Recent Developments for Private Company M&A

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Contents

Executive Summary

This report highlights some recent developments relevant to private company M&A. Part 1 provides a summary of some recent Delaware caselaw. Several decisions provide important drafting lessons on topics such as damages multipliers, indemnification notice provisions, materiality scrapes, and earnouts. A group of decisions provides lessons on noncompetes, including the greater scope available with forfeiture-for-competition provisions. Other decisions address the sharing of information by a director with its nominating shareholder, common gaps in amendment provisions for shareholder agreements, and the importance of considering contractual confidentiality obligations when populating deal data rooms.

The three Delaware Supreme Court decisions summarized at the end of Part 1 reversed recent Chancery Court decisions that were favorable to plaintiffs' firms, one involving a controlling stockholder and two involving aiding and abetting liability of buyers. These decisions can be considered within the context of the first section in Part 2, which addresses DExit and Delaware's response in Senate Bill 21.

The remaining sections in Part 2 address some regulatory and other developments impacting private company M&A. Regulatory developments include administrative and enforcement activity under federal antitrust laws, developing merger enforcement efforts by states, and "mini-HSR" laws that crop up in healthcare deals. There is also an overview of changes relating to CFIUS and national security laws by the current administration, and a brief summary of the federal government's increasingly frequent role as a deal participant, which is an undercurrent to some of the federal regulatory developments. Other developments described in Part 2 include a brief overview of some recent developments in representation and warranty insurance, and an overview of debt financing trends for private company M&A. The last section in Part 2 addresses SEC updated guidance that impacts the ability of public companies to require target shareholders to enter into lock-ups and written consents in deals using form S-4 registration statements, which is an issue that often arises when smaller public companies acquire private targets in deals with stock consideration.

Part 1: Recent Delaware Caselaw

1. ***IN RE DURA MEDIC HOLDINGS, INC. CONSOLIDATED LITIGATION***:[1] Delaware chancery court provides guidance on when a multiple of damages is available.

In re Dura involved indemnity claims by the buyers of a company for, among other things, breach of representations and warranties that no significant customer had given notice to the company that it intended to terminate, limit, or negatively alter its business relationship with the company. Having found that the representation was breached with respect to two customer contracts, the court considered whether the buyers were entitled to damages based on a 6.7797 multiplier of lost earnings under the contracts, which was the multiplier that the acquiror applied to LTM April 2018 EBITDA to arrive at the merger price. The court noted that the merger agreement expressly permitted damages based on a multiplier of losses, although did not require it. The court considered the sellers' argument, based on *Zayo Group, LLC v. Latisys Holdings, LLC*,[2] that a multiple of damages is only available for losses that permanently affect the business. The *Zayo* court considered whether a damages multiplier would be appropriate with respect to the breach of a material contracts representation for failure to disclose that a customer had notified of an intention not to renew. The *Zayo* court framed the issue in terms of benefit-of-the-bargain or expectancy damages, and held that it was "appropriate for calculating damages only when the alleged breach of the representation or warranty has caused a permanent diminution in the value of the business (as a result of lost revenues into perpetuity) and the business has thereby been permanently impaired." The *Zayo* court declined to award a multiple of damages because the material contracts at issue there all were due to expire within less than one year.

The *Dura* court described *Zayo's* reference to "a permanent diminution . . . into perpetuity" as not a workable test, because "[n]othing lasts forever," and the key issue was rather "the extent to which the misrepresentation affects future earnings periods." The *Dura* court held that the loss of the two contracts at issue in that case "resulted in recurring declines in revenue" and that a multiple of losses was accordingly appropriate. The court dismissed the sellers' argument that the buyers could find new customers to replace the two that were terminating, and failure to do so could give rise to a breach by buyers of their obligation to mitigate losses. The court held that mitigation could involve cutting costs, or persuading the customers to return, but would not require obtaining new customers.

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[1] C.A. No. 2019-0474-JTL (Del. Ch. Feb. 20, 2025)
[2] 2018 WL 6177174

Takeaways

Deal negotiations regarding damages multiples typically do not go beyond whether or not to include language that expressly permits them. *Dura* cautions that, for buyers at least, that approach is insufficient.

Buyers should specify that the deal price was based on a multiple, and that damages shall be based on a multiple of losses if it relates to a breach of the material contracts or material customer representations where the circumstances giving rise to the breach will result in a loss of revenue. The following is example language:

> "The Parties acknowledge and agree that the [Base Purchase Price] was established with a market approach using a multiple of [7.0 (the "Multiple") applied to the Company's CY 2024 EBITDA][3] . The Parties further acknowledge and agree that in the event of a breach of the representations and warranties set forth in Sections [ ],[4] where the circumstances giving rise to the breach will result in any loss of revenue to the Company, the [Buyer Indemnified Parties] shall be entitled to recover damages based on a Multiple of Losses."

A more aggressive approach would be to specify that all damages for breach of representations and warranties will be based on a multiple of losses unless sellers show by clear and convincing evidence that the circumstances giving rise to the breach would not result in a decrease of EBITDA (or other metric on which the multiple is based).

The preferred approach for sellers would be to expressly exclude the use of multiples as a measure of losses. Failing that, sellers could try approaches such as the following:

- Turn *Dura* into a 2-part test, where you do not even ask the question of whether a multiple applies if the Business is performing within an expected range.

- Provide that a multiple is not permitted as a damages remedy for breach unless: (a) there will be a loss in revenue associated with the breach for a period of at least [five] years; and (b) it relates to, e.g., a top 5 customer, or a customer that generated at least 10% of revenue during the last completed fiscal year prior to the deal closing;

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[3] Revise to reflect appropriate multiple and metric used
[4] Insert references to material contracts and material customers representations and warranties.

- Provide that a multiple is not permitted where it relates to a breach or termination of a contract that is terminable for convenience by the counterparty, or relates to failure to renew a contract that is renewable for terms of less than [three] years or is terminable for convenience by the counterparty.

One important caveat to the above is that in deals that involve representation and warranty insurance, carriers typically take the "silence on silence" approach described below in Part 2 – Representation and Warranty Insurance Developments – Certain Losses. So the typical approach is to be silent in the acquisition agreement, so that the RWI policy does not exclude damages multiples, and buyer can fight the carrier on the issue under applicable state law if necessary when a claim is made.

2. **DESKTOP METAL, INC. V. NANO DIMENSION LTD.**:[5] Delaware chancery court awarded specific performance to enforce "hell or high water" provision, requiring buyer to enter into CFIUS mitigation agreement and close.

This post-trial decision involved an action filed in the Delaware Court of Chancery by Desktop Metal, Inc. ("Desktop") against Nano Dimension Ltd. and an affiliated entity (collectively, "Nano") for specific performance to require Nano to complete a merger. In a July 2024 merger agreement, Nano agreed to acquire Desktop for approximately $183 million, a transaction requiring CFIUS approval due to Desktop's defense-related products. To address regulatory risk, the parties negotiated a "hell or high water" provision, requiring the parties to take all action necessary to obtain CFIUS approval. Nano's obligations under the provision were subject to a carveout where CFIUS required Nano to relinquish control of any portion of Desktop's business representing more than 10% of Desktop's revenue (the "10% carveout"). The hell or high water provision included a detailed "Required-Actions Exception" listing thirteen commonly imposed CFIUS mitigation measures that would not trigger the 10% carveout.

After signing, Nano's second-largest stockholder, Murchinson Ltd., gained control of Nano's board after protesting against the Desktop deal, and advocating a strategy of letting Desktop run out of funds and have Nano buy it out of bankruptcy at a much lower price than under the deal merger agreement. The court found that, following the board change, Nano delayed responding to CFIUS and reversed positions it had previously accepted, continuing to object even after CFIUS circulated a final National Security Agreement ("NSA").

[5] C.A. No. 2024-1303-KSJM (Del. Ch. Mar. 24, 2025)

Nano argued that several NSA provisions – including manufacturing location restrictions, remote access software limitations, and governance restrictions – triggered the 10% carveout, but the court rejected this argument, finding the measures applied to a small fraction of revenues and, moreover, fell within the Required-Actions Exception.

Nano also asserted counterclaims alleging failure to satisfy the "No-Bankruptcy Condition," and failure to satisfy the covenants closing condition, based on breach of the ordinary course covenants and certain other provisions. The court rejected all counterclaims. With respect to the No-Bankruptcy Condition, the court noted that it did not include an insolvency condition, but a condition that Desktop not have made a written admission of insolvency, and the court held that while Desktop was extremely cash strapped, Desktop had not made such an admission. The court further held that even if the No-Bankruptcy Condition had not been satisfied, such failure was due to Nano having delayed the CFIUS clearance in breach of the hell or high water provisions, and thus Nano would be unable to rely on the condition failure as a result of the "prevention doctrine".

The court awarded Desktop specific performance, ordering Nano to enter into the NSA and close the merger, noting that the parties had stipulated to specific performance and that the equities strongly favored enforcement.

TAKEAWAYS

One of the unusual aspects of this decision is that the Chancery Court ordered the buyer to enter into a National Security Agreement, which was the final impediment to obtaining CFIUS clearance, in order to close the deal. Buyers are now on notice that Delaware courts will not hesitate to force them to close if they wrongfully try to get out of a merger agreement, even if it entails entering into a mitigation agreement with a government organization.

Another unusual aspect of the deal is that Murchinson was very public in its desire to get control of the Nano board in order to cause Nano to get out of the merger agreement. It presumably needed to be in order to win its proxy fight. But the court noted that this left Nano with "an uphill battle in convincing anyone that it did everything it could, come hell or high water, to obtain [CFIUS approval]." This paved the way for the court not only to be skeptical of Nano's arguments, but also to invoke the "prevention doctrine" to prevent Nano from invoking another closing condition. While the bad public record may have been unavoidable in this deal, it serves as a reminder to buyers to avoid creating a record that may impede their ability to get out of a merger, should they decide to do so.

Sellers in transactions requiring complex regulatory approvals should prioritize strong regulatory efforts provisions, including "hell or high water" commitments with carefully defined exceptions. In particular, the "Required-Actions Exception" structure in *Desktop Metal*—which enumerated specific mitigation measures that would not trigger carve-outs—proved critical to the seller's success. Sellers

should consider using disclosure schedules or similar drafting tools that pre-commit the buyer to accept commonly imposed regulatory conditions and reduce post-signing disputes over mitigation obligations.

3. THOMPSON STREET CAPITAL V. SONOVA:[6] Drafting pointers for indemnification notice provisions.

In an appeal of a motion to dismiss in *Thompson Street Capital v. Sonova*, the Delaware Supreme Court addressed a dispute regarding whether a buyer had complied with the indemnification notice provisions in a merger agreement. One business day before the indemnity escrow funds were due to be released, the buyer (Sonova) sought indemnification based on alleged breaches of the merger agreement's representations and warranties relating to the target's billing practices. The seller (Thompson Street Capital) then brought suit, seeking an order declaring that the buyer's indemnification notice failed to comply with the requirements in the merger agreement requiring buyer to deliver notice within 30 days of becoming aware of a claim, and to provide certain information related to the claim, and therefore that the seller was entitled to the release of the escrowed funds. The Chancery Court granted buyer's motion to dismiss, rejecting the seller's arguments regarding untimeliness, holding that even if notice was delivered after lapse of the 30 day period, that would not invalidate the notice under the merger agreement in the absence of "actual and material prejudice" to the seller, which the seller had not pled. The Chancery Court also held that the buyer had provided adequate specificity in its notice. The seller appealed.

The Delaware Supreme Court reversed the Chancery Court decision on a number of grounds. The Supreme Court held that the buyer's noncompliance with the notice requirements was reasonably conceivable on the record, which satisfied the applicable standard for denying buyer's motion to dismiss. The Supreme Court also held that language in the notice provision specifying that the buyer "shall have no right to recover any amounts" pursuant to the applicable indemnification section unless it provides the requisite indemnification notice set forth a condition precedent to buyer's right to indemnification. These holdings were unsurprising, and consistent with the buyer's interpretation of how the indemnification notice provisions operated.

What was surprising was the second layer of analysis that the Supreme Court incorporated into its decision, particularly after referencing Delaware law's pro-contractarian approach. The Supreme Court held that because the notice requirements included a condition precedent capable of triggering a forfeiture (of the buyer's indemnification right), an analysis was required as to whether they would violate the legal maxim that the "law abhors a forfeiture." The Supreme Court held that courts may

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[6] C.A. No. 2023-0922 (Del. Apr. 28, 2025)

excuse the non-occurrence of a condition precedent if the condition is not a material part of the agreement and the non-occurrence of the condition precedent would cause a disproportionate forfeiture. The Supreme Court remanded to the Chancery Court for further development of these materiality and disproportionate forfeiture issues.

