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SEC STAFF ISSUES NO-ACTION RELIEF FOR DePIN DOUBLEZERO

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On September 29, 2025, the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission ("SEC") granted no-action relief to DoubleZero Foundation from the registration requirements of Section 5 of the Securities Act of 1933 (the "Securities Act") and Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") in connection with Programmatic Transfers (as defined below) of its native 2Z token ("2Z").[1] The response adds to the short line of Section 5 and Section 12(g) relief granted to digital asset issuers, including IMVU,[2] Pocketful of Quarters,[3] and TurnKey Jet.[4]

What Is DoubleZero?

DoubleZero Foundation ("DoubleZero," or the "Foundation") is a memberless Cayman Islands foundation company established to support the development, decentralization, security, and adoption of the DoubleZero Network—a purpose-built internet optimized for distributed systems, such as blockchains.[5] DoubleZero recently introduced a decentralized physical infrastructure network ("DePIN") to enable a central marketplace for underutilized private fiber links (the "Protocol"). The Protocol aims to improve consensus speed by leveraging the spare fiber capacity of private market participants. Market participants may contribute, and thereby potentially monetize, their unused fiber capacity, and the Protocol links the fiber together to form a single mesh network, which DoubleZero claims to allow for faster, more efficient communication (the "Network"). Blockchain validators and other participants ("Users") can then pay fees to the Network to use the high-speed Network as an alternative to the slower traditional internet channels.

The Network is operated, administered, and developed by a diffuse network of participants:

- **Network Providers**, which contribute their underutilized fiber;
- **Resource Providers**, which perform various maintenance and monitoring duties necessary to sustain the technical integrity and ongoing functionality of the Network;

IN THIS ISSUE:

SEC Staff Issues No-Action Relief for DePIN DoubleZero 1

Caremark* Claims Survive As Board, After "Red Flag," Investigated and Discussed Ongoing Illegal Practices But Delayed Ending Them—*Brewer v. Turner 4

Democratic DeFi Proposal Highlights Competing Visions for Cryptoasset Market Structure Regulation 10

Simplify and De-Politicize: Thoughts on Shareholder Proposals and Securities Litigation Reform 12

SEC Update: SEC Gives Relief to IPO Registrants During Government Shutdown; SEC Issues Order to Reduce Operating Costs of Consolidated Audit Trail; SEC Approves Generic Listing Standards for Commodity-Based Trust Shares; SEC Seeks Public Comment to Improve Rules on Residential Mortgage-Backed Securities and Asset-Backed Securities 19

From the Editor 24

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- **Users**, who pay 2Z to access the high-speed Network; and
- **The Foundation**, which educates the public, coordinates communications among the various stakeholders, and supports the decentralization and development of the Protocol and Network.

DoubleZero plans to distribute 2Z tokens to Network participants in two ways (collectively, the "Programmatic Transfers"):

1. **Provider Payments**, as compensation to Network Providers for contributing their fiber capacity;[6] and
2. **Computation Payments**, as compensation to Resource Providers for calculating the amounts of Provider Payments, maintaining the DoubleZero ledger, and otherwise facilitating the administration of the Network.

2Z also functions as the currency with which Users make payments to access the Network.[7]

Request for No-Action Relief

In connection with the launch of the Protocol, DoubleZero requested confirmation that the Staff would not recommend enforcement action if the Programmatic Transfers were conducted without registration under Section 5 of the Securities Act and if 2Z was not registered as a class of equity securities under Section 12(g) of the Exchange Act. DoubleZero argued that, under *Howey*, the expectation of profits is not derived from the entrepreneurial or managerial efforts of a promoter or sponsor, but rather from the efforts of Network Providers and Resource Providers themselves, and, thus, one of the indicia of an investment contract is absent, meaning there is no investment contract-security requiring registration.

Howey Analysis

Courts apply the *Howey* test to determine the existence of an investment contract and, thus, a security under the federal securities laws. The *Howey* test examines whether there is (i) an investment of money, (ii) in a common enterprise, (iii) with a reasonable expectation of profits, (iv) derived from the entrepreneurial or managerial efforts of others.[8] If any element is not met, there is no investment contract under *Howey* and, therefore, no security under the federal securities laws.

DoubleZero's argument focused on the fourth element. In evaluating whether the expectation of profits is based on the entrepreneurial or managerial efforts of others, courts will consider whether the failure or success of the enterprise depends on the "undeniably significant" mana-

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gerial efforts of others—usually the issuers or promoters of the securities.[9] When the success of the enterprise instead relies on the efforts of the securities-holders themselves, there is no investment contract.[10] Where enterprises involve the efforts of multiple participants, courts will determine whose efforts constitute the "essential managerial conduct of the enterprise," representing the "critical determinants of [its] success."[11] In digital asset transactions, courts will often look to the "economic reality surrounding the offer and sale" and whether it would lead purchasers to have a reasonable expectation of profits.[12]

Here, DoubleZero argued that any expectation of profits from Programmatic Transfers is based on the Network Providers and Resource Providers' own efforts, not the efforts of the Foundation or any other third party. Network Providers must expend significant time, effort, and technical expertise to participate in the Network, and, once connected, ongoing maintenance and attention is required to ensure satisfactory fiber performance and continued eligibility for rewards. DoubleZero emphasized that this is not "plug-and-play," and Network Providers are not passive investors in this endeavor. Rather, Network Providers' own performance is the "critical determinant" of the Protocol and Network's success. Similarly, Resource Providers engage in activities to secure the Network, validate transactions on the DoubleZero ledger, verify Network Providers' link performances, and compute payment distributions, among other tasks necessary for the Network to function. In doing so, DoubleZero argued, the Resource Providers themselves, not the Foundation, monitor and maintain the Network. Although the Foundation works to support the Protocol and Network, including by making grants, interfacing with policymakers, and assisting Network Providers with onboarding, such activities are fundamentally ancillary to the day-to-day services provided by the Network Providers and Resource Providers.

Accordingly, DoubleZero asserted that the efforts of the Network Providers and Resource Providers constitute the "undeniably significant" managerial efforts determinative of the Network's success.

Moreover, DoubleZero argued that there is no expectation of profits created by the Foundation. Network Providers and Resource Providers engage with the Network to potentially receive compensation for their own services, not profits derived from the efforts of the Foundation or any third party. DoubleZero's public communications and marketing regarding 2Z "have always been, and always will be," educational and factual, focused on technical explanations and the token's utility. As such, DoubleZero maintained that its marketing activities do not reasonably induce any expectation of passive profits.

DoubleZero also argued that a potential secondary market for 2Z does not alter the analysis. Specifically, DoubleZero highlighted the consumptive nature of potential secondary acquisitions and again noted that the Foundation's marketing focuses on the utility of 2Z, rather than the potential for appreciation or economic gain.[13]

Ultimately, the Staff responded that it would not recommend enforcement action if the Programmatic Transfers were conducted without registration under Section 5 of the Securities Act and if 2Z was not registered as a class of equity securities under Section 12(g) of the Exchange Act.

Considerations for Market Participants

Although the Staff's response is not binding, is limited to the facts presented, and did not provide any legal analysis, the relief may carry notable implications for DePIN and decentralized finance ("DeFi") ecosystems.

Economic Reality

The relief follows recent SEC guidance suggesting that when token distributions are used as compensation for verifiable work—such as computation or certain mining[14] or staking activities[15]—there is no offer and sale of securities. Accordingly, the relief may reflect further acknowledgment of the economic reality surrounding many DePIN and DeFi transactions, namely that market participants are incentivized by the prospect of compensation for their own services, rather than by passive investment potential.

Efforts of Others

The relief also provides insight into how the "efforts of

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others" element of *Howey* may be evaluated by the Staff in the DePIN and DeFi contexts. DoubleZero's request highlights the distinction between passive investment schemes and DePIN and DeFi ecosystems where market participants are actively and directly engaged in operating or maintaining a network. Further, even where a foundation or other third party provides certain support services, from a Staff perspective, such efforts alone may not satisfy *Howey*'s "efforts of others" requirement.

Reasonable Expectation of Profits

Finally, the relief is consistent with courts' and the SEC's prior emphasis on marketing materials in evaluating the reasonable expectations of purchasers. Where marketing focuses solely on a token's utility and consumptive use—rather than its potential for profit—the SEC or courts may be more likely to find that there is no reasonable expectation of profits under *Howey*.

ENDNOTES:

[1]Response of the Division of Corporation Finance: DoubleZero (September 29, 2025) (https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/doublezero-092925).

[2]Response of the Division of Corporation Finance: IMVU, Inc. (November 19, 2020) (https://www.sec.gov/rules-regulations/no-action-interpretive-exemptive-letters/division-corporation-finance-no-action/imvu-111920-2a1).

[3]Response of the Division of Corporation Finance: Pocketful of Quarters, Inc. (July 25, 2019) (https://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1).

[4]Response of the Division of Corporation Finance: TurnKey Jet, Inc. (April 3, 2019) (https://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm).

[5]Incoming No-Action Letter: DoubleZero (September 25, 2025) (https://www.sec.gov/files/corpfin/no-action/doublezero-final-conformed-092625.pdf).

[6]Provider Payments will be deferred to ensure sufficient fiber quality.

[7]2Z will also be used for staking mechanisms that secure the Protocol. To act as a Resource Provider, one must maintain a stake of 2Z or be delegated a stake of 2Z by other 2Z holders.

[8]*S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

[9]*Securities and Exchange Commission v. Glenn W. Turner Enterprises, Inc.*, 474 F.2d 476, Fed. Sec. L. Rep. (CCH) P 93748 (9th Cir. 1973).

[10]*See, e.g., Williamson v. Tucker*, 645 F.2d 404, 419, Fed. Sec. L. Rep. (CCH) P 98003, 32 Fed. R. Serv. 2d 361, 58 A.L.R. Fed. 371 (5th Cir. 1981) (rejected by, Haase v. Sessions, 835 F.2d 902, 9 Fed. R. Serv. 3d 1103 (D.C. Cir. 1987)).

