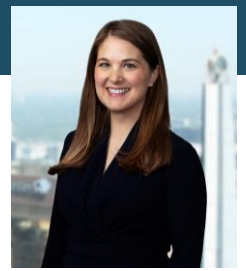

Vinson&Elkins
Navigating
Fifth Annual Navigating Annual Meeting and Reporting Season Program
November 12, 2025

Today's Panelists



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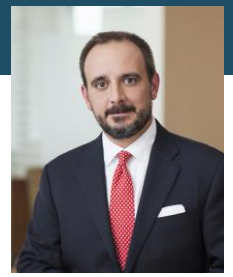

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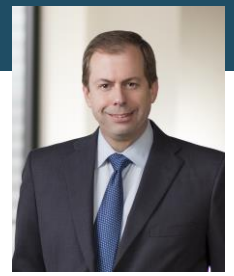

Robert Kimball
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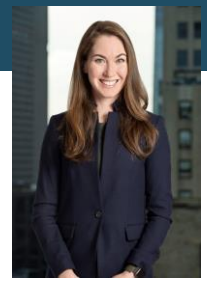

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Presenters:

Robert Kimball, V&E
Mike Telle, V&E

Regulatory Backdrop

- President Trump has publicly favored **significant deregulation**, reducing compliance burdens on corporations, prioritizing capital formation and rolling back rules implemented during the Biden administration

- Key aspects of this approach include:
  - **Deregulatory Directive** – “10-to-1” deregulation initiative (eliminating 10 existing regulations for every new one issued) and requiring independent agencies, including the SEC, to seek White House approval for new rulemaking
  - **New Leadership and Priorities** – SEC Chair Paul Atkins and other Republican commissions advocate for a “pro-business shift” and return to the SEC’s “core mission” of investor protection, fair markets and capital formation, while curbing perceived enforcement overreach
  - **Targeting Biden-Era Rules** – The current administration is actively working to abandon or scale back numerous rules finalized under former SEC Chair Gary Gensler, including Climate Disclosure Rules and ESG Initiatives
  - **Speeches and Interpretive Guidance** – SEC Chair Paul Atkins has recently spoken on the SEC’s willingness to reconsider whether precatory proposals are proper subjects for action by shareholders. Also, promulgated SLB 14M which rescinded SLB 14L making exclusion of certain shareholder proposals easier.

Regulatory Backdrop

- **Shift in Enforcement** – SEC is moving away from aggressive “regulation by enforcement” approach in areas like crypto, ESG and cybersecurity. The focus is expected to narrow to “bread and butter” securities fraud cases, such as insider trading and accounting fraud and matters that undermine investor confidence.

- **Capital Raising and Innovation** – Promoting initiatives to facilitate capital formation, including potentially broadening the “accredited investor” definition, easing restrictions on smaller companies and exploring a move away from mandatory quarterly reporting

- In essence, the Trump administration seeks to **reduce the regulatory burden** on businesses and provide a more predictable and less interventionist regulatory environment at the SEC

Executive Orders & Related Considerations for Public Disclosures

Tariffs & Trade Policies

❑ Reciprocal Tariffs

- Effective April 5, 2025, a 10% baseline tariff was imposed under the IEEPA on imports from all countries
  - On April 9, 2025, President Trump suspended the baseline tariffs for all countries other than China for 90 days, which was later extended until August 1, 2025. On July 31, 2025, President Trump released new reciprocal tariff rates that became effective on August 7, 2025
  - On November 5, 2025, the Supreme Court heard oral arguments challenging the validity of the reciprocal tariffs.

❑ Steel and Aluminum Tariffs

- Effective March 12, 2025, President Trump lifted exemptions from tariffs on steel and aluminum imports and issued new 25% tariffs under Section 232 of the Trade Expansion Act of 1962, which were doubled to 50% in June 2025

More than 80% of all publicly traded companies include tariff risk factors in their annual and quarterly reports. The rapidly changing nature of tariffs and other trade policy, including delayed effects from implementation, require careful consideration in drafting risk factor disclosures.

Shareholders have begun to file lawsuits against companies based on their risk factor disclosures for allegedly misleading or omitting material information that (i) overstated the company's ability to mitigate the effect of tariffs and (ii) understated the negative effects of tariffs on the company's business and financial condition.

Diversity, Equity & Inclusion

❑ Developments in DEI Disclosure

- The Fifth Circuit vacated the SEC's approval of Nasdaq board diversity disclosure rule in late 2024
- Proxy advisors have pared back recommendations based on diversity metrics
- President Trump issued a series of executive orders targeting DEI initiatives and illegal discrimination during his first 100 days in office

❑ Trends and Potential Considerations

- Generally, references to DEI decreased in frequency in both Form 10-Ks and proxy statements
- Companies are still required to describe their human capital resources, though many companies have scaled back, relocated or even eliminated their focus on DEI-related initiatives in this section of the Form 10-K
- Risk factors continue to account for DEI-related issues
- Proxy statements must still describe the nominating committee's process for identifying and evaluating director nominees, including whether and how the nominating committee considers diversity in identifying director nominees

Shift from Quarterly to Semiannual Reporting?

❑ President Trump signaled an interest in moving from a quarterly reporting schedule to a semiannual reporting schedule

- Prior to 1970, publicly traded companies reported on a semiannual basis
- In his first term, President Trump directed the SEC to consider reinstating semiannual reporting requirements, and the SEC issued a request for comment, though no rule was formally proposed
- In late September, the SEC indicated it would prioritize President Trump's proposal

❑ Implications for shifting to a semiannual reporting schedule:

- Investors are likely to continue to push for earnings reports on a quarterly basis, while quarterly earnings releases and calls may become the key focus for investors seeking transparency
- Form 8-Ks may end up filling in gaps between reports in much the same way as they do under the current reporting regime
- Companies may need to reassess their insider trading policies and trading windows to align with any new reporting periods

SEC Operational Status

❑ The SEC is currently operating in accordance with the agency's plan for operating during a government shutdown.

- **EDGAR**. EDGAR will accept registration statements and other filings during the shutdown.
- **Registration Statements and IPOs**.
  - The SEC staff are unable to review registration statements or declare them effective, and cannot grant a request for acceleration of the effective date of pending registration statements during the shutdown.
  - A company can remove the "delaying amendment" that is used to postpone effectiveness until the SEC has review and accelerated the filing by including the language – *"This registration statement shall hereafter become effective in accordance with the provisions of section 8(a) of the Securities Act of 1933."*
  - Ordinarily, the registration statement must also include all information required by the form, including the price of the securities to be sold. However, SEC staff indicated companies can rely on Rule 430A in order to launch an IPO with a price range on the cover of the registration statement and update the offering price in the final prospectus after the registration becomes effective.
  - Shelf takedowns can proceed using a prospectus supplement without needing to be declared effective by SEC staff.
- **Preliminary Proxy Statements**. It is not necessary to receive a response from SEC staff regarding a preliminary proxy statement or preliminary information statement before filing the definitive materials.
- **No-Action Requests and Interpretive Guidance**. The SEC will not provide a response to Rule 14a-8 no-action requests and other requests for written or oral guidance on legal and interpretive questions during the shutdown.
- **Business Days**. Days during which the government is shut down are considered "business days" for purposes of rules involving day counting.

Required Changes Since Last Form 10-K

Summary Checklist

	Required Changes Since Last Form 10-K
☐	EDGAR Next
☐	Climate-Related Disclosures – ***Stayed***

EDGAR Next

❑ EDGAR Next

- On September 27, 2024, the SEC adopted amendments intended to enhance the security of its EDGAR system and improve filers' access and account management capabilities
- The amendments require EDGAR filers to authorize at least two individuals as account administrators and those individuals will need to complete multifactor authentication to access EDGAR accounts and make filings
- Companies using a financial printer to make SEC filings should confirm the printer has been delegated authority to make filings on behalf of the company
- The new dashboard went live on **March 24, 2025,** and new filers are required to complete an amended Form ID reflecting EDGAR Next changes
- Compliance with EDGAR Next is now required to make filings
- Existing filers will continue to obtain access by enrolling on the dashboard until **December 22, 2025**, at which point both new and existing filers must submit an amended Form ID to file and take other actions on their accounts

❑ Get Prepared

- ✓ Train/educate insiders with filing obligations
- ✓ Obtain new login.gov credentials (SEC recommends use of individual (not group) business email account to register)
- ✓ Decide on process changes for disclosure controls
- ✓ Collect EDGAR codes (CIK, CCC and passphrase—not same as password)

Climate-Related Disclosure Rule

❑ Climate-Related Disclosure Rule

- The SEC adopted a final rule to enhance and standardize climate-related disclosures by public companies and in public offerings on March 6, 2024

The SEC voluntarily stayed the final rule pending judicial review. The SEC has since withdrawn its defense of the final rule and requested the Eighth Circuit to rule on the merits. The final rule is unlikely to become effective and will not go into effect while the litigation is pending, and compliance will not be required so long as the voluntary stay remains in place.

Reminders from 2025

Summary Checklist

	Reminders from 2025
☐	Disclosure of Payments by Resource Extraction Issuers
☐	Final SPAC Rules
☐	Beneficial Ownership Reporting Requirements

Disclosure of Payments by Resource Extraction Issuers

❑ Disclosure of Payments by Resource Extraction Issuers

- The SEC adopted final rules on December 16, 2020, to require resource extraction issuers to disclose payments that they (or their subsidiaries or entities under their control) have made to foreign governments or the U.S. federal government for the purpose of the commercial development of oil, natural gas, or minerals
  - Resource extraction issuers are companies that file annual reports on Form 10-K, Form 20-F or Form 40-F and are engaged in the commercial development of oil, natural gas and minerals
  - Covered activities include exploration, extraction, processing and export of oil, natural gas or minerals, or the acquisition of a license for any of the foregoing activities
- The information must be furnished annually on Form SD no later than 270 days following the end of the resource extraction issuer's most recently completed fiscal year
- The next compliance date for calendar year-end resource extraction issuers is **September 28, 2026** (with respect to payments made in 2025)

Final SPAC Rules

❑ Final SPAC Rules

- On January 24, 2024, the SEC approved final rules relating to special purpose acquisition companies (“SPACs”) that require:
  - Disclosure regarding the compensation to the sponsor of the SPAC, conflicts of interest, dilution of shareholder interests, the target company, and fairness of the business combination for both the SPAC IPO and de-SPAC transactions
  - Disclosure in certain situations for the target company in a de-SPAC transaction to be a co-registrant with the SPAC (or another shell company) and thereby assume responsibility for the disclosures in the registration statement filed in connection with the de-SPAC transaction
  - A 20-calendar day minimum dissemination period for prospectuses and proxy and information statements filed for de-SPAC transactions where consistent with local law
  - Re-determination of smaller reporting company status after the completion of a de-SPAC transaction

Any business combination transaction involving a reporting shell company, including a SPAC, will be deemed to be a sale of securities to the reporting shell company’s shareholders. The safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995 will no longer be available in filings by SPACs.

Beneficial Ownership Reporting Requirements

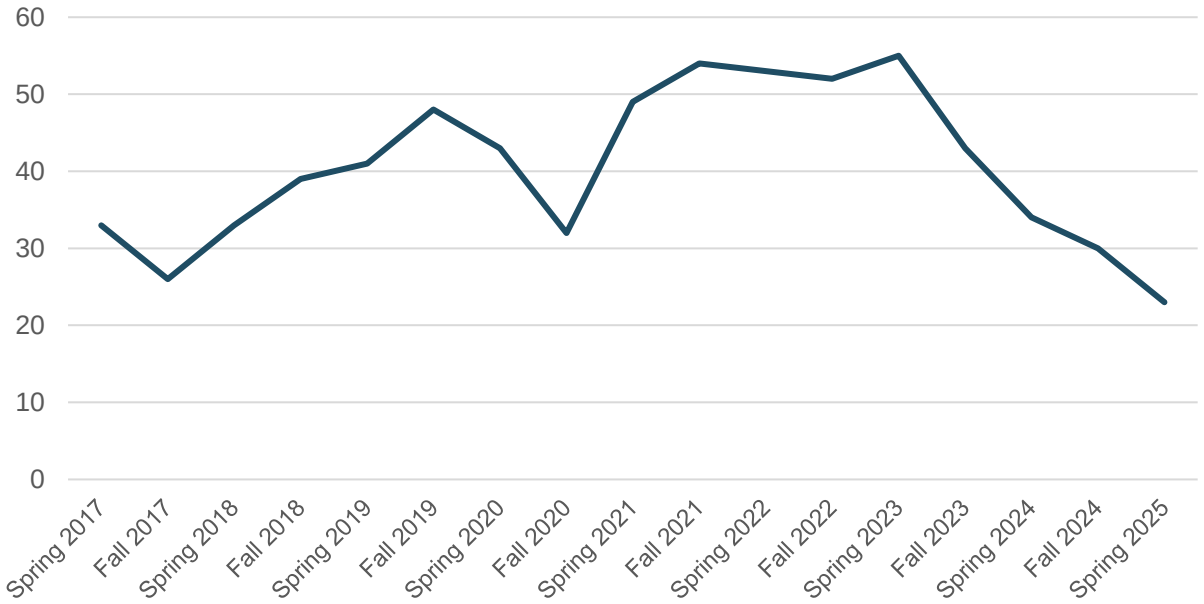
❑ Beneficial Ownership Reporting Requirements

- The SEC adopted amendments to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (“Exchange Act”) on October 10, 2023
- The amendments:
  - Shorten filing deadlines
    - Investors filing a Schedule 13D and Schedule 13G will be required to submit their filings within a shorter timeframe than previously required (*e.g.*, initial Schedule 13D must be filed 5, rather than 10, business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G)
    - New Schedule 13D filing deadlines took effect on **February 5, 2024**
    - Compliance with new Schedule 13G filing deadlines took effect beginning **September 30, 2024**
  - Clarify disclosure requirements
    - Item 6 of Schedule 13D requires disclosure of interests in all derivative securities, including cash-settled derivative securities, that use a covered class as a reference security
  - Require structured, machine-readable language
    - Schedule 13D and Schedule 13G filings must use an XML-based language for quantitative disclosures, textual narratives and identification checkboxes. Compliance became mandatory beginning **December 18, 2024**
  - Include guidance on cash-settled derivatives and group formation
    - When cash-settled derivatives are counted toward the threshold for beneficial ownership
    - What constitutes formation of a group for the purposes of beneficial ownership

