Client Memorandum

January 16, 2026

2025 Year-End U.S. Legal & Regulatory Developments

In This Issue:

The following is our summary of significant 2025 U.S. legal and regulatory developments of interest to Canadian companies and their advisors. The first section below covers key developments from the fourth quarter of 2025; the second section discusses certain key developments from the first three quarters of 2025.

Recent Developments (Fourth Quarter 2025)

1. Section 16 Reporting Obligations Extended to Insiders of Foreign Private Issuers

On December 18, 2025, President Trump signed into law the National Defense Authorization Act for Fiscal Year 2026 (the "2026 NDAA"), which includes the *Holding Foreign Insiders Accountable Act*. The *Holding Foreign Insiders Accountable Act* amends Section 16(a) of the Securities Exchange Act of 1934 (the "Exchange Act") to extend Section 16 reporting obligations to directors and officers (collectively, "insiders") of foreign private issuers with securities listed on a U.S. national securities exchange or registered pursuant to Section 12(g) of the Exchange Act. Notably, however, the text of the amendments does not extend Section 16(a) reporting obligations to 10%+ holders of a foreign private issuer's registered securities, nor does it amend Section 16(b) to extend the short-swing liability provisions to insiders of foreign private issuers (or Section 16(c) to extend the short sale restrictions). In addition, the *Holding Foreign Insiders Accountable Act* also amends Section 16(a) to provide that the U.S. Securities and Exchange Commission ("SEC") may exempt any persons, securities or transactions from Section 16 reporting if it determines that the laws of a foreign jurisdiction apply substantially similar requirements.

These amendments to Section 16(a) will take effect on March 18, 2026, 90 days after the enactment of the 2026 NDAA.

Section 16 insiders are required to file Form 3 reports within 10 calendar days of becoming an insider of a company with securities listed on a U.S. national securities exchange or registered pursuant to Section 12(g) of the Exchange Act. Subsequent transactions, including purchases and sales, gifts, and equity compensation transactions, must be reported within two business days on Form 4 (with some limited exceptions). Certain other transactions not previously reported on Form 4 must be reported on Form 5 within 45 days of the public company's fiscal year end. According to the amendments, the first Form 3 reports for insiders of foreign private issuers will be due March 18, 2026.

This will be a significant departure from prior U.S. disclosure practice for foreign private issuers. Companies should carefully review who they have identified as "executive officers", as these individuals will now become subject to the reporting requirements of Section 16. Section 16 defines a subject "officer" to include an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer, and officers of the issuer's parent(s) or subsidiaries if they perform such policy-making functions for the issuer. To the extent they have not already done so, directors and officers will also need to apply in advance to the SEC for filing codes in order to be able to file the Section 16 reports on the SEC's EDGAR system.

We have applied to the SEC for an exemption from the requirements for directors and officers of Canadian foreign private issuers who file reports on SEDI on the grounds that those reports are substantially similar to the Section 16(a) filings.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/section-16-reporting-obligations-extended-to-insiders-of-foreign-private-issuers https://www.paulweiss.com/media/3984463/sec_adopts_new_climate_disclosure_requirements.pdf

For the full text of the 2026 NDAA, please see:

- https://www.congress.gov/bill/119th-congress/senate-bill/1071/text

2. SEC Grants Companies Unprecedented Discretion to Exclude Shareholder Proposals

The SEC's Division of Corporation Finance has announced a policy change that grants companies significant discretion to determine whether shareholder proposals may be excluded from proxy materials. Specifically, the staff will no longer provide substantive responses to no-action requests that do not concern whether the proposal is proper under state law, giving proponents little or no recourse to reverse a company's decision to exclude a proposal.

The new policy applies to the current proxy season (October 1, 2025 to September 30, 2026) and to pending no-action requests received before October 1, 2025. The announcement reflects the SEC's ongoing focus on reining in shareholder proposals, including last month's speech by SEC Chairman Paul Atkins questioning whether precatory shareholder proposals are permissible under state law and therefore Rule 14a-8, and anticipated further changes to Rule 14a-8 expected in the first half of 2026.

Companies will still need to notify the SEC and proponents no later than 80 calendar days before filing a definitive proxy statement that excludes a Rule 14a-8 shareholder proposal. Companies wishing to receive a response from the staff for proposals excluded on bases other than validity under state law will need to provide an unqualified representation that the company has a reasonable basis to exclude the proposal under Rule 14a-8, judicial decisions and/or prior published SEC guidance (though the latest announcement specifically notes that lack of prior staff guidance does not mean companies cannot form a reasonable basis to exclude a proposal). In these situations, the staff will respond with a letter indicating that, based solely on the company's or counsel's representation, it will not object if the company omits the proposal from its proxy materials.

While the staff is halting its review of no-action requests, institutional investor and proxy advisor policies on the treatment of shareholder proposals remain in place. Specifically, institutional investors may still seek to understand the substantive bases upon which the company has decided to exclude a shareholder proposal. Both ISS and Glass Lewis may also, in egregious situations, recommend against directors of a company that has excluded a shareholder proposal without first obtaining no-action or judicial relief. While current ISS and Glass Lewis policy contemplates the potential to recommend against election of directors of companies that have excluded shareholder proposals without obtaining no-action or judicial relief, it is hard to see these policies remaining in place following the SEC's decision to eliminate substantive no-action relief for most shareholder proposals. While less likely, proponents may also challenge a company's decision to exclude a shareholder proposal in federal court.

Going forward, companies would be well advised to ensure that there remains some reasonable basis under Rule 14a-8 to exclude a shareholder proposal and be prepared for shareholder questions related to such decisions. Rule 14a-8 currently provides several bases for excluding shareholder proposals, including with respect to proposals relating to a company's ordinary business and proposals that violate law or the proxy rules. While a company may likely find some reasonable basis to exclude shareholder proposals relating to environmental and social matters under Rule 14a-8, companies may find it more difficult to justify the exclusion of validly submitted core governance proposals related to key shareholder rights.

