Newsletter

White & Case M&A – U.S. Market Update

Welcome to the latest edition of White & Case's biannual update regarding key developments in U.S. M&A

Authored by industry leading lawyers in White & Case's Corporate/M&A, Private Equity, Public Company Advisory, Antitrust and CFIUS/FDI teams.

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2025 DGCL Amendment Summary

In late March 2025, Delaware enacted significant amendments to its General Corporation Law. These changes provide new protections for interested directors and officers and controlling stockholders that comply with specified procedures. The amendments also provide statutory definitions for key terms such as "controlling stockholder" and "interested director." These express procedures and definitions offer a path to approving conflicted transactions which avoids judicial review under Delaware's most onerous standard – entire fairness.

Key changes to DGCL Section 144:

Safe Harbor for Conflicted Transactions: The amendments provide a safe harbor (business judgment rule treatment) for transactions in which a director or officer or a controlling stockholder may have a conflict of interest:

Transactions involving Directors or Officers: The safe harbor is available if either the board of directors or the disinterested stockholders approve the transaction as follows: In the case of board approval, the material facts of the director's or officer's interest must be disclosed or known to all members of the board or applicable committee and the transaction must be authorized, in good faith and without gross negligence, by a majority of disinterested directors then serving on the board or such committee (as applicable). If a majority of the directors then serving on the board are not disinterested, the transaction must be approved (or recommended for approval) by a committee of the board that consists of at least two directors, all of whom have been determined by the board to be disinterested. In the case of stockholder approval, the transaction must be approved by an informed, uncoerced affirmative vote of a majority of the votes cast by disinterested stockholders.

Transactions involving a Controlling Stockholder (other than a "going private" transaction): The safe harbor is available if either a committee of the board of directors or the disinterested stockholders approve the transaction as follows: In the case of committee approval, the material facts as to the controlling stockholder must be disclosed or known to all members of the committee. The committee must consist of at least two directors (all of whom have been determined by the board to be disinterested), the committee must have the authority to negotiate (or oversee the negotiation of) and to reject the transaction, and the transaction must be authorized, in good faith and without gross negligence, by a majority of disinterested directors then serving on the committee. In the case of stockholder approval, the transaction must be conditioned (at the time of its submittal to stockholders for their approval) on the approval of disinterested stockholders and be approved by an informed, uncoerced affirmative vote of a majority of the votes cast by disinterested stockholders.

Controlling Stockholder "going private" transactions: The safe harbor is available if both a committee of the board of directors and the disinterested stockholders approve the transaction in accordance with the same requirements applicable to a non-take private transaction.

Importantly, the amendments limit the need for the dual protections of special committee and disinterested stockholder approval to "going private" transactions (i.e., Rule 13e-3 transactions, in the case of publicly traded corporations and, in the case of privately held corporations, transactions where all or substantially all the corporation's stock held by disinterested stockholders (but not that held by the controlling stockholder) is cancelled, converted, purchased or otherwise acquired or ceased to be outstanding). In addition, while the board must determine that all members of a committee are disinterested, the safe harbor is still available if a court ultimately disagrees, so long as a majority of the disinterested directors on the committee approve the transaction. Finally, to take advantage of disinterested stockholder approval, the transaction must be conditioned on such vote prior to being submitted to the stockholders (as opposed to at the beginning of the transaction as required under prior case law).

Express Statutory Definitions: To help clarify the scope of the safe harbor, the amendments include statutory definitions for several key terms, including:

"Controlling Stockholder": The amendments impose a bright-line rule that a stockholder is a controller only if the stockholder owns a majority in voting power entitled to vote generally in the election of directors (or has that right by contract) or holds at least one-third in voting power plus managerial authority functionally equivalent to a majority owner. To the extent a stockholder is a controller, the amendments add an exculpation provision providing that controlling stockholders cannot be liable for money damages for a breach of the duty of care.

"Disinterested Director": The amendments provide that a director of a publicly traded company determined to be independent under the applicable NYSE/Nasdaq rules is presumed disinterested unless substantial and particularized evidence proves otherwise. Additionally, a director's nomination by an interested party does not, by itself, suggest the director is interested.

Effective Date: The amendments are now effective and apply to all acts and transactions occurring before, on or after such effectiveness except for transactions subject to litigation on or before February 17, 2025.

With these rules now enshrined in the Delaware General Corporation Law, corporations and their controlling stockholders, directors, officers and advisors can confidently structure conflict transactions in a manner that obtains the deferential treatment of Delaware's business judgment rule.

Analysis of Lost Premium Damages Provisions Following the Adoption of DGCL Section 261 Amendments

Introduction and Background

Effective August 1, 2024, Delaware adopted a set of amendments to the Delaware General Corporation Law (the "**DGCL**") intended to address, among other things, the Delaware Chancery Court's 2023 decision in *Crispo v. Musk.*[1] In the *Crispo* decision, the Chancery Court stated in *dicta* that a Delaware target company in a merger could not collect damages from a breaching buyer reflecting any premium or other economic benefits that its stockholders would have been entitled to receive if the merger had been consummated ("**lost premium damages**") where the agreement expressly provided that stockholders are not third-party beneficiaries of the agreement for such purposes.

The *Crispo* decision, which was the Delaware courts' most significant pronouncement on the issue of lost premium damages, came almost 20 years after the landmark decision by the United States Court of Appeals for the Second Circuit in *Consolidated Edison v. Northeast Utilities*[2] (commonly known as *Con Ed*). In *Con Ed*, the Second Circuit, applying New York law, held that a target company's shareholders could not pursue a claim for lost premium damages (which were provided for in the merger agreement) against the buyer for its failure to close the merger because (i) the agreement did not grant third-party beneficiary status to the target company's shareholders to collect lost premium damages in the event the merger did not close, and (ii) the target company could not recover those damages for itself because the losses were suffered by its shareholders, not the target company.

