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The Informed Board

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Companies can prepare now for the likelihood of congressional investigations if Democrats gain control of the House and/or the Senate, we explain in the lead article in this issue of *The Informed Board*. Democrats have signaled where they hope to focus, which provides a roadmap for preparations.

Three other articles explain the impact of recent changes at the SEC. One could curtail some shareholder activism in the short term. Another alters the best ways for companies to respond to shareholder proposals. And a new enforcement team has been formed to scrutinize public company financial reporting.

In an article and our podcast, we describe the implications for companies as states step in to regulate AI and pursue consumer protection, Big Tech and antitrust cases where the federal government has not acted.

In an interview, a director provides concrete tips on how companies can prepare for a crisis, even though they don't know what form it will take.

Finally, we highlight a new Delaware court ruling that stresses how hard it is for plaintiffs to succeed with claims that directors acted in bad faith.

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It's Time to Start Preparing for Congressional Investigations

- If the Democrats win a majority in the House, and possibly the Senate as well, they are likely to launch investigations, seeking documents and testimony from corporations.
- Areas in which Democrats have expressed interest include: gifts, donations or funding directed to the administration or its initiatives; regulatory or merger approvals where the White House may have played a direct role; transactions in which the U.S. government invested; presidential pardons; and white-collar matters where normal processes may have been bypassed.
- Companies whose businesses may touch on these areas, or that have links to the current administration, should consider planning now for the possibility of congressional investigations in 2027.

Current polling suggests that Democrats may retake the House of Representatives and could possibly flip the Senate as well. For businesses, one of the most significant consequences would be to give the new majority the power to compel companies and individuals to produce documents and testimony through legally binding subpoenas.

Any company whose business intersects with government contracts, regulatory approvals, the current administration's priorities, or which has direct or indirect links with the current administration should consider planning now for the possibility of congressional investigations when the new Congress convenes in 2027. Democratic lawmakers have already signaled some of the areas they hope to focus on.

Why This Matters Beyond Politics

Exposure to congressional investigations can reach any company that received a favorable regulatory decision, benefited from a government transaction, donated to certain political causes, or simply operates in a sector — such as digital assets or prediction markets — where the current administration or its allies are seen as having a stake. A subpoena can also land on a company because of its relationships: who it partners with, who sits on its board, or who has invested in it.

Today, without subpoena power, opposition lawmakers are largely limited to sending letters requesting information voluntarily, and targets can simply decline to comply. That option would largely disappear if Democrats win a majority in either chamber and can compel responses. Even a House-only

majority would likely be significant, since House committees are likely to coordinate closely with Senate Democrats to pursue a shared agenda.

This is not a hypothetical concern. Democratic lawmakers have already begun sending a steady stream of letters to companies directing them to preserve documents and communications, effectively laying the groundwork for subpoenas that could follow a change in majority. In one notable example, the ranking member of a House select committee sent a preservation letter to a digital assets firm with ties to the administration, instructing it to retain all records concerning its dealings with the administration and its foreign investors.

That letter is far from an isolated case. In the past 12 months, ranking Democratic members across multiple House and Senate committees have sent similar letters to companies and individuals in a wide range of industries. Recipients have included:

- Energy company executives asked about contacts with the administration involving foreign policy matters.
- A pharmaceutical company regarding a drug-pricing arrangement with the White House.
- A grocery delivery platform regarding algorithmic pricing practices.
- Parties to a major media merger regarding the approval process.

These letters do not carry the legal force of a subpoena, but they put companies on notice: Failing to prepare for future requests and to preserve the requested materials now could create potential exposure once a committee has subpoena power to back up its request. Companies that have received such a letter should treat it as an early warning sign that a formal process will be in the cards if the Democrats regain subpoena power.

What Investigators Are Likely to Focus On

Several themes are emerging as likely oversight priorities:

- Gifts, donations or funding — including from foreign sources — directed to the administration or its initiatives.
- Regulatory or merger approvals where the White House is reported to have played a direct role.
- Transactions in which the U.S. government acted as an investor, counterparty or key decision-maker.
- Pardons connected to political donors or administration allies.
- White-collar matters where normal enforcement processes are reported to have been bypassed.
- Parties and industries purported to have close ties to the administration or the president's family, and the broader networks of business partners around them.

Companies do not need to be direct targets to be swept within the areas of congressional concern. Vendors, joint venture partners and financial counterparties to a primary target are frequently asked for records as well.

How an Investigation Typically Unfolds

Every congressional investigation proceeds slightly differently, and some congressional inquiries don't become formal investigations at all. Nonetheless, a standard practice for congressional inquiries and investigations is as follows:

1. An initial letter arrives, requesting documents and written answers. There is no legal obligation to respond, though ignoring it carries risks of escalation and may be untenable if it comes from a committee with oversight responsibility for the recipient's industry.
2. If the response is viewed as inadequate, the committee can escalate to a subpoena — a legally enforceable demand.
3. Investigators may ask to interview employees informally or take formal depositions.
4. The matter can culminate in a public hearing, where a refusal to testify, absent a valid legal basis, can itself trigger a subpoena.
5. Many investigations end with a public report highlighting findings and the individuals or companies the committee views as bad actors. Even absent any finding of wrongdoing, the reputational impact of being named can be substantial.

A Word on Cross-Border Exposure

Companies with international operations face an added layer of complexity. A foreign subsidiary asked to produce documents located overseas must weigh U.S. compliance demands against local privacy, national security and secrecy laws. Congressional committees generally lack authority to reach beyond U.S. borders, but companies often cooperate anyway rather than risk being frozen out of future U.S. business. Most that resist ultimately negotiate the scope of production, using the limits of Congress's reach abroad as leverage — rather than trying to block a subpoena outright, an approach that has rarely succeeded.

What Boards Can Do Now

The companies that navigate congressional scrutiny most successfully are those that prepare in advance. Steps companies can take now include:

- **Take stock of exposure.** Identify dealings, past or present, that touch on government contracts, regulatory approvals, political contributions or relationships connected to the administration.
- **Check for preservation letters** already received, by the company or its peers, and evaluate their applicability to the business.

- **Identify outside counsel and government relations support** in advance, so the company can move quickly if it is targeted by a member of Congress or a congressional committee.

- **Prepare a communications framework** for employees, investors and customers, since a letter or subpoena can become public quickly.

- **Map internal owners** of politically sensitive relationships so management can flag developments to the board early.

- **Brief the board periodically** on the company's oversight risk profile, not just when a letter arrives.

- **Coordinate messaging and response strategies** with industry peers and trade organizations facing similar exposure, where appropriate.

- **Review insurance coverage and indemnification provisions** relevant to investigation costs and executive exposure.

The Bottom Line

A shift in congressional control would meaningfully change capabilities of oversight committees to evaluate the activities of businesses around the world. Boards that use the period before the election and new Congress to understand their exposure, shore up their document practices and line up the right advisers will be far better positioned to handle whatever comes.

