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BOARD EVALUATIONS

Effective Board Evaluations: A Director's Practical Tips

By Beth Vanderslice

Here is an interview that members of Skadden, Arps, Slate, Meagher & Flom LLP recently conducted with Beth Vanderslice:

Both as a director and as a consultant at Trewstar, you've been involved in a number of board evaluations. What lessons have you learned along the way? How do you go about the process?

Traditional board evaluations have tended to rely on standardized, multiple-choice surveys. In my experience, these often result in uniformly high scores — everyone rates themselves a 4 or 5 — which discourages honest reflection and fails to surface substantive issues or opportunities for improvement. Check-the-box approaches do not drive meaningful change.

Instead, the process should center on confidential, in-depth interviews with each board member, including the CEO. Those interviews

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Beth Vanderslice serves on the boards of AMD Inc., AESC Group Ltd. and Boston College. She was previously a director of Xilinx, Inc., where she chaired the nominating and governance committee, served on the compensation committee, participated in two CEO transitions and created a board evaluation process. Since 2019, she has also been a partner at Trewstar Corporate Board Services, which specializes in corporate board placements and board advisory services.

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should be conducted by an independent evaluator, ideally someone with board experience, who can recognize important themes, ask probing follow-up questions, and ensure objectivity and anonymity.

When I lead evaluations, I use a detailed questionnaire that probes all aspects of board governance, focusing on five core areas.

First is board structure — whether the board's composition, size and committee structure are optimal for the company's current needs. This includes asking about the mix of skills and backgrounds of the directors, the role of the chair of the board or lead independent director, and the effectiveness of the committee organization.

Next is board meetings, evaluating the quality and effectiveness of meetings, including agenda setting, the usefulness of materials and management presentations, time management, and the balance between full board and committee work. I pay special attention to the time independent directors spend together and with the CEO.

Board responsibilities are also a focus — the board's involvement in setting and monitoring strategy, management development, succession planning, crisis preparedness, and the identification of risks and opportunities. Is the board actively engaged in creating shareholder value and staying abreast of industry trends?

The relationship between the board and management is also important. How open and effective is their communication, and does the board support and challenge management constructively?

Finally, information and resources — does the board receive timely, relevant information and have access to necessary resources, including non-company-specific data, and opportunities for site visits and product demonstrations?

Each area is explored through eight to 12 questions.

That's the substance. What tips can you offer about the process of asking these questions and compiling the results?

The design and execution of the process are critical. Using an independent interviewer with board experience not only ensures objectivity, but also allows the interviewer to draw on best practices observed across multiple boards.

For committee evaluations, input from external advisers such as compensation consultants or audit firm partners can provide a valuable perspective and benchmarking against best practices.

Confidentiality and anonymity are crucial. Board members are more candid when assured that their feedback will remain confidential and anonymous, and evaluations are most valuable when they surface honest, sometimes delicate, feedback that might not otherwise be voiced.

I've found — and this is probably not obvious — when reporting to a board on the results, verbatim comments are much more effective than summarized or reworded responses. The authenticity of participants' own words, even though anonymous, makes the feedback more impactful and irrefutable. It's much more effective in fostering productive discussions and concrete action.

Typically, the process spans six to eight weeks.

Apart from verbatim quotes, what else would you recommend in presenting findings?

It's best to first share the results with the board chair, lead independent director or nominating and governance chair, and the CEO before presenting them to the full board. This sequencing helps manage sensitive issues and avoids surprises in the boardroom. In some cases, outside counsel may be involved in delivering particularly sensitive feedback.

What about evaluating individuals?

This varies among companies. It is important to establish at the start whether the evaluation

will include an invitation for each director to provide individual feedback. Even when the interviewer does not solicit individual assessments, respondents may offer them.

However, it's gathered, feedback about individuals should be conveyed privately — never in front of the full board. Typically, the chair or lead independent director communicates this one-on-one, sometimes using a script we prepare when the feedback is sensitive. This approach ensures discretion and encourages constructive dialogue about how the director can improve.

It's also important in many cases to evaluate the chair of the board or the lead independent director role. That helps clarify roles and expectations, reducing confusion and potential conflict between board leadership positions.

Any potential pitfalls that companies and evaluators should be particularly attuned to?

I would caution against collecting or storing sensitive feedback in ways that could make it discoverable in legal proceedings. Specifically, I avoid email and board platforms for sensitive feedback, preferring verbal communication for follow-up. You need to be especially careful to avoid verbatim comments that could be misinterpreted or become problematic if taken out of context.

All notes from evaluation conversations should be destroyed after the process, although it's common to send a single hard copy of the final report to the general counsel in a way that ensures it's covered by the attorney-client privilege.

It's one thing to prepare a report. It's another thing to effect change. What can you tell us about implementing improvements suggested by the evaluation process?

The real work begins after the assessment. A thorough evaluation generates a substantial list of ideas for improvement. Action items can range from minor process tweaks to significant governance changes.

We encourage boards to prioritize recommendations, assign responsibility for their implementation, and track progress. Some companies form temporary board effectiveness working groups to evaluate and implement recommendations, meeting regularly over the following months to maintain momentum.

Effective evaluations require active participation and ownership by the board itself. The board — not just management or outside consultants — should own the process of implementing recommendations. A subset of the board can take the lead on tracking and grading progress, with regular updates to the full board. Obviously, the process is most effective when supported by the board chair, and/or the lead independent director, and relevant committee chairs.

You've described a time-consuming process. How often should boards conduct self-evaluations?

I am a strong advocate for conducting board evaluations annually, rather than every two or three years. Each year brings new themes and learning opportunities, even for well-functioning boards. Regular evaluations keep the board engaged and focused on ongoing improvement.

And the evaluation process should evolve to address new areas of oversight, such as technology strategy and risk, including AI, as these become increasingly important for boards.

Can you give examples of concrete changes that resulted from evaluations that have increased a board's effectiveness?

Sure. I can think of several. We have been involved in numerous situations where some of these specific recommendations have been made:

- Changing the templates for board materials and presentations.
- Holding pre-meeting sessions for independent directors to allow for candid discussion of priorities and focus areas, ensuring that the full board meeting is more productive.

- Providing clear feedback to the CEO after board meetings, especially regarding discussions held in independent director sessions, to ensure management understands the board's perspectives and expectations.

- Revising the committee structure and specific charters to clarify and delegate duties more appropriately, particularly with regard to strategy and technology oversight.

- Related to this topic is developing a process for committee chair rotations.

- Developing a code of conduct and boardroom principles around boardroom behavior.

- Protocols for the way board members interact with the CEO's direct reports.

In some cases, evaluations have helped prompt boards to articulate expectations for director tenure, even in the absence of formal age or tenure limits.

When done thoughtfully, a board evaluation is a powerful tool for governance, not just a compliance exercise. It can drive real change, lead to meaningful improvements in board performance and company oversight, and foster a culture of continuous improvement and engagement among directors.

Board Minutes in the Age of Zoom and AI

By Louis Lehot and Kelly Boyd

Let me tell you about the most underappreciated document in corporate law. It is not a merger agreement. It is not a 10-K. It is the board minutes. And most boards treat them the way they treat the terms and conditions on software: they know they should read them carefully, but nobody does.

That needs to change, and it has needed to change for a long time. Former Delaware Chief Justice and Chancellor Leo Strine, Jr. made this case beautifully in his 2024 law review article, 'Minutes Are Worth the Minutes: Good Documentation Practices Improve Board Deliberations and Reduce Regulatory and Litigation Risk.'[1] If you have not read it, you should. Strine spent decades watching boards get into trouble in Delaware courts, and his thesis is simple: well-crafted minutes protect directors. Poorly crafted minutes hand plaintiffs a gift.