The Amendments to DGCL 261

The Delaware General Assembly amended DGCL Section 261 to add Section 261(a)(i) to address the *Crispo* decision. Under Section 261(a)(i), a breaching party to a merger agreement is subject to "such penalties or consequences as set forth in the agreement of merger or consolidation (which penalties or consequences may include an obligation to pay to the other party or parties to such agreement an amount representing, or based on the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive pursuant to the terms of such agreement if the merger or consolidation were consummated in accordance with the terms of such agreement)."[3] Further, if a damages payment is made to either the target company or the buyer, the receiving party may keep the payment without having to distribute the payment to its stockholders, even though the stockholders are the ones who had been expected to receive the premium if the merger had closed.[4] Finally, an agreement may include a provision appointing representatives to act on behalf of the target company's stockholders and the buyer's stockholders to enforce the stockholders' respective rights under the agreement.[5]

Review of Post-Amendment Merger Agreements

To understand how deal participants and Delaware practitioners are addressing the amendments to DGCL Section 261, we reviewed all merger agreements (with the exception of one outlier) meeting the following criteria: (i) public deals, (ii) announced between August 1 and December 31, 2024, (iii) governed by Delaware law, (iv) with a minimum equity value of $250 million, and (v) providing for the acquisition of 100% of the target company's outstanding equity.

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1 304 A.3d 567 (Del. Ch. 2023).

2 426 F.3d 524 (2d Cir. 2005).

3 DGCL 261(a)(1)(i).

4 DGCL 261(a)(1)(ii).

5 DGCL 261(a)(2)(i).

Here are the key takeaways from the survey:

Prevalence of Lost Premium Damages Provisions

Of the 38 merger agreements reviewed, 22 of them (58%) provided for lost premium damages and 16 (42%) did not. As discussed below, the primary determinant of whether a merger agreement provided for lost premium damages was whether the agreement followed the strategic model or the private equity model.

Interplay Among Lost Premium Damages, Other Remedies and Reverse Termination Fees

In the event of a breach by the buyer, virtually all merger agreements in public M&A transactions give the target company the right to either (i) specifically enforce the buyer's obligations under the agreement or (ii) terminate the agreement and sue for damages. There are different variations of these two remedies, and the interplay between these remedies and any reverse termination fee that is provided for in the merger agreement. Most importantly, these remedies packages generally differ significantly depending on whether the buyer is a strategic buyer or a private equity or other financial buyer that generally relies on leverage to fund the acquisition.

The most common remedies structure for transactions involving a strategic buyer provides for (i) full specific performance to enforce the buyer's obligations under the merger agreement and (ii) damages in the event of a willful breach (and sometimes any breach) or fraud by the buyer (the "**strategic model**"). A significant minority of merger agreements following the strategic model provide for the payment of a reverse termination fee by the buyer to the target company in specified circumstances, in which case the payment of the reverse termination fee is generally the target company's sole and exclusive remedy.

The most common remedies structure for transactions involving private equity and similar financial buyers that rely on leverage to fund acquisitions provides for (i) conditional specific performance under which the target can specifically enforce the buyer's obligations under the merger agreement only in certain circumstances, (ii) a reverse termination fee payable by the buyer to the target company if the buyer fails to close in breach of the agreement, and (iii) damages for willful breach or fraud by the buyer capped at the amount of the reverse termination fee (the "**private equity model**"). In circumstances where the reverse termination fee is payable, the fee payment is the target company's sole and exclusive remedy for the buyer's failure to close the transaction.

Lost premium damages may be less necessary or useful from a target company's perspective under the private equity model than under the strategic model because under the private equity model (i) target companies are entitled to a reverse termination fee for buyer's failure to close or for the buyer's breach in many circumstances, (ii) lost premium damages are not recoverable where the reverse termination fee is the target company's sole and exclusive remedy, and (iii) the reverse termination fee serves as a cap on the target company's damages.

Of the 25 merger agreements that followed the strategic model, 19 (76%) provided for lost premium damages, while of the 13 merger agreements that followed the private equity model, only three (23%) provided for lost premium damages. Accordingly, it appears that the primary determinant of whether a merger agreement provides for lost premium damages is whether the agreement follows the strategic model or the private equity model.

Drafting Tips

1. *Silence is not golden:* To recover lost premium damages in the event of breach or fraud, the DGCL requires that the merger agreement specify that the non-breaching party may pursue lost premium damages. Absence of a lost premium damages provision most likely precludes a non-breaching party from collecting these damages.

2. *Name the company as the stockholders' representative and not as their agent:* The lost premium damages provision should track the language of DGCL Section 261(a)(2)(i) to provide that the non-breaching company is a "representative" of its stockholders.

3. *State that stockholders are third-party beneficiaries:* For clarity, state that the stockholders are third-party beneficiaries of the merger agreement with respect to lost premium damages.

4. *State that the non-breaching party may retain any lost premium damages it recovers:* For clarity, state that the non-breaching party may retain, without distribution to its stockholders, any lost premium damages recovered from the breaching party.

5. *Cite to authority:* While not expressly required, it is prudent to expressly refer to Section 261 of the DGCL when referencing lost premium damages.

A longer, more detailed version of this article can be found here: Analysis of Lost Premium Damages Provisions Following the Adoption of DGCL Section 261 Amendments | White & Case LLP

Who's in Control?
A Framework for Thinking About Control Rights in a Joint Venture

This article is part of a series designed to help business teams and legal counsel navigate the key concepts involved in structuring a joint venture.

There are multiple factors to consider when evaluating control rights in a joint venture (JV), and it can be daunting to design a governance configuration that is structured for your specific deal. While adopting a control regime based on market norms provides consistency and simplicity—both valuable traits in long-term contracts—it's worth pausing to assess whether your JV's unique characteristics merit a different approach.

A thoughtful evaluation of the venture's life cycle, capital needs, investment structure, and risk allocation—before drafting begins—can save time and money, sharpen focus on material issues, and ensure that control rights align with each party's actual exposure and objectives.

By approaching governance with this broader lens—considering investment dynamics, operational roles, and the evolving needs of the business—parties can develop a control framework that reflects both commercial realities and long-term priorities. The following considerations can serve as a roadmap for crafting that framework:

A. Who Is Bearing the Risk?

A natural starting point for allocating control rights is financial contribution—both upfront capital and future funding obligations. The logic is simple: more money means more risk.

But risk can take other forms as well. A party's exposure may also increase through:

- **Credit support** for JV obligations,
- **Indemnities** between JV partners or to third parties (e.g., tax equity participants),
- **Guarantees** of payment or performance, and
- **Day-to-day operational responsibilities**.

These non-monetary risks can be just as relevant—if not more so—than capital in determining governance rights.