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SEC Forms Beefed Up Enforcement Unit to Focus on Public Companies

- The SEC has established a new Financial Reporting and Accounting Unit within its Division of Enforcement, consolidating resources and expertise previously spread across its headquarters in D.C. and regional offices.
- The reorganization will enhance the agency's capacity to investigate public company accounting, financial disclosures, internal controls and audit quality. More, and more sophisticated, investigations are likely.
- The change reinforces the importance of boards and audit committees periodically reviewing their oversight of financial reporting processes, internal controls, materiality assessments and non-GAAP measures.

On August 5, 2026, the Securities and Exchange Commission (SEC) announced the formation of a Financial Reporting and Accounting Unit within its Division of Enforcement. This represents a significant organizational shift. Up to now, enforcement staff with accounting and financial reporting expertise have been dispersed geographically. Now resources will be consolidated in a centralized team of specialists with a dedicated focus on investigating financial reporting misconduct at public companies.

The practical effect for public companies is likely to be closer scrutiny of financial reporting, and the prospect of more investigations. This heightened enforcement capacity raises the stakes for board-level oversight of financial reporting, because the SEC has signaled that it intends to hold individuals as well as companies accountable when controls fail or disclosures mislead.

How Will the New Unit Work?

The unit's mandate spans the full range of financial reporting matters: compliance with Generally Accepted Accounting Principles (GAAP), revenue recognition, reserves and estimates, asset valuations, public disclosures and internal controls over financial reporting. It also covers the quality, integrity and independence of audits performed by outside accounting firms, so the reorganization is relevant not only to how your company reports its financials but also to the firms that audit them.

To be clear, this is not an expansion of the SEC's enforcement authority. The agency has always had the power to pursue accounting fraud and reporting failures. But concentrating existing resources and expertise is designed to accelerate investigations, signal that public company reporting will be a priority area, and improve coordination across cases and bring enforcement actions more efficiently.

Where Is It Likely to Focus?

Accounting and financial reporting cases are among the most complex and resource-intensive matters the agency pursues. By creating a dedicated unit, the SEC can more quickly identify patterns of misconduct across companies and industries, and build cases more efficiently. Centralization also means the agency can more readily develop institutional expertise in emerging areas — such as the use of artificial intelligence in financial processes — and apply lessons from one investigation to the next.

Areas that have historically attracted SEC attention — and that the new unit is positioned to pursue with greater focus — include:

Revenue recognition: improper timing of and accounting for revenue, undisclosed side agreements that alter the economic substance of transactions, and failure to apply the applicable accounting standards correctly.

Reserves and estimates: manipulation of loss reserves, provisions for bad debts or other estimated figures to smooth earnings or meet analyst expectations.

Non-GAAP financial measures: metrics companies present alongside their official financial statements (*e.g.*, adjusted EBITDA, adjusted earnings per share, core sales growth) that may mislead investors if they exclude normal, recurring costs or lack adequate reconciliation to GAAP figures.

Earnings guidance: forward-looking projections such as earnings or earnings per share guidance communicated to investors that lack a reasonable basis, including where guidance was achieved through an unsupported accounting adjustment or an undisclosed sales practice.

Sales practices and inventory management: how companies describe their sales practices and manage inventory and backlog (*e.g.*, offering discounts to pull future sales into the current period, extending days of inventory on hand).

Internal controls: weaknesses in the systems and procedures designed to ensure accurate financial reporting, particularly when management overrides established controls.

Materiality: whether an error or omission is "material" — that is, significant enough that a reasonable investor would consider it important. The SEC has consistently emphasized that there is no simple mathematical threshold for materiality, such as a 5% quantitative impact on reporting items. Qualitative factors must be considered: for example, where the error turns a loss into a profit, affects executive compensation, masks a failure to meet analyst estimates or involves intentional conduct.


For boards, this means ensuring that the oversight mechanisms already expected of them are genuinely robust and not just compliant on paper.

Audit quality: deficiencies in the work performed by outside auditors, including failure to exercise professional skepticism or adequately test management representations.

Practical Actions Boards and Audit Committees Can Take

In light of the SEC's new commitment to this area, here are steps that boards and audit committees can take to ensure that their company meets the SEC's expectations:

Review internal controls comprehensively. Confirm that the company's internal controls over financial reporting are well-designed, consistently followed, and periodically tested — not just in areas subject to the external audit but also over disclosures, non-GAAP metrics and earnings guidance.

Scrutinize non-GAAP measures. Ensure the company has clear policies governing which adjustments are made, that they are applied consistently, and that presentations to investors include proper context and reconciliations to official GAAP results.

Strengthen materiality assessment processes. Confirm that management evaluates accounting errors and judgments using both quantitative and qualitative factors, and that materiality decisions are documented and reviewed by appropriate personnel.

Engage with outside auditors. Ask the external audit firm about its own quality control processes, any Public Company Accounting Oversight Board inspection findings regarding it, and how it plans to respond to the SEC's heightened focus on audit quality.

Evaluate disclosure practices. Review whether disclosures — particularly around estimates (*e.g.*, of earnings per share), assumptions and risk factors — are clear, current and sufficiently detailed that investors can understand the company's financial position.

Monitor management tone and conduct. The SEC often examines whether a culture of compliance exists at the top. Directors should be attentive to any pressure on finance teams to meet targets through aggressive accounting, and ensure that whistleblower channels are accessible and taken seriously.

Looking Ahead

The SEC's consolidation of its resources in this area does not change the underlying legal obligations of public companies or their directors, but it increases the agency's capacity to detect problems, investigate efficiently and bring enforcement actions. For boards, this means ensuring that the oversight mechanisms already expected of them are genuinely robust and not just compliant on paper.

This comes at a moment when financial reporting is becoming increasingly complex, driven by new accounting standards, evolving business models and greater investor attention to non-traditional performance metrics. Companies whose controls and governance practices have not kept pace with these developments are potentially the most at risk.