What Strine did not fully address is what happens when your boardroom is a Zoom tile, your secretary is an AI bot, and your 'draft minutes' appear in your inbox before the meeting is even over. That is where most boards are today, and that is what this piece is about. AI tools can now generate meeting summaries or notes during or shortly after meetings, sometimes before the formal drafting process begins.

The Classic Advice, Still Correct

Strine's guidance can be distilled into a few durable principles. Minutes are not transcripts. They do not record who said what, how long the debate lasted, or whether the CFO rolled her eyes when someone asked about the DCF. They record what the board knew, what it reviewed, what questions it asked, what advisors it relied on, and what decision it reached.

The goal is to document the process, not play-by-play. Courts applying the business judgment rule want to see that directors were informed and deliberate, not that they were stenographically documented.

What good minutes do not include: verbatim debate, individual director positions, speculative hypotheticals raised mid-meeting, and anything said during the break when someone thought the mic was off.

Strine also makes a practical point that lawyers often forget: the minutes should be drafted and circulated promptly, while memories are fresh, reviewed by directors, corrected, and formally approved at the next meeting. That cycle

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matters. *Silent acquiescence to a draft that mischaracterizes the meeting is a governance failure.*

What Changed: The Virtual Boardroom

When Strine wrote his article, most boards had already migrated substantially to virtual or hybrid formats. But the AI-assisted note-taking layer is newer, faster-moving, and less examined by legal scholars. Here is the governance reality in 2025:

- Most board meetings happen via Zoom, Teams, or Google Meet
- Platforms can record meetings and generate audio, video, and raw transcripts if those

features are enabled by the host or enterprise administrator

- AI tools generate meeting summaries and action items automatically
- Draft minutes can appear in inboxes before the meeting ends
- Multiple versions of 'what happened' may now exist in enterprise cloud systems

None of this is inherently bad. But it changes the evidentiary footprint of board meetings in ways that traditional governance frameworks were never designed to handle.

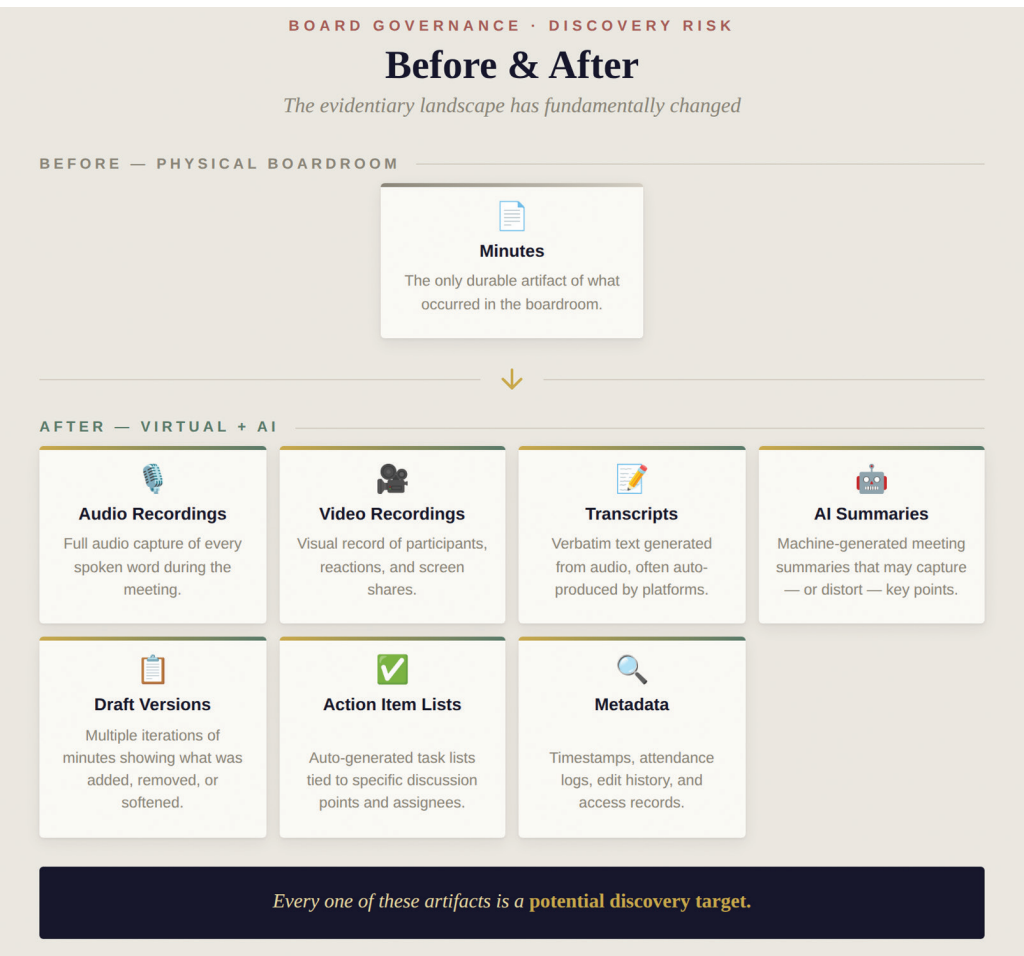
Five AI Note-Taking Risks You Need to Understand

Here are the specific risks AI-assisted note-taking introduces into board governance, in order from most common to most subtle.

Risk 1: The Transcript Trap

AI tools are optimized to capture everything. That is their job. But comprehensive capture is not the same as defensible documentation. A verbatim or near-verbatim record preserves:

- Half-formed thoughts raised early in a discussion



- Speculative scenarios that were never adopted as conclusions
- Evolving positions that look inconsistent when frozen in a log

Plaintiffs love transcripts. They are very good at reading them selectively. What looks like a rich discussion in context looks like confusion and disorganization out of context.

Risk 2: AI Hallucination and False Precision

AI summarization tools do not just record. They interpret. They identify themes, infer conclusions, and impose structure on discussions that may not have reached one. Common problems include attributing a final decision when the board was still deliberating, collapsing a nuanced disagreement into apparent consensus, and occasionally just getting the facts wrong. A confident-sounding summary that mischaracterizes what happened is worse than sparse notes. It creates specific, quotable, incorrect evidence.

Risk 3: Individual Attribution

Some AI tools tag speakers by name and summarize individual positions. Delaware practice cautions against individualizing minutes. Board action is collective. Naming who said what invites plaintiffs to look for the weakest link in director reasoning, and they will find it. Although not a strict legal prohibition, Delaware practitioners generally avoid attributing statements to individual directors unless necessary to document recusals, dissents, or committee reports.

