the Corporate Governance advisor

November/December 2025 • Volume 33, Number 6

DIRECTOR LIABILITY

Officer Exculpation in 2025: What the Latest Vote Results Tell Us

By Lenin Lopez

Between May and June of 2025, several companies put an officer exculpation proposal up for a vote. We sampled approximately 30 of these companies from a wide range of industries, including technology, financial services, energy, life science, and healthcare. Of the proposals we reviewed, three failed, reflecting a success rate of almost 90%. This aligns with broader data indicating that investor support for officer exculpation has stabilized after some hesitation at the outset.

Nonetheless, not all proposals were structured alike, and the differences in approach likely contributed to the outcomes.

The Bundling Trend: More Than Just Officer Exculpation, Sort of

One trend that gained momentum in 2025 was the bundling of officer exculpation with other

Continued on page 2

Lenin Lopez is Senior Vice President and Corporate Securities Attorney of Woodruff Sawyer.

Wolters Kluwer

CONTENTS

charter amendments. Instead of proposing a standalone change, many companies packaged officer exculpation with updates that would generally fall under the category of refinements and clarifications. Think of the modernization of archaic language, removing references to classes of stock that have since been retired, or cleanup changes to conform with current Delaware law.

This approach was generally successful. Perhaps it helped to paint a picture that the proposal should be viewed as routine and part of a broader governance refresh. In any case, rationales proffered by boards in recommending that stockholders approve officer exculpation didn't break new ground.

Common rationales for recommending that officer exculpation proposals be approved included addressing rising litigation and insurance costs and an enhanced ability to attract and retain officers.

Successful companies have also been very clear in explaining that officer exculpation only permits exculpation for direct claims brought by stockholders, but that it would not eliminate officers' monetary liability for breach of the duty of care claims brought by the company itself or for derivative claims made by stockholders on behalf of the company.

Translation: Officer exculpation isn't a free pass; it's just putting officers on equal footing with individual directors of the board.

Some companies decided to tee up an officer exculpation proposal in their proxy statements along with several other unrelated proposals to amend their charter. A few years ago, that approach may have been cause for pause. Now, it isn't necessarily a reason for concern if the company going this route, clearly explains the reasons why the proposals make sense.

So why did some exculpation proposals fail?

When and Why Proposals Failed

The three proposals that we identified as having failed had two things in common: high voting thresholds and low shareholder turnout. In each case, the company had baked into legacy charter language either a supermajority of outstanding shares or approval thresholds—barriers that became fatal despite majority support from votes actually cast.

This reinforces a key lesson and takeaway from the prior proxy seasons: support alone doesn't win the day. A well-designed proposal must account for voting dynamics, including turnout and structural constraints.

Retail-heavy stockholder bases also present challenges. These investors tend to vote less frequently or abstain on technical governance matters.

A Note on Proxy Advisors

For the 2025 proxy season, ISS maintained its "vote case-by-case" approach on officer exculpation proposals. Glass Lewis continued to say it would evaluate these proposals on a "case-by-case basis," but noted it would "recommend voting against such proposals eliminating monetary liability for breaches of the duty of care for certain corporate officers, unless compelling rationale for the adoption is provided by the board, and the provisions are reasonable."

While it's hard to find exact stats on whether a "vote against" recommendation from ISS or Glass Lewis dooms an officer exculpation proposal, I'd just like to point to the scoreboard. Most of these proposals tend to get approved, and if they don't, it's typically a voting threshold and low shareholder turnout issue.

Companies that prepare strong disclosures and run robust shareholder engagement campaigns should be able to secure approvals even when facing proxy advisor pushback. Yes, companies should continue to respect proxy advisor positions, but there is no need to defer to them blindly.

Practical Takeaways

The path to approving an officer exculpation proposal is a well-traveled and successful one. With that in mind, here are a few considerations for companies thinking of including an officer exculpation proposal in their upcoming proxy, whether that be this calendar year or next:

- **Review Your Charter Language Early.** Identify whether a simple majority or supermajority threshold applies and plan accordingly.
- **Don't Assume Investor Familiarity.** Even with growing acceptance, many stockholders, especially retail, still require education on why officer exculpation matters. Make the case clearly and succinctly.
- **Bundle Wisely.** Combining officer exculpation with refinements and clarifications can be effective, but avoid obscuring the proposal or diluting its rationale.
- **Engage Retail Shareholders.** Where possible, boost turnout through proactive investor outreach and simple, accessible communications. Also, don't feel like you need to go at it alone. Proxy solicitors are just a call away.
- **Be Ready to Proceed Without Proxy Advisor Support.** Positive outcomes are achievable without unanimous recommendations from proxy advisors, but only with strong preparation.

Parting Thoughts

The 2025 proxy season underscores that stockholders—particularly institutions—are comfortable with officer exculpation when proposals are well-framed, clearly disclosed, and procedurally sound. That said, high voting thresholds, high retail ownership, and bundling complexity all continue to shape outcomes. With more companies considering charter modernization, officer exculpation will likely remain a topic in future proxy seasons.

Identifying Corporate Directors and Officers as "Discretionaries": Not Fiduciaries

By Marc I. Steinberg

During my five-decade career as an SEC attorney, academician, practitioner, and expert witness, one principle that has remained constant in corporate governance terminology is that corporate directors and officers are fiduciaries. In my just published Oxford University Press book "Corporate Director and Officer Liability: "Discretionaries" Not Fiduciaries," I take issue with the accuracy of this term and show through many examples that this characterization is a misnomer. In the vast majority of situations, when assessing director and officer liability, fiduciary standards are absent.

This is not to say that fiduciary standards never apply. Indeed, they do. For example, the entire fairness test applies when a director or officer engages in a self-dealing transaction with his or her corporation, which does not receive the approval of independent directors or disinterested shareholders. Likewise, in a going-private transaction where a parent takes its subsidiary private, cashing out the subsidiary's minority shareholders, the entire fairness likewise applies unless the transaction is approved by an adequately informed and diligent special committee comprised of independent directors as well as by a majority of the disinterested shares.

