2026 Outlook for Boards and General Counsel:

Key Governance, Enforcement and Securities Law Developments

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Executive Summary

The second Trump Administration has caused a significant shift in regulatory and enforcement priorities impacting issuers' financial reporting, shareholder engagement, and corporate governance around ESG, AI, DEI, and crypto, among other topics. Overarching themes from the Trump Administration include reducing the compliance burdens on doing business as public company, reducing the "woke" agenda of the prior administration, and protecting U.S. economic interests abroad. These themes operate against the backdrop of a significant reduction in the federal government workforce due to action by the Department of Government Efficiency (DOGE), the longest federal government shutdown in history (43 days) in late 2025, and an impending shutdown in 2026.

The Securities & Exchange Commission's (SEC) rulemaking focus is on reducing corporate disclosure requirements, depoliticizing annual shareholder meetings, and simplifying the capital raising process, all to encourage more companies to go public. Significant rule proposals from the SEC are expected in 2026.

The level of federal enforcement activity has been impacted by staffing reductions and the 2025 government shutdown. The SEC is also pursuing a "new day" approach that includes refocusing on protecting retail investors from those who lie, cheat, and steal, ending the "Regulation by Enforcement" approach of the prior administration, and targeting foreign actors taking advantage of U.S. capital markets. The U.S. Department of Justice (DOJ) has significantly curtailed FCPA and other white-collar investigations of U.S. companies, although it has remained active in False Claims Act enforcement, mainly in the healthcare sector. The DOJ has also announced formation of a cross-agency Trade Fraud Task Force to combat tariff evasion and other import violations.

The federal government is actively promoting the AI and crypto industries. Its AI initiative focuses on the U.S. being the global leader in AI and aims to preempt state AI regulation for allegedly stifling innovation and promoting ideological bias. The federal government has undertaken a 180 degree pivot from the prior administration with respect to crypto, both dropping enforcement actions and pursuing legislative and regulatory frameworks to legitimize and promote crypto.

Several states, including California, are pushing back on parts of the federal agenda, including through laws targeting climate change and AI. On another state-related note, the major theme in Delaware has been the reaction by its legislature and judiciary to the challenge by several other states to Delaware's role as the preeminent state for incorporation, or "DExit." Amendments to Sections 144 and 220 of the Delaware General Corporation Law (DGCL") were enacted in 2025, addressing some of the concerns raised by the pro-DExit camp. The Delaware Supreme Court also nullified the result of and reduced the plaintiffs' attorneys' fees payable in some of the high-profile Chancery Court decisions that fueled the DExit movement. For now, at least, Delaware appears to be weathering the storm.

This article describes the above developments in more detail, and outlines some of the related challenges and opportunities that boards of directors and general counsel of public companies (and where relevant private companies) should be aware of for 2026.

Securities Laws and Stockholder Voting

The SEC's Chair, Paul Atkins, has expressed a desire to reverse the significant decline in the number of public companies since its peak in 1997 through reducing disclosure burdens on public companies, de-politicizing shareholder meetings, and eliminating frivolous shareholder litigation.[1] Many of the following initiatives can be seen as furthering that goal.

Rule 14a-8

According to the SEC's Regulatory Flexibility Agenda, the Division of Corporation Finance is targeting April 2026 for issuing a rule proposal to amend Exchange Act Rule 14a-8. Chair Atkins has indicated that the SEC will fundamentally reassess the original intent behind Rule 14a-8 and the rule's current purpose. While an adopting release would likely come too late to impact the 2026 proxy season, the two developments described below are not too late to have potential impact.

In a speech in October 2025, Chair Atkins outlined his views in support of excluding precatory (non-binding) shareholder proposals. Under Rule 14a-8(i)(1), shareholder proposals may be excluded if said proposals are not a proper subject for shareholder action under state law. Shareholder proposals that require boards to take action, such as with respect to environmental and social issues, are typically excludable on that basis, so shareholders sidestep the exclusion by making the proposals precatory. A note to Rule 14a-8(i)(1) states the SEC's views that most precatory proposals are proper under state law, and that the SEC will presume they are proper unless the company demonstrates otherwise. Chair Atkins noted in his speech, however, that the issue was unsettled under Delaware law and expressed confidence that the SEC would permit a Delaware corporation to exclude a precatory proposal if the corporation's notice to the SEC was supported by a legal opinion. An alternative approach that appears to be on safer footing under Delaware law, and would accordingly serve as a safer basis for exclusion under Rule 14a-8, would be for the corporation's board to adopt a bylaw that restricts the ability of shareholders to adopt precatory proposals.[2] The laws of other states of incorporation may also restrict precatory proposals for corporations domesticated in those states.

On November 17, 2025, the SEC announced that, due to resource constraints following the government shut-down, the Division of Corporation Finance had determined not to respond to no action requests seeking to exclude Rule 14a-8 shareholder proposals, other than those under Rule 14a-8(i)(1).[3] The SEC indicated that, if an issuer nonetheless wants some form of response from the SEC, it or its counsel should include, as part of its notification to the Division under Rule 14a-8(j), "an unqualified representation that the company has a reasonable basis to exclude the proposal based on the provisions of Rule 14a-8, prior published guidance, and/or judicial decision." The Division will respond with a letter indicating that, based solely on the company's or counsel's

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[1] See, e.g., https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala.

[2] See Kyle Pinder, The Non-Binding Bind: Reframing Precatory Stockholder Proposals Under Delaware Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5418534. Chair Atkins referenced Kyle Pinder's article approvingly in his speech.

[3] 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.

representation, the Division will not object to exclusion of the shareholder proposal. Accordingly, the SEC has provided issuers with a broad ability to exclude Rule 14a-8 proposals for the 2026 proxy season. Several issuers have taken the SEC up on its invitation to obtain a letter indicating that the Division will not object to exclusion based solely on the representations of the issuer or its counsel.[4] Note that, whether or not issuers wish to obtain such a letter, pursuant to Rule 14a-8(j) they still need to provide the SEC and the proponent notice of an intent to exclude a shareholder proposal at least 80 days prior to filing definitive proxy materials. The SEC has likely preserved its role in reviewing no action requests under Rule 14a-8(i)(1) so that it can develop a new position for precatory proposals, consistent with Chair Atkins' views described above.

Quarterly Reporting

Quarterly reporting, which has been in place in the U.S. since 1970, has been criticized as overly burdensome and promoting short-termism over long-term value creation. In September 2025, Chair Atkins publicly announced that, at the prompting of President Trump, the SEC was fast-tracking a proposal that would permit public companies to file financial statements on a semi-annual basis instead of quarterly. A corresponding rulemaking petition to amend Exchange Act Rules 13a-13 and 15d-13 and the general instructions to Form 10-Q was filed by the Long-Term Stock Exchange with the SEC on September 30, 2025. If semi-annual reporting were to be implemented, then issuers will still have the option of reporting on a quarterly basis in a voluntary manner, including the issuance of regular earnings releases and holding of earnings calls. Possible reasons for continuing to report on a quarterly basis include better coverage by the Street, ease of shareholder engagement, shorter trading blackouts for insiders who rely on the release of material non-public information to create an opportunity for an open window for trading, ease of capital raising, and reduction of Regulation FD issues.