Risk 4: Retention and Discoverability

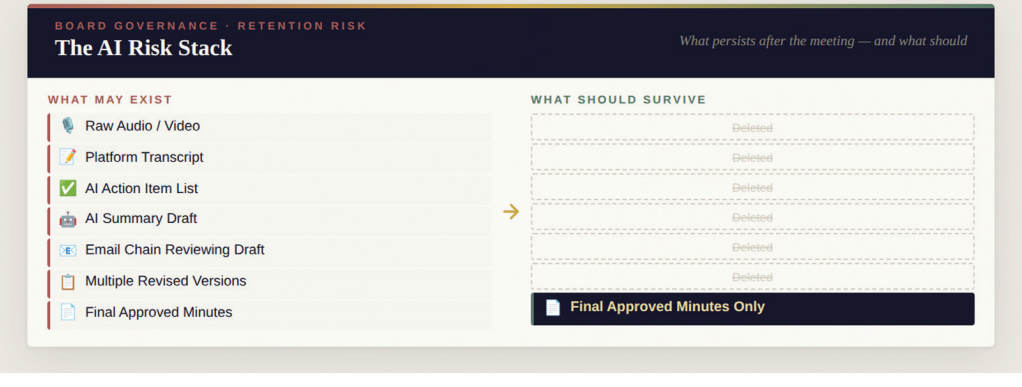
Even if your final minutes are impeccable, AI artifacts may persist. Transcripts in cloud storage, intermediate drafts, action item summaries generated by the platform, email chains about the summary - all of this may be discoverable. If your final minutes look thin relative to what the AI captured, expect that discrepancy to be argued in litigation. In particular, plaintiffs in Delaware frequently compare formal minutes to other internal documents obtained through Section 220 demands to argue that the official record omits material discussions.

Risk 5: Delegating Judgment to a Bot

The most subtle risk is cultural. When AI generates the draft and nobody meaningfully revises it, courts may question whether any human exercised judgment over the official record. Minutes are supposed to reflect deliberate documentation choices by people who were in the room. A bot was not in the room.

What To Do About It: Tips by Board Type

Here is where the advice diverges. Venture-backed, PE-backed, and public company boards



face different litigation profiles, different investor dynamics, and different regulatory environments. The core principles are the same. The practical application differs.

For Venture-Backed Boards

Venture boards have a specific problem: speed. Decisions happen fast, often between meetings, often by consent action. The resulting minutes and consents are frequently sparse or inconsistent. When disputes arise - and they do, especially around down rounds, bridge loans, liquidation preference disputes, and founder exits - the minutes are the first thing investors and plaintiffs examine.

Practical tips for venture boards:

- Establish a standing policy that AI transcripts and recordings are not board records and are deleted after minutes are approved, subject to applicable document retention policies and any legal hold obligations
- Have legal counsel or a designated person draft minutes, not whoever happened to be available that day

BOARD GOVERNANCE · MINUTES & AI

Board Governance at a Glance

How minutes practices and AI risks differ by board type

	🚀 Venture-Backed	🏛️ PE-Backed	📊 Public Company
PRIMARY RISK	Investor conflict claims	Squeeze-out and fiduciary claims	Section 220, SEC, and class actions
MINUTES PRACTICE	Often sparse or informal	Often driven by sponsor templates	Subject to formal disclosure expectations
KEY CONCERN	Consent actions common; need proper documentation	Board composition and quorum scrutiny is high	Audit committee minutes especially high-stakes
AI LANDSCAPE	Tools used informally and inconsistently	Adoption varies by sponsor governance culture	Often have professional corporate secretaries

EXPLAINER

Why Consent Actions Need as Much Care as Meeting Minutes

A **unanimous written consent (UWC)** is legally equivalent to a board vote. It binds the company and documents a decision. But boards often treat UWCs as housekeeping and sign without reviewing the recitals.

Those recitals — what the board "considered" and "determined" — **are the governance record**. If vague or incorrect, you have the same exposure as poorly drafted minutes.

Vague or incorrect recitals are bad minutes by another name.

- When using AI note-taking tools, configure them to capture topics and action items only, not verbatim content
- Review consent actions carefully. The recitals are the minutes. Treat them accordingly
- For conflict transactions, document the process in detail: who was recused, what independent advice was received, what alternatives were considered

For PE-Backed Boards

Private equity-backed boards face a different pressure: the sponsor often controls the board, and that creates heightened fiduciary scrutiny on any transaction involving the sponsor - whether it is a management fee, a dividend recapitalization, a related-party acquisition, or an eventual sale process.

Delaware courts look hard at PE-controlled boards in conflict situations. The minutes from those board meetings are frequently the central battleground in post-closing litigation.

Practical tips for PE-backed boards:

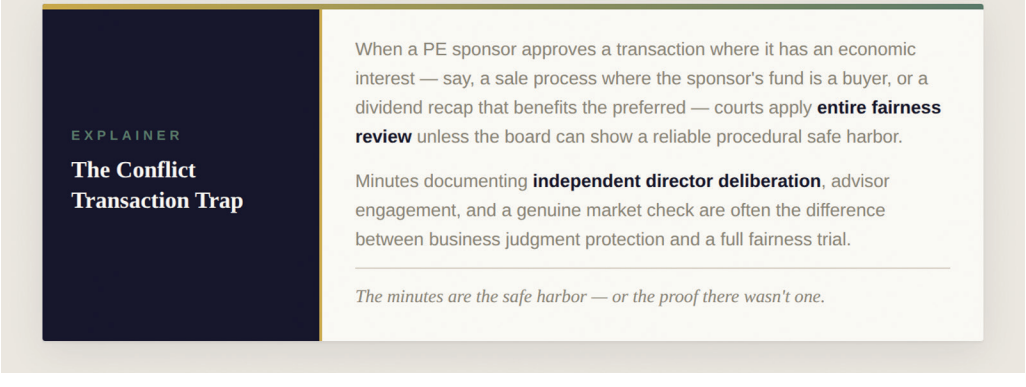
- Maintain a formal conflicts log and reference it in minutes whenever a conflict topic arises
- Independent directors should have their own advisor (legal, financial, or both) for significant conflict transactions, and that advice should be documented in the minutes
- Do not let sponsor-drafted minutes go unreviewed by independent director counsel
- Adopt a written policy on AI note-taking: who controls the tools, what gets retained, and who owns the final record
- Accelerate the minutes review cycle. Disputes over PE deals often move fast after closing. You want contemporaneous documentation, not reconstructed recollections

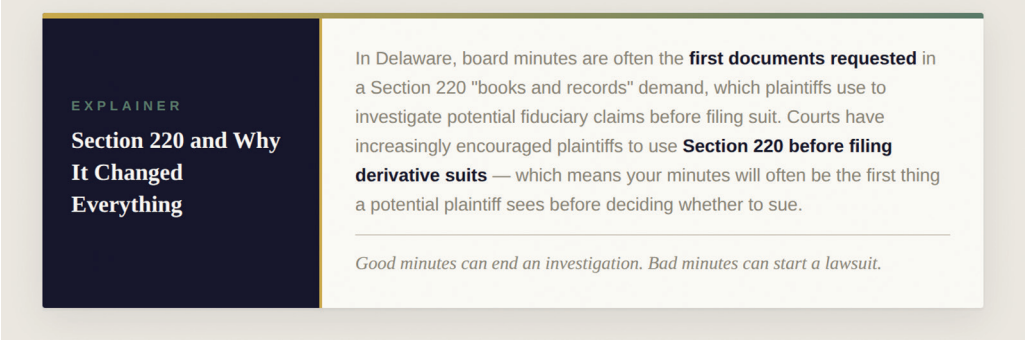
Delaware's Expanding View of "Books and Records"

Delaware courts increasingly recognize that "books and records" can include electronic materials such as emails, texts, and messaging applications when formal board materials are insufficient. As a result, incomplete minutes may encourage courts to allow broader discovery into informal communications among directors and management. Many companies now use board portals (such as Diligent or Boardvantage) that store meeting materials and comments, which may also become part of the evidentiary record.

For Public Company Boards

Public company boards operate under the most demanding governance environment.