[11]*S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 485, Fed. Sec. L. Rep. (CCH) P 94710 (5th Cir. 1974).

[12]*Securities and Exchange Commission v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 326, Fed. Sec. L. Rep. (CCH) P 101631 (S.D. N.Y. 2023) (rejected by, Securities and Exchange Commission v. Terraform Labs Pte. Ltd., 684 F. Supp. 3d 170, Fed. Sec. L. Rep. (CCH) P 101644 (S.D. N.Y. 2023)) and motion to certify appeal denied, 697 F. Supp. 3d 126, Fed. Sec. L. Rep. (CCH) P 101709 (S.D. N.Y. 2023) (citing *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852, 95 S. Ct. 2051, 44 L. Ed. 2d 621, Fed. Sec. L. Rep. (CCH) P 95206 (1975)).

[13]*United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 853, 95 S. Ct. 2051, 44 L. Ed. 2d 621, Fed. Sec. L. Rep. (CCH) P 95206 (1975).

[14]Statement on Certain Proof-of-Work Mining Activities (March 20, 2025) (https://www.sec.gov/newsroom/speeches-statements/statement-certain-proof-work-mining-activities-032025).

[15]Statement on Certain Protocol Staking Activities (May 29, 2025) (https://www.sec.gov/newsroom/speeches-statements/statement-certain-protocol-staking-activities-052925).

CAREMARK CLAIMS SURVIVE AS BOARD, AFTER "RED FLAG," INVESTIGATED AND DISCUSSED ONGOING ILLEGAL PRACTICES BUT DELAYED ENDING THEM— *BREWER V. TURNER*

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In *Brewer v. Turner* ("*Regions*"),[1] the Delaware Court of Chancery declined, at the pleading stage of litigation, to dismiss a *Caremark* claim brought against directors of Regions Financial Corporation, which operates Regions Bank. The plaintiff sought a return to the company, from the directors personally, of the $191 million the company paid under a consent settlement with the Consumer Financial Protection Bureau ("CFPB") in connection with the Bank's allegedly illegal overdraft checking practices. The court, finding that the directors face a substantial likelihood of liability under *Caremark* for a failure of their fiduciary duties of oversight, rejected Regions' demand futility defense.

Key Points

- **The court viewed a whistleblower complaint from a disgruntled former executive as a "red flag" under *Caremark*.** We note that, in previous *Caremark* cases, the court often has *not* viewed a whistleblower complaint as a red flag, as it does not evidence that the company actually engaged in any wrongdoing. In *Regions*, however, the court emphasized that the whistleblower complaint came from the company's former Deputy General Counsel—and, although there were reasons to doubt his credibility, his job had involved assessing legal risk. We note also that the complaint was detailed and specific as to the alleged illegal conduct. Also, there were other events, each of which standing alone did not rise to the level of a red flag, but in combination with the whistleblower complaint supported a view that Regions' Board of Directors was on notice that the overdraft practices were illegal.

- **The court viewed the Board's "delay" in ending the illegal practices as indicating "bad faith" under *Caremark*.** We note that, in previous *Caremark* cases, the court often has stressed that *Caremark* liability arises if a board consciously *ignored* a red flag—but, when a board instead responded to a red flag, legal challenges with respect to the substance *or timing* of the response will not be successful. In *Regions*, the Board did *not* ignore the whistleblower complaint—the Board discussed the complaint and the practices detailed in it, and hired a law firm to investigate the practices. Eighteen months after receiving the whistleblower complaint, the company ended the illegal practices. The court emphasized, however, that it was reasonably conceivable (the standard at the pleading stage) that—as the whistleblower complaint asserted and the CFPB found—the Board delayed ending the illegal practices to provide the company time to develop a plan to replace the revenue it knew would be lost when the illegal practices ended.

- **The court viewed the consent settlement with the CFPB as a "corporate trauma" sufficient to give rise to *Caremark* liability.** *Caremark* provides a route to holding directors accountable for the consequences of a failure of oversight of the corporation's key risks when the failure led to a corporate trauma. Often, *Caremark* cases have involved corporate traumas relating to human health and safety (for example, airplanes falling from the sky, in *Boeing*; or contaminated ice cream poisoning consumers, in *Blue Bell*) or extreme financial losses. In *Regions*, the court accepted without discussion that the $191 million fee paid to the CFPB rose to the level of a corporate trauma sufficient to give rise to *Caremark* liability. The court stated that, as Regions offered retail banking services, it was reasonably conceivable that overdraft practices were "a central compliance risk" for the company.

- **The decision reinforces the broader approach that the court seems to have been taking with respect to potential *Caremark* liability.** While historically *Caremark* claims were almost invariably dismissed at the pleading stage (given, in particular,

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the required element of bad faith by directors), in recent years *Caremark* claims have survived the pleading stage in a number of cases. In *Regions*, as noted above, the court, arguably, took a somewhat expansive view as to when a whistleblower complaint may constitute a "red flag"; when a board's "delay" in responding to a red flag that the board is not consciously ignoring may constitute "bad faith"; and when events may be deemed to rise to the level of a "corporate trauma." That said, the court generally has let *Caremark* claims survive only where it views the overall factual context as egregious or extreme. In *Regions*, the distinguishing factor appears to have been that, in the court's view, the Board, after being on notice of possibly illegal practices, may have *purposefully continued* the illegal practices (for a year and a half), based on concerns about the impact of ending the practices on the company's profits.

- **The new DGCL amendments may discourage *Caremark* claims.** We note that the amendments narrow stockholders' access to books and records under Section 220 demands to investigate possible corporate wrongdoing. Accordingly, it may now be more difficult than in the past for stockholders to bring *Caremark* claims, which typically have been based on information discovered in books and records produced in response to Section 220 demands.

Background

The Audit Committee and Risk Committee of Regions' Board each had oversight responsibility for Regions' practices relating to overdraft checking. When the CFPB increased its regulatory scrutiny of overdraft practices at banks, Regions formed a Consumer Transparency Working Group to look at Regions' overdraft practices. In early November 2019, the Board received a draft complaint from its Former Deputy General Counsel, Jeffrey A. Lee (the "Lee Complaint"). In the Lee Complaint, Lee accused Regions of reverse discrimination against him when the company promoted a woman over him to become General Counsel; stated that he had been viewed by the CEO as a "troublemaker"; asserted that he had been fired for raising issues about the legality of Regions' overdraft practices; and detailed how Regions' overdraft practices were illegal. Regions reached a confidential settlement with Lee within two weeks after receiving the Lee Complaint.

In September 2020, the CFPB served Regions with a Civil Investigative Demand concerning the Company's overdraft practices. In July 2021, Regions terminated its illegal overdraft practices. The CFPB concluded that Regions violated the CFPB's overdraft regulations from at least August 2018 to July 2021. In September 2022, Regions entered into a Consent Order settlement with the CFPB, pursuant to which it paid $141 million (the amount of the illegal overcharges) and a $50 million civil penalty.

The plaintiff brought a derivative lawsuit in the Court of Chancery, claiming that the Board breached its fiduciary oversight duties under *Caremark* with respect to the company's overdraft practices. The suit seeks to recover, from the directors personally, the $191 million the company paid under the CFPB Consent Order. Chancellor Kathaleen St. J. McCormick, at the pleading stage, held that demand on the board was futile, as a majority of the directors faced a substantial likelihood of liability under *Caremark*. The Chancellor concluded that the Lee Complaint was a "red flag" that provided the Board with notice of the illegal overdraft practices, and that it was reasonably conceivable that the Board "consciously ignored" the red flag when it "delayed" ending the illegal practices.

Discussion

The *Caremark* claim. Under *Caremark*, a board's duty of oversight requires directors (i) to make a good faith effort to ensure that the corporation has proper reporting systems in place (so-called Information System Claims), and (ii) to take action in response to "red flags" that indicate potential corporate wrongdoing that may lead to a corporate trauma (so-called Red Flags Claims). In *Regions*, the plaintiff asserted a Red Flags Claim, alleging that Regions' board had consciously ignored the Lee Complaint and continued to permit the company to engage in overdraft checking fees practices that were contrary to the requirements set forth in regulations promulgated by the CFPB. The plaintiff claimed that—as Lee had asserted and the CFPB had found—Regions delayed ending its il-

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legal practices so that it could develop a plan to replace the revenue that would be lost when it ended the illegal practices.

The court viewed the Lee Complaint as a "red flag." Red flags, for *Caremark* purposes, are events that put a board on notice of an impending corporate trauma. Because bad faith is a required element of a *Caremark* claim, the court has focused on how clear the warning signs were and how directly they were tied to the trauma the corporation suffered—that is, as the court states in *Regions*, the court considers whether a red flag was "sufficiently connected to the corporate trauma at issue to elevate the board's inaction in the face of the red flag to the level of bad faith." Notably, in *Caremark* cases, the court often has found that a company's receipt of a whistleblower complaint—or, similarly, notice of a lawsuit, or a subpoena—was *not* a red flag, as they do not evidence that the company actually engaged in wrongdoing. In this case, however, even though there were reasons to doubt the whistleblower's credibility (*i.e.*, he was a disgruntled former employee, who had been viewed by the CEO as "a troublemaker," and he was primarily making an "unusual" complaint about reverse discrimination against him), the court found that his Complaint *was* a red flag of illegal conduct by the company. The court emphasized that Lee's job had "included identifying legal risks"; that the Complaint had been sent to the Audit Committee; and that, "[g]iven Lee's former position at the Company, it is reasonable to infer that the Board was made aware of the [Complaint] and its contents." We note also that the Complaint was detailed and specific—it related that Lee had advised management, as early as March 2018, that Regions' overdraft practices did not comply with federal regulations; and it explained specifically how the company's practices violated statutes and CFPB guidance on overdraft practices.