TAKEAWAYS

The decision in effect gives buyers a second bite at the apple: if a buyer fails to give an indemnity notice in compliance with the merger agreement, the buyer can still argue that its indemnity claim is valid on the basis that invalidating the claim would constitute a disproportionate forfeiture.

There are several takeaways for buyers and sellers. Sellers should include language in the merger agreement specifying that the indemnification claim notice requirements are a material part of the agreement and should be strictly construed, and that any indemnification claims notice that does not comply with the requirements shall be deemed invalid. Sellers should also consider adding a "time is of the essence" provision.

Buyers should avoid language suggesting that indemnification claim notice requirements must be strictly enforced. Consider inserting language such as the following:

> "The parties acknowledge and agree that the [Buyer Indemnified Parties] may have imperfect information at the time of delivering a claim notice pursuant to this Section [ ], and no indemnification claim notice shall be deemed to be invalid except to the extent it fails to provide the [Seller Indemnifying Parties] with reasonable notice of the basis for any claim within a reasonable period after the Buyer Indemnified Parties have actual knowledge of all material facts relating to the claim, and the [Seller Indemnified Parties] are actually and materially prejudiced thereby."

4. JANCO FS 2, LLC V. ISS FACILITY SERVICES, INC.:[7] Delaware superior court addressed application of materiality scrape to absence of changes representation, resulting in very low hurdle for buyer breach claim.

In *JanCo FS 2, LLC v. ISS Facility Services, Inc.*, the Delaware Superior Court addressed multiple breach of contract and fraud claims arising from the sale of a cleaning business. The case arose from a

[7] C.A. Nos. N23C-03-005 MAA CCLD & N23C-07-036-MAA CCLD (Del. Super. Ct. Aug. 30, 2024).

2021 transaction in which ISS (“Seller”) sold its cleaning services division to JanCo (“Buyer”) for $80 million. After closing, JanCo claimed that ISS had fraudulently induced it into the transaction and breached multiple representations in the asset purchase agreement (the “APA”), including those concerning the business's financial condition, absence of material changes, work authorization compliance, and employee bonuses.

The heart of the court's analysis concerned the interplay between (1) the APA's "Absence of Changes" representation under Section 4.10, pursuant to which, ISS represented that the business had not suffered any Material Adverse Effect since June 30, 2021, and (2) the APA's "materiality scrape" provision, which provided that "all qualifications and limitations set forth in the Parties' representations and warranties as to 'materiality,' 'Material Adverse Effect,' 'Material Adverse Change' and words of similar import shall be disregarded in determining whether there shall have been any inaccuracy in or breach of any representations and warranties in this Agreement."

Buyer argued that you should simply convert the defined term “Material Adverse Effect” into lower case “adverse effect”. So, for example, the beginning part of Section 4.10(l) would read:

> “Since June 30, 2021, Sellers have operated only in the Ordinary Course of Business and have not suffered or experienced any other event or circumstance which has resulted in an adverse effect on it or which . . . ”

Seller argued that applying the materiality scrape to the representation would produce a nonsensical result, rendering the provision illegible by leaving a blank where "Material Adverse Effect" had been, and thus creating a drafting ambiguity. For example, Section 4.10(l) would read:

> “Since June 30, 2021, Sellers have operated only in the Ordinary Course of Business and have not suffered or experienced any other event or circumstance which has resulted in a [ ] on it or which . . . ”

The court undertook a different approach. It undertook a detailed textual analysis of how these provisions interact. Observing that "Material Adverse Effect" is a defined term in the APA, the court held that the proper "order of operations" is to first insert the full definition wherever the capitalized term appears, and then apply the materiality scrape to remove any references to "materiality" or "words of similar import" from the resulting text. Section 4.10(l) would read:

> “Since June 30, 2021, Sellers have operated only in the Ordinary Course of Business and have not suffered or experienced any other event or circumstance which has resulted *in any effect, condition, circumstance or change that individually or when taken together with other conditions, effects or circumstances in the aggregate has had an adverse effect on the Target Accounts, Purchased Assets (including intangible assets), liabilities, condition (financial or otherwise),*

properties or results of operation of the Sellers relating to the Target Accounts in the aggregate, or to the ability of any Party to consummate timely the transactions contemplated hereby on it or which . . . "

(italicized text corresponds to MAE definition). Using this approach, the representation remains coherent. But, consistent with Buyer's proposed approach, its scope expands dramatically.

The court rejected Seller's argument that Buyer's approach (and therefore also the court's) would render the representations "overbroad," pointing to the existence of boundaries on indemnification that evidenced the parties' negotiated risk allocation. Under Section 7.4(a), Buyer could not recover unless it demonstrated losses exceeding a "basket" amount of $500,000. Under Section 7.4(b), Buyer could not collect more than a specified "cap." The court reasoned that the existence of these thresholds indicated the parties did not intend for Buyer to prove a material adverse effect before indemnification would be available; otherwise, the lower basket threshold would likely be irrelevant, as Buyer would need to prove damages exceeding the cap, let alone the basket.

Applying this interpretation, the court found that Buyer cleared the "low hurdle" of proving a breach of the Absence of Changes representation.

TAKEAWAYS

The decision illustrates a potential pitfall for sellers in M&A transactions. If the materiality strip is applied to the Absence of Changes representation, the representation becomes that since the specified date there has not been an adverse event. The customary way to avoid that extremely broad representation, and the way typically used in representation and warranty insurance policies, is to simply provide that the materiality strip does not apply to the Absence of Changes representation. More broadly, sellers should carefully review all materiality and MAE qualifiers to ensure that the materiality strip works as intended.[8]

[8] Materiality strips are also customarily excluded under RWI policies from certain defined terms, such as "Material Contract" and "Material Customer".

5. SRS V. ALEXION PHARM'LS, INC..[9] - Delaware provides guidance on efforts obligations in earnout provisions.

Earnout clauses in acquisition agreements contain efforts obligations that fall within either of two camps:

- *Inward-facing*: This approach (e.g., a requirement to deploy efforts the buyer typically uses for its own similarly situated programs) allows the buyer to rely on its established practices, development gates, and drug portfolio governance. An inward-facing test is typically considered to be more buyer-friendly.

- *Outward-facing*: This standard, by contrast, looks to what a similarly situated company would do under comparable circumstances. It could either look to real world actions of similarly situated companies, or look to action of a hypothetical company.

Alexion arose from the acquisition by Alexion Pharmaceuticals, Inc. of Syntimmune, Inc., a biotech company, in November 2018. The deal involved a closing payment of $400 million, and up to $800 million in earnout payments tied to clinical development and regulatory approval milestones. The merger agreement imposed an efforts obligation on the buyer using an outward-facing "commercially reasonable efforts" ("CRE") standard that required use of "such efforts and resources typically used by biopharmaceutical companies similar in size and scope to [Alexion] for the development and commercialization of similar products at similar development stages," taking into account a list of enumerated factors. The CRE definition specified that it did not require Alexion or its affiliates to "act in a manner which would otherwise be contrary to prudent business judgment".

After closing, the drug program at issue, ALXN1830, suffered a number of setbacks, but Alexion continued to push it forward. In April 2020, Alexion announced an initiative, referred to as "10 by 2023", to launch ten products by 2023, which resulted in reallocating resources away from ALXN1830. In July 2021, Alexion was acquired by another pharmaceutical company. In connection with that acquisition, the acquiror promised $500 million in recurring cost synergies. In December 2021, the ALXN1830 program was terminated.

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[9] C.A. No. 2020-1069-MTZ (Del. Ch. Sept. 5, 2024).

SRS, as representative of the Syntimmune stockholders, alleged various breaches of the earnout obligations, including failure to satisfy the CRE standard to achieve seven of the milestones.

Following trial, the Court of Chancery found for SRS. The court looked for guidance to the outward-facing language in *Himawan v. Cephalon, Inc*., where the CRE required "the exercise of such efforts and commitment of such resources by a company with substantially the same resources and expertise as [the buyer], *with due regard to the nature of efforts and cost required for the undertaking*" (ital. added).[10] The court noted that the italicized language permitted the buyer to eschew development where such a business decision was reasonable under the circumstances, including factoring in all costs and risks involved, including the milestone payments and opportunity costs faced by the buyer. The court noted that such language was not present in the CRE definition in *Alexion*. Accordingly, while the *Himawan* CRE definition allowed the buyer to consider its own efforts and costs, the CRE definition in *Alexion* did not. Alexion could only consider a list of enumerated factors, subject to an upper limit that Alexion did not have to act in a manner that was contrary to prudent business judgment.

The court held that the CRE test could apply either a "yardstick approach," defining commercially reasonable efforts by reference to efforts of similarly situated biopharmaceutical companies, or a "hypothetical company approach," that looked to efforts of a similarly situated hypothetical company. The court held that given the absence of exemplar biopharmaceutical companies, the hypothetical company approach should be employed. The court then framed the test as Alexion having promised to "use the efforts and resources that would be used by a hypothetical typical company of Alexion's size, working on a molecule like ALXN1830 at a similar stage of development, considering the factors such a company would typically consider, up until the point of being contrary to prudent business judgment."

SRS based its claim that Alexion breached its CRE obligation on three actions. First, SRS claimed that Alexion's deprioritization of ALXN1830 in connection with implementation of its "10 by 2023" initiative violated its obligation to use CRE. The court noted that competitors of Alexion were moving forward with similar products, and Alexion believed that ALXN1830 had commercial potential. The court held that Alexion's deprioritization of ALXN1830 fell short of commercially reasonable efforts. However, SRS failed to prove that it was harmed by the several months of delay caused by the deprioritization, and so SRS was not entitled to recover damages based on this first argument. The court also rejected SRS's second argument, that Alexion breached its CRE obligation by terminating a program that involved intravenous application of ALXN1830 in order to prioritize a program for

[10] 2024 WL 1885560, at *4 (Del. Ch. Apr. 30, 2024)

subcutaneous application. The court based its decision on the credible evidence of Alexion's expert witness that it did not make sense to pursue both applications at the same time.

With respect to SRS's third argument, the court held that termination of the ALXN1830 program in 2021 constituted a breach of the CRE obligation. The court grouped the enumerated factors in the CRE definition into the following categories: safety, efficacy, order of entry to market, the likelihood of regulatory approval, and other advantages and disadvantages. While Alexion argued that the drug had safety issues, the court held that there was no evidence the drug caused a safety issue, and a hypothetical company would have addressed safety concerns by gathering further data, not terminating the program. The court held that Alexion's efficacy concerns were speculative. The court held that neither party had offered credible evidence with respect to the likelihood of regulatory approval. With respect to order of entry, the court held that for the two indications that Alexion was pursuing when it terminated the program, Alexion believed it could be first to market. With respect to other advantages and disadvantages, the court noted that ALXN1830 had favorable characteristics that could appeal to certain subpopulations, there were no significant labelling issues, and ALXN1830 had strong patent protection. Given all of these factors, the court held that termination of ALXN1830 "fell short of the typical efforts a hypothetical company similarly situated to Alexion would have devoted to the program."

TAKEAWAYS

The decision is important because it goes against the historic trend of earnout disputes favoring buyers. The decision provides helpful guidance on the use of CRE definitions in earnouts:

- If an outward-facing test is used, buyers should include language of the type present in *Himawan*, so that efforts and costs specific to the buyer, including the milestone payments, are factored in, and not just efforts and costs of a hypothetical buyer. Alexion may have believed that the limitation that it not be required to act in a manner contrary to prudent business judgment was a catchall that would protect it, but the court treated the language as a high threshold that was not crossed. Better protection would be provided by catchall language that expressly permits a buyer to reprioritize its portfolio, including terminating programs, as a result of market conditions, adverse clinical trial data, objective risk signals, regulatory feedback, or otherwise, if it deems prudent.

- Consider whether a "yardstick approach" or a "hypothetical company approach" is intended, and, if the former, what the reference group of companies should be. It would be helpful for buyers to select a reference group of companies that have terminated clinical trials of promising drugs based on prioritizing other programs.

- At the end of its decision, the court noted its belief that the ALXN1830 program was terminated to help achieve the $500 million in cost synergies when Alexion was sold. That backdrop made it very difficult to convince the court that terminating the program did not breach the CRE obligation. Buyers should consider the implications of such external events on their compliance with earnout efforts obligations.

Inward-facing tests, where the buyer's use of CRE is compared against its practice with respect to other products, are typically viewed as more buyer-friendly than outward-facing ones. Buyers can tie to their own practices, are better able to calibrate their conduct, and have an informational advantage in any challenge. One exception to that is if the inward-facing test applies to a sub-category of buyer products for which buyer has expended a significant amount of effort and resources. Such a test may become very seller-friendly because of the high efforts standard it creates.

