Skadden

The Informed Board

December 2025

As the U.S. government takes multibillion-dollar stakes in private companies and steers capital in other ways unprecedented outside of wartime economies, should companies be worried or opportunistic? Mick Mulvaney, our guest on the latest *Informed Board* podcast, offers insights into the administration's thinking and some cautionary words.

The SEC is doing many things that companies will view as helpful. It has removed a deterrent to the use of arbitration clauses to curb shareholder litigation, and it may no longer require companies to file quarterly financial reports. But, as we explain in this issue, deciding whether to take advantage of these changes won't be as clear-cut as it might seem.

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We also point out the dangers of brushing off complaints about safety, ethics or compliance — even when they come from outsiders with no financial stake in the company.

Finally, we hear a director's practical tips about how boards can make the most of their limited time together.

Podcast:

Mick Mulvaney Offers Insights on US Government Involvement in the Private Sector

Listen to the podcast

How should we think about the federal government taking equity stakes in companies, encouraging investment in companies that are important to national security and guiding foreign investment in the U.S.? First-term Trump White House chief of staff and OMB director Mick Mulvaney shares his views with Skadden's Ann Beth Stebbins about the dangers and the opportunities.

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Guest

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Would Your Company Want To Stop Filing Quarterly Reports if No Longer Required?

- The Trump administration and the SEC say they want to eliminate the need for quarterly financial reports by public companies, a move that would reduce the regulatory burden on companies and encourage more long-term thinking.
- But a number of factors could cause companies to continue to report more often than semiannually, including shareholder demands, the prospect of activist pressure and the possibility that less frequent reporting would result in less analyst coverage.
- Changing to semiannual reporting could also complicate capital raising, share buybacks and trading windows for insiders.

Public companies in the U.S. could soon be freed of the obligation to report financial information every quarter.

The Securities and Exchange Commission (SEC) has indicated it will support shifting to a semiannual reporting following President Donald Trump's renewed call to end mandatory quarterly reporting. But many companies could decide to disclose financial information more frequently for a variety of reasons, including pressure from investors, analysts and activists, and because of potential complications for trading and fair disclosures.

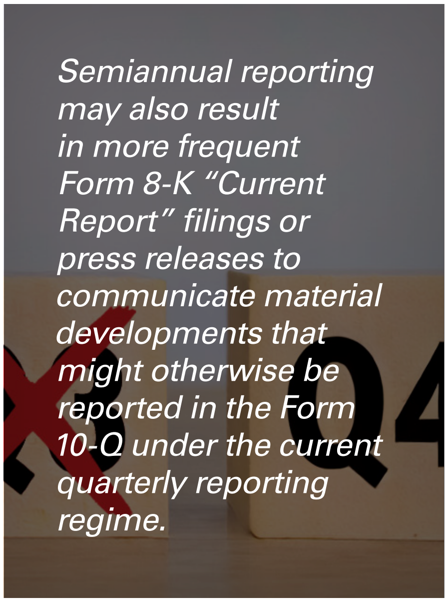
Altering the reporting requirements would require the SEC to go through its rulemaking process, first proposing rules, then subjecting them to a public comment period before finally adopting them. But SEC Chairman Paul Atkins stated that the SEC is fast-tracking President Trump's proposal.

Potential Implications

Semiannual reporting would have various potential implications for public companies, positive and negative:

Long-term focus. The shift to semiannual reporting could potentially allow management to focus more on long-term investments and business strategy rather than quarterly earnings. Proponents have argued that frequent reporting on the quarterly cycle leads to greater short-term market volatility.

Reduced regulatory burden. Filing fewer regulatory filings could free up corporate resources, including those dedicated to preparing the reports and working with auditors to review 10-Q financial statements. However, the Sarbanes-Oxley Act requires companies to maintain robust disclosure controls and procedures and internal control over financial reporting



Semiannual reporting may also result in more frequent Form 8-K "Current Report" filings or press releases to communicate material developments that might otherwise be reported in the Form 10-Q under the current quarterly reporting regime.

processes, separate from public reports. Companies would also need to assess how semiannual reporting would impact financial accounting processes (*e.g.*, the frequency of impairment testing) and the external annual audit.

Increased voluntary reporting. Given the longstanding mandate and cadence of quarterly reporting, companies may continue this practice voluntarily in response to investor and analyst expectations. For example, reduced information flow could result in less analyst coverage. Companies may also be forced to continue quarterly reporting to provide comparability with competitors. Many companies in jurisdictions that mandate only semiannual reporting, such as the EU and U.K., nonetheless choose to voluntarily report earnings on a quarterly basis.