The court viewed the Board's delay in responding to the red flag as "bad faith." Notably, in previous *Caremark* cases, the court has emphasized that a response by a board to a red flag need not have been effective nor timely in the plaintiff's view. In other words, the critical issue has been whether the board responded—the *nature and timing* of the response being within the board's purview to decide. *Regions* highlights that there are limits on this concept. The Regions directors argued that, although they did not act on the plaintiff's preferred timeline, they had hired a law firm to investigate the overdraft practices; as reflected in meeting minutes, they had discussed the Lee Complaint, the CFPB's guidelines on overdraft fees, and the company's overdraft practices; and the Board had expanded the scope of the Working Group's work to include the overdraft fees issue. However, the court wrote: "Everyone knows that delay can be intentional and a tactic to avoid the consequences of acting appropriately"; and "Consciously delaying actions [to stop conduct] that a Board knows to be illegal supports an inference of bad faith."

The court rejected the Regions directors' argument that their hiring a law firm to investigate the matter proved a lack of bad faith. The Board minutes reflected that the law firm delivered a report and recommendations, but the minutes produced to the plaintiff in her Section 220 demand were "largely redacted," so it was unknown what the findings and recommendations were. The court wrote: "Hiring a law firm to advise [on] regulatory risk is a good thing . . . [but] merely hiring an attorney to look into something [is not] sufficient to avoid an inference of bad faith under *Caremark*. . . ."

The court viewed the Board as having made a conscious decision to continue the illegal practices. The Lee Complaint asserted, and the CFPB found, that the Board sought to delay terminating the illegal practices so that it could develop a plan to offset the loss of revenue that would occur when the practices were ended. The court, at the pleading stage, found this reasonably conceivable. The court pointed to Lee's allegations that the Customer Transparency Working Group was not empowered to stop the illegal overdraft practices; and that management had hired an outside consultant whom it charged with not just reviewing the overdraft practices but also with developing a plan for how Regions could increase its fee revenue even if it stopped collecting the illegal fees.

It is unclear why the court did not evaluate the claims under *Massey*. The court has evaluated under the *Massey* prong of the *Caremark* doctrine claims that direc-

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tors and officers purposely caused the corporation to break the law in pursuit of greater profits. The court has emphasized in these cases that "the law does not charter lawbreakers"[2] and that *Massey* claims will survive where the corporation engaged in "recidivous law breaking."[3] In *Regions*, the plaintiff asserted claims under both *Massey* and *Caremark*, but the court did not analyze the *Massey* claim, stating only, without explanation, that "Plaintiff's strongest theory is *Caremark*."

Practice Points

- **Although the substance and timing of a board's response to a red flag of illegal corporate conduct is up to the board to decide, unreasonable delay in actually ending illegal practices may give rise to *Caremark* liability.** A board, having received a red flag warning of illegal conduct, should not only discuss and investigate the company's legal compliance, but should seek to end the illegal conduct promptly. If a law firm is hired to investigate, the board should be made aware of the firm's conclusions, consider its recommendations, and implement the recommendations or take other action to end any illegal practices, all on a timely basis. While the substance and timing of a board's response are within its purview to decide, the board should be making a good faith effort to end illegal practices within an appropriate timeframe. Delay to consider how to offset revenue losses that will result from ending illegal practices is not likely to be accepted by the court as an appropriate reason to delay ending the illegal practices. Reasonably prompt action will be warranted particularly when the board becomes aware that the legal noncompliance has been ongoing for an extended period of time; involves multiple violations or ongoing noncompliance; may result in significant fines or penalties or other significant corporate harm; and/or relates to the company's central compliance risks.

- **When determining whether a whistleblower complaint (or notice of litigation or subpoena) is a red flag for *Caremark* purposes, a company should consider the overall context.** *Regions* highlights that complaints should be taken seriously when the information comes from an executive who had legal compliance responsibilities, and particularly where the information is detailed and specific with respect to the alleged legal noncompliance. (We note that in one recent case (*Garfield v. Allen*),[4] the court suggested that plaintiffs can themselves generate red flags that put directors on notice by delivering a demand letter to the board prior to bringing litigation. The court emphasized that this outcome is problematic from a policy standpoint, since it opens space for plaintiffs to create their own claims by sending demand letters. But, the court stressed, from a doctrinal perspective, where the red flags come from does not matter—all that matters is that directors knew of a serious problem and consciously ignored it.)

- **If *Caremark* claims are asserted, the board should consider establishing a special litigation committee (SLC) to determine if it is in the company's best interests to pursue the derivative litigation.** The court recently considered for the first time the validity of an SLC in the *Caremark* context (*Chou* 2023).[5] The court had found that the directors of AmerisourceBergen faced a substantial likelihood of liability under *Caremark* based on their apparently having consciously ignored multiple red flags of illegal conduct that led to corporate trauma. The board then added a new director, who was independent, and appointed him to be the sole member of an SLC to determine whether it was in the company's best interests to pursue the derivative case. The one-person SLC determined that the Board's actions did not merit pursuing the litigation. The court, applying the standard *Zapata* framework, then concluded that the SLC was independent and its investigation was reasonable, and dismissed the case.

- **A board must oversee the company's "central compliance risks."** The potential for *Caremark* liability is heightened when legal noncompliance ("violation of positive law") is involved. A board should identify what the "central compliance risks" facing the company are, and should maintain a focus

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on seeking to ensure compliance in those areas. Although management may have day-to-day responsibility in these areas, identifying the central compliance risks and monitoring the compliance is a *board*-level responsibility. Notably, what the central risks are may change over time (for example, legal compliance with respect to cybersecurity is a newly added central risk for many companies).

- **If a board hires a law firm to investigate alleged misconduct following receipt of a red flag, the board should consider and follow-up on the law firm's report.** Merely hiring a law firm does not provide "absolution," the court wrote in *Regions*. The board's or committee's minutes should record that the law firm delivered a report or recommendations, the board or committee considered the report, and what actions the company took in response. (See also *Chou* (2020),[6] which presented a similar situation, where a law firm was hired in response to a red flag, but the board did not record what the law firm found nor what actions the board took in response.)

- **A board or board committee should consider preparing more fulsome (rather than cursory) meeting minutes relating to responses to red flags, and should avoid over-redaction when producing books and records.** More fulsome minutes would reflect the full consideration accorded, and actions taken in response, to a red flag with respect to legal noncompliance—or the reasons why the board did not consider an event to be a red flag. Where the minutes mention only that the topic was discussed, or where they are heavily redacted when produced, they will not necessarily support an argument that the board's response was not inappropriately delayed.

- **In light of the new DGCL amendments, Boards should reconsider their practices with respect to Section 220 demands.** Books and records as now defined by the DGCL amendments should be maintained, so that they can be produced in response to Section 220 demands, lessening the likelihood of having to produce other documents. Also, companies must be ready to meet the new five-business-day time period for producing the books and records; and should consider taking advantage of the restrictions that can be imposed with respect to the confidentiality, use and distribution of documents that are produced. Companies should keep in mind the amendments' requirement that the stockholder's demand be prepared with "reasonable particularity"; and the new, higher burdens that the amendments impose for obtaining books and records.

- **We note that both exculpation and D&O insurance may not be available to directors or officers for *Caremark* liability.** Given that *Caremark* claims generally require a finding that the director's or officer's failure to act rose to the level of bad faith, directors and officers should be mindful that a successful *Caremark* claim against them may not be covered by any Section 102(b)(7) exculpatory provisions that may be contained in the corporation's charter and may not be covered by any D&O insurance policies that the corporation may carry.

ENDNOTES:

[1]*Brewer on behalf of Regions Financial Corporation v. Turner*, 2025 WL 2769895 (Del. Ch. 2025), certification denied, 2025 WL 3048942 (Del. Ch. 2025).

[2]*In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. 2011).

[3]*In re Facebook, Inc. Derivative Litig*. (Del. Ch. May 10, 2023).

[4]*Garfield on behalf of ODP Corporation v. Allen*, 277 A.3d 296 (Del. Ch. 2022).

[5]*Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2023 WL 7986729 (Del. Ch. 2023), judgment entered, 2023 WL 8544558 (Del. Ch. 2023) and aff'd, 327 A.3d 1060 (Del. 2024).

[6]*Teamsters Local 443 Health Services & Insurance Plan v. Chou*, 2020 WL 5028065 (Del. Ch. 2020).

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DEMOCRATIC DEFI PROPOSAL HIGHLIGHTS COMPETING VISIONS FOR CRYPTOASSET MARKET STRUCTURE REGULATION

By Aaron K. Washington, Daniel Michael, Chad E. Silverman and Matthew Harris

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What's new: Senate Democrats have introduced a decentralized finance ("DeFi") proposal that creates a new regulatory framework for decentralized finance platforms, focusing on preventing illicit finance and regulatory arbitrage by applying existing securities market requirements to DeFi.

Why it matters: The DeFi proposal would significantly expand regulatory oversight of DeFi platforms and front-end applications, impacting developers, operators and intermediaries in the digital asset and cryptocurrency sectors.

What to do next: Companies and organizations involved in DeFi should closely monitor legislative developments, assess their exposure to new regulatory definitions, and prepare for potential registration, compliance and risk management obligations.

Key Points

- A new Democratic counterproposal on DeFi regulation highlights several policy differences over how to regulate digital asset market structure in the U.S. Due to policy disagreements, lawmakers remain at odds over the timeline for drafting a comprehensive market-structure bill and its eventual passage.
- This proposal is the third cryptoasset market structure regulatory framework to come out of Congress. In September, the Senate Banking committee released its proposal, and the CLARITY Act passed the House in July.
- All three proposals seek to leverage existing regulatory frameworks to create a crypto market structure and show Congress' instinct to retrofit the current system rather than design one built for crypto.
- The Democratic proposal, however, would require DeFi front-end applications to register with the SEC or CFTC and bring them under rigorous KYC rules and Treasury oversight, marking a clear expansion of federal control over decentralized platforms.
- With a lack of alignment on key issues, the Senate Banking Committee has paused digital market structure meetings, while the Senate Agriculture Committee is likely to release its own draft bill in October. It's unclear whether procedural and policy disagreements will prevent the Senate from passing crypto market structure legislation in 2026.

