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U.S. Antitrust Agency Merger Enforcement Roundup and Commentary



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FTC Alleges Harm to Innovation Competition and Sets Aside Two Controversial Merger Settlements; DOJ Accepts a Weakened Competitor Defense in One Merger and Accepts Divestitures in Another

The Trump Administration continues to differentiate its merger enforcement policy from the Biden Administration's, largely but not entirely suggesting a more balanced evaluation of mergers and greater acceptance of divestitures to address competitive concerns. In the past few months:

- The Federal Trade Commission ("FTC" or "Commission") challenged a proposed combination of Edwards Lifesciences Corporation ("Edwards") and JenaValve Technology ("JenaValve"), two medical device companies, neither of which has yet commercialized a product in the alleged "overlapping" market.
- The Department of Justice ("DOJ") abandoned, prior to trial, the previous administration's challenge to American Express Global Business Travel's ("GBT") proposed acquisition of CWT Holdings ("CWT"), apparently accepting the parties' argument that CWT was unlikely to continue to be a significant competitor in the future, absent the merger.
- The FTC set aside two merger settlements of the previous administration which it deemed contrary to the public interest.
- The DOJ settled, prior to trial, the previous administration's challenge to UnitedHealth's proposed acquisition of Amedisys, Inc.

[FTC Challenges Edwards Lifesciences' Acquisition of JenaValve Technology, Alleging Harm to Innovation Competition](#)

The FTC is seeking a [preliminary injunction](#) to enjoin Edwards' proposed acquisition of JenaValve, pending the FTC's in-house [administrative trial](#) on the transaction. Edwards, through its ownership of JC Medical and JenaValve are both engaged in the development of a transcatheter aortic valve replacement ("TAVR") device for the treatment of aortic regurgitation ("AR"), a potentially fatal heart condition. Edwards and JenaValve are characterized as horizontal competitors because both firms have a product in clinical trials; however, neither firm has commercialized a TAVR-AR device nor has either firm received Food and Drug Administration ("FDA") approval to sell a TAVR-AR device. Nevertheless, the FTC challenged the proposed combination, alleging that it will eliminate existing head-to-head innovation and quality competition between the two firms in the market for TAVR-AR devices.

The FTC's willingness to litigate this matter is aggressive and novel. The FTC has raised innovation concerns in many merger matters, but outside of mergers involving pharmaceutical products, it rarely alleges merger-related harm in a market where neither party has commercialized a product in the "overlapping" relevant market. (For a compendium of such cases for the period 1993-2022, see Bilal Sayyed, [Actual Potential Entrants, Emerging Competitors and the Merger Guidelines](#).) The major innovation cases of the Biden Administration were more limited. The Commission's challenge builds on the Fifth Circuit's previous acceptance of the FTC's theory of harm to innovation in its criticized but ultimately successful challenge to Illumina Inc.'s consummated acquisition of Grail, Inc. (a vertical transaction). See [Illumina \(Grail\) v. Federal Trade Commission](#), 88 F.4th 1036 (5th Cir. 2023) (vacating the Commission's order and remanding for reconsideration; the parties subsequently agreed to unwind the transaction). But in *Illumina (Grail)*, both parties were already operating in their respective relevant

and related markets. The FTC's previous [challenge](#) during the Biden Administration to Sanofi's proposed (and [subsequently abandoned](#)) acquisition of an exclusive license from Maze Therapeutics (2023) alleged the transaction would eliminate the introduction of a new (but nascent) competitive threat to Sanofi's existing monopoly product.

The FTC's competitive effects theory in *Edwards/JenValve* contrasts with the theory in the FTC's unsuccessful challenge to Meta Platforms' ("Meta") proposed acquisition of Within Unlimited ("Within") (in 2022/2023) and its unsuccessful challenge to Steris Corporation's proposed acquisition of Synergy Health ("Synergy") (in 2015). In both matters, only one of the merging parties was an active participant in the relevant market; the other, according to the FTC, was a potential future competitor. In *Meta/Within*, the Commission [alleged](#) that the proposed acquisition would eliminate the potential for future actual competition from Meta as an entrant to the market for Virtual Reality Dedicated Fitness Apps, but for the acquisition (The FTC also alleged that the acquisition would eliminate the existing competitive impact of Within's perception of Meta as a potential or future entrant into the same market). In *Steris/Synergy*, the Commission [alleged](#) that the proposed acquisition would eliminate the potential for future actual competition from Synergy as a new entrant into the U.S. market for contract radiation sterilization services. The district courts found that the Commission failed to show with a reasonable probability that Meta and Synergy – the potential future entrants – would enter the relevant market. Both district courts required the Commission to show a greater than 50% likelihood that the alleged potential entrant would, in fact, enter the relevant market. See *Federal Trade Commission v. Meta Platforms, Inc.*, 654 F. Supp. 3d. 892 (N.D. Cal. 2023) (requiring a showing of well north of 50%) and *Federal Trade Commission v. Steris Corporation*, 133 F. Supp. 3d 962 (N.D. Ohio 2015) (requiring a showing of a "preponderance of the evidence").

In *Edwards/JenaValve*, the FTC could have alleged that the merger would eliminate potential competition between the two merging parties (or between one or both merging parties and existing competitors). Only rarely has the FTC or DOJ litigated to completion a challenge to a transaction where [neither](#) firm operated in the relevant market at the time of challenge. While the U.S. Supreme Court has indicated such challenges are within the scope of the Clayton Act's prohibition of anticompetitive mergers, see *United States v. Penn-Olin Chemical Company*, 378 U.S. 158 (1964), neither agency has been able to make out the necessary factual record to enjoin or unwind such a transaction, including in the later district court trial in the *Penn-Olin* matter.