The court in *Alexion* did not consider SRS's claim that Alexion breached its obligation to refrain from taking action, or omitting to take action, to avoid achievement of the milestones, because it did not carry additional potential for damages.[11] The merger agreement contained the customary buyer-favorable wording, which prohibited action or inaction "the primary purpose of which" was to avoid achievement of the milestones. In another recent earnout dispute, the language also prohibited action or inaction that factors in the cost of making the earnout payment. That is very seller-friendly, and should be strongly resisted by buyers.

In another earnout dispute, the sellers made a claim that the buyer fraudulently induced them to take an earnout payment instead of increased cash at closing. Most merger agreements contain non-reliance language that precludes fraudulent inducement claims, but the language only applies to buyers. In deals where there is an earnout or other form of contingent or deferred payment, buyers should also require that sellers agree to non-reliance language.

6. ICAHN PARTNERS V. DESOUZA:[12] Delaware court of chancery addressed the limitations that apply to a stockholder-nominated director's sharing of information with the nominating stockholder.

[11] See the June 11, 2025 decision, available at: https://courts.delaware.gov/Opinions/Download.aspx?id=380920

[12] C.A. No. 2023-1045-PAF (Del. Ch. Jan. 16, 2024).

Icahn Partners arose after three funds affiliated with activist investor Carl Icahn (collectively, the "Icahn Parties"), nominated three directors to the board of Illumina, Inc. One of the three nominees, Andrew Teno, who was an employee of another Icahn affiliate, was elected to the board. Following his election, Teno disclosed privileged and confidential board-level information to the Icahn Parties, which they included in a derivative lawsuit alleging fiduciary breaches by Illumina's directors. The company moved to strike those portions of the complaint.

In a letter ruling, the Court of Chancery granted the motion to strike, holding that Teno was not entitled to share privileged or confidential information with the Icahn Parties, and that the Icahn Parties were not entitled to use the information in litigation. While acknowledging that Delaware law permits directors broad access to company information, which the court noted "is essentially unfettered in nature" and extends to privileged information, the Court expressly rejected the Icahn Parties' claim that Delaware case law establishes that a director who has been nominated by a stockholder can share confidential or privileged information with that stockholder. The court instead reaffirmed that there are limited circumstances in which a director may share such information:

1. *Designated-Director Exception*: A director may share confidential or privileged information with a stockholder if the stockholder has the contractual right to designate that director to the board, or has sufficient voting power such that the director is effectively a designee of the stockholder.

2. *Dual-Fiduciary ("One-Brain") Exception*: A director may share such information if the director also serves in a controlling or fiduciary capacity with the stockholder. This longstanding Delaware doctrine is predicated on the view that it is unrealistic to expect that a director can segregate board information from stockholder interests where they are subject to dual fiduciary duties. (As a "human with only one brain," a director would not be able to avoid sharing information "with himself in his stockholder capacity.")

Here, the Icahn Parties maintained that they were within the scope of the legal privilege because Teno was their board nominee and was employed by an Icahn-affiliated entity. They argued that these factors would, in the words of the Court, "render unreasonable any expectation that Teno would not share confidential and privileged information that he acquired as a director with Plaintiffs [the Icahn Parties]."

The Court, however, determined that the Icahn Parties satisfied neither element that would entitle them to privileged company information. They did not have a contractual right to appoint the director, nor did they have voting power to cause his election. And although Teno was employed by an Icahn-affiliated entity, he was not an employee or fiduciary of any of the Icahn entities that owned shares and were seeking to use the privileged information. As a result, the Court found no legal basis to permit disclosure.

TAKEAWAYS

This case serves as an important reminder of the law regarding privilege in connection with board-level information and the extent to which a director can share information with a stockholder

responsible for placing the director on the board (an "Affiliated Stockholder"). One important takeaway is the bright line between designating stockholders and nominating stockholders. A stockholder who prevails in a proxy contest and gets representation on the board may not have the same right to access privileged company information as a stockholder who obtains a contractual right to designate a person on the board under a settlement agreement with the company.

The decision also serves as a reminder that directors have extremely broad rights to company information, and where either of the two information sharing exceptions applies (designated-director or dual-fiduciary), the company should assume that an Affiliated Stockholder will also be entitled to receive that information. Issues tend to arise where there is tension between the company and the Affiliated Stockholder, but not sufficient adversity to preclude the applicable director from having access to board-level information. The typical way companies try to navigate this issue is through establishing a special committee on which the applicable director is not a member. Given the "essentially unfettered" information rights of directors, the committee's role should not be overly broad.

The information sharing issue also arises where the company competes with another portfolio company of the Affiliated Stockholder. In footnote 40 of the decision, the court noted the right of the director to share information with the Affiliated Stockholder does not give the Affiliated Stockholder the ability to use the information however it wishes. Citing an article by Vice Chancellor Laster & J. Zeberkiewicz, the court noted: "[T]he director can share with his stockholder affiliate, but the ability to share within the silo does not permit sharing outside of the silo."[13] In other words, the Affiliated Stockholder does not have the right to share the board-level information with its other portfolio companies.

The decision also has implications for privilege waiver. If a company has a board member that is sharing information with its Affiliated Stockholder, and neither of the two information sharing exceptions applies, then the company is at risk of being deemed to have waived privilege with respect to that information. Companies should ensure that they have policies in place prohibiting the sharing of information in such situations (similar to Illumina's Code of Conduct), ensure that such policies are known by the directors, and be vigilant that impermissible sharing is not taking place. Companies should also ensure that they are sharing information with directors in a way that does not jeopardize privilege, such as through board portals or company issued email addresses.

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[13] See J. Travis Laster & John Mark Zeberkiewicz, *The Rights and Duties of Blockholder Directors*, 70 Bus. Law 33, 56-57 (2015)

7. ***KIM V. FEMTOMETRIX*:**[14] Delaware chancery court highlights gaps in common shareholder agreement provisions that can be exploited to the detriment of minority stockholders.

Kim v. FemtoMetrix addresses a common gap in a voting agreement that permitted a company and majority stockholders to amend the agreement and remove a board designee against the wishes of the designating stockholders. Avaco Co., Ltd. (Avaco), a stockholder of FemtoMetrix, Inc. ("FemtoMetrix" or the "company"), and its board designee, Mr. Kim, sued FemtoMetrix challenging an amendment to the company's voting agreement that allowed for the removal of Mr. Kim from the company's board, even though such a removal was expressly prohibited by the voting agreement. The voting agreement provided that Avaco could appoint one board member and that Avaco's designee could not be removed without Avaco's consent unless for cause. The amendment introduced a prohibition on board membership for any service provider or affiliate of a person engaged in commercial litigation against the company, thereby disqualifying Mr. Kim from board membership because Avaco was already engaged in commercial litigation against the company in a separate lawsuit. The amendment therefore circumvented the voting agreement provisions specifying that Avaco's designee could not be removed without Avaco's consent. The court granted summary judgment in favor of the company, allowing the amendment to the voting agreement and Mr. Kim's removal from the board. In doing so, the court exposed a potentially large loophole in language that is similar to that found in many voting agreements, with implications for minority stockholders under stockholder agreements in general.

The dispute implicated Sections 1.2 and 1.4 of the voting agreement, containing designation and removal rights, and section 7.8, containing amendment provisions. Section 1.2(a) set forth a customary director designation right. Section 1.4(a) provided that Mr. Kim could not be removed without Avaco's consent except for cause. The amendment made Section 1.4(a) subject to a new Section 1.4(d), which conditioned board membership on not being a "Conflicted Director," which was defined as someone who is a service provider or affiliate of a person engaged in commercial litigation against the company. The court rejected the plaintiffs' argument that the amendment violated sections 1.2 and 1.4 of the voting agreement, noting that neither section precluded an amendment that affected the designation right. The court held that the designation right was not absolute and did not preclude changes in eligibility criteria. The court held that being a "Conflicted Director" under these new eligibility criteria made the director removable for cause.

Section 7.8 set forth the general approval requirement for amendments, and a number of exceptions, two of which were at issue. The first exception, section 7.8(a), provided that the voting agreement could not be amended with respect to any investor without such investor's written consent,

[14] C.A. No. 2025-0025-LWW (Del. Ch. Aug. 8, 2025).

unless the amendment applied to all investors "in the same fashion". In rejecting the plaintiffs' argument that the amendment at issue therefore required Avaco's consent because Avaco was the sole investor impacted by it, the court held that the amendment was "facially neutral", and "equal application, as contemplated by Section 7.8(a), is not the same as equal effect. Nothing in Section 7.8(a) requires that an amendment always have an identical effect on each Investor." The second exception at issue, Section 7.8(e), provided that Section 1.2(a) could not be amended without the written consent of Avaco. The court held that this provision was also not violated by the amendment because the language of Section 1.2(a) was not amended. According to the court: "Avaco could have bargained for a right to veto every amendment that affects its Board designees. It did not. It agreed that it has the right to veto amendments to Section 1.2(a) specifically."

TAKEAWAYS

The decision contains important lessons for minority investors, such as investors in growth equity or venture deals. The language at issue was similar to that often found in voting agreements, including that in the form voting agreement of the National Venture Capital Association (NVCA). The first problem was that the designation and removal rights did not provide Avaco with the watertight protection it likely envisioned for two reasons: first, the designation and removal right could be undermined by an amendment introducing director qualifications, and second, the prohibition on amendments without Avaco consent only applied to Section 1.2(a) and not to all provisions in the agreement that impacted designation and removal by Avaco. The opinion exposes a loophole in the designation and removal provisions that is potentially extremely broad. This could be addressed by prohibiting any amendment without Avaco's consent if the amendment limited or interfered with Avaco's right to designate or remove its designee, or introduced or expanded the right of any other stockholders to remove Avaco's designee.

The second problem was the standard in Section 7.8(a) requiring individual investor consent for amendments unless they applied to all investors "in the same fashion". This is a commonly used standard, and one used in NVCA forms. The court's focus on facial neutrality in an amendment, and its dismissal of the relevance of the actual effect of the amendment on an investor, exposes the very low degree of protection that the "in the same fashion" standard provides minority investors. For example, what if an amendment to a stockholder agreement provided: "In any sale of the company, if any corporate investor does not agree to a broad noncompete and a general release of claims for the benefit of the acquiror of the company and its affiliates, such investor will forfeit its right to receive any consideration in the sale"? The provision is arguably facially neutral because it does not on its face reference any specific stockholder. Stockholders holding the requisite percentage of shares could therefore approve this type of amendment, to the detriment of any corporate investor. Practitioners should be mindful of the weak protection that the "in the same fashion" standard affords investors. This could be addressed by a proviso such as the following: "provided, however, that an amendment that affects an investor in a way that is significantly adverse, relative to the effect on other investors holding

a majority of outstanding shares, shall not be deemed to apply to such investor in the same fashion as it applies to other investors."

8. **DERGE V. D&H UNITED FUELING SOLUTIONS, INC.:**[15] – 5-year noncompete with multi-country scope held binding on stockholder with less than 1% interest.

This decision involved a summary judgment proceeding in an action by the former Chief Operating Officer (the "COO") of a fuel storage company ("Tankology") against the acquiror of Tankology's holding company (collectively, the "Company"), seeking a declaratory judgment that the noncompete that the COO signed in connection with the sale was unenforceable. As summarized by the Delaware Chancery Court, the noncompete prohibited the COO for five years from "owning any interest in, managing, controlling, participating in, consulting with, rendering services for, or becoming engaged or involved with a business engaged in activities concerning fuel storage anywhere in the United States and each other country in which [the Company] generated revenue in the two-year period before the Merger."

In granting summary judgment in favor of the acquiror, the court considered a number of the COO's arguments. The COO argued that the court should employ the more searching inquiry applicable to employment noncompetes, rather than those entered into in connection with the sale of a business, because the COO owned less than 1% of the Company and did not negotiate the terms of the sale. Rejecting this argument, the court held that the COO voluntarily signed a written consent for the deal, and nothing in the record suggested that the COO lacked equal bargaining power or that he was required to sign a contract of adhesion. Moreover, he received almost $1 million in the deal, which was conditioned on his signing the noncompete.

The court held that the temporal and geographic scope of the noncompete were reasonable. The court noted that several Delaware courts found noncompetes of that length to be valid. The court held that while the geographic scope was expansive, it appropriately covered the market where the Company had economic interests. The court held that obtaining a noncompete from the Company's top executives legitimately protected the acquiror's interests, including goodwill and protection of confidential information from misuse, and maintaining the business relationships with vendors, suppliers and customers.

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[15] C.A. No. 2025-0087-BWD (Del. Ch. Dec. 8, 2025)

TAKEAWAYS

The decision provides useful guidance for buyers and sellers of Delaware corporations, particularly when considered in connection with other recent decisions.

- A noncompete entered into by an executive in a company sale transaction will not be treated as an employment noncompete merely because the executive holds less than one percent of the outstanding equity of the target company.[16]

- A very broad geographic scope can be obtained if it ties to the jurisdictions in which the target company generated revenue. This can be beneficial for acquirors of companies that generate revenue in significantly more countries than they have operations in.

