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Quorum

Insights Into Corporate Governance, M&A and Securities Law

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Revisiting Public Disclosure Frequency: SEC Considers Semi-Annual Reporting Regime

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During a September 19, 2025 interview on CNBC's Squawk Box, SEC Chairman Paul S. Atkins discussed a proposal to give U.S. public companies the option to move from mandatory quarterly reporting to semi-annual reporting. Later that month, in an opinion published in the *Financial Times*, Chairman Atkins emphasized that offering companies the option to report semi-annually would further market-driven disclosure practices. If this proposal is adopted, it would bring about a major shift in the U.S. securities reporting framework that proponents argue would promote long-term value creation and place an emphasis on the materiality of disclosures that inform capital decisions.

Since its adoption by the SEC in 1970, Quarterly Reports on Form 10-Q have been a major component of the U.S. public company reporting regime, requiring disclosure of financial results for the fiscal quarter, management discussion and analysis, risk updates, and certifications of internal controls. In recent years, this requirement, and quarterly reporting and guidance in general, became a subject of public discussion due to concerns that quarterly reporting encourages a short-term focus and creates excessive compliance burdens. Addressing the harmful effects of "short-termism" in particular, Jamie Dimon and Warren E. Buffett wrote in a 2018 Wall Street Journal opinion that "[s]hort-term-oriented capital markets have discouraged companies with a longer term view from going public at all, depriving the economy of innovation and opportunity" – a view that, according to the authors, was shared by Business Roundtable, an association of nearly 200 CEOs of major U.S. companies.

Benefits of a shift from quarterly to semi-annual reporting have already been considered by at least two stock exchanges. The Long-Term Stock Exchange, a purpose-based national securities exchange that permits companies that trade on other exchanges to dual-list, recently filed a petition with the SEC seeking to allow public companies the option to report earnings **semi-annually instead of quarterly, and arguing that** mandatory quarterly reporting has imposed unintended costs on U.S. markets for decades, contributing to **short-term market pressures, volatility, and underinvestment in innovation**. Additionally, Nasdaq, in its Advocacy Report published earlier this year, observed that "[t]he quarterly reporting process has evolved over time to become routine and redundant", and recommended (1) standardizing guidelines for the quarterly press release to allow that document to replace the Form 10-Q entirely, and (2) revising SEC rules so that companies report semi-annually instead of quarterly if they choose to do so, where quarterly reporting does not offer benefits to investors.

The SEC previously considered reporting framework changes in 2018, when it issued a request for comment on whether its rules should provide companies with flexibility as to the frequency of their periodic reporting. At the time, the SEC did not issue a rulemaking proposal or take any further action. However, based on recent support voiced by President Donald Trump, Chairman Atkins, and various prominent political leaders, regulators and stakeholders, a periodic reporting regulatory reform could be more likely to be proposed and implemented than ever before. Proponents of the change base their support on certain benefits they argue will result from semi-annual reporting:

- <u>Reduce "Short-Termism"</u>. Quarterly deadlines contribute to short-term pressure on executives to meet near-term earnings targets at the expense of long-term investment and innovation. A shift to semi-annual reporting would allow executives to stop "managing to the quarter" and focus on long-term value creation.

- Ease Compliance Burdens. A reduction in filing frequency would ease compliance burdens by lowering costs associated with audits, internal control testing, preparing SEC filings and earnings releases, and investor communications associated with quarterly reporting. The newly available resources and personnel could be utilized by issuers to meet critical needs and objectives of the business.

- Encourage More Companies to Become and Remain Public. The elimination of the burdens and costs of quarterly reporting could help encourage more companies to become publicly traded in the United States, which would be in alignment with the SEC's policy goal of "mak[ing] being a public company an attractive proposition for more firms by eliminating compliance requirements that yield no meaningful investor protections, minimizing regulatory uncertainty, and reducing legal complexities throughout the SEC's rulebook".

- Align with Foreign Jurisdictions. The rule change would bring U.S. periodic reporting requirements in line with requirements in jurisdictions such as the European Union, the United Kingdom, and Australia. Notably, the European Union and the United Kingdom each previously introduced a quarterly reporting requirement, only to later replace it with a semi-annual reporting regime.

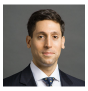
As is the case with any material policy change, critics have raised several concerns:

- Reduce Market Transparency. Less frequent mandated reporting could weaken corporate transparency, slow the dissemination of critical information to investors, and increase information asymmetries.

- Fail to Achieve a True Departure from Market Norms. A change in the law may not eliminate the pressure on public companies to continue providing quarterly financial updates to conform to, and comply with, market expectations, analyst practices, debt covenants and investor relations norms. However, it should be noted that, under the currently anticipated proposal, public companies would have an option to continue issuing quarterly reports – a choice that would place a renewed focus on market-driven disclosure practices emphasized by Chairman Atkins. In addition, public companies would remain subject to other existing disclosure obligations, including the requirement to disclose material information on Form 8-K upon the occurrence of certain events.