The SEC has not yet issued a rule proposal on this topic. The SEC indicated in its Regulatory Flexibility Agenda that the Division of Corporation Finance is targeting rule proposals to rationalize disclosure practices by April 2026. It is possible that semi-annual reporting may be addressed as part of that initiative.

Mandatory Arbitration Provisions

On September 17, 2025, the SEC published a policy statement announcing that it would no longer refuse to accelerate effectiveness of registration statements on the basis of the issuer having charter or bylaw mandatory arbitration provisions for investor claims arising under federal securities laws.[5] This reverses the SEC's unwritten policy to deny such acceleration requests. The prior unwritten policy was based on public policy and investor protection grounds and, in particular, on views that the anti-waiver provisions of the federal securities laws and the right of investors to bring private class actions may override the Federal Arbitration Act's policy favoring arbitration agreements. In its new policy statement, the SEC noted that in the future it will instead focus its review on the adequacy of the registration statement's disclosures, including those relating to mandatory arbitration provisions.

[4] https://www.sec.gov/rules-regulations/shareholder-proposals/2025-2026-responses-issued-under-exchange-act-rule-14a-8#incoming-requests.
[5] https://www.sec.gov/files/rules/policy/33-11389.pdf.

Issuers that wish to adopt mandatory arbitration provisions should ensure that the provisions comply with applicable state law and are accurately described in any registration statement. As noted in the policy statement, Delaware law does not permit mandatory arbitration provisions for stockholder claims.[6] Moreover, even where state laws expressly permit or are silent on such provisions, institutional investors, which historically have opposed mandatory arbitration provisions (that typically also include class action waivers), may bring costly and lengthy legal challenges despite the fact that, as Chair Atkins touted, arbitration results in "quicker payments to harmed shareholders and reduced litigation costs."[7] While it is not clear how courts will resolve potential challenges and whether issuers will rush to include mandatory arbitration in their governance documents, what is clear is that the current SEC will no longer be a roadblock to their adoption. At least one Texas corporation has adopted mandatory arbitration provisions.[8]

Proxy Advisory Firms

The proxy advisory firm (PAF) business is under pressure from regulators and at risk of eroding due to institutional investors switching to in-house, proprietary platforms.

On December 11, 2025, the White House issued an executive order (EO) directing the SEC and other agencies to take a broad range of actions aimed at increasing oversight of PAFs and promoting "accountability, transparency, and competition".[9] The EO specifically targeted Glass Lewis and ISS, describing them as foreign-owned and controlling more than 90% of the proxy advisor market. The EO directs:

- the SEC Chair to review its relevant rules, guidance, and other materials and consider necessary rescissions as well as take other action such as enforcing anti-fraud provisions with respect to PAF recommendations, assessing whether PAFs should register as registered investment advisers, and assessing implications under Section 13 of the Exchange Act;
- the FTC Chair to make various inquiries of PAF behavior relating to potential violations of antitrust law, or engaging in unfair methods of competition or unfair or deceptive acts or practices; and
- the Secretary of Labor to take steps to revise regulations and guidance relating to the fiduciary status of PAFs in advising with respect to shares held under ERISA plans, and enhancing transparency.

The EO does not specify a timeline for any of these actions. A SEC rulemaking proposal is expected sometime in 2026. Consequently, any final rules are very unlikely to have an impact on the 2026 proxy season.

In June 2025, Texas Governor Greg Abbott signed into law SB2337,[10] which targets proxy voting advice on the basis of nonfinancial factors, such as ESG and DEI, and voting recommendations on any shareholder proposal

[6] See DGCL §115(c).
[7] See, e.g., https://www.sec.gov/newsroom/speeches-statements/atkins-10092025-keynote-address-john-l-weinberg-center-corporate-governances-25th-anniversary-gala.
[8] https://news.bloomberglaw.com/esg/biblical-oil-firm-first-to-mandate-arbitration-since-sec-shift.
[9] https://www.whitehouse.gov/presidential-actions/2025/12/protecting-american-investors-from-foreign-owned-and-politically-motivated-proxy-advisors/.
[10] https://capitol.texas.gov/tlodocs/89R/billtext/html/SB02337F.HTM.

that is inconsistent with management's recommendation if it does not include a written economic analysis of the financial impact on shareholders of the proposal. In either case, the PAF is required to include onerous disclosure to each shareholder receiving its voting recommendation, conspicuously stating that its advice is not provided solely in the financial interest of shareholders and explaining the basis of the advice and that it subordinates the financial interests of shareholders to other objectives. The PAF is also required to disclose on its website that its advice and recommendations are not based solely on the financial interests of shareholders. The law also contains provisions relating to PAFs providing conflicting advice to different clients.

The Texas law applies with respect to voting recommendations on public entities that are incorporated in Texas, have a principal place of business there, or have a company proposal to reincorporate in Texas. The law came into effect by its terms on September 1, 2025. Both ISS and Glass Lewis filed legal actions challenging the law. In September 2025, a preliminary injunction was granted preventing enforcement by the Texas Attorney General of the law against those two PAFs.[11]

In January 2026, JPMorgan Chase's Asset Management Division announced that it would discontinue using PAFs and would instead use an internal AI-powered platform called Proxy IQ. Later that month, another large asset management firm announced the launch of its own proprietary proxy voting service for client assets.[12] While these are the first large asset managers to announce a shift from PAFs to their own platforms, they are unlikely to be the last. Glass Lewis has announced that it is also changing its business model and will use AI to offer clients more customized voting policies based on client voting preferences.

Retail Voting Programs

In September 2025, the SEC issued a no action letter to Exxon Mobil Corporation permitting implementation of a "Retail Voting Program," which is a program to which retail shareholders can sign up to give standing voting instructions to vote their shares in accordance with management's recommendations.[13] The program must be available to all retail investors and not to any registered investment advisors exercising voting authority over client securities. Shareholders that opt in must be given annual reminders of their opt-in status and their ability to opt out. Shareholders must also have the ability to override their opt-in instructions with respect to any voting proposal.

Retail Voting Programs are a potentially useful way for public companies with large retail ownership to reduce the costs and burdens of voting and vote solicitation for both the companies and their retail shareholders, for both annual and special meetings. It remains to be seen how many companies will take advantage of these programs, which will come with cost and administrative burden. The SEC has indicated that companies wishing to adopt a similar program should consult with the SEC about the specifics of their proposed programs.