Because risk exposure may shift over time, governance rights might need to adjust accordingly. Common examples include:

- **Reduction in control**, including once a party achieves a target return or sells a significant portion of its equity, upon the passage of a set period of time or upon the termination of commercial contracts between the JV or a JV member's affiliate, and
- **Increase in control**, including as a party's equity investment grows or when certain milestones (e.g., financial close, project completion) are missed by another party.

B. What Stage Is the Business In?

The business's lifecycle stage has a direct impact on its governance needs:

During development, capital flows, contract negotiation, and project changes are front and center. A structure that creates delays—whether in approving capex, amending contracts, addressing cost overruns or emergencies or onboarding new capital—can be fatal to success. A party with outsized financial exposure or development expertise may reasonably require broader authority during this stage.

Once operational, governance tends to stabilize. Less capital is needed and the corporate structure is more fixed. So, allowing flexibility for a shift in governance may be appropriate. However, operational expertise could potentially still matter more than ownership share. In these cases, parties can delegate day-to-day control through commercial contracts with third parties or affiliates.

This can be effective *if* the JV agreement aligns with the terms of those contracts. Non-operating members should retain meaningful oversight of changes to affiliate arrangements, and it may be efficient for responsibility over low-level corporate actions at the JV level to follow the same decision-makers responsible for operations. High-level actions (e.g., major acquisitions, large indebtedness) may still require broader approval.

C. Are There Investments at Other Levels of the Corporate Structure to Consider?

If a third-party investor (debt or equity) sits **below** the JV, parties must consider how JV-level control interacts with the terms of the subsidiary's contractual obligations. For instance:

- Does a change in JV control trigger a default?
- Is shared control allowed?
- Should a JV member responsible for a key indemnity hold decision-making rights over related matters?

If an investor sits **above** one of the JV members, that member must consider whether the upstream investor will require indirect governance rights or approval thresholds.

D. How Many Members Are Involved—Now and in the Future?

Multi-party JVs add complexity. Governance agreements must address:

- Board seat allocation and appointment rights,
- What requires majority, supermajority, or unanimous approval,
- When board rights can be gained or lost, and
- Whether (and how) governance rights are transferrable.

Minority members often seek negative consent rights—especially if they lack board representation.

Transfer provisions must align with these rights. If equity can be partially transferred, JV members must determine how to divide governance power among multiple stakeholders. Known partners may be acceptable; unknown transferees might not. Yet overly restrictive transferability can reduce liquidity—so members seeking future exit options often push for governance rights to be assignable. Conversely, long-term participants may favor tighter controls, including minimum ownership thresholds for board seats and restrictions on competitor influence.

If parties want to avoid multi-member complications, they may opt to only permit direct transfers of 100% of a JV member's equity to any incoming partner.

Common Governance Structures

With these considerations in mind, parties can select a governance model suited to their venture:

1. Managing Member + Negative Consent Rights

Used when one member holds a majority stake or operational expertise, while the other(s) remain passive. The minority party receives veto rights over major actions, typically scaled to ownership and risk exposure. A passive investor may still prefer board-level transparency over complete delegation. *This structure is common in energy JVs with a financial investor.*

2. Stationary Board Appointment Rights

Here, board control doesn't change over time and negative consent or supermajority thresholds may apply to material decisions (e.g., M&A, CEO changes). *This structure is common where one member will always hold a majority or where minority investors are closely aligned with the lead investor. It is popular in private equity syndications with friendly co-investors.*

3. Variable Board Rights Based on Ownership

This "corporate-style" model aligns board representation with equity share. It's appropriate when ownership is expected to or potentially could shift. Tiered approval thresholds (e.g., supermajority for large debt, unanimous for dissolution) help maintain balance. JVs with numerous small members may need safeguards to avoid delay or administrative burden from excessive or difficult minority members.

4. Unanimous Approval for All Actions

This structure is rare and is typically used only when parties have a strong pre-existing relationship and flexible exit plans. While it ensures buy-in, the risk of deadlock is high—especially if capital needs arise or relationships strain. This structure should be used with caution for any development-stage companies or operational companies with potential liquidity issues.

Joint ventures are inherently dynamic, and their governance structures should reflect that reality. By taking a thoughtful, deal-specific approach to control rights—rather than defaulting to boilerplate norms—parties can better manage risk, promote alignment, and ensure flexibility as the business evolves. A well-constructed governance regime not only facilitates smooth decision-making but also positions the JV for long-term success.

Update – SEC Lockups

On March 6, 2025, the SEC released updated guidance with respect to voting agreements in stock-for-stock merger transactions. The guidance, among other things, clarifies the situations in which signatories to voting agreements and/or written consents will be able to have their stock registered on the applicable broader transaction Form S/F-4. In many public merger transactions, voting agreements will be expected and/or required of significant stockholders/directors/officers, and where there is a majority stockholder, a written consent may be required by the buyer in connection with the approval of the transaction. These agreements and/or consents help the acquiror achieve deal-certainty and minimize interloper-risk between signing and closing.

In light of the uncertainty regarding how to treat these common voting/consent arrangements under the securities laws, the latest SEC's guidance clarifies that:

- Stockholders executing written consents (assuming less than 100%) may not receive registered securities on the Form S/F-4 and must otherwise have a valid exemption under the Securities Act for their transaction; and
- Stockholders not executing a written consent (even if otherwise signing a voting agreement) may have their securities registered on the broader transaction Form S/F-4.

Market Trends

Private Equity – The Sports Market

With U.S. professional sports franchise valuations booming, the potential pool of buyers of teams in U.S. major sports leagues has shrunk proportionally, prompting rule changes to allow private equity investors to obtain ownership in teams.[1] As of December 11, 2024, 33 teams across Major League Baseball (MLB), Major League Soccer (MLS), the National Basketball Association (NBA), the National Hockey League (NHL), and the National Football League (NFL) have secured direct private equity-backed investments.[2] However, that leaves a total of 121 teams across these leagues without direct private equity-backed investments,[3] which highlights a significant portion of professional sports franchises with potential for future investment opportunities from this newly allowed investor base. Additionally, some teams with existing investments may also seek further private equity funding in the future if they have not already reached the applicable league's investment limits. Private equity firms can offer a compelling pitch to teams, including optimizing business models and financing major projects such as stadium upgrades and renovations, all while allowing an existing majority owner to retain significant control of their teams due to current league rules only allowing minority sales to private equity investors. We expect that leagues will continue to loosen their existing rules with respect to ownership restrictions on private equity investments in the coming years.