While the shift to semi-annual reporting is being actively considered and discussed, no formal rule change proposal has been issued yet. Once published, such proposal would likely be sought to be implemented through the SEC's regular notice-and-comment rulemaking process, and, if adopted, the final rule would set forth the full scope and parameters of the new reporting regime.

SEC Changes Course on Mandatory Issuer-Investor Arbitration Clauses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On September 17, 2025, the U.S. Securities and Exchange Commission (SEC) issued a policy statement potentially paving the way for the adoption of mandatory arbitration by issuers. According to the policy statement, "the presence of an issuer-investor mandatory arbitration provision will not . . . impact decisions whether to accelerate the effectiveness of a registration statement." This development may have significant implications for public companies, investors, and the securities litigation landscape.

Background

Historically, the SEC has been unwilling to accelerate the effectiveness of registration statements of companies with issuer-investor mandatory arbitration clauses in their organizational documents, citing concerns about the protection of investor rights and the potential for such clauses to limit access to the courts.

In an example cited by the SEC in its September 17, 2025 policy statement, the Carlyle Group L.P. included a mandatory arbitration clause in proposed amendments to its post-IPO limited partnership agreement (the "Proposed LPA") (and made corresponding disclosure in its Registration Statement on Form S-1 in connection with the Carlyle Group's planned IPO).[1] At the time, both the Carlyle Group and the SEC faced pressure from investors and regulators over the mandatory arbitration provision, which would have prohibited the Carlyle Group's shareholders from filing class-action lawsuits and precluded them from seeking redress from federal or state courts. Numerous stakeholders, including former SEC officials and lawmakers, urged then-Chair of the SEC, Mary L. Schapiro, to block the offering unless the mandatory arbitration clause was removed from the Carlyle Group's Proposed LPA. In response, the SEC issued comments on the Carlyle Group's amended S-1, specifically noting that "the Division of Corporation Finance does not anticipate that it will exercise its delegated authority to accelerate the effective date of [the Carlyle Group's] registration statement if [the] limited partnership agreement includes" a mandatory arbitration provision. While other commentators have criticized the SEC's use of its authority to withhold acceleration (thereby denying a company timely access to capital markets and providing the SEC an ability to delay and interfere with a planned public offering), the Carlyle Group did not challenge the SEC and quickly responded that it had removed the issuer-investor mandatory arbitration clause from its Proposed LPA and filed an additional amendment to its S-1.

Since the Carlyle Group's highly-publicized removal of an issuer-investor mandatory arbitration clause from its organizational documents, the SEC has continued to comment on, and caused companies pursuing an IPO to abandon their mandatory arbitration and mediation provisions as they pertain to claims arising under U.S. federal securities laws.

The September 17, 2025 policy statement represents a change in course, with the SEC announcing that it would no longer object to or deny the acceleration of a registration statement *solely* because an issuer's organizational documents contain a provision requiring mandatory arbitration of investor claims arising under federal securities laws.

Key Implications

While issuers may increasingly consider and include mandatory arbitration clauses in their governing documents, potentially limiting the ability of investors to bring class action lawsuits under federal securities laws to the court system, the SEC's policy statement has already raised several key implications in respect of federal and state law.

Federal law implications:

- The Federal Arbitration Act (FAA) governs arbitration agreements in the United States and reflects federal policy in favoring arbitration, which aims to provide an efficient and streamlined process for resolving disputes. In 2011's *AT&T Mobility LLC v. Conception*, the United States Supreme Court reaffirmed the FAA's presumption in favor of arbitration, holding that the FAA preempts state laws that discriminate against arbitration agreements, looking to prior United States Supreme Court decisions in 1987's *Shearson/American Express, Inc. v. McMahon* and others.

- Prior to the policy statement, the federal securities laws were thought to potentially override the FAA, including the anti-waiver provisions of the Securities Act of 1933 and the Exchange Act of 1934 (each of which provide that any provision binding a person acquiring any security to waive compliance with any provision of the act or the rules of the SEC shall be void). In its recent policy statement, the SEC noted that it has considered United States Supreme Court jurisprudence, including 2018's *Epic Systems Corp. v. Lewis* (which found that for any federal statute enacted after the FAA–which would include the Securities Act and Exchange Act–"there must be a 'clearly expressed congressional intention' to override the [FAA]") and analyzed case-law developments involving the intersection of the FAA and other federal statutes. Based on this review, the SEC concluded that, at least in the context of issuer-investor mandatory arbitration provisions, the federal securities laws do not override the FAA. "Nothing in the text of the anti-waiver provisions or any other provisions of the federal securities statutes could be construed as a clearly expressed congressional intention that the Arbitration Act would not apply to federal securities laws claims."