As the Rule 14a-8 shareholder proposal pathway continues to narrow, shareholder proponents may look to other avenues to push for change at companies. These avenues may include increased use of exempt solicitation notices, the use of withhold or "vote-no" campaigns against directors, as well as, in certain circumstances, use of Rule 14a-4, which allows shareholders filing and mailing their own proxy materials to submit and solicit support for an unlimited number of shareholder proposals.

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For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/sec-grants-companies-unprecedented-discretion-to-exclude-shareholder-proposals

For the SEC Division of Corporation Finance's announcement, please see:

- https://www.sec.gov/newsroom/speeches-statements/statement-regarding-division-corporation-finances-role-exchange-act-rule-14a-8-process-current-proxy-season?utm_medium=email&utm_source=govdelivery

3. Executive Order Targeting ISS and Glass Lewis: Impact on the 2026 Proxy Season and Beyond

On December 11, 2025, the Trump Administration issued an executive order with the goal of eventually curtailing the influence of Institutional Shareholder Services Inc. ("ISS") and Glass, Lewis & Co. LLC ("Glass Lewis"). Among other things, the executive order seeks to rein in the proxy advisors' support for diversity, equity and inclusion ("DEI") and environmental, social and governance ("ESG") initiatives, which have become increasingly misaligned with the priorities of mainstream institutional investors in recent years. The order also seeks to require proxy advisors to provide much-needed enhanced disclosures on their recommendations, methodology and conflicts of interest and hold them accountable for material misstatements or omissions under federal securities antifraud rules.

In the near-term, the executive order may decrease proxy advisor support for DEI- and ESG-related matters and empower the SEC to limit the use of shareholder proposals to advance such causes. With the influence of proxy advisors potentially waning as a result of SEC and other administrative actions, companies facing activist pressure may also be less inclined to settle with activists. Over the medium- and longer-term, the executive order's focus on the proxy advisors' role in helping coordinate voting decisions among investors may accelerate the ongoing shift away from one-size-fits-all "benchmark" proxy voting policies to policies tailored for individual institutional clients. The expansion of custom voting policies could be highly consequential for investor voting practices, shareholder engagement, and the tactics and outcomes of future proxy contests.

Overview of the Executive Order

Pursuant to the executive order, the SEC has been given broad authority to "review all rules, regulations, guidance, bulletins, and memoranda relating to proxy advisors" and to "consider revising or rescinding all rules, regulations, guidance, bulletins, and memoranda relating to shareholder proposals" that are inconsistent with the purpose of the executive order.

The SEC has also been tasked with regulating proxy voting advice, notwithstanding the decision by the U.S. Court of Appeals for the District of Columbia in July which invalidated earlier SEC efforts to regulate proxy voting advice under Section 14(a) of the Exchange Act. Specifically, the SEC has been instructed to (i) enforce federal securities antifraud rules with respect to proxy voting recommendations, (ii) assess whether proxy advisors should be required to register as investment advisers under the Investment Advisers Act of 1940, (iii) consider requiring proxy advisors to provide increased disclosures on their recommendations, methodology and conflicts of interest, (iv) analyze whether proxy advisors help investment advisers coordinate voting decisions and form a "group" under Section 13 of the Exchange Act, and (v) assess whether registered investment advisers may be breaching their fiduciary duties when engaging proxy advisors to advise on DEI and ESG matters.

The executive order also instructs the Federal Trade Commission ("FTC") to investigate antitrust violations by proxy advisors and the Secretary of Labor to strengthen fiduciary standards of retirement plans covered under the Employee Retirement Income Security Act of 1974. The FTC's antitrust investigations are already underway and the Department of Labor earlier this year announced plans to eliminate rules that permit retirement plan fiduciaries to consider ESG factors when making investment and voting decisions.

Impact on the 2026 Proxy Season

The immediate impact of the executive order may be to further accelerate ISS and Glass Lewis's ongoing retreat from blanket support of DEI and ESG matters. As discussed in our earlier alert, ISS has adopted a case-by-case approach to environmental and social shareholder proposals in its 2026 benchmark proxy voting policies. The 2026 policy is a reversal from prior years where ISS generally recommended in favor of such proposals. Earlier this year, Glass Lewis announced that clients would be able to opt out of its DEI-related voting recommendations. Glass Lewis has also reserved the right to further modify its 2026 benchmark voting policy on shareholder proposals in response to regulatory developments.

The executive order also empowers the SEC to limit the availability of Rule 14a-8 shareholder proposals, particularly with respect to DEI and ESG matters. Amendments to Rule 14a-8 are expected in the first half of 2026 and a continued decline in investor and proxy advisor support for environment and social proposals could provide the SEC with further justification to limit the use of Rule 14a-8 shareholder proposals and permanently scale back its role in adjudicating no-action requests.

It bears noting that "core" governance matters related to shareholder rights are less likely to be impacted by the executive order. These matters have not faced criticisms over political bias and investor support for governance-related proposals have remained steady in recent years.

As the influence of proxy advisors wanes under ongoing regulatory scrutiny and tightening regulations, the dynamics of proxy contests could also change in the coming months. Historically, ISS and Glass Lewis's recommendations in favor of activists have counterbalanced the pro-management votes of index funds in proxy contests, and that has been a key factor for companies deciding whether to settle with an activist. Going forward, companies may see less value in proxy advisor recommendations as a gauge of shareholder support, which could result in fewer settlements and potentially fewer activist victories in proxy contests.

Impact Beyond the 2026 Proxy Season

Looking further ahead, the executive order may have lasting consequences for investor voting practices and could reshape shareholder engagement and the tactics and outcomes of future proxy contests. Specifically, the executive order calls on the SEC to assess whether proxy advisors serve as a vehicle for investment advisers to "coordinate and augment" their voting decisions. The order follows remarks by SEC Commissioner Mark Uyeda earlier this month where he questioned whether investment advisers who vote their shares solely based on the recommendations of proxy advisors may have formed a group under Section 13 of the Exchange Act and could be required to file a Schedule 13D even if they beneficially own less than 5% of a class of voting securities.

