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PROXY SEASON

Making Sure Newly Cautious Shareholders Get the Information They Want

By Brian Breheny, Raquel Fox, Joshua Shainess, and Kyle Wiley

Recently updated guidance from the Staff of the Securities and Exchange Commission (SEC) regarding its beneficial ownership reporting rules has had a significant impact on companies' interactions with major shareholders, making some shareholders cautious about initiating discussions on corporate policies with a company's management. Companies need to adapt their approaches to engagement to respond to changes from institutional shareholders.

Shareholders with beneficial ownership of more than 5 percent of a class of registered voting securities must report their holdings on either Schedule 13G or 13D. If they do not hold their securities "with the purpose of changing or influencing the control of the issuer" they can avoid filing the more detailed Schedule 13D. Instead, those passive investors may be eligible to file a simpler form, Schedule 13G. For large institutional investors with more than 5 percent beneficial ownership in many public companies, the ability to file on a Schedule 13G avoids significant administrative burdens.

In the past, the SEC Staff had said in its guidance that engagement with management on executive compensation, environmental, social or other public interest issues, or corporate governance topics unrelated to a change of control, typically would not prevent the shareholder from reporting on Schedule 13G.

Brian Breheny, Raquel Fox, Joshua Shainess, *and* **Kyle Wiley** *are attorneys of Skadden, Arps, Slate, Meagher & Flom LLP.*

While investors in the past have often weighed in on the agenda for engagement meetings, some may no longer do that. Companies should thus not wait for the investor to raise particular topics.

On February 11, 2025, however, the SEC Staff rescinded that interpretation and said that investors may no longer be allowed to use the shorter form if they "exert[] pressure on management to implement specific measures or changes to a policy"—that such lobbying about policies may now be deemed to "be 'influencing' control over the issuer."

As examples, the SEC Staff cited pressure on management "to remove its staggered board, switch to a majority voting standard in uncontested director elections, eliminate its poison pill plan, change its executive compensation practices, or undertake specific actions on a social, environmental, or political policy."

The change has made institutional investors circumspect about raising policy issues in discussions with a company's management. And, in response, companies are having to change their approach to interactions with major shareholders. Here is what we are seeing, and how companies can adapt so that their biggest shareholders get the information they want but may now be reluctant to ask for explicitly.

- **Change:** Investors are being cautious about requesting an engagement and, in many cases, may engage only when requested by companies. Among the factors that investors will likely consider when agreeing to a meeting may include the proposed date of the meeting in relation to the date of the shareholder meeting and the proposals on the agenda at the meeting. Meetings with contested agenda items will likely be greeted with particular caution.

- **Response:** Companies that want to speak to an investor should take the initiative to arrange the meeting.
- **Change:** In the past, investors have weighed in on the agenda for engagement meetings. Many investors may no longer do that and, if they do, any suggested agenda topics are expected to be less prescriptive.
- **Response:** Companies should be prepared to discuss the topics that they expect the investor will likely want to cover and not wait for the investor to raise particular topics.
- **Change:** Questions from investors at engagement meetings will likely be more open-ended and less targeted. For instance, questions are now likely to be more broadly worded. Such as: We would appreciate if you could share your thoughts on….
- **Response:** Companies should be prepared to answer the questions and add gloss that they expect the investor will want/need to make informed investment decisions.
- **Change:** Similarly, investors likely will not answer pointed questions, including and most specifically any questions about how the investor intends to vote.
- **Response:** Companies should be prepared to ask investors more broad-based questions, such as: Did you get enough information to make an informed voting and/or investment decision?
- **Change:** Investors may read disclaimers at the beginning of engagement meetings. The use of these disclaimers will not necessarily eliminate the possible implications under the new SEC Staff guidance. Nonetheless, investors will likely want to make it clear that they do not intend to exert pressure or take the discussion beyond what the SEC Staff currently thinks is allowed for companies filing on the shorter Schedule 13G.
- **Response:** Companies may want to respond that they understand the plan for the discussion and they similarly do not intend for the discussion to go beyond what is required.

Many companies have significantly expanded their shareholder engagement efforts over the past few years and companies typically are well served in building productive relationships with their long-term investors, notwithstanding these changes to potential engagement meetings. To make the most of these discussions, companies need to take into consideration the new constraints institutional investors feel because of the revised guidance.

When Do Large Investors Vote Against Directors for Compensation Concerns at US Companies?

By Karla Bos, AJ Patterson, and Laura Wanlass

Few large US investors made significant changes to their published say-on-pay policies for 2025. That was likely a relief for public companies and advisory firms alike in times of great change and volatility.

However, six well-known US investors identified by Aon Governance did make notable revisions to their stated policies regarding potential votes on directors in connection with pay matters. Most of these changes introduce new uncertainty for companies and increase the importance of understanding and engaging with their investors.

We believe that changes by two of the largest investors may not have much impact in practice. BlackRock added language potentially expanding its director opposition regarding equity plans and repricing actions, but it appears the changes primarily codified existing positions. Fidelity Investments revised language that muted a longstanding reason for potential votes against compensation committee members, but it remains to be seen whether the firm will change its voting practices or has simply modified its policy language.

However, changes by four other large investors—Invesco, Morgan Stanley Investment Management, State Street Global Advisors and T. Rowe Price Associates—could prove to be more impactful, as each reduced or eliminated explicit policy language that previously provided for potential votes against directors for certain compensation concerns.

Investors pulling back in this manner may have been encouraged to do so, at least in part, to mitigate potential risks posed by unexpected guidance from the Securities and Exchange Commission (SEC) in February that newly cautioned large investors about their corporate governance engagement practices. The guidance:

- Conveys that forceful engagement on matters such as director elections and executive compensation conducted by investors holding more than 5 percent of a voting class of a company's publicly traded securities could be deemed activist behavior.
- Provides that "[a] shareholder who goes beyond [a discussion of its voting views and practices] and exerts pressure on management to implement specific measures or changes to a policy may be 'influencing' control over the issuer'" and therefore required to file expansive 13D holdings disclosure previously required only for investors seeking to make significant changes to a target company.
- Has led some investors to be more guarded in engagement discussions, cease publication of ad hoc insights about their voting decisions or add policy statements affirming they do not seek to change or influence control of an issuer.
- May not be fully understood until the SEC provides additional guidance or pursues enforcement actions.

The question arises: Did some investors reduce their adverse policy language on director elections relative to compensation matters primarily to forestall unwanted political or regulatory attention without intending to reduce their support for such directors in practice?

This may not be the case, considering reports reviewed by Aon Governance that indicate higher overall director support year to date than in 2024. However, it is not yet clear how much of that support may be attributable to increased director support

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in other areas such as board diversity, where many investors also have eliminated explicitly adverse policies.

Aon Governance believes that, with the possible exception of BlackRock's reinforcing language, the policy changes related to compensation are too new to be interpreted with certainty. By the fall, we expect to learn more from investors and our analysis of proxy season voting data. Until then, we encourage companies to review the policy revisions described below to inform their investor engagement and assessment of voting results from the company's annual shareholder meeting.

BlackRock, Proxy Voting Guidelines for Benchmark Policies—US Securities

- **ADDED** "[W]e may also vote against members of the compensation committee to signal our concerns about the structure or design of the equity compensation plan or the company's equity grant practices and the imprudent use of equity."
- **AON'S VIEW:** This reinforces an existing policy under *Executive Compensation*, "Where executive compensation appears excessive relative to the performance of the company and/or compensation paid by peers, or where an equity compensation plan is not aligned with shareholders' interests, we may vote against members of the compensation committee." However, the new language may be more visible now that it appears under *Equity compensation plans* and in the context of additional new language on what BlackRock finds helpful when considering support for equity plan share requests.
- **ADDED** "We may vote against members of the compensation committee where a board implements or approves a repricing or option exchange without shareholder approval. Where such a repricing or option exchange includes named executive officers, we may also vote against the company's annual advisory vote on executive compensation."
- **AON'S VIEW:** The first part codifies an existing example listed under Board *responsiveness and shareholder rights* where BlackRock states it may vote against relevant committees and/or individual directors: "Members of the compensation committee where the company has repriced options without shareholder approval." The latter part codifies BlackRock's already-common, but previously unstated, practice.

Fidelity Investments, Proxy Voting Guidelines

- **REVISED** one of the three scenarios described where Fidelity will oppose the election of directors on the compensation committee for failure to adequately address concerns. Instead of referring to concerns "communicated by Fidelity in the process of discussing executive compensation," the policy now refers to concerns "raised by shareholders."
- **AON'S VIEW:** This change alters a longstanding, Fidelity-centric expectation that an issuer is expected to address executive compensation concerns specifically conveyed by Fidelity during engagement. The revised language suggests that a company should address concerns raised by its broader shareholder base. However, this language could have been adopted primarily to deflect potential concerns under the above-mentioned SEC guidance rather than to reflect a shift in voting perspective.