State law considerations:

- State law has also not been consistent on the enforceability of mandatory arbitration clauses. Whereas some states like Texas permit mandatory arbitration of federal securities law claims,[2] and others like Nevada include statutory provisions the likely permit mandatory arbitration of such claims, [3] Delaware corporate law may not allow for mandatory arbitration of federal securities law claims. The recent SEC policy statement noted expressly that it did not express a view on whether Delaware law, or any other state law provision, is inconsistent with the FAA.

- The Delaware General Corporation Law was amended in June of this year through Senate Bill 95 (SB 95) which, among other amendments, revised Section 115(c) to permit forum selection clauses in Delaware organizational documents; provided that at least one Delaware federal or state court remain available as a forum (a de facto prohibition on mandatory arbitration).

- Paul S. Atkins, the current SEC Chair, delivered a speech in Delaware urging the state to allow mandatory arbitration of federal securities law claims, and citing the negative effects of "litigation costs that abusive lawsuits impose on companies franchised in Delaware."[4] Noting that SB 95 became law prior to the recent SEC policy statement and at a time when the SEC's views on mandatory arbitration may have been different, Atkins asked that, with the added clarity from the SEC, the Delaware legislature revisit its prohibition of mandatory arbitration with respect to federal securities law claims and "help Delaware be a leader in the reform of securities litigation." Delaware has not yet responded to Atkins' comments, notwithstanding his pointed observation that recent actions suggest that Delaware is "uninterested in reform" and the state seems to embrace "litigation costs that abusive lawsuits impose on companies" in Delaware.

Potential Benefits and Drawbacks

Mandatory arbitration clauses may offer benefits to issuers, including:

- Reduced litigation risk: By limiting the ability of investors to bring class action lawsuits, issuers may be able to reduce their litigation risk and avoid costly and time-consuming litigation. Removing a class action lawsuit from the suite of available remedies may have the broader effect of eliminating the risk of certain types of litigation normally made viable only through class action and the magnitude of aggregated losses.

- Increased efficiency: Arbitration may provide a more efficient and streamlined process for resolving disputes, potentially reducing the time and cost associated with litigation.

However, there are also potential drawbacks to consider, particularly for investors:

- Limited access to recourse: Mandatory arbitration clauses can restrict the ability of investors to seek redress and leave them with limited recourse through arbitration. Mandatory arbitration and the removal of the class action lawsuit would impose additional obstacles on a plaintiff's ability and desire to pursue claims on an individual basis and would impact the willingness to incur legal costs without the prospect of larger damages generally reserved for class settlements and judgments (common in claims for breaches of federal securities laws).

- Lack of transparency: Arbitration proceedings may be confidential, making it difficult for investors to understand the basis for any decisions or to anticipate or rely on prior determinations.

Conclusion

The SEC's policy statement marks a significant shift in the regulatory landscape, potentially paving the way for the increased adoption of issuer-investor mandatory arbitration clauses in issuers' organizational documents. While there are potential benefits to such clauses, there are also concerns about their impact on investor protection and access to recourse.

The public's reaction to the SEC's policy statement has been mixed, with some commentators suggesting a phased implementation that initially applies only to new securities offerings or sunset provisions that allow future reconsideration of the policy. Glass Lewis' 2025 Benchmark Policy Guidelines, which was published before the SEC's policy statement, states that it "may recommend that shareholders vote against the chair of the governance committee, or the entire committee, where the board has amended the company's governing documents to reduce or remove important shareholder rights, or to otherwise impede the ability of shareholders to exercise such right, and has done so without seeking shareholder approval. Examples of board actions that may cause such a recommendation include: . . . the adoption of provisions that limit the ability of shareholders to pursue full legal recourse — such as bylaws that require arbitration of shareholder claims." ISS' 2025 Proxy Voting Guidelines does not address mandatory arbitration provisions. It remains to be seen whether Glass Lewis or others will amend their views on mandatory arbitration provisions in light of the SEC's policy statement. Thus, initial adopters of these mandatory arbitration clauses must be calculated in their approach.

If the use of mandatory arbitration clauses becomes more widespread, it will be important to monitor their impact, institutional investors' response to their use, and additional legislation and court decisions setting boundaries on or regulating their implementation. Additionally, Delaware could find itself at the center of an eventual clash between state and federal law on mandatory arbitration provisions and the ability of a state to require claims be brought in its courts, and as a result, Delaware may have to contend with the positions of the FAA, *Conception* and its progeny, and the SEC.

[1] Proposed LPA, § 16.9 (available as Appendix A to the Amended Registration Statement on Form S-1 filed on January 10, 2012).

[2] *See* Tex. Civ Prac & Rem Code, § 171.001 (2025) (stating generally that a written agreement to arbitrate is valid and enforceable if the controversy arises between the parties after the date of the parties' agreement, with a company's organizational document constituting an agreement under state law).

[3] *See* Nev. Rev. Stat. § 78.046 (2025) (permitting a corporation to prescribe a forum or venue, which, for internal actions, must include at least one court in Nevada, but specifying that the law is applicable to the extent not inconsistent with any applicable jurisdictional requirements and the laws of the United States and "must not be interpreted as prohibiting any corporation from consenting . . . to any alternative forum in any instance.").