The executive order and Commissioner Uyeda's remarks represent a coordinated regulatory effort at addressing the practice of institutional investors automatically voting in accordance with proxy advisor recommendations (also known as robo-voting). Institutional investors who rely on the same proxy advisor recommendations may face increased risk of becoming 13D filers, an outcome most institutional investors will likely look to avoid. Consequently, regulatory scrutiny of robo-voting could further hasten the ongoing shift toward customized proxy voting policies that are tailored to each institutional investor.

An expansion in customized proxy voting policies could make vote outcomes less predictable, particularly in proxy contests where institutional investors may be least likely to adhere to their historical voting patterns. More importantly, in future proxy contests, securing the support of ISS and Glass Lewis may decrease in importance relative to targeted engagement with a broader swath of institutional investors, who through their custom voting policies, will be driving vote outcomes. The nature of proxy contests could also evolve to become more data-driven, particularly as artificial intelligence plays a growing role in the creation of custom proxy voting policies. In short, the days when benchmark voting policies and the support of proxy advisors could serve as a reliable gauge of vote outcomes may be numbered. Winning future proxy contests may require companies to deploy new tools to track individual investor voting practices and deliver bespoke messaging to shareholders at scale.

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The Trump Administration's executive order seeks to provide companies with much-needed transparency and accountability from proxy advisors. The order also seeks to provide companies with relief from shareholder proposals that have consumed significant corporate resources in recent years without delivering meaningful value to shareholders. However, the executive order may also bring about potentially transformative longer-term changes to shareholder voting practices through the increased use of customized voting policies, which could in turn reshape future shareholder engagement and proxy contest strategies.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/executive-order-targeting-iss-and-glass-lewis-impact-on-the-2026-proxy-season-and-beyond

For the full text of the executive order, please see:

- https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/

4. SEC Chairman Atkins Addresses SEC's Next Steps in Regulation of Digital Assets

On November 12, 2025, SEC Chairman Atkins delivered a speech at the Federal Reserve Bank of Philadelphia, outlining next steps in the SEC's "Project Crypto" initiative to create a comprehensive regulatory framework for digital assets. His remarks emphasized the SEC's goal of reducing regulatory uncertainty for developers, exchanges, custodians, and investors. And, while he acknowledged that the *Howey* test for assessing whether a transaction is a security applies to digital asset transactions, he also recognized that the application of the test to those transactions involves consideration of facts and circumstances that may change over time.

Project Crypto's Underlying Core Principles

Chairman Atkins first described two core principles guiding his view on how the federal securities laws apply to digital assets and transactions: (1) securities remain securities regardless of how they are represented (for example, whether represented by paper certificates or digital tokens) and (2) "economic reality trumps labels," such that "calling something a 'token' or an 'NFT' does not exempt it from the current securities laws if it in substance represents a claim on the profits of an enterprise and is offered with the sorts of promises based on the essential efforts of others." Chairman Atkins described these guiding principles as "hardly novel" because they are "embedded in the Supreme Court's repeated insistence" on substance rather than form in determining whether the federal securities laws apply to a particular transaction. He noted that "what is new" is the "scale and speed at which asset types evolve" in new markets, which requires regulators to be "nimble" in response to requests for guidance.

A Potential Crypto Token Taxonomy

Chairman Atkins also identified four categories of digital assets, previewing a "token taxonomy" that the SEC will consider establishing in the coming months to further clarify regulation of digital assets and transactions under the securities laws:

- "Digital commodities" or "network tokens," whose value is derived from a functional and decentralized crypto system, are not securities;
- "Digital collectibles," which are designed to be collected and/or used, are not securities;
- "Digital tools," which provide a practical function, are not securities;
- "Tokenized securities," which represent ownership of a financial instrument that is maintained on a crypto network, are and will continue to be securities.

A Crypto Asset's Security Status May Change

Chairman Atkins further explained that "while most crypto assets are not themselves securities, crypto assets can be part of or subject to an investment contract" where "these crypto assets are accompanied by certain representations or promises to undertake essential managerial efforts that satisfy the *Howey* test." Such crypto assets are subject to the securities laws, provided that the representations or promises are "explicit and unambiguous as to the essential managerial efforts to be undertaken by the issuer." However, a token that was initially offered as part of an investment contract might not remain a security permanently—the investment contract can expire, and "the token may continue to trade, but those trades are no longer 'securities transactions' simply by virtue of the token's origin story." In Chairman Atkins's view, "a non-security crypto asset" can "separate from an investment contract" when "the issuer either fulfills the representations or promises, fails to satisfy them, or they otherwise terminate." These representations or promises might terminate when, for example, "the issuer's role diminishes or disappears." At that point, Chairman Atkins explained, "purchasers are no longer relying on the issuer's essential managerial efforts, and most tokens now trade without any reasonable expectation that a particular team is still at the helm," so subsequent transactions in that asset would not be subject to the federal securities laws.

Looking Ahead

Chairman Atkins has asked SEC staff "to prepare recommendations for the Commission to consider that would allow tokens tied to an investment contract to trade on non-SEC regulated platforms, including those registered at the CFTC or through a state regulatory regime." He also requested that the SEC "consider a package of exemptions to create a tailored offering regime for crypto assets that are part of or subject to an investment contract." We will continue to monitor these developments.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/sec-chairman-atkins-addresses-sec-s-next-steps-in-regulation-of-digital-assets https://www.paulweiss.com/media/3984463/sec_adopts_new_climate_disclosure_requirements.pdf

For the full transcript of Chairman Atkins's speech, please see:

- https://www.sec.gov/newsroom/speeches-statements/atkins-111225-securities-exchange-commissions-approach-digital-assets-inside-project-crypto

2025 Developments (First Through Third Quarters)

1. SEC Soliciting Comments on "Foreign Private Issuer" Definition and Exemptions

On June 4, 2025, the SEC issued a concept release soliciting comments on whether it should amend the definition of "foreign private issuer" ("FPI").