Invesco, Policy Statement on Global Corporate Governance and Proxy Voting

- **REMOVED:** the section on Board Responsiveness, including:

  "Boards should respond to investor concerns in a timely fashion, including reasonable

requests to engage with company representatives regarding such concerns, and address matters that receive significant voting dissent at general meetings of shareholders."

"We will generally vote against the incumbent chair of the compensation committee, or nearest equivalent, if there are significant ongoing concerns with a company's compensation practices that have not been addressed by the committee or egregious concerns with the company's compensation practices for two consecutive years.

We will generally vote against the incumbent compensation committee chair, or nearest equivalent, where there are ongoing concerns with a company's compensation practices and there is no opportunity to express dissatisfaction by voting against an advisory vote on executive compensation, remuneration report (or policy) or nearest equivalent.

Where a company has not adequately responded to engagement requests from Invesco or satisfactorily addressed issues of concern, we may oppose director nominations, including, but not limited to, nominations for the lead independent director and/or committee chairs."

- **REPLACED** this section with a brief, broader policy on *Governance failures*, with no explicit reference to compensation matters, that states Invesco may take voting action against director nominees in response to material failures of governance, risk oversight or fiduciary responsibilities that adversely affect shareholder value.
- **AON'S VIEW:** While Invesco has retained a variety of other policies describing reasons it may vote against directors, the SEC activism guidance could have contributed to decisions to eliminate published views on board responsiveness— including the expectation for engagement—and simplify the policy without intending to materially alter its voting approach.

Morgan Stanley Investment Management, Equity Proxy Voting Policy and Procedures

- **REMOVED** "We consider withholding support from or voting against a nominee where we believe executive remuneration practices are poor, particularly if the company does not offer shareholders a separate "say-on-pay" advisory vote on pay."
- **REPLACED** this and several other specific examples of potential director opposition with a broader Board Accountability policy describing expectations for communication, engagement and alignment with shareholders and stating, with no explicit reference to compensation matters, that "We may consider withholding support for directors where we have significant concerns due to inadequate risk oversight of potentially financially material issues."
- **AON'S VIEW:** Under Morgan Stanley's 2025 rewrite of its board of directors policies, only two stated scenarios for potential director opposition remain: the one cited above and another pertaining to audit committee concerns. The only remaining reference to compensation in this section is an acknowledgment that "monitoring and incentivizing performance" is one of the board's important responsibilities. The impetus for the firm's policy changes, and the potential for voting practices to remain similar, could be similar to that noted for Invesco, although Morgan Stanley's policies still "generally expect the board to engage meaningfully with long-term shareholders."

State Street Global Advisors, Global Proxy Voting and Engagement Policy

- **REMOVED:** "We may oppose remuneration reports where pay seems misaligned with shareholders' interests. We may also consider executive compensation practices when re-electing members of the compensation committee."

"We may vote against the re-election of members of the compensation committee if we have serious concerns about remuneration practices and if the company has not been responsive to shareholder feedback to review its approach. In addition, if the level of dissent against a management proposal on executive pay is consistently high, and we have determined that a vote against a pay-related proposal is warranted in the third consecutive year, we may vote against the Chair of the compensation committee."

- **AON'S VIEW:** State Street's 2025 policy changes are perhaps the most challenging of the policy updates to interpret, as virtually all explicit negative voting triggers were also removed. While the discussion of *Compensation and Remuneration* states that it is the board's responsibility to determine appropriate executive compensation, the policies do not specify which, if any, of the firm's expectations and potential pay and performance alignment criteria might lead to votes against a compensation committee member. While the recent SEC guidance may have been influential, we cannot predict whether or to what extent State Street's voting may change in practice. We do believe that wholesale support for directors under the numerous scenarios previously cited as potentially meriting an against vote would be inconsistent with the principles and expectations still reflected in the policies.

T. Rowe Price Associates, Proxy Voting Guidelines (Americas)

- **REMOVED** one of three cases describing where the investor may vote against members of a compensation committee; specifically, if "Compensation Committee members approve excessive executive compensation or severance arrangements."
- **RETAINED** the other two cases for potential opposition: repricing of underwater options without prior shareholder approval and demonstration of poor compensation practices (considering performance results and other factors).
- **AON'S VIEW:** It is not clear whether this change was intended to shift the firm's voting practice or just to simplify policy language. T. Rowe Price could have determined it did not vote against compensation committee members frequently enough based on "excessive" pay arrangements to warrant retaining the line item policy, and/or that opposition in that regard could be sufficiently captured by its approach to vote against due to "poor compensation practices" or its broad policy to consider opposition where "Directors exhibit persistent failure to represent shareholders' interests or fail in the oversight of material governance, environmental, or social risks, in the opinion of T. Rowe Price."

Conclusion

We believe it will take longer than one proxy season to gauge the effect of these policy adjustments on director elections relative to executive compensation. The anti-ESG environment continues to evolve, and the voting impact of board "responsiveness" policies regarding say-on-pay proposals won't apply until 2026.

However, even as the market waits for the full impact to play out, companies embarking on off-season engagement and proxy planning in the fall will need insights on their investors and how they have been voting, especially if in-season feedback from their investors was constrained by the February 2025 SEC Guidance. Aon Governance looks forward to analyzing voting data for the 2025 proxy season once disclosed in late summer and providing investor intelligence and engagement guidance to our clients.

ADVANCE NOTICE BYLAWS

Delaware Court of Chancery Gives Activists Advance Notice Bylaw Do-Over

By Andrew Kaplan, Mark Mixon, and Justine Drohan

The Delaware Court of Chancery recently concluded that a board properly rejected activists' non-compliant director nomination notice, but nevertheless permitted the activists a rare second attempt at complying with the company's advance notice bylaw. Applying *Unocal* and *Blasius* in a post-trial memorandum opinion, the do-over followed the Court's separate conclusion that the board's decision to reduce its size while in the shadow of a proxy fight was a breach of fiduciary duty.

Background

On May 21, 2025, Vice Chancellor Bonnie W. David issued a decision in *Vejseli v. Duffy*,[1] invalidating a board resolution that reduced the size of the board and permitting activists a second attempt at complying with an advance notice bylaw in nominating two new directors. The Court in this decision reaffirmed the enforcement of advance notice bylaws but, using its discretion as a court of equity, nevertheless provided a second chance at complying with the advance notice bylaw here due to the board's own actions, which were not taken on a "clear day" and thus were a breach of the board's fiduciary duties.

The opinion describes the facts as follows. In January 2024, digital currency mining assets of a company in Chapter 11 proceedings were spun off to a newly formed entity, Ionic Digital, Inc. (the Company), and many creditors became stockholders of the Company. The Company experienced significant management and director turnover, and a subset of stockholders became frustrated with the Company's failure to publicly list its shares and what they considered other management failures.

These activists aligned themselves with non-stockholder third parties whom the Company previously had passed over for arguably lucrative business opportunities. Those activists and third-party entities attempted to initiate a proxy contest at the Company's first annual meeting of stockholders and install two new directors.

The Company's board consisted of six seats (four directors and two vacancies), divided into three even classes, each standing for election every three years. Class I, consisting of one director and one vacancy, was up for re-election at the upcoming annual meeting of stockholders. In advance of the annual meeting, however, the Company's board reduced its size from six directors to five, and, as a result, eliminated one of the two seats (which was vacant up until this point) that otherwise was going to be up for election.

Without disclosing the board size reduction, the board announced the annual meeting date, triggering a 10-day window for submissions of nominations or other proposals of business under the company's advance notice bylaw. The activists submitted nominations for the two board seats they believed were still up for election. In their nomination notice, however, the activists failed to disclose all existing agreements between them and the third-party entities with which they had partnered. After the nomination deadline passed, the board disclosed the board reduction and rejected the nomination notice based on the activists' failure to include these agreements. The activists filed suit, alleging, among other things,

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that the directors had breached their fiduciary duties by reducing the board size and rejecting the nomination notice. In the meantime, the company postponed its annual meeting of stockholders until thirty days after the Court ruled in this action.

The Board Reduction

The Court first concluded that the board's decision to reduce the board size was a breach of the board's fiduciary duties. In reaching its decision, the Court considered the board's actions under the enhanced scrutiny standard of review under *Unocal*, with a focus on election interference under *Blasius*, which considers whether (1) the board faced a "real and not pretextual" threat "to an important corporate interest or to the achievement of a significant corporate benefit," and (2) the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise. The Court applied enhanced scrutiny because the resolution "interfere[d] with the election of directors," and because the resolution was not adopted "on a 'clear day,'" but rather as a defensive measure against the impending proxy contest.