Delaware Chancery Court Distinguishes Remedies for Purchase Price Adjustments From Indemnification Claims in M&A Deals


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I. Introduction

The Delaware Chancery Court's decision in *Northern Data AG v. Riot Platforms, Inc.* erects a dividing line between post-closing purchase price adjustments ("PPA"s) evaluated by an accounting expert and representation and warranty claims reserved for indemnification. The Court confirmed that where the parties' agreement requires an expert to resolve purchase price disputes "in accordance with GAAP," GAAP serves as the governing baseline, and the Court will defer to the expert's determination. But when a dispute implicates legal questions about pre-closing facts and contractual representations and warranties, those issues cannot be shoehorned into the PPA process. The Court accordingly upheld the expert's determinations on two GAAP questions and vacated the expert's determinations on two indemnity issues that the Court held were outside the expert's authority.

II. Background

Northern Data AG, a German stock corporation that develops and operates computing infrastructure, was the owner of Whinstone US, Inc., a Delaware corporation that builds and runs data centers. In 2021, Riot Platforms, Inc., a Nevada-based Bitcoin mining company, along with its financial advisor Ernst & Young ("EY"), began exploring a potential acquisition of Whinstone from Northern Data. Whinstone and its advisors worked with EY and Riot towards this acquisition in early 2021 until the parties signed a Stock Purchase Agreement ("SPA") on April 8, 2021. Riot's acquisition was for a mix of stock and cash. The stock consideration was the dominant component and the cash consideration was subject to a post-closing true-up.

The PPA procedure was contained in Article II of the SPA, and provided for adjustments based on working capital, indebtedness, cash and transaction expenses. As is customary, the PPA procedure required Northern Data, as seller, to deliver an "Estimated Closing Statement" prior to the closing, on which Riot paid the initial purchase price, and Riot, as buyer, was required to deliver a "Proposed Final Closing Statement" after the closing, on which the cash consideration would be adjusted. Both the "Estimated Closing Statement" and the "Proposed Final Closing Statement" were to be prepared in accordance with GAAP, consistent with an illustrative closing statement attached as an exhibit to the SPA, which exhibit reflected the target company's historical practices. The buyer's delivery of the final closing statement would trigger a period for the seller to review the acquired company's financials and supporting information and state any objections. Any disputes that arise during this process that the parties could not resolve themselves would be submitted to an independent accounting expert who would act "as an expert and not as an arbitrator," and would make determinations "in accordance with GAAP." However the SPA made clear that the PPA process would not apply to representation and warranty related disputes, which were covered by an indemnification procedure with a damages cap, as provided in Article IX of the SPA. The SPA provided that the indemnification provisions were the "sole and exclusive" remedy for breach of representation and warranty claims.

After closing, Riot submitted a Proposed Final Closing Statement. Northern Data timely served a Statement of Objections, and the parties ultimately submitted disputes to an accounting expert. The expert resolved four disputed items in Riot's favor. Northern Data sued to vacate the expert's determinations.

III. The Court's Decision

The Court adopted a bifurcated standard of review consistent with the SPA's mandate that the independent accountant would act "as an expert, not an arbitrator," and thus, under Delaware Supreme Court precedent, the expert's authority is "limited to its mandate to use its specialized knowledge to resolve a specified issue of fact." *Terrell v. Kiromic Biopharma, Inc.*, 297 A.3d 610, 618 (Del. 2023). Thus, to the extent the expert was using his authority to resolve a factual dispute within his area of expertise, his decisions would be upheld subject to a manifest error standard, while any legal questions (including scope of the expert's authority and the characterization of a dispute as an indemnification claim) were subject to de novo review by the Court.

The four disputed items split into two categories:

- Disputed Items 2 and 3: GAAP revenue recognition for upfront payments under hosting arrangements with a key customer.
- Disputed Items 1 and 4: Pre-closing receivables and liabilities implicating accuracy of seller's representations, including the validity of accounts receivable and disclosure of indebtedness.

On Disputed Items 2 and 3, the Court upheld the expert's determinations. The core issue was whether "engineering services" were distinct performance obligations from "hosting services" under Accounting Standards Codification (ASC) 606. The expert concluded they were not distinct and, as a result, the upfront payments were properly recognized in accordance with GAAP as deferred revenue to be amortized over the hosting term. According to Riot (and the Court agreed) the SPA's directive to resolve disputes "in accordance with GAAP" placed GAAP at the top of the hierarchy; the illustrative closing statement and historical accounting practices served to narrow the choice among acceptable GAAP methods only where GAAP permitted discretion. Because the expert concluded GAAP left only one acceptable treatment, his determination was within his authority and not the product of manifest error according to the Court. The Court's approach is consistent with other cases in which the Court had found that GAAP compliance operated as a "floor" and factors such as historical or illustrative practices operated only to select among GAAP-compliant alternatives. *See ArchKey Intermediate Holdings, Inc. v. Mona*, 302 A.3d 975 (Del. Ch. 2023).