Neither Edwards nor JenaValve sells a TAVR-AR device nor has received FDA approval to sell such a device. The FTC's complaint attempts to avoid the relatively high hurdle of showing a greater than 50% chance of future entry into the market by one or both firms – the standard adopted in the most recent potential competition cases – by identifying both firms as current participants in the relevant market because they are conducting clinical trials of the safety and efficacy of their TAVR-AR devices in development. Without a need to show a reasonable probability of future entry, the Commission's litigation can focus on the potential for competitive harm from the transaction. The parties will likely argue that the Commission attempts a sleight of hand; without showing that at least one of the two combining firms has a reasonable probability of bringing a TAVR-AR device to market, there can be no loss of actual or potential competition. Competition to innovate or innovation towards a failed product is not something the courts or the Commission should protect, they may argue. Thus, the Commission may be required to show a reasonable probability that at least one of the firms will commercialize a TAVR-AR device.

The Commission faces an additional hurdle that may have led it to focus on innovation effects. With neither company presently engaged in the sale of a TAVR-AR device, establishing credible price effects from the transaction would be difficult. Hence, the Commission's allegations that the combination, by combining the only two firms in clinical trials for an TAVR-AR device, would slow the pace of innovation towards a marketable product and would lower the quality of any product the combined firm brings to market. Whether the presence of one firm is

influencing the other firm's development efforts is a factual question – a tough factual question – but the courts are unlikely to require precise measurement of how much of an influence. This may be an easier hurdle than showing future price effects where there is no history of price competition and, given that both devices are in clinical trials, potentially only very speculative estimates of future prices. For example, where the quality of the devices differs substantially, or patients with different characteristics respond materially better to one device, the amount of price competition between the two devices, if successful in coming to market, may be very low to none. The Commission's focus on innovation and quality effects in *Edwards/Jena Valve* may be sensible litigation strategy because of that difficulty.

Since the administration of President Bill Clinton, both the FTC and the DOJ have emphasized the importance of protecting innovation competition in their review of mergers, but they have historically avoided litigating novel theories of harm. Mergers, however, may also improve the prospects of successful innovation and of an innovative product coming to market. According to the antitrust agencies:

A merger of two innovative firms may lead to an increase in innovative activity relative to the status quo and these merger-specific efficiencies may outweigh the potential for harm due to an elimination of competition between them. . . . Sometimes, reduced incentives to innovate may not be a cause for competitive concern if the merger increases the merged firm's ability to conduct R&D more successfully. [Non-Price Effects of Mergers – Note by the United States](#) (June 6, 2018) at 12.

The Commission's complaint in this matter should be recognized as an aggressive use of Clayton Act Section 7's prohibition of anticompetitive mergers, but also as continuing the evolution of the antitrust agencies' focus on innovation effects in mergers. Going forward, merging parties must consider seriously standalone innovation claims as a potential hurdle for completion of their merger, even where price effects are unlikely or de minimis. It is possible, however, for innovation efficiencies to save an otherwise anticompetitive merger.

[DOJ Accepts "Weakened Competitor Defense" in Abandoning Biden Administration Challenge to Global Business Travel Group's Proposed Acquisition of CWT Holdings](#)

In the July 2025 Quorum, [we described the DOJ's acceptance](#) of a "weakened competitor defense" in closing its investigation of the proposed merger of T-Mobile and UScellular. The Trump Administration's DOJ appears to have again accepted that a party in a high-profile transaction was not likely to be a significant future competitive threat, although this time without publicizing it.

In the last days of the Biden Administration, the DOJ [filed suit to permanently enjoin](#) GBT's proposed acquisition of CWT. The DOJ alleged that the merger would "extinguish fierce head-to-head competition" between GBT and CWT in the U.S. market for the sale of business travel management services to global and multinational customers, threatening to harm "scores of businesses crucial to the U.S. economy." The trial was scheduled for September 8, 2025. However, on July 30, 2025, the DOJ stipulated to a [voluntary dismissal of its complaint](#) "in the exercise of its prosecutorial discretion." The DOJ gave no explanation of its reason for dismissal, but a corresponding proceeding in front of the United Kingdom's Competition and Markets Authority ("CMA") suggests that the parties had a strong claim to a weakened competitor defense.

In July 2024, [the CMA indicated](#) that the transaction "[gave] rise to a realistic prospect of a substantial lessening of competition" in the worldwide market for business travel agency services to global multinational customers and, in August 2024, referred the matter for an in-depth investigation. In November 2024, [the CMA published an interim report](#) confirming the earlier conclusion and initiating a discussion of remedies. In February 2025, [the CMA indicated it might reach a different conclusion](#) as to the competitive effects of the merger. In March 2025, [the CMA closed its investigation](#), after the CMA Inquiry Group failed to find (by the required two-third majority) an expected substantial lessening of competition. The CMA investigatory group found, among other things, that "while CWT remains a competitor to GBT, it is a materially weakened competitor and is likely to continue

to further weaken in the future.” CWT’s “financial difficulties during and following the Covid-19 pandemic have had a material adverse impact” and its “financial performance remains weak and is likely to continue to further weaken in the future.” The CMA noted that CWT did not claim to be an “exiting” or failing firm. Consistent with CWT’s weakened state, the CMA investigatory group noted that other firms were stronger competitors than CWT and would remain so after the transaction.

The Biden Administration’s DOJ had evidence of the weakened financial condition of CWT at the time it filed the complaint but, as detailed in its complaint, rejected this evidence as insufficient to undercut CWT’s competitive impact and, in the alternative, argued that CWT had other, less anticompetitive alternatives to a transaction with GBT. Most of the evidence it cited in support of these positions was from mid-to-late 2023 and likely of questionable relevance. Its rejection was in keeping with the Biden Administration’s general unwillingness to publicly accept a weakened competitor defense, as captured in the [2023 Merger Guidelines](#) at section 3.1: “Although merging parties sometimes argue that a poor or weakening position should serve as a defense even when it does not meet [the elements of a failing firm defense], the Supreme Court has ‘confined the failing company doctrine to its present narrow scope.’” The Biden Administration would “evaluate evidence of a failing firm consistent with this prevailing law.” The Trump Administration appears to be adopting a different, more nuanced position and one more aligned with individual firm and market realities.