But, far more often, fiduciary standards are lacking. The consequence, therefore is that the liability exposure of a corporate director or officer depends on the pertinent facts and circumstances, with widely varying standards of liability applicable. Accordingly, a new and neutral term should be adopted: corporate directors and officers are "discretionaries."

Standards of liability are not to be confused with standards of conduct. In Delaware and elsewhere, including pursuant to the Model Business Corporation Act, lofty standards are set forth with respect to an officer's or director's standards of conduct. But these standards are merely hortatory.

They simply provide what a director or officer is expected to do. For example, MBCA Section 8.30 sets forth standards of conduct and makes clear that its provisions are not relevant for liability purposes, stating: "Section 8.30 addresses standards of conduct - the level of performance expected of directors undertaking the role and

Marc I. Steinberg is the Radford Professor of Law for SMU Dedman School of Law. He just published "Corporate Director and Officer Liability: "Discretionaries" Not Fiduciaries", available at Oxford University Press at https://global.oup.com/academic/product/corporate-director-and-officer-liability-9780197751503.

the Corporate Governance Advisor

The ***CORPORATE GOVERNANCE ADVISOR*** (ISSN 1067-6171) is published bimonthly by Wolters Kluwer at 28 Liberty Street, New York, NY 10005. For Customer service, call 1-800-234-1660.

responsibilities of the office of director [but] does not address the liability of a director."

The Delaware courts likewise have made this important distinction. For example, as stated in one decision: "When determining whether directors have breached their fiduciary duties, Delaware corporate law distinguishes between the standard of conduct and the standard of review [with the former standard] describ[ing] what directors are expected to do." (73 A.3d at 35)

At times, the Delaware courts have conflated these two standards, resulting in language that has much to be desired. A prominent example is illustrated by the *Zuckerberg* decision, where the Delaware Supreme Court stated: "Predicated upon concepts of *gross negligence*, the duty of care requires that [corporate] fiduciaries inform themselves of material information before making a business decision and act *prudently* in carrying out their duties." (262 A.3d at 1049-50 (emphasis supplied))

The gross negligence standard of culpability for breach of the duty of care provides the first example of the absence of fiduciary standards. Notably, gross negligence also must be proven for a plaintiff to rebut the presumption of the business judgment rule. This degree of culpability in other contexts may result in the imposition of punitive damages. Under Delaware corporate law, establishing that a director or officer acted with gross negligence requires a showing that he or she acted with "reckless indifference" or a "deliberate disregard" for the best interests of the corporation and collectively its stockholders. (891 A.2d at 192).

The laxity of this standard is illustrated by Vice Chancellor Laster's recent observation that it is easier for a prosecutor to obtain a conviction for criminal negligence than it is for a plaintiff-shareholder to rebut the presumption of the business judgment rule. (291 A.3d at 690 n. 21) Perhaps incredibly, it is more likely for one to be imprisoned than for the business judgment rule presumption to be rebutted. Certainly, this standard is devoid of fiduciary substance.

The exculpation statutes provide a huge exclamation point to this fact. In Delaware and many other states, directors (and officers in several states) are not held monetarily liable unless they engage in intentional misconduct or commit a loyalty breach. The recently enacted Texas statute, following Nevada's approach, insulates directors and officers from liability unless they engage in blatantly egregious misconduct. For directors and officers of publicly-traded companies, they can be liable only if they breach a "fiduciary duty" and engage in intentional misconduct, an ultra vires act, fraud, or a knowing violation of law. To say that corporate directors and officers are fiduciaries under these very lax liability standards belies reality.

Not satisfied with this lenient standard, Texas goes even further. Its statute permits a publicly-traded company to adopt a by-law (without shareholder approval) requiring that a shareholder have an ownership threshold of at least 3% in order to have standing to institute a derivative action. Because most duty of care and loyalty claims are derivative actions, a company opting into this statute will be able to erect a formidable barrier to prevent even the bringing of meritorious claims. As adopted, this statute gives directors and officers almost a carte blanche to engage in questionable, if not wrongful, conduct. Protecting miscreant directors and officers is bad policy and highlights the absence of fiduciary standards.

The recent Delaware statute is mild when compared to Texas. It nonetheless illustrates the demise of fiduciary standards in many situations. Evidently, the Delaware legislature believed that this statute was necessary in view of the greater laxity extended by other states, thereby posing a threat to the "Delaware franchise." Under the Delaware statute, an interested director or officer or control person transaction (except for a going private transaction) will be upheld if broadly defined disinterested directors in good faith and having adequate disclosure approve the transaction, acting without gross negligence. This lenient standard, requiring a complainant to establish palpable misconduct by disinterested directors in order to seek redress, lacks fiduciary content.

The inability to seek recompense is accentuated by the ease in many states that disinterested directors, pursuant to the business judgment rule, can effectuate the dismissal of even meritorious derivative litigation against their fellow directors. Again, so long as these directors are deemed to have acted in good faith, having adequate information, it is nearly insurmountable for a plaintiff to pursue the action. And, in these situations, cases are dismissed without the alleged improprieties engaged in by defendant directors and officers seeing the light of day.

A last example focuses on the corporate opportunity doctrine. In Delaware and many other states, a corporation may waive corporate opportunities in favor of permitting its directors and officers to seize these opportunities. The Delaware statute, for instance, authorizes a company to allow its directors and officers to take "specified business opportunities or specified classes of business opportunities." (Del. Gen. Corp. L. § 122(17)) No shareholder approval is required under the statute, as a board promulgated by-law amendment is deemed sufficient. Allowing corporate directors and officers to take corporate opportunities for their financial benefit that would have been advantageous to the corporation for which they serve is antithetical to fiduciary conduct.