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[11] The injunction does not apply to corporations who are the subject of a voting recommendation by a PAF or the shareholders of such corporations, both of whom are granted the right to bring claims under the law.
[12] https://newsroom.wf.com/news-releases/news-details/2026/Wells-Fargo-Wealth--Investment-Management-Launches-Internal-Proxy-Voting-System/default.aspx
[13] https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/exxon-mobile-091525.

Other SEC Rule Proposals

The SEC's Regulatory Flexibility Agenda also lists the following rulemaking initiatives, among others:[14]

- Public Company Disclosure: The SEC is undertaking a comprehensive review of Regulation S-K to refocus it on material disclosure requirements. In January 2026, Chair Atkins issued a statement soliciting public comments on amending Regulation S-K (other than Item 402, which is being addressed separately), with a deadline of April 13, 2026.[15] Accordingly, a proposing release will likely follow later in the year. Recent speeches by the new Director of the Division of Corporation Finance, Jim Moloney, and Commissioner Uyeda at a prominent securities law conference make clear the SEC is "aiming high" with its proposed revisions to Regulation S-K.
- Foreign private issuers (FPI): In June 2025, the SEC issued a concept release seeking public comments on the FPI definition. No deadline has been given for a proposing release. On March 18, 2026, officers and directors of FPIs will become subject to the reporting obligations under Section 16(a) of the Exchange Act, pursuant to the Holding Foreign Insiders Accountable Act (HFIAA),[16] which was signed into law on December 18, 2025. The HFIAA did not subject officers and directors to the short swing profit recapture rules of Section 16(b), or short sale prohibitions of Section 16(c), or subject 10% holders of FPIs to Section 16.
- Rule 144: An initial proposing release was issued in January 2021 to amend aspects of Rule 144 relating to the holding period and filing requirements. A second proposing release, relating to expansion of the scope of the safe harbor, is targeted for April 2026.
- Emerging Growth Company (EGC) Accommodations and Simplification of Filer Status: A proposing release to expand EGC accommodations and simplify filer statuses for reporting companies is targeted for April 2026.
- Shelf registration modernization: A proposed release to modernize the shelf registration process and reduce compliance burdens is targeted for April 2026.
- Exempt Offerings: A proposing release to simplify the pathways for private businesses to raise capital, and increase their access to investors, is targeted for April 2026.

Climate Disclosure Rules

In March 2024, the SEC adopted disclosure rules requiring issuers to make extensive climate-related disclosure, including with respect to scope 1 and scope 2 emissions, climate-related risks and actual or likely impacts, mitigation activities and transition plans, governance and risk management matters, climate-related targets, and

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[14] Certain of these topics are also subject to bills that are working their way through Congress, such as the Incentivizing New Ventures and Economic Strength Through Capital Formation ("INVEST") Act.
[15] https://www.sec.gov/newsroom/speeches-statements/atkins-statement-reforming-regulation-s-k-011326.
[16] https://www.congress.gov/bill/119th-congress/senate-bill/1089/text.

costs and expenses associated with severe weather events and other naturals, and carbon offsets and renewable energy credits.

The rules were challenged by several states and industry groups before they became effective. The challenges were consolidated in the U.S. Court of Appeals for the Eight Circuit. The SEC stayed application of the rules pending judicial review. On March 27, 2025, the SEC announced that it would no longer defend the rules. In September 2025, the Eighth Circuit ordered that the litigation would be held in abeyance until the SEC reconsiders its rules or renews its defense of them. Accordingly, the rules are unlikely to take effect during the term of the Trump Administration.

Several states have introduced or adopted climate disclosure bills. California's Climate Corporate Data Accountability Act (SB 253)[17] and Climate-Related Financial Risk Act (SB 261)[18] were signed into law in October 2023. SB 261 requires a biennial climate-related financial risk report, for posting on covered entity's website, commencing January 1, 2026. SB 253 calls for annual scope 1 and scope 2 emissions disclosure, commencing on a date to be determined in 2026 (not before June 30, 2026), with phase-in for scope 3 emissions disclosure in 2027. Both laws apply to companies doing business in California with annual revenue above a threshold amount. In November 2025, the Ninth Circuit Court of Appeals granted a preliminary injunction halting enforcement of SB 261. Industry challenges to SB 253 are currently pending before the Ninth Circuit, although, as of the time of writing, enforcement of the law has not been enjoined.

Various non-U.S. jurisdictions have adopted, or are considering, similar environmental disclosure laws, including the EU, UK, and Canada. Some of these laws are also being stayed or revisited with a view to narrowing their scope.

[17] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253.
[18] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261.

24/7 Trading

The weekday trading hours for both Nasdaq and NYSE Arca are currently 16 hours a day (early trading sessions are from 4:00 a.m. to 9:30 a.m., regular trading sessions from 9:30 a.m. to 4:00 p.m., and late trading sessions from 4:00 p.m. to 8:00 p.m., all ET). In February 2025, the SEC approved a proposed rule change of NYSE Arca to lengthen its weekday trading hours to 22 hours a day (18.5 hours on Fridays). Such extended trading has not yet commenced.[19]

On December 29, 2025, Nasdaq filed a proposed rule change with the SEC to lengthen its weekday trading for equity securities and exchange traded products from 16 hours a day to 23 hours a day.[20] Both exchanges are expected to commence extended trading hours during the second half of 2026, following requisite SEC approval and readiness of market intermediaries, such as DTCC.

In January 2026, the NYSE announced that it was developing a platform for trading tokenized securities, with 24/7 trading and instantaneous trade settlement. The NYSE stated that it will seek regulatory approval for the new platform. It did not provide any timelines.

Listed companies should factor extensions of trading hours into their IR and communications strategies and processes, and review their insider trading and governance policies for any required updates.

[19] https://www.sec.gov/files/rules/sro/nysearca/2025/34-102400.pdf.
[20] https://www.sec.gov/files/rules/sro/nasdaq/2026/34-104563.pdf.

Compensation Matters

Executive Compensation Disclosure

The SEC solicited comments on the executive compensation disclosure requirements contained in Item 402 of Regulation S-K on May 16, 2025, and held a roundtable the following month. The SEC commissioners and roundtable participants expressed concerns about, among other things, the “Frankenstein patchwork” of rules, the excessive volume and complexity, flaws and inconsistencies in the required tabular presentation, the poor quality of a lot of corporate disclosure, the disconnect between governance processes and how the disclosure rules work, and that the rules are supposed to focus on disclosure and not influence or politicize pay.[21] They also expressed various concerns with the pay ratio, pay-versus-performance, and clawback rules introduced under Dodd-Frank,[22] and discussed various benefits of the say-on-pay rule. As discussed above, a proposing release may either precede, or accompany, a proposing release with respect to more comprehensive amendments to Regulation S-K.