Sovereign Wealth Funds in Sports

Currently, Norway's sovereign wealth fund, valued at $1.8 trillion,[4] holds a minority equity stake of 1.07% in Madison Square Garden Sports Corp., the entity which owns the New York Knicks (NBA), and New York Rangers (NHL), as well as their minor league affiliates.[5] In 2023, the Qatar Investment Authority invested $200 million to acquire a 5% ownership stake in Monumental Sports & Entertainment, the parent company of the Washington Capitals (NHL), the Washington Wizards (NBA), and the Washington Mystics (WNBA).[6] This transaction raised expectations for additional sovereign wealth funds to enter the U.S. sports market, but there have been no reports of other sovereign wealth funds acquiring ownership in a major U.S. sports team since 2023.[7]

Yet the NBA, MLB, NHL, and MLS all permit sovereign wealth funds to make minority investments in their franchises, so there is potential for future investments from sovereign wealth.[8] While the NFL does not allow direct investments from sovereign wealth funds in its teams, reports indicate that their new rules do permit ownership by an entity or individual, including sovereign wealth funds, of up to 7.5% in an approved fund.[9] The potential for sovereign wealth funds to hold an ownership stake may align with the interests of professional sports owners and leagues, as these funds often pursue longer-term investment strategies.[10]

Future Outlook: Expansion of Leagues

Neither the NBA nor the NFL have formed an expansion team in over 20 years. However, the NBA is actively evaluating Las Vegas and Seattle as near-term expansion markets.[11] Additionally, on March 27, 2025 the NBA and FIBA, basketball's international governing body, announced that they are beginning the process of exploring the creation of a new professional basketball league in Europe. Separately, there have been widespread reports

1 https://www.sportspro.com/insights/features/private-equity-sport-explainer-nfl-nba-european-football-cvc-clearlake-arctos/

2 https://pitchbook.com/news/articles/private-equity-sports-investment-dashboard

3 Id.

4 https://www.reuters.com/markets/europe/norways-wealth-fund-will-remain-calm-despite-losses-government-says-2025-04-10/#:~:text=The%20world's%20largest%20fund%20last,financial%20crisis%20was%20highly%20profitable

5 https://www.atlanticcouncil.org/blogs/menasource/gulf-states-soccer-sports-sovereign-wealth-fund/

6 https://frontofficesports.com/pif-other-sovereign-wealth-funds-now-have-entry-point-into-nfl/

7 Id.

8 https://www.espn.com/nfl/story/_/id/41013650/nfl-owners-approve-private-equity-investment

9 Id.

10 https://www.sportico.com/business/team-sales/2024/sovereign-wealth-sports-investments-nba-nhl-rules-1234784873/

11 https://www.espn.com/nba/story/_/id/41286389/nba-expansion-cities-draft-teams-leagues-line

that investors including Sela, owned by Saudi Arabia's Public Investment Fund, and Macau's Galaxy Entertainment Group, are exploring a potential new $5 billion European basketball league to rival the NBA, consisting of six men's teams and six women's teams.[12,13] These European league expansions would offer an opportunity to private equity and sovereign wealth funds to become major investors, albeit that the current NBA rules only permit a single private equity firm owning up to 20% in a team and sovereign wealth funds owning up to a 5% passive investment in teams.[14]

The NFL is making substantial efforts to expand its presence into Europe, reflecting the league's ambition to tap into international markets. Over the years, the NFL has hosted games in various European cities, including London, Munich, and Frankfurt.[15] The NFL plans to host future games in Berlin, Madrid, and Dublin in 2025.[16] NFL Commissioner Roger Goodell has openly discussed these expansion plans, stating in 2022 that the NFL is considering not just adding a team in Europe, but potentially establishing an entire European division with four teams.[17] The NFL's possible expansion to Europe would align the significant involvement of private equity firms and sovereign wealth funds in European soccer. For example, RedBird Capital Partners acquired AC Milan,[18] Clearlake Capital was part of the consortium that purchased Chelsea F.C.,[19] and a consortium consisting of Saudi Arabia's Public Investment Fund, PCP Capital Partners, and RB Sports Media acquired Newcastle United F.C.[20] Given the prominent private equity and sovereign wealth fund involvement in high-profile soccer investments, they could be key suitors interested in the NFL's expansion to Europe.

College Athletics

The landscape of Name, Image, and Likeness (NIL) rules in college athletics has undergone significant transformation. Student-athletes in the NCAA are now able to monetize their personal brands through endorsements and sponsorships, which had been historically banned. NIL has also introduced challenges for the NCAA as well as their constituent conferences and schools, such as managing evolving regulations and legal challenges which have ultimately led to a preliminary $2.8 billion settlement between the NCAA and its student-athletes.[21] This settlement, if finalized, could also allow additional spending of $22 million annually per school to be shared with student-athletes.[22] Private equity may serve as a source of funding to address these potential new costs and also offer assistance in navigating strategic revenue generating processes for athletic departments.[23] However, other private equity firms have noted that the current state of investment in college athletics is "very unstable and unpredictable."[24] Due to the inability of investors owning equity in a college institution, alternative structures are being explored. For instance, Clemson University recently formed Clemson Ventures to consolidate revenue-generating assets such as media rights, ticket and merchandise sales, NIL activities, and intellectual property, which may then seek to sell equity or take on private credit in exchange for a return on these revenue generating assets.[25]

12 https://www.espn.com/espn/story/_/id/43741075/pif-backing-proposed-5-billion-basketball-league

13 Id.

14 https://www.sportspro.com/news/nba-adam-silver-sovereign-wealth-fund-team-ownership-expansion/#:~:text=The%20NBA%27s%20current%20investment%20rules,more%20than%20five%20per%20cent

15 https://operations.nfl.com/journey-to-the-nfl/the-nfl-s-international-impact/the-nfl-international-series/#:~:text=Through%20the%202024%20season%2C%20the,City%20and%20three%20across%20Germany

16 https://www.nfl.com/international/international-games

17 https://www.cbssports.com/nfl/news/nfl-floats-wild-idea-of-possibly-putting-four-teams-in-europe-as-part-of-major-international-expansion/

18 https://www.acmilan.com/en/news/articles/club/2022-08-31/redbird-capital-partners-completes-acquisition-of-ac-milan

19 https://clearlake.com/consortium-led-by-todd-boehly-and-clearlake-capital-completes-acquisition-of-chelsea-football-club/