Semiannual reporting may also result in more frequent Form 8-K "Current Report" filings or press releases to communicate material developments that might otherwise be reported in the Form 10-Q under the current quarterly reporting regime.

Shareholder activists. Activist investors generally want more transparency, not less. They may pressure companies to voluntarily report key metrics in between semiannual filings and raise issues if a company chooses not to do so, or does not disclose the same level of information as competitors. If a company begins to underperform relative to its peers, an activist may use the lack of disclosure as a wedge issue. To avoid this, companies would be well advised to proactively engage with their largest shareholders to understand their desired level of reporting.

Capital raising, buybacks and trading by insiders. Semiannual reporting could also limit trading opportunities unless supplemented with interim disclosures of earnings or other material information. Longer gaps between disclosures of material nonpublic information might complicate new securities offerings and make companies more cautious about opening trading windows for share repurchases and trades by insiders, and entry into Rule 10b5-1 insider trading plans.

Regulation FD. Longer gaps between periodic reports could also present risks of inadvertent selective disclosure of material nonpublic information without broad dissemination, in violation of SEC Regulation FD. It is considered best practice to maintain "quiet periods" before quarterly earnings. Companies would need to reassess those under a semiannual reporting timeline.

Next Steps

In 2018, during President Trump's first administration, the SEC published a request for comment on earnings releases and quarterly reports and hosted a roundtable, but declined to pursue further reforms. However, there was broad support for a change to semiannual reporting in response to a request for comment then, and the SEC can consider that in proposing rule changes. Nonetheless, as explained, any changes would take time to implement, and final rules would likely include a transition period.

In the meantime, companies will need to assess investors' views and weigh the pros and cons before eliminating full quarterly reports.

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Could Mandatory Arbitration Spell the End of Securities Class Actions?

- The SEC has reversed a longstanding policy under which the agency would not accelerate the effectiveness of a securities registration statement for a company with a mandatory arbitration clause covering shareholder claims.
- The reversal eliminates one obstacle that has deterred public companies from adopting mandatory arbitration provisions, which potentially could curb costly shareholder class action litigation.
- But there are potential legal obstacles as well as practical reasons companies may prefer to litigate shareholder claims in court.

What Changed

On September 17, 2025, the Securities and Exchange Commission (SEC) announced that the presence of a mandatory arbitration provision in a company's governing documents will not impact the agency's decisions about whether to approve the effectiveness of a securities registration statement.

The change represents a sharp break with the SEC's practice. For decades, it took the position that mandatory arbitration clauses could potentially violate federal securities laws by preventing investors from vindicating their rights in the courts, including via class actions. The SEC has now concluded that the federal securities laws do not guarantee the right to pursue claims in court or on a classwide basis. SEC Chairman Paul S. Atkins called the change one step toward delivering on his goal to "make IPOs great again."

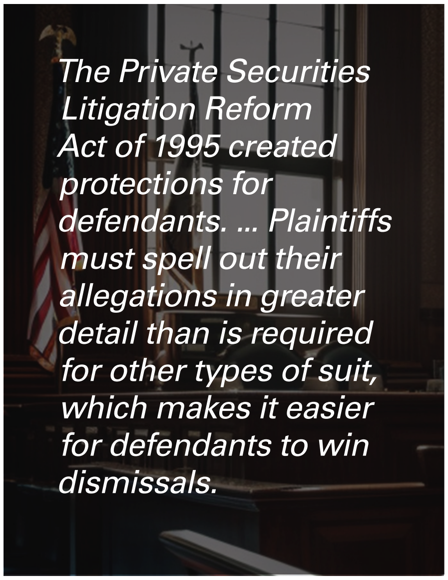
Arbitration agreements that require shareholders to pursue claims in individualized proceedings rather than class actions could help curb abuses of the class action mechanism, where the expense of defending against claims involving thousands of shareholders and the potentially huge exposure to damages can force companies to enter multimillion-dollar settlements even where the claims are meritless.

Factors To Weigh in Deciding Whether To Adopt a Mandatory Arbitration Clause

Some are predicting that the SEC's decision will prompt more companies to consider adopting mandatory arbitration provisions. But the choice may not be clearcut.

Possible Legal Obstacles

The laws of the state where a company is incorporated could prevent enforcement of a mandatory



arbitration provision in a corporation's charter or bylaws applying to shareholders.