- This decision upheld a noncompete where the "restricted business" definition was tied to the business of the target company. By contrast, the noncompete in another recent decision was invalidated because it extended the definition to the acquiror's business.[17]

- A noncompete that extends for five years after closing can be reasonable. By contrast, a noncompete that extended for two years after the target company's executive had terminated employment with the acquiror was held not reasonable because it was not tailored to preserve the purchased goodwill.[18]

9. NORTH AMERICAN FIRE ULTIMATE HLDGS, LP V. DOORLY:[19] - Determination of unenforceability of noncompete for lack of consideration should be based on consideration at time of entry into noncompete, not time of enforcement.

This decision involved an appeal by an employer (NAF) of a Delaware Chancery Court decision dismissing NAF's amended complaint against its employee (Doorly) for violating restrictive covenants in an Incentive Unit Grant Agreement (the "Award Agreement"). Doorly received Class B units of NAF

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[16] But note that the issue should also be evaluated under the law of the jurisdiction where the executive resides.
[17] See *Kodiak Bldg. Partners v. Adams*, 2022 WL 5240507 (Del. Ch. Oct. 6, 2022)
[18] See *Cleveland Integrity Services, LLC v. Byers*, 2025 WL 658369 (Del. Ch. Feb. 28, 2025). Note that while the *Derge* court cited Delaware decisions where noncompetes in excess of five years had been upheld, lengthy noncompetes may also raise issues under federal antitrust law.
[19] C.A. No. 2024-0023 (Del. Feb. 3, 2026)

(the “Units”) under the Award Agreement in exchange for other equity in NAF that he received in the sale of his business to NAF. The Units were subject to time and performance vesting. Doorly was subsequently terminated, when it was discovered that he was planning to leave NAF and had formed a competing entity, in violation of the restrictive covenants in his Award Agreement. Given that he was terminated for cause, all of his vested and unvested Units were forfeited.

NAF filed a complaint against Doorly for breach of contract, among other claims. In ruling on Doorly’s motion to dismiss, the Chancery Court held that the Units were the sole consideration for the restrictive covenants, and when the Units were forfeited, the Award Agreement became unenforceable for lack of consideration.

In reversing the Chancery Court’s decision, the Delaware Supreme Court held that the Chancery Court erred in measuring consideration at the time of enforcement of the restrictive covenants. The Supreme Court held that it was a general principle of contract law that consideration must be measured at the time a contract is entered into. If the consideration subsequently decreases in value, that does not result in a failure of consideration. According to the Supreme Court, “consideration is measured at the time of formation and is not reevaluated at the time of enforcement.”

TAKEAWAYS

The result in the case seems harsh: a seller of a business ended up not receiving anything for it as a result of his violation of restrictive covenants. But a contrary outcome would have been unworkable. It would have opened the door for sellers to seek to unwind transactions, where buyer stock they receive subsequently becomes worthless, and buyers to seek to unwind acquisitions of companies that go bankrupt after closing. The decision can be seen as a logical application of Delaware’s pro contractarian stance. If a Seller is willing to enter into an acquisition agreement that could result in the seller losing all of the deal consideration in the future, whether as a result of a violation of restrictive covenants, through indemnity claims or otherwise, the Delaware courts will not second guess that decision.

10. ***CANTOR FITZGERALD V. AINSLIE***,[20] ***LKQ V. RUTLEDGE***,[21] and ***FORTILINE V. MCCALL***:[22] Delaware courts draw key distinctions between traditional noncompetes and forfeiture-for-competition provisions, treating the latter as contractual conditions to receipt of payment and therefore not subject to the reasonableness review that applies to restraints of trade.

In *Cantor Fitzgerald v. Ainslie*, the Delaware Supreme Court addressed whether forfeiture-for-competition provisions in limited partnership agreements should be subject to reasonableness review, as traditional noncompete covenants are. The case involved six former limited partners of Cantor Fitzgerald who voluntarily resigned from employment with a Cantor Fitzgerald affiliate and withdrew from the partnership between 2010 and 2011. The limited partnership agreement provided that former partners would receive certain amounts ("Conditioned Amounts") relating to their capital accounts and grant units in installments over four years, but would forfeit unpaid Conditioned Amounts if they engaged in competitive activity (or otherwise breached other restrictive covenants) during that period. After the plaintiffs joined competing firms, Cantor Fitzgerald withheld payments ranging from approximately $100,000 to over $5 million.

The Delaware Court of Chancery had held that the forfeiture-for-competition provision described above should, similar to a noncompete, be subject to a reasonableness review. The Chancery Court held that the provision was an unreasonable restraint of trade, largely due to its four-year duration. The Delaware Supreme Court unanimously reversed, holding that when sophisticated actors voluntarily agree to forfeiture-for-competition provisions, the provision should be enforced as written, "absent unconscionability, bad faith, or other extraordinary circumstances." The Supreme Court noted that the Chancery Court viewed the forfeiture-for-competition provision as similar to liquidated damages, and relied heavily on "Delaware's distaste for liquidated damage provisions" in the context of employment noncompetes. The Supreme Court disagreed with that analysis, and viewed the provision instead as a condition precedent to Cantor Fitzgerald's obligation to pay a deferred financial benefit. The Supreme Court noted Delaware's strong policy favoring the enforceability of partnership agreements, under the Delaware Revised Uniform Limited Partnership Act. Critically, the Supreme Court distinguished forfeiture-for-competition provisions from traditional noncompetes, explaining that the former do not prohibit competition-they are not enforceable through injunctive relief, and merely attach an economic cost to a withdrawing partner's decision to compete. Unlike restrictive covenants that could deprive an individual of their livelihood, forfeiture provisions give the departing party a choice: they are free to compete, but if they do so, they forfeit certain deferred payments.

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[20] No. 162, 2023 (Del. Jan. 29, 2024).
[21] No. 110, 2024 (Del. Dec. 18, 2024).
[22] No. 2024-0211-MTZ (Del. Ch. June 27, 2025), aff'd, No. 300, 2025 (Del. Feb. 10, 2026).

Following *Cantor*, the Seventh Circuit certified questions to the Delaware Supreme Court in *LKQ v. Rutledge*, asking whether Cantor's reasoning precluded reviewing forfeiture-for-competition provisions for reasonableness outside the limited partnership context, and, if not, what factors should be considered. The case involved a mid-level manager, Robert Rutledge, who had received stock through RSU agreements containing forfeiture-for-competition provisions. Those provisions required Rutledge to forfeit his RSUs, any underlying shares, or any proceeds from stock sales if he competed with LKQ within nine months of his departure.

The Delaware Supreme Court answered that *Cantor's* holding was not limited to the limited partnership context. The Court explained that a restricted stock unit agreement "stands on different footing than underlies noncompetition covenants" because it conditions receipt of a contingent, unearned benefit on a voluntary choice and "does not restrict competition or a former employee's ability to work." Like the partners in *Cantor*, if a former employee wishes to compete during the relevant period, "the employer need not confer the deferred benefit on the former employee, who has agreed to forfeit that benefit upon engaging in competition." The Court grounded its analysis in Delaware's contractarian principles, emphasizing that respecting private agreements "has wealth-creating and peace-inducing effects, which are undercut if citizens cannot rely on the law to enforce their voluntarily undertaken mutual obligations." However, the Court acknowledged that reasonableness review could still apply if a forfeiture provision "is so extreme in duration and financial hardship that it precludes employee choice by an unsophisticated party."

In *Fortiline v. McCall*, the Court of Chancery considered the question of whether a noncompetition agreement would be evaluated like a forfeiture-for-competition if the remedy sought was only damages and not injunctive relief. It held that it would not.[23] *Fortiline* involved a company founder and former employees who left and allegedly set up a competing business that recruited half of the company's workforce. These individuals were subject to restrictive covenants in their equity award agreements, including noncompetition and nonsolicitation provisions.

Fortiline and a parent entity sued to enforce the restrictive covenants, and filed a motion for a preliminary injunction. After the Court of Chancery denied the plaintiffs' motion - holding the restrictive covenants were unreasonably broad and unenforceable - the plaintiffs amended their complaint to seek damages instead of injunctive relief. The plaintiffs argued that a claim for breach of a restrictive covenant that seeks only damages is not subject to reasonableness review. The Court rejected this

[23] For a more detailed description, see: https://www.jdsupra.com/legalnews/delaware-court-confronts-issue-of-first-5764013

argument, explaining that the *Cantor* and *LKQ* decisions "pin reasonableness review on what the provision demands of the employee, not on the plaintiff's chosen remedy," so damages claims do not convert restrictive covenants into forfeiture provisions. Because the provisions at issue were restrictive covenants that prohibited competition - rather than forfeiture-for-competition provisions that merely imposed an economic cost on the choice to compete - they remained subject to reasonableness review. Having already found the covenants unreasonably broad and unsupported by legitimate business interests, the Court granted summary judgment for the defendants.

TAKEAWAYS

These decisions offer important guidance for dealmakers structuring post-closing employee retention arrangements: forfeiture-for-competition provisions can offer greater flexibility than noncompetes alone. The situation can arise, for example, where a key employee does not hold sufficient equity in the target company to be subject to an enforceable sale-of-business noncompete. An employment noncompete may not be enforceable in the jurisdiction where the employee resides, or may only permit a noncompete of very limited duration and scope. A forfeiture-for-competition provision included in a post-closing award can provide the acquiror with additional protection against the employee leaving.

Note that there are potential limitations on use of the provisions. The *LKQ* court cautioned against provisions that were excessively onerous in duration and financial hardship. Language in the *Cantor* decision also left open the possibility that a provision could be interpreted differently based on whether the employee voluntarily resigned, or was involuntarily terminated. Note also that the decisions all deal with Delaware law. As noted by the Seventh Circuit in its certification request in LKQ, not all jurisdictions differentiate between forfeiture-for-competition provisions and restraint of trade.

11. ***ARIZONA BEVERAGES USA, LLC V. EVERCORE, INC.:***[24] – Sellers in M&A processes need to consider the implications of breaching confidentiality provisions in agreements posted in deal data rooms.

AriZona Beverages involved a petition *by* AriZona Beverages USA, LLC ("ABU"), a beverage company, for limited pre-action discovery of the identity of individuals and entities who had received access to its can supply agreement with VoBev, LLC ("VoBev"), in connection with a sell-side M&A

[24] No. 608480/2024 (Sup. Ct., Nassau Cnty. Aug. 27, 2024).

process of VoBev. ABU claimed that such individuals and entities had conspired with Evercore (the investment bank running the sale process) to tortiously interfere with the supply of cans to ABU and tortiously induced VoBev to breach its can supply agreement with ABU.

According to ABU, in order to maintain the pricing of its beverages, it needed a reliable supply of beverage cans, and there were only two manufacturers of such cans west of the Mississippi: VoBev and a company called Ball Can Corporation ("Ball Can"). ABU had recently won an arbitration award against Ball Can for breach of a can supply agreement between ABU and Ball Can. ABU had purportedly been informed that Ball Can was one of the interested parties in the VoBev sale process, and Ball Can was conditioning its interest on VoBev terminating the can supply agreement between VoBev and ABU.

Evercore admitted that a third party had been provided access to the VoBev can supply agreement in the deal virtual data room ("VDR"), subject to a deal confidentiality agreement, but Evercore refused to disclose its identity on the basis that it would result in a breach of the deal confidentiality agreement with that third party. The court held that ABU had provided sufficient information to show that the VoBev can supply agreement was critical to its business, and directed Evercore to disclose, among other things, the identity of each person and entity to whom Evercore had provided access to the VDR containing the VoBev can supply agreement, or to whom Evercore had supplied a copy of the agreement or otherwise disclosed its terms.

TAKEAWAYS

In every sale process, sellers have to determine how to deal with confidentiality provisions in commercial and other agreements. There is a tension between providing bidders with sufficient information so they can meaningfully evaluate the target company, and strictly complying with the confidentiality provisions in all agreements. For some agreements, particularly in industries where contractual confidentiality provisions are ubiquitous, the consequences of breaching may be trivial and the benefit of providing fulsome disclosure in the sale process clearly outweighs the risks of a breach. But for many agreements, alternative procedures should be put in place, such as providing a high level summary of the agreement on an anonymized basis, possibly aggregated with other similar contracts, staggering disclosure and using clean teams. *AriZona Beverages* provides a useful reminder that making agreements available in data rooms may breach confidentiality provisions in those agreements, and simply relying on deal confidentiality agreements does not prevent or cure such a breach.

12. *MAFFEI V. PALKON*: Delaware supreme court reversed TripAdvisor decision, holding that decision to reincorporate from Delaware to Nevada on a clear day was protected by business judgment rule.