Senate Democrats recently produced a counteroffer to Republicans' decentralized finance and cryptocurrency legislative agendas. The Democrats' DeFi proposal ("DeFi Proposal") focuses on preventing illicit finance and regulatory arbitrage through decentralized finance platforms. It attempts to achieve this objective by creating a regulatory framework that incorporates many existing regulatory requirements for securities markets participants and applying them to DeFi.

The DeFi Proposal, which has not been drafted into legislative text, covers a wide-range of DeFi applications and platforms in a new regulatory regime overseen by the Department of the Treasury ("Treasury"), the Securities and Exchange Commission ("SEC") and the Commodity Futures Trading Commission ("CFTC"). The DeFi Proposal comes on the heels of the House's passage of the CLARITY Act in July 2025 and the Republican-led Senate Banking Committee's Responsible Financial Innovation Act ("RFIA") draft bill that was released on September 9, 2025.

While the DeFi Proposal tracks the RFIA in certain

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respects, several provisions seek to advance an alternative approach to crypto market structure regulation.

Role of the Treasury

The DeFi Proposal takes a unique position and gives Treasury a key role in the market structure process and grants it the authority to determine whether a protocol is sufficiently decentralized. Additionally, the DeFi Proposal treats any DeFi project whose controllers generate revenue from users, exercise significant influence in the project, and maintain concentrated voting power as a "money-services business," though Treasury would be able to expand that definition.

Like the RFIA and the CLARITY Act, the DeFi Proposal assigns Treasury a central role in preventing illicit financial activity in digital assets but its approach differs. The RFIA and the CLARITY Act each task Treasury with drafting rules applicable to BSA and anti-money laundering obligations to certain digital asset service providers and intermediaries. By contrast, the DeFi Proposal empowers Treasury to create a restricted list of DeFi projects and apps that have been used for money laundering or other illegal purposes. It further allows Treasury to determine whether an individual or a group of individuals has enough control over a DeFi platform to be labeled as a "digital asset intermediary" for purposes of the DeFi Proposal and the BSA. These entities would also be classified as Virtual Asset Service Providers under U.S. law and be subject to applicable regulatory requirements.

Digital Asset Market Structure

All three proposals leverage existing regulatory frameworks for persons that perform essential functions in the digital asset markets ecosystem and subject them to varying degrees of regulatory oversight. The CLARITY Act contains significant exemptions for DeFi projects from most SEC or CFTC regulations (but **not** antifraud, antimanipulation or false reporting rules) if they are merely verifying blockchain transactions, supplying computing power, building blockchain interfaces or developing trading software and wallets. The RFIA adopts the GENIUS Act's definition of digital asset service providers, which contains less-sweeping exemptions. The RFIA also calls for the creation of a public-private partnership to allow participants to test new tokens and other DeFi or crypto projects within a closely watched joint SEC-CFTC sandbox.

The DeFi Proposal, however, creates a new layer of potential regulatory oversight by explicitly extending obligations to front-end applications in an attempt to close perceived regulatory gaps. The DeFi Proposal deems any person or entity that designs, deploys, controls or operates a front-end service for a DeFi protocol, or materially benefits from a DeFi protocol that facilitates covered activities such as trading, custody, settlement and lending, to be a digital asset intermediary. As a result, they would be required to register as brokers with the SEC, or as futures commission merchants or digital commodity brokers with the CFTC, unless another category of registrant is more appropriate to their activities. The DeFi Proposal requires digital asset intermediaries to implement a full risk management program, conduct regular stress tests and ensure any underlying code is independently audited. It also mandates that they monitor for fraud, manipulation, sanction evasion, money laundering and other illicit finance activities.

Investment Contracts and Ancillary Assets

Compared to the CLARITY Act and RFIA, the DeFi Proposal offers little in the way of developing clearer rules of the road for digital assets that may be deemed to be investment contracts that currently fall under the SEC's jurisdiction. Both the CLARITY Act and the RFIA would create a unified regulatory framework for digital assets and currencies, but where the CLARITY Act sought to classify digital assets into three distinct buckets and make the CFTC the premier U.S. crypto regulator, the RFIA makes the SEC the primary regulator over what it calls "ancillary assets"—digital assets distributed in connection with an investment contract—when traded in primary markets, such as for the purpose of raising capital. Ancillary assets traded in the secondary market would not be considered securities under the RFIA, and it requires the SEC to issue joint regulations with the CFTC regarding margins, swaps, futures, options and digital commodities. The Senate Agriculture Committee is expected to soon

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release its own draft bill that would outline the CFTC's authority.

Importantly, the RFIA also requires that the SEC define "investment contract," which could modify or codify the test for such contracts from the Supreme Court's *SEC v. Howey* decision.[1] Because Senate Democrats hope the DeFi Proposal will be just one part of a more comprehensive market-structure bill, the DeFi Proposal does not contain a requirement that the SEC define investment contracts. Notably, Sen. Elizabeth Warren (D-Mass.), the ranking member of the Senate Banking Committee, has publicly opposed changes to the *Howey* test and the creation of a category of ancillary assets.

Legislative Path Forward

Because of policy disagreements, lawmakers remain at odds over the timeline for drafting a comprehensive market-structure bill and its eventual passage. Republican senators have asked Democratic senators to set a date to mark up the bill, but Democrats have refused to do so until both sides can agree on its content. This stalemate has led the Senate Banking Committee to pause its meetings on the bill, while the Senate Agriculture Committee is expected to release its own bill outlining the CFTC's authority. It's unclear whether these procedural and policy disagreements will simply delay or ultimately derail Congress' efforts to pass crypto market structure legislation in 2026. A bipartisan compromise will likely be required for any crypto market-structure bill to clear the Senate's 60-vote threshold.

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ENDNOTES:

[1] https://www.skadden.com/insights/publications/2025/08/howeys-still-here.

SIMPLIFY AND DE-POLITICIZE: THOUGHTS ON SHAREHOLDER PROPOSALS AND SECURITIES LITIGATION REFORM

By Paul S. Atkins

Paul Atkins is the Chairman of the Securities and Exchange Commission. The following is adapted from remarks that he gave at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala, in Newark, Delaware, on October 9, 2025.

It is a pleasure to return to the Weinberg Center. For a quarter century, the Center has distinguished itself as one of the premier and longest-standing corporate governance institutions in academia. Its insights command the attention of practitioners in boardrooms and courtrooms alike. As a leading venue for informed dialogue, the Weinberg Center commits itself to shaping and influencing corporate governance. In that spirit, I am delighted to discuss one of my top priorities as Chairman, which is to make being a public company an attractive proposition for more firms.

Let's face it: in many quarters and for many reasons, taking a company public is no longer so "cool" as it once was. There are approximately 4,700 exchange-listed companies today, compared to a high point of approximately 7,800 in 2007.[1] My goal is to reverse this trend—to "Make IPOs Great Again"—and it involves three pillars. First, we must simplify and scale the SEC's disclosure requirements to reduce the costs of preparing SEC filings and, at the same time, make them more comprehensible. Second, we must de-politicize shareholder meetings and return their focus to voting on director elections and significant corporate matters. Finally, we must reform the litigation landscape for securities lawsuits to eliminate frivolous complaints, while maintaining an avenue for shareholders to continue to bring meritorious claims. My remarks will focus on the latter two pillars, each of which also implicates state corporate law.

Precatory Proposals

In the past few proxy seasons, perhaps nothing has

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epitomized the politicization of shareholder meetings more than shareholder proposals focused on environmental and social issues.[2] These proposals, which reflect views from both sides of the political aisle, generally call for actions that are not binding on the company—referred to as "precatory proposals"—and frequently involve issues not material to the company's business. When voted on at meetings, they almost always receive even lower support than shareholder proposals do generally.[3] Nonetheless, these proposals consume a significant amount of management's time and impose costs on the company.[4] However, is a company actually required to include these precatory shareholder proposals in its proxy materials? The answer to this question lies at the intersection of the Commission's Rule 14a-8 and state corporate law.

While Rule 14a-8 provides a mechanism for a shareholder to include its proposal in the company's proxy statement,[5] the rule can only be used for proposals that can properly be brought before a shareholder meeting under state law.[6] If a proposal is not permissible under state law—that is, if it is not a "proper subject" for action by shareholders—Rule 14a-8 permits a company to exclude the proposal from its proxy statement.[7] The original 1942 version of Rule 14a-8 embodied this concept,[8] and it lives today in paragraph (i)(1) of the rule.[9]

State law governs whether a proposal is a "proper subject."[10] So, are precatory proposals a "proper subject" for action by shareholders under Delaware law? The expertise and domain of the Commission and its staff is in the federal securities laws. Accordingly, it is appropriate for the agency to defer to those who practice Delaware law to answer this question. But at least one Delaware practitioner has recently concluded that precatory proposals are not a "proper subject" because Delaware law does not confer to stockholders an inherent right to vote on precatory proposals.[11]

The view that Delaware law does not provide shareholders the right to have their precatory proposals addressed by companies is not a new one.[12] Speaking at an SEC roundtable on proxy rules and state corporate law in 2007, Leo Strine, who was Vice Chancellor [of the Delaware Court of Chancery] at the time and who I understand delivered the keynote address at the Symposium earlier today, said the following about precatory proposals under Delaware law: "In Delaware, [we] vote on real things . . . We do not have imaginary voting. We do not have therapy for whoever . . . We do not have what I call 'pizza on the wall.' That is precatory proposals."[13]

But if precatory proposals are not a "proper subject" for shareholder action under Delaware law—and more than two-thirds of S&P 500 companies are incorporated in the state[14]—why have companies not sought to exclude precatory shareholder proposals pursuant to paragraph (i)(1)? At the same 2007 roundtable, the late Marty Dunn, a much-admired lawyer in the SEC's Division of Corporation Finance, posited exactly this question.[15] In response, then-Chancellor Strine said, "[the SEC] made . . . up [precatory proposals and Delaware is] fine with it."[16]

The Commission, through the note to paragraph 14a-8(i)(1), contemplates whether precatory proposals are a "proper subject."[17] The note reflects a codification of the Commission staff's views that there is a presumption that precatory proposals are a "proper subject" under state law.[18] However, the notion that Rule 14a-8 gives shareholders the right to present precatory proposals—when state law does not—is supported neither by the text of the note nor its history. In fact, the note expressly states that a company can overcome the presumption.[19] Furthermore, when the Commission amended the note in 1983,[20] the purpose was to "make it clear that whether the nature of the proposal, mandatory or precatory, affects its includability is solely a matter of state law, and to dispel any mistaken impression that the Commission's application of paragraph [(i)](1) is based on the form of the proposal."[21]

Pulling all of this together, if there is no fundamental right under Delaware law for a company's shareholders to vote on precatory proposals—and the company has not created that right through its governing documents—then one could make an argument that a precatory shareholder proposal submitted to a Delaware company is excludable under paragraph (i)(1) of Rule 14a-8. If a company makes this argument and seeks the SEC staff's views,[22] and the company obtains an opinion of counsel[23] that the proposal is not a "proper subject" for shareholder action under Del-

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aware law, this argument should prevail, at least for that company. I have high confidence that the SEC staff will honor this position.