In the release, the SEC summarized findings from its recent review of FPIs filing on Form 20-F, expressing concerns about recent changes to their composition, primarily with respect to their (i) jurisdictions of incorporation and headquarters and (ii) lack of volume of trading outside of the United States. In 2003, the most common jurisdiction of incorporation and headquarters for FPIs was Canada, followed by the United Kingdom. As of 2023, the most common jurisdictions of incorporation and headquarters were the Cayman Islands and China, and approximately 55% of FPIs traded almost exclusively in the United States. Given these changes, the SEC is considering whether to modify the FPI definition to address the fact that many FPIs are (i) not subject to robust disclosure requirements and regulatory review and (ii) not trading securities in their home countries. Some of the changes on which the SEC is soliciting feedback include:

- lowering the thresholds for ownership of securities and/or business contacts required to be subjected to U.S. reporting requirements, effectively tightening the FPI definition;
- adding a foreign volume trading requirement and/or a foreign listing requirement to ensure FPIs are subject to meaningful foreign regulation;
- conducting an assessment of foreign jurisdictions' regulations to determine whether such regulations provide adequate investor protection;
- developing systems of mutual recognition with select foreign jurisdictions; and
- requiring FPIs to be incorporated or headquartered in jurisdictions where the foreign securities authority is a signatory to the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information ("MMoU") or the Enhanced MMoU.

The SEC is not soliciting comments on changes to the Multijurisdictional Disclosure System (the "MJDS") framework on which many Canadian issuers rely, as the primary concern seems to lie with jurisdictions whose reporting and disclosure requirements are less onerous. Nonetheless, the MJDS is only available to Canadian issuers that are FPIs, so any tightening of the FPI definition may limit the ability of Canadian issuers to continue to rely on the MJDS.

For the SEC's concept release, please see:

- https://www.sec.gov/files/rules/concept/2025/33-11376.pdf

2. Significant Delaware Corporation Law Amendments Enacted

On March 25, 2025, Delaware Governor Matthew Meyer signed into law significant changes to Sections 144 and 220 of the Delaware General Corporation Law ("DGCL"). After vigorous debate, the amendments were approved by significant majorities in both houses of the Delaware General Assembly in substantially the form proposed by the sponsors of the bill, after the Delaware General Assembly received input from the Corporation Law Section of the Delaware State Bar Association. These amendments aim to provide greater clarity and predictability in structuring controller and other interested transactions, and to reduce undue burdens on corporations by modifying the standards applicable to stockholder access to corporate books and records. Our view is that these statutory amendments are highly beneficial to Delaware corporations and their stockholders.

Key amendments include:

- Implementing a statutory safe harbor to provide liability protection for controller/interested transactions that comply with more straightforward, specified procedures. For controlling stockholder going-private transactions to qualify for the safe harbor, the procedures are a modified *MFW* framework, requiring approval by both (i) a committee of directors determined to be independent by the board, and (ii) a majority of the votes cast by disinterested stockholders. Non-squeeze-out transactions with controlling stockholders and other interested transactions would have to satisfy only one prong of this framework to qualify for the safe harbor.

- Defining "controlling stockholder" as a stockholder that (i) owns a majority in voting power; (ii) owns at least one-third in voting power and exercises managerial authority; or (iii) otherwise has sufficient voting power or rights to control the board.

- Adding more rigorous standards governing stockholder demands to inspect corporate books and records, including modifying the requirements for what constitutes a proper demand, narrowing the books and records accessible to stockholders upon a proper demand and imposing heightened evidentiary standards for obtaining non-formal books and records such as emails and text messages.

The amendments became effective on March 25, 2025 and apply retroactively, except for actions or proceedings completed or pending, or demands to inspect books and records made, on or before February 17, 2025.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/practices/transactional/corporate/publications/significant-delaware-corporation-law-amendments-enacted?id=57096

For the full text of our memorandum discussing the amendment as proposed in February 2025, please see:

- https://www.paulweiss.com/media/3985951/transformative_amendments_proposed_to_delaware_general_corporation_law.pdf

For the full text of the amendments to Section 144 and 220 of the DGCL, please see:

- https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=141930&legislationTypeId=6&docTypeId=2&legislationName=SS1forSB21

3. SEC Statement Permitting Mandatory Arbitration of Securities Law Claims

On September 17, 2025, the SEC adopted a Policy Statement that the Federal securities laws do not bar charter and bylaw provisions that would impose mandatory arbitration on investor claims against issuers. As a result, SEC staff will no longer consider these provisions in determining whether to accelerate the effectiveness of a registration statement, and instead will focus on the adequacy of the registration statement's disclosures, including disclosure regarding the arbitration provision.

Whether such provisions may be included in a company's organizational documents does remain a question of state corporate law. In that regard, we note that Delaware recently enacted an amendment to the Delaware General Corporation Law that is intended to bar mandatory arbitration of Federal securities law claims for Delaware corporations.

In her dissenting remarks, Commissioner Crenshaw expressed concerns about the impact on investors, who would be foreclosed from securities litigation class action lawsuits by such mandatory arbitration provisions.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/sec-statement-permitting-mandatory-arbitration-of-securities-law-claims

For the SEC's Policy Statement, please see:

- https://www.sec.gov/files/rules/final/2025/33-11389.pdf

4. New York's Highest Court Affirms Dismissal of Derivative Action Where Plaintiff Lacked Standing Under Foreign Law

On May 20, 2025, in *Ezrasons, Inc.* v. *Rudd* ("*Ezrasons*"), New York's highest court affirmed dismissal of a shareholder derivative lawsuit against officers and directors of Barclays PLC—a bank holding company incorporated under the laws of England and Wales and headquartered in London. The 6–1 opinion held that plaintiff lacked standing to pursue derivative claims under English substantive law and rejected plaintiff's argument that the New York state legislature intended to bestow standing on all shareholders of foreign corporations to file derivative lawsuits in New York. The opinion provides foreign corporations with another arrow in the quiver of defenses available to achieve dismissal of derivative actions at an early stage.