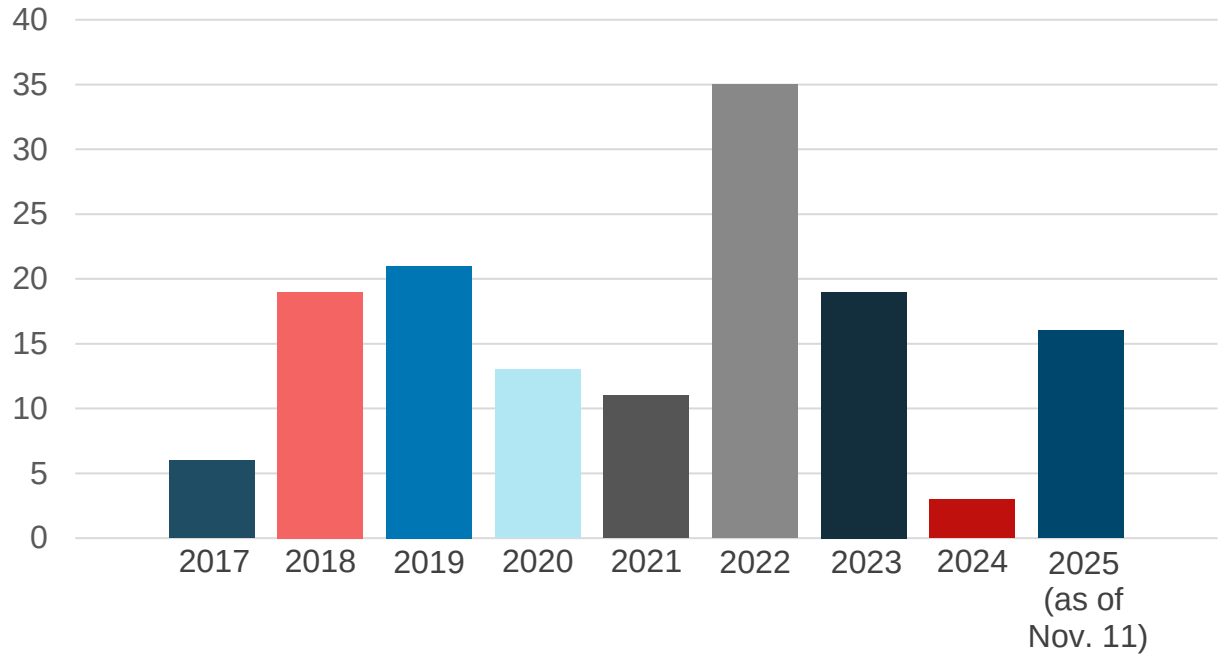
Proposed Rules & Expected Rulemaking

2025 SEC Rulemaking

Number of Rulemaking Activities on the SEC's Regulatory Agenda (Spring 2017 - Spring 2025)



Number of New SEC Rules Proposed (2017 – November 11, 2025)



Summary Checklist

	Advanced Notice of Proposed Rules	Issued	Comment Period Close
☐	Foreign Private Issuer Eligibility(1)	**June 2025**	**September 2025**
☐	Evaluating the Continued Effectiveness of the Consolidated Audit Trail	**October 2025**	**TBA**
	Expected Rulemaking		**Proposed Rule Target**
☐	Rule 144 Safe Harbor(2)		**April 2026**
☐	Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies		**April 2026**
☐	Shelf Registration Modernization		**April 2026**
☐	Rationalization of Disclosure Practices		**April 2026**
☐	Shareholder Proposal Modernization		**April 2026**

(1) Issued as a concept release requesting public comment on various questions related to narrowing the definition of "Foreign Private Issuer."
(2) This rule is a re-proposal of rules initially proposed on January 19, 2021 to amend Rule 144 to expand availability of the safe harbor.

Recent Developments

AI-related Disclosures

- The number of S&P 500 earnings calls using the term “AI” reached an all-time high, with 287 citations in the second quarter of 2025, representing a 32% quarter-over-quarter increase(1)
- AI risks were mentioned in 90% of 2024 10-Ks by S&P 500 companies, and in similar percentages across large-cap companies, representing a nearly 25% year-over-year increase(2)
- Many large-cap companies adding a standalone risk factor of AI-related risks
  - AI risks were often mentioned in other risk factors, such as cybersecurity, intellectual property, human capital management, regulatory risks, competitive risks, and reputational risks
- Companies also commonly disclosed AI-related information in their Business and MD&A sections (particularly as it relates to the integration of AI tools into products, services and operations), as well as in the Cautionary Note Regarding Forward Looking Statements
- The SEC noted in June 2024 that AI is a disclosure priority for the agency, noting that it will consider how companies are describing AI-related opportunities and risks. AI remains a priority for the current administration, with the SEC bringing several enforcement actions in early 2025 for false and misleading statements related to AI capabilities

(1) FactSet, *“Highest Number of S&P 500 Earnings Calls Citing “AI” Over the Past 10 Years,”* (September 5, 2025), https://insight.factset.com/highest-number-of-sp-500-earnings-calls-citing-ai-over-the-past-10-years.

(2) Center for Audit Quality, “Analysis of AI-Related Information in S&P 500 Companies’ 10-Ks,” https://www.thecaq.org/sp-500-and-ai-reporting.

Retail Voting Programs

- On September 15, 2025, the SEC's Division of Corporation Finance issued a no-action concurrence letter to Exxon Mobil Corporation ("Exxon"), confirming that it would not recommend enforcement action if Exxon implements its proposed retail voting program
- The program would allow retail shareholders to opt in to have their shares automatically voted in line with the board's recommendations, and could serve as a blueprint for other public companies
- Retail owners are generally more management-friendly but often fail to vote their proxies for many reasons, including large investments of time for a relatively low prospect of obvious financial return, cumbersome voting rules and a general sense that an individual investor's vote is not as meaningful compared to institutions with a significant share of voting rights
- Key components:
  - Open to all retail shareholders
  - Shareholders must affirmatively opt in
  - Shareholders receive annual reminders of participation
  - Shareholders receive annual proxy materials
  - Shareholders retain the right to vote directly on any proposal, and can override their voting instructions at any time and at no cost
  - Not available to investment advisers registered under the Investment Advisers Act of 1940

Investor Environment, Proposals & Engagement

Presenters:

Jon Solorzano, V&E

Sebastian Tiller, V&E

Jessica McDougall, Longacre Square Partners

Key Developments

- **Changes to 13G eligibility may be altering engagement**
  - Recent SEC Staff guidance treats any investor “pressure” on management to take a specific action—including common ESG or governance requests (or implicit threats about voting intentions)—as potential “influence or control,” terminating 13G eligibility and triggering more onerous Schedule 13D filings
- **Retail Voting Programs – Will they change engagement and activism landscape?**
  - Likely not a fundamental shift, but a unique set of facts that might not fit with most issuers
- **Proxy advisors are in the hot seat and influence may be shifting**
  - Intensified political, regulatory, and issuer-led scrutiny in the U.S. reflects concerns over a perceived duopoly (ISS/Glass Lewis), alleged “ideological overreach,” and outsized influence on polarizing topics, which may change influence
- **The Rise of Y’all Street**
  - The development of Texas Business Courts
  - Benefits of TX domicile
  - New TX laws targeting proxy advisors

Key Takeaways

- **Engagement may continue to be curbed; clear disclosures are more important than ever**
  - Clearly explain changes in compensation structure/ metrics, one-time awards, or use of discretion.
  - Demonstrate responsiveness to vote outcomes by including shareholder feedback, where available, and actions considered/ taken.
- **Enhance director skills matrix and bios to showcase expertise**
  - Review skills matrix for specificity and relevance of current directors for the strategy.
  - Consider disclosing priority skills that will be sought in new directors to showcase thoughtful refreshment.
- **Be aware of changes in voting structures and shareholder base—know your audience and how to contact them**
  - Institutional shareholders have bifurcated their in-house stewardship teams—and more plan to do this in 2026

Key Takeaways

- **Carefully watch uptake of retail shareholder programs to see if support tallies meaningfully change before making commitments to it**
  - Careful to be sure “juice is worth the squeeze” and works for your company
- **A movement away from precatory shareholder proposals could lead to other ways for shareholders to register displeasure**
  - Vote no campaigns might trend up
  - More opaque votes against particular directors may be more difficult to ascertain
- **Retrenchment to “G” issues has been trending for the last couple of years, but will be even more relevant in immediate future**
  - Less polarizing, less prescriptive, and easier to ascribe nearer term linkage to value
  - Expect more focus on issues like director tenure, chair/CEO splits, staggered boards, board refreshment and structural issues perceived to be shareholder unfriendly

Key Takeaways

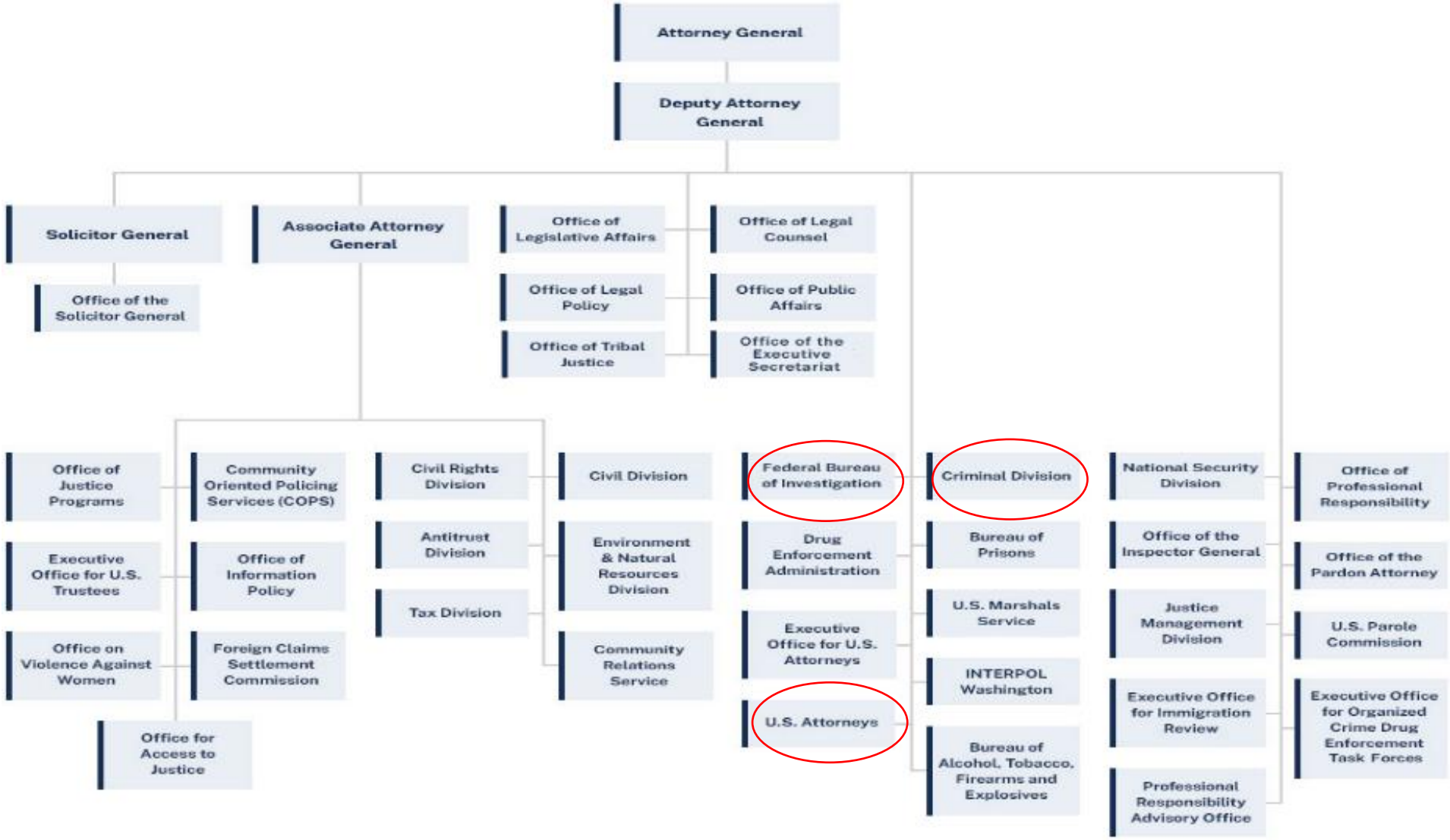
- **As M&A markets continue to heat up again, we will likely also see an uptick in unsolicited or potentially even hostile M&A activity**
  - Activism will continue to be one of the catalysts driving M&A activity
- **Refresh and update strategic plan and financial projections and review with the Board**
  - Strategic plan and projections are benchmarks for any potential M&A transaction
  - Review and consider if company's strategy has been clearly communicated to the market
- **Confirm if portfolio of businesses contribute to overall strategy and improving financial results**
  - Corporate "break-ups" have a become a theme, which many companies are looking at to streamline their business operations
  - If one or two business segment underperform, they may pull and detract from success of other businesses

Government Enforcement & Private Securities Litigation

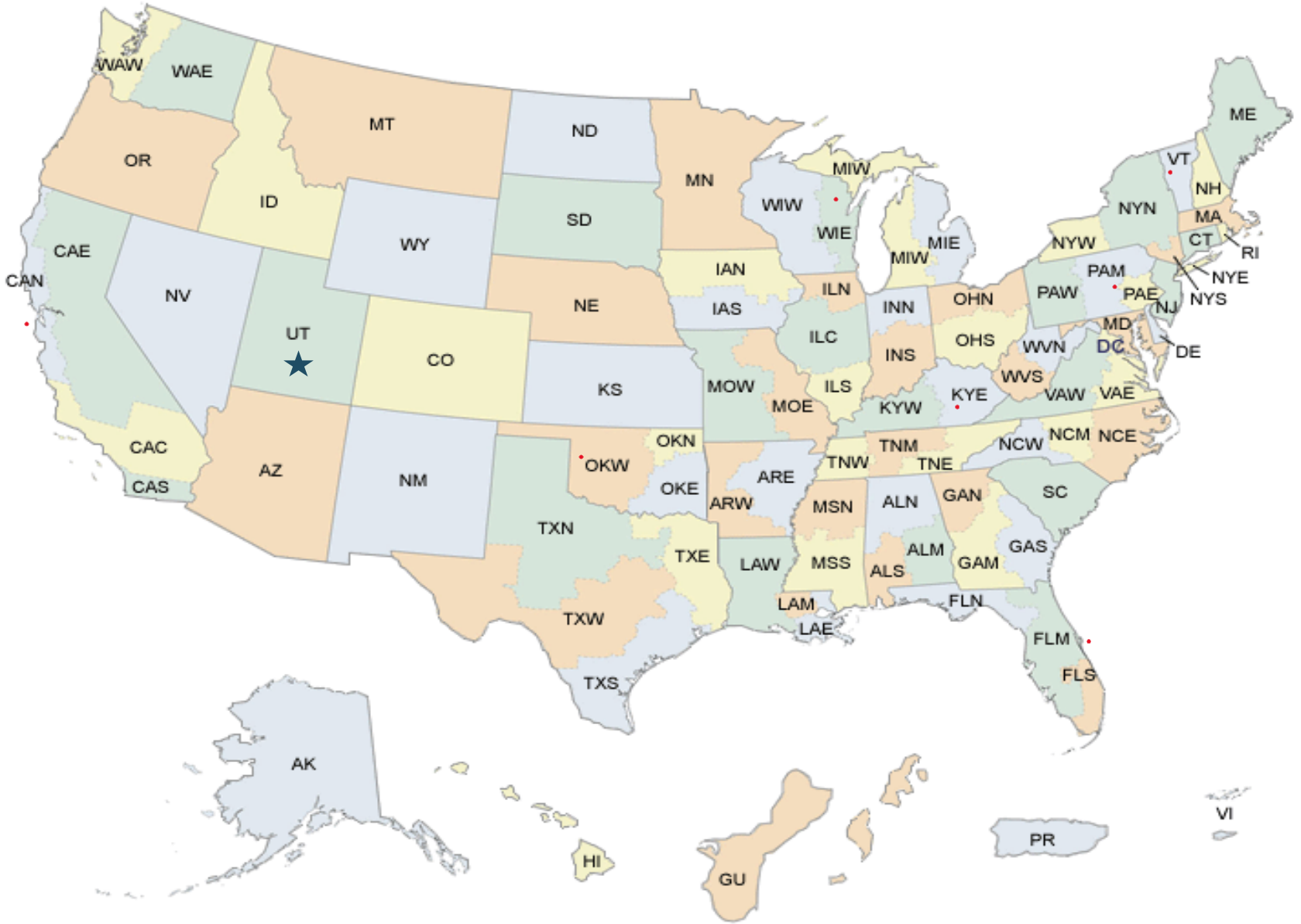
Presenters:

Katherine Frank, V&E
Jeff Johnston, V&E
Zach Terwilliger, V&E

DOJ Criminal Enforcement

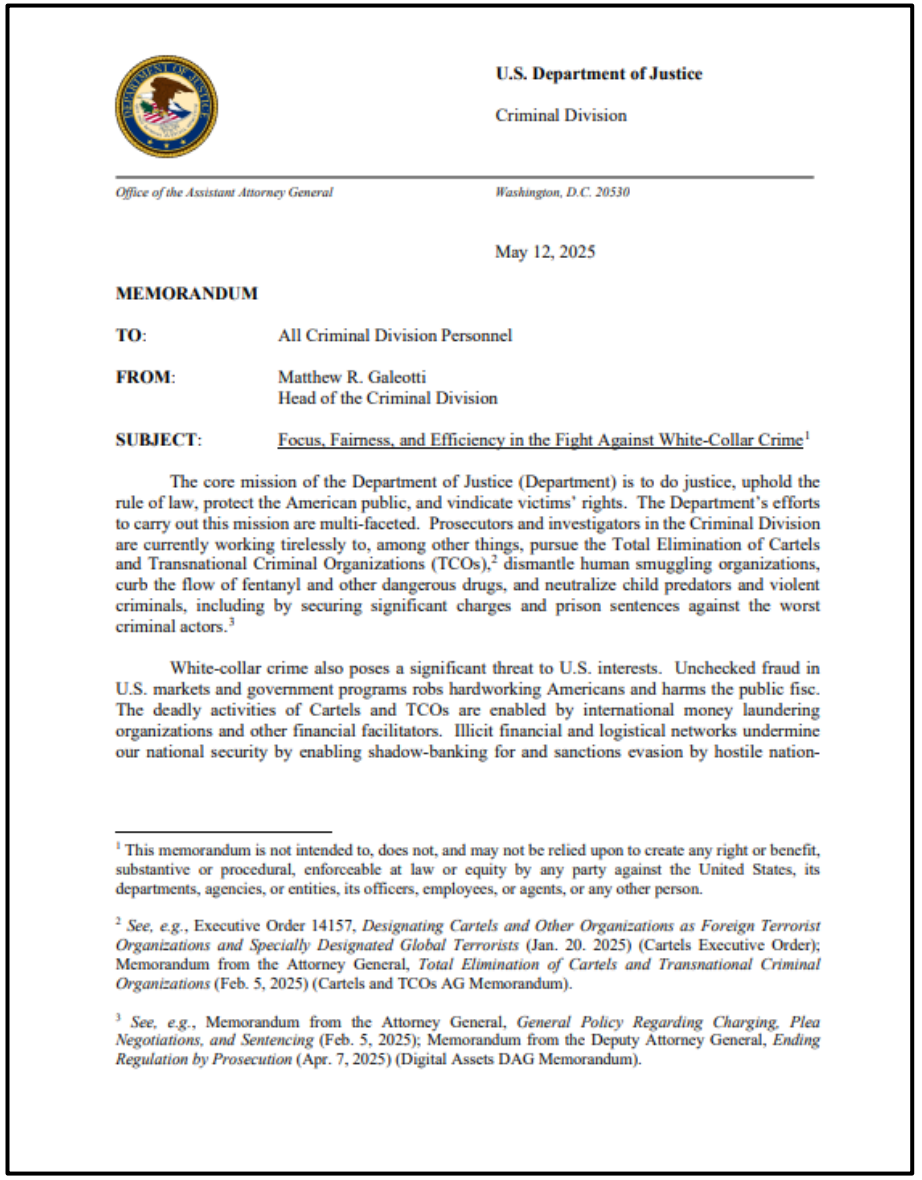


U.S. Attorneys' Offices



"Fairness, Focus and Efficiency" & DOJ's New White Collar Priorities

- On May 12, 2025, the head of DOJ's Criminal Division issued a division-wide memorandum articulating DOJ's new approach to white-collar criminal enforcement
- Memo directs the Criminal Division to:
  - Prioritize certain key enforcement areas identified as "high impact"
  - Streamline corporate investigations to resolve matters expeditiously
  - Narrow the scope and use of independent monitorships
- Provides critical clarity on the direction of white collar enforcement under Trump DOJ
  - Suggests enforcement slowdown is temporary and not all white collar cases are being de-prioritized – some areas (*e.g.*, False Claims Act, healthcare, procurement fraud, AML) may even ramp up
- **Directs the Fraud and MLARS Sections to review all existing corporate agreements for potential early termination of DPAs, NPAs and monitorships**



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

May 12, 2025

MEMORANDUM

TO: All Criminal Division Personnel

FROM: Matthew R. Galeotti
Head of the Criminal Division

SUBJECT: Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime[1]

The core mission of the Department of Justice (Department) is to do justice, uphold the rule of law, protect the American public, and vindicate victims' rights. The Department's efforts to carry out this mission are multi-faceted. Prosecutors and investigators in the Criminal Division are currently working tirelessly to, among other things, pursue the Total Elimination of Cartels and Transnational Criminal Organizations (TCOs),[2] dismantle human smuggling organizations, curb the flow of fentanyl and other dangerous drugs, and neutralize child predators and violent criminals, including by securing significant charges and prison sentences against the worst criminal actors.[3]

White-collar crime also poses a significant threat to U.S. interests. Unchecked fraud in U.S. markets and government programs robs hardworking Americans and harms the public fisc. The deadly activities of Cartels and TCOs are enabled by international money laundering organizations and other financial facilitators. Illicit financial and logistical networks undermine our national security by enabling shadow-banking for and sanctions evasion by hostile nation-

[1] This memorandum is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

[2] *See, e.g.*, Executive Order 14157, *Designating Cartels and Other Organizations as Foreign Terrorist Organizations and Specially Designated Global Terrorists* (Jan. 20. 2025) (Cartels Executive Order); Memorandum from the Attorney General, *Total Elimination of Cartels and Transnational Criminal Organizations* (Feb. 5, 2025) (Cartels and TCOs AG Memorandum).

[3] *See, e.g.*, Memorandum from the Attorney General, *General Policy Regarding Charging, Plea Negotiations, and Sentencing* (Feb. 5, 2025); Memorandum from the Deputy Attorney General, *Ending Regulation by Prosecution* (Apr. 7, 2025) (Digital Assets DAG Memorandum).

"Fairness, Focus and Efficiency" & DOJ's New White Collar Priorities *(cont'd)*

DOJ's identified "**high impact**" enforcement areas include:

- Health Care / Federal Procurement Fraud
- Trade and Customs Fraud / Tariff Evasion
- Fraud Involving Variable Interest Entities ("VIEs")
- Market Manipulation and Investor Fraud
- Sanctions Violations / Facilitating Cartels, Terrorists, and Hostile Nations
- Material Support of Foreign Terrorist Organization
- Complex Money Laundering
- Violations of the Controlled Substances Act and the Federal Food, Drug, and Cosmetic Act
- FCPA/FEPA, Bribery and Money Laundering
- Digital Asset Crimes that Victimize Investors

Implications for Corporate Compliance Programs

Now is the time to review compliance, not disregard

Should a future issue arise, how companies treat compliance during this period will be an important test of the commitment to compliance

Use this time to position the company to tell a positive story

Case Study: Whistleblower Scenario – Internal Investigation

- Acme HHC, Inc. (a home healthcare company) receives a complaint from an employee who alleges they overheard an alleged price-fixing conversation between their regional supervisor and a competitor at HHR 2025 [Home Healthcare Rendevous] in Las Vegas.
- Employee is very concerned and seems like they may have spoken to a lawyer (or at least used AI)
- What Next: CCO performs very targeted investigation to determine attendance at HHR and supervisor's region
- Do you bring in outside counsel: Y/N

Case Study: Whistleblower Scenario – Internal Investigation

Outside counsel is retained

- Independence/Objectivity
- Seriousness/Internal Messaging
- Monday morning quarterbacking by regulator
- Clear message if employee is speaking to a lawyer

Work Plan:

- Document preservation
- Collection of limited .pst files
- Review of pricing for region
- Review of annual ethics/antitrust training materials
- Review of code of conduct
- Targeted interviews: employee, other attendees, back-office support, interview of “supervisor”

Case Study: Whistleblower Scenario – Internal Investigation

- Findings and meeting with CCO and GC
- Not black and white
  - Conversation appears to have occurred, but no action taken either directly or even steps that would lead to that path—appears aspirational and more to do with what they wish they could do as well as a good dose of alcohol
- Remediation
  - Specific counseling to supervisor with PIP
  - Specific code of conduct for conferences/events
  - Create separate regional control for change in pricing that is off-cycle or otherwise an outlier

Updates on SEC Division of Enforcement

New Leadership

Paul S. Atkins
Chairman

Judge Margaret Ryan
Director of Enforcement

No “Lying, Cheating or Stealing”

- Dismissals
  - Controls and registration cases without fraudulent conduct
  - Disclosure and controls cases related to cyber breaches
    - “We do not second-guess good faith exercises of judgment about cyber-incident disclosure.”
- “Back to basics” enforcement
  - Large-scale offering frauds
  - Insider trading
  - Market manipulation
  - A few public company reporting and disclosure cases

“Investor protection is the cornerstone of our mission — to hold accountable those who lie, cheat, and steal.”

Chairman Atkins, May 2025

New Task Forces

Cyber and Emerging Technologies Unit (CETU)

- Fraudulent disclosures relate to cyber incidents
- Fraud related to blockchain technology and crypto assets
- Hacking to obtain MNPI
- Artificial Intelligence
  - Fraudulent statements about the use of AI
  - Fraud committed with AI

Cross Border Task Force

- Replaces FCPA Unit
- Identify and combat cross-border fraud harming U.S. investors
- U.S. federal securities law violations related to foreign-based companies
- Focus enforcement efforts on **gatekeepers**
- Foreign issuers – particularly China

Don’t Leak, Tip or Trade, or Tolerate Those Who Do: Insider Trading

Insider Trading

- Insider Trading
  - Transacting in (*e.g.*, buying, selling, gifting) securities in breach of a fiduciary duty/relationship of trust while possessing material, nonpublic information, with scienter (knowledge or recklessness)
  - Can include “tipping off” third-parties
- Key Definitions:
  - Material information: Information that is substantially likely to influence a reasonable investor
  - Nonpublic information: Information that has not been publicly disseminated; can include information about other companies (not just employer)
  - Insider: Ranges from a director, officer or significant shareholder to someone with no direct fiduciary duty to the company but who would violate a contract or policy
  - Fiduciary duty, relationship of trust or confidence, or other breach of duty: Requirement for discretion and confidentiality based on a party’s involvement in the situation

"Shadow Insider Trading" and *Panuwat*

***Shadow Insider Trading**: The use of non-public confidential information about one company to trade or purchase the securities of another closely correlated company*

- In August 2021, the SEC filed an insider trading action against Matthew Panuwat, an employee of biopharmaceutical company Medivation, Inc.
  - The SEC alleged that, after learning that Medivation was to be acquired by Pfizer, Inc., Mr. Panuwat purchased out-of-the-money options in *another* biopharmaceutical company on the theory that the similarly-situated entity's value would increase upon announcement of Medivation's acquisition
  - The court rejected Mr. Panuwat's motion for summary judgment, finding that Mr. Panuwat's trades were in breach of his duties to Medivation based on, among other things, Medivation's insider trading policy and a confidentiality agreement Mr. Panuwat signed with Medivation
  - The case went to trial in April of 2024, with the jury finding that the SEC had established by a preponderance of the evidence that Mr. Panuwat was liable for insider trading
- Given the SEC's success in the *Panuwat* case and their focus on pursuing other similar "shadow trading" cases, companies may want to review their insider trading policies, confidentiality agreements, and training processes and materials

Observations on Insider Trading Policies

Blackout Periods and Preclearance

- Blackout Periods
  - Timing:
    - Start of quarterly blackout typically falls between two weeks prior to quarter end up to the date of quarter end.
    - End of quarterly blackout typically falls one to two trading days following the release of earnings.
      - Practice note: Consider the company's standard policy on MNPI "cleansing"
  - Persons Subject to Quarterly Blackout:
    - Most often, includes directors, Section 16 officers and certain designated employees (*i.e.,* those with access to quarterly information)
    - Occasionally, all employees are subject to quarterly blackout
- Preclearance
  - Persons Subject to Preclearance;
    - Most often, includes directors, Section 16 officers and certain designated employees
  - Duration of Preclearance:
    - For those companies that give duration, the cutoff is typically 2 or 5 trading days
      - Practice note: Consider how to handle limit orders

Pledging and Hedging; Gifts and Other Exceptions

- Pledging and Hedging
  - The typical rule is that all employees, directors and officers are prohibited from pledging and hedging
  - A small minority give specific exceptions, often requiring GC or board preapproval, requiring demonstrated ability to repay, and setting caps
    - Practice note: Consider ISS and GL commentary
- Gifts
  - Practice is still somewhat mixed, with the majority treating gifts the same as regular trading, and others setting certain conditions around gift giving (*i.e.*, recipient agrees not to trade during blackout)
- Other Exceptions
  - Option exercises (without open market sales)
  - Withholding by the company to cover taxes upon vesting (but not sell-to-cover, unless handled by 10b5-1-type plan)
  - ESPP and 401k payroll-deduction purchases, so long as election occurs in an open window
  - Changes in form of beneficial ownership
  - Transactions required by a court order (including a qualified domestic relations order) or by will or the laws of descent and distribution

Waivers; Shadow Trading

- Ability to Grant Waivers
  - Practice is still mixed, with a minority of policies allowing for waivers. Among those companies that allow waivers, the GC or Legal Department usually holds the power to approve trades.
- Shadow Trading
  - Most companies' policies include language similar to the below:
    - "This policy prohibits trading in the securities of the company's customers, suppliers, and strategic partners etc., based on any information about such other companies learned through the individual's employment."
  - However, there is no consistent approach for treatment of pure shadow trading.
    - Some policies phrase the prohibition more broadly, without specifying how the information was acquired or limiting the categories of affected companies.
    - Some policies describe the Panuwat fact pattern or reference "shadow trading" directly.
    - Some policies refer to "competitors" or "economically-linked" entities.