In 2007, Delaware amended its constitution to give the SEC the ability to certify questions to its highest court for declaratory judgements.[24] So far, the Commission has taken advantage of this tremendous opportunity only once—in June of 2008,[25] shortly before I left the SEC as a Commissioner in my prior tour of duty. Interestingly, that certification also involved whether a shareholder proposal was a "proper subject" for shareholder action.[26] The court issued its decision just 20 days after the Commission's certification.[27] As I stated at the time, I salute the court for its speed in deciding the issue.[28] If the need for the Commission to certify a question to the court arises in the future, I hope that both the agency and the court will continue to benefit from this unique partnership to expeditiously resolve matters of Delaware law that arise in the context of the federal securities laws.

Texas Developments

While we are on the topic of the role of states in shareholder proposals, I also want to discuss recent developments in Texas. [In September], the state's shareholder proposal law went into effect and added a new section to the Texas Business Organizations Code ("TBOC").[29] If a company opts into this section, then a shareholder must own at least $1 million in market value or three percent of the company's voting shares, among other requirements, to submit a shareholder proposal.[30] These thresholds are obviously significantly higher than those in Rule 14a-8.[31] Some commenters have raised the issue of whether submission thresholds established by a state are preempted by Rule 14a-8.[32]

Two years ago, Commissioner Mark Uyeda addressed the concept of private ordering for shareholder proposals.[33] I agree with his view that "[R]ule 14a-8's procedural bases for exclusion . . . should be viewed as default standards that apply only if companies decline to establish their own standards in their governing documents."[34] While Commissioner Uyeda's remarks were focused on standards contained in a company's governing documents, I see no difference if the standards are contained within a state's corporate law.

Shortly after the Commission adopted the original version of Rule 14a-8, then-SEC Chairman Ganson Purcell explained that "[t]he right that [the rule is] endeavoring to assure to the stockholders are those rights that he has traditionally had under State law."[35] If a shareholder does not have a right to submit a proposal under state law—because it fails to satisfy requirements imposed by either state law or the company's governing documents—then what right is Rule 14a-8 assuring?

So, if a company has opted into the Texas law, or has otherwise properly established conditions in its governing documents, and receives a shareholder proposal from a proponent that does not satisfy the requirements in the Texas law or the governing documents, then the proposal should be excludable under paragraph (i)(1) of Rule 14a-8.

Rule 14a-8: A Fundamental Reassessment Needed

While the interplay between paragraph (i)(1) and state corporate law is interesting, I believe a fundamental reassessment of Rule 14a-8 is in order. To that end, Shareholder Proposal Modernization is on the Commission's policy agenda,[36] and as part of this modernization effort, I have asked the staff to evaluate whether the Commission's original rationale for adopting Rule 14a-8 in 1942 still applies today, especially in light of developments in the proxy solicitation process and shareholder communications generally over the last 80 plus years.[37]

Mindful that Section 14 of the Securities Exchange Act of 1934 (the "Exchange Act"), under which Rule 14a-8 is promulgated, is centrally concerned with disclosure,[38] the Commission should re-evaluate the rule's fundamental premise that shareholders should be able to force companies to solicit for their proposals—to the extent that a shareholder proposal is a proper subject for shareholder action under state law—at little or no expense to the shareholder. In fact, Chairman Purcell faced questions on this fundamental premise in a Congressional hearing over 80 years ago.[39] Thus, it is only prudent for the Commission to review and reassess the original intent behind the rule and the role that it serves our capital markets today.

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Of course, the Commission must first propose changes, then gather and consider public feedback before adopting any changes. This process does not happen overnight. Until any changes are finalized, I encourage companies, shareholder proponents, and their advisors to consider the points that I have raised.[40]

Securities Litigation Reform

Turning to my other topic—securities litigation reform and Delaware's role in it—while class action securities litigation can serve an important path for vindication of rights as well as a deterrence function,[41] meritless, vexatious, or frivolous litigation also has the marginal effect of driving capital away from the U.S. public markets.[42] Press reports, conferences, and academic papers are replete with much commentary on this issue. It is incumbent on legislatures and regulators to ensure that their laws and rules are not being "gamed" or abused to support someone's business model. Reform may be needed to ensure that the "cost" of being a public company does not involve frivolous lawsuits and exorbitant plaintiffs attorneys' fees masked as recoveries for shareholders.[43] All companies pay for these costs—even ones that are not subject to lawsuits—through increased D&O insurance premiums. Absent federal legislative changes, states can have significant influence in shaping reform in securities litigation. Reform should not be equated with the elimination of lawsuits, but rather, it can mean providing companies with optionality for how best to resolve disputes with their shareholders.

Unfortunately, recent actions by the Delaware legislature suggest that the state is not only uninterested in reform, but instead, seems to embrace the litigation costs that abusive lawsuits impose on companies franchised in Delaware. As many of you in the room are aware, through Senate Bill 95 ("SB 95"), Delaware recently amended its General Corporation Law (the "Corporation Law") with respect to a couple of matters related to intra-corporate affairs claims, which include federal securities law claims.[44] First, in permitting forum selection in Delaware for federal securities law claims, SB 95 also prohibited mandatory arbitration with respect to these claims.[45] Second, SB 95 extended the Corporation Law's prohibition on fee shifting to federal securities law claims.[46]

I am disappointed by these two targets of SB 95. While mandatory arbitration and fee shifting are not without controversy,[47] they also have merits, including, with respect to mandatory arbitration, quicker payments to harmed shareholders and reduced litigation costs[48]—and, with respect to fee shifting, fewer frivolous lawsuits.[49] Companies should have the ability to determine, after weighing the pros and cons, whether one, both or neither of these provisions is appropriate for their business and shareholder base.

When the Commission articulated its views [in September] that mandatory arbitration provisions are not inconsistent with the federal securities laws,[50] I explained that the company, and not the Commission, should decide the particular method of resolving disputes with the company's shareholders.[51] Unfortunately, for public companies that consider mandatory arbitration to be a vital aspect of their dispute resolution strategy, SB 95 has effectively eliminated Delaware as an option for incorporation.

Turning to fee shifting, many of you here this evening are well aware of the history of fee shifting in the Delaware courts and legislature. In 2014, the Delaware Supreme Court held that the fee-shifting bylaw of ATP Tour, a non-stock corporation, was valid.[52] Within a year, more than 50 public companies adopted such bylaws.[53] However, in mid-2015, the Delaware legislature, through Senate Bill 75 ("SB 75"),[54] declined to extend the *ATP* decision to stock corporations and instead, prohibited fee shifting for internal corporate claims.[55]

Following SB 75, some commentators predicted an exodus of companies reincorporating to another state and the potential demise of Delaware as the leading state for corporate charters.[56] I was one who said at the time that SB 75 could be the proverbial straw that breaks the camel's back of Delaware's primacy as the chosen state of franchise.[57] Those predictions have not necessarily materialized over the past decade,[58] but the pressure on and alternatives to Delaware are growing. Moreover, this possibility of a "DExit" sprang back to life earlier this year, with one prominent venture capital firm publicly announcing its reasons for reincorporating in Nevada.[59]

As part of an effort to halt "DExit,"[60] Delaware passed

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Senate Bill 21 ("SB 21") in March of this year to amend provisions of the Corporation Law related to controlling stockholder transactions and inspection of books and records.[61]

If SB 21 were one step forward by Delaware to modernize its Corporation Law, the prohibition of mandatory arbitration and fee shifting for federal securities law claims in SB 95 were two giant steps backward.

However, I recognize that SB 95 was developed and became law at a time when the Commission had not made its views on mandatory arbitration clear to the public. With the benefit of clarity under the federal securities laws, I hope that the Delaware legislature will revisit the prohibition of both mandatory arbitration and fee shifting with respect to federal securities law claims. Doing so can help Delaware be a leader in the reform of securities litigation.

Conclusion

In closing, the declining number of public companies that I referenced at the outset of my remarks is not inevitable or irreversible. It is a signal that the costs of being a public company, coupled with the politicization of shareholder meetings, and ever-present specter of costly, frivolous litigation, have negatively impacted the vibrancy of our capital markets. Taken together, these forces have eroded American competitiveness; locked retail investors out of many of the most dynamic companies; and pushed entrepreneurs to seek capital elsewhere, either in the private markets or competing jurisdictions.

The chance to reverse these trends is well within your reach—and requires your renewed commitment to the principles that made the U.S. capital markets exceptional. For a quarter century, the Weinberg Center's scholarship and leadership have exemplified that commitment. The Center has left a profound imprint on corporate governance, and its legacy calls on everyone anew to reflect thoughtfully, but without delay, on how we can update rules and practices to better serve U.S. capital markets, investors, and business.

I commit that the SEC in the coming years will play its part, as well. We must do so to ensure that the American public capital markets remain the envy of the world through growth, vibrancy, innovation, and nimbleness.

ENDNOTES:

[1]Based on information provided by Commission staff in the Division of Economic and Risk Analysis.