Although the Trump Administration did not identify a reason for its dismissal of its earlier complaint – and [some senators speculated](#) that “undue influence” had led the DOJ to dismiss its complaint – it is highly likely that, faced with the prospect of judicial consideration of the same evidence provided to the CMA, the DOJ accepted either that CWT was a weakened competitor or that it would have difficulty rebutting evidence to that effect that the parties would have introduced at trial (and had, in fact, submitted to the court following filing of the complaint). *The current administration’s disposition of this matter is additional evidence that the leadership of the antitrust agencies has adopted a more balanced evaluation of mergers than the previous administration. Defenses or countervailing factors that would have been ignored in the Biden Administration’s antitrust agencies may find a more receptive audience in the Trump Administration.*

[FTC Reopens and Sets Aside Two Controversial Merger Settlements](#)

The FTC reopened and set aside the final consent orders in the [Chevron/Hess](#) (2025) and [ExxonMobil/Pioneer Natural Resources](#) (2024) mergers. The consent orders had prohibited Chevron from nominating, designating, or appointing Hess’ Chief Executive Officer John B. Hess to Chevron’s board of directors and, among other things, prohibited ExxonMobil (“Exxon”) from nominating, designating, or appointing Pioneer’s CEO Scott Sheffield to Exxon’s board of directors or as serving as an advisor to the board or Exxon’s management. Chevron, Hess and Mr. Sheffield had petitioned the Commission to reopen and modify the final consent order.

Section 5(b) of the FTC Act authorizes the Commission to, after notice and opportunity for hearing, modify a prior order whenever it believes: (a) that conditions of fact or of law have changed so as to require such action; or (b) if the public interest so requires. In its review, the Commission found that the underlying complaints in the [Chevron/Hess](#) and [Exxon/Pioneer](#) merger matters failed to plead a violation of antitrust law. According to the Commission, the orders were contrary to the public interest and should be reopened and set aside. See *Commission Orders Reopening and Setting Aside [Chevron/Hess](#) and [Exxon/Pioneer](#) orders.*

In the July 2025 Quorum, we suggested that parties subject to consent orders requiring prior approval of future transactions seek to reopen and modify those orders, because the Commission has moved away from prior approval clauses in merger settlements. The two matters discussed above are additional evidence that the Commission continues to make aggressive efforts to reverse areas in which it believes the Biden Administration overreached in its application of the FTC Act.

DOJ Resolves Complaint Prior to Trial, Accepting Divestitures in UnitedHealth/Amedisys Merger & Obtains \$1.1 Million Civil Penalty for HSR Violation

In November 2024, the DOJ, along with the states of Maryland, Illinois, New Jersey and New York [sued to enjoin](#) the proposed merger of UnitedHealth Group, Inc. (“UnitedHealth”) and Amedisys, Inc. (“Amedisys”), “two of the largest home health and hospice service providers in the country.” The proposed merger was “presumptively anticompetitive and illegal in hundreds of local markets across America.” It would (according to the DOJ’s complaint) also reduce competition for nurses, leading to lower wages and worse working conditions. Prior to filing for an injunction, the DOJ rejected the parties’ offer to divest home health and hospice locations in hundreds of local markets to “a much smaller competitor” owned by two private equity firms. VitalCaring, the proposed buyer of the offered assets was, according to DOJ “an unproven company with only three years of operational experience, poor financial performance and potentially catastrophic legal exposure” for its CEO’s alleged breach of fiduciary duty in forming VitalCaring while CEO of her previous employer. DOJ’s complaint also alleged that Amedisys erroneously and inaccurately certified substantial compliance with the DOJ’s Request for Additional Information (“Second Request”), failing to produce over 2.5 million documents until its inaccurate compliance was discovered by the DOJ.

In August, the DOJ and the parties reached a [settlement](#) requiring the divestiture of 164 home health and hospice locations across 19 states, accounting for over \$500 million in annual revenue. The divested assets were to be sold to two buyers (neither of whom was VitalCaring). The DOJ also required Amedisys to pay a civil penalty of \$1.1 million for its erroneous certification of compliance with the Second Request. The settlement(s) are subject to court review, to confirm the settlements are consistent with the public interest.

The administration has moved over the summer to clear its merger litigation docket. In June it settled its late January challenge to Hewlett-Packard Enterprises’ proposed acquisition of Juniper Networks (discussed in the [July 2025 Quorum](#)), reportedly [over the objection](#) of the Antitrust Division’s leadership. In July, it dismissed the Biden Administration’s challenge to the GBT/CWT merger (as discussed above) and in August, it settled the Biden Administration’s challenge to the UnitedHealth/Amedisys merger (as discussed here). The Administration claims it is not anti-merger, but that it has returned to the more balanced approach of the first Trump Administration. The acceptance of merger settlements in lieu of litigation is strong evidence of the administration’s position.

Delaware Court of Chancery Upholds Removal of Designated Director Following Amendment to Stockholders Agreement



By [Peter Bariso](#)
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On August 8, 2025 in *Kim, et al. v. FemtoMetrix, Inc.*, the Delaware Court of Chancery permitted the amendment of a stockholders agreement without the consent of an adversely impacted investor, even though both the intent and effect of the amendment was to force that investor’s director designee to resign from the board.

FemtoMetrix, a private developer of measuring instruments for the chip industry, undertook a capital raise in which Avaco Co. Ltd., a Korean publicly traded equipment manufacturing company, acquired Series B Preferred Stock in FemtoMetrix. In connection with the investment, Avaco, FemtoMetrix and other stockholders of FemtoMetrix entered into a new stockholders agreement—the FemtoMetrix Amended and Restated Voting Agreement—which granted Avaco the right to appoint a “Series B Designee” to the board of directors of FemtoMetrix.

Avaco designated its employee, Charles Kim, as the Series B Designee on the FemtoMetrix board and the two companies initially worked together to develop products. However, after a few years, both Avaco and Kim initiated legal proceedings against FemtoMetrix, in Korea and California, each focused on what the Court called commercial matters unrelated to the voting agreement.