Minutes are subject to Section 220 demands, regulatory inquiries, derivative suits, and the glare of an increasingly active plaintiffs' bar. Audit committee minutes get special attention in accounting fraud and restatement contexts. Compensation committee minutes matter in say-on-pay disputes. And M&A board minutes are essentially pre-litigation documents from the moment an acquisition is signed.

Practical tips for public company boards:

- Treat every set of minutes as a potential exhibit. Not paranoia - just good drafting discipline
- Adopt a formal AI governance policy covering board meetings: what tools are permitted, what gets retained, and what constitutes the official record
- Establish a clear chain of custody for minutes: AI tool generates raw notes, corporate secretary drafts, outside counsel reviews, directors comment, board approves
- Audit committee and compensation committee minutes should be reviewed by committee counsel, not just management
- Run the 'front page test': would you be comfortable if the Wall Street Journal quoted these minutes? If not, revise them
- For M&A transactions, minutes from each stage of the process - early exploration, financial advisor engagement, negotiation, fairness opinion, final vote - should form a coherent narrative of deliberate, informed process, particularly where enhanced scrutiny standards such as Revlon duties may apply

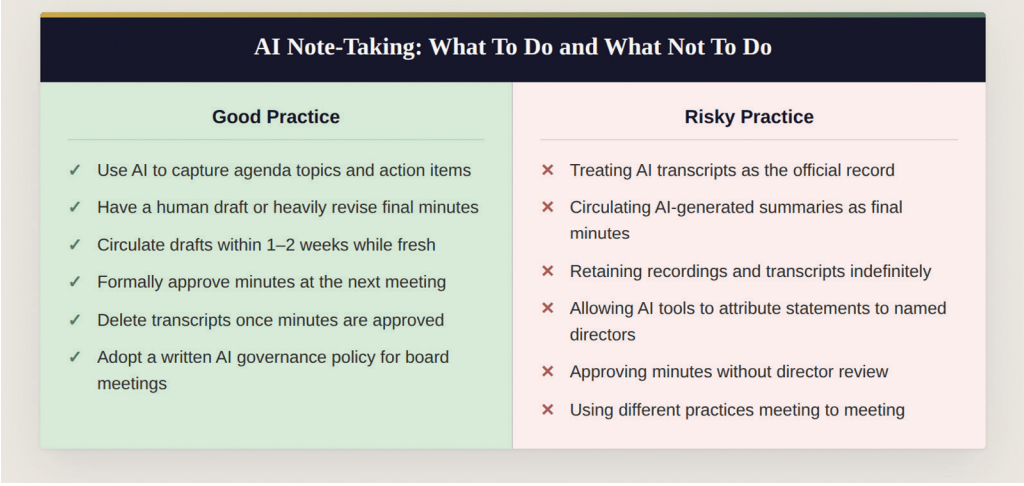
Universal Best Practices for the AI Era

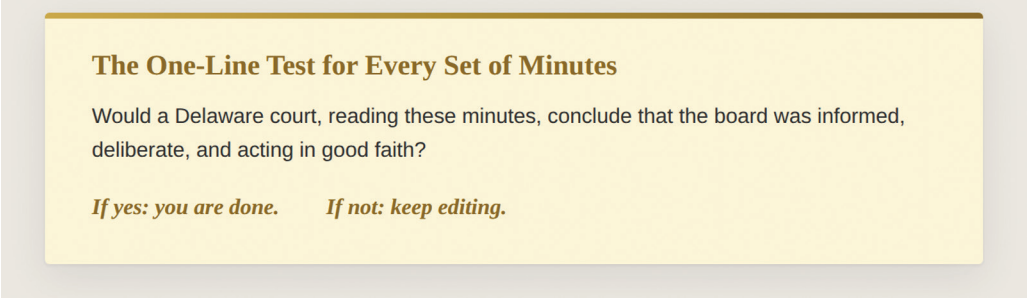
Regardless of board type, these practices apply across the board (yes, pun intended).

The Bottom Line

As Strine observed, careful minute-taking is the "spinach" of corporate governance. He is right. Minutes are not exciting. Drafting them carefully is not billable at the rates that get attention. But getting them wrong is very expensive.

The good news is that AI tools, used properly, can make good minutes easier to produce. They can help capture topics discussed, flag missing agenda items, and accelerate the drafting cycle. The bad news is that, used carelessly, they produce a detailed evidentiary record that lawyers on the other side will love. The technology is not the problem. The governance discipline is. Board minutes require a human being to exercise judgment about what the board did and why. That has always been true. It is just more important now that there is a bot in the room taking notes.





Until there is AI that guarantees the deletion of AI, my recommendation is that boards should carefully control whether AI note-taking tools are used and how the resulting data is retained or not to allow it in the board room at all.

Note

1. Leo E. Strine, Jr., 'Minutes Are Worth the Minutes: Good Documentation Practices Improve Board Deliberations and Reduce Regulatory and Litigation Risk,' 29 Fordham J. Corp. & Fin. L. 561 (2024).

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

By Sean A. O'Neal and Brett A. Pearlman

As liability management transactions (LMEs) become increasingly prevalent, directors are frequently called upon to evaluate these complex transactions. In this article, 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.

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

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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 creditors 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). The board should also analyze its 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.

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.

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 or 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 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.

Note

1. For additional information on LME blockers, see our October alert memo available at *https://www.clearygottlieb.com/news-and-insights/publication-listing/defense-against-the-dark-arts-a-guide-to-liability-management-blockers-in-the-us-loan-market*.

Navigating Governance in Turbulent Times

By Helena K. Grannis and Natalia Rezai

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 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.

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- **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.

- **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 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.

- **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 the 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.

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.

Notes

1. SEC, "Agency Rule List – Spring 2025," available at *https://www.reginfo.gov/public/doleAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode&showStage=active&agencyCd=3235*.

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 at *https://www.clearygottlieb.com/news-and-insights/publication-listing/section-16a-insider-reporting-legislation-ends-foreign-private-issuer-exemption*.

3. For additional information on AI, see our AI articles available at *https://www.clearygottlieb.com/news-and-insights/publication-listing/selected-issues-for-boards-of-directors-in-2026*.

4. For additional information, see our DEI-related risks article available at *https://www.clearygottlieb.com/news-and-insights/publication-listing/considerations-in-advising-boards-of-directors-on-dei-related-risks*.

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 at *https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/exchange-act-sections-13d-13g-regulation-13d-g-beneficial-ownership-reporting*. For additional information, see our February alert memo available at *https://www.clearygottlieb.com/news-and-insights/publication-listing/new-sec-staff-guidance-on-passive-investor-status-for-schedule-13g*.

6. For additional information, see our shareholder engagement article available at *https://www.clearygottlieb.com/news-and-insights/publication-listing/shareholder-engagement-is-the-power-of-proxy-advisors-and-institutional-investors-shifting*.

7. For additional information non applying a retail voting program in practice, see our October blog post available at *https://www.clearymawatch.com/2025/10/applying-a-retail-voting-program-in-practice/*.

Confronting a Changing and Uncertain Corporate Governance Environment in 2026

By Betty Linkenauger Segaar, David I. Meyers, Mary Katherine Rawls, and Adrianna C. ScheerCook

In 2026, public companies are facing a rapidly shifting economic, regulatory, geopolitical, and technological landscape. While these changes create meaningful opportunities, they also introduce new and often interrelated risks that must be incorporated into existing governance, risk management, and disclosure processes.

Against this backdrop, boards of directors are increasingly expected to exercise more proactive, informed, and agile oversight. Oversight by active, engaged directors is critical to help companies navigate this changing environment, ensuring that their governance models, risk management frameworks, and strategic planning processes are well-positioned to support long-term value creation, growth, and resilience.