Director Compensation

In June 2020, a derivative suit was filed in the Delaware Court of Chancery against Tesla, Inc., Elon Musk, and non-employee directors for allegedly excessive compensation to the outside directors during the period from 2017 through 2020. The non-employee directors received a mix of cash and equity pursuant to a plan that was put in place before the company’s IPO in 2010. During the relevant period, the equity components consisted of triennial option awards for 50,000 shares, with additional awards upon joining the board, for the lead independent director, and for committee service. A 2014 amendment to the plan, which provided for these awards, was approved by the company’s stockholders, although not by unaffiliated stockholders. Given Tesla’s huge increase in stock price, the awards during the applicable period both had a high grant date fair value (the complaint alleges average director compensation in 2018 was $8.7 million), and further significantly increased in value thereafter. The complaint alleged breach of fiduciary duty and unjust enrichment.

The Plaintiff, derivatively on behalf of Tesla, and the non-employee directors entered into a settlement agreement in July 2023, pursuant to which the directors denied allegations of wrongdoing, agreed to provide to Tesla the value of 3,130,406 options, and agreed to forego compensation for 2021 through 2023. Tesla and the Tesla board of directors agreed to implement certain governance measures during a five-year period, including conditioning director compensation on an annual basis to the approval of a majority of unaffiliated stockholders present in person or represented by proxy at the stockholder meeting. The Delaware Chancery Court approved the settlement in January 2025. Pursuant to the settlement, the directors returned 1,957,861 options and paid Tesla $276,616,721 in cash. In January 2026, the Delaware Supreme Court upheld the settlement, although it reduced

[21] https://www.sec.gov/newsroom/meetings-events/sec-roundtable-executive-compensation-disclosure-requirements.
[22] The Dodd-Frank Wall Street Reform and Consumer Protections Act.

by more than half (approximately $176 million awarded by the Chancery Court was reduced to approximately $71 million) the fees awarded to plaintiffs' attorneys.

The litigation serves as a reminder that boards need to pay attention to director compensation. Given the inherent conflicts in directors awarding themselves compensation, excessive director compensation can be a magnet for litigation. The Tesla litigation highlighted the risk of an equity component based on a fixed share amount. If the company does very well, the value of the equity component can dramatically increase and make it a target for litigation. A fixed value award is less risky. Shareholder approval/ratification of director compensation can be an important defense in shareholder litigation. If the compensation is fixed pursuant to a plan that does not give boards discretion on the compensation directors receive, or provides discretion that is subject to meaningful limits, then shareholder approval of the plan, as opposed to individual awards, may suffice. Companies should consider whether a peer group study by independent compensation consultants would provide relevant information in their particular circumstances.

Tornetta v. Musk

2025 ended with a high-profile turn in executive compensation case law in Delaware. On December 19, 2025, the Delaware Supreme Court issued a decision ending the years' long litigation over Tesla CEO Elon Musk's 2018 compensation plan.[23] The Supreme Court overturned the remedy applied by the Delaware Court of Chancery's decision, effectively reinstating the 2018 compensation plan.

By way of background, in 2018, Tesla's Board and disinterested stockholders, by majority vote, approved a compensation plan for Musk worth about $56 billion at the time (and worth as much as $139 billion today). Shortly thereafter, a Tesla shareholder holding fewer than 10 shares filed suit in the Delaware Court of Chancery alleging that Musk breached his fiduciary duties as controlling stockholder of Tesla by forcing the board to approve the 2018 compensation package. A five day trial was held in November 2022 and the lower court found that Musk exercised transaction-specific control over the transaction and, finding that the procedures in *Kahn v. Lynch Communication Systems, Inc*. were not followed, the court applied the entire fairness standard of review to the transaction. The court held that the process followed was not sufficient to remove the transaction from the entire fairness standard of review.

Following the Court of Chancery's decision, on April 29, 2024, Tesla filed a second proxy statement recommending that its stockholders "ratify" the rescinded compensation plan. A majority of Tesla's disinterested directors approved the proposal, and Tesla and the Defendant Directors moved to revise the Chancery Court's post-trial decision. The court denied this motion, holding that the second shareholder vote occurred after trial and could not be used to reopen the record or alter the judgment.

The director defendants appealed the Court of Chancery's rescission of the 2018 plan, contending that rescission was an inappropriate remedy since it could not return the parties to their original 2018 positions, as Musk could not recover the six years of time and effort invested in meeting the plan's milestones. The Delaware Supreme

[23] *In re Tesla, Inc. Deriv. Litig*., C.A. No. 2018-0408 (Del. 2025).

Court agreed, finding that rescission was inappropriate because Musk could not be returned to his pre-2018 position after years spent achieving the plan's milestones, his earlier equity gains did not replace the lost opportunity, and the burden was not on the defendants to show restoration to the status quo. The Delaware Supreme Court reinstated the 2018 compensation plan and awarded the Plaintiff nominal damages. The court also significantly reduced Plaintiff's quantum meruit fee award to approximately $54 million in damages, based on a calculation of four times lodestar.

Some of the key "controlling shareholder" issues at stake in the Tesla litigation have now been superseded by the Delaware legislature's adoption of S.B. 21 ("SB 21," which is discussed below under "DExit & SB 21"). Nonetheless, boards should ensure proxy disclosures are complete and accurate, particularly regarding director conflicts, since inadequate disclosure can void shareholder approvals and defeat ratification defenses. The decision also highlights that remedies like rescission may be inappropriate when a transaction has already been performed and cannot be unwound to restore the status quo, and serves as a reminder that plaintiffs retain the burden of proof with respect to appropriate relief, even under an entire fairness standard of review.

Governance

Board Oversight of AI

Oversight of artificial intelligence (AI) is an essential governance responsibility for public company boards and general counsel, which presents unique and evolving risks and opportunities. The current legal landscape is a hodge podge of federal, state and foreign laws.

Pursuant to a January 2025 executive order[24] and a related July 2025 policy paper entitled "Winning the Race: America's AI Action Plan"[25] (the "AI Action Plan"), the White House revoked Biden-era AI policies and directives and established a federal policy focused on U.S. "global AI dominance" that provides for the following: (i) partnership between the Commerce and State Departments and industry to deliver "full-stack AI export packages" to U.S. allies, (ii) promoting a rapid buildout of data centers, (iii) removing federal regulations that impede AI development and deployment, and (iv) updating federal procurement guidelines to ensure frontier large language developers with which the government contracts ensure their systems are free from ideological bias. In December 2025, the White House issued another executive order (the "December EO") that sought to promote a unified federal AI policy and thwart the development of a "patchwork" of state standards, including those with ideological bias, through various actions such as denying funding under a specified program, and exploring federal action that preempts state law.[26]

Federal agencies are generally using existing authority in the context of AI, and taking required action pursuant to the AI Action Plan and the December EO. For example, the FTC regulates AI through its statutory authority under Section 5(a) of the FTC Act to regulate unfair or deceptive acts or practices.[27] The DOJ has the authority to enforce civil rights law protections against discrimination, including that resulting from AI algorithms. It has also been tasked under the December EO to establish an AI litigation task force to challenge state laws that are inconsistent with the policy set forth in the December EO. The FCC regulates AI-generated calls as robocalls, pursuant to its authority under the Telephone Consumer Protection Act.[28]

