent capital, reducing reliance on institutional investors and bank financing and potentially enabling longer-duration lending strategies. For retail investors, access to private credit promises portfolio diversification and potentially enhanced returns, albeit with attendant risk, liquidity constraints and complexity.

As we navigate 2026, the usual caveats about market uncertainty aside, private credit is likely to see another strong year in terms of deal volumes, further penetration of new markets and a source of innovation.

## Strategic Considerations

As we navigate 2026, the usual caveats about market uncertainty aside, private credit is likely to see another strong year in terms of deal volumes, further penetration of new markets and a source of innovation. What began as "alternative" credit has become a mainstream capital source, rivalling traditional markets in scale and often surpassing them in flexibility. Understanding this landscape is critical to obtaining and navigating a broad menu of financing alternatives. Those who embrace its possibilities and remain clear-eyed about its risks will be best positioned to capitalize on the opportunities ahead.

[2] For additional information, see our 401(k) plan article elsewhere in this memorandum.

# Considerations for U.S. Boards when Contemplating a Liability Management Transaction

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As liability management transactions (LMEs) become increasingly prevalent, directors are frequently called upon to evaluate these complex transactions. We outline key considerations for boards contemplating these transactions under Delaware law.

LMEs are strategic transactions implemented by borrowers, often at the request of a key group of lenders, to take advantage of flexibility in current loan documentation. Typically, LMEs take the form of one of the following three transaction structures:

1. **Drop-Down Financing:** A borrower transfers material assets (often material intellectual property or a valuable business unit) to an unrestricted subsidiary (which is excluded from the loan agreement covenants) or a non-guarantor subsidiary, in each case resulting in the liens on the underlying assets being released. Structurally senior debt is subsequently incurred at the unrestricted subsidiary/non-guarantor subsidiary from existing lenders, private equity sponsor, or third parties, with proceeds on-lent to the borrower to fund cash flow shortfalls and bolster liquidity. Participating lenders end up with structurally senior debt and non-participating lenders are left with subordinated debt.

Companies and sponsors pursue LMEs to, among other things, extend maturities, raise liquidity and/or de-lever (at times by capturing debt discount).

2. **Uptier Transaction:** A borrower incurs new money "super-priority" loans provided by a group of existing lenders that is senior to the company's existing debt, with existing debt of participating lenders exchanged for or "rolled up" into (typically a lesser amount of) "second" priority loans, while existing loans of non-participating lenders are effectively subordinated to a "third" priority position.

3. **Double-dip:** A borrower creates a new subsidiary that is not a guarantor of the company's existing debt (NewCo) which incurs new debt from participating lenders. The transaction creates two separate claims against the same source of credit support whereby: (1) the existing borrower and guarantors under the company's existing secured debt guarantee NewCo's debt, and (2) NewCo on-lends the proceeds of the new debt to borrower/guarantors and pledges that receivable to its lenders. In a "pari plus" transaction (a variation of the Double-dip), the new debt receives the benefit of additional guarantees and collateral that the lenders to the existing borrower do not receive, in addition to pari passu credit support from the existing credit group.

Companies and sponsors pursue LMEs to, among other things, extend maturities, raise liquidity and/or de-lever (at times by capturing debt discount). Existing creditors often push companies to pursue such transactions to enhance credit protections, improve their rate return through new money financings, exchange or extend debt at favorable prices, and position themselves better for a potential Chapter 11 restructuring. Recent studies have shown that about half of LMEs undertaken since 2016 do not prevent a future default or bankruptcy filing.

LMEs have become prevalent in the market since the J. Crew transaction in 2016 (which is generally regarded as the first high-profile drop-down transaction). LMEs have been described as forms of "lender on lender violence" or "tranche warfare" as participating lenders receive enhanced priority and economics to the exclusion of non-participating lenders. As a result, many lenders in the market have responded by demanding certain minority lender protections in loan agreements, frequently dubbed as "LME blockers."[1]

Given the strategic importance of and potential creditor litigation inherent in LMEs, boards should carefully navigate their fiduciary obligations throughout the decision-making process. Under Delaware law, boards of directors owe fiduciary duties to represent the best interests of the corporation and its stakeholders. Generally speaking, the duty does not extend to creditor unless the company is insolvent. The two core fiduciary duties are the duty of care and the duty of loyalty and good faith.