Set forth below are significant corporate governance trends and developments that we expect to impact board oversight and actions throughout 2026.

I. Focus on Macroeconomic Conditions

Geopolitical tensions and conflicts, shifting trade policies, evolving sanctions regimes, and supply chain constraints continue to add complexity and risk for companies. These developments are becoming structural features of the operating environment, rather than discrete or episodic issues. Boards must now integrate these factors into recurring strategic and risk discussions, rather than addressing them only as specific situations arise.

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Boards should therefore review how these factors are included in companies' enterprise risk management frameworks. Management teams should also give periodic updates on developments and risks with respect to these factors, rather than limiting updates to ad hoc crisis briefings. In addition, boards should consider how these factors impact companies' liquidity planning, funding strategy, and capital allocation decisions.

By embedding a focus on macroeconomic conditions into their regular oversight responsibilities, including through strategy sessions, risk reviews, and committee work, boards can better ensure that companies remain resilient, compliant, and prepared to pivot as conditions evolve.

II. Recalibration of Stakeholder Engagement

Companies' engagement with stakeholders is changing in response to regulatory developments, political scrutiny, and changes in how voting decisions are made. Boards should understand how these changes may affect investor relationships, proxy season dynamics, and the channels through which stakeholders seek to influence corporate governance.

Increasing Passivity of Investor Engagement. In 2025, the U.S. Securities and Exchange Commission (SEC) updated its beneficial ownership reporting requirements to emphasize the passivity of institutional investors. Previously, SEC guidance indicated that engagement with management on executive compensation, environmental, social, or other public interest issues, or corporate governance topics unrelated to a change of control typically would not, in itself,

prevent a stockholder from qualifying as a passive investor.

The new guidance, however, broadened the actions that would constitute an attempt to influence control, and, consequently, cause a stockholder to be deemed an "active," rather than "passive," investor. Notably, the new guidance states that recommendations to "change… executive compensation practices or undertake specific actions on a social, environmental, or practical policy" coupled with explicitly or implicitly conditioning support of one or more of the company's director nominees may constitute an attempt to influence control.

This new guidance has generally made investors more cautious with management engagement. As a result, many engagement meetings are shorter and more scripted, with fewer forward-looking or thematic discussions, and feedback often is confined to direct responses to company-prepared questions.

Stockholder engagement strategies under these new parameters are continuing to develop, but companies should review their approaches to stockholder outreach to ensure they continue to receive timely and valuable feedback. In particular, boards should consider whether:

- Management and the board should more actively set the timing, structure, and substance of engagements.
- Additional venues for engagement outside of typical proxy season touchpoints would be useful.
- The board receives regular and adequate information on investor engagements, including areas of concern and emerging expectations.

Investors may increasingly look to boards and management teams to structure engagement opportunities and provide visibility into companies' approaches to key topics.

Narrowing of Eligible Stockholder Proxy Proposals. Historically, stockholders could make their views on governance matters known to management, the board, and other stockholders through a variety of mechanisms, including by submitting a proposal to the company for inclusion in the company's annual proxy statement. Although the proposal may not pass, the fact that the proposal would appear in the proxy statement and be subject to a stockholder vote may impact the company's activities. For example, in advance of the vote, the company may settle with the stockholder proponent by making responsive changes on terms mutually acceptable to the stockholder proponent and the company.

However, long-standing SEC rules limit the subjects of stockholder proposals that companies are required to include in their proxy statements. The SEC's interpretations related to these eligibility rules heavily impact a stockholder's ability to access a company's proxy statement and thereby force a stockholder vote on a proposal.

In 2025, the SEC issued guidance narrowing the stockholder proposals that companies are required to include in their proxy statements. In November 2025, the SEC announced that, due to "current resource and timing considerations," it would not give companies substantive responses to Rule 14a-8 no-action requests to exclude stockholder proposals for the 2026 proxy season, with a limited exception for no-action requests based on certain state law issues.

As a result, public companies face a heightened risk of litigation from proponents if the determination is made to exclude the proposal from the proxy statement, which, to date, has been limited. Companies seeking to exclude stockholder proposals during the 2026 proxy season should follow Rule 14a-8's procedures and bring proposed exclusions to their boards for deliberation regarding the company's decision, and also consider engaging and negotiating with the stockholder proponent.

Greater Scrutiny of Proxy Advisors and Changing Voting Models. In December 2025, the White House issued an executive order aimed at reducing the influence of proxy advisors, asserting that the policies of these firms, particularly those related to environmental, social, and governance (ESG) and diversity, equity, and inclusion (DEI) matters, advance nonfinancial goals that conflict with investor fiduciary duties. The executive order directs the SEC, Federal Trade Commission, and Department of Labor to review the rules governing the proxy advisory industry.

At the same time, voting programs for retail investors have been shifting, which may reduce reliance on proxy advisory firms. For example, in September 2025, the SEC granted ExxonMobil's no-action request to establish a new retail stockholder voting program that allows stockholders to authorize standing voting instructions that require ExxonMobil to vote their shares based on the recommendation of the company's board at each meeting of stockholders. Additionally, over the last several years, large asset managers have continued to roll out or expand "pass-through voting" and "voting choice" programs, allowing underlying investors greater input into how their indirectly held shares are voted.

These programs may decrease the predictability of voting outcomes for companies and increase the importance of stockholder engagement and communication. Boards and management may also need to devote more attention and resources to understanding investor preferences and explaining the company's position on key matters. Boards should stay apprised of investor engagement plans and feedback.

III. Artificial Intelligence

Artificial intelligence (AI) is rapidly developing and becoming embedded in many aspects of companies' operations. At the same time, regulation, as well as best practices for oversight and risk identification and management in connection with AI, are still evolving. As AI becomes increasingly important in companies' businesses, as well as those of their third-party vendors, it is essential that boards have the expertise and structures needed to oversee the risks and opportunities associated with AI.

Boards should consider whether they have the skillset to effectively oversee AI, including the ability to guide and challenge management on these matters. This may mean requiring regular education for directors on AI fundamentals, current and proposed regulatory frameworks, and emerging best practices, or recruiting directors with specific AI experience. Companies should also consider updating their director and officer questionnaires to collect information regarding the AI expertise of board members.

Additionally, stakeholders increasingly expect companies to adopt formal AI governance frameworks as AI becomes more prevalent. The number of S&P 500 companies disclosing that a board committee has AI oversight responsibilities more than tripled in 2025. Audit committees are the primary choice; however, technology committees, nominating and governance committees, and others are also designated to oversee AI. The prevalence of technology committees has also grown in recent years as companies seek structures better suited to ongoing oversight of AI and cybersecurity generally.

As AI implementation and use will differ across companies, appropriate governance structures will likewise differ. Boards and management should thoughtfully approach board and management-level governance structures that best support the company's AI activities. Boards should also consider the type and scope of information delivered by management on AI, including whether it effectively supports the board's oversight role.

Boards also should consider how AI tools might be used to enhance their own oversight function. AI capabilities can be used by boards to provide analyses, summaries, and comparisons that can contribute to deeper discussions, more insightful questions, and better decision-making. The use of AI can also help overcome the information gap between directors and management.

However, appropriate parameters should be put around the use of AI in the boardroom. Confidentiality and data security matters should be carefully considered, as well as potential biases and errors found in AI-generated materials. As in other areas of companies, AI can be a powerful tool in the boardroom, but ultimately, it cannot replace the board's oversight role or the need for informed, independent judgment.