My book provides many more examples. Importantly, the book's focus is not whether these lax liability standards are wise or imprudent. Rather, its objective is to demonstrate that corporate directors and officers are not fiduciaries. But the question may be asked: "Why does it matter?" After all, for centuries, directors and officers have been identified as fiduciaries. Their identification as such is firmly entrenched in the corporate governance landscape. The clear answer is that the law should be truthful. The substance of a legal term should convey an accurate meaning. This is not the case here. Black's Law Dictionary defines a fiduciary as one who owes the duties of reasonable care, good faith, and loyalty. As applied to corporate director and officer liability, the definition of fiduciary conflicts with actuality.

Moreover, individuals, particularly uninitiated investors, rely on the fiduciary principle. As a consequence, they expect that directors and officers are subject to a higher level of required conduct than in fact is the case. These investors may believe that they have been unfairly misled. Although these perceptions are unlikely to deter them from investing in the securities markets, this deviation of perception from reality reflects poorly on the rule of law.

I am pleased that the book thus far, has received favorable reviews, including by two former Delaware Supreme Court Chief Justices and one current Delaware Vice-Chancellor. Former Chief Justice Leo E. Strine states: "Marc Steinberg's gimlet-eyed look at what the law actually expects of those said to owe fiduciary duties to corporations is a refreshing example of how rigorous thinking can aid the difficult job of policymaking." Former Chief Justice E. Norman Veasey comments that "Professor Steinberg's new book on director and officer liability is richly-researched, well-written, well-organized and provocative." Vice Chancellor J. Travis Laster asserts that "Professor Steinberg goes beneath the surface to look unflinchingly at how the law operates and makes a powerful case that the fiduciary headline doesn't match the story." The book also is favorably reviewed by highly respected practitioners. Edward Herlihy, a partner at one of this country's most prestigious law firms situated in New York City, states that this book "is one of the most important works that has ever been written in the corporate and securities law fields." In addition, several premier academicians favorably reviewed the book, including Stephen Bainbridge from UCLA, Todd Henderson from the University of Chicago, Jonathan Macey from Yale, and Felix Steffek from the University of Cambridge.

The book concludes with the following passage that sums up the objective and focus of the book: "The continued mischaracterization of corporate directors and officers as fiduciaries is unacceptable. Clearly, legal principles and terms related thereto should be truthfully interpreted and should be applied to accurately implement these principles and terms. In other words, the law should be truthful. Identifying corporate directors and officers as fiduciaries while embracing lax liability standards presents a false portrayal…. This false portrayal is detrimental to the rule of law, contravenes reasonable investor expectations, and impairs the integrity of the financial markets. No longer should the term fiduciary be used to characterize the status of corporate directors and officers. Fittingly, an accurate and neutral substantive term should be recognized — corporate directors and officers are "discretionaries."

This book hopefully is a significant contribution to the development of the rule of law. Identifying corporate directors and officers as fiduciaries conflicts with both investor trust and legal clarity. Corporate directors and officers are "discretionaries."

Sixth Circuit Reverses Class Certification in Major Securities Fraud Case

By Robert J. Giuffra Jr., David M.J. Rein, Richard C. Pepperman II, Jeffrey T. Scott, Julia A. Malkina, and Jacob E. Cohen

On August 13, 2025, in a decision described by Bloomberg as a "landmark ruling," the U.S. Court of Appeals for the Sixth Circuit reversed the certification of a securities fraud class action against S&C client FirstEnergy. S&C represented FirstEnergy in the appeal.

The court clarified that a plaintiff alleging both misstatements and omissions cannot evade the more demanding evidentiary standard under *Basic Inc*. v. *Levinson* to prove that common issues of reliance predominate by characterizing the case as an omissions case under *Affiliated Ute Citizens of Utah* v. *United States*. The court also held that the district court failed to conduct the "rigorous analysis" of plaintiffs' classwide damages methodology required by *Comcast Corp*. v. *Behrend*.

Background

Reliance. The requirement to prove reliance would ordinarily preclude class certification in securities fraud cases because individual issues of reliance would predominate over common issues under Federal Rule of Civil Procedure 23(b)(3). But the Supreme Court has recognized two different presumptions of reliance:

1. *The Basic presumption*: The first reliance presumption is far more demanding for plaintiffs. The so-called *Basic* presumption rests on the theory that "the price of stock traded in an efficient market reflects all public, material information—including material misstatements."[1] If plaintiffs prove that the stock in question trades in an efficient market, they are entitled to a rebuttable presumption that investors who bought the stock at the market price relied on those alleged misstatements. In several recent cases, defendants have succeeded in rebutting the *Basic* presumption by showing an absence of price impact—*i.e.*, that the alleged misrepresentations did not actually impact the market price of the stock.

2. *The Affiliated Ute presumption*: In *Affiliated Ute*, the Supreme Court held that plaintiffs do not need to prove reliance in omissions cases—*i.e.*, cases "involving primarily a failure to disclose."[2] The *Affiliated Ute* presumption is based on the practical difficulties of proving reliance when no statements are made at all.

Because the *Affiliated Ute* standard is less demanding, plaintiffs often try to characterize cases as primarily involving omissions. Courts have thus grappled with determining whether a case involves "omissions" subject to the *Affiliated Ute* presumption or "misrepresentations" subject to the more demanding *Basic* presumption.

Damages. To certify a class, plaintiffs also must prove that damages are capable of measurement on a classwide basis. Otherwise, individual damages issues would overwhelm common issues and preclude class certification. In *Comcast Corp.* v. *Behrend*, the Supreme Court held that plaintiffs seeking class certification cannot satisfy Rule 23(b)(3)'s predominance requirement without "evidentiary proof" that "damages are capable of measurement on a classwide basis" in a manner "consistent with [their] liability case."[3] The Supreme Court instructed district courts to conduct a "rigorous analysis" of the classwide damages methodology plaintiffs proffer at

Robert J. Giuffra Jr., David M.J. Rein, Richard C. Pepperman II, Jeffrey T. Scott, Julia A. Malkina, and Jacob E. Cohen are attorneys of Sullivan & Cromwell LLP.

class certification to ensure that their damages methodology matches their liability theory.[4] In recent years, plaintiffs-side experts have tried to meet their evidentiary burden under *Comcast* by merely reciting the general standard for damages in securities cases (the "out-of-pocket" measure), and promising to develop a methodology for measuring out-of-pocket damages after the class is certified.