However, as a result of these pending litigations, FemtoMetrix and certain of its stockholders amended the voting agreement without Avaco’s consent “to prevent Avaco from obtaining sensitive information while the parties were embroiled in litigation.”

In relevant part, the original voting agreement Avaco entered into provided for certain limitations and protections impacting Avaco’s designation rights, including:

- *Section 1.2(a)*, which granted Avaco the right to appoint the Series B Designee, subject to Section 1.6, which itself bars “bad actors” from serving as directors;
- *Section 1.4(a)*, which provides that Avaco must consent to the removal of its designee, unless the removal is “for cause” (“cause” was not defined in the voting agreement);
- *Section 7.8*, which provides that the voting agreement can generally be amended with the consent of (i) FemtoMetrix, (ii) certain “Key Holders” (which were not identified in the opinion but which do not include Avaco) and (iii) a majority of the common stockholders, subject to certain exceptions, including the following:

(A) amendments with respect to one investor require that investor’s consent “unless the amendment . . . applies to all Investors . . . in the same fashion”; and

(B) amendments to Section 1.2(a) expressly require Avaco’s consent.

The new amendments, approved without Avaco’s consent, prohibit “Conflicted Directors” from serving on the board and clarified that no investor can designate a Conflicted Director or prevent the removal of a Conflicted Director. “A Conflicted Director is defined as a person who is ‘a service provider or otherwise employed by or an Affiliate of any Person that is engaged in commercial litigation against [FemtoMetrix].’”

Following approval of the amendments and demand to remove Kim from the board by stockholders holding over 51% of the Series B Preferred Stock and 70% of the common stock of FemtoMetrix, Avaco brought claims under Section 225 of the

Delaware General Corporation Law, which gives the Delaware Court of Chancery authority to hear and determine the validity of a contested director removal. Both Avaco and FemtoMetrix filed motions seeking summary judgment. Recognizing that under Delaware law, “in evaluating cross-motions for summary judgment, the court must . . . only grant a motion for summary judgment to one of the parties when there is no disputed issue of material fact and that party is entitled to judgment as a matter of law”, “pure matters of contractual interpretation . . . [are] . . . readily amenable to summary judgment” by Delaware courts because the “proper interpretation of language in a contract . . . is treated as a question of law.”

Although the Delaware Court of Chancery did not disagree with Avaco that the amendments alter Avaco’s designation rights and were specifically designed to target Avaco and cause Kim’s removal from the board, the Court found that the amendments were approved and adopted by the requisite stockholders and did not violate any provision of the existing voting agreement.

With respect to Section 1.4 (which gave Avaco a consent right on the removal of a designee without cause), the Court noted that Avaco’s “designation right is not absolute or insulated from changes in eligibility criteria imposed elsewhere in the Voting Agreement.” Prior to the amendments, Avaco could not designate a bad actor and could not prevent the removal of a director for cause. The Court noted that the voting agreement did not expressly protect Avaco from any future qualifications or limitations on their designation right. Additionally, the voting agreement did not define “cause.” The Court reasoned that, by permitting FemtoMetrix to remove an Avaco designee that is a Conflicted Director, the amendment “identifies a circumstance in which a designee effectively becomes removable for cause: being a Conflicted Director.”

With respect to Section 7.8 (which prohibits amendments that would adversely affect an investor without its consent unless the amendment applied to all investors “in the same fashion”), the Court took no issue with the fact that, upon its adoption, the amendment solely affected Avaco. The amendment was “facially neutral” and applied equally to all investors. “When Avaco’s California litigation against FemtoMetrix ends, Avaco will be free to redesignate Kim to the Board. And if another Investor with a Board designee sues FemtoMetrix, the designee may be removed as a Conflicted Director.” The Court stressed that “equal application . . . is not the same as equal effect,” so long as the amendment requires objective application to all investors.

Avaco also pointed to language in the voting agreement that required their consent to amend Section 1.2(a). Admitting that Section 1.2(a) itself was not expressly amended, Avaco contended that the amendments had an adverse effect on Avaco’s designation rights granted under Section 1.2(a) and therefore Avaco’s consent was required for the amendments. Noting that Delaware courts will generally stay within the four corners of a contract, the Delaware Court of Chancery held that its “role is not to rewrite the contract between sophisticated market participants, allocating the risk of an agreement after the fact, to suit the court’s sense of equity or fairness. Instead, it is to give meaning and substance to the words the parties have freely chosen.” According to the Court, such an argument by Avaco is more akin to a breach of the implied covenant of good faith and fair dealing, rather than an express contractual claim.

The Court recognized that in its summary judgment brief Avaco alleged that the amendment violated (a) the implied covenant of good faith and fair dealing and (b) an efforts clause in Section 4.1 of the voting agreement. However, neither claim was included in Avaco’s complaint and “amendments in briefs do not serve to amend the pleadings.” By failing to invoke the implied covenant of good faith or required efforts under Section 4.1 until after discovery had concluded, it resulted not in a “technical foot fault” but a “fundamental failure to give [FemtoMetrix] fair notice of the claim asserted against [it]” or to prepare a defense of such claims.

The FemtoMetrix decision is another reminder for contracting parties to carefully consider the express language of the contract and not rely on what one side may view as the intended rights and obligations provided by an agreement. Going forward, investors should strongly consider clearly securing all rights they want to

protect (e.g., prohibiting amendments of any terms that could negatively affect rights and not just specific itemized provisions). As the Delaware Court of Chancery noted, it is not typically the role of the court to protect parties after the fact. “Parties have a right to enter into good and bad contracts, the law enforces both.”

As with its deference to contractual language, in *FemtoMetrix* the Delaware Court of Chancery refused to entertain an “appeal to equity” or any arguments not firmly grounded in text when no such claims were expressly plead. In order to preserve all potential legal arguments, a litigant should make sure to articulate all arguments in its complaint that it may wish to pursue. Litigants should not expect Delaware courts to permit parties to use motions to raise legal theories later in the case. As noted by the court, “[i]t does not fall upon this court to save a plaintiff from her own deficiencies.”