In doing so, the Court noted that the most credible explanation offered at trial for the board reduction was that the board sought to ensure that "the Board, rather than the stockholders, could later identify better candidates," which was "not a legitimate corporate purpose."

The Court also found that (1) the resolution was not necessary to accomplish the objectives of "cost savings and avoiding deadlock" that the board asserted post hoc as the reasons for the resolution, and (2) the board reduction was preclusive, because by eliminating a seat, the board made it impossible for stockholders to elect directors to that position, and therefore imposed its own favored outcome on the stockholders.

The Advance Notice Bylaw

The Court also held that the board properly rejected the nomination notice. First, the Court found that the activists failed to comply with the advance notice bylaw provision requiring "copies of all written agreements, contracts, arrangements, understanding, plans or proposals relating to" "[a]ny change in the present board of directors or management . . ., including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board" by not attaching the agreements between the activists and third-party entities and, more importantly, not even disclosing the existence of some of those agreements.

The agreements included, among others, a solicitation agreement—described by, but not attached to the nomination notice—for "the purpose of (i) supporting the [n]ominating [s]tockholders in their efforts to achieve the election of the persons they have nominated (at the [n]ominating [s]tockholders' sole discretion) to the Board . . . at the 2025 [A]nnual [M]eeting . . . of [the Company.]"

The Court concluded there are legitimate reasons why a board would want to know whether a nomination was part of a broader scheme relating to the governance, management, or control of the Company and such information was important to stockholders in deciding which director candidates to support. While the Court cited precedent suggesting that information regarding terminated agreements could be important, the Court did not definitively resolve whether such agreements needed to be disclosed because some provisions in the activists' arrangements survived termination.

Second, the Court concluded the directors did not breach their fiduciary duties by rejecting the nomination notice. The Court analyzed the fairness of their decision under the enhanced scrutiny standard of review. The Court determined that the board rejected the notice to advance the "important corporate interest[]" of "preserving an informed stockholder vote," and that the board's enforcement of the advance notice bylaw was both reasonable and not preclusive because "[e]nforcing the Advance Notice Bylaw is a reasonable means of ensuring that stockholders receive material information about director nominees" and "did not preclude [the activists] from submitting a compliant Nomination Notice."

The Court also rejected the activists' argument that the board's failure to provide an opportunity to supplement the nomination notice before the nomination window closed was inequitable and found that such action did not amount to "manipulative conduct," given that the window closed only two days after the activists submitted the nomination notice, noting that "Plaintiffs could have complied with the Advance Notice Bylaw's disclosure requirements, but they did not."

Despite concluding the board properly and fairly rejected the activists' nomination notice, as a consequence of the board's breach of fiduciary duty in reducing the board size, the Court issued an injunction "directing the Board to reopen the nomination window under the Advance Notice Bylaw to allow the Board, Plaintiffs, and any other the Company stockholder to submit director nominations."

In doing so, the Court stated that "[a] remedy that would permit the directors who breached their fiduciary duties to choose who will serve on the Board is no remedy at all." The Court also noted that the "unusual facts of this case" necessitated this remedy because it was the board's own wrongful conduct that required re-opening the nomination window, and the record did not support the board's position that the activists intentionally concealed material information.

Takeaways

- This decision reaffirms that the Delaware Court of Chancery applies enhanced scrutiny under *Unocal* with a focus on stockholder franchise concerns articulated in *Blasius* when evaluating claims that a board breached its fiduciary duties by taking defensive action that impacts the election of directors.
- The Court reinforced that Delaware law permits a company to reject a non-complying nomination notice after the close of the nomination window where the activists' submission did not provide the company sufficient time to do so before the deadline. If such rejection is challenged, however, a court may still examine a board's motives in rejecting even a non-complying notice.
- To avoid triggering enhanced scrutiny review, directors and advisors should ensure that any adjustment to board size is done on a clear day and for legitimate corporate interests, as documented by the record. This supports the notion that any board size decrease should (ideally) be done in connection with any director departure and that leaving a vacancy open for a period of time could lead to scrutiny if circumstances change in the future.
- This case is a reminder that the Delaware Court of Chancery, as a court of equity, has broad discretion to fashion a remedy for breach of fiduciary duty. That principle is difficult to predict and plan around. It manifested here when, despite achieving practically complete victory with respect to the advance notice bylaw, the Company was compelled to give the activists another chance.
- While the Court seemed to suggest that disclosure of recently terminated agreements would be appropriate, it also expressly acknowledged that it remains an open question whether an activists' failure to disclose such agreements is sufficient to establish a violation of the advance notice bylaw at issue in this case. At minimum, disclosure is required where a material provision of such an agreement expressly survives termination.

Note

1. *Vejseli v. Duffy*, 2025 WL 1452842 (Del. Ch. May 21, 2025).

DIRECTOR ELECTIONS

Not Just Say-on-Pay: ISS Recommendations "Against" Directors Also Spike in June

By Ben Burney

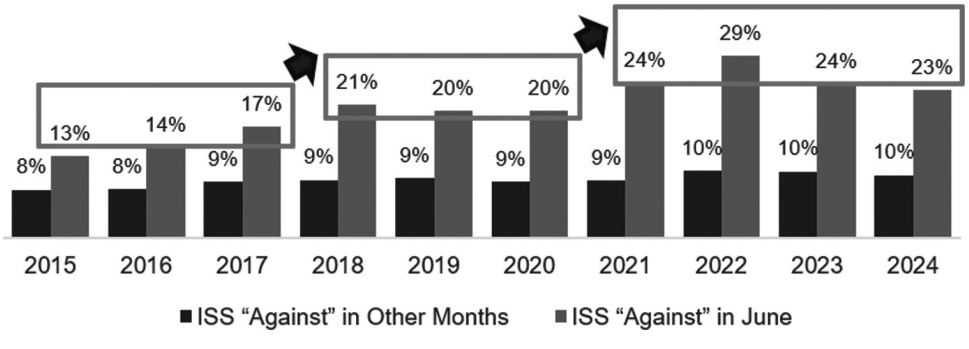
In a prior article,[1] we identified a notable trend: ISS recommendations "Against" say-on-pay spike each June. We now have explored trends in Institutional Shareholder Services (ISS) recommendations for board directors and find the same "June Phenomenon": ISS recommendations "Against"[2] spike in June.

But the June Phenomenon for directors has an added twist: The trend of adverse recommendations in June appears to be increasing over time, whereas with say on pay the "Against" rate has been stable. In 2015 and 2016, the average rate in June was below 15 percent, and beginning in 2018, the recommendations "Against" have been above 20 percent. It is unclear what has caused the increase in "Against" recommendations during this time. Recommendations "Against" in other months have trickled up slightly, from 8 percent to 10 percent.

Unlike say on pay, votes for directors are not advisory and over the past 10 years, less than 0.1 percent of director nominations have failed. Failures in June appear equally likely as in other months, and Exequity finds no discernible trend in the number of companies with directors failing to be re-elected.

On average since 2015, directors have received 96 percent support when ISS recommends "For" and 83 percent when "Against." Average support for directors when ISS recommends "Against" has trickled 1.7 percent higher since 2015 (from 82.4 percent in 2015 to 84.2 percent in 2025), but average support when ISS recommends "For" trickled down by 1.6 percent (from 97.6 percent in 2015 to 96.0 percent in 2024). *See* graph below.

2015–2024 "Against" Recommendations for Directors



Ben Burney *is a principal of Exequity LLP.*

Notes

1. "Why Do ISS Recommendations 'Against' Say-on-Pay Spike in June?," *Insights*, Vol. 39, No. 7, July 2025, p. 16.
2. Note we define "Against" as one of "Against," "Withhold," or "Abstain" recommendations from ISS.

STATE LAW

Texas Makes Bullish Changes to Its Corporate Law: Amendments to the TBOC

By Hillary H. Holmes, Gerald Spedale, and Jason Ferrari

The 89th Texas Legislature, which concluded on June 2, 2025, passed several bills that amended the Texas Business Organizations Code (TBOC) in a continued effort to make the state an even more attractive home for US businesses. This article summarizes the four bills—SB 29, SB 1057, SB 2411, and SB 2337—which collectively introduce the most significant changes to the TBOC from a corporate law perspective. The resulting amendments were designed to place limitations on litigation risk for, and liabilities of, directors and officers, to manage relations with shareholders and proxy advisory firms, and to provide additional certainty in corporate formalities.

Senate Bill 29

Senate Bill 29 includes consequential changes affecting corporate governance, governing authority liability, shareholder rights, and the internal management of Texas entities. SB 29 was signed into law on May 14, 2025, and the amendments to the TBOC became effective immediately.