Factual Background & the District Court's Certification Order. In July 2020, the price of FirstEnergy's securities dropped after a federal criminal complaint was unsealed alleging that FirstEnergy had made payments, through 501(c)(4) organizations, benefitting political groups affiliated with Ohio House of Representatives Speaker Larry Householder in return for support for favorable legislation.

In response, plaintiffs filed a securities fraud class action. The complaint alleged that 46 separate statements were false and misleading by omitting to disclose the alleged "bribery scheme." The U.S. District Court for the Southern District of Ohio certified the class. *First*, it held that plaintiffs were entitled to the *Affiliated Ute* presumption of reliance. *Second*, without conducting a rigorous analysis of plaintiffs' damages methodology, the district court stated that "predominance exists for the reasons articulated" in the court's discussion of plaintiffs' non-fraud claims under the Securities Act, which are subject to a statutory damages formula. The court made no findings about the methodology plaintiffs proposed for their securities fraud claims under Section 10(b) of the Exchange Act.

Sixth Circuit's Decision

The Sixth Circuit reversed the district court's class certification order on both grounds: its application of the *Affiliated Ute* presumption of reliance and its failure to properly examine plaintiffs' damages methodology under *Comcast*.

Reliance. The Sixth Circuit joined other courts of appeals by limiting the *Affiliated Ute* presumption to cases primarily involving "omissions" claims.[5] In so ruling, the Sixth Circuit made three important contributions to the growing consensus.

1. The Sixth Circuit held that courts "must follow a two-step analysis" to determine whether the *Affiliated Ute* presumption applies: (i) "the court must classify each claim as alleging either an omission or a misrepresentation," and (ii) determine "whether the overall case is primarily based on omissions or on misrepresentations."[6]

2. The Sixth Circuit held that it is "important" to give a "narrow legal construction of what constitutes an omission."[7] As the court explained, "[b]ecause every misrepresentation includes some sort of 'concealment,' the right way to think about *Affiliated Ute* is as a narrow case premised on the conceptual difficulty of proving reliance on a representation that was never made."[8] Thus, when grouping the challenged statements into omissions or misrepresentations, the court held that "half-truths and generic, aspirational corporate statements are misrepresentations," not omissions, because they do not involve a situation where the defendant "stand[s] mute" and plaintiffs are "left 'with absolutely nothing upon which to rely.'"[9] Although other courts have recognized that so-called "half-truths" are misrepresentations, the Sixth Circuit's decision is the first to hold that generic statements that virtually all companies make (such as committing to act with "integrity") are not "omissions" merely because the company fails to disclose misconduct.

3. The Sixth Circuit clarified how courts should determine whether a case involving a mix of misrepresentations and omissions qualifies for the *Affiliated Ute* presumption. It held that the *Affiliated Ute* presumption only applies if each of the following four factors are met: "(1) the omissions are *not* only the inverse of the misrepresentations, or the omissions are *not* only the truth that is misrepresented; (2) reliance is *not*

practically possible to prove by pointing to a misrepresentation and connecting it to the injury; (3) the preponderance and primary thrust of the claims do *not* involve misrepresentations made by the defendant; and (4) the omissions alleged *do* have standalone impact apart from any alleged misrepresentations."[10] In applying that test, the court held that plaintiffs failed to satisfy any of the four factors.[11]

Damages. The Sixth Circuit held that "[t]he district court failed to conduct any analysis at all, let alone a rigorous one," of plaintiffs' damages methodology.[12] Instead, the district court "rejected FirstEnergy's objections to Plaintiffs' experts in one sentence" and erroneously relied on the Securities Act damages formula, which is "entirely different[]" from the damages analysis required under the Exchange Act.[13] Therefore, the court "reverse[d] the district court and remand[ed] for the application of *Comcast*'s 'rigorous analysis'" to plaintiffs' Exchange Act claims.[14]

Implications

The decision continues the narrowing of the applicability of the *Affiliated Ute* presumption to cases that are truly based on omissions—*i.e.*, situations where the plaintiff would be faced with the "severe evidentiary burden of proving reliance on something that was never said."[15] Defendants in securities fraud actions should carefully scrutinize whether a complaint truly alleges omissions under the factors the Sixth Circuit identified. Indeed, in light of the Supreme Court's holding in *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.* that "pure omissions" are not cognizable under Section 10(b) of the Exchange Act and that plaintiffs instead must identify a statement that is false or misleading,[16] it is not clear how, if at all, the *Affiliated Ute* presumption could ever apply.

The decision also provides a critical defense in so-called event-driven securities litigation. In such cases, plaintiffs often try to transform any negative company event (such as a data breach) into securities fraud by pointing to generic statements touching on the subject of that negative event (such as committing to protect client data). Following the Supreme Court's 2021 decision for S&C client Goldman Sachs in *Goldman Sachs Group, Inc.* v. *Arkansas Teacher Retirement System*,[17] which clarified that the "generic nature of a misrepresentation" is "important evidence of a lack of price impact" under the *Basic* presumption,[18] plaintiffs have tried to seek shelter under the *Affiliated Ute* presumption in event-driven cases. The Sixth Circuit's decision cuts off that path.

On the issue of damages, the decision reinforces the requirement that district courts conduct a "rigorous analysis" to determine if plaintiffs proffer "a methodology for calculating damages on a classwide basis that is susceptible of measurement across the entire class."[19] The Fourth Circuit recently granted Rule 23(f) interlocutory review to address this issue in *In re The Boeing Company Securities Litigation*—another case in which S&C represents the defendants.[20] Defendants facing a class certification motion should carefully scrutinize plaintiffs' expert's damages report to assess potential *Comcast*-based arguments.