20 https://www.skysports.com/football/news/11678/12427983/newcastle-takeover-completed-saudi-led-consortium-end-mike-ashleys-14-year-ownership

21 https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-gains-preliminary-approval-moving-college-athletics-closer-to-revenue-sharing/

22 Id.

23 https://www.cnbc.com/2024/12/19/private-equity-looks-to-buy-in-to-college-sports.html

24 https://www.axios.com/2025/01/08/arctos-ian-charles-private-equity-sports

25 https://www.sportsbusinessjournal.com/Articles/2025/02/24/private-equity-is-set-to-revolutionize-college-athletics/

Conclusion

Overall, private equity firms and sovereign wealth funds have demonstrated their strong desire to be investors in the global sports market. Their substantial financial resources and strategic expertise make them well-suited to navigate operational complexities and capitalize on the growth opportunities within the sports industry. Given these attributes and the increasing commercial potential in the sports industry, it is likely there will be a continued rise in investments made by private equity firms and sovereign wealth funds in the foreseeable future.

Key Trends in Shareholder Activism in the U.S.

In 2024, shareholder activism in the United States maintained robust momentum as activist investors continued to play a significant role in influencing corporate strategies, governance, and leadership changes. This article explores several of the key trends in activism in 2024. First, it discusses the continued focus of activist investors on M&A. Second, it explores how activism is related to CEO turnover at activist-targeted companies. Finally, it discusses the continued trend of more and more first time activists driving activist campaign volume.

M&A Remains a Key Thesis of Activists, with Increased Advocacy for Full Company Sales

M&A continued to be a focal point for activist investors, with M&A-related demands constituting over 40% of U.S. activist campaigns in 2024. This percentage is generally consistent with that of recent years. However, 2024 saw a significant uptick in activists advocating for full company sales. In 2024, activist campaigns where the activists were pushing for a sale of the entire company constituted 21% of all campaigns, as compared to 17% in the previous year.[1] The sectors which were most heavily targeted by activists seeking sales of the entire company were technology, healthcare, and consumer goods.[2]

High-profile M&A-focused activist campaigns in 2024 included the following:

- Barington Capital and Thor Equities launched a joint activist campaign, urging Macy's to explore strategic alternatives, including the potential sale of its real estate assets, to unlock shareholder value.[3]
- Jana Partners launched an activist campaign by acquiring a 5% stake in Lamb Weston, urging the company to explore a potential sale to enhance shareholder value.[4]
- Starboard Value launched an activist campaign against Match Group, pushing for strategic changes and potentially exploring a sale to unlock shareholder value amid underperformance.[5]

Elevated CEO Turnover at Activist-Targeted Companies

The pressure exerted by activist campaigns has led to a marked increase in CEO turnover rates at targeted companies. Over the past two years, approximately 20% of U.S. companies subjected to activist campaigns witnessed a CEO change within a year, substantially exceeding the 12% average turnover rate within the S&P 500 more generally.[6]

1 https://www.ib.barclays/our-insights/q3-2024-shareholder-activism.html

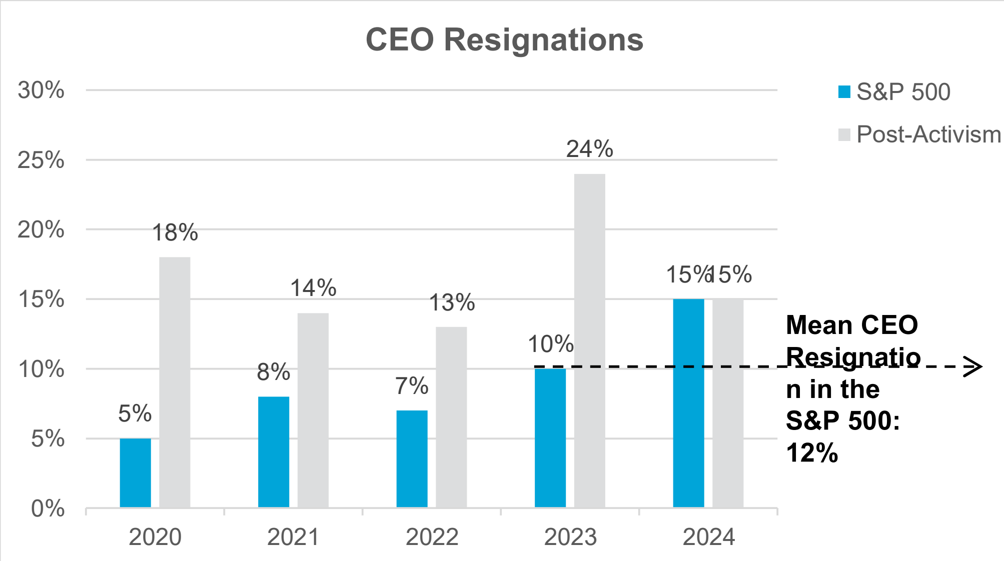
2 https://corpgov.law.harvard.edu/2025/01/21/2024-review-of-shareholder-activism/

3 https://www.cnbc.com/2024/12/09/macys-activists-cost-cuts-real-estate.html

4 https://www.reuters.com/business/finance/activist-investor-jana-partners-builds-5-stake-lamb-weston-wsj-reports-2024-10-18/

5 https://www.wsj.com/business/deals/starboard-builds-big-stake-in-tinder-parent-match-59b0a176

6 https://www.ib.barclays/our-insights/shareholder-activism-surged-2024.html



[7]

In 2024, the high-profile companies which underwent leadership changes following an activist campaign included Starbucks, Johnson Controls International, and CVS Health.