On Disputed Items 1 and 4, the Court vacated the expert's determinations. Both disputes turned on whether Northern Data's pre-closing financial representations were accurate: one addressed whether an invoiced receivable had already been satisfied (double-billing), and the other concerned whether a pre-closing electricity liability should have been recognized as such. Both items directly implicated provisions in Section 4 of the SPA which stated that the seller and acquired company accurately represented their accounts receivable and indebtedness. According to the Court, both Disputed Item 1 and 4 involved pre-closing activities or statements, not changes in the target company's business between signing and closing of the SPA. Only the latter type of dispute was subject to the PPA procedure and expert review. The Court held that Disputed Items 1 and 4 therefore raised legal questions of whether the parties complied with their representations and warranties, a determination outside the authority of the accounting expert. The Court recognized that Section 9.7 of the SPA required all representation and warranty issues, such as Disputed Items 1 and 4, to be resolved exclusively through the indemnification provisions. Not only did the agreement state explicitly that indemnification was the sole remedy for these disputes, but funneling them into the PPA procedure for accounting disputes would also render the indemnification damages cap meaningless which the Court found further supported its conclusion.

The Court thus entered summary judgment: for Riot on Items 2 and 3 (expert determinations stand), and for Northern Data on Items 1 and 4 (expert exceeded authority; determinations vacated).

IV. Takeaways

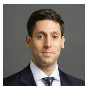
Keep PPA and indemnification lanes separate. The Chancery Court's decision highlights the importance for M&A deal parties of clearly defining and demarcating post-closing remedies. The Court has recognized the distinction between pre-closing disputes (or disputes related to pre-closing factual items) and post-closing matters as a meaningful dividing line between methods of dispute resolution and has made it clear that it will not blur that line. Should parties desire, for any reason, to apply indemnification provisions to post-closing disputes or otherwise permit the pre- and post-closing provisions of a deal to cross this line, they must make their intentions very clear in the governing contract. What is more, even where disputes involve accounting matters, the Court indicated that if those issues related to representations and warranties, the PPA process cannot be invoked unless the operative agreement expressly permits it. A place for everything, and everything to its place, the Court seems to say, as the line drawn in *Northern Data* is strict and straightforward. The remedies for each phase of the deal must be clearly drafted with only the predicate acts applicable to them in mind.

Courts will still have a voice. The *Northern Data* decision is a reminder that the courts will retain a strong presence in resolving disputes even where parties utilize accounting experts under PPAs. While accounting experts remain useful and viable options for resolving issues within their area of expertise, the Court reminded parties that the authority of an expert cannot be expanded to encompass any matter which tangentially touches on the subject matter of their review. However, the Court also acknowledged that arbitrators are experts often chosen to resolve legal disputes. To the extent deal parties would like to avoid the formalities and expenses of a courtroom, it may be prudent to provide for both accounting experts and arbitrators in the PPA. What parties may not do is sweep non-accounting disputes or pre-closing disputes into the limited purview of an accounting expert.

If GAAP governs, GAAP governs. The Court also signaled to deal parties that where they invoke the guardrails of GAAP in guiding accounting experts' review, those standards will be given deference by the courts unless otherwise specified. The Court did not prohibit parties from deciding for themselves that one party's historical practice or particular financial and accounting practices should be the guiding light for accounting experts. However, the Court was clear that where GAAP is invoked without clear language to the contrary, courts will require compliance with GAAP above all else. Going forward, parties should carefully negotiate the desired accounting principles applicable to a transaction.

The headline of the Court's decision seems to be that deal parties should be very aware of the line between pre- and post-closing matters and take care in drafting any unique or customized alterations to the traditional deal structure. Additionally, the Court will not surrender its role to arbitrators and accounting experts; there is still a place for judicial review and parties that wish to avoid the expense of that process should think carefully about how they choose to do so.

Nasdaq Proposes Increased Standards for Initial and Continued Listing



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The Nasdaq Stock Market LLC (Nasdaq) recently filed new rule proposals (SR-NASDAQ-2025-068 and SR-NASDAQ-2025-069) with the Securities and Exchange Commission (SEC) which, per Nasdaq, provide "enhancements to its initial and continued listing standards" and reinforce "its long-standing commitment to capital formation while ensuring investor protection and upholding market integrity."

The proposals (1) add to initial listing requirements by increasing the minimum required public float in certain instances, (2) provide for an accelerated process for suspending and delisting companies if minimum market values are not maintained and (3) impose a minimum proceeds requirement for new listings of Chinese companies.

Initial Listing Requirements: Under the new proposed rules, companies that seek to be listed under the net income standard on the Nasdaq Capital Market or Nasdaq Global Market (the lower two of the three Nasdaq tiers) now must have a Market Value of Unrestricted Publicly Held Shares (MVUPHS) of at least $15 million. Previously, companies pursuing initial listing under the net income standard needed only $5 million of MVUPHS for the Nasdaq Capital Market or $8 million for the Nasdaq Global Market.