A number of states have enacted laws regulating AI, which, as of the time of writing, should be treated as creating legal obligations that are not preempted by federal law, notwithstanding the December EO. California has enacted several laws, many provisions of which become effective in 2026, including the Transparency in Frontier AI Act (mandating guardrails, incident reporting and whistleblower protection with respect to "frontier" AI models),[29] the California AI Transparency Act (mandating disclosure and provision of AI detection tools for certain providers of frequently used generative AI systems);[30] the Generative Artificial Intelligence: Training Data Transparency Act

[24] https://www.whitehouse.gov/presidential-actions/2025/01/removing-barriers-to-american-leadership-in-artificial-intelligence/.
[25] https://www.whitehouse.gov/wp-content/uploads/2025/07/Americas-AI-Action-Plan.pdf.
[26] https://www.whitehouse.gov/presidential-actions/2025/12/eliminating-state-law-obstruction-of-national-artificial-intelligence-policy/.
[27] See, e.g., information available at https://www.ftc.gov/industry/technology/artificial-intelligence.
[28] https://docs.fcc.gov/public/attachments/FCC-24-17A1.pdf.
[29] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202520260SB53.
[30] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB942.

(requiring disclosure regarding how generative AI systems are trained and deployed);[31] and an amendment to Division 8 of the Business and Professions Code to regulate companion chatbots.[32] Other examples of state laws include Illinois[33] and Texas[34] statutes targeting AI-driven discrimination, both effective as of January 1, 2026, and Colorado's legislation designed to prevent algorithmic bias and promote AI transparency, which takes effect in June 2026.

U.S. companies may also be exposed to AI laws in foreign jurisdictions in which they operate. Among these, and recognized as the world's first major, comprehensive regulation for AI, is the EU Artificial Intelligence Act, which entered into force on August 1, 2024, and has a phased rollout over several years. The Act sets forth a risk-based regulatory framework that applies to companies if their AI systems' output are used within the EU.

As with other new technology, intellectual property rights relating to AI and training data are being shaped in the courts. Two significant copyright decisions relating to large language model (LLM) training data were issued in June 2025. Summary judgment was granted in favor of Meta, in one decision, and Anthropic, in the other, both on the basis of fair use.[35] The decisions highlight the importance of not using pirated or unauthorized works to train AI models, and of implementing guardrails when designing LLMs to prevent them from regurgitating lengthy copyrighted material. The decisions apply to training, not outputs, but other litigation has been filed challenging the use of AI-generated outputs based on copyright infringement.[36] Significant AI-related patent lawsuits have also been filed.[37] Courts have held that a non-human, such as a generative AI system, cannot be an author for purposes of obtaining copyright protection,[38] or listed as an inventor on a patent.[39]

AI use in cybersecurity attacks has been identified as a significant risk for companies in 2026, escalating from the exception to the norm. The development of agentic AI will exacerbate the threat, given the ability of attacks to initiate and spread autonomously. According to one report: "We anticipate that actors will fully leverage AI to enhance the speed, scope, and effectiveness of operations, building upon the robust evidence and novel use cases observed in 2025. This includes social engineering, information operations, and malware development. Additionally, we anticipate threat actors will increasingly adopt agentic systems to streamline and scale attacks by automating steps across the attack lifecycle."[40]

Given the novelty, potency and rapid development of AI technology, boards should be proactive in ensuring that management applies a robust, responsible AI framework addressing cybersecurity, data governance, model lifecycle oversight, independent validation, and human-in-the-loop controls. Such frameworks should empower

[31] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB2013.
[32] https://legiscan.com/CA/text/SB243.
[33] https://www.ilga.gov/Legislation/publicacts/view/103-0804.
[34] https://capitol.texas.gov/BillLookup/History.aspx?LegSess=89R&Bill=HB149.
[35] For citations to the decisions and a summary of them, see: https://www.foley.com/p/102l0r2/ai-fair-use-decisions-bode-well-for-the-semiconductor-industry/.
[36] See, e.g., Andersen v. Stability AI, No. 23-cv-00201-WHO (N.D. Cal.); see also https://www.congress.gov/crs_external_products/LSB/PDF/LSB10922/LSB10922.7.pdf.
[37] See, e.g., https://patentpc.com/blog/the-biggest-latest-ai-patent-lawsuits-key-cases-what-the-stats-say.
[38] See, e.g., Thaler v. Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025); see also https://www.congress.gov/crs_external_products/LSB/PDF/LSB10922/LSB10922.7.pdf.
[39] See, e.g., Thaler v. Vidal, 43 F.4th 1207 (Fed Cir. 2022).
[40] https://services.google.com/fh/files/misc/cybersecurity-forecast-2026-en.pdf.

the general counsel to evaluate AI-related material risks, confirm marketing and product representations, and rigorously test controls to prevent misleading public disclosure. Boards should also ensure that their general counsel are actively monitoring and ensuring compliance with the disparate and rapidly evolving AI legal landscape. Director upskilling, engagement of external advisors, and the empowerment of the general counsel as the architect of AI governance should collectively help safeguard organizations from AI-related risks and legal exposure, uphold the duty of care, and support responsible deployment of AI technologies.

D&O Insurance

The consensus is that the generally "soft" market in the public company directors and officers liability insurance market that began in 2022 is expected to continue through 2026. This has largely been driven by a number of new insurers entering the market, beginning in 2022, followed by a fairly significant decline in both new initial public offerings and SPAC activity. The result was an oversupply of D&O insurance capacity during a time of decreased demand.

Given the current environment, we anticipate that the majority of public companies will see stable to moderately decreasing premiums for their D&O insurance in 2026, and that insurers will be open to negotiating broadened terms and conditions in policy renewals. As such, companies should also carefully review the structure of their D&O insurance programs and, in particular, determine if their current limits are adequate, or whether it makes sense to consider additional limits given the favorable pricing environment. Developing relationships with additional D&O insurers, particularly if a company maintains a clean claims history, has the potential to insulate against aggressive price increases down the road when the market inevitably turns "hard" again. Moreover, increased competition for incorporations by states other than Delaware may lead to state-by-state variances in D&O premiums.

DEI

The current administration has reversed course from the prior administration's promotion of DEI initiatives to actively dismantling and prohibiting them. On January 21, 2025, President Trump signed Executive Order 14173,[41] which described DEI programs as violations of the Civil Rights Act of 1964 as well as ordered all executive departments and agencies to terminate such programs and combat private-sector DEI preferences and revoked various executive orders that promoted DEI initiatives. It also ordered other actions to remove references to DEI principles under federal programs and procedures and required certifications in federal contracts and grants that the counterparties do not operate any DEI programs.