Surge of First-Time Activists Entering the Arena

The activist landscape in 2024 saw the emergence of a record number of first-time activists. While global data indicates that 45 first-time activists launched campaigns, accounting for 18% of the total campaigns launched in 2024,[8] specific statistics for first-time activists exclusively within the United States are not readily available. However, reports suggest that U.S. activity increased, with 115 campaigns launched, up 6% year-over-year. Additionally, first-time activists represented 19% of campaigns in the U.S. during the first half of 2024, up from 13% in the same period of 2023.[9]

The landscape of first-time activist campaigns in 2024 reflected broader shifts in shareholder activism, with new entrants demonstrating distinct priorities and strategies:

- **Increased Focus on Operational Improvements and Board Refreshment[10]** – in 2024, first-time activists primarily focused on operational improvements and governance reforms. Notably, 26% of first-time activist demands centered on operational enhancements, surpassing the 22% of first-time activist demands focused on M&A—a reversal from previous years when M&A-related demands dominated first-time activist agendas. This shift suggests that first-time activists are not only pushing for short-term financial gains but also seeking sustainable improvements in corporate oversight and strategic direction.
- **Greater Targeting of Mid-Cap Companies[11]** – While large-cap companies have historically been the primary focus of first-time activist campaigns, first-time activists in 2024 increasingly turned their attention to mid-cap companies. In the third quarter of 2024, mid-cap companies (with market capitalizations between $2 billion and $10 billion) accounted for 25% of total first-time activist campaigns, a significant rise from just 10% in the same period the previous year. Moreover, first-time activists achieved a 74% success rate in campaigns targeting mid-cap firms, up from 51% in 2023. This growing preference for mid-cap targets reflects a strategic shift, as these companies may be more susceptible to activist influence and governance changes compared to their larger counterparts.

These trends underscore how first-time activists are continuing to shape the shareholder activism landscape, moving beyond traditional financial restructuring to emphasize long-term corporate performance and governance

7 https://corpgov.law.harvard.edu/2025/01/21/2024-review-of-shareholder-activism/

8 https://www.ib.barclays/our-insights/shareholder-activism-surged-2024.html

9 https://pages.marketintelligence.spglobal.com/Shareholder-activism-is-on-record-pace-Is-your-company-prepared-Register-December-2024.html; https://www.mofo.com/resources/insights/240819-occasional-activists-shaping-corporate-governance-in-2024#_ftn5

10 https://www.reuters.com/markets/record-number-activist-investors-joined-shareholder-rebellion-2024-2025-01-02/?utm_source=chatgpt.com; https://corpgov.law.harvard.edu/2025/03/12/u-s-shareholder-activism-review-2024-and-a-look-toward-2025/

11 https://corpgov.law.harvard.edu/2024/12/18/the-activism-vulnerability-report-4/

matters. Their emergence has added new complexity to the activist environment, requiring companies to be more vigilant and responsive to an increasingly diverse range of shareholders and shareholder demands. Many of these first-time activists are hedge funds and institutional investors that have historically maintained passive investment strategies but are now adopting a more assertive stance on corporate governance issues.

The growing presence of first-time activists presents both challenges and opportunities for corporate boards. While new activist campaigns can introduce fresh perspectives and innovative ideas, they also heighten uncertainty and complexity in shareholder engagements.

Looking Ahead: Preparing for the Evolving Activism Landscape

As shareholder activism continues to evolve, companies must remain proactive in engaging with investors and anticipating potential activist campaigns. Strengthening investor relations, conducting regular governance assessments, and proactively considering and addressing strategic vulnerabilities can help companies mitigate activist pressures and maintain long-term stability. In an increasingly complex corporate environment, companies should prioritize transparent communication with shareholders, fostering constructive dialogue that can preempt activism before it escalates. Additionally, boards should evaluate potential vulnerabilities in their business strategies and governance structures, ensuring they are well-positioned to address activist demands in a way that aligns with long-term shareholder value. By staying ahead of these trends and adopting a proactive approach, companies can better navigate the evolving shareholder activism landscape and sustain corporate resilience in the face of investor scrutiny.

Regulatory Updates

Five Things to Keep in Mind about Antitrust Enforcement with the New Administration

With the Trump Administration officially in office and President Trump's appointed officials now at the helm of the FTC and DOJ, it is important to consider what will change – and what will remain the same. There are a few key antitrust considerations that parties should keep in mind when planning deals and making HSR filings under this new administration.

1. **The new HSR Rules are officially up and running.**

The FTC's changes to the HSR Form and Instructions officially went into effect on February 10, 2025 and are expected to significantly increase the burden and time required to prepare HSR filings.[1] The new FTC Chair, Andrew Ferguson, has noted that the new rules "will allow [the FTC] to find anticompetitive mergers efficiently, while more quickly getting out of the way of deals that will benefit the American people."[2]

Parties should keep the additional time required for the preparation of HSR filings in mind when preparing and collecting relevant documents for transactions and should retain antitrust counsel early in the planning process to ensure that filings can be made as efficiently as possible.

2. **The treatment of minority investments is unlikely to change; the focus on private equity sponsors will likely be scaled back.**

The new HSR Rules have expanded the requirement for disclosure of minority shareholders, investment funds, and entities that hold indirect stakes in either the acquiring or the acquired parties.[3] There is no indication that review of minority investments will change significantly with the Trump Administration. Chair Ferguson's concurring statement to the new HSR Rules noted that "[m]inority investors, including limited partners, might pull the strings for the acquiring persons" and that the new rules regarding minority investments are "necessary and appropriate to determining the competitive effects of a transaction involving limited partnerships or complex corporate structures." With Chair Ferguson at the helm of the FTC, it is expected that parties will still be expected to answer for any relevant minority investments.

On the other hand, the Biden Administration's focus on private equity sponsors may see a shift. Chair Ferguson and Commissioner Melissa Holyoak have both indicated that the focus in investigating transactions involving private equity sponsors should no longer be on the mere <u>structure</u> of the parties to the transaction but will instead be on the relevant <u>activities</u> and whether those <u>activities</u> violate the antitrust laws.[4]

3. **The 2023 Merger Guidelines aren't going anywhere.**

The Merger Guidelines finalized in December 2023 were part of the Biden Administration's efforts to encourage greater intervention by the FTC and DOJ. These guidelines lowered presumptive violation thresholds and introduced novel legal theories of harm. On February 18, 2025, Chair Ferguson published a memo indicating that the FTC plans to use the 2023 Merger Guidelines for the foreseeable future in part because "guidelines work best when there's some stability" versus if they change with each incoming administration.[5] While it is expected that the antitrust enforcers may abandon some of the more novel theories of harm enforced under the Biden Administration, the majority of the guidelines are expected to remain the framework for enforcement.

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1 The changes to the HSR rules and instructions are summarized here.

2 https://x.com/AFergusonFTC/status/1889104725624168453.

3 See HSR Final Rule, pages 28-32, 211-34.

4 https://www.ftc.gov/system/files/ftc_gov/pdf/welsh-carson-ferguson-statement-final.pdf.