On February 4, 2025, in an interlocutory appeal from the Delaware Chancery Court's denial of a motion to dismiss,[25] the Delaware Supreme Court held that the business judgment rule applied - not the entire fairness standard of review - in an action against the TripAdvisor board of directors and controlling stockholder seeking to enjoin the reincorporation of TripAdvisor from Delaware to Nevada.[26]

The decision to reincorporate was approved by the TripAdvisor board in March 2023, and by its stockholders in June 2023. Approval by Gregory Maffei, TripAdvisor's controlling stockholder with 43% of the voting power through super-voting stock, determined the outcome of the stockholder vote. Without his support, the requisite stockholder approval would not have been obtained. Minority stockholders sued, alleging that Maffei and the directors breached their fiduciary duties by approving a transaction in which they were self-interested because it would insulate them from almost any stockholder litigation as a result of Nevada's more permissive corporate law regime. The defendants moved to dismiss, arguing that the reincorporation could only be a self-interested transaction if it extinguished existing potential liability, which was not the case, and hence the business judgment rule applied.

The Chancery Court held that the entire fairness standard of review applied in a transaction between a corporation and a controlling stockholder where the controller received a non-ratable benefit. The Chancery Court held that a controller or other fiduciary received a non-ratable benefit where a transaction "materially reduces or eliminates the fiduciary's risk of liability." The Chancery Court rejected any bright line between existing potential liability and future potential liability, and held that the test focused instead on materiality. In denying the defendants' motion to dismiss, the Chancery Court held that it was reasonably conceivable to infer at the pleading stage that the reincorporation would confer a material benefit on the defendants.

The Delaware Supreme Court reversed. The Supreme Court agreed with the Chancery Court that a non-ratable benefit had to be material to trigger entire fairness review. But the Supreme Court disagreed with the Chancery Court's rejection of the importance of the temporal nature of liability (i.e., existing liability versus future potential liability), and held that the temporal nature was very relevant to

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[25] No. 125, 2024 (Del. Feb. 4, 2025).
[26] Maffei exercised control through a holding company which was also a defendant in the litigation, as were its directors.

materiality. The Supreme Court held that in this case, "the absence of any allegation that any particular litigation claims will be impaired or that any particular transaction will be consummated [after the reincorporation] weighs heavily against finding that the alleged reduction in liability exposure under Nevada's corporate law regime is material." In other words, a decision to reincorporate made on a clear day (i.e., no pending or threatened litigation against the directors or controller, and no specific transaction that could trigger litigation is contemplated) should ordinarily be entitled to the benefit of the business judgment rule. Because the plaintiffs had not alleged any past conduct giving rise to actual or threatened claims, the hypothetical future benefit of reduced liability exposure was "too speculative" to constitute a material, non-ratable benefit.

TAKEAWAYS

The decision should be considered in the context of the "DExit" movement, described above. The Chancery Court decision was criticized as hostile to the interests of Delaware corporations and their controllers, and evidence of the bias of the Delaware judiciary towards plaintiff's firms. The decision cracked open a door for plaintiff's firms to push on with potentially increasingly speculative claims of material non-pro rata benefits to directors and controllers. The Supreme Court's decision closed back the crack. The Supreme Court's decision came out before SB 21 was enacted, but can be seen as part of the overall response by the Delaware judiciary and legislature to the DExit movement.

On a more concrete level, the decision gave clear guidance that reincorporating out of Delaware on a clear day ordinarily will not be subject to an entire fairness standard of review. If the reincorporation is done during the course of pending or threatened litigation against the board or a controlling stockholder, entire fairness may very well be appropriate. In either situation, for companies with controlling stockholders, the additional protections under SB 21 should also be employed.

13. IN RE MINDBODY, INC. S'HLDR LITIG.:[27] Reversing the trial court, the Delaware supreme court held that a buyer was not liable for aiding and abetting the target CEO's disclosure breach because (i) failure to correct inaccurate statements in the proxy statement did not constitute the "substantial assistance" in the disclosure breach, and (ii) buyer did not have actual knowledge that its own conduct was legally improper.

[27] C.A. No. 2019-0442 (Del. Dec. 2, 2024)

Mindbody concerned consolidated actions against Richard Stollmeyer, the founder and CEO of Mindbody, Inc., for breach of fiduciary duty, and Vista Equity Partners Management, LLC ("Vista"), for aiding and abetting, in connection with Vista's acquisition of Mindbody in 2019. In a post-trial decision, the Delaware Court of Chancery held, among other things: (i) Stollmeyer breached his *Revlon* duty of loyalty by manipulating the sale process in Vista's favor for his own personal benefit and not to maximize stockholder value, (ii) Stollmeyer also breached his fiduciary duty of disclosure through material omissions in Mindbody's proxy statement, and (iii) Vista was liable for aiding and abetting the disclosure breach. The Delaware Supreme Court affirmed the holdings regarding Stollmeyer's *Revlon* duties and disclosure breaches, but reversed with respect to Vista's aiding and abetting liability.[28]

The test for aiding and abetting a breach of fiduciary duty requires (i) the existence of a fiduciary relationship, (ii) a breach of fiduciary duty, (iii) knowing participation in the breach by the defendant, and (iv) damages proximately caused by the breach.[29] The issue in *Mindbody* was the "knowing participation" prong, which required a showing of both "knowledge" (scienter) and "participation". The trial court held that certain factual findings showed "knowledge," and that Vista's contractual obligations under the merger agreement to correct misstatements and omissions evidenced an obligation to correct material omissions, and therefore that Vista "participated" in the disclosure breaches. The Supreme Court rejected both holdings.

The Supreme Court held that the trial court's "knowledge" analysis failed to take into account the legal requirement that Vista not only have knowledge of Stollmeyer's disclosure breach, but also have actual knowledge of the wrongfulness of Vista's own conduct regarding the disclosure breach.

With respect to "participation," the Supreme Court held that Vista's contractual obligations under the merger agreement to correct misstatements and omissions in the proxy statement could not transform Vista's passive awareness of disclosure breaches into "knowing participation" in the breaches. According to the Supreme Court, the participation must involve "substantial assistance" to the primary violator, not simply passive awareness. The Supreme Court looked to the Restatement (Second) of Torts §876(b) that some other Delaware courts had used as an analytical framework to determine "substantial assistance", and considered the following factors, as analyzed by the *Dole Food*[30]court:

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[28] A fuller description of the Chancery Court decision is available in our 2024 publication **here**.
[29] *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).
[30] *In re Dole Food Co. Inc. S'hldr Litig*., 2015 WL 505214 (Del. Ch. 2015).

- The nature of the tortious act that the secondary actor participated in or encouraged, including its severity, the clarity of the violation, the extent of the consequences, and the secondary actor's knowledge of these aspects;
- The amount, kind, and duration of assistance given, including how directly involved the secondary actor was in the primary actor's conduct;
- The nature of the relationship between the secondary and primary actors; and
- The secondary actor's state of mind.

The Supreme Court held that the first factor weighed in favor of finding "substantial assistance". For the second factor, the Supreme Court held that Vista provided no affirmative assistance, but merely failed to point out the disclosure violations in the proxy statement. The Supreme Court noted that the trial court's reasoning suggested that Vista's contractual obligation to notify the target of disclosure violations created a disclosure duty between Vista and the target's stockholders. The Supreme Court rejected the existence of any such duty, holding that the contractual obligation was only to notify the target. Moreover, the failure to do that did not create any information vacuum because the target's CEO already knew about the disclosure breaches. According to the Supreme Court, Delaware law "generally requires that participation for the purposes of aiding and abetting liability requires more than the passive awareness of a fiduciary's disclosure breach that would come from simply reviewing draft Proxy Materials." Accordingly, the Supreme Court held that the second factor weighed against a finding of "substantial assistance."

For the third factor, the Supreme Court noted that Vista was an arms'-length third-party buyer of Mindbody, and this type of situation is the most difficult type of aiding and abetting claim to prove, given that Delaware law is protective of arms'-length negotiations. The Supreme Court held that this protection was not vitiated by the contractual obligations under the merger agreement for Vista to notify of disclosure breaches. As with the second factor, the absence of any duty of Vista to Mindbody's stockholders is key. The Supreme Court also noted public policy reasons for not implying fiduciary duties between an acquiror and the target's stockholders. It would collapse the arms'-length relationship between an acquiror and the target company, and require the acquiror to treat the target company's stockholders like its own. It would also force the acquiror to second guess disclosure decisions made by the target's board, which itself has fiduciary obligations to the target's stockholders. Accordingly, the Supreme Court held that the third factor weighed against a finding of "substantial assistance."

The Supreme Court held that the fourth factor required Vista to know that its own conduct was legally improper. The Supreme Court held that the trial court's findings of omissions in Vista's internal documents (viewed by the trial court as having been "scrubbed") did not support a finding of scienter. The Supreme Court held that this factor also weighed against a finding of "substantial assistance." Weighing all the factors together, the Supreme Court held that Vista's conduct did not constitute "substantial assistance," and reversed the trial court's holding that Vista was liable for aiding and abetting.

TAKEAWAYS

The decision reverts aiding and abetting law to where practitioners understood it to be prior to the *Mindbody* Chancery Court decision. As noted by the Supreme Court, the parties did not cite any Delaware cases finding a third-party acquiror liable for aiding and abetting a breach of fiduciary duty.[31] The Supreme Court's *Mindbody* decision accordingly reinstates a very high standard for liability. But the standard is not impossibly high. *Mindbody* leaves open the possibility that an acquiror could be liable for the target's disclosure breaches if, for example, it actively participated in drafting disclosure in the proxy statement, knowing that the disclosure it drafted was materially misleading.

14. IN RE COLUMBIA PIPELINE GROUP, INC. MERGER LITIG.:[32] Building on its *mindbody* decision, the Delaware supreme court reversed a trial court finding that an acquiror aided and abetted fiduciary duty breaches relating to both the sale process and proxy statement disclosure, on the basis that the acquiror did not have actual knowledge of both the sell-side breaches and the wrongfulness of its own conduct.

Columbia Pipeline involved fiduciary duty claims arising from the 2016 sale of Columbia Pipeline Group, Inc. ("Columbia") to TC Energy Corp. ("TransCanada") for $25.50 per share in cash. Robert Skaggs, Jr served as Columbia's Chief Executive Officer and Chairman of the Board of Directors, and Stephen Smith served as Columbia's Chief Financial Officer. Skaggs and Smith both had plans to retire in 2016, and wanted a sale of Columbia in order to receive significant change of control benefits that were put in place when they joined Columbia in connection with its 2015 spin-off from another company. In a post-trial decision, the Delaware Court of Chancery held, among other things, that TransCanada was liable for aiding and abetting fiduciary duty breaches by Skaggs and Smith relating to (i) their pursuit of a merger process in a way that favored their own interests and was not value-maximizing for stockholders (the "sale process breaches"), and (ii) issuing a misleading proxy statement (the "disclosure breaches").[33] The Delaware Supreme Court reversed with respect to both the sale process breaches and the disclosure breaches.

With respect to the sale process breaches, relying on its *Mindbody* decision, the Supreme Court noted that the "knowing participation" requirement for aiding and abetting liability required that the buyer

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[31] This presumably excludes the Chancery Court decisions in *Mindbody* and *Columbia Pipeline*, discussed below.
[32] C.A. No. 2018-0484 (Del. S.C. June 17, 2025)
[33] A fuller description of the Chancery Court decision is available in our 2024 publication here.

knew both of the sell-side breach and that its own conduct was legally improper. The Supreme Court noted that the trial court held that constructive knowledge was sufficient in both cases. The Supreme Court rejected this conclusion, holding instead that its subsequent *Mindbody* decision clarified that "actual knowledge" is required for aiding and abetting liability. The Supreme Court then considered the signals that the trial court relied on to infer that TransCanada knew of the sale process breaches, including items like the failure to push on social issues, the failure to enforce standstill provisions, various communications Skaggs and Smith had with TransCanada personnel, and various statements and communications by Smith, who was inexperienced in M&A. Expressing skepticism that a buyer could be expected to infer a sell-side fiduciary duty breach based on "its sell-side counterpart's self-interest and eagerness to conclude a deal," the Supreme Court held that the signals identified by the trial court did not support a finding of actual knowledge. Given that holding, TransCanada could not have had actual knowledge that its own conduct was legally improper.