In March 2025, the EEOC and DOJ released guidance around violation of Title VII of the Civil Rights Act through DEI in the workplace. The guidance clarified that employment decisions motived by race, sex or other protected

[41] https://www.govinfo.gov/content/pkg/DCPD-202500158/pdf/DCPD-202500158.pdf.

characteristic under DEI programs violate Title VII of the Civil Rights Act even if defended on the basis of business necessity, such as racial preferences of clients, customers or coworkers.[42]

In May 2025, the Department of Justice announced the establishment of a Civil Rights Fraud Initiative to "utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws."[43] A Wall Street Journal article in December 2025 indicated that the Department of Justice had launched investigations at several major U.S. companies pursuant to this initiative.[44]

In a June 5, 2025, decision,[45] the U. S. Supreme Court held that Title VII does not permit courts to impose a heightened evidentiary burden on plaintiffs from majority groups in employment discrimination claims. The decision makes it easier for individuals to bring "reverse discrimination" claims.

As of the end of 2025, a significant number of states had passed laws restricting DEI programs, mainly in the public sector but some also in the private sector. Some state attorneys general have issued guidance reaffirming the legality of well-structured DEI programs.

As a result of these developments, a significant number of companies have scaled back, qualified, deleted or otherwise revised their public disclosure regarding DEI initiatives. Boards should ensure that their companies' compliance and employment programs as well as public disclosures, including those in periodic reports, sustainability reports, and proxy statements, are consistent with the new legal landscape. Boards should further consider the company's broader human capital management strategy regarding DEI to determine whether and how adjustments could be made to accomplish their goals.

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[42] See https://www.eeoc.gov/what-do-if-you-experience-discrimination-related-dei-work and https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work.
[43] https://www.justice.gov/opa/pr/justice-department-establishes-civil-rights-fraud-initiative.
[44] https://www.wsj.com/politics/policy/trump-doj-dei-fraud-investigations-93213d52?reflink=desktopwebshare_permalink.
[45] *Ames v. Ohio Dep't of Youth Services*, 605 U.S. 303 (2025).

Crypto

In 2025, the SEC halted its war on the crypto industry and began to advance fit-for-purpose regulations and interpretations.[46] Among the actions it has taken are the following:

- Termination of multiple investigations and lawsuits against major crypto industry participants such as exchanges, trading firms, and blockchain tech entrepreneurs.
- Creation of the SEC Crypto Task Force, led by SEC Commissioner Peirce (long known as “Crypto Mom”): The Crypto Task Force has held roundtables at SEC headquarters in Washington, D.C., and numerous meetings on road trips throughout the United States, gathering information to support the rulemaking and interpretive advice that has now begun.[47]
- Rescission of no-action and interpretive guidance issued by prior administrations that the SEC now considers too restrictive to be of practical use.
- Technical advice to Senate and House staff who are working on a comprehensive “market structure” bill to be presented on Capitol Hill and, if it passes there, to be enacted into law by signature of the President.

The GENIUS Act, which was signed into law on July 18, 2025,[48] creates a comprehensive regulatory framework for U.S. dollar-denominated stablecoins. The Act places primary oversight with banking regulators rather than securities regulators. It has led to a proliferation of stablecoins and growth in the stablecoin industry, which is expected to accelerate in 2026.

Early adopters of crypto include some payment and gaming companies. Some large financial institutions, like Blackrock and JPMorgan, have switched from being vehemently opposed to crypto to launching crypto products. As crypto becomes more mainstream, boards and general counsel may wish to gain an appropriate understanding of it, so they are in a position to evaluate potential use cases in their respective industries and respond to questions from customers, investors, and other third parties.

[46] For some background information about crypto, please see: https://www.jdsupra.com/legalnews/ten-faq-about-crypto-for-corporate-3811437/.
[47] Foley & Lardner has filed comments with the SEC Crypto Task Force on proposed SEC rulemaking and guidance.
[48] https://www.congress.gov/bill/119th-congress/senate-bill/394/text. The Act becomes effective on the earlier of 18 months after enactment and 120 days after the date on which he primary Federal payment stablecoin regulators issue final regulations implementing the Act.

DExit & SB 21

While Delaware is commonly thought of as the preeminent state for incorporation (after taking the mantle from New Jersey just over a hundred years ago), since 2023, the state has come under significant criticism as being inhospitable to corporations and overly solicitous to plaintiff's attorneys. It now faces concerted competition from other states, including Texas, Nevada, and Florida, as the go-to state for incorporation

There were several decisions in 2023 that provoked backlash, including *Moelis*,[49] which invalidated a controller's stockholder agreement in a decision that was sharply at odds with prevailing M&A practice, and *Activision*,[50] some aspects of which were unusually formalistic and ran contrary to common M&A practices. Both decisions were legislatively overturned in the 2024 DGCL amendments.[51] Another decision, *Palkon v. Maffei*,[52] applied the entire fairness standard of review to a reincorporation transaction, eliciting the ire of controllers given the speculative nature of the purported controller benefit. That decision was overturned by the Delaware Supreme Court in February 2025. More generally, a big judicial catalyst for DExit was the so-called "MFW creep"[53] that saw an expansion of the definition of a controlling shareholder and increasing process requirements for even ordinary course transactions, as opposed to take-private transactions, to avoid entire fairness review.

On March 25, 2025, SB 21 was enacted and became effective.[54] The law sought to recalibrate the perceived pro-plaintiff bias through expanding DGCL Section 144, which regulated the voidability of contracts and transactions in which officers and directors are interested, to also regulate challenges to controlling stockholder contracts and transactions, and to expand applicability of the rule to fiduciary duty challenges. Among its changes, SB 21 significantly relaxed the structural protections required to shield related party transactions from judicial review, particularly the requirements under In re *MFW*[55] and its progeny, and created a minimum ownership requirement before a person could be deemed a controlling stockholder. SB 21 also tightened up DGCL Section 220, the rule governing inspection of books and records, which has been a vehicle for a significant increase in litigation in the last few years.[56]

[49] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co*., 311 A.3d 809 (Del. Ch. 2024).
[50] *Sjunde AP-Fonden* v. Activision Blizzard, Inc., 2024 WL 863290 (Del. Ch. 2024).
[51] S.B. 313 became effective August 1, 2024. A copy of the law is available at: https://legis.delaware.gov/SessionLaws/Chapter?id=41939.
[52] *Palkon v. Maffei*, 311 A.3d 255 (Del. Ch. 2024), rev'd, 2025 WL 384054 (Del. 2025).
[53] See, e.g., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522546
[54] https://legis.delaware.gov/BillDetail/141930.
[55] *In re MFW S'holders Litig*., 67 A.3d 496 (Del. Ch. 2013), aff'd, 88 A.3d 635 (Del. 2014).
[56] For a fuller discussion of the SB 21, see https://www.foley.com/insights/publications/2025/03/sb21-delaware-responds-dexit-battle/ and https://www.foley.com/insights/publications/2025/04/delaware-significant-changes-delaware-general-corporation-law/.