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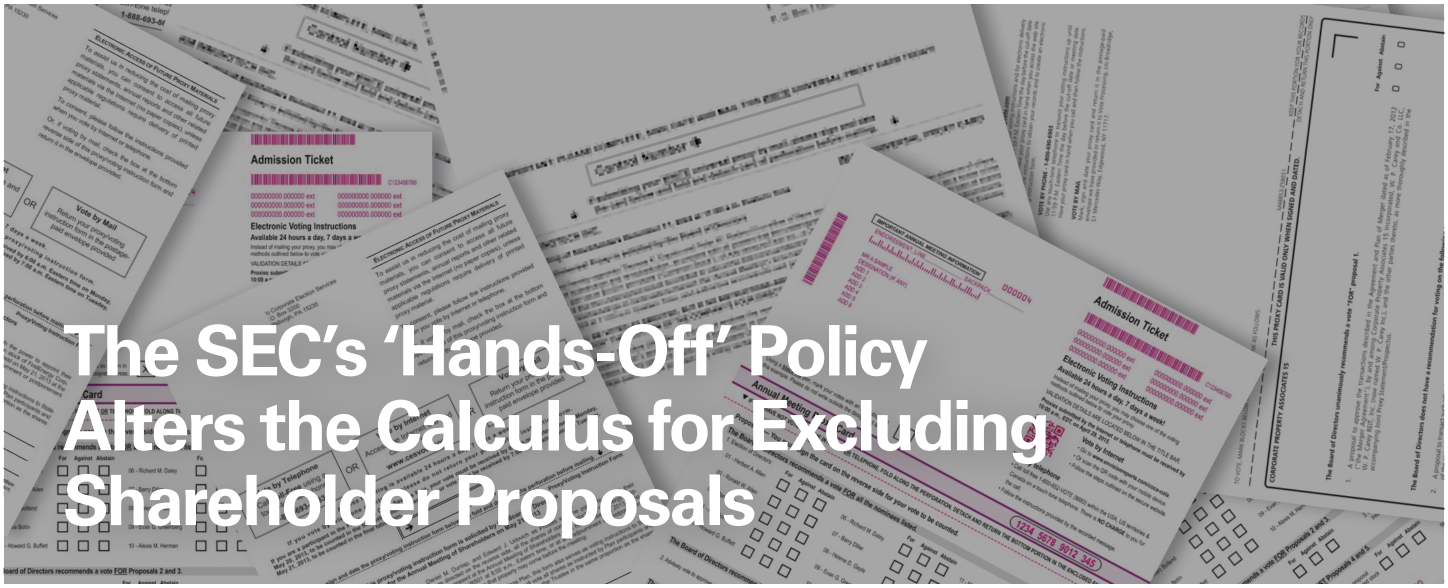
The SEC's 'Hands-Off' Policy Alters the Calculus for Excluding Shareholder Proposals



- In the 2026 proxy season, the staff of the Securities and Exchange Commission (SEC) stopped assessing the reasons companies offered for excluding shareholder proposals from their proxy statements.
- While, at first glance, the change seemed to give companies more latitude, in practice this hands-off approach introduced new risks in excluding a proposal, including an increased risk of litigation and investor opposition, plus the possibility that some shareholders may use companies' bylaws instead of SEC rules to put their proposals before other shareholders.
- The SEC staff recently announced that this hands-off policy will continue going forward. As companies gear up for next year's proxy season, they will need to study the track record of exclusions in 2026 before deciding whether to exclude any shareholder proposals.

Ahead of the 2026 proxy season, the SEC staff changed its approach to companies that wish to exclude shareholder proposals from their proxy statements. The staff said that it would no longer evaluate a company's reasons for excluding a proposal, as it had historically.

That would appear to make it easier for companies to exclude shareholder proposals. But in practice the change has forced companies to consider new factors. In the past, the SEC staff's conclusions were generally respected and few exclusions were litigated. Now more cases may end in court. Moreover, the change in the SEC's review could prompt shareholders pressing environmental, social or governance issues to choose an alternative means of putting questions to a vote: using their rights under corporate bylaws. In addition, adverse investor reaction has the potential to result in lower support for directors.

As companies look toward the 2027 proxy season, the calculus that goes into excluding a proposal has changed.

What the SEC Did: A Hands-Off Approach to Exclusions

In October 2025, SEC Chair Paul Atkins called for a "fundamental reassessment" of the SEC rule that allows shareholders to submit proposals for inclusion in a company's proxy statement (Rule 14a-8). The next month, the SEC staff announced that for the 2026 proxy season it would no longer review the merits of decisions by companies to exclude shareholder proposals. Companies were still required to notify the SEC staff and the proponent when excluding a proposal, and were given the option to include in the notice an explicit statement that the company had a "reasonable basis" for exclusion in order to receive a "no objection" letter from the staff.

In August 2026, the SEC staff went further, announcing that its approach of not reviewing the merits of company exclusion decisions would continue but it would no longer issue "no objection" letters (though companies must still provide notice of exclusion to the staff and the proponent).

How the Calculus for Companies Changed

Before 2026, even if a company or proponent disagreed with the staff's no-action decision on whether a company could exclude a shareholder proposal, investors, proxy advisors and companies alike generally accepted the outcome. Litigation was rare because it was too costly and slow given the tight timeline between the submission of a proposal and proxy printing.

This year, with the staff stepping back, companies had to weigh a broader set of risks when deciding whether to exclude a proposal:

- **Litigation risk.** With the staff no longer acting as a neutral arbiter, proponents might be more likely to challenge exclusions in court.
- **Advance notice bylaw risk.** Instead of availing themselves of Rule 14a-8, proponents might use companies' advance notice bylaws to put their proposals on the annual meeting agenda, and then run a proxy solicitation.
- **Reputational and investor relations risk.** Without the validation of the company's position in a no-action letter from the staff, excluding a proposal could draw negative attention from proxy advisors and investors and invite a "vote no" campaign against board members — particularly nominating and governance committee chairs.

This year, many companies weighed these risks against the likelihood that some proposals would not receive significant shareholder support (especially those on environmental and social topics). In many cases, companies concluded that, under the SEC staff's new approach, the risks of exclusion outweighed the benefits and chose to include proposals even when they had reasonable arguments for keeping them out.

How the Exclusion Process Played Out in 2026

As of August 2026, approximately 140 companies had excluded roughly 170 proposals (compared to approximately 195 proposals in 2025).

- **SEC responses.** About 95% of notices included the optional "reasonable basis" representation described in the staff's November 2025 statement, generating "no-objection" letters from the SEC staff.
- **Issues excluded.** Roughly half of excluded proposals related to corporate governance topics, a third to social topics, 10% to environmental topics, and 5% to executive compensation.
- **Fewer reasons.** Most notices this year cited only one basis for exclusion, a shift from prior years when companies typically included

Shareholder proposals that made it to a vote in 2026 U.S. proxy season:

- More than 380

Proposals that won majority support:

- 28 related to governance
- 1 related to compensation
- 0 relating to environmental or social issues

as many arguments as possible. The most commonly cited grounds were that the proposal involved ordinary business/micromanagement; suffered from procedural defects (such as failure to prove share ownership); had already been substantially implemented; or contained materially misleading statements.

- **Prolific proponent.** Approximately 45% of excluded proposals were submitted by a single prolific individual proponent.

Some Exclusions Were Challenged in Court

Six proponents sued six companies over excluded proposals. In three of those cases, the company promptly settled by agreeing to include the proposal in the proxy statement or by making the disclosure requested by the proposal. A company prevailed in one case and a proponent was successful in the other. The sixth case amounted to a split decision: The court refused to issue the injunction the proponent sought but allowed the case to go forward.