[2]For the past four proxy seasons, environment and social shareholder proposals represented 49% (2025), 60% (2024), 54% (2023), and 52% (2022) of all shareholder proposals voted at shareholder meetings. This data was provided by Proxy Analytics LLC. A proxy season refers to the period from July 1 of the prior year to June 30 of the stated year. Data is for companies included in the Russell 3000 Index.

[3]For the past four proxy seasons, environment and social shareholder proposals received, on average, 12.9% (2025), 16.2% (2024), 19.8% (2023), and 28.5% (2022) support. This compares to 23.2% (2025), 22.9% (2024), 23.5% (2023), and 32.4% (2022) support received for all shareholder proposals. This data was provided by Proxy Analytics LLC. A proxy season refers to the period from July 1 of the prior year to June 30 of the stated year. Data is for companies included in the Russell 3000 Index.

[4]In 2020, the Commission estimated that a company can incur up to $150,000 to process a shareholder proposal, and this amount does not include any opportunity costs associated with management's time that could have been spent on value-creating activities for the company. *See* Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-89964 (Sept. 23, 2020) [85 FR 70240, 70274 and note 295 (Nov. 4, 2020)].

[5]17 CFR 240.14a-8.

[6]Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Release No. 34-89964 (Sept. 23, 2020) [85 FR 70240, 70274 (Nov. 4, 2020)] ("[W]hile Rule 14a-8 provides a federal process for proxy voting and solicitation with respect to a shareholder proposal, matters of corporate organization such as voting rights and whether a proposal is a proper subject for action remain governed by state law.") and Shareholder Proposals, Release No. 34-56160 (July 27, 2007) (the "2007 Long Proposing Release") [72 FR 43466, 43467 (Aug. 3, 2007)] ("[T]he Commission has sought to use its authority in a manner that does not conflict with the primary role of the states . . . . For example, Rule 14a-8, the shareholder proposal rule, explicitly provides that a shareholder proposal is not required to be included in a company's proxy materials if it 'is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization.' ").

[7]2007 Long Proposing Release at 43468 ("Because

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the proxy process is meant to serve, as nearly as possible, as a replacement for an actual, in-person meeting of shareholders, it should facilitate proposals concerning only those subjects that could properly be brought before a meeting under the corporation's charter or bylaws and under state law.").

[8]*See* Release No. 34-3347 (Dec. 18, 1942) [7 FR 10655 (Dec. 22, 1942)].

[9]17 CFR 240.14a-8(i)(1).

[10]*Id. See also* Adoption of Amendments to Proxy Rules, Release No. 34-4979 (Jan. 6, 1954) (the "1954 Release") [19 FR 246 (Jan. 14, 1954)]. The 1954 Release amended the predecessor to Rule 14a-8(i)(1) to "make it clear that State law is to be the standard of eligibility of a proposal under the rule."

[11]Kyle Pinder, The Non-Binding Bind: Reframing Precatory Stockholder Proposals under Delaware Law, 15 Mich. Bus. & Entrepreneurial L. Rev. ____ (forthcoming), *available at* https://papers.ssrn.com/sol3/Delivery.cfm/5418534.pdf?abstractid=5418534&mirid=1&type=2.

[12]*See, e.g.,* Leo E. Strine Jr., Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward, 63 Bus. Law. 1079, 1088-1089 (2008) ("Strangely, precisely because state corporation laws do not contemplate non-binding stockholder votes on anything, the SEC has permitted non-binding or "precatory" proposals on virtually everything . . . As a result, stockholders had, by federal mandate, the option to require a stockholder referendum on a non-binding resolution when state law gives stockholders no right to demand such a show of hands.") and Mohsen Manesh, The Corporate Contract and Private Ordering of Shareholder Proposals, 50 J. Corp. L. 1, 29 (2024) ("For one, there is nothing in Delaware's statute or caselaw establishing as 'settled' public policy the right of shareholders to make or vote on a proposal at a shareholder meeting.").

[13]Unofficial Transcript: Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law (May 7, 2007) ("2007 Roundtable") at 18, *available at* https://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf. However, at the same roundtable, the late Frank Balotti, who I consider as one of the leading experts of Delaware corporate law, said that he believed precatory proposals were authorized by Section 211 of the Delaware General Corporation Law. *Id*. at 34 ("I think precatory resolutions are authorized by [Section] 211 [of the Delaware General Corporation Law], which says that a stockholder can bring before a meeting anything that is proper for a stockholder to act on. I believe that it is proper for stockholders to ask directors to do whatever, as opposed to telling directors to do whatever.").

[14]*Delaware Tells Companies: 'Let's Stay Together,'* The Informed Board (Spring 2025), Edward B. Micheletti and Jenness E. Parker, *available at* https://www.skadden.com/insights/publications/2025/05/the-informed-board/delaware-tells-companies.

[15]2007 Roundtable at 32 ("The question in 14a-8 land that we always deal with when we get shareholder proposals, one of the first basis to exclude it is it is inappropriate under state law. Whenever we get a precatory proposal, nobody ever argues to us that they don't have authority to raise it under state law, which I find interesting . . . If in fact Delaware law doesn't authorize precatory proposals, why do we not get that argument . . .?").

[16]*Id.*

[17]Note 1 to Rule 14a-8(i)(1) states: "Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise."

[18]Amendments to Rules on Shareholder Proposals, Release No. 34-39093 (Sept. 18, 1997) [62 FR 50682, 50685 (Sept. 26, 1997)] ("We would revise the note to [paragraph (i)(1)] to reflect the Division [of Corporation Finance]'s current practice of assuming that a proposal drafted as a recommendation or request is proper unless the company demonstrates otherwise.").

[19]17 CFR 24.14a-8(i)(1) note ("[W]e will assume that a proposal drafted as a recommendation or suggestion is proper *unless the company demonstrates otherwise*.")(emphasis added).

[20]While the Commission amended the text of the note to its current form in 1998, the purpose of the amendment appears to have been to reflect the Division of Corporation Finance's then practice of "assuming that a proposal drafted as a recommendation or request is proper unless the company demonstrates otherwise," rather than no longer looking to state law to determine whether it is a "proper subject" based on the mandatory or precatory nature of the proposal. *See* supra note 18.

[21]Amendments to Rule 14a-8 Under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-20091 (Aug. 16, 1983) [48 FR 38218, 38220 (Aug. 23, 1983)].

[22]A company is not required to obtain the staff's views to exclude a proposal. These views are non-binding, and only a court can adjudicate whether a company can exclude a shareholder proposal submitted under Rule 14a-8 from its proxy statement. *See* Statement of Informal Procedures for The Rendering of Staff Advice With Respect to Shareholder Proposals, Release No. 34-12599 (July 7, 1976) [41 FR 29989 (July 20, 1976)]. If a company

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seeks the staff's views to exclude a proposal, the company bears the burden of persuading the staff. 17 CFR 240.14a-8(g).

[23]17 CFR 240.14a-8(j)(2)(iii).

[24]DE Const. art. IV, § 11(8).

[25]*CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

[26]*Id.* at 231.

[27]*Id.* at 229 (the court issued its opinion on July 17, 2008, following the Commission's June 27, 2008 certification).

[28]*See* Paul S. Atkins, Shareholder Rights, the 2008 Proxy Season, and the Impact of Shareholder Activism (July 22, 2008) ("July 22, 2008 Speech"), *available at* https://www.sec.gov/news/speech/2008/spch072208psa.htm.

[29]Texas Senate Bill 1057, *available at* https://legiscan.com/TX/text/SB1057/2025.

[30]TX Bus. Orgs. § 21.373(e).

[31]*See* 17 CFR 240.14a-8(b)(1)(i).

[32]*See, e.g.,* A New Era of Corporate Law in Texas, Latham & Watkins LLP (Sept. 23, 2025), *available at* https://www.lw.com/en/insights/a-new-era-of-corporate-law-in-texas and New Texas Law Applicable to "Nationally Listed Corporations" Sets Forth Heightened Requirements for Shareholder Proposals, Jackson Walker (Sept. 8, 2025), available at https://www.jw.com/news/insights-texas-law-shareholder-proposals/.

[33]Mark T. Uyeda, Remarks at the Society for Corporate Governance 2023 National Conference (June 21, 2023), *available at* https://www.sec.gov/newsroom/speeches-statements/uyeda-remarks-society-corporate-governance-conference-062123.

[34]*Id.* In a footnote to his remarks, Commissioner Uyeda addressed the 1947 decision by the Court of Appeals for the Third Circuit in *SEC v. Transamerica Corporation et al*., which could be interpreted as prohibiting a company from establishing its own standards for submitting shareholder proposal. *Id.* at note 55. I agree with Commissioner Uyeda's views on this matter. For further discussion of Transamerica, *see, e.g., Pinde*r, supra note 11, at 13-14.

[35]Hearings Before the Committee on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821 and H.R. 2019, 78th Cong. 172 (1943) ("1943 Hearings"), at 172.

[36]Securities and Exchange Commission Agency Rule List—Spring 2025, *available at* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=%showstage=active&agencyCd=3235.

[37]*See e.g*., Strine, supra note 12, at 1095 ("If investors seeking to change corporate governance really care about their proposals, why can't they pay all of their own solicitation costs? Especially now that it is becoming both cheaper and easier to run an effective proxy contest because of the increase in institutional holdings and the ease of sending information electronically?").

[38]*Business Roundtable v. S.E.C*., 905 F.2d 406 (D.C. Cir. 1990) (observing that "it is not seriously disputed that Congress's central concern [when enacting the Exchange Act] was with disclosure" when holding that the Commission exceeded its statutory authority under the Exchange Act in adopting the one share, one vote rule barring exchanges and Nasdaq from listing common shares with unequal voting rights) and *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964) (stating that "the purpose of Section 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation.").

[39]*See* 1943 Hearings at 163-165 (Congressman Boren raised concerns on shareholder proposals being misused by a few shareholder proponents using them as a platform to pursue their own propaganda), at 170-171 (Congressman Hall questioned why the management should be responsible for including proposals that it disagreed with), and at 175 (Congressman Reece criticized how the rule went beyond furnishing information).