To be listed, companies must meet the required criteria under one of three standards for Nasdaq Capital Markets: income (based on the company's net income from continuing operations); market value (based on the market value of its listed securities); or equity (based on stockholders equity and operating history). Nasdaq Global Market also includes a fourth option, a total assets/total revenue standard. The proposed rules would more closely align the income standard with the minimum public float requirements for applicants seeking to list under the equity standard, the market value standard or the total assets/total revenue standard (each of which also imposes a minimum MVUPHS of $15 million for Nasdaq Capital Market and for Nasdaq Global Market requires $18 million for the equity standard and $20 million for the market value or total assets / total revenue standards).

Per Nasdaq, the MVUPHS is a core liquidity requirement, meant to "ensure that there is sufficient liquidity to provide price discovery and support an efficient and orderly market for the company's securities." Nasdaq has proposed increasing the minimum MVUPHS under the income standard to help address concerns it has observed with the trading of smaller companies and because "Nasdaq believes that the MVUPHS is an indicator of liquidity and does not believe it is appropriate to require such a significantly lower liquidity threshold for companies simply because they have a minimum level of net income, as opposed to equity or market value."

Continued Listing Requirements: The proposed rules also provide for suspension from trading and immediate delisting for any company that is noncompliant with any of the continued listing requirements in Rule 5450 or Rule 5550 (*e.g.*, minimum bid price, total holders, total shares, number of market makers and other requirements) and whose listed securities fall below $5 million in market value for 10 consecutive business days.

Nasdaq rules have minimum requirements for companies to remain listed and generally offer grace periods to companies that fail to maintain compliance with those rules. The proposed rules would remove the compliance period available to Nasdaq-listed companies to the extent that, at the time of such noncompliance, the market value of such company is also depressed below $5 million.

Per Nasdaq, "the compliance periods are designed to allow time for companies to take action to come back into compliance" to address "temporary" business issues or market conditions. Currently, companies that fall out of compliance with continued listing requirements can submit a plan of compliance for staff review. However, in its proposed rule, Nasdaq expressed a belief that "once the market identifies significant problems in a company otherwise deficient in the listing standards by assigning a very low market value, that company is no longer appropriate for continued trading" and the challenges facing such companies are not temporary.

China-Specific Requirements: Nasdaq also proposed a new rule aimed at companies headquartered or incorporated in, or whose business is principally administered in, China. The proposal would require that to be listed on Nasdaq, Chinese companies must offer securities in a firm commitment initial offering that will result in gross proceeds of at least $25 million.

In its proposed rule, Nasdaq noted that it has identified concerns with the trading of Chinese companies, identifying that "70% of the matters that Nasdaq has referred to the SEC or FINRA since August 2022 have been related to trading in Chinese companies. . .Nasdaq believes that these concerns are due, in part, to low liquidity in these companies' securities." The new listing requirements for Chinese companies "are intended to increase investor protections and ensure sufficient liquidity exists for meaningful price discovery" to further support investor confidence.

If the proposed rule is approved by the SEC, Nasdaq is proposing to implement the changes to the initial listing requirements promptly, but will give companies that have already taken steps to commence an initial listing 30 days to complete the process under the prior standards, and thereafter all new listings will have to meet the new requirements. Nasdaq intends to implement the new accelerated process for suspending and delisting companies 60 days after SEC approval.

Antitrust Agency Enforcement Round-Up: September/October 2025

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The Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC" or the "Commission") have been shut down as of October 1 for all but ongoing litigation and time-sensitive matters because of the federal budget impasse; prior to the shutdown, the FTC announced a few interesting enforcement actions that we believe attempt to advance the law towards a more aggressive interpretation of Section 5 of the FTC Act and Section 7 of the Clayton Act.

A. Hart-Scott-Rodino Act / Merger Notification Filings and Antitrust Investigations Status During Government Shutdown

The premerger notification offices of both the FTC and the DOJ are open and accepting Hart-Scott-Rodino merger notification filings; the statutory deadlines for review of those filings – generally 30 days – has not been tolled by the budget impasse. However, parties to transactions likely will find some delays in the review of their new merger notification filings as the agency staff will be pulled off of furloughed status to work on time-sensitive matters. Existing merger investigations continue, but at a substantially reduced pace, unless the parties have informed the staff that they expect to close the transaction consistent with the HSR Act's statutory review deadlines regardless of the status of the agencies' investigations.

Non-merger investigations do not have any statutory review periods, so such investigations are significantly slowed. The agency leadership can determine that certain investigations are essential and call staff back from furlough to continue to work during the shutdown. This may happen, for example, if the statute of limitations on bringing an antitrust claim is about to run out, or if a delay in bringing an enforcement action will result in significant additional harm to the public.