The Court of Appeals Opinion

Writing for the six-judge majority, Judge Anthony Cannataro reaffirmed New York's "longstanding adherence to the internal affairs doctrine," which mandates that "the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation." The court rejected plaintiff's argument that Sections 626 and 1319 of New York's Business Corporation Law (the "BCL")—enacted over 60 years earlier—overrode the internal affairs doctrine. Section 626 specifies procedures for bringing a shareholder derivative action in New York but does so "without displacing the internal affairs doctrine or precluding application of foreign substantive limitations on a particular plaintiff's standing." And Section 1319 simply "sets forth a list of various BCL articles and sections" that apply to foreign corporations doing business in New York. Neither section "clearly manifest[ed] legislative intent to override the internal affairs doctrine as it applies to shareholder derivative standing."

Applying English corporate law pursuant to the internal affairs doctrine, the Court of Appeals agreed that plaintiff lacked standing to sue derivatively and affirmed dismissal. Notably, the court "assume[d]," without deciding, that the registered member requirement was "substantive." Although plaintiff argued at the Court of Appeals that the requirement was "procedural," the argument had not been made below and therefore was not preserved for appellate review.

Implications

The *Ezrasons* decision reaffirms New York's commitment to applying the substantive law of the place of incorporation to litigation impacting internal corporate rights and relationships, including shareholder derivative actions. At the same time, the decision rejects the contention that New York should apply its own laws to all derivative lawsuits involving non-U.S. corporations, which are often subject to more prohibitive prerequisites under the laws of their home countries.

Directors and officers of non-U.S. companies hauled into New York courts to defend shareholder derivative suits thus now have additional support for motions to dismiss where plaintiffs have not satisfied all the prerequisites imposed by the laws of their home country. Directors and officers facing derivative lawsuits should also consider whether additional defenses may be deployed early to secure dismissal, including lack of personal jurisdiction, *forum non conveniens*, and defenses on the merits. Indeed, on the same day that the Court of Appeals decided *Ezrasons*, it also issued a one-paragraph order in *Haussmann* v. *Baumann* ("*Haussmann*") affirming dismissal of a *different* derivative suit against the German pharmaceutical company, Bayer AG, on *forum non conveniens* grounds.

Although the Court of Appeals did not shut the door to derivative lawsuits against non-U.S. companies, the *Ezrasons* opinion rejects recent efforts to transform New York courts into an open forum for shareholder derivative lawsuits against non-U.S. companies. The *Ezrasons* opinion, coupled with the short order in *Haussmann*, reflects an increased skepticism of New York courts to foreign derivative lawsuits filed in the state.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/new-york-s-highest-court-affirms-dismissal-of-derivative-action-where-plaintiff-lacked-standing-under-foreign-law

For the State of New York Court of Appeals' opinion in *Ezrasons, Inc.* v. *Rudd*, please see:

- https://www.uschamber.com/assets/documents/Opinion-Ezrasons-v.-Rudd-N.Y.-Court-of-Appeals.pdf

For the State of New York Court of Appeals' opinion in *Haussmann* v. *Baumann*, please see:

- https://www.uschamber.com/assets/documents/Opinion-Ezrasons-v.-Rudd-N.Y.-Court-of-Appeals.pdf

5. DOJ Antitrust Official Discusses Merger Enforcement Policy

On June 4, 2025, Deputy Assistant Attorney General for Antitrust Bill Rinner outlined the position of the current administration regarding several areas of merger enforcement in a speech to the George Washington University Competition and Innovation Lab Conference. Highlights from Mr. Rinner's speech include:

Merger remedies. The overarching criteria for merger settlements is that "they must be strong, robust, and provide great confidence in their ability to protect competition."

The U.S. Department of Justice (the "DOJ") will strongly prefer "structural remedies"—that is, those that resolve competitive concerns by requiring parties to divest overlapping businesses.

This is in contrast to so-called "behavioral remedies" that would govern the parties' ongoing conduct, which are generally disfavored by the DOJ. However, Mr. Rinner indicated that "there may be times in which limited behavioral remedies buttress genuine structural relief."

Divestiture buyers should have "incentive and ability to replace lost competition in every dimension, including product or service quality."

Merger review process. The DOJ will take action where parties fail to comply with the requirements set forth in the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act"). In particular, the DOJ "will seek judicial sanctions where parties systematically abuse legal professional privilege or recklessly disregard professional duties by withholding or altering documents required by the HSR Act."

- The DOJ will not send what Mr. Rinner termed "'scarlet' warning letters." The prior administration had a practice of sending letters informing parties that they close their deal at peril of a subsequent antitrust investigation and lawsuit to unwind the merger. Mr. Rinner noted that the law provides for post-consummation challenges, and if the DOJ "declines to bring an enforcement action, there is no need to" inform parties of this.