Director and Officer Duties: New Presumptions and Protections (New TBOC Sections 21.418 and 21.419)

A central feature of SB 29 is the codification of the business judgment rule (BJR Statute). The amendments codify the presumption that directors, officers, and other managerial officials of corporations, limited liability companies, and limited partnerships acted in compliance with their duties. To take advantage of this presumption, a Texas corporation must be publicly traded or must opt-in to TBOC 21.419 in its certificate of formation, and a Texas limited liability company must be publicly traded (although it also may replicate the effect of the statute in its company agreement).

For entities that opt-in to the BJR Statute, the actions of directors and officers are presumed to be taken in good faith, on an informed basis, in the best interests of the corporation, and in compliance with applicable law and the corporation's governing documents. To prevail in an action alleging a breach of duty, a claimant must (a) rebut one or more of these presumptions and (b) prove both (i) that the act or omission constituted a breach of the person's duties as a director or officer, and (ii) that the breach involved fraud, intentional misconduct, *ultra vires* acts, or knowing violations of law. The claimant must "state with particularity the circumstances constituting" one of the four elements of the breach. These protections are in addition to any existing statutory or common law defenses.

SB 29 amends the TBOC to provide additional protections for certain activities involving conflicts of interest. Under amended TBOC Section 21.418(e), directors and officers of corporations that are publicly traded or opt-in to the BJR Statute are shielded from any cause of action brought by shareholders for a breach of duty with respect to the making, authorizing or performing of a contract or transaction because the director or officer had an interest in the transaction unless the cause of action is permitted by the BJR Statute; meaning the act or omission

Hillary H. Holmes, **Gerald Spedale**, *and* **Jason Ferrari** *are attorneys of Gibson, Dunn & Crutcher LLP.*

was a breach of the person's duties and the breach involved fraud, intentional misconduct, *ultra vires* acts or knowing violations of law.

In addition, for limited liability companies and limited partnerships, the amendments clarify that governing documents may expand, restrict, or even eliminate fiduciary duties and related liabilities, including the duties of loyalty, care, and good faith.

Share Ownership Requirements for Derivative Actions (Amended TBOC Section 21.552)

Texas corporations that (a) have common shares listed on a national securities exchange, or (b) (i) have 500 or more shareholders and (ii) affirmatively opt-in to the BJR Statute, may institute a requirement that, at the time a derivative proceeding is instituted, the shareholder bringing such action beneficially owns a minimum amount of common shares. Corporations may set a threshold of up to 3 percent of the corporation's outstanding shares as a prerequisite to initiating derivative proceedings. This requirement must be set out in either the certificate of formation or the bylaws.

Jury Trial Waivers and Exclusive Forum Selection (Amended TBOC Section 2.115)

The amendments expressly permit entities to include waivers of the right to jury trials for any internal entity claims within their governing documents. Under Texas law, internal entity claims include claims of any nature that are based on (i) rights, powers, and duties of its governing authority, governing persons, officers, owners, and members; and (ii) matters relating to its membership or ownership interests. This includes, for example, derivative claims of breach of fiduciary duties by directors of corporations. Such waivers are enforceable even if not individually signed by members, owners, officers, or governing persons. A person is considered to have knowingly waived the right to a jury trial if the person voted for or ratified the document containing the waiver or acquired stock in the entity at, or continued to hold stock in a particular entity after, a time in which the waiver was included in the governing documents.

Also, in their governing documents, entities may choose an exclusive Texas forum and Texas venue for internal entity claims.

Limitations on Shareholder Inspection Rights (Amended TBOC Section 21.218)

The amendments narrow inspection rights for shareholders, members, and partners. Emails, text messages, and social media communications are excluded from the definition of entity records unless they effectuate formal action by the entity. For publicly traded Texas corporations and Texas corporations that affirmatively opt-in to the BJR Statute, inspection demands may be denied if the requesting holder is involved in ongoing or expected litigation with the corporation or derivative proceedings. However, these limitations do not impair discovery rights in pending litigation.

Court Finding of Independence of Committees Reviewing Related Party Transactions (Amended TBOC Sections 21.416 and 21.4161)

Boards of publicly Texas traded corporations or Texas corporations that opt-in to the BJR Statute may petition the Texas Business Court (or any other district court with proper jurisdiction if the corporation's principal place of business is not located in a Texas Business Court operating division) for a determination on the independence of directors on board committees formed to review and approve transactions involving controlling shareholders, directors, or officers. After expedited proceedings to determine appropriate legal counsel for the corporation and its shareholders (other than any relevant controlling shareholder), the court will hold an evidentiary hearing and issue a binding determination regarding the independence of the directors on the committee. The court's finding is dispositive absent facts not presented to the court.

TBOC Section 21.554 provides a similar procedure for determination that directors on committees charged with making determinations on behalf of the

corporation in connection with derivative proceedings are independent and disinterested.

Limitations on Attorney Fee Awards (Amended TBOC Section 21.561)

The amendments limit awards of plaintiff's attorney fees in derivative proceedings by restricting what constitutes a substantial benefit to an entity. Specifically, the amended statute expressly provides that additional or amended disclosures made to shareholders, limited partners, or members do not qualify as a substantial benefit for purposes of plaintiff's expense awards.

Senate Bill 1057

Senate Bill 1057 permits certain corporations to implement significantly higher thresholds for shareholder proposals. SB 1057 was signed into law on May 19, 2025, and the amendments to the TBOC will become effective on September 1, 2025.

Limitations on Shareholder Proposals (New TBOC Section 21.373)

The corporations that can elect to take advantage of these provisions are limited to any "nationally listed corporation," which is defined as a Texas corporation that (a) has equity securities registered under Section 12(b) of the Securities Exchange Act of 1934 (Exchange Act), (b) is admitted to listing on a national securities exchange, and (c) either (i) has its principal office in Texas or (ii) is admitted to listing on a stock exchange that has its principal office in Texas and has received certain approvals from the Securities Commissioner of Texas. Under Texas case law, the principal office of a corporation is the location where the corporation's officers direct, control and coordinate the corporation's activities.

To implement these provisions, a corporation must make an affirmative election through an amendment to its governing documents. The corporation must provide notice to its shareholders of the proposed amendment to the governing documents in any proxy statement provided to shareholders in advance of adopting the amendment. Additionally, once these requirements are implemented, any proxy statement provided to shareholders must contain specific information regarding how shareholders may submit a proposal, including information about how shareholders may contact one another for the purpose of satisfying the minimum ownership requirements.

In order to submit a proposal, the heightened requirements mandate that a shareholder or group of shareholders must, subject to the corporation's governing documents:

- Hold at least $1 million in market value or 3 percent of the corporation's voting shares;
- Have held such shares for at least six months prior to the meeting;
- Continue holding the shares through the duration of the meeting; and
- Solicit holders representing at least 67 percent of the voting power of shares entitled to vote.

Under the TBOC "voting shares" are defined as "shares that entitle the holders of the shares to vote on a proposal."

These provisions apply to any proposal on a matter to be submitted to shareholders for approval at a meeting of shareholders, other than director nominations and procedural resolutions that are "ancillary to the conduct of the meeting." As such, the provisions apply not only to shareholder proposals under Rule 14a-8 of the Securities Exchange Act of 1934, but also to "floor" proposals submitted pursuant to a corporation's advance notice provisions unless the proposal's topic is "ancillary to the conduct of the meeting."

Senate Bill 2411: Expanded Officer Exculpation and Transactional Streamlining

Senate Bill 2411 introduces several important amendments addressing officer liability, merger approvals, and transactional administration. SB 2411 was signed into law on May 24, 2025, and

the amendments to the TBOC will become effective on September 1, 2025.

Expanded Exculpation of Officers (Amended TBOC Section 7.001)

SB 2411 provides for exculpation of officers to the same extent already permitted for directors. SB 2411 permits entities organized under the TBOC to limit or eliminate the liability of officers for monetary damages for an act or omission taken by the officer in his or her capacity as an officer of the entity, except that exculpation cannot be provided for breaches of loyalty, intentional misconduct, transactions in which the officer received an improper benefit, or statutory violations. To adopt such exculpation provisions, an entity must make an affirmative election in its certificate of formation.

Procedural Certainty in Approval of Major Transactions and Related Actions (Amended TBOC Sections 3.106, 10.002, 10.004 and 10.104)

SB 2411 modernizes transactional procedures by:

- Authorizing governing authorities of an entity (for example, boards of directors of a corporation) to approve corporate documents, including plans of merger, in final or "substantially final" form;
- Clarifying that disclosure letters, schedules, and similar documents delivered in connection with a plan of merger are not deemed part of a plan of merger unless expressly included, but still have the effect provided in the plan of merger;
- Allowing plans of merger to designate representatives to act on behalf of owners or members with exclusive authority to enforce or settle post-closing rights, with such designations becoming irrevocable upon plan approval; and
- Allowing plans of conversion to authorize additional post-conversion actions without further approvals beyond the plan's adoption.