Some interpret six lawsuits out of 170 excluded proposals as a small risk. The other way to look at the data is that six institutional investors out of the 32 that had a proposal excluded brought litigation.

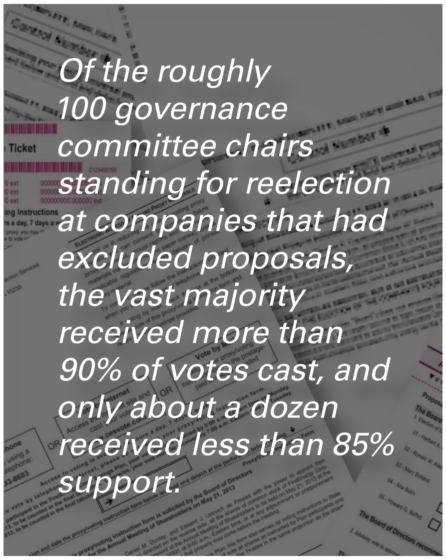
The takeaway: Litigation can be unpredictable and companies are not assured of prevailing in litigation if their exclusion decisions are challenged.

Proponents May Try to Utilize Companies' Advance Notice Bylaws

Rule 14a-8 is not the only means shareholders have to get their proposals before other shareholders: Advance notice bylaws provide an avenue for shareholders who comply to get their measures on the agenda for the annual meeting. They would have to prepare and file their own proxy statement and solicit investors to win support. One advantage for proponents: They are not limited to a single proposal, as they are under Rule 14a-8.

- In one case, after a company provided notice that it would exclude a greenhouse gas emissions proposal submitted under Rule 14a-8, the proponent threatened to submit multiple proposals under the company's bylaws and solicit proxies in support. After further engagement, the company agreed to include the original proposal. The proponent later withdrew it before the annual meeting.
- In another case, a labor union notified a company that had a merger pending that it would solicit shareholder support for five corporate governance proposals at the company's upcoming meeting, though no contested solicitation materialized.

The takeaway: While neither episode resulted in a proxy contest, a well-financed proponent shut out under Rule 14a-8 may try to pursue its



Of the roughly 100 governance committee chairs standing for reelection at companies that had excluded proposals, the vast majority received more than 90% of votes cast, and only about a dozen received less than 85% support.

agenda under a company's advance notice bylaw, which would introduce greater unpredictability for a company's annual meeting.

So Far There Has Been Little Pushback from Investors or Proxy Advisors Over Exclusions

Criticism of companies excluding proposals was relatively muted this year and, importantly, did not translate into meaningfully lower voting support for directors. Of the roughly 100 governance committee chairs standing for reelection at companies that had excluded proposals, the vast majority received more than 90% of votes cast, and only about a dozen received less than 85% support. Where support was lower, it typically appeared to stem from other governance concerns — such as a classified board or dual-class capital structure — rather than the exclusion itself.

Institutional Shareholders Services (ISS), the proxy advisor, had said that if a company did not clearly explain the basis for an exclusion, ISS would consider that a governance shortcoming. However, in only one case did it recommend against reelection of a governance committee chair on that ground, and it reversed its position after the company filed supplemental materials elaborating on its rationale for excluding the proposal.

The takeaway: In this first year of the staff's hands-off policy, investors generally were not second-guessing company exclusion decisions. It remains to be seen if they maintain this posture in the future.

Lessons for the 2027 Proxy Season

In the 2026 season, of the more than 380 proposals that made it to a vote, only 28 governance-related proposals and one compensation-related proposal received majority shareholder support, while no environmental or social proposals did.

Companies have already begun receiving shareholder proposals for their 2027 annual meetings, with most expected to arrive in the fourth quarter of 2026 and early 2027. As the 2027 proxy season shapes up, here are questions companies should ask when considering whether to exclude proposals:

- **How likely is litigation?** Institutional proponents are more likely to have the resources to litigate, and if they are repeat proponents, they may have an added incentive to challenge exclusions. Individual proponents may be unwilling to incur the costs of litigation but could seek funding from other groups.
- **Is the possibility that a proposal will be submitted using your advance notice bylaw a serious threat?** Only well-funded proponents are likely to conduct a proxy solicitation.

- **What is the risk of reputational damage or an adverse impact on the voting for directors?** A few instances of aggressive or poorly explained exclusions may have contributed to lower voting support, but these were exceptions. Will that track record continue in 2027?

The best strategy for excluding a proposal remains providing a clear and well-supported explanation, and communicating that to all audiences — the proponent, other shareholders, the larger investment community and proxy advisors.

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Director Interview:
Preparing for the Crisis You Inevitably Can't Anticipate

Susie Giordano is a director of Super Micro Computer Inc. and the chief legal officer of Lime. She also served as interim general counsel and corporate secretary of Intel Corp.

What defines a crisis, as opposed to other weighty issues that boards need to address?

I liken it to the wildfires we're seeing. A brush fire in and of itself may not be a crisis, but when several small fires get whipped up by the wind, they can meld together into a big fire — which then becomes a crisis. It's when the narrative gets out in front of you because there's an additional factor you weren't anticipating that may not even be connected to the first issue, but somehow the press headline connects the two things. That's the wind that whips this into something that requires containment. You've lost control of your ability to address what is happening, and the headlines are way out ahead of where you are.

Another element is that you don't have all the facts when you're trying to deal with it. You don't know how deep it runs or how pervasive it is. And you're caught between looking for what started the fire and trying to contain the blaze. You have to do both in parallel.

A classic example was Chiron Corp., when its flu vaccine manufacturing license got yanked. That resulted in British regulators, state AGs, the Department of Justice and the Securities and Exchange Commission, congressional subpoenas and the tobacco plaintiffs all coming after the company simultaneously, and management didn't yet know the full scope of the problem.

How does a board prepare for a crisis?

You're never going to be prepared for the crisis that comes. It's like child-proofing your house — it's never the predictable thing that sends your child to the emergency room. Sometimes it's a combination of things you aren't anticipating.

But there are things you can do. You need to know who on your board is going to run toward the flame versus who is not. Board members need to have time. Everybody wants board experience, but not everyone has time to commit to a crisis situation, which is when your board members are most needed. You may be required to drop everything you're doing and spend long days in the situation room until you have the crisis under control.

You also need truly independent directors. If your crisis involves the CEO and your most prominent board member went to business school with them and they're golf buddies on the weekend, that's probably not the person to run the investigation, even if they meet all of the objective Nasdaq independence tests.

It's also crucial to get your outside contacts in place well ahead of time. The board may want to engage separate counsel from the company's general corporate counsel. If so, the last thing you want is a law firm taking three days to clear conflicts when you need experienced counsel on calls immediately. Have a stable of law firms ready. Have a PR firm ready — and one that knows your business and your customers. If you know who your first responders are, you've saved 72 hours in a process where people are scrambling. Every minute counts.