IV. Finding New Paths for Sustainability

The corporate sustainability landscape has evolved significantly since the beginning of 2025 due to ongoing regulatory divergence at the federal and state levels, increasing public and political scrutiny, and general uncertainty. In 2026, the ESG landscape remains highly politicized and is experiencing significant regulatory fragmentation.

Many companies have responded by revisiting their ESG programs and modifying their public-facing communications with respect to ESG topics. This includes shifting toward the term "sustainability" and away from the term "ESG" due to its politicized connotations. At the same time, stakeholders continue to focus on certain ESG issues that may affect long-term value. Boards should recognize that many of these substantive issues remain important, even as terminology and political dynamics shift.

DEI practices and disclosures have also been under increasing scrutiny. As noted above, in early 2025, the White House issued executive orders targeting DEI programs and policies. While these executive orders were aimed at the federal government and government contractors, they have influenced broader public debate and contributed to the recalibration of DEI approaches across companies.

Effective February 25, 2025, ISS indefinitely halted consideration of a board's gender diversity and racial/ethnic diversity when making voting recommendations with respect to the election of directors at U.S. companies. In March 2025, Glass Lewis modified its approach to board diversity so that it flags all director election proposals at U.S. public companies in which its recommendation is based, in part, on considerations of gender or underrepresented community diversity.

In response to the changing environment, many companies have reduced DEI-related disclosures in public-facing documents, including proxy statements. Companies have also expanded their definitions of diversity to encompass varied skills, experiences, and backgrounds in addition to gender and racial/ethnic characteristics.

Finally, the prevalence of greenwashing litigation has continued to increase in the United States, with heightened scrutiny directed at sustainability representations, particularly in marketing and labeling.

Given the new risk dynamics at play in these areas, boards should take an active role in overseeing sustainability programs and disclosures. In particular, boards and management should:

- Seek to tailor sustainability programs to the company's business model and operations, prioritizing issues that are most material to long-term value and risk
- Integrate key sustainability risks into the company's enterprise risk management framework
- Coordinate disclosures to mitigate misalignment risks; and
- Engage with stockholders on sustainability, particularly when making changes to sustainability programs, goals, or disclosures.

V. Revisiting Board Refreshment and Succession Planning

Board refreshment and succession planning are critical to ensure that board composition

remains aligned with a company's evolving strategy, current and emerging needs, risk profile, and stakeholder expectations. Over the last few years, additional emphasis has been placed on companies' explanations regarding what skills and experiences each director brings to the board and how the board ensures it has the right mix of skills and perspectives.

The SEC's universal proxy rules further heightened scrutiny of individual directors. In universal proxy contests, activist investors can more easily target specific directors and tend to target directors whose profile may be perceived as misaligned with the company. In this environment, it is important for boards to have robust processes for evaluating directors' continued service.

While most boards conduct some type of annual evaluation process, those processes may not be as rigorous or actionable as they could be. To enhance their effectiveness, boards should consider:

- Incorporating individual director evaluations, in addition to board- and committee-level assessments, to provide more specific feedback on performance and engagement.

- Engaging a third-party facilitator periodically to conduct evaluations. The use of a third-party facilitator can help to promote candid feedback and assist with difficult conversations about board composition and function.

These steps may help drive meaningful improvements in board effectiveness.

Investors are also increasingly expecting disclosures that demonstrate boards are considering succession planning in a structured way, including board leadership, director, and management succession planning. Thoughtful succession planning supports continuity, reduces the risk of disruption, and can enhance confidence in long-term strategy.

As boards confront this evolving governance environment, the common thread across these developments is the need for deliberate, forward-looking, and well-documented oversight. In 2026, directors should periodically reassess board and committee structures, risk management frameworks, disclosure controls, engagement strategies, and succession planning processes to ensure they remain fit for purpose in light of changing regulatory expectations, stakeholder dynamics, and technological advances such as AI. Thoughtful calibration of these elements, tailored to the company's industry, strategy, risk profile, and investor base, can help boards mitigate legal, regulatory, and reputational risks and better position the company to capitalize on emerging opportunities.

By approaching these issues in an integrated manner, including engaging proactively with management, advisors, and key stakeholders, boards can strengthen their governance foundations and support companies' long-term value creation, resilience, and credibility in a period of continued uncertainty.

Texas Attorney General Declares Public DEI Initiatives Unconstitutional and Warns of Legal Risks from Corporate DEI

By Jason Schwartz, Cynthia McTernan, Cate McCaffrey, Elvys Morales, and Shreya Sarin

On January 19, 2026, Texas Attorney General Ken Paxton issued Opinion No. KP-0505 entitled "Re: 'Diversity, Equity, and Inclusion' in Texas." In the Opinion, Paxton opines on the legality of two categories of DEI initiatives: public-sector programs operated by the state of Texas, and corporate DEI practices common in the private sector. While this Opinion lacks force of law, in Texas, courts consider opinions of the Attorney General as persuasive authority when interpreting state law.

The 75-page opinion begins with a 25-page recitation of the relevant legal history. The Opinion begins with a discussion of founding-era legal principles, then traces the development of anti-discrimination law through Reconstruction, the Jim Crow era, and the Civil Rights Act of 1964. It then discusses the rise of demographic-based preferencing in federal programs, related corporate practices, and the Supreme Court doctrine permitting these practices.

Finally, it discusses recent actions by the U.S. Supreme Court, the federal government, and Texas that, in the Attorney General's view, make clear that many of the DEI-initiatives permitted under the prior framework can no longer stand. This includes reference to DEI-related guidance published by the EEOC and DOJ, on which we previously reported in March and July of last year. The Opinion then reviews numerous DEI-related policies and programs operated by the Texas state government and prescribes them all as unconstitutional. Finally, the Opinion reviews several common, corporate-DEI initiatives and practices and enumerates the laws that these programs may violate.

Public Sector Programs

The Opinion declares that seven categories of public-sector programs violate both the U.S. and Texas Constitutions. This includes:

1. Texas Historically Underutilized Business (HUB) programs, which are state procurement and contracting schemes that, among other things, sets goals for spending with businesses "at least 51 percent owned by one or more persons who are economically disadvantaged due to their identification as members of certain groups," including Black Americans, Hispanic Americans, Asian Pacific Americans, Native Americans, and women.

2. The Texas Disadvantaged Business Enterprise (DBE) programs, which regulate transportation contracting across state, regional, and local governments and award contracts to "disadvantaged business[es]," defined as businesses owned by "socially and economically disadvantaged" individuals or "socially disadvantaged" persons.

3. Other contracting schemes dictated by Texas statute that purportedly give preference to minority- and women-owned businesses, including Texas Transportation Code Section 451.253(a), which aims "to increase the participation of minority and women-owned businesses in public contracts," and the Texas Occupational Code Section 2026.152, which directs the Texas Racing Commission to do business with minority-owned businesses.

Jason Schwartz, Cynthia McTernan, Cate McCaffrey, Elvys Morales, and Shreya Sarin are attorneys of Gibson, Dunn & Crutcher LLP.

4. Consideration of race and gender in appointments to state boards, commissions, committees, and advisory bodies.

5. Race- and sex-conscious higher-education programs, such as Texas Education Code Section 51.810, which requires targeted enrollment plans for Hispanic students and African American male students, as well as accounting scholarships and internships that favor applicants based on minority status.

6. Race- and sex-based preferences in park funding, which prioritize funding for "underserved populations," a term statutorily defined with respect to race and sex.