While noting that was sufficient to reverse aiding and abetting liability for the sale process breaches, the Supreme Court nonetheless also considered the culpable participation element, noting, as in *Mindbody*, that it required demonstration of TransCanada's "substantial assistance" in the sales process breaches. The Supreme Court held that aggressive bargaining tactics, without more, does not constitute "substantial assistance" in the sale process breaches. The Supreme Court noted a number of factors considered by the trial court. With regard to whether multiple breaches by TransCanada of its standstill obligations demonstrated substantial assistance, the Supreme Court noted that if even if TransCanada knowingly violated its standstill obligations (which was not clear here), for aiding and abetting liability, it would also have needed to know that Columbia's negotiators were breaching their fiduciary duties. The Supreme Court held the fact that Columbia's in-house and outside counsel did not believe the standstill obligations were being breached, and Columbia relayed that understanding to TransCanada, belied a conclusion that TransCanada knew Columbia's negotiators were breaching their fiduciary duties. The Supreme Court also dismissed TransCanada's threat to make a harmful public announcement relating to the deal if its offer price was not accepted as merely "hard bargaining," noting the truthful element that TransCanada would have disclosure obligations under the Toronto Stock Exchange rules if negotiations were to fail. The Supreme Court concluded that TransCanada's conduct did not constitute the "substantial assistance" required to support aiding and abetting liability.

For reasons similar to those in its *Mindbody* decision, the Supreme Court also held that the trial court erred in finding aiding and abetting liability for the disclosure breaches.

TAKEAWAYS

This decision reinforces the *Mindbody* holding that aiding and abetting liability of a buyer requires a showing of "actual knowledge" of both the sell-side fiduciary breach and the wrongfulness of buyer's own conduct. The *Mindbody* decision related to aiding and abetting liability for disclosure breaches. This decision applied also to aiding and abetting for sale process claims. It provides helpful

reassurance that hard bargaining, without more, will not support a claim for buyer aiding and abetting liability.

Part 2: Other Key Developments

DExit and SB 21

Since 2023, the Delaware courts have come under significant criticism as being overly solicitous to plaintiff's attorneys, and Delaware now faces competition from States like Texas, Nevada and Florida as the go-to state for incorporation. There were several decisions in 2023 that provoked backlash, including *W. Palm Beach v. Moelis*,[34] which invalidated a controller's stockholder agreement in a decision that was sharply at odds with prevailing M&A practice, and *Activision*,[35] 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.[36] Another decision, *Palkon v. Maffei*,[37] 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. As described above, 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"[38] that saw an expansion of the controlling shareholder definition and application of the same process requirements for avoiding entire fairness that apply in the going private context under *In re MFW*[39] to ordinary course transactions.[40]

On March 25, 2025, Delaware Senate Bill 21 (SB 21) became effective.[41] The law sought to recalibrate the perceived pro plaintiff bias through amendments to DGCL Section 144, which regulated

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[34] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co*., 311 A.3d 809 (Del. Ch. 2024), rev'd *Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund*, No. 340, 2024 (Del. Jan. 20, 2026).
[35] *Sjunde AP-Fonden* v. Activision Blizzard, Inc., 2024 WL 863290 (Del. Ch. 2024).
[36] S.B. 313 became effective August 1, 2024. A copy of the law is available at: https://legis.delaware.gov/SessionLaws/Chapter?id=41939.
[37] *Palkon v. Maffei*, 311 A.3d 255 (Del. Ch. 2024), rev'd, 2025 WL 384054 (Del. 2025).
[38] See, e.g., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522546.
[39] *In re MFW S'holders Litig*., 67 A.3d 496 (Del. Ch. 2013), aff'd, 88 A.3d 635 (Del. 2014)
[40] *In re Match Grp., Inc. Deriv. Litig*., 315 A.3d 446 (Del. 2024) (holding that where a controlling stockholder stands on both sides of a transaction with its controlled corporation, the standard of review does not change to business judgment unless both of *In re MFW's* procedural devices – that is, using a special committee and a majority-of-the-minority vote – are used).
[41] https://legis.delaware.gov/BillDetail/141930.

the voidability of contracts and transactions in which officers and directors are interested, and to DGCL Section 220 relating to shareholder inspection of books and records.

DGCL Section 144

The amendments introduced a number of significant changes to Section 144. They preserved the core structure of Section 144 that transactions can be protected on the basis of approval by disinterested directors, approval by disinterested stockholders, or if they are fair. But they expanded Section 144 from a rule addressing whether interested party contracts were void or voidable, to a rule that shields officers, directors and controllers from fiduciary duty challenges and damages awards.[42]

Under the amendments, to obtain the liability shield for interested party transactions relating to officers and directors through disinterested director approval, approval has to be by a majority of disinterested directors serving on the board. If a majority of directors are not disinterested, approval has to be by a committee of two or more directors, each of whom the board has determined to be disinterested with respect to the act or transaction. There will be less scope for judicial second guessing of director disinterestedness than under prevailing case law because the amendments do not require that the committee members be disinterested, just that the board have made a determination that they are.[43]

A major change the amendments introduced is to extend the applicability of Section 144 to controlling stockholder transactions. Outside the going private context, controlling stockholder transactions may not be the subject of equitable relief, or give rise to damages awards, if: (i) the requisite approval by a committee of disinterested directors is obtained, (ii) the transaction is conditioned by its terms at the time submitted to stockholders on the approval or ratification by disinterested stockholders, and such approval or ratification is obtained by majority of votes cast, or (iii) the transaction is fair. For going private transactions, (i) and (ii) are not in the alternative, both are required. This legislatively overturns case law relating to fiduciary duty challenges to controlling stockholder transactions in significant ways:

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[42] Approval by the board or board committee must be made in good faith and without gross negligence.
[43] For listed companies, there is also a presumption that directors are disinterested with respect to an act or transaction if they satisfy the applicable criteria for determining director independence under stock exchange rules.

- It significantly relaxes the procedural hurdles under *In re MFW* and its progeny for controllers to obtain the liability shield outside of going private transactions. Under the amendments, either (i) or (ii) is required, but not both.

- It also significantly relaxes the procedural requirements under *In re MFW*, whether or not a going private transaction is involved, in a number of ways, including the following:

    - As discussed above for interested party transactions relating to officers and directors, there is less scope for judicial second guessing as to whether committee members are disinterested.

    - The approval of disinterested stockholders must be by a majority of votes cast, in contrast to the majority of shares held by disinterested stockholders required under *In re MFW*.

    - The transaction only has to be conditioned on disinterested stockholder approval at the time submitted to stockholders, and not *ab initio*.

- It introduces a floor ownership of one-third in voting power of outstanding stock for a stockholder to be deemed a "controlling stockholder".

The changes to Section 144 included in SB 21 should lead to greater protection for corporations from challenges to interested party and controlling shareholder transactions by simplifying the procedural requirements under fiduciary duty case law for shielding such transactions from litigation and providing additional clarity.

DGCL Section 220

Stockholders of private companies generally have much more limited access to company information than stockholders of public companies. Books and records actions under Section 220 are a mechanism used by private company stockholders both as a precursor to litigation, and to pressure management to support action the stockholder wants, such as an exit event or sale of the stockholder's shares. Prior to the amendments, Section 220 gave wide latitude to stockholders to seek corporate records, but Delaware has sought to rein that in.

The amendments to Section 220 significantly limit the information a company is required to produce in response to a Section 220 demand. While the amendments have not resulted in a big decrease in the number of demands sent to companies, they have curtailed the ability of stockholders to use Section 220 to engage in litigation fishing expeditions or otherwise harass the company. The amendments delineate, through a "books and records" definition, the documents that stockholders can obtain, including items such as a charter and bylaws, minutes of meetings of stockholders, emails to

stockholders within the last 3 years, minutes of meetings of the board and board committees and information packages for those meetings, agreements under DGCL Section 122(18), annual financial statements, and D&O independence questionnaires. This is more restrictive than what shareholders were previously able to obtain under Section 220. Importantly, the list does not include emails or text messages among directors, officers, or managers, access to which previously offered leverage to plaintiffs' attorneys to engage in sometimes expansive fishing expeditions looking for reasons to threaten lawsuits against a company.

Under the amendments, a stockholder's demand must be "made in good faith and for a proper purpose" and describe "with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect." The books and records sought must be "specifically related to the stockholder's purpose." The amendments permit the corporation to impose reasonable restrictions on the "confidentiality, use, or distribution" of the books and records, to redact unrelated material, and to require that the stockholder incorporate by reference the books and records into any complaint the stockholder files. This is another restriction that is meant to limit access to company documents under Section 220, and prevent stockholders from using a demand to fish for potential claims, or otherwise harassing management, by requiring them to have a valid basis (that is more than investigating suspected wrongdoing) in order to receive documents from a corporation under Section 220.

Constitutional Challenge

The constitutionality of SB 21 was upheld by the Delaware Supreme Court in a unanimous opinion issued on February 27, 2026. Cases in which SB21 is implicated were stayed pending resolution of the constitutional challenge. Additional judicial interpretive guidance relating to SB21 should start to come out now the constitutional challenge has been resolved.

Delaware's DExit challenge has also been helped by the Delaware Supreme Court's reversals of the *Palkon v. Maffei* decision in February 2025, *Tornetta v. Musk*[44] in December 2025 and *W. Palm Beach v. Moelis* in January 2026.

[44] 310 A.3d 430 (Del. Ch. 2024), rev'd sub nom. In re Tesla, Inc. Deriv. Litig., 2025 WL 3689114 (Del. Dec. 19, 2025).

Antitrust Regulatory Review and Enforcement Outlook

Enforcement

Antitrust enforcement remained assertive in 2025, though U.S. agencies adopted a more pragmatic approach to merger review. The FTC and DOJ retained the Biden-era *Merger Guidelines* to preserve stability and "agency credibility." The 2023 *Merger Guidelines* lowered concentration thresholds for problematic mergers and embraced broader theories of competitive harm than prior versions.

Enforcers continued to look beyond traditional horizontal overlaps, pursuing theories such as vertical foreclosure and sensitive data exchange, with particular attention to healthcare, labor issues, and "Big Tech." In January 2026, for example, a federal district court blocked a medical-device merger at the FTC's request based on the agency's innovation-focused theory in medical manufacturing, prompting the parties to abandon the deal.

The FTC and DOJ continued to pursue litigation initiated under prior administrations against Google and Meta, despite expectations of a lighter regulatory touch. Those efforts met significant setbacks: in *FTC v. Meta*, the court ruled for Meta, finding the agency failed to prove monopoly power once the market was defined to include TikTok and YouTube. And in September 2025, a federal judge rejected the DOJ's most severe proposed remedy in its online-search monopoly case against Google, ruling the company need not sell its Chrome browser. The DOJ fared better in another action against Google, with the court finding the company unlawfully monopolized certain advertising technology platforms.

The agencies also targeted the use of AI and **algorithmic pricing** software to coordinate prices. In November 2025, the DOJ settled claims against RealPage, Inc., whose revenue-management software was allegedly used to inflate rents in the multi-family housing market. The settlement prohibits the use of competitors' nonpublic, competitively sensitive information in setting rental prices. The case followed a wave of private litigation in sectors ranging from health insurance to hospitality over similar technology.

Despite its assertive enforcement, the agencies displayed greater flexibility, including willingness to accept behavioral remedies, like divestitures, to resolve competitive concerns short of litigation. In May 2025, for instance, the FTC cleared Synopsys, Inc.'s $35 billion acquisition of Ansys, Inc. subject to the divestiture of certain assets. Likewise, the DOJ settled its challenge to Hewlett Packard Enterprise's (HPE) deal with Juniper Networks after HPE agreed to divest a business and license Juniper's technology to rivals.

Administration Oversight of Agencies

The Administration played an active role in supervising the antitrust enforcement agencies. In early 2025, President Trump issued an executive order to ensure Presidential supervision over "so-called independent agencies," then dismissed Democratic FTC Commissioners Alvaro Bedoya and Rebecca Slaughter. Slaughter challenged her removal in a case now pending before the Supreme Court, which stayed a lower-court order temporarily reinstating her. The Administration also directed investigations into specific industries. At the President's urging, DOJ launched several **probes** into the meatpacking industry last November. And in January 2026, the President signed an **executive order** directing both agencies to examine the impact of private-equity ownership of single-family homes on housing affordability.

HSR Filings

In February 2025, the FTC implemented sweeping revisions to the Hart-Scott-Rodino (HSR) Act premerger notification rules. These **changes** demand significantly more information and documentation, increasing the time and burden associated with HSR filings. On February 12, 2026, however, a federal district court in Texas **vacated** the new HSR rules, finding that the FTC exceeded its statutory authority and failed to show the reforms' benefits outweighed their "significant and widespread" costs. The U.S. Court of Appeals for the Fifth Circuit has stayed that ruling pending appeal, so as of the time of this writing, the expanded pre-merger filing requirements remain in effect.

The FTC also reinstated the Early Termination program, allowing non-problematic mergers to close before the mandatory 30-day waiting period.

FTC Noncompete Rule

On September 5, 2025, the FTC ended its multiyear effort to ban employee noncompete agreements, **abandoning** its appeal of the lower-court decision vacating the agency's 2024 "Noncompete Rule." In abandoning the appeal, FTC Chair Ferguson noted his view that noncompetes can be "pernicious" and that the FTC should do "everything it [can] to find unlawful noncompete agreements and eliminate them." To that end, Chair Ferguson committed the FTC to continuing to seek out unfair or anticompetitive noncompete agreements, but challenging them on a case-by-case basis rather than through a blanket rule.