5 https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-memo-re-merger-guidelines.pdf.

Overall, the Trump Administration's FTC has indicated that it intends to enforce the antitrust laws "vigorously and aggressively,"[6] so parties should not expect the new administration to completely dial back on enforcement and investigations.

4. Remedies will be an option again.

The Biden Administration antitrust agencies generally pursued a policy pushing for more lawsuits and fewer remedies. Only two settlements occurred before active litigation in the last year of the Biden Administration: Exxon/Pioneer and Chevron/Hess. In both cases, the Republican Commissioners of the current FTC accused the Commission of having ulterior motives in obtaining the remedies.[7]

The antitrust agencies under President Trump's first term actively pursued deals but were willing to work with parties to allow deals to proceed with appropriate remedies. It is likely that President Trump's second term will bring a similar openness to remedies. FTC Chair Ferguson has indicated that he plans to "[p]ursue structural and behavioral legal remedies under the antitrust laws and the FTC Act to make sure large platforms treat all Americans fairly and to prevent them from using their market power to box out new entrants and stymie innovation."[8] Commissioner Holyoak has similarly explained that her general approach is to be "pragmatic" with remedies and that "[e]verything should be kept on the table." She highlighted that Chair Lina Khan's FTC had a "dogmatic approach" favoring litigation and "no remedies" but that the FTC is "not in the business of trying to stop deals just to stop deals."[9]

Assistant Attorney General of DOJ's Antitrust Division Gail Slater has similarly flagged her willingness to consider remedies. During her confirmation hearing on February 12, 2025, Gail Slater testified that remedies, if done right, "can remove anticompetitive harm from a merger in order to allow it to proceed in a pro-consumer, pro-competitive manner." Slater also spoke about remedies on a panel at the "Antitrust Under Trump" event held by the Capitol Forum and FGS Global on April 2, 2025, noting that she will be "more of a proponent of remedies in merger cases," but that she "know[s] a bull**** consent when [she] sees one" and will not support such remedies.

5. Certain key industries remain a focus.

When asked to identify what industries and sectors would be top priorities for the Antitrust Division of the DOJ during her confirmation hearing, Gail Slater noted that she planned to prioritize antitrust enforcement in the "agriculture, healthcare, and tech" industries.[10]

FTC leadership has similarly shown interest in cracking down on antitrust concerns specifically in the "Big Tech" industry. FTC Chair Ferguson noted that the FTC "will end Big Tech's vendetta against competition and free speech" and "will make sure that America is the world's technological leader and is the best place for innovators to bring new ideas to life."[11] FTC Commissioner nominee Mark Meador has also signaled a push for Big Tech enforcement and has been vocal in his support of antitrust enforcement actions against Google and Ticketmaster, noting that addressing the antitrust issues in these industries "is the first hurdle we need to clear if we want the market to function competitively."[12]

Parties planning deals in the agriculture, healthcare, and tech industries should be aware of potential elevated interest from the FTC and DOJ in these sectors, and should plan to confer with antitrust counsel early on to assess potential risks and how to mitigate them.

6 https://news.bloomberglaw.com/antitrust/trump-ftc-launching-task-force-focused-on-corporate-labor-harms

7 https://www.ftc.gov/system/files/ftc_gov/pdf/2410004exxonpioneermh-afstmt.pdf
https://www.ftc.gov/system/files/ftc_gov/pdf/commn-holyoak-chevron-hess-dissenting-statement-09-30-2024.pdf

8 https://punchbowl.news/wp-content/uploads/FTC-Commissioner-Andrew-N-Ferguson-Overview.pdf

9 https://www.law.com/nationallawjournal/2024/11/14/we-should-be-pragmatic-meet-the-possible-next-ftc-chair-/?slreturn=20250509164850

10 https://www.judiciary.senate.gov/imo/media/doc/2025-02-12_-_qfr_responses_-_slater.pdf

11 https://x.com/AFergusonFTC/status/1866641731892154546?lang=en.

12 https://www.mlex.com/mlex/articles/2273636/us-ftc-nominee-meador-signals-continued-headaches-for-big-tech-consolidation

Latest Developments in the U.S. Foreign Direct Investment Space: the Outbound Investment Security Program and Trump's "America First Investment Policy"

In late 2024, in the final months of the Biden Administration, Treasury established a new Outbound Investment Program ("OIP") to prohibit or require notification of certain outbound US investments to China[1] (including Hong Kong and Macau) in several technology sectors relevant to military, intelligence, surveillance, or cyber-enabled capabilities. The OIP is a new variable that should be considered when making investment decisions related to semiconductors and microelectronics, quantum computing, and artificial intelligence ("AI") systems. The investments covered by the OIP are covered in greater detail below.

More recently, in February 2025, President Trump issued the "America First Investment Policy" National Security Policy Memorandum ("NSPM"), which outlines the second Trump Administration's posture towards foreign investment in the Untied States. The core directives of the NSPM are outlined below. While new rules and other measures outlined in the directives are necessary for implementation, the NSPM is a harbinger of a significant shift in foreign investment review under the Trump Administration.

i. *Covered Investments Under the Outbound Investment Security Program*

On October 28, 2024, Treasury issued a final rule to implement Executive Order 14105 establishing the OIP, which specifically addresses US persons undertaking certain transactions with "covered foreign persons," which are persons of a country of concern (i.e., China) engaging in relevant "covered activities" relating to semiconductors and microelectronics, quantum information technologies, and artificial intelligence ("AI") systems. Not all transactions involving these sectors are prohibited or require notification, however, and the OIP outlines specific actions and technologies within each sector that are prohibited or notifiable.

<u>Types of Investment Covered by the OIP</u>

The OIP applies to six types of investment or investment-related transactions, both direct and indirect. These include:

1. Acquisition of equity or a contingent equity interest in a covered foreign person;
2. Provision of a loan or similar debt financing that permits the lender certain management or governance rights in a covered foreign person;
3. Conversion of contingent equity interest into equity interest in a covered foreign person, if the contingent equity interest was acquired after January 2, 2025;
4. Acquisition, leasing, or other development of operations, land, property, or other assets in China that will result in establishment of a covered foreign person or engagement of a person of a country of concern in a covered activity (this would cover greenfield and brownfield investments);
5. Entrance into a joint venture, wherever located, with a person of a country of concern where the joint venture will engage in covered technology-related activities; and
6. Acquisition of a limited partner or equivalent interest in a non-US investment fund that will likely invest in a person of a country of concern in the relevant technology sectors and does undertake transactions that would be subject to the OIP if done by a US person.