7. Consideration of race in designation for special projects, such as the Texas Enterprise Zone Act, which establishes an extensive economic development program aimed at encouraging private investment and job creation in areas suffering from severe economic distress.

Underpinning the Attorney General's conclusion as to each of these programs is a presumption that the programs are subject to strict scrutiny because they effectively mandate that similarly situated groups be treated differently in the allocation of government benefits on the basis of race and sex.

The Opinion asserts that none of these programs satisfy strict scrutiny because they are not narrowly tailored to serve a compelling governmental interest. According to the Attorney General, many of the programs rely on generalized assertions of industry-wide or societal discrimination rather than specific, identified instances of government-sponsored discrimination, and lack reasonable durational limits essential for remedial purposes.

The Attorney General asserts that some of these programs are overinclusive because they extend preferences to all minorities, not just those essential to any purported remediation. Other programs, the Attorney General argues, are underinclusive, and therefore, cannot possibly serve to remediate specific instances of past discrimination. The Opinion also notes that the Constitution "forbids the punishment of [one] generation for the wrongs of the last."

Private Sector Programs

The Attorney General's Opinion then addresses private sector DEI initiatives, including:

1. Demographically-based workforce representation goals;

2. Diverse slate policies;

3. Diversity fellowships or other race- or gender-based hiring programs;

4. Tying compensation to DEI-related metrics;

5. Identity-based employee resource groups, mentoring, and training;

6. Supplier diversity programs; and

7. Diversity-related governance, including Chief Diversity Officers, Diversity offices, and Board committees overseeing DEI programs.

The Attorney General's Opinion does not characterize these programs as categorically unlawful and notes that "the mere existence of a DEI policy, in isolation, may not impose liability under Title VII." Nonetheless, the Attorney General states that these DEI practices "beg discussion of four broad categories of liability."

First, the Opinion discusses ways in which DEI practices may violate Title VII or the Texas Commission on Human Rights Act (TCHRA). The Opinion states that these laws prohibit not only demographically based decision-making with respect to "terms, conditions, or privileges of employment"—such as hiring decisions, termination decisions, and compensation

determinations—but also policies and programs that "limit[], segregate[], or classif[y] an employee or applicant" in a manner that would "deprive or tend to deprive" them "of any employment opportunity or adversely affect" their status "in any other manner."

The Opinion also notes that even where segregation is the result of "self-segregation" by employees, it may violate federal and state antidiscrimination law. According to the Attorney General, policies that may run afoul of these laws include demographic hiring goals, policies that "require a minimum number of female or minority directors on governing boards," policies requiring "interview panels or candidate pools include specific demographic groups," the tailoring of "job descriptions and recruiting materials to appeal to individuals of specific demographics," and the establishment of "compensation incentives tied to representation goals, DEI metrics in performance reviews, and promotion criteria with DEI targets." The Opinion also states that "structured interview requirements, internships, fellowships, pipeline programs, and targeted recruitment—may also constitute unlawful employment actions under Title VII" if they "openly discriminate based on race or sex."

Second, the Opinion discusses ways in which DEI training programs might create a hostile work environment. Specifically, the Attorney General writes that when "'official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment'" and "any race is spoken of 'with a constant drumbeat of essentialist, deterministic, and negative language,'" trainings may rise to the level of a Title VII or TCHRA violation.

Third, the Opinion states that policies that limit contracting opportunities on the basis of race may violate Section 1981. Specifically, the Attorney General states that liability may arise when race-based eligibility criteria categorically exclude applicants from contracts or contract-like opportunities. The Opinion gives the example of a venture fund competition open only to businesses owned by Black women, which the Attorney General says violates Section 1981. Further, the Opinion states that liability can be "triggered anytime an applicant is denied a job, internship, fellowship, or promotion based on race, in addition to situations when an individual is treated unequally based on race in the 'benefits, privileges, terms, and conditions of the contractual relationship.'"

Fourth, the Opinion notes that DEI initiatives may run afoul of federal and state securities laws "where risk of antidiscrimination lawsuits and customer backlash are not acknowledged to investors." According to the Attorney General, this may occur when a company promotes or implements DEI initiatives such as DEI-linked marketing campaigns, while failing to disclose the associated risks of litigation, boycotts, customer backlash, lower sales, or stock-price declines. This may also occur when a company makes only general risk disclosures to its shareholders that are not tailored to the specific DEI-related risks the company may face.

SEC Enforcement Manual Update: Key Changes

By C. Dabney O'Riordan, Nicole Love, and Dilvin Tayip

On February 24, 2026, the SEC Division of Enforcement (the "Division") updated its Enforcement Manual for the first time since 2017. The Commission characterized the updates as an effort to strengthen the Division's commitment to promoting greater transparency, consistency, and efficiency in investigations in service of the SEC's broader mission to protect investors, maintain efficient markets, and facilitate capital formation.

The changes generally reflect either statements and practices that Chairman Paul Atkins had previously announced or, in many cases, were internal policy changes adopted years ago but not included in the manual.[1] With the changes formalized in the Enforcement Manual, defense counsel are better able to ensure consistency among the staff in following these new procedures, and the changes are more likely to endure into the future administrations.

Below, we focus on key changes that concern how Division staff interact with defense counsel and will therefore impact strategic decisions and best practices for clients.

Key Changes

Wells Process: Greater Oversight and Transparency

The Wells process is the procedure by which potential defendants can provide a substantive argument after the Division staff preliminarily decides to recommend that the Commission bring charges. This is a critical stage as it is the last opportunity for a potential defendant to convince SEC leadership, including the Commissioners, that certain defendants, charges, or remedies should not be pursued.

Over the last few administrations, as the Division sought to be more aggressive and push its investigations to conclusion, there had been growing disparity in how Division staff approached the Wells process—with some staff refusing to share information or provide reasonable time frames for a Wells submission. The changes summarized below should assist in a more consistent approach across the Division and allow for a more robust and constructive Wells process in keeping with Chairman Atkins' stated goal of a "balanced approach [that] serves the interest of justice and strengthens the integrity of our enforcement program."[2]

That said, Division Director Judge Margaret Ryan has made clear that this should not be interpreted as an unlimited process that can be abused. She underscored the importance of reaching conclusions within reasonable time periods and noted that, "[d]eliberate circumvention of the process... including tactical tardiness and other games, will not be tolerated."[3]

Dual Approval for Wells Notices. In addition to Associate Director or Unit Chief approval, the Manual now requires an additional level of approval from the Office of the Director for issuance of a Wells notice. The Manual does not discuss the level of detail to be provided, the factors to be considered by, or the level of review that will be undertaken by the Office of the Director.

Division Staff Sharing of Investigative Record. Upon issuing a Wells notice, the amended Manual provides that Division staff now "should" both (1) inform Wells notice recipients of "salient, probative evidence" gathered or received by staff that staff has reason to believe is not known to the recipient, subject to confidentiality or other constraints for sharing of

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information and (2) "be forthcoming about the content of the investigative file" and make reasonable efforts to allow the recipient to review relevant portions of that file.

There are, of course, exceptions for documents that are privileged, would reveal a whistleblower or Bank Secrecy Act information, or contain information that is otherwise subject to confidentiality restrictions; however, these should be exceptions to the general approach of providing more of the investigative record.

Deadline for Wells Submission. For timing of the Wells submission, the Manual sets the default deadline for submissions at four weeks—doubling what had become standard practice of a two-week deadline. Again, this brings consistency to the fact that most, but not all, Division staff had historically granted reasonable extensions from the two-week deadline.