Company Compliance

- Item 408(b) of Regulation S-K requires a public company to disclose whether it has adopted insider trading policies and procedures governing transactions in company securities by the company itself, and, if so, to file those policies and procedures, or if not, to explain why.
- Policies are trending toward the addition of language similar to the below:

  “From time to time, the Company may engage in transactions in its own Securities. It is the Company’s policy to comply with all applicable securities and state laws (including appropriate approvals by the Board or appropriate committee, if required) when engaging in transactions in Company Securities.”

Attorney Responsibility Rules Under SOX

Background

- Adopted in response to public company accounting and disclosure scandals
- Two principal provisions relating to attorney conduct and sanctions:
  - Section 303(a) prohibits actions that may mislead auditors for the purpose of rendering financial statements misleading (Rule 13b2-2(b))
  - Section 307 directed the SEC to adopt minimum standards of professional conduct for lawyers appearing and practicing before the SEC in the representation of securities issuers (Rule 205)

Section 303(a)

Rule 13b2-2(b)

- Section 303(a) makes it unlawful "for any officer or director of an issuer, *or any other person acting under the direction thereof*, to take any action to fraudulently influence, coerce, manipulate, or mislead" any accountant auditing the issuer's financial statement "for the purpose of rendering such financial statements materially misleading"
- SEC interprets "under the direction" to include partners or employees of the issuer's law firm
- Fraudulent intent required only for attempts to "influence" auditors, but not efforts to "mislead, coerce or manipulate" them
- "Purpose" requirement is satisfied if the actor "knew or should have known" that his or her conduct could render the issuer's financial statements materially misleading
  - This formulation historically has indicated the existence of a negligence standard
- An example of conduct that could violate Rule 13b2-2(b) is "providing an auditor with an inaccurate or misleading legal analysis"

Rule 205

- SEC adopted Rule 205 effective August 5, 2003
- Applicable not only to securities lawyers but also to other lawyers who would not ordinarily regard themselves as candidates for regulation by the SEC
- The SEC says that Rule 205 preempts any inconsistent state law or rule

Summary of Rule 205:

When an attorney appearing and practicing before the SEC in the representation of an issuer becomes aware of evidence of a material violation, the attorney must report it “up the ladder” and may be required to take additional, follow-up actions

Reporting Up and Reporting Out

- **Reporting Up (Required)**
  - Requires lawyers to report certain kinds of misconduct to a Chief Legal Officer or CEO, and if the lawyer does not receive an appropriate response, then to report the misconduct to the issuer's audit committee or board of directors
- **Reporting Out (Not Required)**
  - The SEC also proposed, but did not adopt, a provision that would have required lawyers to "report out" misconduct to the SEC or to withdraw from representation
  - Rule 205.3 permits (does not require) an attorney to reveal to the SEC, without the issuer's consent, confidential information to the extent the attorney reasonably believes necessary
    - To prevent the issuer from committing a material violation that is likely to cause substantial injury to issuer or investor
    - To prevent issuer from committing perjury to or fraud on SEC
    - To rectify the consequences of a material violation that caused substantial injury where the attorney's services were used

Rule 205

Triggers

1. Attorney appearing and practicing before the SEC
2. In the representation of an issuer
3. Aware of evidence of a material violation

Rule 205

What is “appearing and practicing before the Commission”?

- Transacting any business with the SEC
- Representing an issuer in any SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request or subpoena
- Providing advice on U.S. securities laws regarding any document that the attorney has notice will be filed with or submitted to the SEC or incorporated by reference in an SEC filing
  - Includes advice given in the context of preparing or participating in preparing any such document
- Advising whether any information, statement, opinion or other writing is required to be filed with the SEC

What is “appearing and practicing before the Commission”?

RULE 205 CLEARLY APPLIES

- A securities lawyer assisting with a public offering
- A securities lawyer assisting with the drafting of any section of a 10-K, 10-Q or other SEC filing
- An in-house lawyer assisting with determining whether a Form 8-K is required
- A business lawyer assisting with a private placement
- A litigator assisting in connection with an SEC investigation
- A litigator drafting or reviewing a description of a lawsuit for an issuer’s 10-K, 10-Q or other SEC filing

RULE 205 MAY APPLY

- A benefits attorney preparing an employee benefit plan that will be filed as an exhibit to an SEC filing
- A benefits lawyer advising on an employment contract or other compensation issues relating to an executive of an issuer
- A transactional lawyer drafting a material contract for an issuer
- An environmental, labor, benefits, intellectual property or tax lawyer drafting representations or covenants in a material contract for an issuer

Rule 205

What is a “material violation”?

- Any of three events:
  - A “material violation of the securities laws”
  - A “breach of fiduciary duty”
  - A “similar material violation”
- Covered material violations include those by the issuer or by any officer, director, employee, or agent of the issuer

Rule 205

Reporting Obligations Decision Tree

Reporting Attorney (Step 1)

- The attorney must report the evidence to the issuer's chief legal officer or CEO

Chief Legal Officer/CEO (Step 2)

- The CLO/CEO must make an inquiry
  - If CLO/CEO reasonably believes there is no material violation, CLO/CEO notifies the reporting attorney with explanation
- Take all reasonable actions to cause the issuer to adopt an appropriate response
  - Advise the reporting attorney of such steps
  - CLO/CEO may avoid taking these steps by reporting the evidence to a Qualified Legal Compliance Committee (QLCC) if the issuer has a QLCC

Reporting Attorney (Step 3)

- If the reporting attorney reasonably believes CLO/CEO has provided an appropriate response, no further action
- Otherwise, the reporting attorney must report "up the ladder" to the audit committee, another committee of the board consisting entirely of non-employee directors, or the full board

Special Rules for Subordinate Attorneys

- Subordinate attorney may report the evidence to the supervising attorney
- That discharges the subordinate attorney's obligations under Rule 205
- But supervising attorney must take the required "up the ladder" reporting and other actions under Rule 205

Violations

- Consequences of violation
  - Civil penalties and remedies under the Exchange Act in action brought by SEC against the lawyer who failed to comply
  - SEC disciplinary proceedings against the lawyer who failed to comply
  - Adverse publicity
- Best practices
  - Both lawyers and public companies should establish procedures to implement compliance with Part 205
  - Law firms and law departments within public companies should have adopted formal procedures for reporting and consulting with respect to potential violations by issuers to determine if action is required to comply with Part 205

Delaware vs. Texas

Presenters:

Katherine Frank, V&E
Quentin Smith, V&E

Delaware vs. Texas: Is Texas on Its Way to Become the Forum of Choice?

Coinbase Op-Ed

OPINION COMMENTARY Follow

Why Coinbase Is Leaving Delaware for Texas

We're reincorporating in a state whose legal climate is far friendlier to business.

By Paul Grewal

Nov. 12, 2025 8:23 am ET

Recent Reincorporation Examples

- **Recent Delaware to Texas Reincorporations:**
  - Tesla, Inc.
  - Space Exploration Technologies Corp. (SpaceX)
  - Dillard's, Inc.
  - Zion Oil & Gas, Inc.
- **Recent Delaware to Nevada Reincorporations:**
  - TripAdvisor, Inc.
  - Dropbox, Inc.
  - Affirm Holdings, Inc.
  - Trade Desk, Inc.
  - AMC Networks Inc.
  - Fidelity National Financial, Inc.
  - Madison Square Garden Sports Corp.
- **Publicly Rumored Reincorporations:**
  - Meta Platforms, Inc.

Reincorporation Litigation & Controlling Stockholder Transactions Under Delaware Law

Musk Pay Package

- Delaware Court of Chancery invalidated Tesla Inc.’s (NASDAQ: TSLA) $55.8 billion equity compensation package for Elon Musk in 2024.
- Musk successfully moved to reincorporate Tesla and Space Exploration Technologies Corp. from Delaware to Texas in 2024.

Maffei v. Palkon ("TripAdvisor")

- TripAdvisor and Liberty TripAdvisor directors voted to redomicile both entities from Delaware to Nevada
- Minority stockholders sued, arguing the decision would provide non-ratable benefits in the form of reduced litigation exposure to the Board and TripAdvisor's controlling stockholder
  - Stockholders argued the self-interested decision should be subject to entire fairness standard of review
- The Chancery Court applied the entire fairness doctrine, holding that potential insulation from litigation could conceivably confer a non-ratable benefit to the controller.

Ruling: The Delaware Supreme Court overruled and held the business judgment rule (and its protective presumption) should apply to the re-domicile decision. The decision to apply a deferential business judgment rule review means that corporations can leave Delaware without probing judicial inquiries into the Board's business decision.

- "[T]he hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative to constitute a material, non-ratable benefit triggering entire fairness review"
- But the Court emphasized that temporality plays a critical role in determining the materiality (and existence) of the alleged non-ratable benefit. ***In particular, the court will assess whether the reincorporation decision is "made to avoid any existing or threatened litigation or made in contemplation of any particular transaction."***

Safe Harbor for Transactions with Controlling Stockholders (March 2025)

- In March 2025, the Delaware legislature passed Senate Bill 21 (“SB 21”), which amended DGCL § 144
- SB 21 provides certain safe harbors for transactions involving conflicted directors, officers, and controlling stockholders that can be used to bar breach-of-duty claims and other equitable relief if certain criteria is met
- Under § 144(b), a controlling stockholder transaction (that is not a “going private transaction”) may be subject to statutory protection if:
  - The Transaction is approved by an informed majority of disinterested directors serving on a committee
    - The committee is disinterested with respect to the controller
    - The material facts about the Transaction (including the controlling stockholder’s interests) are disclosed
    - The committee is fully empowered to negotiate and approve / reject the Transaction
    - The committee approves the Transaction in good faith and without gross negligence
  - Or the Transaction is approved by a majority of votes cast by disinterested stockholders
    - The vote must be fully informed and not coerced
    - The Transaction must be conditioned on such approval at or prior to the time it is submitted to stockholders
  - Or the Transaction is fair to the corporation and the corporation’s stockholders

Definition of "Disinterested Director"

- The safe harbor in DGCL § 144(b) provides that controlling stockholder transactions may be approved by an informed majority of disinterested directors serving on a committee.
- Under the DGCL, a director is "disinterested" if they (1) are not a party to the act or transaction at issue, (2) do not derive any personal benefit from the act or transaction that is separate and distinct from any benefit that the corporation or all stockholders receive and (3) do not have a material relationship with a person that has a material interest in the act or transaction.
  - "Material interest" means an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that, in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue.
  - "Material relationship" means a familial, financial, professional, employment, or other relationship that, in the case of a director, would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue

Definition of “Disinterested Director”

- Any director of a listed public company shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if:
  - The Board has determined that the director satisfies the listing exchange’s criteria for determining director independence from (a) the corporation and (b) the controlling stockholder, if applicable.
  - Such presumption shall be heightened and may only be rebutted by “substantial and particularized facts” that the director has (a) a material interest in such act or transaction or (b) has a material relationship with a person with a material interest in such act or transaction.

Key Differences in Corporate Law

2025 Texas Business Organizations Code Amendments

- **In May 2025, Texas significantly reformed the Texas Business Organizations Code ("TBOC") to promote Texas as a preferred state of incorporation.**
  - The new law boasts many benefits, including, but not limited to, strengthening a Texas corporation's defenses against meritless or nuisance lawsuits, validating the selection of the Texas courts as the exclusive forum for internal claims, and providing greater certainty about the standard to which directors and officers are held in fiduciary duty actions.
- **2025 TBOC Amendment Highlights**
  - **Codification of the Business Judgment Rule**
  - **Defending Against Derivative Suits**
  - **Independent and Disinterested Directors**
  - **Waiver of Jury Trials for Internal Entity Claims**
  - **Exclusive Forum Provision**
  - **Shareholder Proposal Ownership Threshold**
  - **Proxy Advisor Rule**

Brief Comparison of Delaware & Texas Corporation Law

Topic	Delaware	Texas
General	• Delaware is considered the leading corporate law jurisdiction in the U.S. • The Delaware Court of Chancery is a highly respected, well-established business court with an extensive body of case law. The trials in Delaware are held before expert corporate law judges without a jury.	• Texas has recently received attention from a few high-profile redomicile/attempted redomicile transactions of companies from Delaware to Texas. • Texas only recently established the Texas Business Court, which began hearing cases in September 2024. Texas permits jury trials in corporate law cases, but the 2025 TBOC Amendments provide that Texas corporations may waive the right to a jury trial for any internal entity claim in their governing documents.
Derivative Litigation	• Stockholders must make a demand on the board before commencing derivative litigation, but they can bypass demand if they can adequately plead that demand would be futile. • If a stockholder makes a pre-suit demand on the board that is denied, the board's refusal of that demand is generally reviewed under the Business Judgment Rule and can be overridden by a Delaware court if the refusal was uninformed or in bad faith.	• Texas limits derivative litigation in three major ways. (1) Texas requires a demand on the corporation (rather than Delaware's practice of pleading demand futility); (2) The decision of independent and disinterested directors regarding the claim is binding on Texas courts. (3) Public corporations may adopt a minimum share ownership percentage for shareholders in order to institute or maintain a derivative proceeding.
Business Judgment Rule	• Delaware courts use three different standards of review when fiduciary decision making is challenged: (i) the Business Judgment Rule, (ii) Enhanced Scrutiny and (iii) Entire Fairness • The Business Judgment Rule – a standard deferential to fiduciaries – is the default standard used, with the heightened standards of Enhanced Scrutiny and Entire Fairness taking precedence based upon the facts underlying the dispute.	• The Business Judgment Rule in Texas generally protects corporate officers and directors, who owe fiduciary duties to the corporation, from liability for acts that are within the honest exercise of their business judgment and discretion. • Texas recently codified the Business Judgment Rule for public corporations and private corporations that opt into this provision by including in their governing documents a statement affirmatively electing to be governed by TBOC § 21.419. • Texas never adopted the concepts of Enhanced Scrutiny and Entire Fairness in the context of fiduciary duties as they are understood under Delaware law, and the codification of the Business Judgment Rule makes it unlikely that Texas courts will review actions under either heightened standard.