[40]In my last formal speech to an outside group as a Commissioner in 2008, I raised some of the same issues regarding Rule 14a-8 and state corporate law as I do in these remarks. *See* July 22, 2008 Speech.

[41]*See, e.g.,* Mohsen Manesh and Joseph A. Grundfest, The Corporate Contract and Shareholder Arbitration, 98 N.Y.U. L. Rev. 1106, 1110 (2023), *available at*: https://www.nyulawreview.org/wp-content/uploads/2023/10/98-NYU-L-Rev-1106.pdf.

[42]*See* Hal S. Scott & Leslie N. Silverman, Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes, 36 Harv. J. L. & Pub. Pol'y 1187, 1190 (2013), *available at* https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2013/05/36_3_1187_Scott_Silverman.pdf.

[43]*See*, *generally*, Neil M. Gorsuch and Paul B. Matey, Settlements in Securities Fraud Class Actions: Improving Investor Protection, Andrews Class Action Litigation Reporter (Aug. 22, 2005).

[44]S.B. 95, 153rd Gen. Assemb. (Del. 2025), *available at* https://legis.delaware.gov/BillDetail/142081.

[45]8 DEL. CODE ANN. Tit. 8, Section 115(c) (2025) (effective Aug. 1, 2025).

[46]8 DEL. CODE ANN. Tit. 8, Section 102(f) & 109(b) (2025) (effective Aug. 1, 2025).

[47]*See*, *generally,* David H. Webber, Shareholder Liti-

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gation Without Class Actions, 57 Ariz. L. Rev. 201 (2015), *available at* https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1035%context=faculty_scholarship, and Jens Dammann, Fee-Shifting Bylaws: An Empirical Analysis, The Journal of Law and Economics 65:1 (2022), *available at:* https://www.journals.uchicago.edu/doi/full/10.1086/718163.

[48]*See, e.g.,* Scott, supra note 42 at 1209-1212 and Paul Weitzel, The End of Shareholder Litigation? Allowing Shareholders to Customize Enforcement Through Arbitration Provisions in Charters and Bylaws, 2013 BYU L. Rev. 65, 83 (2013), *available at* https://digitalcommons.law.byu.edu/lawreview/vol2013/iss1/2/.

[49]*See, e.g.,* Jonathan T. Molot, Fee Shifting and the Free Market, 66 Vanderbilt Law Review 1807 (2013), *available at* https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1322&context=vlr.

[50]Acceleration of Effectiveness of Registration Statements of Issuers with Certain Mandatory, Release No. 33-11389 (Sept. 17, 2025) [90 FR 45125 (Sept. 19, 2025)].

[51]Paul S. Atkins, Open Meeting Statement on Policy Statement Concerning Mandatory Arbitration and Amendments to Rule 431 of the Commission's Rules of Practice (Sept. 17, 2025), *available at* https://www.sec.gov/newsroom/speeches-statements/atkins-091725-open-meeting-statement-policy-statement-concerning-mandatory-arbitration-amendments-rule-431.

[52]*ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

[53]*See* Lee Rudy, Investors Opposing Fee-Shifting Bylaws (May 1, 2015), *available at* https://www.ktmc.com/news/investors-opposing-fee-shifting-bylaws.

[54]S.B. 75, 148th Gen. Assemb. (Del. 2015), *available at* https://legis.delaware.gov/BillDetail?LegislationId=24380.

[55]Synopsis, Senate Bill No. 75, *available at* https://legis.delaware.gov/BillDetail/24380.

[56]Stephen Bainbridge, Fee-Shifting: Delaware's Self-Inflicted Wound, 40 Delaware Journal of Corporate Law 851, note 126 and accompanying text (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2624750.

[57]Paul Atkins, CA Has Hollywood, TX Has Oil, Delaware Corporation, RealClearMarkets (June 11, 2015), *available at* https://www.realclearmarkets.com/articles/2015/06/11/ca_has_hollywood_tx_has_oil_delaware_corporations.html.

[58]In 2024 and 2015, 67% and 66%, respectively, of Fortune 500 companies were incorporated in Delaware and 81% and 86%, respectively, of IPO issuers were incorporated in Delaware. *See* Delaware Division of Corporations: 2024 Annual Report, available at https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2024-Annual-Report.pdf, and Delaware Division of Corporations: 2015 Annual Report, *available at* https://corpfiles.delaware.gov/Corporations_2015%20Annual%20Report.pdf.

[59]Jai Ramaswamy, Andy Hill, and Kevin McKinley, We're Leaving Delaware, And We Think You Should Consider Leaving Too (July 9, 2025), *available at* https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too/.

[60]Andrew D. Santana and Kacey Fonner, Stopping 'Dexit': Delaware Makes Significant Changes to Its General Corporation Law, Fox Rothschild (March 31, 2025), *available at* https://www.foxrothschild.com/publications/stopping-dexit-delaware-makes-significant-changes-to-its-general-corporation-law.

[61]S.B. 21, 153rd Gen. Assemb. (Del. 2025), *available at* https://legis.delaware.gov/BillDetail/141857.

SEC UPDATE: SEC GIVES RELIEF TO IPO REGISTRANTS DURING GOVERNMENT SHUTDOWN; SEC ISSUES ORDER TO REDUCE OPERATING COSTS OF CONSOLIDATED AUDIT TRAIL; SEC APPROVES GENERIC LISTING STANDARDS FOR COMMODITY-BASED TRUST SHARES; SEC SEEKS PUBLIC COMMENT TO IMPROVE RULES ON RESIDENTIAL MORTGAGE-BACKED SECURITIES AND ASSET-BACKED SECURITIES

SEC Gives Relief to IPO Registrants During Government Shutdown

On October 9, 2025, the Securities and Exchange Commission's Division of Corporation Finance (the "Division") updated guidelines for processing registration state-

ments during the federal government shutdown. The updated guidance was intended to provide greater clarity for issuers that wanted to proceed with an IPO or other securities offerings on Form S-1 or F-1 despite the government being formally closed (the shutdown ended on Nov. 12, 2025).[1]

The updated guidelines allowed IPO registrants to remove Rule 473 delaying amendment language and to rely on Rule 430A to omit pricing information from the registration statement at the time of effectiveness during the government shutdown.

For companies trying to move ahead with IPOs during the shutdown, these issuers could go effective with a bona fide price range and then price after effectiveness in a typical fashion (that is, the issuer can include pricing information in the final prospectus filed after effectiveness). Having Rule 430A available for use will permit companies to price above or below the bona fide price range and benefit from the 20% safe harbor under Rule 430A.

That said, changing the bona fide price range will require a pre-effective amendment, which will restart the 20-day period that must pass before the IPO registration statement automatically goes effective. There were suggestions by some market observers that issuers should consider including a price range that isn't considered in excess of current Division policy, which is up to $2 for offerings up to $10 per share and no more than 20% of the high end of the range for offerings greater than $10 per share.

The SEC's prior guidelines remained otherwise unchanged, such as in respect to registration statements on Form S-4 or F-4 for business combinations or exchange offers. As noted in the guidelines, issuers "that remove their delaying amendment with outstanding staff comments should carefully consider the material issues raised by the staff and not remove their delaying amendments prior to making the necessary changes to the registration statement."[2]

SEC Issues Order to Reduce Operating Costs of Consolidated Audit Trail

On September 30, 2025, the SEC issued an order granting conditional exemptive relief related to certain requirements of the National Market System Plan governing the Consolidated Audit Trail ("CAT NMS Plan"), Rule 613 of Regulation NMS, and Rule 17a-1 under the Securities Exchange Act of 1934.[3]

This conditional exemptive relief allows self-regulatory organizations that take part in the CAT NMS Plan "to expeditiously and meaningfully reduce the operating costs of the consolidated audit trail ("CAT") while maintaining core regulatory functionality." This relief addresses four areas related to CAT:

- Lifecycle linkages
- Re-processing of late records
- Providing an online targeted query tool ("OTQT")
- Data storage and retention

The order expands on previous cost savings measures approved by the Commission and will allow plan participants to, among other things: (1) cease creating interim lifecycle linkages absent regulator request; (2) ease requirements related to the re-processing of late records; (3) cease providing certain functionality associated with the online targeted query tool; and (4) delete certain CAT data and more cost effectively store older CAT data.

The CAT budget originally approved by the Operating Committee of the CAT for 2025 was greater than $248 million. The SEC said that "as a result of implementation of previous cost amendments and the relief granted, CAT's expenses are approximately forecast to fall an additional $20 million-$27 million below the approximately $196 million forecast expenses for 2025."[4]

"Both the Commission and the participants that operate the CAT need to take very seriously their roles in reducing these seemingly endless cost increases. CAT must be more efficient and cost-effective, especially after the recent decision by the U.S. Court of Appeals for the Eleventh Circuit that vacated the 2023 Funding Model Order governing the CAT," said SEC Chairman Paul S. Atkins. "While I am pleased to support . . . exemptive relief, I want to reiterate that this is just the start."

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Requirement to Create Lifecycle Linkages by T+1 at Noon ET

Pursuant to previous exemptive relief issued by the Commission in November 2023, participants are currently required to provide interim lifecycle linkages by T+1 at 9:00 p.m. ET and final lifecycle linkages by T+5 at 8:00 a.m. ET.

In December 2024, the SEC subsequently approved an amendment to the CAT NMS Plan that removed the requirement to link and create order lifecycles for Options Market Maker quotes in Listed Options OMM ("OMM Quotes"). Now, the exemptive relief granted on September 30, 2025 enables participants to further relax requirements related to the provision of lifecycle linkages.

Specifically, the exemptive relief would allow the CAT NMS Plan processor ("Plan Processor") to provide only final lifecycle linkages for all order events by T+5 at 8:00 a.m. ET, except that no lifecycle linkages will be required for options market maker quotes in listed options consistent with the December 2024 plan amendments for OMM quotes. One condition of this relief: upon receiving requests by authorized regulatory users from the Participants or the Commission, the Plan Processor must create interim CAT Order IDs for a specified trade date or dates and thereby provide linked lifecycles to regulators before T+5 at 8:00 a.m. ET.