How do you balance full board participation versus speed and availability?

It depends on the issue. If it's financial, your audit committee chair is probably best positioned to lead the response. If it's governance, someone like me, with a strong background in corporate governance. If it's cyber, do you have a cyber expert on your board?

It's not practical to bring the full board along every step of the way. Immediately establishing a special committee is a really good practice, and who's on it should be the intersection of who's got the expertise and who's got the time. Working by committee with regular updates to the full board is a good model.

What do you think about tabletop exercises?

Honestly, I'm skeptical of their value in preparing for crises generally, and they require a tremendous amount of time and internal resources. It takes many hours to put these together, and it's the Mike Tyson thing: Everyone has a plan until they get punched in the face. Then everybody panics, nobody can find the playbook.

But there are ways to prepare. The bigger the organization, the more important it is to know your escalation paths. Whether you need to run the whole tabletop, I don't know — but everyone throughout the organization needs to know, if something happens, this is who I go to.

Even more important than a tabletop exercise is managing communications for attorney-client privilege. In a crisis, it's a free-for-all — everybody's texting, trying to help. The key is to stay calm, keep your processes and protocols, don't make it worse. Employees, board members, and executives communicating and speculating — that's fuel for the fire.

Even if a full tabletop isn't warranted, would a board discussion about how to approach a crisis be useful — escalation paths, key communications principles, go-to outside firms, who runs point?

Extremely useful. And I'd add that boards need to know the company's values and ethos, because when a crisis hits, that is not the time to be talking about what really matters to us: Do we care more about the CEO's reputation, or about doing the right thing? Do we care more about margins, or about safety? Boards should have those conversations early and often.

When the crisis happens and the advisers come in, everyone focuses on the stock and shareholders. But the customer element is huge, and that can get ignored. You have to look at all the recipients of the information — how you want to communicate and what actions you want to take.

Isn't there tension between the attorney-client privilege and the need to communicate with employees and customers?

There's real tension. Outside counsel may caution against breaching the privilege by saying too much, while the CEO and board are saying, "We have employees and customers to think about. We need to get information out there." But if you leap to conclusions without knowing what you're dealing with and conveying those thoughts, that's a problem.

On the employee side, if there's a communication lockdown, the next level down doesn't know what to believe. Nobody can talk to them, and they start looking for their next job.

The practical advice for boards: Know who your key performers are, and not just those who figure in your CEO succession planning. If a crisis hits, who steps into the gaps to keep delivering on the business? Identify culture carriers you can trust in a privileged conversation, so they can help keep things calm and stabilize the team.

What about management's role in communications versus the board's role?

It's fact-specific. Management won't want to run everything through the board, but the board will feel uncomfortable with external communications they haven't seen. Maybe the board nominates one person to review communications so that, as long as that person has looked at it, the board is comfortable. The board's role should be oversight.

If the crisis involves malfeasance of senior people, the chairman or lead independent director would naturally step in to communicate. That's one of the key criteria for the chair or lead independent — that they can communicate and step in.

What other issues can you expect to come up in a crisis?

First, you may need to cooperate with law enforcement. You may have Southern District of New York or the SEC making inquiries. Making sure the board understands how the company needs to engage with law enforcement is important. That might be a new skill for many board members.

Second, maintain communications security. Before the crisis hits, have an understanding of how the board will communicate. Diligent board software is the most secure, but it's clunky. Text is easiest. Many people use Signal. But the time will come when devices are collected and imaged. Directors need to understand that, if there's ever a crisis, their devices may be taken. In a law enforcement situation, you can't control what happens to that information.

Third, there's always a risk that internal investigations turn up other, unrelated damaging information — for example, salacious photographs are found on an executive's computer. Those issues come up through outside counsel's report to the special committee, and it's up to the committee to figure out whether the company needs to take action on now another new fire.

Any tips on engaging with outside auditors during a crisis?

The auditors want to know everything, but if you tell them everything, you've blown attorney-client privilege.

In managing a crisis, you need to involve the auditors as a partner. The problem may arise right before your 10-K filing, and the auditors will say they're not releasing their consent until they understand what happened. I can't tell you how many times I've heard about a whistleblower complaint coming five days before a filing, and you're trying to figure out whether to hold up the filing and watch the stock crash, or not.

Involving the audit partner and understanding their parameters ahead of time is something you can prepare for. Have a session with them. Understand their internal processes, timing and structure. For example, you could have a junior audit partner who has three levels to run through before anything goes to national, or you may have someone very senior. Getting that lay of the land ahead of time is helpful.

A Guide to Coping With Divergent State AI Regulations

- With no comprehensive federal regulatory framework for AI, a growing number of states have enacted their own laws — some targeting developers, others focused on the way companies deploy AI, and some both.
- The Trump administration opposes state-specific laws and has threatened to challenge some, but states continue to legislate in the area, and it is unclear how the conflict will play out.
- In this unsettled environment, boards should be comfortable that their companies have processes in place to monitor developments, assess which laws apply to their businesses, and adjust their AI governance and compliance programs as the legal landscape changes.

At present, there is no federal regulatory framework for artificial intelligence (AI), but a number of states have stepped into this void, adopting laws that govern different aspects of the development and use of AI. Other states also appear likely to adopt their own laws, making for a complex and potentially conflicting set of requirements for companies, and these remain in flux.

The Trump administration has said it will challenge some of these laws, which adds another layer of uncertainty to the legal landscape.

Below is a guide for boards about the current situation, with some questions they can address to management to ensure their companies comply with the applicable laws and position their companies for the evolution of the law.

The Current Federal Landscape

The Trump administration has generally favored a light-touch approach to AI regulation, emphasizing the need to promote innovation and avoid regulatory requirements that could slow the development and adoption of AI. The centerpiece of that approach is the administration's July 2025 AI Action Plan, which called on the U.S. to "innovate faster and more comprehensively" and to "dismantle unnecessary regulatory barriers."

For now, there appears to be little prospect of comprehensive federal AI legislation. Instead, the administration has relied largely on voluntary measures, including guidelines under which developers of advanced AI models are encouraged to share information about their more complex models with the federal government before public release.

Against that backdrop, a number of states have stepped in with their own AI laws. The administration, however, has made clear that it would prefer AI regulation to be addressed at the federal level and has pushed back against state regulation. In December 2025, President Trump issued an Executive Order directing the Department of Justice to establish an AI Litigation Task Force to challenge certain state AI laws, instructing the Commerce Department to identify particularly burdensome state laws, and directing federal agencies to consider a state's AI regulatory climate when making certain discretionary funding decisions. In March 2026, the White House went a step further, issuing a National Policy Framework that urged Congress to adopt a "minimally burdensome national standard" that would displace state-by-state regulation.