And, while the Supreme Court has held that arbitration provisions in agreements between investors and their financial advisors do not violate federal securities laws, SEC Commissioner Caroline Crenshaw, who was critical of the change in policy, suggested that if provisions governing shareholder claims against companies are draconian (for example, if they eliminate claims, remedies or shorten limitations periods), they might still violate Supreme Court precedent. And some within the plaintiffs' bar have already opined that companies adopting mandatory arbitration provisions would be "buying a lawsuit."

Investor Sentiment

Public companies must consider the reaction of investors and, in certain cases, proxy advisory firms. CalPERS has already expressed its opposition to the change in the SEC's policy and to mandatory arbitration provisions. On the other hand, some investors would prefer to avoid the cost and distraction of shareholder litigation.

Advantages of Litigating in Court

In addition, there are procedural and other benefits to proceeding in court. The Private Securities Litigation Reform Act of 1995 created protections for defendants. For example, no discovery can take place while a motion to dismiss is pending, and the law sets a high bar for complaints. Plaintiffs must spell out their allegations in greater detail than is required for other types of suit, which makes it easier for defendants to win dismissals. Arbitration provisions can, however, be drafted to try to include various protections, including some of those found in the courts.

Moreover, many judges are experienced at adjudicating federal securities law claims and applying a well-developed body of precedent. And courts presiding over securities class actions have in recent years granted motions to dismiss in full (with or without allowing the plaintiffs to refile) 61% of the time.[1]

Classwide settlements in court also provide classwide releases, and defending multiple arbitrations could become costly. The cost-benefit analysis will depend on the company, its investor base and the potential claims that may be brought.

Other Reasons

There are other considerations, as well, that might affect the decision calculus. For example: Would a non-appealable arbitration finding of securities fraud compromise insurance coverage or applicable indemnities? Also, can an arbitration provision be drafted to encompass other potential defendants that would be entitled to indemnity from the company, such as directors, officers and underwriters? If not, the

[1] National Economic Research Associates, Inc., *Recent Trends in Securities Class Action Litigation: 2024 Full-Year Review*, at 17.

company might still be exposed to class action liability indirectly, because it might be forced to indemnify those parties as they defend class actions in the courts while defending itself in arbitrations.

Conclusion

In short, while the change at the SEC could set the stage for companies to install significant new protections to curb abuses of shareholder litigation, boards need to understand that the choice isn't as simple as it might appear at first. This is not a one-size-fits-all proposition. Each company will have to analyze the factors and weigh the cost-benefit analysis.

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Watch Out for Watchdogs

- Watchdog groups that have no direct stake in companies are increasingly raising concerns directly to boards about critical issues like safety, ethics or compliance.
- Ignoring such communications can create risks for the company and its directors.
- Boards should respond with the same care as they would to whistleblower complaints or shareholder demands, which means understanding the issues and assessing their seriousness.
- Documenting the board's response and reasoning is vital so the board can show that it acted in good faith and with due care if the company or board's response is challenged later.

Directors of public companies are no strangers to scrutiny. Shareholders, whistleblowers, analysts, activists, unions, reporters, influencers, consumers, investigators, legislators and regulators all routinely question board decisions and corporate conduct. Add "watchdogs" to that list — organizations or individuals who, without a direct stake in the company, demand board action on issues they believe are critical.

When a watchdog group raises concerns or makes demands, directors must respond thoughtfully and diligently. As a board confronts such concerns, the directors' mindset is important. Directors should be open to consider inputs from all sources that lead to a more thoughtful review and better outcomes. Proper handling not only fulfills their oversight responsibilities but also benefits the company and creates a defensible record of informed, good faith action. An appropriate response to watchdogs will often mirror a board's approach to whistleblower complaints or shareholder demands. In every case, directors should ensure they are acting with diligence and care, reflecting a thoughtful process and sound business judgment.

A Recent Example

Consider the recent experience of a major manufacturer. A watchdog group founded by a former employee sent a certified letter to its board demanding an investigation into ongoing safety and design issues with a product. The organization had no financial interest in the company or the outcome; its goal was to alert the board to potential problems and prompt corrective action. Later, the watchdog and others criticized the company's alleged lack of direct response to the demand. The watchdog's demands and the company's response have since been cited publicly.

Should Boards Respond to Watchdogs?