Brief Comparison of Delaware & Texas Corporation Law *(cont'd)*

Topic	Delaware	Texas
Shareholder Proposals	• In Delaware, shareholder proposal limitations are generally addressed in the corporation's bylaws. • Under federal law, to submit a shareholder proposal, Rule 14a-8 of the Securities Exchange Act of 1934 requires only that the shareholder proponent must have continuously held: (i) at least $2,000 in MV of the company's securities entitled to vote on the proposal for at least three years; or (ii) at least $15,000 in market value of the company's securities entitled to vote on the proposal for at least two years; or (iii) at least $25,000 in market value of the company's securities entitled to vote on the proposal for at least one year.	• For public Texas corporations that either have their principal office in Texas or are listed on a Texas stock exchange that opt into this provision, shareholder proposals may only be submitted by shareholders that: (i) hold at least $1M in market value or three percent of the shares entitled to vote on the proposal; (ii) have held such shares for six months prior to the meeting; and (iii) who solicit the holders of sixty-seven percent of the shares entitled to vote on the proposal. These criteria are more stringent that Rule 14a-8. • Qualifying corporations may opt into this provision by amending their governing documents and providing notice to shareholders in their proxy statement.
Controlling Shareholder Transactions	• Delaware recently established safeguards under DGCL § 144 for controlling stockholder transactions that, if met, insulate a director or officer from equitable relief and awards of damages claims based on alleged breaches of fiduciary duties. In most cases the statutory protection will hinge on the approval of a committee of disinterested directors.	• The TBOC authorizes boards of directors to form a committee of independent and disinterested directors to review and approve transactions with a controlling shareholder. Both Texas and Delaware have statutes that defer to the decision of an independent and disinterested committee.
Proxy Advisor Rules	• No special laws governing the voting recommendations of proxy advisors, such as ISS and Glass Lewis.	• Texas SB 2337, which takes effect September 1, 2025, requires proxy advisors to make certain disclosures about their voting recommendations if they rely on nonpecuniary factors, such as environmental, social, and governance topics. • Enforcement of SB 2337 against ISS & Glass Lewis is currently stayed in the U.S. District Court for the Western District of Texas while litigation proceeds.

Conversion Process

Converting from Delaware Into Another State

Step 1:

Upon determination by the Board (or an authorized committee) to pursue Reincorporation, Board of Directors adopts Board Resolution Approving Plan of Conversion and Recommends Adoption

Step 2:

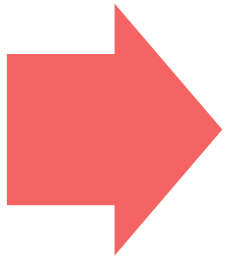
Stockholders Adopt Stockholder Resolution Approving Conversion at an Annual or Special Meeting

Any Plan of Conversion will specify the terms and conditions of the Conversion, addressing topics such as exchange of capital stock; treatment of equity compensation plans; and attach forms of transaction and governing documents, such as the certificate of formation and bylaws.

Converting from Delaware Into Another State

Step 3:

Company Files Certificate of Conversion in Delaware



Step 4:

Company files Certificate of Conversion and Charter in New State

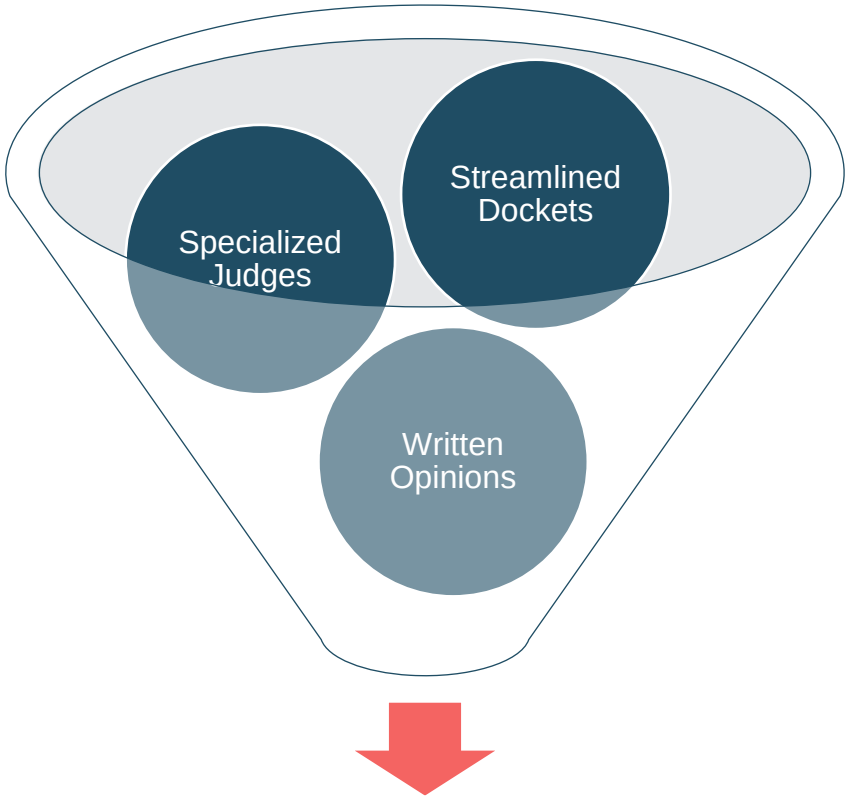
Certificate of Conversion will contain certifications mandated by DGCL

Texas’s Business Court

Texas Business Court

- Texas recently established the Texas Business Court to preside over certain corporate and commercial claims.
- The Texas Business Court aims to promote predictability and expediency of resolving commercial disputes.
- The Texas Business Court is already hearing cases but will need time to develop reputationally and build a body of case law that provides comparable levels of guidance to directors and officers.

Potential Benefits of Litigating in Business Court



- Faster Pace of Litigation
- Robust Jurisprudence
- More Predictable Legal Outcomes
- Potentially Lower Litigation Costs

Litigation Considerations

Dispositive Motion Practice:

- As the jurisprudence advances, it might develop avenues for litigants to quickly resolve actions guided by purely legal issues
- Early litigants in the Business Court might have the opportunity to shape and influence such development with their arguments

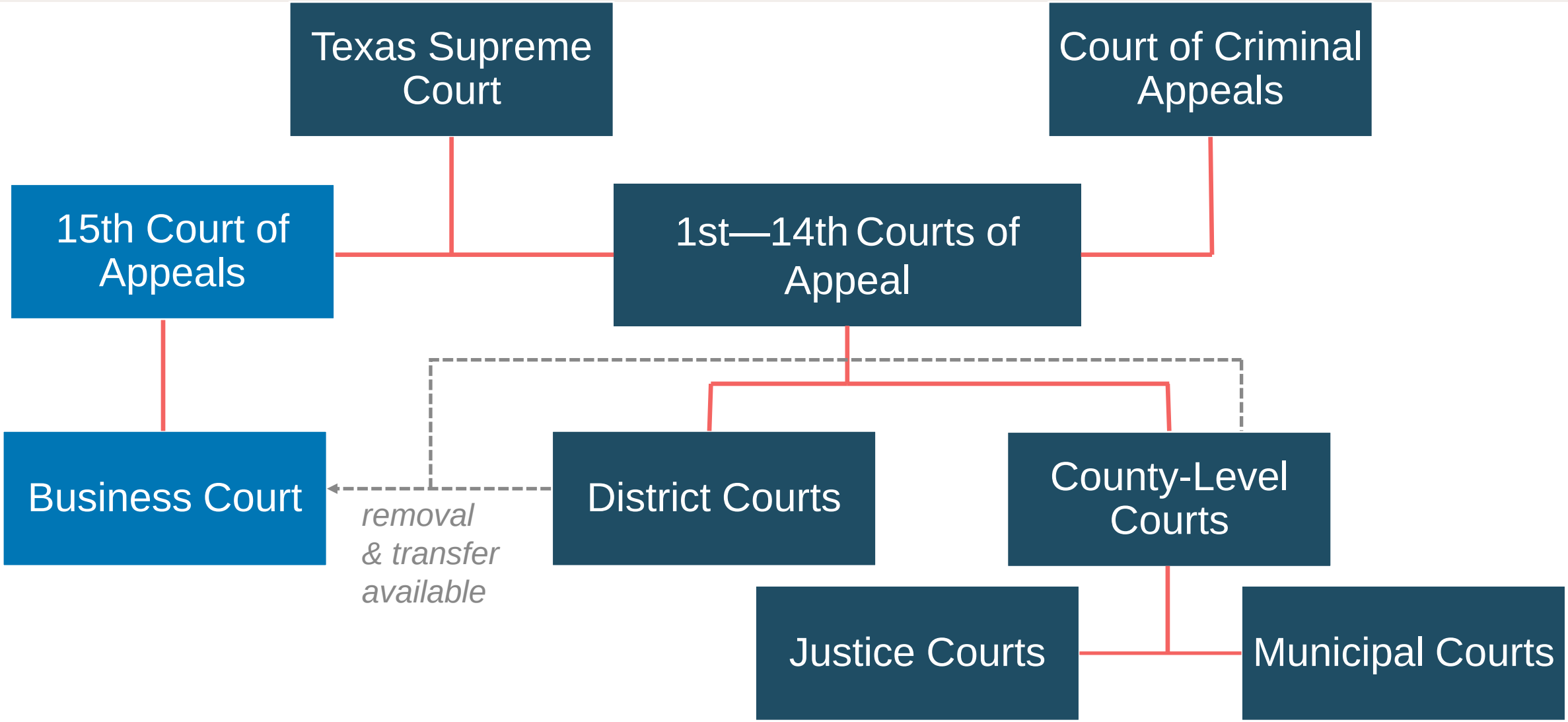
Forum Selection Clauses:

- Parties may agree that the Business Court has authority to hear disputes regarding a particular contract or transaction
- Must still meet $5 million amount in controversy requirements for general “qualified transactions,” i.e., contract disputes

Incorporation in Texas:

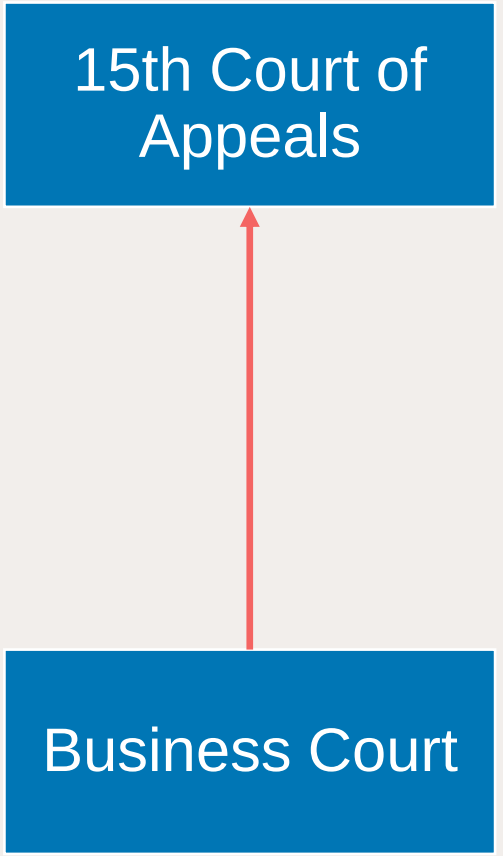
- Certain corporate actions can be heard in the Business Court—*regardless of amount in controversy*—if a party is a public company incorporated in Texas
- If the Business Court proves to be a stable and reliable forum for such matters, Corporations might consider reincorporation options

Texas Judicial System (as amended)



Appellate Review

- June 9, 2023: Governor Abbott signed S.B. 1045 into, creating the Fifteenth Court of Appeals.
- Tex. Gov. Code. § 25A.007:
  - The Fifteenth Court of Appeals has exclusive jurisdiction appeals from orders and judgments of the Business Court or original proceedings related to an action or order of the Business Court;
  - Except in instances where the Texas Supreme Court has concurrent or exclusive jurisdiction.
- Procedure governing appeal is the same as procedure for appealing from the District Courts



Texas Business Court

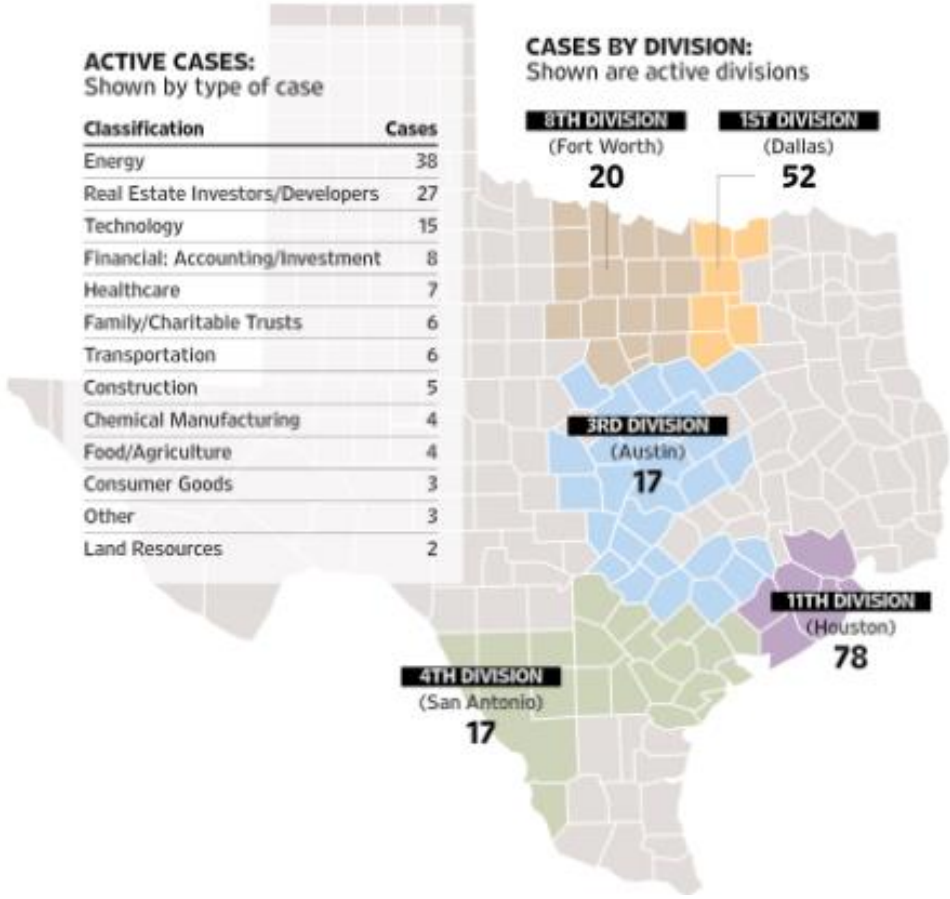
SNAPSHOT: TEXAS BUSINESS COURT

Using data provided by re:SearchTX and Texas Business Court staff, the graphic below shows how many cases have been filed in each division, including those resolved, as well as a breakdown of active cases by industry.