Notes

1. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 263 (2014).

2. 406 U.S. 128, 153-54 (1972).

3. 569 U.S. 27, 33-35 (2013).

4. *Id.* at 35.

5. *In re FirstEnergy Corp. Sec. Litig.*, __ F.4th __, 2025 WL 2331754 (6th Cir. Aug. 13, 2025).

6. *Id*. at *6, *24.

7. *Id.* at *12.

8. *Id.*

9. *Id.* at *11, *24.

10. *Id.* at *20 (emphasis in original).

11. *Id.* at *22.

12. *Id.* at *23.

13. *Id.*

14. *Id.* at *24.

15. *Id.* at *6.

16. 601 U.S. 257 (2024).

17. 594 U.S. 113, 123 (2021).

18. *Goldman Sachs* and *Shupe* v. *Rocket Companies, Inc.*, 752 F. Supp. 3d 735 (E.D. Mich. 2024), are two prominent examples of defendants successfully rebutting the *Basic* presumption by showing a lack of price impact. S&C represented the defendants in both cases.

19. *FirstEnergy*, 2025 WL 2331754, at *24.

20. No. 25-1492 (4th Cir.).

How Do You Engage When The "Big 3" Have Split in Half?

By Broc Romanek

Now that the last of the "Big 3" institutional investors have announced that they are splitting their stewardship team into two, it's fair to wonder how this impacts your engagement strategy and scheduling. Engagement sure has changed this year in numerous ways – in fact, Vanguard's latest engagement survey revealed a 44% decline in the 2nd quarter of 2025 compared to the same period in the prior year.

First, let's review how these stewardship teams are now split:

1. BlackRock Investment Stewardship and BlackRock Active Investment Stewardship

2. State Street Asset Stewardship Team and State Street Sustainability Stewardship Service

3. Vanguard Capital Management and Vanguard Portfolio Management (timing of the split not yet known; so separate policies not yet available)

We'll see how engagement will need to evolve as experience with this brave new world progresses, but here are some early thoughts:

1. **Understand Diverging Stewardship Priorities:** The Big Three's two sets of stewardship teams probably won't always march in lockstep – particularly on E&S issues. This makes sense as these teams were split to better support client objectives between stewardship and investment strategy (index v. active).

2. **Brace for More Relationship Building:** Given that the number of people you'll need to know has doubled, you will need to spend more effort to build relationships, clarify positions, and understand investor priorities. Being organized matters more than ever before while you do this.

3. **Map the Global vs. Regional Policy Divide:** Recognize that investor expectations may vary based on geography. U.S. and E.U. investor bases can interpret ESG – particularly diversity – quite differently. Understanding these regional leanings can help tailor engagement strategies and disclosures more effectively.

4. **Track the Complexity of Voting Choice Programs:** The rise of "voting choice" or "pass-through" voting means that institutional investors may no longer vote as a single bloc. Investors can select among various policy frameworks (including ISS and Glass Lewis), which may complicate vote projections.

Broc Romanek is editor of the Corporate Governance Advisor and TheGovernanceBeat.com.

SEC Compensation Recovery Rule: Restatements and Related Clawbacks

By Olga Usvyatsky

SEC Rule 10D-1, often referred to as the compensation clawback rule, requires public companies to establish policies for recouping incentive-based pay that was wrongly awarded to current or former executives after a financial restatement. Implemented under the Dodd-Frank Act, the rule is designed to ensure accountability by requiring the return of excess compensation tied to misstated results—whether the misstatement arose from an error or misconduct. The rule applies to both material ("Big R") and immaterial ("little r") restatements.

Under the rule, companies must indicate on the cover page of their annual reports when a filing includes corrections to previously issued financial statements. Companies are also required to disclose a recovery analysis outlining whether any compensation was clawed back and file their recovery policy as an exhibit to the annual report.

Key Q2 2025 Findings:

- The number of error correction flags declined sharply in Q2 2025 compared to Q2 2024.
- The number of companies with the recovery analysis flag increased in Q2 2025 compared to Q2 2024.
- A failure to adopt the mandatory clawback policies or to attach the compensation recovery policy as an exhibit to the annual report led to amended filings or non-compliance with exchange listing rules for some issuers.
- Two companies reported restatements-related clawbacks and two more companies disclosed that the recovery analysis is still ongoing.

The figure below describes the number of companies with the error-related flags in the second quarter of 2025.

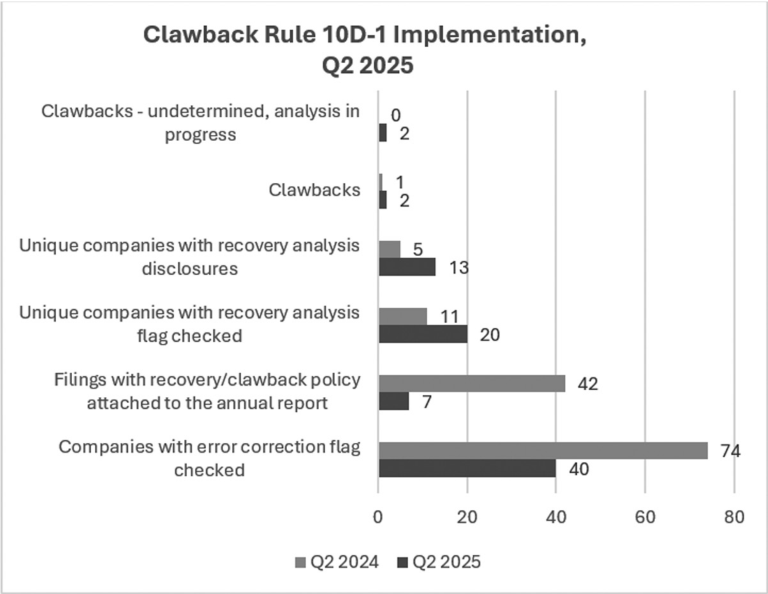
The number of companies flagging an error correction box declined from 74 in Q2 2024 to 40 in Q2 2025. The decline could be attributed to several possible explanations:

- A decrease in the number of restatements in Q2 2025 following the uptick in Borgers-related restatements in 2024.
- More restatements were disclosed in filings that are not subject to Rule 10D-1 cover page requirements (e.g., more restatements were disclosed in 10-Q filings vs. 10-Ks and 10-K/As).