Boards may wonder whether they are obligated to respond to watchdogs or other third parties raising concerns about critical company issues. The board must exercise judgment in each instance about whether and how to respond. As a practical matter, however, the board should at least consider a watchdog's demands and document its response and reasoning. Doing nothing can be risky for several reasons:

- Watchdogs may identify real issues that, if addressed, could benefit the company.
- If ignored, these demands could later be cited as "red flags" in litigation or regulatory investigations, suggesting the board failed in its oversight duties.
- Plaintiffs' lawyers and regulators often use hindsight to argue that ignored warnings were clear signs of deeper problems.

Red Flags and Fiduciary Duties

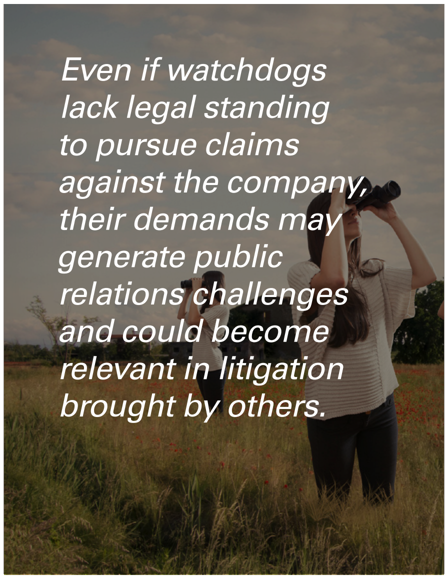
"Red flag" is a key term in fiduciary duty litigation. If shareholders can show that directors ignored credible warnings, directors may face lawsuits alleging failures of oversight — so-called *Caremark* claims. Red flags are warning signs that put directors on notice of potential legal, financial or compliance risks. Addressing these promptly and thoroughly is essential to mitigating litigation risk, protecting the company's reputation and safeguarding operations.

How Should Directors Respond?

When faced with a watchdog's demand, directors should respond as they would to similar issues raised by whistleblowers, shareholders or government agencies. The weight a board puts on various inputs as it evaluates its response will depend on a variety of factors discussed below. A mindset of openness is key; it will lead to a more thoughtful review and process, a more developed factual record in which to respond to potential litigation or regulatory review, a more defensible public-facing posture, and overall better outcomes for the company.

Some steps that directors should consider to faithfully discharge their oversight responsibilities include the following:

1. Understand the Issues Raised
    - Assess the seriousness, credibility and specificity of the allegations.
    - Key questions to consider:
        - How serious are the allegations?
        - Are the claims credible, detailed and backed by evidence?
        - Have similar issues arisen before, indicating a systemic problem?
        - Is the company already aware of or monitoring these concerns?
        - Would further steps be helpful and appropriate, considering costs and benefits?



    - Would engaging with the watchdog be helpful or harmful?
    - What are the benefits and risks of engaging directly with the watchdog?

2. Seek Information and Expertise
   - Gather information from management and, where appropriate, seek advice from subject matter experts, outside counsel or consultants.
   - It is often helpful to request that a watchdog provide evidence or facts to substantiate its claims, enabling the board to assess their seriousness and factual support. If the watchdog does not provide support, that may influence the board's response.
   - Depending on the issues raised, the chief risk officer or legal department may be tasked with evaluating and reporting on the concerns.
   - Directors are not required to investigate personally but must ensure that reliable corporate agents or advisers review the issues and report back with facts and recommendations.
   - Directors are entitled to rely on management and outside advisers, provided that reliance is reasonable and the advisers are qualified and knowledgeable.
3. Tailor the Response
   - Not every complaint warrants the same level of response. Boards should assess each demand on its merits and the potential impact of the claims.
   - For the most serious or credible allegations — especially those involving legal, ethical or accounting violations — independent investigations may be warranted. If the integrity of board members or management is implicated, retaining outside counsel or experts to investigate and report to the board or a committee is often advisable where the allegations are credible or non-frivolous.
4. Document the Process
   - A well-documented process is critical. Board or committee minutes should reflect:
     - The steps taken in response to the watchdog's concerns.
     - The individuals involved in advising the board.
     - The information considered by directors before making decisions.
   - The record should demonstrate that directors acted in good faith and with due care.

The Importance of a Good Record

Even if watchdogs lack legal standing to pursue claims against the company, their demands may generate public relations challenges and could become relevant in litigation brought by others. For example, shareholders may seek board materials related to the issues raised pursuant to their rights to inspect corporate books and records. Plaintiffs lawyers may then seize upon a watchdog's demand as evidentiary support in derivative litigation that asserts fiduciary duty claims against directors. In that scenario, the plaintiffs' lawyers may argue that the watchdog's letter was a red flag the board ignored. In that situation, the best defense is a good process and a clear record showing that directors considered the concerns, informed themselves and made a reasoned, good faith decision in the corporation's best interests.