How much practical effect the administration's position will have on state AI regulation remains to be seen. There are already signs, however, that it may be influencing state policymakers. Colorado, for example, recently repealed and replaced its comprehensive AI law before it took effect, significantly reducing some of its requirements.

The broader point for boards is that the AI regulatory landscape remains unsettled. Although the federal government is currently taking a relatively permissive approach, states continue to legislate, and the interaction between federal and state regulation is evolving quickly. Boards should therefore be comfortable that their companies have processes in place to monitor these developments, assess which laws apply to their businesses, and adjust their AI governance and compliance programs as the legal landscape changes.

The State Landscape

A growing number of states have enacted, or are considering, laws regulating artificial intelligence (see table). These generally take one of two paths which track the broader debate on how AI should be regulated. Some focus on regulating the developers of frontier AI models, imposing transparency, disclosure and, in some cases, risk-management obligations, while other laws focus on the deployment of AI in areas such as decision-making or consumer-facing chatbots. Still other laws seek to regulate both developers and deployers. Which laws apply will depend on a company's business, the AI systems it develops or uses, and how those systems are deployed.

New York's Responsible AI Safety and Education (RAISE) Act is an example of a state law focused on regulating developers. The law, which takes effect January 1, 2027, applies to developers of large AI models, and requires them to publish safety protocols, report serious safety incidents within 72 hours and register with a new oversight office.

The Colorado Artificial Intelligence Act (CAIA), initially enacted in May 2024, is an example of a regulation seeking to regulate both developers and deployers of AI systems. Initially, the law covered "high-risk" AI systems

that are a substantial factor in reaching a "consequential decision" about an individual (*e.g.*, relating to education, employment, lending, health, etc.) and the potential of such systems to yield algorithmic discrimination. Likely in response to the administration's opposition to laws that focus on algorithmic discrimination, the CAIA has since been repealed and replaced with the Automated Decision-Making Technology Act, a narrower framework focused on increased transparency about consequential decisions and disclosures about adverse outcomes affected by automated decision-making technology.

For many companies, the principal challenge will be developing a coherent AI compliance framework across an increasingly fragmented landscape of state laws. Rather than adopting policies that vary depending on the state in which a user or consumer resides, companies may conclude that it is more efficient, both to reduce compliance costs and to minimize the risk of non-compliance, to adopt a single, nationwide policy designed to satisfy the most stringent applicable state requirements. Even that approach, however, can be challenging where states impose materially different, or potentially inconsistent, requirements.

Boards should therefore ensure that management has established an appropriate governance process for identifying applicable state AI laws, assessing their impact on the company's AI activities, updating the company's policies and controls as those laws evolve, and ensuring AI implementation is being documented to the extent required by state laws.

This does not require boards to oversee compliance on a state-by-state basis, but they should understand the company's overall approach to managing this regulatory complexity, including who within the organization is responsible for AI compliance, how potentially conflicting requirements are addressed, and whether the board is receiving periodic updates on material regulatory developments and associated compliance risks.

Questions to Ask

Given the current landscape, boards may want to ask management questions along these lines:

- **Do we have a clear understanding of the company's AI footprint and the regulatory regimes that apply to it?**
  - Has management identified the AI systems the company develops, deploys or relies upon, the jurisdictions in which those activities occur, and the different legal obligations that may arise depending on the company's role?
- **Is responsibility for AI compliance clearly assigned, and is the board receiving the right level of reporting?**
  - Who within management is accountable for monitoring legal developments, assessing compliance gaps and escalating material incidents? Is the board receiving regular, decision-useful updates on emerging risks rather than simply descriptions of new laws?

- **Are the company's compliance processes sufficiently robust to address both its own use of AI and foreseeable downstream uses?**
  - Do the company's controls extend, where appropriate, to customer or third-party use of its AI systems? Are there effective processes for detecting, investigating and escalating incidents?
- **Are the company's public statements about AI accurate, supportable and consistent with its actual practices?**
  - Has management established a process to verify claims regarding AI safety, testing, risk management and compliance, and to ensure that disclosures made in different contexts are consistent with one another?
- **How is management preparing for further changes in the federal-state regulatory landscape?**
  - Is the company tracking potential federal challenges to state AI laws, as well as congressional action that could preempt or displace state requirements? Has management considered how the company's compliance framework would need to change if the current patchwork of state laws is narrowed, expanded or replaced?

More broadly, boards should understand whether the company has an effective framework for overseeing the core elements likely to remain relevant regardless of changes in the regulatory landscape, including AI inventories, safety and risk-management documentation, incident reporting and public disclosures.

Key Legislation	Scope	Status
California		
SB 53 (frontier transparency) **AB 2013** (training data) **SB 942** (provenance) **SB 243** (companion chatbots)	Laws include requirements for developers of frontier AI models relating to safety and incident reporting, transparency regarding AI training data, disclosures and tools relating to AI-generated content, and safeguards for companion chatbots, particularly where minors are involved.	SB 53, AB 2013 and SB 243 in effect (Jan. 1, 2026) SB 942 effective Aug. 2, 2026
New York		
S 6453-A (RAISE Act)	Focuses on developers of large, advanced AI models that could present significant public safety risks. Requires covered developers to maintain safety and security protocols, report certain serious incidents within 72 hours, and comply with related oversight and documentation requirements.	Effective Jan. 1, 2027

(Continued on page 23)

Key Legislation	Scope	Status
Connecticut		
PA 26-15	Broad AI statute that regulates frontier AI, companion chatbots, AI used in employment decisions, AI-content provenance and disclosure, and certain AI systems and online services used by or directed toward minors.	Staggered: Oct. 1, 2026 - Mar. 1, 2028
Colorado		
SB 189 (ADMT Act, replacing the 2024 AI Act)	Regulates automated decision-making technologies that process personal data and are used to materially influence consequential decisions about individuals, (*e.g.*, employment, education, housing, financial services, insurance and healthcare). Imposes documentation and disclosure obligations on both developers and deployers, and give individuals certain rights following adverse decisions.	Effective Jan. 1, 2027
Texas		
HB 149 (TRAIGA)	Prohibits specified uses of AI that are considered harmful or unlawful, including uses involving manipulation, discrimination, unlawful surveillance and other identified misconduct. Also imposes disclosure requirements in some contexts and establishes enforcement mechanisms for violations.	In effect (Jan. 1, 2026)
Utah		
SB 149	Primarily regulates how businesses use generative AI in interactions with consumers. Requires certain disclosures when consumers are interacting with AI, imposes additional obligations in regulated professions, and includes safeguards applicable to certain chatbot and consumer-facing AI applications.	In effect (May 2024)

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Activism Update: Fewer Proxy Contests, More AI-Focused Themes

- Almost 60% of U.S. activist campaigns were directed at technology and consumer/retail companies. Complaints about the pace of artificial intelligence adoption figured in many tech campaigns.
- Only four proxy contests went to a vote, but activists still obtained 51 board seats, mainly through negotiated settlements.
- Many campaigns continue to be launched outside traditional nomination windows.
- New SEC guidance requiring disclosure of investors in entities used to target specific companies may impact activist activity in near term.
- Continued regulatory scrutiny of proxy advisory firms and efforts to curb voting blocs at large institutional investors may make shareholder votes harder to predict.