In April 2025, the SEC issued a set of Compliance and Disclosure Interpretations (C&DIs) to reduce inconsistencies in the application of Rule 10D-1, more specifically, clarifying what types of errors are subject to the clawback rule and when the recovery analysis is required. The guidance clarified that both material ("Big R") and immaterial ("little r") restatements require checking the error correction box, while out-of-period adjustments do not. It also emphasized that a recovery analysis must be provided even if payout metrics remain unaffected – which, from a practical perspective, implies that the error correction and recovery analysis flags should be highly correlated.

Olga Usvyatsky is editor of "Deep Quarry" on Substack and a former VP of Research of Audit Analytics. Company-level data underlying this analysis is available for premium subscribers of "Deep Quarry."

Figure 1 – Companies with error correction and recovery analysis boxes selected



Source: *SEC filings, analysis by Deep Quarry.*

The second-quarter 2025 data shows similar implementation challenges identified through the 2024 and the first quarter of 2025, albeit with some signs of incremental progress toward more compliance.

The Overlooked Elements of Executive Pay: Perquisites, Retirement and Severance

By Ed Hauder

When people think of executive compensation, they naturally think of salaries, annual bonuses, and long-term incentives. While these are the foundational elements of pay that predominantly occupy Compensation Committees' time and attention, the non-core elements play a material role in retention, motivation and governance.

Perquisites

Generally, perquisites are provided to executives to enable them to devote more time to the company's business, protect its operations and/or address risks related to health or security. Understanding the purposes and roles of perquisites is essential in determining which to offer and how they fit into the company's executive compensation philosophy and program.

There are several lenses through which to consider perquisites:

Companies: Value perks that make executives more productive, less distracted, healthier and/or safer. These are the predominant objectives for most Committees when adopting perquisites.

Investors/Shareholders: Are generally not opposed to perquisites provided that they are not excessive, are within market norms and demonstrate a legitimate business purpose.

Proxy Advisors: May view perquisites as a poor pay practice if they are "excessive." Examples include tax gross-ups and "excessive" company plane and automobile use. Both ISS and Glass Lewis have published research on executive perquisites[1].

Executives: May view perquisites as more valuable than a similar amount of cash because they facilitate material assistance in managing complex professional and personal responsibilities. Among the most common are financial planning assistance, company car, personal use of company plane and/or executive physicals.

Often, Compensation Committees focus on particular high-ticket perquisites, such as personal use of company planes or other pivotal arrangements related to executive health and safety. Committees need to understand their perquisite offerings in the context of the above perspectives.

Our Take

Perquisites can be an effective component of a company's executive compensation program. Clarifying the business purpose is the most important element of assessing the need for and potential value of perquisites. Clarity on the needs of the business provides the basis for positive and sustainable outcomes with investors and their advisors.

Retirement

Historical Context

The nature of the employment relationship with executives has changed significantly over the past 30 years. Pension plans and supplemental executive retirement plans have been dramatically reduced and, in many cases, have

Ed Hauder is a Principal and Head of Research and Content of Meridian Compensation Partners, LLC.

Key Questions When Considering Perquisites

- What is the business purpose of this perquisite?
- Would the perquisite present any internal complications based on what is offered to other executives or employees?
- Is this perquisite consistent with the compensation philosophy?
- What is the market practice with respect to this perquisite?
- Does our industry have a different experience with this perquisite?
- What are our investors' views about this perquisite?
- What are the proxy advisory firms' views on this?
- What are the proxy disclosure implications of providing this perquisite?

been eliminated entirely. Instead, compensation has become substantially more performance and stock based. Most companies do maintain defined contribution and "restoration" plans to mitigate the statutory limitations of qualified plans. Somewhat ironically, the shift away from pensions has made the retirement provisions of equity awards particularly important and valuable, given the significant portion of total compensation that is comprised of equity awards.

Retirement Plans

Across nearly all industries, retirement plans have become overwhelmingly defined contribution (DC) in nature. Defined benefit (DB) plans have largely been phased out or frozen and replaced by DC plans. The cost of DB plans, the volatility they often introduce into company profitability and a workforce with considerably more mobility across employers over a career are the factors that drove this change. Nonetheless, opportunities to accumulate (and move) retirement assets are highly valued. This means the company contribution elements (e.g., match formulas, discretionary contributions, executive restoration elements and investment choices) are an important aspect of executive remuneration. However, retirement arrangements rarely have the value or retention power to materially impact the attraction or retention of executives, as they often can get the same offering elsewhere.

Treatment of Equity upon Retirement

For higher-growth companies, the treatment of equity upon retirement often receives less attention as executives are more focused on intermediate time frames. However, for more established companies, the treatment of equity on retirement is of high interest and value. A company should balance:

1. Retaining employees/executives with longer service retirement eligibility; against

2. Attracting mid-career talent with more attainable retirement eligibility.

Most companies define retirement eligibility as some combination of age and service. Once attained, outstanding equity awards are eligible for some degree of beneficial treatment (e.g., pro rata and/or full vesting of equity). Striking the balance outlined above requires defining:

1. The age(s) and/or service that constitutes retirement (there can be more than one);

2. How much an individual is entitled to receive at these milestones; and

3. Other features:

    A. Designed to ensure that, as the executive cohort becomes more senior and seasoned, the retention value of equity is not lost through the executive's right to resign and claim retirement treatment (e.g., a requirement to provide advance notice of retirement).