Content of Wells Submissions. The amendments include guidelines on effective Wells submissions—stating they are most helpful "when they focus on disputed factual or legal issues, or raise significant legal risks or policy or programmatic concerns." In addition, recommendations to discuss (as relevant) litigation risks, policy concerns, the Seaboard factors,[4] and expert reports are not new to practitioners, but it is, nonetheless, noteworthy that the Manual has explicitly identified them as helpful.

No References to Settlement Discussions or Offers. Consistent with prior practice, the amendments make clear that the Division staff will reject a Wells submission that contains or discusses any settlement offers. Rather, if a party wishes to make a settlement offer to the Commission or address prior settlement discussions with the staff, they must do so in a separate document.

Wells Meetings. The amendments provide that post-Wells notice meetings are typically granted and should be scheduled within a reasonable time after the submission but, in any event, no later than four weeks after receipt of the Wells submission.

Settlement and Waivers: Reversion to Prior Practice

Consistent with the SEC's September 2025 announcement,[5] the amendments reflect the restoration of the agency's prior practice permitting simultaneous Commission consideration of an offer of settlement and related waiver requests from automatic disqualifications and other collateral consequences from the settlement terms.

If the Commission accepts the settlement offer but rejects the waiver request, the prospective defendant or respondent will typically have five business days to inform the staff about moving forward with the portion of the settlement accepted by the Commission.

Preservation Letters: Modern Communications are Squarely in Scope

The amended Manual provides details of the Division's expectations to preserve documents upon receiving a request for documents from the Division staff. The key takeaways are that, when a company receives an SEC request, it should carefully prepare and distribute internally a preservation notification covering:

- All "documents," which the amendments provide, include electronic communications such as texts and messages sent via messaging applications (e.g., WhatsApp, iMessage, Signal), communication platforms (e.g., Teams, Slack, Discord, Telegram), and messages sent or received on personal devices such as smartphones or tablets.

- "[A]ny and all messaging platforms and messaging applications," including communications on personal devices.

The preservation notice should also require an acknowledgement of receipt.

Remediation, Cooperation, and Self-Reporting: Detailed Expectations and Examples

The amended Manual provides a more detailed articulation of the Division's framework for evaluating a company's remediation, cooperation, and self-reporting and underscores the Division's openness to recommending reduced or no civil penalties in recognition of such efforts.

Remediation. Specific examples of "effective" remediation include disciplining wrongdoers, strengthening internal controls, clawing back compensation from responsible executives, making prompt corrective disclosures, hiring new financial and accounting staff to address accounting and disclosure issues, improving training, and retaining independent compliance consultants.

Cooperation. For cooperation credit, a party must provide assistance beyond what is required by law as opposed to only compliance with subpoenas for documents or testimony. Examples of "exemplary cooperation" include summarizing factual findings from internal investigations, identifying key documents and witnesses, providing detailed explanation and summaries of factual issues, and providing financial analyses conducted by external experts.

Self-Reporting. The Division views self-reporting credit as appropriate when a company reports misconduct before staff learns of it from other sources and prior to an imminent threat of disclosure or government investigation, and made clear that such credit will rarely be appropriate where the conduct has already received media attention or is under investigation by another regulator.[6]

Restriction on Directing Investigations. The amended Manual includes an explicit restriction prohibiting staff from directing how private entities conduct internal investigations to ensure that such private investigations do not cross the line into government action. This underscores that cooperation does not include taking direction from Division staff on how to conduct an internal investigation. While reiterating that private entities retain discretion over how to conduct an investigation, the amended Manual also notes that "indicia of the investigation's independence, thoroughness, and effectiveness [are] helpful indicators when deciding whether to credit an internal investigation's findings."

Other Noteworthy Changes

In addition to the key changes identified above, there are other changes in the 2026 Manual also worth noting.

Expanded Detail and Expectations on Privilege Logs. The amended Manual provides more detail on privilege logs. For example, for documents withheld on attorney-client privilege grounds, the log must include the identity of the attorney and client, and documents withheld on attorney work-product doctrine grounds must indicate what litigation the document was prepared in anticipation of. Previously, the Manual noted only that "staff should request a detailed privilege log" which left open room for some negotiation.

Continuous Review on Declination/ Termination Notices. The amended Manual states that Division staff should "continuously review" open investigations and send termination letters when appropriate. Moreover, "[s]taff are also encouraged to send a termination letter to any party who made significant productions in an investigation to enable that party to determine that the matter has been closed." The Division's prior policy was to notify individuals and entities who were named in a formal order, had received a Wells notice, or had requested a termination.

Criminal Referrals. The amended Manual incorporates the Commission's June 2025 policy statement that identified factors staff should

consider when evaluating whether to refer potential violations to criminal authorities (including harm/risk of harm, potential gain, specialized knowledge, knowledge of illegality/harm, recidivism/pattern, and whether DOJ involvement provides additional meaningful protection to investors).[7]

Tolling Framework. In addition to noting that retroactive tolling agreements are disfavored, the amended Manual now documents the Division's years-long policy that Associate Directors and Unit Chiefs may only approve tolling for up to 90 days—with Director or Deputy Director approval needed for tolling longer than that.

Formal Orders. The amended Manual includes an update that formal orders of investigation must be approved by the Commission—which reflects the SEC's March 2025 final rule revoking its previous delegation of this authority to the Division Director.[8]

"Top 5" Lists. The amended Manual outlines the Division's years-long practice of senior officers designating "Top 5" priority matters on each of their dockets and to review and update those lists quarterly for more effective decision-making regarding resources and priorities. The criteria remain substantively unchanged—including, among other factors, whether there was misconduct by persons who owe fiduciary or other enhanced duties, widespread harm to investors, particularly vulnerable harmed investors, deterrence value including emergent market issues, and wrongdoing clearly prohibited under newly enacted legislation or rules.

Notes

1. Paul S. Atkins, SEC Chairman, Keynote Address at the 25th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law (Oct. 7, 2025).

2. *Id.*

3. Margaret Ryan, Division of Enforcement Director, Remarks to the Los Angeles County Bar Association (Feb. 11, 2026).

4. The Seaboard Report identifies four criteria for evaluating a company's cooperation in an SEC investigation: self-policing, self-reporting, remediation, and cooperation. *See* "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," Securities Exchange Act Release No. 44969 (Oct. 23, 2001).

5. Paul S. Atkins, SEC Chairman, Statement on Simultaneous Commission Consideration of Settlement Offers and Related Waiver Requests (Sept. 26, 2025).

6. Notably, this is a different approach than that recently expressed by the U.S. Attorney's Office for the Southern District of New York. In its recently issued guidance on self-reporting, to be eligible for self-reporting credit in the Southern District, disclosure must be made before the company learns of the existence of a government investigation. Therefore, it is possible to receive self-reporting credit even if that office is already investigating or otherwise aware of the misconduct as long as the reporting entity has not learned of the existence of a government investigation. The Southern District also does not preclude self-reporting credit where there are press reports regarding illegal activity as long as there is no public reporting of a government investigation into illegal activity. *SDNY Corporate Enforcement and Voluntary Self-Disclosure Program for Financial Crimes*, U.S. Atty's Off. S.D.N.Y. (Feb. 24, 2026).

7. 17 C.F.R. § 202 (2025) (*Policy Statement Concerning Agency Referrals for Potential Criminal Enforcement*), SEC Rel. No. 34-103277 (June 16, 2025).

8. 17 C.F.R. § 200 (2025) (*Delegation of Authority to Director of the Division of Enforcement*), SEC Rel. No. 33-11366 (Mar. 10, 2025).

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