- Merger enforcement will be limited to antitrust issues. The DOJ will not seek to use the merger review process to advance non-competition goals.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/doj-antitrust-official-discusses-merger-enforcement-policy

For the Deputy Assistant Attorney General for Antitrust's speech, please see:

- https://www.justice.gov/opa/speech/daag-bill-rinner-delivers-remarks-george-washington-university-competition-and

6. U.S. Antitrust Agencies Continue to Focus on Interlocking Directorates

In an en banc, unanimous opinion in *In re Match Group, Inc. Derivative Litigation* ("*Match*"), the Delaware Supreme Court declined to provide a less burdensome path to business judgment review for self-interested controlling stockholder transactions that are not full "squeeze-out" mergers. Instead, the court's opinion, by Chief Justice Collins J. Seitz, Jr., confirms that, in all transactions where the controller stands on both sides and receives a non-ratable benefit (including in non-squeeze-outs), entire fairness is the presumptive standard of review and defendants must demonstrate that they satisfied both prongs of the framework set forth in *Kahn* v. *M & F Worldwide Corp.* ("*MFW*") to obtain business judgment review of the transaction—satisfying only one of the two protective measures will shift the burden of proving entire fairness to the plaintiff, but will not alter the standard of review. In addition, the opinion confirms that in the *MFW* setting, to replicate arm's-length bargaining, all committee members, not just a majority of the committee, must be independent of the controller. *Match* therefore affirms that *MFW* remains the only path under Delaware law to invoke business judgment review in self-interested controller transactions and clarifies the need to ensure the independence of each special committee member in order to rely on *MFW's* protections.

Background

In its seminal 2014 *MFW* opinion, the Delaware Supreme Court held, in the context of a controller squeeze-out transaction where minority holders sell their shares and are not stockholders of the surviving entity, that the transaction will be subject to business judgment review if it is conditioned from the start on both (i) approval by a special committee of independent directors that is fully empowered and meets its duty of care and (ii) the fully informed, uncoerced vote of a majority of the minority stockholders. After *MFW* was decided, the Court of Chancery also applied the *MFW* framework in a series of non-squeeze-out cases where the controller received a non-ratable benefit, which raised the question whether it was necessary to do so in those circumstances in order to obtain business judgment review of those transactions.

Match also arose in the context of a controller, non-squeeze-out transaction, specifically the 2020 separation of Match from its controlling stockholder, IAC/InterActiveCorp ("IAC"). IAC had conditioned the transaction from the start upon approval by an independent special committee and a vote of a majority of the minority stockholders. The Match board formed a three-member separation committee and empowered the committee to, among other things, approve or disapprove any proposed separation transaction. The transaction was ultimately approved by both the separation committee and a majority of the minority stockholders.

The plaintiffs, minority stockholders of Match, brought direct and derivative claims alleging, among other things, that the transaction was a controller transaction subject to entire fairness review, and that the business judgment rule did not apply under *MFW* because the separation committee was not fully independent. Initially, the Court of Chancery dismissed the complaint upon finding that the transaction fully complied with the *MFW* requirements. Importantly, the Court of Chancery determined that the independent committee prong of the *MFW* framework was satisfied even though the complaint adequately alleged that one of the three directors on the separation committee lacked independence from IAC, reasoning that the allegedly non-independent director did not dominate or infect the proper functioning of the committee, which was comprised of a majority of independent directors.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/media/3984613/delaware_supreme_court_affirms_two-condition_mfw_roadmap_to_obtain_business_judgment_review_of_controller_transactions.pdf

For the Delaware Supreme Court's opinion in *In re Match Group, Inc. Derivative Litigation*https://courts.delaware.gov/Opinions/Download.aspx?id=354960, please see:

- https://courts.delaware.gov/Opinions/Download.aspx?id=362250

7. District Court Holds That "Negative Causation" Defense Bars Section 11 Liability Where Market Absorbs Disclosure Before Stock Price Drops Below IPO Price

On April 10, 2025, a California district court granted summary judgment to defendants in a Section 11 lawsuit based on the issuer's evidence that the market absorbed any impact from a disclosure before its stock price dropped below the initial public offering ("IPO") price nearly two weeks later. The decision helpfully clarifies two important points of law for defendants facing post-offering securities class actions: *first*, that Section 11 plaintiffs cannot recover investment losses based on share price declines above the offering price, and *second*, that defendants are not required to affirmatively identify an alternative cause of a stock price decline to support a negative causation defense.

Background

In September 2021, Freshworks Inc., a software company, held an initial public offering in which it sold 28.5 million shares of its common stock at $36 per share. The company's share price quickly rose following the IPO. Several weeks later, when the company disclosed relatively weak results for 3Q 2021, its share price dropped 14% and 8% on consecutive days, but remained above the IPO offering price. Approximately two weeks later, the company's share price first dropped below its IPO price.

A shareholder brought claims under Section 11 of the Securities Act of 1933, as amended (the "Securities Act"), and alleged that Freshworks' registration statement failed to disclose the company's disappointing interim 3Q financials at the time of the IPO. Freshworks ultimately moved for summary judgment on the grounds that plaintiff could not recover for losses sustained above the $36 IPO price, and that any losses below that threshold were not caused by the alleged omissions in the registration statement.

The District Court's Decision

The district court, Judge Breyer in the Northern District of California, granted defendants' motion for summary judgment and held that no recoverable losses were caused by defendants' alleged omissions. The court agreed with defendants that, as a matter of law, plaintiff could not recover investment losses under Section 11 based on stock drops above the company's IPO price.

The court also credited defendants' uncontested expert evidence that Freshworks' stock traded in an efficient market and, therefore, that the market absorbed any impact from the issuer's post-IPO disclosure in the two weeks between the disclosure and the date when the company's stock price first dropped below the IPO price. Defendants thus proved their "negative causation" defense, i.e., that any investment losses below the IPO price were not caused by the alleged omissions.

Notably, the court rejected plaintiff's argument that the negative causation defense required defendants to affirmatively identify an alternative cause of the stock drop below the IPO price, explaining: "Nowhere in the statute or the case law is there a requirement that the defendant affirmatively prove what caused the decline; all a defendant must show is that the decline was not caused by the alleged misstatement or omission." As a result, any dispute of fact as to what caused the stock price to decline below the offering price was not material—and could not prevent summary judgment—because plaintiff had not offered any evidence to dispute defendants' expert's conclusion that the decline was not caused by the alleged omissions.