B. FTC Challenge to Partnership Agreement That Allegedly Dismantles Competitor

The FTC seeks to enjoin a "partnership agreement" between **Zillow Inc.** and **Redfin Corporation** that, in exchange for a $100 million payment and future compensation, "dismantle[d] Redfin as a competitor in the market for internet listing services" and facilitated the transfer of certain of Redfin's assets – business contracts, customer relationships and personnel – to Zillow. Zillow and Redfin also agreed for Redfin to serve "as an exclusive syndicator of Zillow listings" in exchange for additional compensation. The FTC alleges a violation of both Section 1 of the Sherman Act (an illegal agreement in restraint of trade) and of Section 7 of the Clayton Act (an anticompetitive acquisition of assets). *FTC Sues Zillow and Redfin Over Illegal Agreement to Suppress Rental Advertising Competition* (Sept. 30, 2025).

The FTC is arguing that "employees" of Redfin are "assets" of Redfin. If it is successful in making this argument, it will allow for the development of case law and Commission practice that the Commission (or DOJ) can use to challenge so-called "acqui-hire" transactions (especially in, but not limited to, the tech space) as anticompetitive and subject to challenge under either or both Section 1 and Section 7. Commentators have suggested that the antitrust labor exemption may preclude a Sherman Act Section 1 (restraint of trade) or Section 7 (anti-merger) challenge to acqui-hires, although there is no case law supporting this point. 15 U.S.C. § 17 holds that human labor is not a "commodity or article of commerce." (This was intended to protect union activity from challenge under the Sherman Act as an agreement in restraint of trade.) The partnership agreement is also especially vulnerable to a Section 1 claim because it does not clearly integrate the companies by "pool[ing] capital or resources or shar[ing] risks" but, as pled by the FTC, looks like a market allocation agreement.

Acqui-hires are not subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Act. Thus, the acquisition of personnel and non-exclusive rights to intellectual property can effectuate, in practice, the acquisition of a company without pre-closing antitrust review. The antitrust agencies are very concerned about this practice and are looking to develop a basis for requiring such transactions to fall under the reporting requirements of the HSR Act. The challenge to the **Zillow/Redfin** transaction provides the opportunity for the Commission to develop this area for future enforcement actions.

C. Interlocking Directorate Enforcement

Section 8 of the Clayton Act prohibits individuals from simultaneously serving as directors or officers at two competing companies. The Biden Administration was active in investigating and remedying such interlocks. The Trump Administration is continuing this enforcement priority. In September, the FTC announced the resignation of three (unnamed) board members of Sevita Health. Each of the resigning individuals served as a director of both Sevita Health and Beacon Specialized Living Services. Both companies offer residential services for individuals with intellectual and developmental disabilities. In announcing the resignations, the FTC encouraged companies to proactively audit board memberships, particularly when private equity investors or new stockholders obtain new board seats. *Three Directors Resign from Sevita Board of Directors in Response to the FTC's Ongoing Enforcement Efforts Against Interlocking Directorates* (Sept. 15, 2025).

Interlocked companies – not only the directors or officers who violate Section 8 – are also liable for violations of Section 8. Although the penalty for violating Section 8 is to break the interlock, shareholders of one or both interlocked companies have, acting as private plaintiffs, filed "derivative" suits challenging the interlocked board's failure to comply with Section 8. Some have been settled by the affected companies for modest financial settlements.

With the antitrust agencies' continued interest in unwinding interlocks, it is good practice for compliance departments to audit the board and officer positions of their directors and senior officers annually to avoid falling into a violation through inattention. Interlocks that at one time were exempt from the prohibition – because of the *de minimis* exceptions – can develop as one or both interlocked companies expand into new markets or achieve greater sales in existing markets. Notably, the definition of "competitors" used in Section 8 matters is interpreted more broadly than in merger matters. Merger challenges under Section 7 of the Clayton Act tend to define antitrust markets narrowly; review of interlocks under Section 8 of the Clayton Act tends to define antitrust markets with less precision and into broader categories. Additionally, the FTC and the DOJ recently have taken the position that "board observers" fall within the prohibitions of Section 8.

For more guidance on the FTC and DOJ efforts to enforce the prohibition against interlocked boards, *see FTC & DOJ: Board Observers Are Subject to the Antitrust Laws' Prohibition on Interlocking Directorates* (Jan. 2025); *Trump Administration Likely to Continue Biden Administration's Efforts to Identify and Remediate Interlocking Directorates* (*Competition Close-Up*, Jun. 2025); and *The Biden Administration's Extensive Review of Interlocking Directorates Across the Entire Economy May Put Your Board Representation at Risk* (May 2024).

D. Challenge to Non-Compete Agreement

The Commission has acceded to the vacatur of the Non-Compete Clause Rule (as held in *Ryan LLC v. Federal Trade Commission*, 746 F. Supp. 3d 369 (2024) and, consistent with the FTC's request, two appellate courts have dismissed the Commission's earlier challenges to decisions preventing enforcement of the Non-Compete Clause Rule. Notwithstanding the Commission's dismissal of its appeals of the unfavorable decisions, FTC Chairman Andrew Ferguson indicated that the Commission will "protect American workers by . . . patrolling . . . markets for specific anticompetitive conduct that hurts American . . . workers and taking bad actors to court." Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, Ryan LLC v. FTC, at 3 (Sept. 5, 2025).