H1 Set Another Record in the U.S.

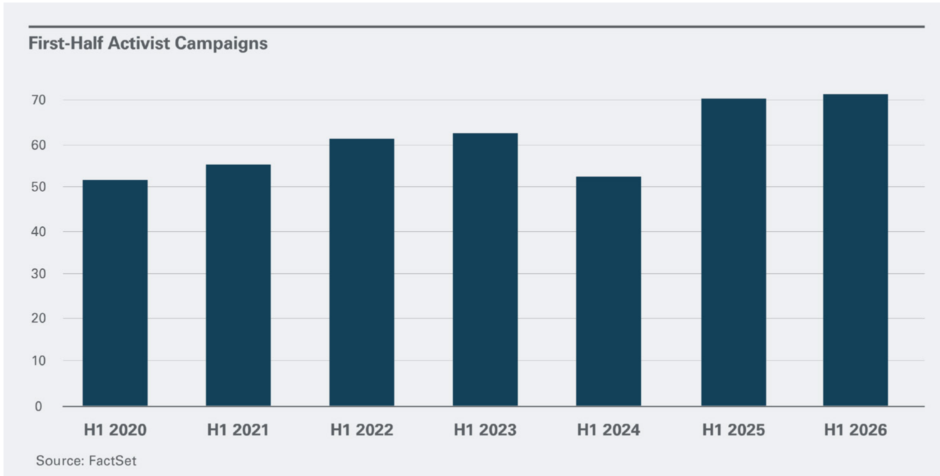
The first half of 2026 provided no respite for boards from activist demands, as this was the busiest first half on record for shareholder activism in the U.S. According to FactSet data, there were 71 new campaigns at U.S.-incorporated companies, narrowly surpassing last year's first half and well above the five-year average over the same period.[1]

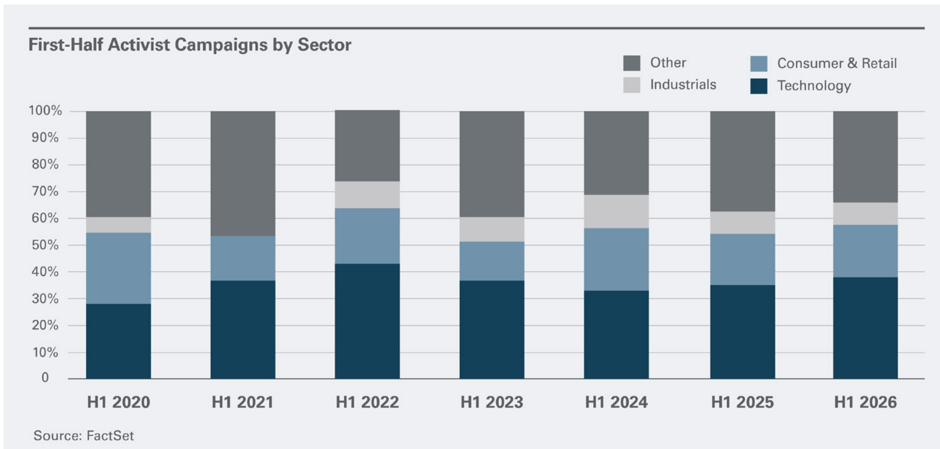
Micro- and small-cap companies remain the most common targets, but no company is immune. While companies valued below $2 billion accounted for 62% of U.S. campaigns in H1 2026, mid-caps ($2 billion to $10 billion) accounted for 25% of all U.S. campaigns, and large- and mega-cap companies still accounted for roughly one in eight campaigns.

Technology and Consumer/Retail Sectors Were Most Targeted, Many with AI-Focused Campaign Themes

Technology was the most targeted sector by a wide margin during H1 2026, accounting for nearly two-fifths of U.S. campaigns, with consumer/retail second at just over a fifth. Together, the two sectors accounted for close to 60% of all U.S. activism campaigns.

[1] FactSet, data as of July 31, 2026. The dataset is limited to companies with a market capitalization greater than $100 million and excludes: (i) exempt solicitations; (ii) campaigns targeting funds registered under the Investment Company Act of 1940; (iii) ESG- and compensation-focused campaigns; (iv) short-seller activism; (v) campaigns limited to supporting or opposing management or stockholder proposals; (vi) hostile M&A; (vii) instances in which a Schedule 13D was filed but no activism was publicly disclosed; and (viii) labor unions, public pension funds and religious groups as the activist.



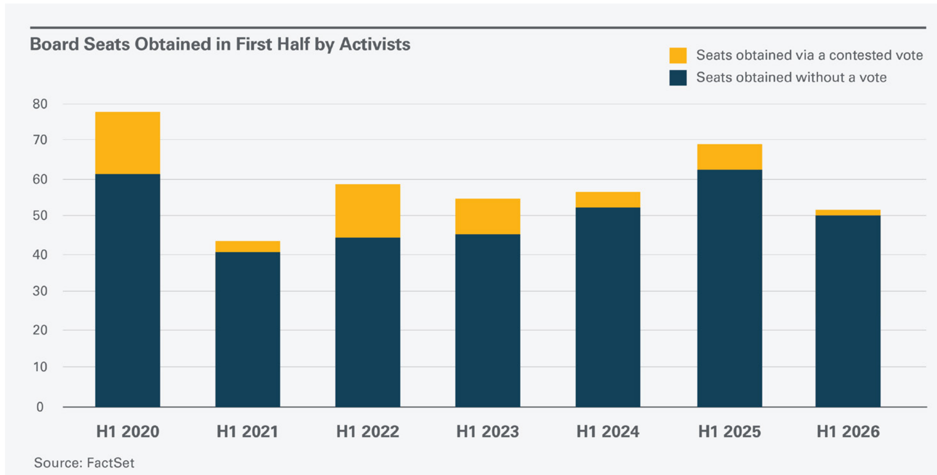


While most campaigns remain focused on M&A, capital allocation and portfolio optimization, nearly 30% of U.S. technology campaigns in H1 2026 featured an AI angle, and the theme appeared in roughly one in six U.S. campaigns overall.

Most often activists claimed that a company is not moving fast enough to leverage or capture the benefits of AI, such as using AI to unlock cost savings, improve productivity and accelerate growth. At other times, activists argue that a company is not sufficiently communicating its AI-related efforts to investors and the market at large.