Implications

The decision joins a growing consensus that the plain language of Section 11 prohibits plaintiffs from recovering for investment losses sustained by stock drops *above* an offering price. The decision also rejects a common argument from plaintiffs that, to establish a negative causation defense, defendants must prove not only that their alleged misrepresentations were *not* the cause of a stock drop, but also affirmatively prove what *was* the cause of the stock drop. Issuers facing Section 11 lawsuits following a public offering should carefully review their stock price movement around the time of the offering and the alleged truthful disclosure to see if the arguments or defenses that persuaded the district court in this case may apply.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-holds-that-negative-causation-defense-bars-section-11-liability-where-market-absorbs-disclosure-before-stock-price-drops-below-ipo-price

For the district court's opinion in *Sundaram* v. *Freshworks Inc.*, please see:

- https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_22-cv-06750/pdf/USCOURTS-cand-3_22-cv-06750-4.pdf

8. District Court Concludes Section 11 Liability "Likely Foreclose[d]" For Companies Going Through Direct Public Listing

On April 4, 2025, a federal district court in Colorado dismissed a Section 11 claim arising out of a direct listing and concluded that recent Supreme Court precedent "likely forecloses Section 11 liability in the direct listing context" altogether. The court applied the Supreme Court's unanimous decision in *Slack Technologies, LLC* v. *Pirani* ("*Slack*"), which requires that a Section 11 plaintiff plead and prove that it purchased shares traceable to the registration statement it claims is materially misleading. Notwithstanding plaintiffs' creative legal theories and plea for an opportunity to prove traceability through discovery, the district court held that plaintiffs could not plausibly allege that the shares they purchased were issued pursuant to the allegedly deficient registration statement because both registered and unregistered shares of the issuer's stock were available at the time of the direct listing. This decision demonstrates that, in the wake of the Supreme Court's decision, Section 11 plaintiffs will be held to a strict tracing requirement, which may effectively insulate companies that go public through a direct listing from Section 11 liability.

Background: The Direct Listing

The lawsuit, *Cupat* v. *Palantir Technologies, Inc.*, concerned Palantir Technologies, Inc. ("Palantir"), a software company that went public through a direct listing in September 2020. A direct listing is different from a traditional IPO in several respects. In an IPO, a company files a registration statement to issue new shares and unregistered shares (such as those owned by company insiders) are "locked up" and cannot be sold on an exchange for a period of time. By contrast, in a direct listing, a company files a registration statement to permit existing shareholders to publicly sell their shares, and both registered and unregistered shares are immediately tradeable. When Palantir went public by way of direct listing, approximately 53% of the shares available for trading were registered under the direct listing registration statement, while the remaining shares were exempt from registration under SEC rules.

After Palantir's share price declined, a putative class of shareholders sued, alleging that defendants misled the market about the company's growth prospects. Among other claims, plaintiffs alleged that Palantir made misleading statements in its registration statement in violation of Section 11 of the Securities Act.

The District Court's Dismissal Decision

The district court granted defendants' motion to dismiss the Section 11 claim. The court acknowledged *Slack*'s requirement that a Section 11 plaintiff "plead and prove that he purchased shares traceable to the allegedly defective registration statement," but noted that the Supreme Court "did not assess whether any specific allegations were sufficient to plead traceability, nor what evidence is sufficient to prove it."

Plaintiffs sought to satisfy the tracing requirement by alleging that (i) the probability that plaintiffs "purchased at least one registered share is so high as to constitute a legal certainty"; (ii) they would be able to prove traceability with appropriate discovery; and (iii) "any unregistered shares they purchased should be deemed registered on an integrated offering theory." The court rejected each of these theories. Plaintiffs identified no authority permitting them to proceed on a Section 11 claim on a probabilistic tracing theory or to engage in discovery to establish Section 11 standing. To the contrary, and consistent with decisions from the First and Ninth Circuits, the court reasoned that a Section 11 plaintiff "must plead facts supporting a plausible inference that its shares are traceable, not simply facts supporting a plausible inference that its shares are probably traceable to the challenged registration statement." The court also rejected plaintiffs' integrated offering allegations, which sought to "make an end-run around what the Supreme Court has suggested is a strict tracing requirement." As the court explained, the integrated offering doctrine applies when an issuer seeks to avoid registration regulations by dividing what is effectively a single offering into multiple offerings; here, however, the issuer conducted only one offering, albeit via direct listing.

Although the court acknowledged that its decision "produces a harsh result" because it "likely forecloses Section 11 liability in the direct listing context," it concluded that its ruling is consistent with *Slack*'s strict tracing requirement, even if it does create a potential "loophole" for direct listings.

Implications

The decision confirms that *Slack*'s strict tracing requirement may effectively insulate companies that go public through a direct listing from Section 11 liability. The decision further suggests that nothing short of chain-of-title allegations will suffice to plead traceability, posing a significant challenge to plaintiffs seeking to plead a Section 11 claim arising out of a direct listing. The decision may also have implications in other circumstances where tracing shares to a particular registration statement is difficult, such as where unregistered shares enter the market after an IPO lockup period expires, or where there have been multiple offerings pursuant to multiple registration statements. Ultimately, this decision and others interpreting *Slack* may make direct listings a more attractive avenue for companies that are looking to go public, as a direct listing may reduce associated litigation exposure.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-concludes-section-11-liability-likely-foreclose-d-for-companies-going-public-through-direct-listing

For the district court's opinion in *Cupat* v. *Palantir Technologies, Inc.*, please see:

- https://cases.justia.com/federal/district-courts/colorado/codce/1:2022cv02384/218281/54/0.pdf?ts=1679489509

For the full text of our memorandum analyzing *Slack Technologies, LLC* v. *Pirani*, please see:

- https://www.paulweiss.com/insights/client-memos/supreme-court-limits-who-may-sue-under-section-11-of-the-securities-act

9. Exxon's Auto-Voting Plan: Implications for Shareholder Activism and Considerations for Companies

On September 15, 2025, the SEC issued a no-action response stating that it would not recommend enforcement action against Exxon's proposed auto-voting plan for retail investors. Under the plan, Exxon's retail investors (including retail investors who beneficially own Exxon shares through a bank, broker or plan administrator) may elect to have their shares automatically voted in accordance with the board's recommendations. Shareholders who opt into the auto-voting plan can later opt out by either casting their vote at a shareholder meeting or revoking their auto-voting instructions. Exxon intends to issue annual notices to its retail holders reminding them of their enrollment in the auto-voting program.