Consistent with this continuing interest, in September 2025 the FTC:

1. Challenged Gateway Services' use of employee non-compete agreements across its pet cremation business, alleging that the company's requirement that all employees (except those in California) agree to a 12-month, post-employment covenant not to compete was an unfair method of competition and is prohibited by Section 5 of the FTC Act. The Commission's proposed Order addressing its complaint prohibits Gateway from entering into, maintaining, or enforcing (or threatening to enforce) certain non-compete agreements and, among other things, prohibits Gateway from preventing certain employees from "soliciting current or prospective customers" except with respect to those current or prospective customers with whom the employee had direct contact with or personally provided service in the last 12 months of his or her employment. *The Commission's enforcement action in this matter parallels the perspective of the Biden Administration's challenge to non-compete agreements under a very expansive interpretation of FTC Act Section 5's prohibition on unfair methods of competition.*

2. Encouraged "members of the public including current and former employers restricted by noncompete agreements, and employers facing hiring difficulties due to a rival's noncompete agreements . . . to share information" with the FTC to "*uproot the worst offenders and restore fairness to the American labor market*" (emphasis added). Federal Trade Commission Issues Request for Information on Employee Noncompete Agreements (Sept. 4, 2025). In support, the Commission released an extensive request for information on the use of non-competes "to understand which specific employers continue to impose noncompete agreements." Request for Information Regarding Employer Noncompete Agreements (Sept. 4, 2025). (Responses to the request are due no later than November 3, 2025, and are not affected by the government shutdown.)

3. Issued warning letters to "several large healthcare employers and staffing firms urging them to conduct a comprehensive review of their employment agreements – including any non-competes or other restrictive agreements – to ensure they are appropriately tailored and comply with the law." FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies (Sept. 10, 2025).

4. Announced a workshop by the FTC's Labor Task Force to "highlight the negative impact of non-compete agreements on American workers and put businesses on notice of [the Commission's] enforcement priorities." FTC Announces Workshop on Noncompete Agreement (Sept. 17, 2025). The workshop was originally scheduled for October 8 but likely will be rescheduled when the government is reopened.

We suggest that employers using non-compete agreements review the scope and breadth of those agreements to confirm that they are consistent with applicable law, including the Commission's interpretation of Section 5 of the FTC Act, which prohibits the use of unfair methods of competition.

See The Federal Trade Commission "Strongly Encourage[s] All Employers . . . to Review Their Contracts Closely, to Ensure That Any Restrictions on Employee Mobility Are in Full Compliance with the Law" for a more detailed discussion of the Gateway Services enforcement action and the analysis which the FTC Commissioners are applying to evaluate the legality of employee non-compete agreements.

Proposed Spin-Off Regulations Withdrawn After Enduring a Barrage of Bar Association Bullets


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In a terse notice released on September 29, the IRS and Treasury Department announced that they would withdraw the controversial proposed regulations governing spin-offs, split-offs and reorganizations that were released earlier this year.

The withdrawal of the proposed regulations was not unexpected and had been previewed by Treasury officials back in May. As discussed previously in *Brass Tax*, these proposed regulations received significant criticism—rightly, in our view—from the corporate tax bar, which described them as overbroad and overly rigid. The IRS and Treasury directly cited this criticism as the reason for withdrawing the regulations.

The proposed regulations would have significantly restricted taxpayers' ability to enter into tax-free transactions involving multi-stage spin-off and split-off transactions, transactions in which the distributed company assumes debt from its parent, and debt-for-debt and debt-for-equity exchanges facilitated by an investment bank or similar financial institution. Those substantive restrictions were paired with an extensive set of compliance standards for tax-free transactions, imposing new disclosure and documentation requirements not only for the kinds of complex separation transactions described above, but also for much more straightforward spin-off transactions and (apparently) even acquisitive reorganization transactions, such as corporate mergers.

Both the substantive and procedural proposed regulations were withdrawn by the September 29 notice. Additionally, on the same day, the IRS issued Revenue Procedure 2025-30, effectively repealing guidance that was issued last year for taxpayers seeking private letter rulings on spin-off transactions and reinstating the guidance originally provided in 2017 and 2018.

The withdrawal of these proposed regulations still leaves a number of open questions regarding the IRS's posture toward spin-offs, especially transactions entailing more complex features. While the proposed regulations' approach to more sophisticated spin-off deals was widely viewed as too restrictive, even many of their critics acknowledged the desirability of (more reasonable) guidance in a few specific areas relating to those transactions. It is possible that the IRS may follow up with narrower guidance targeting those specific areas, but so far there is no indication as to if, or when, that may occur.

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