    B. Designed to provide optionality to the company and avoid doubling up (e.g., not permitting an executive to receive both severance on a termination without cause and retirement treatment of equity).

Increasingly, we see companies in the sticky situation of having an age + service equity vesting provision, which eliminates the retention "glue" equity awards are supposed to provide. This also fails to support planful executive retirements and allows for a "double dip" (an executive terminated without cause, but who has met age and service requirements for retirement, receives both severance and equity vesting).

When considering how much equity should vest upon retirement, it boils down to the Board's take on what is consistent with the company's compensation philosophy. The alternatives range from losing all unvested awards upon retirement to full vesting. Most companies we work with now tend to fall somewhere in between those extremes and may provide partial or pro-rata vesting of equity awards upon retirement. Investors prefer continued to accelerated vesting of equity on retirement as it maintains a long-term decision-making focus as executives near retirement.

Our Take

Retirement plans are fundamentally table stakes – they are important to have but do little to distinguish a company given the widespread similarities across industries. However, the treatment of **equity** on retirement is important to define. Most companies encounter the need to hire mid-career talent. Consequently, retirement provisions that are attainable are essential to being competitive. The key is to balance attainable equity retirement treatment with the retention value of equity and the interests of the company.

Severance

Severance is used to facilitate managerial transitions and/or make individuals indifferent to organizational decisions that may be to their detriment, including a reduction in force and a merger or acquisition. Severance can be provided by individual agreement with each executive or through a severance plan. Most companies have migrated toward generalized plans rather than individual agreements. They are simpler, easier to administer and avoid complex, one-off negotiations with each executive.

Most shareholders and their advisors support severance that is not "excessive" and/or reflects market practice. The proxy advisory firms take a dim view of any severance protection that provides for tax gross-ups. This has led to a shift in the market towards a "best net" approach for severance related to changes in control, as this avoids a tax gross-up and enables the individual executives to either have their severance capped or paid out in full, depending on which would provide a greater benefit.

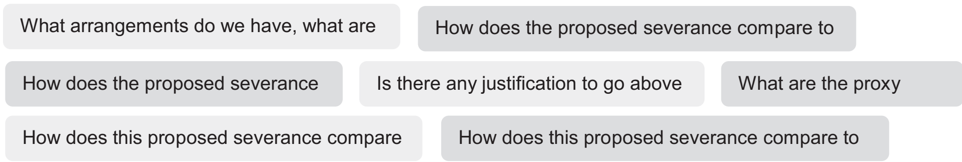
Our Take

Severance is a key component of an executive compensation program. Companies periodically need to make changes in the interests of shareholders. If structured correctly, severance is generally supported by shareholders and proxy advisors and provides competitive and "fair" treatment to terminated executives as they transition to alternative employment.

Key Questions When Considering Equity Award Retirement Provisions

- What is the average age of our executives?
- What sort of employee and executive turnover do we have (i.e., how long do people stay and at what age do they tend to leave?)
- How do we define retirement? Age? and/or number of years of service?
- Do we need to attract "mid-career" executives that might not be able to reasonably satisfy our definition of retirement?
- What is market practice concerning retirement both for the definition of retirement and the treatment upon retirement?
- Is there merit in a hybrid "early" and "normal" retirement definition?

Key Questions When Considering Severance



Conclusion

These non-core elements are an important element of an executive compensation program. They are a particularly critical element of executive compensation at the margin – when attracting and retaining executives during critical times. Getting the non-core elements right can pay off by enabling a company to achieve its strategic goals and objectives.

Note

1. *What 'Perks' Can Tell Us About Executive Compensation*, September 11, 2023, ISS, available at: *https://www.iss-corporate.com/resources/reports/what-perks-can-tell-us-about-executive-compensation/*; *The Resurgence of Executive Perquisites: Overview & Aircraft Costs*, April 24, 2025, Glass Lewis, available at *https://www.glasslewis.com/article/the-resurgence-of-executive-perquisites-overview-aircraft-costs*.

When AI Claims Cross the Legal Line: Why Legal Teams Must Treat AI Disclosures Like High-Stakes Compliance

By Aslam Rawoof and Madison Rallis

To the average user, AI is simply a source of entertainment or convenience. However, for businesses, it is turning into a legal minefield with the risk of both civil and criminal charges.

As the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") escalate enforcement around AI disclosures, it is crucial that businesses take appropriate steps to protect themselves when disclosing use of AI technology. The DOJ's first AI fraud indictment under the Trump Administration sends a clear message: regulators will not tolerate exaggerated or misleading representations of AI capabilities.

The Saniger Case: President Trump DOJ's Opening Shot in AI Fraud Enforcement

Take, for example, Albert Saniger, CEO of Nate, Inc. In 2018, Mr. Saniger founded Nate, Inc., an e-commerce company, and launched the application "nate."[1] Mr. Saniger described the app as a universal shopping cart that expedited the check-out process through AI technology. Mr. Saniger represented to investors that AI powered the app, but, according to the allegations, Mr. Saniger employed a team of human workers overseas to manually process transactions on the app.

Of course, "AI" is not simply artificial intelligence, rather it means the capability of a computer system to simulate the reasoning that humans use to learn and make decisions.[2] Mr. Saniger claimed his app conducts transactions through a computer system that analyzes and learns consumers' purchases across e-commerce websites, then takes that information and completes the checkout process for the consumer.[3] However, according to the charges, these claims were false and it was human contractors, not machines, conducting transactions.

Mr. Saniger raised over $40 million through the sale of Nate stock by making these alleged false statements about the company's AI to investors. Mr. Saniger solicited these investments from capital firms by stating in pitch materials that the app's transactions were powered by AI and needed no human intervention. He even told an investment firm that the number of transactions successfully completed with Nate's AI technology was 93%-97%. In fact, the automation rate was, in actuality, effectively 0%.