Requirements for Re-Processing of Late Records

Due to the SEC's previous exemptive relief in November 2023, participants currently perform certain re-processing on data that is received late, including re-processing that assembles all late-reported CAT data into complete order event lifecycles to present such data to regulatory users in a manner substantially similar to how such data would have been presented if it had been reported on time ("Full Replay process").

Now the conditional exemptive relief issued on September 30 enables participants to cease performing the Full Replay process altogether. It also reduces the frequency and scope of other weekly re-processing for late records known as the "Enhanced Late to the Lifecycle" process, subject to which late records are currently associated with all relevant lifecycles as part of normal re-processing, such that order event lifecycles may be associated with more than one CAT Order ID, among other things.

Specifically, participants must ensure that the Plan Processor maintains the Enhanced Late to the Lifecycle process for late records from trade dates within the prior three years, including lifecycle mapping which indicates all lifecycle associations made during the Enhanced Late to the Lifecycle process. The latter process must be run quarterly, the SEC said. For data outside of this three-year window, no re-processing is required. "Upon requests by authorized regulatory users from the Participants or the Commission, the Plan Processor must run the Full Replay process on specified data, such that late records received through Friday of the prior week are available for regulatory users on the following business day at 8 a.m. ET, absent extraordinary circumstances. Finally, the Plan Processor must continue to notify regulatory users how re-processing will be completed for late records."

Requirement to Provide an OTQT

The conditional exemptive order grants relief to the Plan Processor from providing participants and the SEC with access to CAT Data through certain OTQT functionality. However, the Plan Processor must maintain currently-existing controls, monitoring, logging, and reporting for the remaining query tools: user-defined direct queries and bulk extract, as well as for certain MIRS tools provided as part of the OTQT functionality, the SEC said. Further, OTQT functionality may not be eliminated until two months after the publication of the conditional exemptive order in the Federal Register.

Requirements Related to Data Storage and Retention

Pursuant to the conditional exemptive relief, the Participants will be allowed to:

- Delete all CAT data older than five years, rather than six years as provided by the CAT NMS Plan;
- Move CAT data older than three years to a more

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cost-effective storage tier, one which will not be immediately accessible but can be made available to regulatory users upon request;

- Delete all options market quotes in listed options data after one year; and
- Delete all interim operational data older than 15 days.

SEC Approves Generic Listing Standards for Commodity-Based Trust Shares

On September 17, 2025, the SEC voted to approve proposed rule changes by three national securities exchanges that will adopt generic listing standards for exchange-traded products that hold spot commodities, including digital assets.[5]

As a result, the three exchanges may list and trade Commodity-Based Trust Shares that meet the requirements of the approved generic listing standards without first having to submit a proposed rule change to the SEC pursuant to Section 19(b) of the Exchange Act.

The Exchanges' proposed generic listing standards[6] define the term "Commodity-Based Trust Share" as a security that:

- is issued by a trust, limited liability company, or other similar entity ("Trust") that, if applicable, is operated by a registered commodity pool operator pursuant to the Commodity Exchange Act and is not registered as an investment company pursuant to the Investment Company Act of 1940 ("1940 Act"), or series or class thereof;
- is designed to reflect the performance of one or more reference assets or an index of reference assets;
- is issued by a Trust that holds (i) one or more commodities or commodity-based assets, and (ii) in addition to such commodities or commodity-based assets, may hold securities, cash, and cash equivalents;
- is issued by a Trust in a specified aggregate minimum number in return for a deposit of (i) a specified quantity of the underlying commodities, commodity-based assets, securities, cash, and cash equivalents or (ii) a cash amount with a value based on the next determined net asset value per Trust share; and
- when aggregated in the same specified minimum number, may be redeemed at a holder's request by a Trust which will deliver to the redeeming holder (i) the specified quantity of the underlying commodities, commodity-based assets, securities, cash, and cash equivalents or (ii) a cash amount with a value based on the next determined net asset value per Trust share.

Along with the generic listing standards for Commodity-Based Trust Shares, the SEC approved the listing and trading of the Grayscale Digital Large Cap Fund, which holds spot digital assets based on the CoinDesk 5 Index. The SEC further approved the listing and trading of p.m.-settled options on the Cboe Bitcoin U.S. ETF Index and the Mini-Cboe Bitcoin U.S. ETF Index with third Friday expirations, nonstandard expirations, and quarterly index expirations.

Division of Trading and Markets Director Jamie Selway said in a statement that "the Commission's approval of the generic listing standards provides much needed regulatory clarity and certainty to the investment community through a rational, rules-based approach to bring products to market while ensuring investor protections."

SEC Seeks Public Comment to Improve Rules on Residential Mortgage-Backed Securities and Asset-Backed Securities

On September 26, 2025, the SEC published a concept release that solicited public comment on how to improve current SEC rules governing residential mortgage-backed securities ("RMBS") and certain aspects of asset-backed securities ("ABS").[7]

The concept release[8] noted that there have been no public RMBS offerings since 2013, which raises a concern, as RMBS provide access to a wider range of issuers and investors, reducing reliance on any one source of liquidity, and in theory contribute to lower consumer costs.

The concept release seeks public feedback as to

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whether there are SEC regulatory impediments which have contributed to the absence of public RMBS offerings in the past 12 years, including whether certain disclosure requirements should be revised and if certain sensitive information about mortgage loans underlying the RMBS can be shared with investors given privacy and confidentiality concerns.

The concept release also seeks comment on whether revisions to any other ABS regulations should be considered to facilitate access to the public market.

"A vibrant public market for RMBS can have downstream effects of reducing these costs and benefitting the U.S. housing sector," said SEC Chairman Paul S. Atkins, in a statement. "It is important for the Commission to hear from market participants on steps it can take to revive the public RMBS market."

In its concept release, the Commission said it "welcomes comments on any costs, burdens, or benefits that may result from possible regulatory responses related to the RMBS and ABS items identified in the release or otherwise proposed by commenters. The public may comment on whether certain specific approaches, alternative approaches, or a combination of approaches would address the items identified in the release."

The SEC noted that as part of this assessment, it seeks public input on whether certain modifications may be warranted with respect to the current asset-level disclosure requirements for RMBS under Item 1125 of Regulation AB, including whether and how to address potential disclosure of certain sensitive RMBS asset-level data.

The public comment period will remain open for 60 days following publication of the comment request in the Federal Register.

ENDNOTES:

[1] https://www.sec.gov/newsroom/whats-new/marked-updated-division-corporation-finance-actions-advance-potential-government-shutdown-october-9.

[2] https://www.sec.gov/newsroom/whats-new/division-corporation-finance-actions-during-government-shutdown-october-2025.

[3] https://www.sec.gov/newsroom/press-releases/2025-127-sec-issues-order-reduce-operating-costs-consolidated-audit-trail.

[4] https://www.sec.gov/files/34-104144-fact-sheet.pdf.

[5] https://www.sec.gov/newsroom/press-releases/2025-121-sec-approves-generic-listing-standards-commodity-based-trust-shares.

[6] https://www.sec.gov/files/rules/sro/nasdaq/2025/34-103995.pdf.

[7] https://www.sec.gov/newsroom/press-releases/2025-126-sec-seeks-public-comment-improve-rules-residential-mortgage-backed-securities-asset-backed.

[8] https://www.sec.gov/files/rules/concept/2025/33-11391.pdf.

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FROM THE EDITOR

The SEC's Initial "Trump 2" Year Assessed

As 2025 nears its close, some SEC enforcement trends are becoming discernible. Analysts have found that the Commission has notably reduced enforcement actions since the second Trump administration took power in January, reorienting enforcement activities to focus on fraud and insider trading while cutting back substantially on enforcement actions against cryptocurrency issuers and exchanges.

Enforcement on the whole appears to be notably down. The SEC reportedly brought an estimated 91 new enforcement suits from Inauguration Day through the end of third-quarter 2025, compared with 126 actions filed during the same period in 2024. The impact of the lengthy government shutdown will likely be another deflating factor on enforcement activity in fourth-quarter 2025.

For the fiscal year that ended September 30, 2025, the SEC posted its lowest enforcement totals since fiscal year 2018, according to a report by the Brattle Group (https://www.brattle.com/insights-events/publications/sec-enforcement-activity-for-fiscal-year-2025-a-tale-of-two-halves/). The SEC initiated 506 enforcement actions in FY25: a 13% decline from FY24 and marking its lowest level in eight years.

Historically, the highest number of enforcement actions occurs in the second half of a fiscal year. But the 144 cases initiated in second-half FY25 were by far the fewest for any half-year analyzed, the Brattle Group found.

Of the enforcement actions that the SEC conducted in 2025, activity has been greatly centered on offering frauds, insider trading and Ponzi schemes, in line with Chairman Atkins' stated goal for the SEC to pursue "traditional" securities law violations, with an emphasis on individual offenders. Among the Brattle Group's other findings was that nearly 33% of enforcement actions brought under the second Trump administration as of September 30 have focused on offering fraud or insider trading, up from 26% during the same period last year.

The mix of allegations in SEC enforcement actions during the first half of FY25 was generally in line with prior years (reflecting that this half of the fiscal year was under Gary Gensler's tenure). The second half showed some notable variations, with securities offering cases nearly doubling, while cases involving the Foreign Corrupt Practices Act declining. There was a record proportion (22.9% of total enforcement actions) of parallel criminal investigations in the second half of FY25.

Another factor depressing activity may have been the decrease in the number of active SEC officials in 2025—the Commission is one of many federal agencies that cut headcount by offering buyouts to career enforcers.

Going forward, some slack may be picked up by state regulators, which can launch investigations having a similar density as an SEC investigation. There's also the prospect that a larger amount of private securities litigation, particularly in the crypto sphere, could fill the void left by reduced SEC enforcement.

Chris O'Leary

Managing Editor

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