ACTIVE CASES:
Shown by type of case

Classification	Cases
Energy	38
Real Estate Investors/Developers	27
Technology	15
Financial: Accounting/Investment	8
Healthcare	7
Family/Charitable Trusts	6
Transportation	6
Construction	5
Chemical Manufacturing	4
Food/Agriculture	4
Consumer Goods	3
Other	3
Land Resources	2

CASES BY DIVISION:
Shown are active divisions



Source: The Texas Lawbook, Sept. 3, 2025

Inaugural Judges

Dallas (1st Div.)	Austin (3rd Div.)	San Antonio (4th Div.)	Fort Worth (8th Div.)	Houston (11th Div.)
Andrea Bouressa	Melissa Andrews	Marialyn Barnard	Jerry Bullard	Sofia Adrogué
				
William Whitehill	Patrick K. Sweeten	Stacy Sharp	Brian Stagner	Grant Dorfman
				

V&E Texas Business Court Website

- When was the Texas Business Court adopted? +
- What was the Legislature's justification for adopting the Business Court? +
- When did the Business Court begin hearing cases? +
- What cases does the Business Court hear? +
- Who are the judges and how are they selected? +
- Which Texas court has appellate jurisdiction over cases heard in the Business Court? +
- What if a lawsuit that could have been filed in Business Court is nonetheless filed in another Texas trial court? +
- Can lawsuits commenced before September 1, 2024 be transferred to Business Court? +
- What rules and procedures govern proceedings in the Business Court? +

Provides quarterly updates on all Texas Business Court cases

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Compensation Developments

Presenters:

Katherine Smith, V&E

Regina Ibarra, V&E

SEC Roundtable on Executive Compensation Disclosure

Overview

- Most of executive compensation disclosure framework under Item 402 of Regulation S-K was adopted in 2006; additional items added by Dodd-Frank (*e.g.*, pay ratio, pay vs performance, and clawback)
- Through a statement issued by Paul Atkins, the Chairman of the Securities and Exchange Commission (SEC), the SEC elicited feedback on the current executive compensation disclosure rules
  - Commissioner Atkins noted:
    - Disclosure requirements have become a “Frankenstein patchwork” of rules
    - SEC is open to a broad reconsideration of current rules
    - Rules not effective when companies require highly specialized lawyers and compensation consultants to prepare disclosure that the reasonable investor struggles to understand
- The SEC also held a full-day roundtable on this topic on June 26, 2025

Remarks of Commissioner Hester M. Peirce (R) at the Roundtable

- Current rules direct readers' attention to a set of executive compensation items that, largely, entertain the onlooker rather than educate the investor
  - Noted high attention but unlikely materiality of perk disclosure
  - Suggested rethinking of disclosure about security protection as a perk
- New rules re-package and re-present data that investors mostly already have, or they add details that are immaterial
- Targeted pay ratio and pay vs performance
- Focus on time and expense of preparing disclosure
- Expressed concern that executive compensation disclosure was directing, rather than reflecting, corporate actions

Remarks of Commissioner Mark T. Uyeda (R) at the Roundtable

- It is inappropriate to use SEC regulations with the intent of addressing desired political or social outcomes with respect to income and wealth inequality in the United States
- Attempts to control executive pay through indirect means have proven clumsy and often resulted in the exact opposite result (*e.g.*, 162(m))
- Pay ratio has a “name and shame” purpose
- Critical of clawback rules
- Noted cost estimates for pay vs performance disclosure were 16 years old

Remarks of Commissioner Caroline Crenshaw (D) (not in attendance at roundtable)

- Suggested improvement of data quality and GAAP reconciliation so figures are easily comparable across companies (could save investors money and be more efficient)
- Noted SEC has limited shareholder engagement with management, in the executive compensation and other contexts, by amending staff guidance on 13D and 13G filings(1)

(1) *See* SEC Division of Corporation Finance, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Compliance and Disclosure Interpretations Question 103.12 (updated Feb 11, 2025) ("Shareholders filing a Schedule 13G in reliance on Rule 13d-1(b) or Rule 13d-1(c) must certify that the subject securities were not acquired and are not held 'for the purpose of or with the effect of changing or influencing the control of the issuer.'. . . A shareholder who exerts pressure on management to implement specific measures or changes to a policy may be 'influencing' control over the issuer. For example, Schedule 13G may be unavailable to a shareholder who recommends that the issuer . . . change its executive compensation practices.").

Roundtable Takeaways

- Criticism of expansiveness and expense of current executive compensation framework
- Pay vs Performance, Pay Ratio, perks and clawback frequently targeted
- Summary Compensation Table – oriented towards stock option disclosure, but current landscape includes more complex equity vehicles
- Some questions as to whether definition of Named Executive Officer (NEO) should be reconsidered
- XBRL tagging of compensation data suggested
- Some noted Say-on-Pay and resulting shareholder engagement will mean long disclosure continues regardless of changes to rules-based requirements

Comment Letters to SEC

- Highlights from comments:
  - Equity award reporting in CD&A and otherwise
    - Disclosure of mid-performance period and final PSU award performance level and settlement
    - Suggestion to treat all equity awards the same under Form 4 requirements (so PSUs would be reported at grant)
  - Summary Compensation Table
    - Report value of equity awards at actual value at vesting to align better with reporting of other comp elements
    - Report value of equity awards based on grant date fair value but spread expense reported over vesting period to more closely mirror financial reporting
    - Clarify references to options/SARs in Summary Compensation Table and Grants of Plan Based Awards Table
    - Two tables – one that is target compensation and one that is actual realized compensation
  - Perks
    - Investors generally want continued disclosure, while issuers believe the threshold should be increased and security protection should be excluded
  - Pay Ratio
    - Inflammatory with little concrete value to investors; cannot compare across industries
    - At a minimum, simplify (*e.g.*, only full-time US employees)

Comment Letters to SEC

- Pay vs Performance
  - Complex, expensive and confusing
  - Mix and match of mid-period value and final settlement amount is especially confusing – suggest moving to reporting actual compensation received
  - Eliminate non-CEOs, net income and company selected measure
  - Align (annual) Compensation Actually Paid (CAP) and (cumulative) Total Shareholder Return (TSR) time frames
  - No requirement to disclose multiple peer groups when change to peer group (peer groups not changed to manipulate this disclosure)
- 402(j)
  - Remove requirement for hypothetical termination disclosure for executive who actually terminated prior to proxy filing
- Reduction/changes in disclosure of pension and deferred compensation plans (disclosure eliminated unless material)
- Clawback Rules
  - Overly punitive (no bad behavior required; gross/pre-tax amounts must be returned)

- The SEC is still accepting comments. If you would like to submit a comment, your V&E team would be happy to help draft and coordinate the submission process.

Proxy Advisory Firm Voting Policies: Severance for Termination of Employment

Overview

- Increasing Focus from ISS and Glass Lewis on Payments Made Following a “Voluntary” Termination
- Issue:
  - ISS and Glass Lewis view it as an unfavorable pay practice to provide for severance, equity award vesting, or other benefits for terminations not disclosed as “involuntary”
  - Seeing an increasing number of “No-Vote” recommendations for Say-on-Pay proposals due to these payment practices
- There are some limited exceptions and potential solutions to avoid a no-vote recommendation

Current Disclosure Practices

- Termination Situations in Which the Issue Can Arise:
  - An executive retires on favorable terms, and the company would like the executive to be able to keep equity awards
  - The company decides an executive needs to step down, but the parties do not wish to disclose the termination as "involuntary"/termination without cause (to mitigate PR/reputational/employee relations issues)
  - An executive decides to leave, but this is a mutual agreement that a departure is in the best interest of the parties
  - Common language used in disclosures:
    - "*Step down*"
    - "*Mutual agreement*"
    - "*Resign*"
    - "*Retirement*"
    - "*Part ways*" / "*Depart*"
    - "*Transition*" / "*Separation*"
- Payments and Benefits:
  - Sometimes full severance that would have been paid for "involuntary termination"
  - Sometimes just equity vesting
  - Sometimes something in between (not full severance, but a partial payment)

ISS/Glass Lewis Positions

- Both ISS and Glass Lewis have reaffirmed a case-by-case approach to evaluating compensation practices.
  - Rationale for unfavorable view: Need a robust link between pay and performance, and significant severance payments for terminations not disclosed as involuntary disrupt this link.
    - ISS: Explicitly labels such severance practices as egregious pay practices that may warrant a No-Vote.
    - Glass Lewis: Not as categorical, but has made clear that it views such arrangements unfavorably.
- ISS
  - Highlights "severance payments made when the termination is not clearly disclosed as involuntary (for example, a termination without cause or resignation for good reason)" as a "problematic practice[] that carr[ies] significant weight in [the evaluation of executive compensation] and may result in adverse vote recommendations."
  - In various FAQs, ISS has identified excessive payments upon an executive's termination in connection with performance failure or payments made in connection with an apparent voluntary resignation or retirement (including ambiguous terminations or terminations that are characterized as "stepped down" or that the executive and the board "mutually agreed" on a departure) as the type of practice that:
    - "Is contrary to a performance-based pay philosophy"
    - Carries "significant weight and may result in adverse vote recommendations"
    - Is "not appropriate"
- Glass Lewis: Not as prolific in their publication of unfavorable views of this practice, but has noted that one factor that "may cause [Glass Lewis] to recommend voting against a say-on-pay vote" is "egregious or excessive ... severance payments."

Mitigating Facts/ Potential Work-Arounds

- Payment or vesting pursuant to already disclosed arrangements; will need to describe the situation in a way that reflects a clear link between the contractual requirement and the actual termination scenario. Examples:
  - Equity awards provide for accelerated vesting upon “Retirement”, and an executive departs under circumstances that match the definition of “Retirement”
  - Proxy disclosures specifically refer to the departure as an “involuntary termination” (either without “Cause” or for “Good Reason”), and payments match contractual entitlements
- Describe the Board/Compensation Committee’s specific rationale for approving the payment, despite it being a voluntary resignation. Example:
  - “*In light of the Executive’s significant contributions to _____ and to _____, the Board approved a payment of $_____*” (characterize it more as pay for performance).
- No promised payments or benefits, but parties enter into consulting agreement or other (non-executive officer) arrangement that extends service relationship through filing of next proxy where individual is no longer a NEO for whom Form 8-K and proxy disclosures are required.

Key Takeaways

- Current Actions to Consider:
  - Evaluate whether equity award agreements or other arrangements should include favorable vesting provisions for “Retirement” or other scenarios
  - Examples of “Retirement” Definitions
    - Voluntary resignation after age [64]
    - Voluntary resignation after the earlier of (A) age [65] or (B) age [60] with [5] years of service
    - Could add further requirements related to (i) good standing, (ii) prior written notice and smooth transition to successor, or (iii) Board approval

Item 402 Perquisite Disclosure: Current Status and Future Direction

Overview

- What is a disclosable perk?
- Hot button topic for investors.
- Recent SEC enforcement actions indicate that perk disclosures are still a focus for SEC enforcement.
  - SEC continues to drill deeper into use of corporate aircraft / personal flights
  - SEC also focusing on the requirement that a benefit must be “integrally and directly related to job performance” if it will be excluded and not treated as a perk because it is a payment for business purposes
- Recent trends among public companies: Increased Benefits for Security
  - Is this a perk?
  - Should the perk rules be revised to better reflect issues relating to provision of security?
  - Steps companies can take

Disclosable Perks

- Item 402 requires public companies to disclose certain perquisites and other personal benefits ("perks") provided to NEOs
- Definition: "An item is a perk if it confers a direct or indirect benefit that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, unless it is generally available on a non-discriminatory basis to all employees."
- The $10,000 and $25,000 Rules:
  - If at least $10,000 in such perks have been provided to an NEO, the total value of all perks received by that NEO needs to be disclosed.
  - In addition, if any single perk exceeds the greater of $25,000 per year or 10% of all perks for that NEO that year, then such perk needs to be separately identified by type and quantified (in practice, many provide more detail).
- Exceptions – An item is not a perk if:
  - It is "integrally and directly related to the performance of the executive's duties"
  - The executive reimburses the company for the benefit
  - It is generally provided to all employees on a non-discriminatory basis
- "All" Means "All" – Over two decades ago, the SEC used this phrase to emphasize how they take an expansive view of perk disclosure. If in doubt, the SEC would likely view it as a perk.

Recent SEC Enforcement Actions

- Recent SEC enforcement actions indicate that perk disclosures are still a focus for SEC enforcement
- SEC continues to drill deeper into use of corporate aircraft / personal flights
- Examples:
  - Express, Inc. (December 2024):
    - SEC alleged the company failed to disclose the company's payment of over $1 million in perks over three years of proxy reporting, resulting in a 94% underreporting of compensation.
    - This included expenses relating to the authorized use of charter aircraft for personal purposes (expenses "associated with his personal flights, including transportation, meals, and hotel," which may have a business purpose but do not meet the "integrally and directly related" job performance standard).
    - The matter settled without monetary penalties due to the company's cooperation, self-disclosure, and remediation.
    - The SEC emphasized: "Public companies have a duty to comply with their disclosure obligations regarding executive compensation, including perks and personal benefits, so that investors can make educated investment decisions."

Recent SEC Enforcement Actions

- Examples (Cont'd)
  - Stanley Black & Decker (June 2023):
    - SEC alleged the company failed to disclose perks related to the officers' and directors' use of corporate aircraft because its determination process did not apply the appropriate "integrally-and-directly related to the performance of the executives' duties" standard. This settled without monetary penalties due to the company's cooperation (they also hired outside counsel to conduct an internal investigation, which was overseen by a special committee of independent directors) and self-reporting after the issue was brought to their attention.
    - SEC also found that one executive failed to report almost $500,000 (~$167,000 each year over the 3-year period that was reviewed) of personal expenses charged to his company credit card that were paid by the company (car and driver expenses, car repairs, meal expenditures, travel expenses and clothing). He paid a $75,000 penalty to the SEC, left the company and reimbursed the company for many of these personal expenses.