Other

SB 2411 also updates references in the TBOC to the new Texas Business Courts, includes certificate of formation content modernizations, and clarifies the use of ratifications and validations.

Senate Bill 2337

Au: Should we update this paragraph, since this will be published after these dates.

As of June 16, 2025, Senate Bill 2337 had not yet been signed into law. The bill is subject to a 20-day review that began on June 2, 2025, after which it will automatically become law if not signed or vetoed by the Governor. If SB 2337 becomes law, the amendments to the TBOC will become effective on September 1, 2025. The changes in law apply only to proxy advisory services provided on or after the effective date.

Who Is Subject to Disclosure Requirements (Amended TBOC Section 6A.001)

SB 2337 amends the TBOC to add new Chapter 6A titled "Proxy Advisory Services." This new law would mandate significant public disclosures by proxy advisory firms under certain circumstances when advising on proposals related to corporations with Texas connections. The law applies to any "proxy advisor," which is defined as a person who, for compensation, provides a proxy advisory service to shareholders of a company or to other persons with authority to vote on behalf of shareholders of a company. For this purpose, a "company" includes any publicly traded corporation that (i) is incorporated in Texas, (ii) has its principal place of business in Texas, or (iii) is incorporated in another state and has made a proposal to redomesticate to Texas. "Proxy advisory services" are broadly defined and include, among other things, advice or recommendations on how to vote on proposals, proxy statement research or analysis, ratings or research regarding corporate governance, and development of voting recommendations or policies. The scope of proposals covered by the law includes all proposals that are included in the company's proxy statement, whether made by the company or by shareholders, including director elections and executive compensation.

When Disclosures Are Required (Amended TBOC Sections 6A.101 and 6A.102)

Under the new law, a proxy advisor is required to immediately disclose when its recommendations are "not provided solely in the financial interest of the shareholders of a company." The statute expressly provides that a recommendation is not provided solely in the financial interests of shareholders:

- When it is wholly or partly based on, or otherwise takes into account, one or more non-financial factors, including a commitment, initiative, policy, or value-based standard based on: an environmental, social, or governance (ESG) goal, factor or investment principle; diversity, equity or inclusion (DEI); a social credit or sustainability factor or score; or membership in or commitment to an organization that bases any of its evaluation of the company's value on nonfinancial factors;
- When it involves a voting recommendation with respect to any shareholder-sponsored proposal that is inconsistent with the recommendation of the board of directors or a committee of a majority of independent directors and fails to include a written economic analysis (explained below) of the financial impact of the proposal on the shareholders;
- When it is not based solely on financial factors and subordinates shareholders' financial interests to other objectives; or
- When it recommends a vote against a company proposal to elect a governing person, unless the firm affirmatively states that the firm's recommendation is made solely based on the financial interests of shareholders.

"Written economic analysis" must include the short and long-term benefits and costs of implementing any shareholder-sponsored proposal, an analysis of whether the recommendation is consistent with the investment objectives and policies of the client, the projected quantifiable impact of adopting the proposal on the investment returns of the client, and an explanation of the methods and processes used to prepare the economic analysis.

The new law would also mandate that proxy advisors provide certain disclosures when the advisor provides advice on how to vote on a proposal that is "materially different" (Materially Different Advice) to clients who have not expressly requested services for a nonfinancial purpose. The statute provides that a proxy advisor gives Materially Different Advice when it simultaneously advises: (i) one or more clients to vote for, and one or more clients to vote against, the same proposal; (ii) one or more clients to vote for, and one or more clients to vote against (or abstain), the same director nominee; or (iii) that one or more clients vote for or against a proposal in opposition to the recommendation of the company's management.

What Must Be Disclosed (Amended TBOC Sections 6A.101 and 6A.102)

If the proxy advisor's recommendation is not exclusively based on the financial interests of the shareholders, as specified in the statute, then the proxy advisor must disclose to each shareholder or entity receiving their service that the recommendation is not solely based on, and subordinates, the financial interests of the company's shareholders and explain, with particularity, the basis of the advice concerning each recommendation. The advisor must also provide a copy of the disclosure to the company that is the subject of the proposal. In addition, the proxy advisor must clearly disclose on its publicly accessible website that its services include advice that is not based solely on the financial interests of shareholders, including "sacrificing investment returns or undertaking additional investment risk to promote one or more nonfinancial factors."

If the proxy advisor provides Materially Different Advice, the proxy advisor must, in addition to complying with the applicable disclosure requirement in the paragraph above, disclose which of the advice is provided based solely on the financial interests of shareholders and which is supported by any specific financial analysis. The proxy advisor must also disclose the conflicting advice to each shareholder receiving the advice, any entity receiving the advice

on behalf of a shareholder, the company that is the subject of the proposal, and the Attorney General of Texas.

Enforcement of Chapter 6A (Amended TBOC Sections 6A.201 and 6A.202)

TBOC Section 6A.201 provides that a violation of the chapter is a deceptive trade practice under the Deceptive Trade Practices-Consumer Protection Act, which allows for broad-sweeping private and public rights of action. The statute also provides that the recipient of the proxy advisory services, the company subject to the proxy proposal, and any shareholder of the subject company can bring actions seeking injunctive relief or a declaratory judgment against the proxy advisor. The plaintiff is then required to give notice to the Attorney General, who may intervene in the action.

Conclusion

There are open questions with respect to certain aspects of the new laws' interpretation and application that should be monitored as case law and accepted practice develop. Nevertheless, the recent amendments to the TBOC reflect the continued evolution of Texas business law and the state's efforts to make Texas an attractive home for US corporations.

Nevada Adopts Significant Amendments to Further Entice Corporations to Incorporate or Reincorporate

By David A. Bell, Ran Ben-Tzur, Dean Kristy, and Wendy Grasso

Not to be outdone by Delaware and Texas, the Nevada Senate voted unanimously on May 21, 2025, signed by Governor Lombardo on May 30, 2025, to adopt Assembly Bill No. 239 (AB 239), which provides for significant amendments to the Nevada Revised Statutes (NRS) governing Nevada corporations. The legislation was initially proposed by the State Bar of Nevada's Executive Committee, Business Law Section, which also prepared a memorandum summarizing the changes.

The memorandum explains that the proposed amendments are intended to provide greater clarity and to respond to practice considerations, requests/comments from other attorneys, and other business law developments in other states (presumably Delaware and Texas). While the memorandum does not address the corporate amendments just adopted in Texas, it does reference the existing corporate laws in Delaware, including recently adopted amendments to the Delaware General Corporation Law (DGCL)—making clear that the proposed changes are an attempt to appeal to corporations and challenge Delaware's status as the preferred state for incorporation.

The key changes proposed by AB 239 are summarized below.

David A. Bell, Ran Ben-Tzur, Dean Kristy, *and* **Wendy Grasso** *are attorneys of Fenwick & West LLP.*

Fiduciary Duties and Liability of Controlling Stockholders—Section 78.240 Amendments

The proposed amendments to Section 78.240 would codify the fiduciary duties and liability of Nevada corporation controlling stockholders.

First, the amendments would clarify that stockholders, in their capacity as stockholders, do not owe fiduciary duties to either the corporation or its stockholders, except as described below with respect to controlling stockholders.

Second, the proposed amendments explain that controlling stockholders have just one fiduciary duty—to refrain from exerting undue influence over a director or officer of the corporation with the purpose and proximate effect of inducing a breach of fiduciary duty by the director or officer that:

- Results in liability for the director or officer under the NRS; and
- Involves a contract or transaction in which the controlling stockholder (or any of its affiliates or associates) is a party or has a material and nonspeculative financial interest and results in a material, nonspeculative and non-ratable financial benefit to the controlling stockholder that results in a material and nonspeculative detriment to the other stockholders generally.

The type of controlling stockholder contract or transaction to be scrutinized under the Nevada amendments resembles the definition of "controlling stockholder transaction" recently adopted in Delaware with a few important distinctions.

The Delaware test for "controlling stockholder transaction" set forth in Delaware General Corporation Law (DGCL) § 144(e)(3) requires

a "financial or other benefit" not generally shared with other stockholders. The Nevada test requires a *material*, *nonspeculative,* and non-ratable *financial* benefit. There is no materiality requirement under the Delaware test and the benefit need not be financial. Furthermore, the Nevada test specifically requires that the benefit be "nonspeculative" and that the contract or transaction causes actual harm to the other stockholders. This is not expressly the case in Delaware—but recent Delaware Supreme Court case law has moved in that direction (*see* the *Maffei v. Palkon* discussion of temporality considerations regarding claims of breach of fiduciary duties by a controlling stockholder in connection with Tripadvisor's reincorporation from Delaware to Nevada).

Au: Where is this discussion?