While there have been several high-profile reincorporations out of Delaware,[57] and the state remains subject to criticism as unfavorable to corporations in several regards,[58] the state's legislature and Supreme Court have shown a willingness to engage in course corrections to protect the Delaware franchise.[59]

[57] Examples include Tesla, SpaceX, Dropbox, TripAdvisor, Dropbox, Roblox, The Trade Desk, Dillard's and Affirm. AH Capital Management, the management company for the venture fund a16z, also reincorporated from Delaware to Nevada, and the fund has publicly encouraged its portfolios to consider states other than Delaware for incorporation.

[58] See, e.g., SEC Chair Atkins' speech in October 2025, located at footnote 1 above, in which Chair Atkins criticizes Delaware law for prohibiting charter and bylaw provisions that impose mandatory arbitration and fee shifting for federal securities law claims.

[59] These corrections include passage of SB 313 and SB 21, and Supreme Court reversals in *Palkon v. Maffei*, *Tornetta v. Musk,* and *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.* One paper that examined the number of incorporations in the United States concluded that Delaware has one of its strongest years in 2025. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5154952.

Enforcement

Securities & Exchange Commission (SEC)

2025 was an extremely challenging year for the SEC's Division of Enforcement. Early in the year, the SEC reduced its staffing by 15%, which was followed by sinking morale and a material decrease in enforcement cases.

Chair Atkins was sworn in as SEC Chairman in April 2025. On May 6, 2025, he gave remarks at an SEC Town Hall meeting where he described it as a "new day", with the SEC returning to its core mission of investor protection, furthering capital formation and safeguarding fair, orderly, and efficient markets. He described investor protection as the cornerstone of the SEC's mission and specifically holding accountable "those who lie, cheat, and steal."[60] In a speech later in the year, Chair Atkins shared that his enforcement focus is on "cases of genuine harm and bad acts," not on novel enforcement theories, technical books-and-records violations or internal-controls issues.[61]

On August 21, 2025, the SEC announced that Judge Margaret "Meg" Ryan was named Director of the Division of Enforcement, effective September 2, 2025.[62] Most recently, Director Ryan was a senior judge of the United States Court of Appeals for the Armed Forces. While Director Ryan had no apparent connection to the SEC or securities regulatory experience, her judicial and military background appear to align with Chair Atkins' shift away from "Regulation by Enforcement." In addition, on January 12, 2026, the SEC announced the appointment of Paul G. Tzur and David H. Morrell as Deputy Directors of its Division of Enforcement.[63] Both leaders bring extensive experience in securities law, investigations, and litigation, and each rejoined the SEC from private practice. Deputy Director Tzur oversees the agency's enforcement program in Chicago, Atlanta, and Miami regional offices. Deputy Director Morrell oversees the agency's enforcement program in New York, Boston, and Philadelphia regional offices.

Consistent with the SEC's refocused approach, and in stark contrast to the prior regime, Chair Atkins has announced enhancements to the Wells process — including greater access to key investigative materials, a baseline four-week response period (with potential flexibility in complex matters), and senior-level meetings upon timely request.[64] In another process change earlier in the year, the SEC amended regulations to eliminate the standing delegation of authority that permitted the Director of the Division of Enforcement to issue formal orders of investigation without a vote by the full SEC.[65]

New actions instituted by the Division of Enforcement for fiscal year 2025 fell to 313 — the lowest in a decade and down 27% from fiscal year 2024 — and the new SEC administration initiated only four actions against public

[60] https://www.sec.gov/newsroom/speeches-statements/atkins-townhall-05062025. Chair Atkins made similar statements in Congressional Oversight hearing the same month: https://www.congress.gov/index.php/event/119th-congress/house-event/118265.
[61] *Id.*
[62] https://www.sec.gov/newsroom/press-releases/2025-108-sec-names-judge-margaret-ryan-director-division-enforcement.
[63] https://www.sec.gov/newsroom/press-releases/2026-4-paul-tzur-david-morrell-named-deputy-directors-division-enforcement.
[64] https://www.sec.gov/newsroom/speeches-statements/atkins-100925-keynote-address-25th-annual-aa-sommer-jr-lecture-corporate-securities-financial-law.
[65] https://www.sec.gov/files/rules/final/2025/33-11366.pdf.

companies and/or subsidiaries during fiscal year 2025.[66] Total monetary settlements also declined 45% to $808 million. The SEC also dismissed with prejudice or closed a series of high-profile cryptocurrency matters initiated under Chair Gensler. Additional information about the SEC's new approach for crypto is included under "Crypto," above.

In addition, consistent with the current administration's stated focus of enforcing U.S. federal law against foreign companies and other international actors which put U.S. companies at economic disadvantage,[67] on September 5, 2025, the SEC announced the creation of its Cross-Border Task Force ("Task Force") to identify and combat cross-border fraud harming U.S. investors.[68] The Task Force will primarily focus on investigating potential U.S. securities law violations related to foreign-based companies and those gatekeepers which enable these companies to access U.S. capital markets. The SEC specifically called out "companies from foreign jurisdictions, such as China, where governmental control and other factors pose unique investor risks." As Chair Atkins warned: "[W]e will not tolerate bad actors – whether companies, intermediaries, gatekeepers, or exploitative traders – that attempt to use international borders to frustrate and avoid U.S. investor protections."

The cases brought by the new SEC administration are consistent with the "new day" approach articulated by Chair Atkins, focusing on protecting investors from those who lie, cheat, and steal. One area that has continued to be a focus is insider trading. In March 2025, the SEC charged German national Eamma Safi and Singaporean national Zhi Ge for their alleged involvement in an international insider trading ring that generated more than $17.5 million in illegal profits.[69] In August 2025, the SEC charged a former director of a biopharmaceutical company, along with two of his family members and two of his friends, with insider trading ahead of an announcement that a multi-national pharmaceutical manufacturing conglomerate would acquire the director's company, resulting in more than $500,000 in illicit profits.[70] And, in September 2025, the SEC filed and settled insider trading charges against Ryan Squillante, the former head of equity trading at Denver-based Irving Investors, who was alleged to have used confidential information to trade securities of at least 10 public companies, netting nearly $217,000 in trading profits.[71] The takeaways here for directors and officers are to remain vigilant regarding their company's policies, procedures, and training regarding insider trading, and to — of course — remain mindful of their own practices when exposed to material non-public information.