D.C. Circuit Gives Proxy Advisory Firms a Pass



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Appellate Court Holds That Firms' Voting Recommendations Are Not "Solicitations" Under Section 14(a) of the Securities Exchange Act of 1934

On July 1, 2025, the U.S. Court of Appeals for the D.C. Circuit issued an important decision in *Institutional Shareholder Services, Inc. v. SEC*, invalidating a 2020 SEC rule defining a "solicitation" under Section 14(a) of the Securities Exchange Act of 1934 to include proxy voting advice issued by advisory firms. The Court rooted its decision in the ordinary meaning of the word "solicit," which the Court held encompasses only advocacy on one's own behalf, not recommendations requested by others in exchange for a fee. The decision allows proxy advisory firms to continue to operate without fear of liability or the burden or expense of regulation under Section 14(a) and likely limits the SEC's discretion to expand the sweep of Section 14(a) moving forward.

Background. A key feature of corporate governance in U.S. public companies is proxy voting, which allows shareholders to grant authority to another person to vote their shares on proposals, director elections, or other business at shareholder meetings. Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to issue rules and regulations governing the "solicitation" of proxies and makes it unlawful for any person "to solicit any proxy or consent or authorization" in contravention of those rules.^[1]

Proxy advisory firms offer clients proxy voting recommendations for a fee. Because large-scale institutional investors must make voting decisions on countless proposals (due to the size and breadth of their portfolios), they often rely on proxy advisory firms for research, analysis and recommendations on how to vote. Two advisory firms, Institutional Shareholder Services, Inc. (founded in 1985) and Glass Lewis & Co. (founded in 2003), dominate the industry with an estimated market share of at least 90 percent.^[2]

The Exchange Act does not define "solicit" or "solicitation." However, in 2019, the SEC issued guidance that suggested that advice issued by proxy advisory firms would qualify.^[3] In September 2020, pursuant to its Section 14(a) authority, the SEC issued a rule formally defining "solicit" and "solicitation" to include:

[a]ny proxy voting advice that makes a recommendation to a security holder as to its vote, consent, or authorization on a specific matter for which security holder approval is solicited and that is furnished by a person that markets its expertise as a provider of such proxy voting advice, separately from other forms of investment advice and sells such proxy voting advice for a fee.^[4]

Under the SEC's rule, proxy advisors would be forced to file their recommendations with the SEC as "proxy solicitations" unless they could claim a valid exemption.^[5] At the same time, the SEC rule provided for an exemption if a firm complied with three conditions: (1) disclosing conflicts of interest and steps taken to address them; (2) adopting procedures to make their proxy advice available to the companies that are the target of that advice at least by the time the advice is disseminated to the adviser's clients; and (3) establishing a mechanism to inform clients of the company's response to the firm's advice before the applicable shareholder meeting.^[6]

Institutional Shareholder Services (ISS) brought suit, challenging the SEC's definition as unlawfully expansive.^[7] At summary judgment, the district court (D.C. District Court Judge Amit Mehta) ruled in favor of ISS, holding that the SEC's

definition of “solicitation” was “foreclosed by the text of section 14(a).”^[8] Specifically, the district court held that “[t]he ordinary meaning of those terms when Congress enacted the Exchange Act in 1934 did not encompass voting advice delivered by a person or firm with no interest in the outcome of the vote.”^[9] The SEC and an intervenor, the National Association of Manufacturers (NAM), appealed to the D.C. Circuit.^[10]

The D.C. Circuit’s Decision. On July 1, 2025, a unanimous panel of the D.C. Circuit (Judges Bradley Garcia, Karen Henderson and Neomi Rao) affirmed. As an initial matter, the Court explained that it owed no deference to the SEC’s proffered definition of “solicitation” under the Supreme Court’s June 28, 2024 decision in *Loper Bright Enters. v. Raimondo*, which overruled the Supreme Court’s longstanding *Chevron* decision requiring deference to agency interpretations of statutes.^[11] Relying on *Loper*, the D.C. Circuit was not bound by the SEC’s proposed definition of “solicit” and instead used its own “independent judgment” in construing the term.^[12]

Turning to the statutory text, the Court observed that the Exchange Act does not define “solicit” or “solicitation,” so it would look to “contemporaneous dictionaries” to determine the term’s “ordinary meaning.”^[13] Those dictionaries defined the term as “seeking to persuade another to take a specific action” not merely in a general sense, but in “a sense that solicitation involves advocacy on one’s own behalf.”^[14] In the Court’s analysis, unlike company insiders or their agents, a proxy advisory firm does not seek to obtain a particular voting outcome for its own benefit, but offers recommendations in response to requests of those who do.^[15] A step removed from those who seek voting action or authority, proxy advisory firms do not “solicit” proxies within the meaning of Section 14(a).^[16]

The Court also noted that structural considerations in the statute supported its interpretation of “solicit.” For example, none of the other voting-integrity provisions of Section 14 suggest it was intended to reach those who “merely advise others how to vote, without themselves seeking votes or acting on behalf of those who do.”^[17] Congress also chose to offer investors broader protections for fraud in other Exchange Act provisions (*i.e.*, Section 10(b)) and subject proxy advisory firms to regulation under a different statute, the Investment Advisers Act of 1940.^[18] The choice to limit Section 14(a) to “solicitations,” therefore, was deemed deliberate and need not be accorded a broader interpretation than the plain language would naturally allow.^[19]

In sum, the Court held that proxy voting advice to a third party, for a fee, is a “recommendation,” not a “solicitation.”^[20] The SEC’s attempt to expand the definition of “solicitation” to encompass such advice, therefore, was “contrary to law.”^[21]

Implications. As a practical matter, little will change in the wake of *Institutional Shareholder Services*. Proxy advisory firms have flourished for decades, due to the needs of institutional investors to manage the high number of proxy solicitations that they receive. The ruling by the D.C. Circuit effectively returns the *status quo* under which proxy advisory firms had been operating. And the SEC, notably, dismissed its appeal with the case only continuing at the behest of intervenor NAM, a likely signal that the SEC has disavowed the position that animated its 2020 rule-making.^[22]