The proposed amendments to NRS § 78.240 also include a presumption that there is no breach of fiduciary duty by a controlling stockholder if the underlying contract or transaction has been approved by either:

- A committee of only disinterested directors; or
- The board of directors in reliance on the recommendation of a committee of only disinterested directors.

This change mirrors the safe harbor offered to controlling stockholders and control groups under DGCL § 144. However, it does not expressly codify the possibility of approval by disinterested stockholders or the "fair as to the corporation and its stockholders" cleansing possibility.

Finally, the proposed amendments to NRS § 78.240 explain that a stockholder will not be individually liable to the corporation, its stockholders, or creditors unless the:

- Stockholder is a controlling stockholder;
- Presumption (described above) has been rebutted; and
- Controlling stockholder is found to have breached its fiduciary duty (described above).

The memorandum explains that the proposed changes to NRS § 78.240 are "in light of the Delaware Legislature's recent push to codify in this area" and help "maintain Nevada's competitive advantage as a leader in stable, predictable and common-sense corporate law."

While the Delaware amendments do not specifically address the fiduciary duties of stockholders (and specifically controlling stockholders), the corporate legal community is anxiously awaiting a decision from the Delaware Supreme Court in the appeal of *Tornetta v. Musk*, which may address this question and other issues related to controlling stockholders of Delaware corporations.

The amendments to Section 78.240 of the NRS would define a "controlling stockholder" as a stockholder having the voting power, by virtue of such stockholder's relative beneficial ownership of shares or otherwise, to elect at least a majority of the corporation's directors.

Notably, the definition for "controlling stockholder" proposed by the Nevada legislature is much narrower than the test just adopted in Delaware and reflected in DGCL § 144.

Under DGCL § 144(e)(2), a "controlling stockholder" includes any stockholder who:

- Owns a majority of the voting power of the corporation;
- Controls at least one-third of the voting power of the corporation and has the power to exercise managerial authority; or
- Has the right (by contract or otherwise) to cause the election of a majority of the board of directors or directors entitled to cast a majority voting power of all directors.

The memorandum explains that the proposed test for "controlling stockholder" in Nevada will ensure that only stockholders "truly in a position to control the direction and management of the corporation [are captured in the definition], without arbitrary ownership thresholds or ambiguous standards that could undermine predictable and stable application" (an apparent criticism of the Delaware test).

The amendments to Section 78.240 of the NRS define a "disinterested director" as a director who:

- Individually, or with or through any of the director's affiliates or associates other than the corporation, neither has a material and nonspeculative financial interest in, nor is a party to, the contract or transaction; and
- Satisfies the independent standards of Section 10A(m) of the Securities Exchange Act (other than any financial literacy requirements) and the rules of the national securities exchange, if any, on which the corporation's stock is listed.

Again, the test for when a director is no longer a "disinterested director" under the proposed Nevada amendments appears to be, in some respects, narrower than the one just adopted in Delaware. For example, the Nevada test would require a "material and nonspeculative financial interest" for a director to be deemed "interested."

The test in Delaware merely requires a "material interest" in the act or transaction and is not limited to a financial interest. On the other hand, to be a disinterested director of a Nevada public company, the director also must satisfy the independent standards of Section 10A(m) of the Securities Exchange Act (other than the financial literacy requirements). In Delaware, a public company director who is not a party to the contract or transaction and satisfies the applicable criteria for determining independence, is presumed to be disinterested—a heightened presumption.

Waiver of Jury Trials—New Section 78.046(4)

Similar to the recent Texas legislation, the proposed amendments to NRS § 78.046(4) would allow a corporation to include in its articles of incorporation an enforceable waiver of the right to a jury trial concerning any "internal action" (as defined by the NRS).

The memorandum explains that the reason for this change is "to give some comfort to companies considering a move to Nevada, since jury trials are unavailable for cases heard in the Delaware Court of Chancery."

Materials Provided with Notice Deemed to Be Part of Notice—Section 75.150 Amendments

The proposed amendments to NRS § 75.150 clarify that any materials provided, along with a notice or other communication, will be deemed part of the notice or communication solely for purposes of determining whether notice was duly given under the NRS and the "organic rules" of the entity providing the notice or other communication.

The memorandum explains that this change was made in response to Delaware litigation that called into question whether such materials are part of the notice provided to stockholders. In 2024, the Delaware legislature adopted amendments to Section 232 of the DGCL to clarify that materials provided along with a notice are deemed part of the notice. This was in response to *Sjunde Ap-Fonden v. Activision Blizzard et al.,* where the Court of Chancery found Activision's notice to stockholders to be technically deficient.

Board of Director Approval of Agreements—New Section 78.315(5)

The proposed amendments to NRS § 78.315(5) provide that the board of directors of a Nevada corporation may approve, adopt, or otherwise act on any agreement, instrument, certificate, or other document in final form, or such preliminary form as the directors deem appropriate in their business judgment.

While the memorandum does not specifically reference the *Activision* case in Delaware or the amendments to Section 147 of the DGCL adopted in 2024 as a result—which now authorize Delaware corporate boards to approve documents in final or substantially final form—we assume that this proposed change to the NRS is the result of the 2024 amendments to the DGCL.

Clarification on Certain Voting Standards—Sections 78.2055, 78.207, and 78.390 Amendments

The proposed amendments to NRS §§ 78.2055 and 78.207 clarify that, for any publicly-traded corporation, the approval required for a reverse stock split from any adversely affected class or series may be based on a "vote of the stockholders" of such class or series rather than a vote of a "majority of the voting power" unless the articles of incorporation require a greater proportion.

The proposed amendments to Section 78.390 also would lower the approval required for a publicly traded corporation to amend its articles of incorporation solely for the purpose of increasing or decreasing the number of shares the corporation is authorized to issue from a "majority of the voting power" to a "vote of the stockholders of the affected class or series."

References to External Facts or Events in Voting Agreements—New Section (d) to Section 78.365

The proposed amendments to NRS § 78.365 would permit voting agreements to require that stock held by parties to the agreement be voted "in a manner dependent upon any fact or event which may be ascertained outside of the agreement if the manner in which a fact or event may operate upon the exercise of the voting right is stated in the agreement."

Holding Company Reorganizations—New Section (1) to Chapter 92A

The proposed amendments to NRS Chapter 92A would permit a Nevada corporation to reorganize through the formation of a parent holding company and issue shares in the new parent holding company to stockholders in exchange for their shares in the existing corporation—all without stockholder approval—subject to the conditions described therein, and provided that the reorganization option may not be used to avoid the provisions of Nevada's acquisition of control share statutes or its business combination statutes. The amendments also would require the governing documents for the resulting holding company and surviving company to include certain provisions relating to majority ownership, common management, and voting requirements for a minimum period of two years.

The memorandum specifically references Section 251(g) of the DGCL, which permits this type of restructuring without stockholder approval.

Business Courts

The Nevada Assembly also recently approved AJR 8, which proposes an amendment to the Nevada Constitution to authorize the legislature, to the extent money is available, to provide by law for the establishment of a business court. If established, that court will have exclusive original jurisdiction to hear disputes involving shareholder rights, mergers and acquisitions, fiduciary duties, receiverships involving business entities, other commercial or contractual disputes between business entities, and any other business disputes of a similar nature in which equitable or declaratory relief is sought. However, it has been suggested that because the process for amending Nevada's constitution is extensive, this change, if approved, would likely not be implemented for several years.

Takeaways

- Like Texas, the Nevada legislature is actively pursuing changes to its corporate statutes to entice corporations to incorporate or reincorporate in the state, challenging Delaware's status as the preferred state for incorporation.
- It has been suggested that the Council of the Corporation Law Section of the Delaware State Bar Association and the state's legislature are considering additional updates to Delaware's corporate law to address the changes recently adopted in Texas. The legislature must now also consider the changes expected to be adopted in Nevada.

- To make matters even more difficult for Delaware, the constitutionality of the recent amendments to the DGCL is being challenged in the Court of Chancery in a case related to Dropbox Inc.'s reincorporation to Nevada. In that suit, the plaintiffs argue that provisions of the 2025 DGCL amendments violate the Delaware Constitution by eliminating "the Court of Chancery's equitable power to provide equitable remedies or other relief." Chancellor Kathaleen McCormick has suggested that the Delaware Supreme Court should weigh in on this issue. On June 6, 2025, the Court of Chancery certified two questions of law regarding the constitutionality of Senate Bill 21 (SB 21) to the Delaware Supreme Court.
- If the recent amendments to the DGCL are ultimately overturned as being unconstitutional, the State of Delaware may face an even greater challenge keeping corporations from leaving for more "predictable" (statute-based) states like Nevada and Texas.