H1 2026 Saw Few Proxy Fights; Most Board Seats Were Won Without a Vote

The number of U.S. contests that went to a shareholder vote in H1 2026 declined sharply from prior years, and nearly all board seats were obtained by activists without a vote. Just four U.S.



campaigns reached a vote in H1 2026, less than half the prior-year figure, and activists won just a single seat in those four contests. Still, activists secured some 50 board seats, mostly through negotiated settlements.

Activists also obtained other concessions from boards through informal settlements, typically relating to business reviews, share repurchase programs or leadership changes. As we discussed in an April 2026 article, "Should Boards Be Wary of Informal Settlements With Shareholder Activists?" these can provide a cost-effective resolution for both sides, but the downside is that the company does not gain contractual protections.

Pressure Campaigns Outside Proxy Season Are Proving Effective

Activists are increasingly launching off-cycle pressure campaigns, leveraging sophisticated multimedia and digital strategies, that are no longer tied to traditional annual meeting timelines.

Activists can often obtain commitments from boards that wish to avoid extended public pressure campaigns that can disrupt a company's business operations, instead of launching full proxy election contests.

New SEC Guidance on SPVs Could Impact Activist Activity in the Near Term

On July 9, 2026, the Securities and Exchange Commission (SEC) staff issued interpretive guidance that could materially constrain the ability of certain activists to raise funds to launch activist campaigns.

Based on the new guidance, where a special purpose vehicle (SPV) is formed to acquire securities of a specific company and run an activist campaign there, and investors in the SPV are told in advance of both that purpose and the target's identity, the staff now takes the view that the identity of the investors must be disclosed in any Schedule 13D (reporting more than 5% ownership) the SPV must file with the SEC.

Similarly, where the SPV is formed to finance a proxy solicitation to change the board's composition and investors receive the same advance notice, each investor contributing more than $500 is treated as a "participant" in the solicitation, and information about them must also appear in any proxy statement filed by the activist with respect to the target.

This new guidance is likely to impact smaller and mid-sized activist funds that rely heavily on SPVs to build outsized positions separate and apart from their core diversified investment funds. Since many investors who back these vehicles demand anonymity, they may decline future investment opportunities if there is any risk that they might be identified in a public filing, potentially causing a temporary downshift in activity by these smaller activist funds.

Pressure on Proxy Advisory Firms, AI-Guided Voting and Other Factors May Make Outcomes Less Predictable

The proxy advisory landscape is fragmenting as proxy advisory firms have increasingly come under attack by regulators. A December 2025 executive order directed the SEC to review and consider revising or rescinding proxy advisor rules and guidance to assess whether proxy advisory firms should register as investment advisers, and to have the staff examine whether investment advisers that follow proxy advisor recommendations on non-pecuniary factors are acting inconsistently with their fiduciary duties.

In addition, in August 2026, the U.S. Department of Justice's Antitrust Division withdrew a 1987 business review letter that protected proxy advisory firm Institutional Shareholder Services (ISS) from antitrust enforcement, citing antitrust concerns about ISS' and Glass Lewis' potential to shape corporate governance policies.

Amid this unfriendly regulatory climate, Glass Lewis has announced that it will eliminate its standard benchmark voting recommendations in 2027, moving to recommendations built on client-specific investment philosophies.

Three other factors could also contribute to making votes less predictable:

- The "Big Three" institutional investors have split their stewardship divisions, raising the prospect of split votes within one institution.
- They have also expanded their pass-through voting programs allowing their underlying investors to direct voting decisions instead of the firms' stewardship teams.
- JPMorgan and Wells Fargo announced they were cutting ties with their proxy advisory firms, preferring instead to make voting decisions with the aid of AI tools.

As a result of this potential unpredictability, boards may need to expand their shareholder communications to reach a larger audience, engage earlier and more precisely with significant shareholders and tailor communications to investors' differing priorities. See our February 2026 *Informed Board* article, "Will Curbs on Proxy Advisors Make Shareholder Votes Less Predictable?"

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Podcast:
State AGs Step In Where They Think Feds Aren't Doing Enough

Listen to the podcast

As federal regulatory agencies have scaled back staff, narrowed enforcement priorities and, in some cases, declined to challenge significant transactions, state attorneys general are stepping in to fill the void with enforcement actions under state consumer protection, antitrust and privacy statutes, often teaming up across party lines. Skadden partners Ann Beth Stebbins, Andrea Griswold and David Wales discuss the areas states are targeting and what it means for companies and deals.

Host

Ann Beth Stebbins / New York

Guests

Andrea Griswold / New York

David Wales / Washington, D.C.

Delaware Court Reaffirms Deference to Directors in Risk Management Cases

A recent Delaware ruling is drawing attention for emphasizing the high bar that stockholders must clear when alleging a board acted in bad faith. Bad faith means a conscious dereliction of duty, so a stockholder has to plead fairly extreme facts to withstand a motion to dismiss.

The August 13, 2026, Court of Chancery decision in *In re Boeing* reinforces with clarity long-standing Delaware law protecting boards from second-guessing by plaintiffs based on adverse events rather than fiduciary wrongdoing. It is particularly significant at a time when other states have attempted to persuade companies to reincorporate away from Delaware, arguing that Delaware is not sufficiently director-friendly.

Also significant: The case was decided by Delaware Supreme Court Justice Morgan Zurn, sitting as a Vice Chancellor on the Court of Chancery, where she served before she was recently elevated to the state's high court.

The Boeing case involved stockholder failure-of-oversight (so-called *Caremark*) claims arising from a 2024 incident where a jet's door plug blew off at 15,000 feet due to poor manufacturing. The plaintiffs alleged that the aerospace company's board acted in bad faith and breached its duties by not adequately overseeing the company's safety and quality control programs.

Noting that the board had created an Aerospace Safety Committee and a Product and Services Safety Organization that reported to that committee and the company's chief engineer, the court stated, "the stockholders themselves tell a story of a board that was attentive to safety" and "received copious reporting on numerous manufacturing and compliance risks, as well as management's ongoing efforts to reduce those risks." Justice Zurn said, "Delaware law does not hold corporate fiduciaries liable merely because a generalized risk materialized."

This case comes on the heels of other recent opinions and judicial remarks emphasizing the continued vitality of Delaware's business judgment rule, the essence of which is that Delaware courts won't second-guess board decisions. These rulings continue a long line of Delaware cases holding that an allegation of bad faith in oversight must go far beyond nit-picking board actions, and that, even if in hindsight a board made a mistake or a bad decision, that does not by itself constitute bad faith.

The bottom line: Delaware law continues to presume that boards act diligently and in good faith. To survive a motion to dismiss in an action alleging bad faith oversight claims against directors, stockholder plaintiffs therefore face a daunting high hurdle to plead a conscious dereliction of duty in Delaware.

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