Recent Trend: Security for Executives

- Requirement to Fly Private. A majority of S&P 100 companies now require the CEO to fly private as part of the company's broader security policy
- Personal and Residential Security:
  - Perk reporting has increased from 38% in 2021 to 59% in 2024
  - Many companies are re-evaluating security policies in 2025 in response to the assassination of the UnitedHealth executive in December 2024
  - We expect this to be a trend that continues given recent shootings and deaths at Blackstone and NFL corporate offices in NYC and the CDC campus in Atlanta
  - Can include benefits such as personal security guards, home security systems, private car and driver, secured parking

Recent Trend: Security for Executives

- Current Disclosure Principles: Security benefits are disclosable as perks, with some limited exceptions
- SEC Roundtable: Comments received as part of the SEC Roundtable process highlight some issues with reporting these benefits as perks, and the SEC could be modifying its rules around disclosure of this benefit
- Considerations for Rule Changes:
  - Argument that personal security is a business necessity ("integrally and directly related to job performance")
  - Concern that disclosure of personal security can elevate risk by discouraging companies from providing security services or by exposing vulnerabilities (*i.e.*, identifying employees who lack security)
  - Some commentators have advocated for increasing the $10,000 de minimis reporting threshold
  - Confusion around transportation/home security caused by COVID and remote work arrangements

Recent Trend: Security for Executives

- Company Considerations:
  - Under current rules and to avoid enforcement risks, disclose personal security as a perk
  - Use narrative or footnote disclosure to explain the necessity
  - Consider providing security to a broader group so vulnerabilities are not exposed
  - Consider submitting a comment letter to the SEC roundtable
  - Have adequate disclosure controls and procedures designed to ensure that all benefits that are being provided to executives come to the attention of the appropriate individuals who are responsible for the company's disclosures and understand what the SEC considers to be a perk
    - Remember the SEC's focus on protocols for the company's determination of what is "integrally and directly related to job performance" and ensure controls/procedures
    - Remember the SEC's expansive "all means all" perspective
    - Not in the height of COVID response any longer, so may need to revisit prior positions on measures that were put in place when work-from-home was mandated or strongly encouraged by the company

Proposed ISS Policy Changes for 2026

Impact on Compensation Disclosures

- On November 3, ISS issued its proposed policy changes for 2026, opening a period of public comment. This comment period closed November 11. If implemented, ISS's policies would change with respect to five compensation items.
- Non-Employee Directors: Adverse vote recommendations for problematic pay practice for non-employee directors, including focus on excessive magnitude, problematic perks, excessive performance awards, stock options, or retirement benefits
- Shareholder Engagement: Increased flexibility for companies to respond to low (<70% of votes cast) shareholder vote on SOP: Will consider company's attempts to engage with shareholders and significant corporate activity
- 5 Year Lookback: 5-year lookback (vs. 3 year) for assessment of pay-for-performance horizons for ISS's quantitative screens
- Long-Term Time-Based Awards: Time-based awards with longer time horizons viewed more favorably.
  - If longer horizon, can be majority or all of equity mix
  - Applies to vesting and/or retention requirements
- EPSC: Equity Plan Score Card Changes
  - New Factor under "Plan Features" Pillar: Cash award limits for Non-Employee Directors
  - New Overriding Factor: Even if passing score, if plan lacks sufficient positive features under Plan Features Pillar, could receive No-Vote recommendation

Restatements & Clawbacks

Presenters:

Robert Kimball, V&E
Katherine Smith, V&E

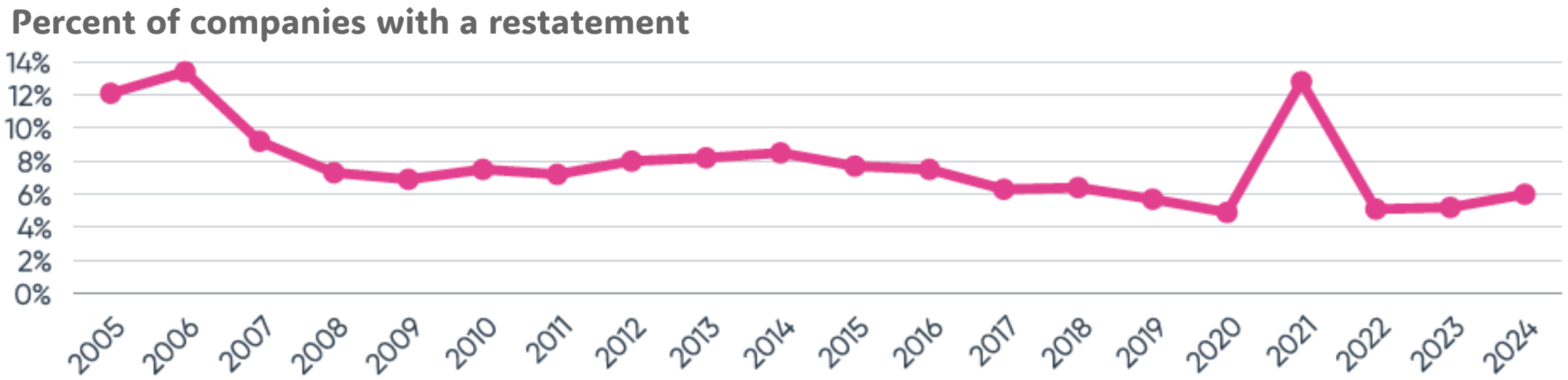
Financial Restatements and Restatements Trends

Financial Restatements

- When an error or misstatement is identified in previously issued financial statements, a company is required to submit a financial restatement to correct that error by adjusting previous periods
- Most restatement issues arise close to SEC reporting deadlines when auditors begin or complete their year-end audit work or their review of interim periods
- Common early issues:
  - Possible delay of (and explanation for) press release and conference call
  - Possible late report and content of Form 12b-25 (EDGAR Code NT)
  - Careful application of restatement standards through good process
  - Possible applicability of Form 8-K, Item 4.02 (withdrawal of reliance on previously issued financial statements) if reissuance restatement is the conclusion
  - No Rule 144 sales until late report is filed (insider trading window should normally be closed anyway)

Financial Restatements Data

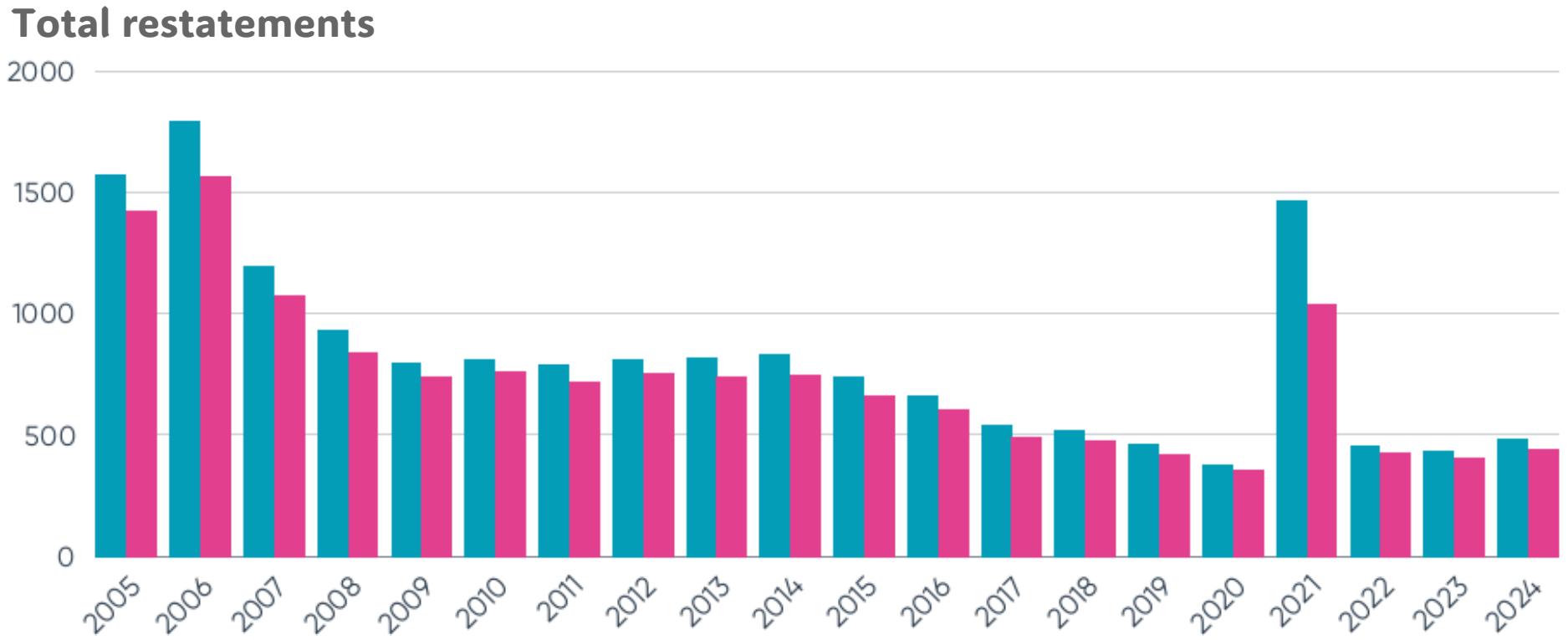
- The percentage of public companies with a restatement has generally decreased



Source: Ideagen Audit Analytics, Financial Restatements (June 2025)

Financial Restatements Data

- The number of distinct companies restating financial statements and the total number of restatements has generally decreased



Source: Ideagen Audit Analytics, Financial Restatements (June 2025)

Common Causes of Restatements

Top 10 issued cited in restatements: 2005 - 2024

Rank	Issue	% of total restatements	# of restatements
1	Debt/Equity	27%	4541
2	Revenue recognition issues	12%	1953
3	Expense (payroll, SGA, other) recording issues	11%	1863
4	Liabilities, payables, reserves and accrual estimate failures	11%	1806
5	Cash flow statement (SFAS 95) classification errors	12%	2077
6	Tax expense/benefit/deferral/other (FAS 109) issues	10%	1756
7	Accounts/loans receivable, investments & cash issues	8%	1338
8	Acquisitions, mergers, disposals, re-org acct issues	9%	1587
9	Inventory, vendor and/or cost of sales issues	6%	1098
10	Consolidation issues incl Fin 46 variable interest & off-B/S	6%	967

Source: Ideagen Audit Analytics, Financial Restatements (June 2025)

Financial Restatements

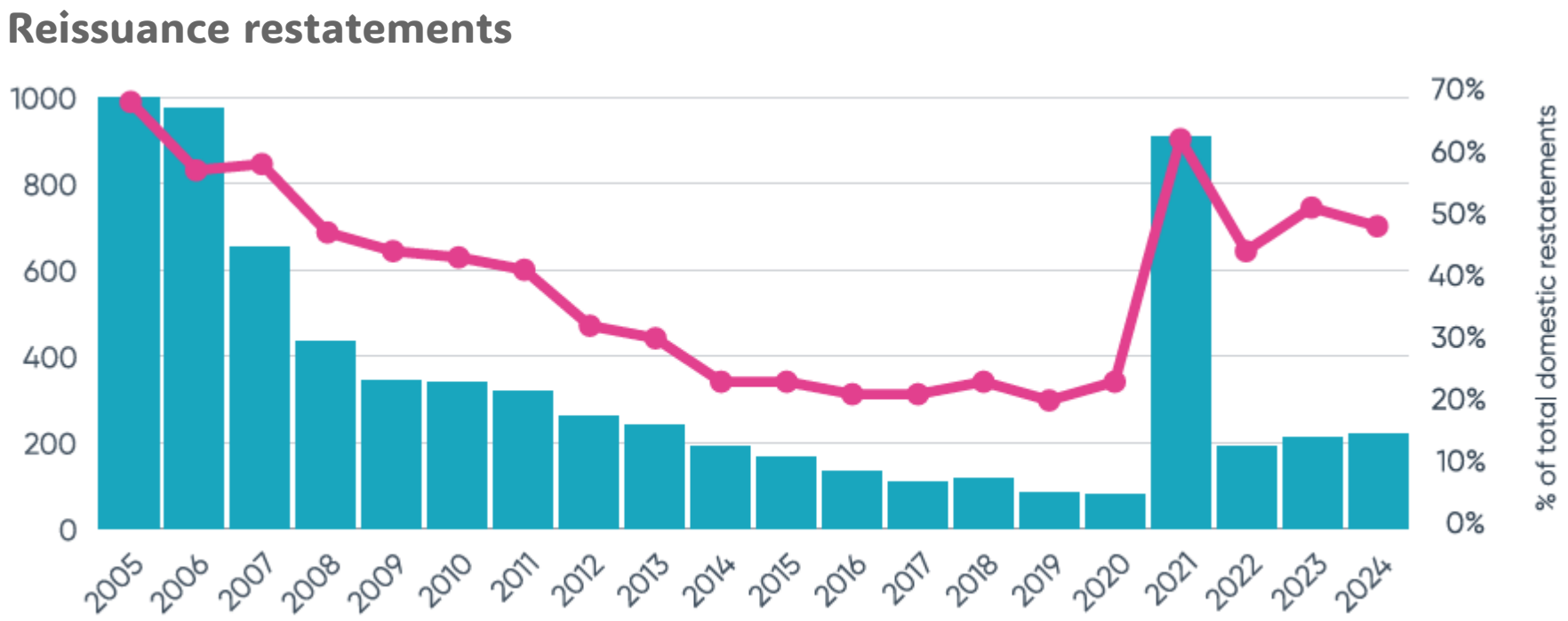
- Companies have three methods for correcting errors and misstatements in financial statements:
  - Reissuance restatements (“Big R”)
  - Revision restatements (“little r”)
  - Out-of-period adjustments

"Big R" Restatements

- Reissuance restatements ("Big R") correct an error (or a combination of errors) in previously issued financial statements that is material to the previously issued financial statements
  - Involve amendment of previous SEC filings, often in "Super 10-K" filing
  - Often involve withdrawal of reliance on previously issued financial statements, which triggers disclosure under Item 4.02 of Form 8-K
  - Often, but not always, involve late periodic reports while possible restatement is under evaluation

"Big R" Restatements (cont.)