Exxon's plan tackles a long-standing dilemma facing companies with a large retail shareholder base. Most retail shareholders do not vote their shares, but when they do, they tend to overwhelmingly vote in favor of management. While the retail base of most large public companies ranges from 15% to 25%, the retail stake in legacy companies that went public decades before the rise of institutional investing can be as high as 40%.

The impact of a large retail base can be particularly consequential in activist campaigns, where a combination of a large retail base coupled with a relatively small actively managed base can meaningfully tilt the outcome of a proxy contest in favor of the company. However, retail holders can be difficult and costly to reach during proxy contests (and for the most part, have been overlooked by both companies and activists in favor of institutional investors). By attempting to "lock in" retail investors in advance, Exxon's auto-voting plan aims to tilt the outcome of future shareholder proposals or proxy contests in the company's favor, and appropriately so, given the high level of support retail holders generally have had for incumbent boards of directors.

We set forth below some considerations for companies as they evaluate whether to adopt similar voting plans for their retail investors.

A. ***Relative Influence of Proxy Advisors***. For most public companies, a significant portion of the shareholder base comprises institutional investors whose voting decisions are influenced by proxy advisory firms. Notwithstanding ongoing regulatory efforts to curtail the influence of proxy advisors, proxy advisors continue to wield significant influence and tend to support dissident slates in approximately half of all proxy contests, making them a critical source of support for activists. By contrast, the largest passive investors generally support management. The growth of pass-through voting programs adopted by passive investors, allowing clients to vote in accordance with proxy advisor policies may only further increase the influence of proxy advisors. While securing the support of retail investors can be helpful, in many situations, retail votes may not offset the votes of investors who vote in accordance with proxy advisor recommendations.

B. ***Retail Base Stability and Composition***. Retail investing has seen noticeable growth in recent years amid the proliferation of online trading tools and social media platforms discussing trading strategies. Retail volumes have doubled during the past decade with more growth expected. Retail investing has also become more volatile, with a growing list of companies finding themselves caught in meme stock trading. An unstable retail base can make it complex, time-consuming and costly to administer an auto-voting plan. While an exception rather than the norm, a retail base with a high level of churn may also be an indicator of a predominance of growth-oriented and/or short-term retail shareholders who could be more inclined to vote with an activist instead of supporting management. For example, activist investor Ryan Cohen successfully rallied the support of retail investors for his campaigns at GameStop and Bed Bath & Beyond.

C. ***Potential Uptake Rate***. The advantage of Exxon's auto-voting plan is that it provides ample time for Exxon to secure the support of retail investors, unlike in proxy contests where even concerted proxy solicitation efforts tend to only attract a fraction of the overall retail base. However, Exxon's auto-voting plan may still prove challenging to administer as retail holders can be difficult to reach and disinclined to vote. Many retail holders do not vote because of the complexities of the proxy voting process. These same retail holders may find an auto-voting plan to be similarly complex and fail to opt in.

D. ***Cost Considerations***. An auto-voting program can be costly to administer both in absolute terms and relative to the benefits reaped. The decision whether to adopt an auto-voting plan should take into consideration factors such as the size of the company's retail base, overall shareholder base composition, historical voting patterns among the company's retail investors, likely receptiveness of retail investors to an auto-voting plan and the ongoing costs and infrastructure required to administer the plan.

Exxon's auto-voting plan can be a useful tool for preemptively mobilizing a supportive but difficult-to-reach retail base. This plan is likely to be most effective at companies with a large and stable retail shareholder base, such as legacy companies with income-oriented investors. For many other companies, it remains to be seen whether an auto-voting plan will have a meaningful impact in the context of shareholder activism.

The best defense against activism (other than strong performance) remains staying closely attuned to shareholder sentiment and being ready to respond when an activist emerges.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/exxon-s-auto-voting-plan-implications-for-shareholder-activism-and-considerations-for-companies

For the SEC's no-action letter, please see:

- https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525

10. Treasury Department Announces Suspension of Corporate Transparency Act Enforcement for U.S. Entities or Their Beneficial Owners; Proposes New Limited Scope for Requirements

On March 2, 2025, the Department of the Treasury (the "Treasury") announced that it will (i) "not enforce any penalties or fines associated with the beneficial ownership information reporting rule under the existing regulatory deadlines" and (ii) will be issuing a "proposed rulemaking that will narrow the scope of the rule to foreign reporting companies only." Under the new rule, the Treasury will "not enforce any penalties or fines against U.S. citizens or domestic reporting companies or their beneficial owners after the forthcoming rule changes take effect."

For the full text of our memorandum, please see:

- https://www.paulweiss.com/practices/transactional/corporate/publications/treasury-department-announces-suspension-of-corporate-transparency-act-enforcement-for-us-entities-or-their-beneficial-owners?id=56794

For the Treasury's March 2, 2025 announcement suspending enforcement of the Corporate Transparency Act against U.S. citizens and Domestic Reporting Companies, please see:

- https://home.treasury.gov/news/press-releases/sb0038

For FinCEN's interim final rule, please see:

- https://www.federalregister.gov/documents/2025/03/26/2025-05199/beneficial-ownership-information-reporting-requirement-revision-and-deadline-extension

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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