State Merger Enforcement Efforts

Washington and Colorado became the first states to adopt versions of the Uniform Antitrust Pre-Merger Notification Act, requiring certain HSR filers to submit additional copies to these states' attorneys general. State notification is required if the filer has a principal place of business in Washington or Colorado or has at least $26.78 million in annual revenue in either state from "the goods or services involved in the transaction." California enacted its own version in early 2026, adopting the

same notification requirement and reporting threshold, though it will not take effect until January 1, 2027. In addition, a coalition of Democratic state attorneys general, led by California and New York, intervened in the Tunney Act review of the HPE-Juniper Networks merger.

The trends and developments described above are likely to continue in 2026. Enforcement activity in healthcare, technology, and other priority industries will remain vigorous. Scrutiny of deals under novel theories of harm will persist, tempered by greater receptivity to negotiated remedies and early termination. Dealmakers should monitor the FTC's appeal of the decision striking down the new HSR rules but, in the meantime, continue to comply with those rules. They should also prepare for growing state-level merger enforcement.

State "Mini-HSR" Laws for Healthcare Deals

In the last few years, an increasing number of states have adopted healthcare transaction review laws - often referred to as "mini-HSR" laws – with some of the more recent laws intended to check the influence of private equity and for-profit healthcare investment in healthcare, particularly in the wake of the Steward Health bankruptcy.[45] The laws are generally aimed at monitoring the impact of health care transactions on competition, quality, access and cost of health care in the state. The scope of regulated health care entities, investors, financial materiality thresholds, and nature of regulated transaction varies for each state's law. Given that the laws are state laws, they are independent of HSR filing requirements, and typically apply to transactions with a smaller dollar value than is required for an HSR filing.

States with Healthcare Material Change Transaction Laws

As of February 2026, apart from long-standing state Attorneys General filing requirements relating to non-profit and/or hospital specific transactions, eleven states – California,[46] Connecticut,[47] Illinois,[48]

[45] Steward Health Care, which was once the largest private for-profit hospital operator in the U.S., filed for bankruptcy in May 2024. It had been owned by a private equity fund from 2010 – 2020.
[46] Cal. Health & Saf. Code § 127500 *et seq*.; 22 Cal. Code of Regs. § 97431 *et seq*.
[47] Conn. Gen. Stat. §19a-486i.
[48] 740 Ill. Comp. Stat. 10/7.2a.

Indiana,[49] Massachusetts,[50] Minnesota,[51] Nevada,[52] New Mexico,[53] New York,[54] Oregon,[55] and Washington[56] – have enacted laws that require a broader scope of health care deal makers to notify state regulators of certain health care transactions. Pennsylvania has similar legislation pending.[57]

Similar legislation has recently been introduced in several states, including Pennsylvania, Illinois, and Rhode Island. At the same time, in 2025, initiatives in a number of states – including Texas, Louisiana, Connecticut, Wisconsin, Colorado, Vermont and Washington – were *not* approved by state legislators, illustrating that this regulatory landscape is in a constant state of flux and is jurisdictionally and politically driven.

Transactions Triggering a Notice Requirement

Whether a particular transaction triggers a notice requirement under a state material change transaction law varies significantly by statute, and depends on: (i) whether the applicable statute requires either or both deal parties to be, directly or indirectly, a regulated health care entity, (ii) whether the parties meet the financial thresholds described in the applicable statute, and (iii) whether the transaction involves a material change transaction circumstance under the statute, including whether any exception applies.

The timing for compliance also varies by statute, and typically takes between 30 and 90 days. Some states, such as Oregon and California, are on the longer side because they have lengthy information requests that can take the parties a considerable amount of time to compile and coordinate. A waiver or approval of the applicable state agency or regulator is typically required prior to closing the transaction. If the agency or regulator elects to conduct a Cost and Market Impact Review, this can significantly delay the closing of the transaction.

State Laws Targeting Private Equity Investment in Health Care Entities

In addition to state material change transaction laws that require health care entities to submit notices, many states have enacted new laws that explicitly target private equity investment in health care entities. California exemplifies this shift. Effective January 1, 2026, California's AB 1415 expands the state regulatory authority by requiring pre-closing notice from new categories of "noticing entities,"

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[49] Ind. Code § 25-1-8.5-1 *et seq*.
[50] Mass. Gen. Laws ch. 6D, § 13; 958 Mass. Code Regs. § 7.00, *et seq*.
[51] Minn. Stat. § 145D.02.
[52] NRS §§ 439A.126; 598A.290 - .430.
[53] N.M. Stat § 24A-91 *et. seq*.
[54] N.Y. Pub. Health Law §§ 4550 – 4552.
[55] ORS § 415.501 *et seq*.
[56] Wash. Rev. Code §§ 19.390.010 – 19.390.090.
[57] PA H.B. 2115.

including private equity groups, hedge funds, and management services organizations, when they enter specified agreements or transactions.[58] Management services organizations are also required to submit data and other information to OHCA.[59] Although OHCA has yet to publish regulations implementing this new obligation, noticing entities are still required to provide OHCA with notice of transactions subject to the agency's review.

Massachusetts also expanded its authority to review health care transactions in 2025. HB 5159 expanded Massachusetts' material change notice program to capture transactions including a change of ownership or control of a high-revenue provider involving a "significant equity investor."[60] The law expressly includes private equity companies and other investors with more than ten percent equity in a provider, provider organization, or management services organization. The statute also brings certain management service organization and sale-leaseback transactions into the scope of regulatory review.[61]

Since July 1, 2024, Indiana requires 90-day pre-closing notice to the Attorney General for covered mergers or acquisitions where at least one party is an Indiana "health care entity," expressly including "private equity partnerships," with a relatively low $10 million total-assets trigger – capturing many sponsor roll-ups.[62]

These laws vary significantly from state-to-state. State regulators are increasingly focused on refining existing laws or adopting new regulations to increase the scope of transactions subject to their review.

CFIUS & National Security

Overview

As expected, the foreign investment landscape altered significantly with the start of the second Trump presidency. An overarching theme, set forth in the America First Investment Policy described below, was to refocus on restricting investment by key adversaries, including the PRC, make the

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[58] Cal. Health & Safety Code § 127507(c)(2).
[59] Cal. Health & Safety Code § 127501.5.
[60] Mass. Gen. Laws ch. 6D § 13.
[61] Mass. Gen. Laws ch. 6D § 13(a).
[62] Ind. Code § 25-1-8.5-1 *et seq*.

CFIUS process more efficient for investment from friendly sources, and introduce outbound investment rules for investment in the PRC in semiconductors, AI and other key areas.

While the 2025 CFIUS Annual Report to Congress is not expected to be published until later in the year, the experience among practitioners is consistent with the approach under the new policy. As mandated by the new policy, mitigation agreements are now typically more focused on concrete actions that can be accomplished within a finite period of time, as opposed to being complex and open-ended. The number of mitigation agreements entered into in 2025 is expected to be in the teens, consistent with the number in 2024 but significantly down from a high of 41 in 2022. Consistent with the renewed focus on the PRC, on July 8, 2025, President Trump signed an order requiring Suirui International Co., Ltd., a Hong Kong company, and Suirui Group Co., Ltd., a Chinese company, to divest their interests in Jupiter Systems, Inc., a US designer and manufacturer of high-end audiovisual equipment that they acquired in 2020.[63]

Another theme impacting the foreign investment landscape is the penchant of the current administration, discussed under "U.S. Government as Deal Participant" below, to engage like a deal participant. This arose, for example, in connection with the U.S. government's approval of the sale of U.S. Steel to Nippon Steel, conditioned on the receipt of a "golden share". The deal was prohibited under the Biden administration, so its resuscitation can be seen as consistent with the approach under the new policy of facilitating deals from friendly sources. Some of the actions by the current administration as a deal participant have been less consistent with the America First Investment Policy.

America First Investment Policy

In February 2025**,** just weeks after President Trump took office, the White House released the *America First Investment Policy as a National Security Presidential Memorandum*.[64] The Memorandum explicitly frames *economic security as national security* and directs U.S. executive agencies to recalibrate U.S. investment policy to encourage foreign investment from U.S. allies and partners while restricting investment involving "foreign adversaries," which includes the People's Republic of China (PRC), Hong Kong, Macau, Cuba, North Korea, Russia, and Maduro's regime in Venezuela.

The memorandum directed the creation of a *fast-track* review process for allied investment, which resulted in CFIUS piloting a "Known Investor Program," announced in May 2025, for the purpose of collecting information from repeat filers in advance of a CFIUS filing in order to expedite the CFIUS

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[63] https://www.govinfo.gov/content/pkg/FR-2025-07-11/pdf/2025-13123.pdf
[64] https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/

review process. The memorandum also expanded the scope and authority of the Committee on Foreign Investment in the United States (CFIUS), and contemplated expanded *outbound* investment controls on U.S. investors into Chinese sectors such as semiconductors, artificial intelligence, and biotechnology. The policy also signaled an intent to rely more heavily on legal tools such as CFIUS and the International Emergency Economic Powers Act (IEEPA) to curb adversarial investment and protect U.S. capital markets and technologies, and directed that enhanced scrutiny be given to inbound investments in critical technologies, infrastructure, personal data, farmland, and other sensitive areas.

The Memorandum further indicated an intent to broaden the scope of what is considered "emerging and foundational technologies" subject to heightened scrutiny, and stated that the administration would consider applying restrictions on inbound investments in areas like private equity, venture capital, greenfield investments, corporate expansions, and investments in publicly traded securities.

Although much of the Memorandum was dedicated to potential future restrictions, it sent a clear signal that there would be greater scrutiny of transactions involving the PRC, that CFIUS would be more assertive going forward, and that penalties would become more significant. The effect on capital flows and transaction structures was more immediate. Already depressed levels of investment from the PRC continued to decline, and U.S. companies and funds increasingly began to curtail information and governance rights of PRC investors, avoid transactions involving certain sectors in the PRC, and relocate research facilities located in the PRC.

Treasury Rules

While the second Trump administration accelerated the pace at which pressure was ratcheting up on Chinese investments, many of the underlying policy tools had been developing prior to 2025. Certain actions taken during the Biden administration were just beginning to reshape the investment landscape in 2025, including notably with respect to CFIUS's toolkit. In December 2024, the Department of the Treasury's final rule to "sharpen and enhance" CFIUS procedures and enforcement authorities took effect. The rule expanded the types of information CFIUS can require from transaction parties and third parties (including in non-notified deals), broadened its subpoena authority, authorized discretionary timelines for responses to proposed mitigation terms, and significantly increased maximum civil monetary penalties from $250,000 to up to $5 million (or the transaction value) for violations of CFIUS obligations or mitigation agreements. It also clarified and strengthened enforcement tools to monitor compliance with mitigation terms and compel information relevant to national security risk.

U.S. Outbound Investment Security Program (Reverse CFIUS)

In addition, Treasury's Final Rule implementing the U.S. Outbound Investment Security Program (OISP) took effect on January 2, 2025. The Final Rule prohibits certain outbound investments by U.S. persons (including U.S. citizens, lawful permanent residents, U.S. entities and their foreign branches) in covered foreign persons of "countries of concern" (currently the PRC, including Hong Kong and Macau)

that are engaged in activities involving semiconductors and microelectronics, quantum information technologies, and artificial intelligence – sectors deemed critical to U.S. national security.

The program also requires post-closing notifications to Treasury for other outbound transactions falling within defined parameters. The Final Rule sets out obligations for due diligence, reporting, and compliance, including knowledge standards, and authorizes penalties and enforcement under the IEEPA. Although often colloquially referred to as "reverse CFIUS", the OISP is administered by the newly-created Treasury Office of Global Transactions within the Office of Investment Security.

Throughout 2025, the OISP's implementation reshaped outbound investment practices, prompting heightened diligence and structural adjustments in deal planning — especially for equity, debt and fund investments tied to Chinese tech firms in the covered sectors. While the understanding and implementation of the OISP continues to evolve, after an initial period of uncertainty and potentially overcompliance, few enforcement actions have been reported and the market has largely adjusted to the new reality.

U.S. Government as Deal Participant

The federal government has historically avoided taking an ownership interest in companies. There is a concern that government ownership could distort and reduce confidence in U.S. markets, and therefore erode the value of the markets. The exceptions, such as Amtrak and the U.S. Postal Service, prove the rule. The federal government has invested in U.S. companies in times of national crisis, such as the great financial crisis and the pandemic, but this is with a view to divesting ownership as soon as economically feasible.