- The number of Big R restatements and the percentage of restatements that are Big R restatements have generally decreased



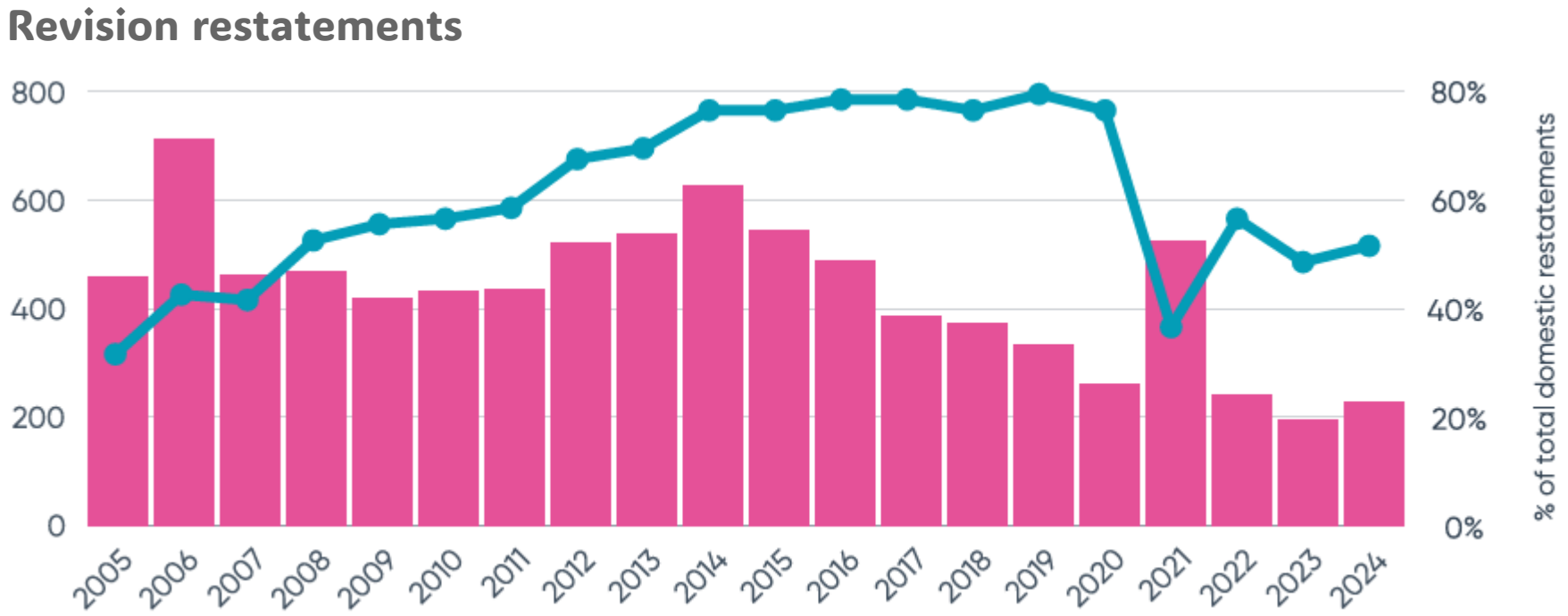
Source: Ideagen Audit Analytics, Financial Restatements (June 2025)

“little r” Restatements

- Revision restatements (“little r”) correct an error that was not material to previously issued financial statements, but would result in a material misstatement if the errors were left uncorrected in the current report
  - Do not involve amendment of previous SEC filings or withdrawal of reliance on previously issued financial statements
  - Sometimes involve late periodic reports while possible restatement is under evaluation
  - Typically explained in notes to financial statements and sometimes also in MD&A

"little r" Restatements (cont.)

- The number of little r restatements has generally decreased while the percentage of restatements that are little r restatements has generally increased



Source: Ideagen Audit Analytics, Financial Restatements (June 2025)

Out-of-Period Adjustment

- Out-of-period adjustments correct immaterial errors and misstatements in the current period
- Out-of-period adjustments are not restatements because the previous financial statements are not affected
- Whether something requires a “little r” restatement or an out-of-period adjustment depends on whether correcting the error in the current period would have a material effect on the financial statements
- May still involve material weakness disclosure

Requirement to Restate and Triggers to Restatement

Requirement to Restate / Triggers to Restatement

- FASB Topic 250 (formerly SFAS 154) – Accounting Changes and Error Correction
  - Establishes GAAP analysis for Big R and little r restatements
- SAB 99 – Materiality
  - Provides guidance in applying materiality thresholds to the preparation of financial statements filed with the SEC
  - Requires both qualitative and quantitative analysis of materiality
- SAB 108 – Consideration the Effects of Prior Year Misstatements When Quantifying the Misstatement in Current Year Financials
  - Major objective is to eliminate inconsistencies in the treatment of historical accounting errors
  - Required both iron curtain and rollover analysis of effects of errors

Topic 250 – Accounting Changes and Error Corrections

- Errors in previously-issued financial statement may include:
  - An error in recognition, measurement, presentation or disclosure in financial statements
  - Errors as a result of mathematical mistakes, mistakes in the application of GAAP, or oversight of facts that existed at the time the financial statements were prepared
- Change from an accounting principle that is not generally accepted to one that is generally accepted is a correction of an error

Topic 250 – Accounting Changes and Error Corrections (cont.)

- Any error in financial statements of a prior period, discovered after their issuance, must be reported as a prior-period restatement by restating the prior-period financial statement
- The registrant must disclose that its previously-issued financial statements have been restated, along with a description of the nature of the error
- In determining materiality for the purpose of reporting the correction of an error, amounts shall be related to the estimated income for the full fiscal year and also to the effect on the trend of earnings. Changes that are material with respect to an interim period but not material with respect to the estimated income for the full fiscal year or to the trend of earnings shall be separately disclosed in the interim period. 250-10-45-27

SAB 99 - Materiality

- SEC Staff Accounting Bulletin 99 (“SAB 99”) addresses the application of materiality thresholds to the preparation and audit of financial statements and states that the test of materiality includes ***both*** a quantitative and qualitative analysis.
- Among the considerations that may make material a quantitatively small misstatement of a financial statement item is whether the misstatement:
  - Arises from an item capable of precise measurement or whether it arises from an estimate, and, if so, the degree or imprecision inherent in the estimate;
  - Masks a change in earnings or other trends;
  - Hides a failure to meet analysts’ consensus expectations for the enterprise;
  - Changes a loss into income, or vice versa;
  - Concerns a segment or other portion of the registrant’s business that plays a significant role in the registrant’s operations or profitability;
  - Affects the company’s compliance with regulatory requirements;
  - Has the effect of increasing management’s compensation; or
  - Involves concealment of an unlawful transaction

SAB 99 – Materiality (cont.)

- There is not a bright-line threshold in assessing materiality; nevertheless, a quantitative threshold (such as 5%) is acceptable to use as an initial step in assessing materiality
- Insignificant misstatements resulting from the normal course of business do not require restatement
- Cost-benefit considerations are a factor in correcting small restatements
- The aggregate effect of a series of individually immaterial misstatements may result in the financial statements as a whole being materially misleading

SAB 108 –Considering the Effects of Prior Year Misstatements When Quantifying the Misstatement in Current Year Financials

- Prior year misstatements should be considered in quantifying misstatements in current year financial statements
- Registrants must quantify the effect of correcting all misstatements, including both the carryover and reversing effects of prior year misstatements, on the current year financial statements; financial statements must be adjusted when either the rollover approach or the iron curtain approach results in quantifying a misstatement that is material

Sample Outline of Memorandum Evaluation Issues

I. Statement of Issue

   A. Nature of error/potential error

   B. How the potential error was identified

II. Accounting treatment

   A. Review of relevant accounting literature about the proper accounting

   B. Recommended conclusion about accounting treatment

III. Assessment of materiality of the error under accounting standards

   A. Summary of relevant accounting literature

      1. SAB 108 (Considering the Effects of Prior Year Misstatements when Quantifying Misstatement in Current Year Financial Statements)

      2. SAB 99 (Materiality)

      3. ASC Topic 250 (former SFAS No. 154) (Accounting Changes and Error Corrections)

Sample Outline of Memorandum Evaluation Issues (cont.)

B. Application of accounting literature

1. Discussion (with attached spreadsheets) of rollover and iron curtain analysis and any numerical materiality (SAB 108)
2. Discussion of qualitative aspects of materiality (SAB 99)
3. Proposed conclusions about materiality
4. Proposed corrective actions or changes to internal controls and disclosure controls

IV. Assessment of materiality under general securities law standards (*Basic v. Levinson*) and line item disclosures

A. Materiality to investors

B. Line item disclosure issues (including interpretive guidance when relevant). In addition to the notes to the financial statements, typical line items or customary disclosures to consider are:

1. MD&A (Reg. S-K, Item 303)
2. Significant accounting principles

Sample Outline of Memorandum Evaluation Issues (cont.)

3. Management's assessment of the effectiveness of internal control over financial reporting (S-K, Item 308(a))

   Is the error evidence of a material weakness or significant deficiency?

4. Changes in internal control over financial reporting (S-K, Item 308(c))

5. Disclosure controls and procedures (S-K, Item 307)

V. Assessment of need to withdraw reliance on prior financial statements

A. If the conclusion is that the error is material, consideration should also be given to whether the reliance on the prior financial statements should be withdrawn (Form 8-K, Item 4.02)

VI. Proposed course of action

A. This should include proposed disclosure (in general terms or specific language) and proposed amendments, if any

The memorandum often is completed in stages, but ultimately is an important guide for analysis and a contemporaneous record of analysis. Clawback effects, if any, are generally not addressed in the accounting memorandum, but should be considered separately.

Form 8-K
Disclosure Requirement

Form 8-K Item 4.02

- Required to be filed for determination that previous financial statements should not be relied on
- Notice of withdrawal of reliance on previous financial statements must be made on Form 8-K Item 4.02, even if a 10-Q or 10-K containing the information is filed within four business days after the determination
- See Exchange Act Form 8-K, CD&I 101.01 (April 2, 2008), stating that Form 8-K events can be reported on Forms 10-Q and 10-K filed within four business days of the triggering event except for events under Item 4.01 (changes in auditor) and Item 4.02 (announcement of non-reliance)

Form 8-K Item 4.02 – Triggering Event

- "If the registrant's board of directors, a committee of the board of directors, or the officer or officers . . . authorized to take such action if board action is not required" concludes that previously issued financial statements should not be relied on because of an error (Item 4.02(a))
- "If the registrant is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken" to prevent future reliance on previously issued financial statements (Item 4.02(b))
- Consider a resolution or Audit Committee Charter provision that only the audit committee or full board—but not management—can withdraw reliance on previously filed financial statements

Form 8-K Item 4.02 – Filing Required for Every Restatement?

- Item 4.02 refers only to cases where reliance on previous financial statements is being withdrawn. Does not apply to, for example:
  - discontinued operations, stock splits, changes in accounting principles
  - determination that restatement is not material
- **SEC Staff View**: Item 4.02 filing is not required for every restatement. Nevertheless, the staff would be surprised if financial statements were restated because of an error, but no Item 4.02 was filed, and the staff would likely question those situations.
  - See SEC Regulations Committee of the AICPA, Joint Meeting with SEC Staff, Sept. 13, 2004.

Form 8-K Item 4.02 – Contents of Disclosure

- The date that the registrant concluded the financial statements should no longer be relied upon and identify the financial statements and years or periods covered that should no longer be relied upon
- A description of the facts underlying the conclusion to the extent known to the registrant at the time of filing
- Whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer(s), discussed the disclosed matters with the registrant's independent accountant

See SEC Division of Corporation Finance, *Financial Reporting Manual*, 4600

Clawback Policy Implications

Clawback Policy Implications

- In the event of a Big R or little r restatement, a company will need to consider whether any compensation will need to be recouped under the company's clawback policy
- The administrator of the clawback policy (commonly the Compensation Committee) will need to determine:
  - **WHO**: Which current or former executive officers are subject to the clawback policy?
  - **WHAT**: Which types of compensation are subject to the clawback policy?
  - **WHEN**: What is the lookback period?
  - **EFFECT**: Were the awards subject to clawback affected by the restatement?
  - **HOW MUCH**: If the awards were affected, the compensation will need to be recalculated to determine if compensation was paid in excess of what should have been paid based on the restated numbers.
- The administrator may consult with management and third-party advisors (*e.g.*, outside legal counsel, compensation consultants, auditors, or other financial consultants) in connection with making these determinations.

Effect of Restatement on Relevant Performance Metrics

- Recalculation of affected compensation is often straightforward, unless the awards vest in whole or in part based on stock price or total shareholder return (relative or absolute).
- "Reasonable estimates" may be used to determine if the stock price was affected and, if so, to what degree.
  - What does that mean? It depends!
    - Consider the following to determine whether an event study by a third-party may be advisable:
      - Stock price movement at restatement
      - The amount of movement that would be required to reduce the award
      - Value of compensation at issue
      - Circumstances of restatement (bad actor/bad PR?)
      - General market/industry trading
      - The Board/Committee's risk threshold

Disclosure Obligations on Form 10-K and Proxy Statement

- Annual Report on Form 10-K: If the financial statements included in the Form 10-K include a Big R or little r restatement, check the box stating that the error correction is a restatement that requires a clawback analysis
- Proxy Statement: Include disclosure under Item 402(w) of regulation S-K, including:
  - A brief summary of the restatement and the clawback policy (why it's implicated)
  - The date the registrant was required to prepare the accounting restatement
  - The aggregate dollar amount of erroneously awarded compensation attributable to the accounting restatement (including $0, if applicable), including an analysis of how the amount was calculated (some present amounts by executive as well)
  - If the financial reporting measure related to a stock price or total shareholder return metric, the estimates that were used and an explanation of the methodology used for such estimates

Disclosure Obligations on Form 10-K and Proxy Statement (cont.)

  - The aggregate dollar amount of erroneously awarded compensation that remains outstanding at the end of the last completed fiscal year
  - If the amount of erroneously awarded compensation has not yet been determined, explain the reason(s) and disclose the information in the next filing that is required to include disclosure pursuant to Item 402 of Regulation S-K
- The disclosure must be provided in an Interactive Data File (tagged) in accordance with Rule 405 of Regulation S-T and the EDGAR Filer Manual
- No SEC comments on 402(w) disclosure in 2025. SEC comments in 2024 focused on failure to include 402(w) disclosure after checking the box on the 10-K or failure to provide it in an interactive data file (not on the quality or content of the disclosure)

Disclosure Obligations on Form 10-K and Proxy Statement (cont.)

Macy's, Inc, filed 04/01/2025

- Engaged third party financial advisory firm to estimate the impact of the restatement on the stock price (and thus, the rTSR), using two measures:
  - An event study analysis comparing the Company's stock price movement against the S&P Retail Select Industry Index for the 2021 - 2023 PRSU awards at the time the corrected results were disclosed to evaluate performance attributable to the correction, and
  - A fundamental analysis applying changes in business financials stemming from the correction to stock price using a constant multiples approach.
- The Company determined that no clawback was necessary with respect to the rTSR PSUs.

CSX Corp, Proxy filed 3/25/2025

- The Company calculated the estimated impact of the restatement on the achievement of TSR by measuring the decrease in earnings per share that resulted from the "little r" restatement and applying a stock price to earnings ("P/E") ratio of 18, which represents CSX's approximate P/E ratio at year end 2023.

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