ARTIFICIAL INTELLIGENCE

From Code to Compensation: The High-Stakes Race for AI Talent

By Ryan Colucci

As artificial intelligence (AI) continues to reshape industries and redefine how companies operate, organizations are under increasing pressure to build leadership and governance structures that can keep pace. In response, a growing number of S&P 500 companies are elevating AI to the executive level through formal leadership roles, while others are embedding oversight responsibilities into existing C-suite functions and board committees. This evolving landscape reflects not only the strategic importance of AI but also the complexity of managing its opportunities and risks across the enterprise.

At the same time, these developments are raising important questions about compensation, from how to attract specialized AI talent to how companies recognize new responsibilities taken on by existing leaders and directors. In the sections that follow, we examine how companies are structuring AI leadership and oversight today, and what this means for executive and board compensation in the years ahead.

Leadership Roles and Oversight Models

While AI is rapidly becoming a strategic priority across industries, relatively few S&P 500 companies have taken the step of assigning formally titled AI leadership roles. Only 8 percent have publicly disclosed a senior-level position with a direct AI focus, and just 4 percent have gone further by establishing a C-suite title that explicitly references artificial intelligence.

These roles, such as Chief AI & Data Officer, SVP of Data, Analytics & AI, and AI Product Manager, are disproportionately concentrated in four industries: (1) Information Technology, (2) Financials, (3) Healthcare, and (4) Industrials. This industry concentration reflects both the strategic importance of AI and the degree to which companies are formalizing their AI leadership through role nomenclature. The rise of dedicated AI roles in these fields reflects both a need to scale AI responsibly and a desire to embed AI deeply into core products and operations.

While only a small subset of S&P 500 companies has formal AI-specific executive titles, a larger group discloses that other senior leaders are responsible for overseeing AI initiatives. Specifically, 12 percent of companies identified at least one non-AI-titled executive with AI oversight duties. These roles span a

S&P 500	Prevalence		Industry Representation				
	#	%	Information Technology	Financials	Health Care	Industrials	Other
Disclose Any Senior AI Role	39	8%	35%	28%	15%	7%	12%
Disclose C-Suite Level AI Role	18	4%	32%	32%	21%	5%	5%

Source: S&P Capital IQ Database

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range of functional areas, reflecting the cross-cutting nature of AI strategy within organizations.

The table below shows the distribution of roles across companies disclosing AI oversight. Unsurprisingly, the most frequently cited position is Chief Technology Officer (46 percent), highlighting the close alignment between AI initiatives and broader technology leadership. Other common roles vary widely, underscoring how AI responsibilities are being integrated across different strategic functions.

• Chief Digital Officer	• Chief Information Officer	• Chief Commercial Officer
• COO or Business Unit Head	• Chief Strategy Officer	• Chief Customer Officer
• Chief Data Officer	• Chief Innovation Officer	• Chief Risk Officer
• Chief Executive Officer	• Chief Transformation Officer	• Sales Leadership Roles

This data highlights that many companies are integrating AI oversight into existing leadership structures, even in the absence of AI-specific titles. It suggests that for some firms, AI is being treated as an extension of core digital, data, or technology functions rather than a standalone domain, at least at this stage of strategic development.

Beyond naming specific executives or titling roles to reflect AI leadership, some companies disclose broader governance structures to oversee their AI initiatives. While these disclosures are less common overall, they highlight the diverse ways organizations are embedding AI oversight across the company.

Roughly 4 percent of S&P 500 companies disclose board-level involvement in AI oversight, with responsibility most often assigned to the full board. Other companies note involvement by standing committees, including Audit, Nominating & Governance, Technology, Risk, Compensation, or Finance, suggesting that AI governance is beginning to be woven into existing board oversight frameworks rather than being housed in a single, consistent place.

In addition to board-related governance, some companies report cross-functional structures that support or oversee AI activities. About 4 percent of companies disclose the use of cross-functional teams or groups, signaling a collaborative approach that spans functions such as technology, legal, operations, and strategy. A smaller subset (2 percent) discloses established AI-specific councils or groups, suggesting a more formalized, centralized body focused exclusively on guiding AI strategy, deployment, and risk management.

These structures, whether at the board level, within cross-functional groups, or through AI-focused

S&P 500	Prevalence		Other Roles With AI Oversight							
	#	%	Chief Technology	Chief Digital	COO or BU Head	Chief Data	CEO	Chief Information	Chief Strategy	Other
Disclose Other Role(s) Overseeing AI Initiatives	61	12%	46%	13%	11%	11%	10%	10%	8%	20%

Source: SEC Filings

S&P 500	Prevalence		Board and Committee Oversight Detail						
	#	%	Full Board	Audit	Nom/Gov	Tech	Risk	Comp	Finance
Disclose Full Board and/or Committee Oversight	20	4.0%	60%	20%	10%	10%	10%	5%	5%
Disclose Cross-functional Team/Group Oversight	19	3.8%							
Disclose AI-Specific Council/Group Oversight	9	1.8%							

Source: SEC Filings

bodies, demonstrate the varied and still-developing approaches companies are taking to organize and operationalize AI oversight. Together with the role-based governance described earlier, they point to a landscape in which companies are experimenting with different oversight models based on their size, sector, and strategic priorities.

Compensation Implications of AI-Related Leadership and Oversight

As companies expand their leadership and oversight structures to address AI-related opportunities and risks, new implications are emerging for both executive and director compensation. These trends are unfolding across multiple fronts.

First, the recruitment of specialized AI and technology talent, especially individuals with advanced technical credentials or experience leading AI-driven innovation, can carry a significant cost. Much of this talent pool is concentrated within large, well-resourced technology companies or venture-backed AI startups. As a result, attracting these individuals often requires customized compensation packages, including sizable sign-on awards with non-standard vesting schedules. In many cases, these awards are large enough to require Compensation Committee approval, leading to a notable increase in Committee- and Board-level engagement around talent strategy in the AI and broader technology domains.

The integration of AI talent at the non-executive level also presents pay equity considerations. In some instances, market-competitive compensation for AI specialists may push up against or even exceed that of existing executives within the same or adjacent functions. This dynamic has the potential to create internal tension if not carefully managed. Organizations should proactively set expectations, be ready to communicate the rationale for these compensation decisions, and revisit internal compensation structures to ensure fairness and alignment with strategy.

For existing executives and employees whose roles are expanding to include AI-related responsibilities, companies may need to make additional investments in training and upskilling. As these roles evolve in complexity, organizations should assess whether current compensation structures appropriately reflect the changing scope of responsibility. Benchmarking to emerging market data, while still limited, will become increasingly important in ensuring pay remains aligned with role content and performance expectations.

At the governance level, current oversight of AI is most often incorporated into the mandates of existing Board Committees, such as Audit, Risk, or Technology, rather than prompting the formation of new Committees. Looking ahead, we may see the creation of dedicated Technology, Risk, or Cybersecurity Committees, increased recruitment of directors with AI expertise, and adjustments to Committee-level compensation in recognition of expanding oversight duties. These changes likely will unfold gradually as companies continue to assess the strategic and risk-related implications of AI at the Board level.

Conclusion

As companies adapt their leadership and oversight structures to meet the demands of AI, compensation is becoming a key lever. Recruiting specialized AI talent often requires customized, high-value pay packages, sometimes exceeding standard frameworks and prompting greater Compensation Committee involvement. Internally, these dynamics raise questions around pay equity and performance alignment, especially as existing executives assume AI-related responsibilities that may shift role complexity and market benchmarks. At the board level, expanded committee mandates tied to AI oversight could eventually influence director pay, particularly where responsibilities grow meaningfully.

While many practices are still taking shape, the evolving AI landscape is already influencing compensation strategies in visible and important ways.

FOREIGN PRIVATE ISSUERS

SEC Concept Release on Foreign Private Issuer Eligibility: A Portent for the FPI Regulatory Framework?

By Colin J. Diamond, Gil Savir, Spencer Francis Young, and Meg Dennard

On June 4, 2025, the Securities and Exchange Commission (SEC) published a concept release in which the agency analyzes trends related to foreign private issuers (FPIs) and solicits extensive feedback regarding whether and how the definition of FPI should be amended. This results from the fact that FPIs are increasingly traded exclusively in the United States and are not subject to any non-US disclosure requirements, and yet benefit from significant exemptions that are not available to their US counterparts.

The current framework for the definition of "foreign private issuer" was adopted in 1983 and last amended in 1999. The test for FPI status is based on whether a majority of the shareholders of a non-US incorporated company are US residents. Even if that is the case, a non-US incorporated company can still be a FPI if it does not maintain certain US nexuses.[1]

At this stage, no definitive rule changes are proposed, and it is not clear how the SEC will proceed. The concept release does not seek comment on the exemptions that apply to FPIs, focusing instead only on the definition of FPI.

The public has 90 days from when the concept release is published in the Federal Register to provide comments in response to the SEC's solicitation.