Nonetheless, the decision is notable for the consequences that could have resulted if the Court had reached a different outcome. As the D.C. Circuit noted, if the SEC’s interpretation of “solicit” held up, proxy advisory firms would have had to file their recommendations with the SEC unless they could claim an exemption, including by disclosing conflicts of interest and steps taken to address them.^[23] Moreover, if advisory-firm advice qualified as a “solicitation,” it could have opened up potential liability (including for damages) under other provisions of the federal securities laws, including SEC Rule 14a-9, which prohibits false or misleading statements in any “solicitation subject to this regulation.”^[24]

At bottom, *Institutional Shareholder Services* is a win for statutory predominance and regulatory agency restraint in the post-*Chevron* era. Citing the Supreme Court’s

admonition that courts should “fix[] the boundaries of the delegated authority” and “ensur[e] the agency has engaged in reasoned decisionmaking within those boundaries,”^[25] the D.C. Circuit “exercise[d] independent judgment” in interpreting the term “solicitation,” rather than extending deference to the SEC’s definition of a term whose ordinary meaning, arguably, is not crystal-clear.^[26] If *Institutional Shareholder Services* holds, the Court’s construction of the term—essentially, requiring action for one’s own benefit, not another’s—will constrain the SEC’s ability to adopt further expansive applications of Section 14(a), through rule-making or otherwise, moving forward. How *Institutional Shareholder Services* reverberates outside Section 14(a), involving rule-making or action in other contexts, by other agencies, remains to be seen.

[1] See 15 U.S.C. § 78n(a).

[2] David F. Larcker *et al.*, *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, Harvard Law School Forum on Corporate Governance (June 14, 2018), <https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/>.

[3] Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice, 84 Fed. Reg. 47,416, 47,417 (Sept. 10, 2019).

[4] 17 C.F.R. § 240.14a-1(l)(1)(iii); see also Exemptions From the Proxy Rules for Proxy Voting Advice, 85 FR 55082, 55154 (September 3, 2020) (revising 17 C.F.R. § 240.14a-1(l)(1)(iii)).

[5] See *Institutional S’holder Servs.*, 142 F.4th at 762.

[6] *Id.* (citing 85 Fed. Reg. at 55,154 (2020 Rule)). The SEC later amended this rule in 2022, removing the second two conditions. *Id.* (citing Proxy Voting Advice, 87 Fed. Reg. 43,168, 43,174 (July 19, 2022)).

[7] *Id.*

[8] *Id.* at 763 (citing *Institutional S’holder Servs. Inc. v. Sec. & Exch. Comm’n*, 718 F. Supp. 3d 7, 20–24 (D.D.C. 2024)).

[9] *Institutional S’holder Servs.*, 718 F. Supp. 3d at 12.

[10] The SEC would later dismiss its appeal “without explanation[,]” leaving NAM as the sole appellant. *Institutional S’holder Servs.*, 142 F.4th at 763. Before addressing the merits, the D.C. Circuit determined that NAM had standing to pursue the appeal. *Id.* at 763–65.

[11] See *id.* at 766 (citing *Loper v. Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024), overruling *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

[12] See *id.*

[13] *Id.*

[14] *Id.* at 766–67 (citing *Webster’s New International Dictionary of the English Language* 2393 (2d ed. 1934); 10 *The Oxford English Dictionary* 395 (1933); 2 *The New Century Dictionary* 1764 (1927); *Solicit*, *Black’s Law Dictionary* (3d ed. 1933); *A Dictionary of the Law* 959 (1913)).

[15] *Id.* at 767 (noting that “the solicitation runs in the opposite direction to the one suggested by NAM”).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] See *id.*

[20] *Id.* at 768.

[21] *Id.*

[22] *See supra* n.10.

[23] *Institutional S'holder Servs.*, 142 F.4th at 762.

[24] *See* 17 C.F.R. § 240.14a-9(a).

[25] *Institutional S'holder Servs.*, 142 F.4th at 766 n.5 (quoting *Loper*, 603 U.S. at 395).

[26] *Id.* at 766 (quoting *Loper* 603 U.S. at 394). Note, however, that the District Court's decision came before *Loper* and was based on the *Chevron* framework. *Id.* at 763 n.2,

Delaware Court of Chancery Reaffirms Bar Against Discovery to Plead Demand Futility



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On June 26, 2025, in *In re The Boeing Co. Deriv. Litig.*,^[1] Vice Chancellor Morgan Zurn of the Delaware Court of Chancery ordered a stay of all discovery pending the Court's resolution of Defendants' motion to dismiss Plaintiffs' derivative claims. Notably, in granting the stay, the Court disallowed Plaintiffs from obtaining and using readily accessible discovery already exchanged in a parallel federal derivative securities action involving similar issues. The decision reaffirms long-standing Delaware precedent barring discovery to plead demand futility, leaving pre-suit books and records demands as the principal means for plaintiffs to develop factual support for their claims.