Please note that each of the identified covered transactions includes a knowledge qualifier applicable to the US person in relation to the transaction (e.g., that the US person knows at the time of the transaction that the counterparty is a covered foreign person). Notably, "knowledge" includes (a) actual knowledge that a fact or circumstance exists or is substantially certain to occur; (b) an awareness of a high probability of a fact or circumstance's existence or future occurrence; or (c) reason to know of a fact or circumstance's existence. With

[1] Note: If not otherwise specified, in all cases, references to China herein include Hong Kong and Macau.

respect to "reason to know," Treasury will assess whether the US person has undertaken "a reasonable and diligent inquiry" to learn of relevant facts and circumstances.

Excepted Transactions under the OIP

The OIP identifies ten types of excepted transactions that are not subject to its prohibitions and notification requirements:

1. US person investment in a publicly traded security;
2. US person investment in a security issued by a registered investment company, such as an index fund, mutual fund, or exchange traded fund, or issued by any company that has elected to be a business development company;
3. US person limited partner investment in a pooled investment fund where:
    i. The limited partner or equivalent's committed capital is not more than $2,000,000, aggregated across any investment and co-investment vehicles of the fund; or
    ii. The limited partner or equivalent has secured a binding contractual assurance that its capital in the fund will not be used to engage in a transaction that would be a prohibited or notifiable transaction if engaged in by a US person;
4. US person investment in a derivative that does not confer the right to acquire equity, any rights associated with equity, or any assets in or of a covered foreign person;
5. US person buyout of all interests held by a person of a country of concern, such that the entity is not a covered foreign person post-transaction;
6. A US person intracompany transaction with its controlled foreign entity that supports new operations that are not covered activities or that maintain ongoing covered activities that the controlled foreign entity was engaged in prior to the OIP taking effect (January 2, 2025);
7. Fulfillment of a US person's binding, uncalled capital commitment entered into prior to the effective date of the OIP (January 2, 2025);
8. Acquisition of a voting interest in a covered foreign person upon default or other condition involving a loan or other financing arrangement, where the loan was made by a lending syndicate and a US person is not the syndication agent and cannot initiate on its own any action vis-à-vis the debtor;
9. Receipt of employment compensation by an individual in the form of stock or stock options, or the exercise of such options; and
10. Certain transactions with or involving a person of a country or territory outside the United States that has been designated by the Treasury Secretary as one that adequately addresses related national security concerns via an OIP-similar program or other security measures (no such designations have been announced to date).

Importantly, investments described in 1-4 above would not be excepted transactions if they afford the US person rights beyond standard minority shareholder protections with respect to the covered foreign person. The OIP regulations note that such standard minority shareholder protections include: (i) the power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation; (ii) the power to prevent an entity from entering into contracts with majority investors or their affiliates; (iii) the power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates; (iv) the right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity; (v) the power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such stock; and (vi) the power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in (i)-(v).

To the extent that any investment meets any of the above ten circumstances, the OIP would not apply.

ii. “America First Investment Policy” Directives

President Trump’s NSPM outlines the following directives, which may telegraph forthcoming policy, regulatory, and/or statutory changes:

1. **Foreign Investment Environment:** The Trump Administration aims to ensure the United States remains the top destination for foreign investment, especially from allies and partners. Investments in critical technology, infrastructure, and sensitive areas by foreign investors will be eligible for favorable treatment based in part on the foreign investor’s independence from foreign adversaries and other threat actors.
2. **Expedited Processes:** The NSPM proposes that an expedited “fast-track” process will be established for investments from allied sources in advanced technologies, subject to security provisions that include requirements to avoid partnering with foreign adversaries in corresponding technology sectors.
3. **Reduction of Administrative Burdens:** The Administration will look for ways to increase government efficiencies by ending the use of “overly bureaucratic, complex, and open-ended ‘‘mitigation’ agreements for United States investments from foreign adversary countries.” According to the NSPM, mitigation agreements should generally be time-limited and consist of concrete actions to be completed.
4. **Environmental Reviews:** The Administration will aim to expedite environmental reviews for investments exceeding $1 billion.
5. **Promotion of Passive Investments:** The Administration will “welcome and encourage passive investments from all foreign persons.” This includes non-controlling stakes and shares with no voting, board, or other governance rights and that do not confer any managerial influence, substantive decision making, or non-public access to technologies/technical information, products, or services.
6. **Expanded CFIUS Jurisdiction:** The Administration will seek to strengthen CFIUS’s authority over greenfield investments, restrict foreign adversaries’ access to U.S. talent and operations in sensitive technologies (especially artificial intelligence), and expand the remit of “emerging and foundational” technologies addressable by CFIUS.
7. **Legal Instruments and Reviews:** The Administration plans to utilize CFIUS and other legal tools to restrict PRC-affiliated investments in strategic sectors, as well as conduct reviews of financial auditing standards and investment structures under the Holding Foreign Companies Accountable Act to “review the variable interest entity and subsidiary structures used by foreign adversary companies to trade on United States exchanges” and protect U.S. investors.
8. **Outbound Investment Restrictions:** The Administration is weighing the benefits of new or expanded restrictions on U.S. outbound investments in sectors critical to the PRC’s Military-Civil Fusion strategy, including semiconductors, AI, quantum computing, biotechnology, hypersonics, aerospace, advanced manufacturing, and directed energy.

The NSPM will be implemented consistent with existing laws and regulations, with the Secretary of the Treasury responsible for rule-making and other actions. Congress may adopt new laws to support the NSPM. Foreign investors and companies seeking foreign investment in the United States should remain aware of the increased scrutiny and potential restrictions on investments involving critical U.S. technologies and infrastructure, particularly those with ties to foreign adversaries.

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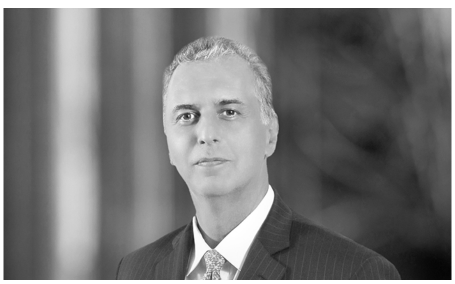

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