Mr. Saniger's representations, if false when made, are considered "AI washing." AI washing refers to when companies misrepresent their use of AI technology to mislead consumers and investors.[4] Matthew Podolsky, acting United States Attorney for the Southern District of New York, alongside the New York Field Office of the FBI, investigated and charged Mr. Saniger with one count of securities fraud and one count of wire fraud. Both charges carry a maximum sentence of 20 years in prison.[5] The SEC filed parallel civil claims for securities fraud. Based on a letter from the SEC to the court, Mr. Saniger has yet to be served because he resides in Spain.[6]

The *Saniger* case is a harbinger of future enforcement priorities. Mr. Podolsky said, "this Office and [their] partners at the FBI will continue to pursue those who seek to harm investors by touting false innovation." Businesses must be wary of their AI disclosures. Not only will the SEC file civil claims against businesses, but the DOJ is also becoming an active party. Even as leadership shifts across key agencies, the regulatory spotlight on AI remains firm.

Aslam A. Rawoof is a partner, and Madison Rallis is an attorney, of Benesch Friedlander Coplan & Aronoff LLP.

New Leadership, Same Pressure: AI Remains a Regulatory Priority

Criminal charges around AI washing are a recent development under the Trump Administration. This may seem unexpected, considering that President Trump revoked President Biden's previous executive order on AI.[7] Three days later, President Trump signed his own executive order regarding AI.[8] Though many expected AI enforcement to lessen following this revocation, enforcement actions appear to have broadened.

President Trump's second term has begun with significant changes to personnel and changes to regulatory entities. Nevertheless, the SEC Cybersecurity and Emerging Technologies Unit ("CETU") remains untouched, with Laura D'Allaird continuing to lead enforcement. This may be a sign that enforcement on AI will continue at pace under the Trump Administration.

AI Washing on the Radar: SEC Signals Escalating Crackdown

At the Securities Enforcement Forum West 2025, multiple SEC attorneys spoke about future enforcement actions against AI washing.[9] One speaker, Madiha Zuberi, an SEC enforcement attorney since 2021 and now senior counsel of the CETU, stated the SEC's current main objectives are "'rooting out those seeking to misuse this new technology and to harm investors'" and investigating "'whether there's transparency around [AI] technology, whether it's described accurately, [and] whether there's responsible communications to customers.'" Ms. Zuberi is clear that the new unit will be cracking down on AI washing and will bring fraud claims against businesses.

Additionally, Kate Zoladz, an SEC attorney since 2010 and deputy director of SEC's enforcement division in the West, reinforced the continued enforcement of AI washing under new SEC Chair Paul Atkins. Ms. Zoladz stated enforcement will "return to basics" through bringing lawsuits against companies making false statements in raising capital. Ms. Zoladz stated that an example of the type of enforcement the SEC will pursue is the *Saniger* case.

Lastly, Ms. Zoladz dispelled any rumors that the SEC is pulling away from AI enforcement under the Trump Administration. It was clear from the comments by various SEC attorneys that the agency is now more determined than ever to pursue fraud claims for AI washing. With enforcement agencies sharpening their focus, legal teams can't afford to sit back and watch as their clients wrongfully or sloppily disclose AI activities.

No Room for Error: How Legal Teams Can Craft AI Disclosures That Stand Up to Scrutiny

Under the Trump Administration, law firms and in-house counsel must be especially cautious when advising businesses on their disclosure of AI practices in their SEC filings, to investors and to consumers. The following are best practices for businesses to avoid scrutiny.

- Only disclose AI technology on business reports, such as SEC filings or sustainability reports, if the technology is material to the business.
- Clearly define AI and other related terms and the intention of the AI system, bearing in mind the definition of AI used by enforcement agencies.
- State material risks and the effects technology is reasonably likely to have on the business and its financials.
- Ensure all information, statements and disclosures are accurate, have a reasonable basis and are supported by evidence.
- Do not exaggerate AI capabilities.

- Create tailored disclosures, rather than using boilerplate language.
- Ensure there are appropriate rapid response protocols and management for AI-related risks.
- Create AI policies and put in place a committee to oversee the enforcement of the policies.

Notes

1. Press Release, United States Attorney's Office Southern District of New York, Tech CEO Charged In Artificial Intelligence Investment Fraud Scheme (Apr. 9, 2025), *https://www.justice.gov/usao-sdny/pr/tech-ceo-charged-artificial-intelligence-investment-fraud-scheme* [hereinafter Tech CEO Charged].

2. *What is artificial intelligence?*, MICROSOFT, *https://azure.microsoft.com/en-us/resources/cloud-computing-dictionary/what-is-artificial-intelligence#self-driving-cars*.

3. Indictment, United States v. Albert Saniger, Docket No. 25-cr-00157 (S.D.N.Y. 2025).

4. Miriam Robin, *SEC's AI Stance Holds Steady Under New Leadership*, INTELLIGIZE (May 21, 2025), *https://www.intelligize.com/secs-ai-stance-holds-steady-under-new-leadership/*.

5. None of the charges against Mr. Saniger have yet been proven. Mr. Saniger, like all criminal defendants, is presumed innocent until proven guilty. The allegations against Mr. Saniger remain, at this point, unproven accusations of wrongdoing.

6. Letter Motion to Adjourn Conference, SEC v. Alberto Saniger Mantinan, Docket No. 25-cv-02937 (S.D.N.Y 2025).

7. Exec. Order No. 14110, 88 Fed. Reg. 75191 (2003).

8. Exec. Order No. 14179, 90 Fed. Reg. 8741 (2025).

9. Jessica Corso, *SEC Focused on 'Rooting Out' AI Abuse, Agency Atty Says*, LAW360 (May 15, 2025), *https://www.law360.com/securities/articles/2340923/sec-focused-on-rooting-out-ai-abuse-agency-atty-says?copied=1*.

Wolters Kluwer

Wolters Kluwer
The Corporate Governance Advisor
Distribution Center
7201 McKinney Circle
Frederick, MD 21704

TIMELY REPORT

Please Expedite

November/December 10041526-0540