With respect to the duty of care, Delaware law provides significant protection through the Business Judgement Rule under which directors are protected from being second-guessed on the merits of individual business decisions, meaning directors cannot be penalized for making what turns out to be a bad business decision, so long as the decision was made in good faith and on an informed basis.

Before embarking on LME discussions, boards should develop a sufficient record that they have considered alternative avenues (*i.e.*, solicited proposals from existing and third-party lenders and evaluated other transactions such as equity raises or asset dispositions) and have obtained the advice of qualitied professionals, which may include lawyers, financial advisors (which advise on operational improvements to improve margins and liquidity) and investment bankers (which advise on balance sheet transactions and lender negotiation dynamics). Board should also analyze their directors' and officers' (D&O) insurance policies. Ensuring adequate coverage is in place before entering into potentially contentious negotiations is a prudent risk management step. A number of insurance companies now offer policies solely to cover potential exposure (particularly litigation) arising out of LMEs.

[1] For additional information on LME blockers, see our October alert memo available here.

LMEs can involve complex conflicts of interest that trigger heightened scrutiny. Many LMEs involve a sponsor or related parties investing additional capital to facilitate the broader transaction, creating a situation where a controlling stockholder or other interested party may be on both sides of the transaction. In such circumstances, board actions may be examined under an "entire fairness" standard rather than the deferential Business Judgement Rule. This higher bar requires demonstrating both fair dealing (process) and fair price, with the defendant bearing the burden of proving "entire fairness" at trial.

To address these potential conflicts and shift the burden of proving entire fairness, boards typically establish a special committee process involving the appointment of independent directors to the board and a newly formed special committee. The special committee can establish procedures and timetables, retain professionals, negotiate the transaction, analyze the economic fairness of the offer(s), and either present recommendations to the full board or have fully delegated authority to approve the transaction.

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Over the past decade, an entire industry of independent directors specializing in the analysis of LMEs has emerged. Such directors are often appointed to boards by sponsors when a company faces an impending catalyst for a liability management transaction (*i.e.*, an impending maturity, projected covenant breach, liquidity shortfall or the company's existing debt is trading at a discount). These directors provide comfort to board members and lenders alike as they have credibility with stakeholders and experience in evaluating similar transactions.

From a legal review and board oversight perspective, close scrutiny should be paid to existing documentation to ensure that the proposed LME is permitted and that requisite consent from existing creditors is obtained. Boards should receive briefings on the terms and process to ensure risks are appropriately considered. Lenders, particularly minority lender groups, have been known to try to block an LME through an injunction otherwise seek damages following consummation of the LME. Particular attention should be paid to:

- Indebtedness, lien, investment and restricted payment covenants
- Amendment provisions (if the LME requires amendments to existing documentation)
- Affiliate transaction covenants (if implicated by the underlying transaction)

Furthermore, boards should pay close attention to the material terms of the proposed LME as documentation often requires enhanced reporting, tighter covenants, more limited baskets (*i.e.*, exceptions to the debt, lien, investment and restricted payment covenants) and other lender protections, including potentially LME blockers. Particular care should be taken to ensure that the company can continue normal operations post-LME closing despite the tighter debt documents.

LMEs present both opportunities and risks for distressed companies. They can present a path forward to a forbearance, restructuring and financing. But they can also result in litigation and might not save the company from a formal proceeding. Directors are called upon to navigate complex fiduciary duties, potential conflicts of interest and intricate documentation requirements. By establishing robust processes—including special committees where appropriate, thorough documentation review, and careful consideration of all strategic alternatives—boards can fulfil their fiduciary obligations and protect themselves from liability.

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