In March 2022, the Delaware Court of Chancery approved the settlement of derivative litigation resulting from the crashes of two Boeing 737 MAX 8 aircraft. This action arose from an emergency landing by an Alaska Airlines Flight on January 5, 2024. The episode precipitated stockholder litigation, including this action brought by Boeing stockholders who sued Boeing's directors and employees derivatively "for purported failures of oversight" under *Caremark*.^[2] After the Alaska Airlines incident, stockholders issued a books and records demand and brought a securities class action in the Eastern District of Virginia ("EDVA"). While Boeing's productions in response to the demands were ongoing, Plaintiffs filed a Section 220 action in Delaware for additional documents, which was later voluntarily dismissed. A derivative action was also brought in the EDVA.^[3] In late 2024, the EDVA dismissed the *Caremark* claims in the derivative action without prejudice so those claims could be heard in Delaware. The parties proceeded to discovery on the derivative securities claims. Meanwhile, Plaintiffs in Delaware represented that they had sufficient information from their books and records demand to bring an action. Defendants and Boeing moved to dismiss, arguing, among other things, that Plaintiffs inadequately alleged demand futility. In the meantime, Plaintiffs requested all of the discovery exchanged in the EDVA action, which was subject to a confidentiality order barring its use outside of the action. According to Plaintiffs, discovery was needed to "substantiate Plaintiffs' well-pled demand futility allegations."^[4]

After learning of the discovery requests and while their motion to dismiss was pending, the Defendants in the Court of Chancery action moved to stay discovery. Defendants invoked Delaware Supreme Court precedent that "derivative plaintiffs . . . are not entitled to discovery to assist their compliance with Rule 23.1"^[5] In addition, Defendants explained that, "in stockholder derivative cases where a parallel action has proceeded to discovery, Delaware courts consistently assess demand futility on the basis of the complaint and the incorporated Delaware General Corporation Law ("DGCL") Section 220 record—not on the universe of discovery that may have already been produced in the related case."^[6] Finally, Defendants drew the Court's attention to the fact that Plaintiffs had already exercised their statutory inspection rights—Plaintiffs not only brought a Section 220 demand, but also Section 220 litigation. Defendants noted that Plaintiffs even dismissed their Section 220 action, expressly conceding that Boeing's Section 220 document productions supplied "more than enough information" for Plaintiffs to put together their complaint.^[7]

In opposing the stay request, Plaintiffs argued that, "[u]nder the circumstances of this case, a stay would not offer any efficiency and could increase inefficiency, due to the prospect of future amendments."^[8] Further, Plaintiffs contended that "[n]o practical reasons prevent Plaintiffs from using discovery that Defendants have

already produced in connection with related derivative claims, and permitting Plaintiffs to do so will impose only negligible burden on Defendants.”^[9] And, according to Plaintiffs, producing the requested discovery here would “merely require Defendants to give Plaintiffs permission to use the already produced documents and testimony in Delaware[.]”^[10]

The Court of Chancery’s Order

The Court of Chancery sided with defendants and granted the stay. The Court characterized what had transpired in the Delaware derivative action as the “typical path”—*i.e.*, Plaintiffs sought and received documents pursuant to Section 220, concluded they had sufficient information to file a complaint and “are now preparing to justify why they should control the claim rather than the corporation on defendants’ Rule 23.1 motion to dismiss.”^[11] That path, the Court noted, does “not contemplate discovery to aid demand futility[.]”^[12]

The Court, meanwhile, rejected Plaintiffs’ contention that the Court should alter its typical approach and allow discovery, because “extensive discovery has been taken in a related securities action, which plaintiffs can access but cannot use unless reproduced in this action.”^[13] Although that discovery was “available” and “relatively easy to produce,” the Court nonetheless held fast to three doctrines prohibiting its use:

- (1) Plaintiffs’ implicit concession that they received enough information through their books and records demand to file their complaint;
- (2) the general rule that discovery is not available “to aid derivative plaintiffs in pleading demand futility, which together with Rule 23.1’s particularity requirement implements the presumption that the board can manage the claim”; and
- (3) a stay is “practical and warranted” where a motion might dispose of the case, no interim relief is being sought and plaintiffs will not suffer prejudice from loss of evidence.^[14]

In the Court’s view, “[t]hat a rule is easy to break does not justify breaking it[.]”^[15]

Takeaways

The Court’s decision reaffirms long-standing Delaware precedent prohibiting discovery to plead the requirements of a derivative claim, including demand futility. Importantly, *In re The Boeing Co.* shuts down a novel argument advanced by Plaintiffs—that the availability and accessibility of relevant discovery in a parallel proceeding somehow warrants deviation from standard practice and opens the door to its use in bolstering Plaintiffs’ derivative allegations in Delaware.^[16] In so ruling, the Court endorsed Defendants’ argument that derivative Plaintiffs ought not to be entitled to discovery to help with their compliance with Rule 23.1, as any rule to the contrary—allowing discovery before a derivative plaintiff demonstrated “standing to assert a corporation’s claim”^[17]—“would be a complete abrogation of the principles underlying the pleading requirements of Rule 23.1.”^[18]

The decision further establishes that, except in exceptional circumstances—(i) where granting the motion to dismiss would not avoid further litigation, (ii) where the plaintiff seeks interim relief, or (iii) where information may be unavailable—Delaware plaintiffs may only derive allegations through the use of a books and records demand under Section 220 of the DGCL. That limitation is notable because of the strict requirements for entitlement to Section 220 books and records under Delaware law, including the requesting party’s status as a continuous and contemporaneous stockholder, the establishment of a proper purpose and a demonstration that the requested documents are necessary and essential to the accomplishment of that proper purpose.^[19]

As previously reported in [Cadwalader Quorum](#), the bar for a stockholder to attain books and records under Section 220 was raised even higher earlier this year, after Delaware Governor Matthew Meyer signed into law Senate Bill 21, which amended, *inter alia*, Section 220 of the DGCL. In particular, Senate Bill 21, which became effective on March 25, 2025, limited the scope of books and records

subject to production in response to a Section 220 request. Now, a corporation need only produce a defined set of corporate documents, including board minutes and materials; text and email communications among directors and officers are not listed as “books and records” within the scope of Section 220. One response to Senate Bill 21 is that derivative plaintiffs, to increase the likelihood a court will deny a motion to dismiss, attempt to get their hands on any other relevant documents, including, as here, in parallel actions wherein discovery is in progress.

[1] Order Granting Defendants’ Motion to Stay Discovery, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 26, 2025), Dkt. No. BL-125.

[2] Defendants’ Motion to Stay Discovery, at 1, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[3] Referencing the overlap between the alleged misstatements in the securities class action and the derivative securities claims, the EDVA partially lifted the stay of discovery in the latter to permit the derivative plaintiffs to get documents that were being produced in the securities class action.