While there was a significant downturn in the quantity of financial and disclosure fraud cases brought by the SEC, the quality of investigations in this space remains one of the areas of focus for the new administration. In December 2025, the SEC charged three former executives of Ammo, Inc. n/k/a Outdoor Holding Co. ("Ammo"), with accounting and disclosure fraud.[72] In a related administrative proceeding, Ammo, without admitting or

[66] The SEC has not published its Division of Enforcement results for FY 2025 as of the date of this publication. This data was gathered form other publicly available sources.
[67] See U.S. Department of Justice's May 12, 2025 Memorandum "Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime" and June 9, 2025 FCPA Guidance**;** see also https://www.foley.com/insights/publications/2025/05/doj-criminal-division-updates-part-1-new-white-collar-crime-enforcement-plan/; https://www.foley.com/p/102kq83/the-trump-administration-2-0s-fcpa-enforcement-strategy-what-you-need-to-know/.
[68] https://www.sec.gov/newsroom/press-releases/2025-113-sec-announces-formation-cross-border-task-force-combat-fraud.
[69] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26268.
[70] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26376.
[71] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26388.
[72] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26446.

denying the findings in the SEC's order, agreed to cease and desist from committing or causing securities law violations and also to implement recommendations of its compliance consultant within two years.[73] The SEC alleges that defendants made false and misleading statements in Ammo's public SEC filings and financial statements to hide or obfuscate unfavorable information about the management, operations, and finances of the company, included hiding related party transactions and that a co-founder of the company played an executive management role notwithstanding a federal court order that prohibited him from such a role at a public company. In addition to the typical injunctive relief and civil penalties sought against individuals, the SEC also seeks to clawback compensation from defendants as allowed pursuant to Section 304(a) of the Sarbanes-Oxley Act.[74] The takeaways here for issuers and their directors and officers are that obscuring material facts, particularly about control, related-party dealings, or negative financial results will still result in aggressive investigations and individual charges.

Also reflective of quality over quantity, in January 2026, the SEC charged two former senior executives of Near Intelligence, Inc. (a now-defunct global data intelligence company), Anil Mathews, its former Chief Executive Officer, and Rahul Agarwal, its former Chief Financial Officer, for allegedly inflating revenue in a financial accounting and disclosure fraud scheme involving Near's largest customer, MobileFuse, LLC. MobileFuse and its former Chief Executive Officer, Kenneth M. Harlan, were charged with aiding and abetting the alleged fraud.[75] The SEC's complaint alleges that, from May 2021 to September 2023, Mathews and Agarwal engaged in a round-trip accounting scheme to overstate Near's reported revenue by on average 27% for fiscal years 2021 and 2022 and the first two quarters of 2023. The SEC alleged in the complaint that this scheme, which relied, in part, on Near and MobileFuse exchanging grossly inflated invoices and Near recognizing revenue according to its invoices to MobileFuse, accounted for at least $37.3 million of improperly reported revenue. The SEC also alleged that the defendants fabricated documents or made misstatements to conceal the scheme from Near's independent auditors. The SEC has further alleged that Harlan and MobileFuse provided substantial assistance to Mathews and Agarwal in perpetrating this scheme.

Department of Justice (DOJ)

While the activity by the DOJ in the securities laws area slowed as well, fiscal year 2025 was a record year for settlements and judgments under the False Claims Act (FCA), primarily driven by fraud in the healthcare industry. The DOJ secured more than $6.8 billion via settlements and judgments under the FCA in the fiscal year that ended in September 2025, the largest amount recovered in a single year in the history of the FCA.[76] The recoveries are more than double the $2.9 billion the Justice Department reported for fiscal year 2024.

[73] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26446.
[74] *Id.*
[75] https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26469.
[76] https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-68b-fiscal-year-2025.

Following a February 2025 executive order directing a pause in enforcement under the Foreign Corrupt Practices Act (FCPA) on the basis of hampering American economic competitiveness,[77] the DOJ released new FCPA guidelines in June 2025. The new guidelines focus enforcement on specific areas, including the following:

- Serious misconduct bearing strong indicia of corrupt intent tied to particular individuals, as opposed to routine business practices or low-dollar, generally accepted business courtesies;
- where there are U.S. national security implications;
- foreign bribery that facilities criminal operations of cartels and transnational criminal organizations; and
- misconduct that deprives U.S. entities with fair access to compete or results in economic injury to U.S. companies or individuals.[78]

In May 2025, the DOJ released a revised Corporate Enforcement and Voluntary Self-Disclosure Policy, which provides more favorable treatment for companies that self-disclose misconduct to the Criminal Division of the DOJ, fully cooperate, and timely and appropriately remediate (where there are no aggravating circumstances).[79] The new policy replaces the presumption under the old policy that the DOJ would decline to prosecute, with a commitment not to prosecute under the new policy. The new policy also provides for favorable treatment, such as a non-prosecution agreement, for “near miss” voluntary disclosures where the company is ineligible for declination and includes guidance for sentence reduction where the foregoing two situations are unavailable.

In August 2025, the DOJ announced the formation of a cross-agency Trade Fraud Task Force to pursue civil and criminal enforcement actions against parties who evade tariffs and other duties as well as smugglers importing prohibited goods.[80] Customs fraud has moved from the margins to the mainstream of DOJ enforcement.

In short, directors and officers should stay abreast of the current administration’s enforcement policies and priorities to ensure companies are appropriately assessing their risk profile, promptly addressing unlawful conduct, and investing adequate resources in their compliance programs.

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[77] https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/.
[78] https://www.justice.gov/dag/media/1403031/dl.
[79] https://www.justice.gov/d9/2025-05/revised_corporate_enforcement_policy_-_2025.05.11_-_final_with_flowchart_0.pdf.
[80] https://www.justice.gov/opa/pr/departments-justice-and-homeland-security-partnering-cross-agency-trade-fraud-task-force.

Authors

If you have any questions about any of the topics covered in this article, please contact any of the authors listed below, or your Foley lawyer.

Nicholas O'Keefe
Partner | Silicon Valley
650.251.1106
nick.okeefe@foley.com

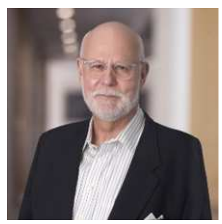
Natasha Allen
Partner | Silicon Valley
650.251.1112
nallen@foley.com

Christopher J. Babcock
Partner | Dallas
214.999.4370
cbabcock@foley.com

Harper F. Beck
Associate | Milwaukee
414.297.4982
harper.beck@foley.com

Beth I. Z. Boland
Partner | Boston
617.226.3179
bboland@foley.com

Michelle Chew
Associate | Chicago
312.832.4748
michelle.chew@foley.com



Patrick Daugherty
Partner | Chicago
312.832.5178
pdaugherty@foley.com

Thomas J. Krysa
Partner | Denver
720.437.2010
tkrysa@foley.com

Ethan D. Lenz
Partner | Madison
414.297.4835
elenz@foley.com

Jessica S. Lochman
Partner | Milwaukee
414.297.5817
jlochmann@foley.com

James G. Lundy
Partner | Chicago
312.832.4992
jglundy@foley.com

Jose F. Sanchez
Partner | Los Angeles
213.972.4595
jose.sanchez@foley.com

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