Conclusion

Watchdog groups are an increasingly prominent source of scrutiny for public company boards. Directors should treat their demands with the same seriousness as those from shareholders or whistleblowers. By following a thoughtful, documented process — understanding the issues, seeking expert input, tailoring the response and making a good record — directors can fulfill their oversight duties and protect both themselves and the company from future claims.

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Interview:
How Boards Can Use Their Time Together Most Effectively

– Boards and managements need to think about how to get the most out of directors' time together, both in the boardroom and during meals and other less formal settings, says Alarm.com director Simone Wu. For example, if board materials are sent well ahead, meetings can be devoted mainly to discussions, not presentations. Boards can contribute most by focusing on forward-looking topics rather than on reports on past performance.

How can a board get the most out of its time together?

I think this is such an important topic because boards typically only get together so many times a year and there are many demands on the board's time.

To help the board maximize its meetings, the board and management should be aligned on the cadence for regular and special topics, with the assumption that board members will consume the pre-read materials they receive in advance. With that being true, management can limit presentations to hitting the highlights and providing context so that 60% to 70% of the board's time together can be spent on discussion.

It's also important to think strategically about time spent outside the actual meetings. An effective board is built on trust and relationships that allow for truly open discussion. Being thoughtful about things like meals and seating arrangements, transitions between sessions and coordinating travel logistics can create additional opportunities for interaction and relationship building.

How should time be allocated during a board meeting?

The board should use its time together as strategically as possible, with intent. If board members are reviewing materials in advance, administrative topics can be dispensed with relatively rapidly, allowing more time to focus on strategic or hot topics relevant to the company. Management can also limit backward-looking operational updates in board meetings since these kinds of updates for the most part could be covered in pre-reads distributed to the board in advance. The board could then maximize the value of boardroom discussions and spend its time focusing on forward-looking challenges and opportunities. These are topics

where the board can add the most strategic value while also exercising appropriate oversight.

Are there topics that should be covered at every meeting?

The board will want to consider what standing topics should be on the agenda for each meeting, and how often the board should receive updates on other topics from management or the responsible committees, based on the company's industry and business, and considerations of best practices and good governance. There should be a regular conversation at the board level as to the topics the board would like to talk about, and the cadence of those discussions so that the board is comfortable that it is spending its time on the right topics.

Regardless of industry, the CEO report is in many ways the most important part of every regular meeting. I want to hear what is top of mind for the CEO, including his or her perspectives on the business, its competitive positioning, and the challenges the company is facing. The CEO is uniquely able to provide a comprehensive view of the company's performance and opportunities, and the CEO's insights are critical to the board's strategic discussions.

Certain topics like cybersecurity and ESG (environmental, social and governance) have evolved from being an occasional topic to a regular topic for most boards. Depending on the business, these may not always be an agenda item for the full board at every regular meeting, but could be covered more frequently in committee meetings.

How can pre-read materials make a meeting more efficient?

Good pre-read materials are critical and it is important that directors have enough time to consume the information — ideally quarterly board materials should be distributed five to seven days in advance so that directors can block out the time to prepare for the meeting.

There needs to be a process of curation by management to balance between information sharing and volume. The materials should be concise, clear and strategically relevant. That's easier said than achieved because different board members will define it differently in practice. But there is always the fallback of an appendix for materials that may be helpful background, or of interest to a subset of the directors with a specific area of expertise.

The context should also be clear. For example, are you asking the board to make a decision or discuss? Is this "fyi" or to challenge management's thinking? I also find an executive summary to be helpful, particularly if it outlines why certain information is being provided and key takeaways.

What are your thoughts about board access to management?

Boards and companies have different cultures. Some companies are open to direct outreach by a director to management between meetings if there are questions about the materials that may not be of broad interest to the board, while others prefer a more formal approach. However it's done, I think deeper connections with leaders in the company enrich the board's discussions on culture, talent, leadership and succession, and better ensure transparency and accountability. Management can also use these interactions as an opportunity to build mentoring relationships with directors that have expertise in their areas of responsibility.

Are executive sessions valuable?

Executive sessions are where a lot of trust is built and leveraged. Directors can have more difficult conversations and speak freely on potentially sensitive topics, including board-specific governance topics, talent and leadership matters, legal and compliance issues, crisis management, or other confidential matters.

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