[4] Plaintiffs’ Opp. to Defendants’ Motion to Stay Discovery, at 3, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 6, 2025), Dkt. No. BL-114.

[5] *Rales v. Blasband*, 634 A.2d 927, 934 n.10 (Del. 1993) (citing *Levine v. Smith*, 591 A.2d 194, 208-10 (Del. 1991), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000)).

[6] Defendants’ Motion to Stay Discovery, at 9, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[7] *Id.* at 10 (internal citations omitted).

[8] Plaintiffs’ Opp. to Defendants’ Motion to Stay Discovery, at 9, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 6, 2025), Dkt. No. BL-114.

[9] *Id.* at 1.

[10] *Id.* at 12.

[11] Order Granting Defendants’ Motion to Stay Discovery, at 3, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 26, 2025), Dkt. No. BL-125.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Defendants’ Reply in Support of Their Motion to Stay Discovery, at 7, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. June 12, 2025), Dkt. No. BL-115.

[17] Defendants’ Motion to Stay Discovery, at 7, *In re The Boeing Co. Deriv. Litig.*, Consol. C.A. No. 2024-1210-MTZ (Del. Ch. May 2, 2025), Dkt. No. BL-107.

[18] *Levine v. Smith*, 591 A.2d 194, 210 (Del. 1991); *see also Brehm*, 764 A.2d at 255.

[19] *See, e.g., Pettry v. Gilead Sciences, Inc.*, 2020 WL 6870461, at *9 (Del. Ch. 2020) (“To inspect books and records under Section 220, a plaintiff must establish by a preponderance of the evidence that the plaintiff is a stockholder, has complied with the statutory form and manner requirements for making a demand, and has a

proper purpose for conducting the inspection.”); *id.* at *27 (“These documents are therefore necessary and essential to Plaintiffs’ proper purposes.”).

Colorado and Washington State Antitrust Premerger Notification Filing Requirements Are in Effect



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Broad state-level premerger notification requirements are now in effect in Colorado (as of August 6, 2025) and Washington State (as of July 27, 2025). Any person that files a Hart-Scott-Rodino (“HSR”) Act Notification and Report Form (“HSR Form”) with the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) must also submit an electronic copy of their HSR Form to the Colorado or Washington State Attorney General (as applicable) if the person filing an HSR Form meets certain state-specific jurisdictional tests.

Colorado State Premerger Notification Act’s Jurisdictional Requirements

[Colorado’s Antitrust Premerger Notification Act](#) sets forth two (2) alternative jurisdictional tests that trigger the state notice requirement for persons subject to the HSR Act’s filing requirements:

1. The person has its principal place of business in the State of Colorado; or
2. The person (or a person that it controls directly or indirectly) had annual net sales in the State of Colorado of the goods or services involved in the transaction of at least twenty (20)% of the [HSR Act’s \\$126.4 million filing threshold](#) (as adjusted annually).

Colorado has a separate (and still in force) [healthcare premerger notification statute](#) requiring sixty (60)-day pre-consummation notice of a transaction, or a series of transactions occurring in any five (5)-year period, that has the effect of transferring fifty (50)% or more of the assets of a hospital (as defined by statute) to another entity through sale, lease, exchange, or other form of disposition.

Washington State Premerger Notification Act’s Jurisdictional Requirements

[Washington’s Antitrust Premerger Notification Act](#) sets forth three (3) alternative jurisdictional tests that trigger the state’s pre-merger notice requirement for persons subject to the HSR Act’s filing requirements:

1. The person has its principal place of business in the State of Washington; or
2. The person (or a person that it controls directly or indirectly) had annual net sales in the State of Washington of the goods or services involved in the transaction of at least twenty (20)% of the [HSR Act’s \\$126.4 million filing threshold](#) (as adjusted annually); or
3. The person is a healthcare provider or provider organization (as defined in the [Revised Code of Washington](#)) conducting business in the State of Washington.

Washington has a separate (and still in force) [healthcare premerger notification statute](#) requiring sixty (60)-day pre-consummation notice of mergers, acquisitions, or contracting affiliations between two (2) or more hospitals, hospital systems, or provider organizations that operate within the state (subject to certain jurisdictional thresholds).

Filing Requirements, Confidentiality Protections and Penalty for Failure to Comply

If the person has its principal place of business in Colorado or Washington (as applicable), it must provide its [HSR Filing \(the HSR Form and the documentary attachments\)](#) to the State Attorney General contemporaneously with its filing with the FTC and DOJ.

If the person does not have its principal place of business in the state, it must still provide its [HSR Form](#) to the State Attorney General at the time of its filing with the FTC and DOJ, but is not required to include the documentary attachments required

by an HSR Filing. However, the State Attorney General has the authority to require such persons to provide the HSR Filing within seven (7) days of a request.

“Principal place of business” is not defined in either state’s premerger notification statute. It is not necessarily the state of incorporation or registration but in corporate law, it generally refers to the place where the corporation’s highest-level officers direct, control and coordinate the corporation’s activities.

The HSR Form, the HSR Filing, the fact of a notifiable transaction and the notice to the State Attorney General are confidential and not subject to public release under each state’s Freedom of Information Act. With a protective order, the HSR Form and HSR Filing may be used in an administrative or judicial proceeding related to the transaction. The State Premerger Notification Act of each state allows the State’s Attorney General to share an HSR Form, or HSR Filing, with any Attorney General of a state that has adopted the same or similar state premerger notification filing requirement and contains similar confidentiality requirements. Neither State Act allows for sharing with any competition agencies or other law enforcement agencies outside the United States; merging parties may grant such rights, however.

There is no filing fee associated with the filing. However, any person that fails to comply with the state’s notification requirement is subject to civil penalties of up to \$10,000 per day, for each day out of compliance.

For a longer discussion of state legislative interest in adopting state-specific premerger notification statutes, including notification of healthcare transactions, see [Washington State Adopts First Broad State Antitrust Premerger Notification Act and Filing Requirement](#), in the May 2025 *Quorum*.