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Shift in the Nature of Foreign Private Issuers[2]

The Concept Release sets forth data on the changes in the nature of FPIs that has occurred between 2003 and 2023. Exhibit 1 sets forth the top five jurisdictions of incorporation for FPIs and related information from 2003 and 2023:

The SEC noted the following points based on this data:

- FPIs tended to be incorporated in jurisdictions different from their headquarters, and the most common jurisdictions shifted to the Cayman Islands for issuers' jurisdiction of incorporation and mainland China for their headquarters.
- Despite the shift in foreign jurisdictions, the market capitalization of FPIs incorporated in the Cayman Islands and/or headquartered in mainland China tended to be relatively small, resulting in those issuers representing a small percentage of the aggregate global market capitalization of all FPIs despite their numerosity. In 2023, the aggregate global market capitalization of FPIs incorporated in the Cayman Islands represented 11.6 percent and the aggregate global market capitalization of FPIs headquartered in mainland China represented 5.1 percent of the aggregate global market capitalization of all FPIs.
- The increase in China-based issuers[3] from approximately 5 percent of FPIs in 2003 to an estimated 28 percent in 2023 led to a corresponding increase in issuers incorporated in the Cayman Islands or the British Virgin

Exhibit 1

2003		2023			
Country	**Number**	**Country**	**Number**	**Aggregate Market Cap ($MM)**	**Median Market Cap ($MM)**
Jurisdiction of Incorporation					
Canada (non-MJDS)	224	Cayman Islands	322	$1,047,823	$104
United Kingdom	106	Israel	97	$116,454	$121
Israel	81	Canada (non-MJDS)	75	$24,097	$24
Brazil	48	British Virgin Islands	62	$13,008	$29
Mexico	38	United Kingdom	44	$1,593,934	$13,072
Jurisdiction of Headquarters					
Canada (non-MJDS)	218	China	219	$462,669	$84
United Kingdom	106	Israel	103	$119,202	$121
Israel	81	Canada (non-MJDS)	70	$17,836	$24
Brazil	50	United Kingdom	63	$1,844,040	$2,957
Mexico	38	Hong Kong	45	$220,018	$56

Exhibit 2

	2014	2023
Percentage of FPIs > 99% Percentage of U.S. Global Trading[4]	44%	55%
Percentage of FPIs > 90% Percentage of U.S. Global Trading	48%	64%
Percentage of FPIs > 50% Percentage of U.S. Global Trading	64%	76%
Percentage of U.S. Global Trading of the lowest 25% of FPIs	22%	53%
Note: The concept of Percentage of US Global Trading is based on an analysis conducted by the SEC, where it computed global daily trading volume in US dollars for all FPIs across all global markets for which daily trading volume information was available for each FPI. This global daily trading volume was then aggregated for a 12-month window around each FPI's fiscal year-end date, with a similar variable constructed for each FPI's aggregated 12-month US dollar trading volume specifically in US capital markets.		

Islands, because 97 percent of China-based issuers are incorporated in either of those two territories.

Exhibit 2 sets forth the percentage of trading on US exchanges by FPIs. The SEC noted the following points based on this data:

- Global trading of FPIs has not only become more concentrated in the United States over the past 20 years, but also a majority of FPIs' equity securities trade nearly exclusively on US exchanges.
- FPIs that trade almost exclusively on US exchanges are likely to have smaller market

Exhibit 3

Concept	Commentary
Should the 50 percent US ownership threshold be lowered for FPI status?	In our view, the effect would be minimal because most FPIs do not rely on this prong, but on the three "nexus" tests.
Should a foreign trading volume test be added as a condition to FPI status?	According to the SEC's data, requiring 5 percent of foreign trading volume would cause 62.4 percent of current FPIs to lose their status. It would cause 89 percent of China-headquartered companies to lose FPI status.
Should FPIs be required to be listed on a major foreign exchange?	The SEC points to its existing definition of "designated offshore securities exchange" under Regulation S as one possible way of determining such exchanges. It also solicits comment on other possible definitions.
Should FPIs be required to be incorporated or headquartered only in jurisdictions in which the SEC has determined there to be an adequately robust regulatory regime and be subject to their home country regimes without exemption?	The SEC notes that this would require the individual assessments of foreign securities regimes, which would necessitate cooperation of foreign authorities and potentially require SEC staff to monitor changes and updates in those foreign regimes. The tone of the SEC's commentary indicates some concern about this approach.
Should the SEC establish additional systems of mutual recognition like the Multi-Jurisdictional Disclosure System (MDJS) approach with other foreign jurisdictions?	This question is distinct from any change to the definition of FPI. MJDS is currently the only mutual recognition arrangement. The benefit of such arrangements is that they can be tailored to each non-US system and can evolve over time.
Should the SEC require FPIs to certify that they are headquartered or incorporated, and under the oversight of, a foreign jurisdiction that is a party to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information (MMoU) or the enhanced MMoU?	The IOSCO is an international body of securities regulators, which seeks to develop and implement international standards regulating the financial markets. The MMoU is voluntary, nonbinding and does not supersede domestic laws. IOSCO members that sign the MMoU are expressing their intent and legal authority to assist other MMoU members in enforcement matters, including the sharing of information in enforcement matters involving FPIs.
What considerations should be given to the impact of FPIs having to transition to domestic reporting status?	The SEC raises numerous questions about the transition, including whether there should be a transition period for FPIs that report in International Financial Reporting Standards before being required to report in US GAAP. Currently there is only an 11-month de facto conversion period from the date on which FPI status is determined until the date that the next Form 20-F is due.

capitalizations and be incorporated in the Cayman Islands and headquartered in China. These exclusive FPIs represent only 9.2 percent of the aggregate FPI market capitalization due to their smaller market capitalizations, despite being numerous as a percentage of total FPIs.

- After reviewing the data, the SEC notes that a growing number of FPIs are subject to limited current disclosure requirements compared to US domestic reporting requirements and the reporting requirements of jurisdictions such as Canada, the European Union, the United Kingdom, Brazil, and Japan, which are declining in prevalence as jurisdictions in which FPIs are incorporated or headquartered.

Potential Changes in Foreign Private Issuer Eligibility

The SEC is concerned that there is a significant uptick in issuers that are not subject to substantive disclosure and regulatory frameworks outside of the United States while still being afforded the scaled disclosure obligations conferred by FPI status. In the SEC's view, the absence of home jurisdiction regulation is at odds with the central underpinning of the FPI regime—that foreign issuers should be accommodated *because* they are subject to meaningful regulation under the laws of their home jurisdictions and traded in foreign markets.

The concept release includes 69 multipart questions organized around the central themes shown in Exhibit 3.

Statement on the Concept Release—Commissioner Mark T. Uyeda

SEC Commissioner Mark T. Uyeda voiced support for the SEC's efforts to review the regulatory treatment of FPIs while cautioning against unintended consequences that could undermine the system's longstanding benefits. Commissioner Uyeda emphasized that the current regime has effectively enabled foreign companies to access the US capital markets and allowed US investors to diversify their holdings, noting that:

Notwithstanding these concerns, it is important to note that we have not seen to date large-scale market failures from the differing disclosure regimes for US issuers and foreign private issuers. To the extent that there have been issues with respect to FPIs, they often involve outright fraud and material misstatements and omissions. In other words, fraud can occur irrespective of the form the issuer files—or the exemption the issuer relies on.

Commissioner Uyeda underscored that while investor protection remains critical, any changes to the framework should preserve the economic substance of cross-border access and the benefits it provides to both issuers and US investors.

Conclusion

If the SEC pursues any of the changes outlined in the concept release, a sizable percentage of FPIs could lose their status. It is also not clear how any potential new rules would be applied in the context of a company undertaking an initial public offering. Furthermore, it is likely that any changes would disproportionately impact smaller market capitalization FPIs or would be FPIs, with the greatest numerical impact being on those headquartered in Canada (non-MJDS reporting companies), China, Hong Kong, Israel, and Singapore, which represent the largest group of FPIs after Canada. FPIs that are likely to be impacted by a rule change should consider submitting feedback to the SEC.

Notes

1. A "foreign private issuer" is any foreign issuer, other than a foreign government, that as of the last business day of its most recently completed fiscal quarter meets the following conditions:
    1. 50 percent or less of its outstanding shares are held by US residents; or
    2. If more than 50 percent of its outstanding shares are held by US residents, all of the following conditions are met:
        i. A majority of the issuer's executive officers or directors are non-US citizens or residents;
        ii. More than 50 percent of the issuer's assets are located outside of the United States; and
        iii. The issuer's business is administered principally outside of the United States.
2. FPIs are permitted to adopt voluntarily the forms filed by US domestic filers. The SEC's survey of FPIs is limited to those that file annual reports on Form 20-F.
3. "China-based issuers" are defined as those issuers that are either headquartered or incorporated in any of mainland China, Hong Kong, or Macau.

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