All that changed in 2025. The current administration has started to act like a private deal participant. Investments have been announced in a number of companies in the rare earth minerals industry, and two in the semiconductor industry. According to one article, the administration is targeting deals in 20 – 30 critical industries, involving companies that it deems to be critical to national or economic security, prior to the midterm elections.[65] Moreover, a February 2025 Executive Order

[65] https://www.reuters.com/business/healthcare-pharmaceuticals/trump-administration-targets-deals-dozens-industries-before-midterms-2025-10-02/

directing the creation of a sovereign wealth fund could lead to more widespread investments by the federal government.[66]

In October 2025, the administration entered into a partnership arrangement with the Canadian parent of Westinghouse to build $80 billion in nuclear reactors, with the U.S. government to arrange financing and help secure permits, in exchange for 20% of future profits, and the ability to turn that into equity ownership of up to 20% and to force an IPO by 2029.[67] In August 2025, the administration conditioned the grant of export licenses for the sale by Nvidia and AMD of certain of their GPUs to China on payment of 15% of the revenue to the federal government.[68]

The administration has also inserted itself in companies in a more operational capacity. In July 2025, as a condition to permitting the sale of U.S. Steel to Nippon Steel, the federal government received a "golden share" that gave it a number of rights, including the right to appoint an independent director and consent rights of the U.S. President over certain actions.[69] In January 2026, the White House issued an Executive Order providing that future contracts and contract renewals with defense contractors prohibit stock buy-backs and corporate distributions during a period of underperformance or noncompliance with the contracts, and ensuring that executive incentive compensation not be tied to short-term metrics, such as free cash-flow or earnings per share.[70]

The role of the U.S. government as a deal participant, or in obtaining veto rights over key company decisions, creates risks for M&A deal parties. For foreign acquirors of U.S. businesses in sensitive industries, there is the risk that CFIUS approval could be conditioned on giving the U.S. government a golden share. More generally, acquirors should consider the risk of the U.S. government investing in the industries in which their target companies operate, and the impact that may have on the businesses of the target companies, including the behavior of customers, vendors and other third parties. Acquirors of businesses that contract with the US government should also consider the risk of the U.S. government leveraging its contracting role to directly interfere in important operational and strategic company decisions.

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[66] https://www.whitehouse.gov/presidential-actions/2025/02/a-plan-for-establishing-a-united-states-sovereign-wealth-fund/

[67] https://www.reuters.com/business/energy/westinghouse-electric-cameco-corp-brookfield-asset-management-80-bln-nuclear-2025-10-28/

[68] See, e.g., https://www.reuters.com/world/china/trump-opens-door-sales-version-nvidias-next-gen-ai-chips-china-2025-08-12/

[69] https://www.sec.gov/Archives/edgar/data/1163302/000110465925060674/tm2517314d1_8k.htm

[70] https://www.whitehouse.gov/presidential-actions/2026/01/prioritizing-the-warfighter-in-defense-contracting/

Representation and Warranty Insurance Developments

Over the last 10 – 15 years, representations and warranties insurance ("RWI") has become a mainstay of private company M&A.[71] There are currently 28 RWI underwriters in the U.S., including both traditional insurance companies and managing general agents, which are underwriting platforms that write policies on behalf of carriers. The number evolves over time, with organizations entering and exiting the market. As a general matter, there is some advantage to placing insurance with a longstanding market participant, because they have a known track record for paying out on claims and a greater incentive to behave reasonably, given potential reputational harm if they do not.[72]

Premiums

Premiums tend to vary based on supply and demand. Premiums during the busy M&A period in 2021 were around 5 – 6% of policy size (e.g. for a $100 million enterprise value company with a 10% policy, the policy limit would be $10 million, and the premium at that time was in the range of $500,000 - $600,000). Premiums subsequently decreased to 2% - 3% of policy limit. Since around the second half of 2025 as the M&A market has started to pick up, they have started to climb again, and now tend to be around 3% - 3.5% of policy limit. It is difficult to get coverage for less than about $80,000, which translates to a minimum policy limit of around $2 million. The above figures are based on the typical policy limit of 10% of enterprise value, and are representative of cost regardless of deal size. Coverage gets less expensive as you move up the insurance tower, so if coverage is obtained for 20% of enterprise value, on a blended basis the cost would be a lower percentage of policy size. Conversely, if coverage is obtained for less than 10% of enterprise value, the cost would be a higher percentage of policy size.

Retention

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[71] Studies by SRS Acquiom indicate that, for deals reviewed in its studies, RWI was used in 38% of deals in 2023, and 42% in 2024.

[72] With appreciation to Peter de Boisblanc (https://www.hwfpartners.com/teams/peter-de-boisblanc/) for input with respect to some of the information in this section.

A retention equal to 1% of the enterprise value used to be the norm for RWI during the pandemic. That has decreased to around 0.5% - 0.6% today, dropping down to around 0.35% to 0.45% after a year. In niche markets, such as a pure real estate deal, the percentages can be lower. The retention for fundamental representations is now typically zero, particularly for larger deals.

Certain Losses

As indicated in Part 1 above, *In re Dura* provided guidance on when damages multiples may be obtainable under purchase agreements governed by Delaware law. RWI policies take the different tack of "silence on silence": carriers will remove exclusions for multiples of damages if both the purchase agreement and the definition of losses in the policy are silent on the issue. The same approach is taken with respect to recovery for consequential damages and diminution in value. Accordingly, the optimal approach to take in purchase agreements varies based on whether or not RWI is being obtained. If it is obtained, the purchase agreement should be silent on all issues. If it is not, the purchase agreement should expressly permit recovery for damages multiples, consequential damages and diminution in value.

Certain Risks

While there is general concern that agentic AI could be used as a potent tool for cyber attacks in 2026, as of now that has not typically resulted in policy cyber exclusions. For businesses that are operating in a perceived high cyber risk environment, carriers will often require that the company have in place an underlying cyber policy. If a policy is not in place, carriers may permit coverage subject to an increased retention. As with other areas, if there are known cyber issues, cyber coverage could be excluded altogether.

While they have appeared in the past, RWI policies do not currently typically contain tariff-related exclusions.

RWI policies are getting more sophisticated with respect to the wording of representations and warranties, and often provide for specific modifications to representations in the purchase agreement, which acts as a form of exclusion. This is particularly in areas that are the subject of frequent claims, such as customer contracts. For example, a representation that there has been no notice from any customer that it plans to terminate a contract will be modified so that it is deemed to refer to no "written notice".

Observations on Claims

Numerous RWI brokers have published data which shows that RWI claims are getting paid, thereby boosting buyers' confidence in RWI products.

- Success in Claims - One RWI broker pointed out that it recorded the highest dollar value paid in RWI claims and the highest median payment for RWI claims compared to previous years, while another broker commented that only 2% of the claims submitted were denied.

- Claim Severity – Smaller (in this case, sub-$5M) claims appear to be the norm, with one RWI broker reporting that over 70% of its claims were for less than $5M.

- Breach Types – The types of breaches appear to remain relatively stable in the recent past, with financial statements, customers, material contracts, taxes and compliance with laws the most significant breach categories resulting in claims.

Tax as Developing Area

Many providers in the RWI industry are expanding their focus on providing standalone tax insurance. This provides coverage for identified tax risks like transfer pricing and tax credit eligibility. Such coverage is different from RWI, which provides coverage for unknown issues, and typically excludes losses relating to transfer pricing.

Debt Financing Trends For Private Company M&A

Overview of 2025 Market

Entering 2025, dealmakers anticipated that easing inflation, lowering interest rates and increasing competition among private credit firms would translate into a resurgence of the M&A and acquisition financing markets. There was a recovery, at least relative to the depressed levels of 2022 and 2023, but not quite to the level or in the way dealmakers expected. Two key themes were the pickup in mega M&A deals and acquisition financing, which did not spread to the lower market tiers, and the more active participation by private credit firms relative to traditional banks.

Geopolitical developments and uncertainty surrounding US trade and tariff policies pushed the acquisition financing market to be more private credit-driven, with traditional banks remaining cautious and highly selective. According to PitchBook's 'Q4 2025 US Private Credit Market Quarterly Wrap, private credit accounted for approximately 64% of sponsor-led middle market deals, up from roughly 55% in 2024.

Private credit firms offer structural flexibility not offered by traditional banks. And in an effort to win new originations and use up some of their dry powder, in 2025 private credit firms became more aggressive in using bespoke terms. This dynamic created the following trends:

- *Unitranche Facilities*: These facilities collapsed multiple debt layers into a single lien, which resulted in simpler documentation, expedited closing timeline and reduced execution risk tied to loan syndication.
- *PIK Toggle Feature:* This feature delayed the payment of some cash interest payments to a later date, enabling borrowers to focus on executing integration plans in sectors with lumpy earnings or longer timelines to ramp up profits.
- *Delayed Draw and Accordion Tranches:* Private credit firms increasingly built in delayed draw and accordion tranches in the acquisition financing documents so that buyers can act quickly in funding add-on acquisitions without needing to re-negotiate the deal terms or documentation.
- *Covenant-lite Structure*: Mostly used in upper middle market M&A acquisition financing deals, this structure reduced risks involving potential technical defaults triggered by short-term volatility.

While the overall debt market was healthy in 2025, activity varied based on borrower size. Traditional banks and private credit heavily favored upper middle market deals where the borrowers have stronger credit profiles. For small-cap and lower middle market deals, debt finance with borrower-friendly structure and terms was harder to find, and financings involved slower and more conservative diligence and credit approval processes. The M&A rebound in 2025 was also uneven, with an uptick in mega deals, but smaller deals harder to pull off due to a persistent buyer/seller valuation gap. Given the more challenging environment for smaller deals, buyers favored execution certainty in financing terms over better pricing. Moreover, according to PitchBook's "December 2025 U.S. Private Credit Monitor," smaller borrowers accessed the debt markets more for refinancings and dividend recapitalizations than M&A.

Outlook for 2026

These trends are likely to continue in 2026, assuming the private credit markets and overall economy remain healthy. Interest rates are anticipated to decline further – although not to the pre-2022 level - which is expected to result in a stronger M&A market and lead to more acquisition finance originations. The shift to private credit firms is also likely to persist. According to Capstone Partners, the amount of private credit fund dry powder has been consistently increasing from 2019 through the end of 2025, rising from $60 billion to $146 billion during that period, so private credit firms have an incentive to remain flexible and innovative and offer competitive terms. For smaller deals, given that interest rates are not expected to return to the pre-2022 level, valuation gaps are unlikely to disappear and so borrowers may continue to favor execution certainty in financing terms.

SEC Updated Guidance for Shareholder Lock-Ups and Written Consents in Stock Deals Using Form S-4 Registration Statement

Parties in stock deals involving public acquirors of private targets have historically shied away from having the acquiror deliver shares registered on a Form S-4 registration statement in part because of SEC interpretative positions around shareholder lock-up agreements and written consents. Prior to 2008, the SEC took the position that entering into lock-up agreements with a target's stockholders, or obtaining written consents from them, prior to the filing of a Form S-4, destroyed the acquiror's ability to use a Form S-4, due to integration concerns. There was an SEC policy exception for lock-up agreements with executive officers, directors, affiliates, founders and their family members, and 5% holders (collectively, "target company insiders"), which were permitted, but meant that those shareholders were treated as having made an investment decision and could only receive acquiror shares in a private placement.

The SEC memorialized and liberalized its rules in Compliance and Disclosure Interpretations ("CDI") in 2008. Under new CDI §293.13, lock-up agreements with target company insiders that satisfied certain conditions no longer rendered them ineligible to receive shares registered on Form S-4. But the consequences of delivering a stockholder consent remained. The SEC further liberalized CDI §293.13 in March 2025 and January 2026. The conditions for applicability of CDI §293.13, as amended, are:

- Only target company insiders are signatories to lock-up agreements;
- the signatories collectively own less than 100% of the target's voting equity securities;
- votes are solicited from other stockholders if such votes are needed to approve the transaction under state or foreign law; and
- the acquiror delivers a prospectus to all security holders of the target company entitled to vote on the transaction as required under the Securities Act.

As under the 2008 CDI, compliance with these conditions means that a Form S-4 registration statement can be used to register the offering of all acquiror shares in the deal. Now, where target company insiders either (i) execute lock-up agreements and fail to satisfy the above conditions, or (ii) deliver written consents approving the deal, in each case before filing of a Form S-4, the offering of shares to them must still be by private placement, but the offering to other shareholders can be registered on Form S-4.

CDI § 293.13 provides helpful clarity and flexibility for navigating the target shareholder approval requirement in deals involving stock consideration where the parties want the target shareholders to receive freely tradeable shares. The situation arises most often in acquisitions of private companies that are relatively large, compared to the size of the public acquiror, and have a large shareholder base, and in de-SPAC transactions. The CDI provides a clear roadmap for avoiding a situation where a Form S-4 cannot be used, which typically would result in unaccredited target shareholders (such as

employees) having to receive cash instead of shares. The CDI also applies with respect to Form F-4 registration statements of foreign acquirors.

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