

June 17, 2026

M&A Insights:
Informal Settlements with Activists,
New Tender Offer Rules and
Covenants Not to Compete

GIBSON DUNN

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Today's Speakers



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Partner, New York

[Andrew Kaplan](#) is a partner in the New York office of Gibson Dunn, where his practice focuses on mergers and acquisitions, and corporate governance matters. Andrew represents both public and private acquirors and targets in connection with mergers, acquisitions and takeovers, both negotiated and contested. Andrew also advises corporations and their boards of directors in connection with corporate governance and compliance matters, shareholder activism, takeover preparedness, and other corporate matters. He also represents various major investment banks as financial advisors in M&A transactions, and hedge funds in their M&A and investment activities. Andrew also has represented both issuers and underwriters in a variety of securities transactions.



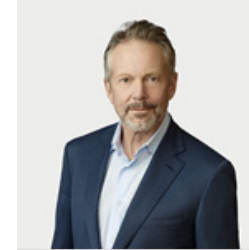
Mellissa Duru
Partner, Washington D.C.

[Mellissa Duru](#) is a corporate partner in the Washington, D.C. office of Gibson Dunn, where she is a member of the firm's Securities Regulation and Corporate Governance Practice Group. Prior to joining Gibson Dunn, Mellissa served as Deputy Director of the Division of Corporation Finance's Legal Regulatory Policy group at the U.S. Securities and Exchange Commission (SEC). As Deputy Director, Mellissa oversaw transactional filings, rules, interpretative guidance, and exemptive and no-action relief requests within the Division of Corporation Finance's Office of Mergers & Acquisitions, Office of International Corporation Finance, Office of Small Business Policy, Office of Rulemaking, and Office of Structured Finance.



Krista Hanvey
Partner, Dallas

[Krista Hanvey](#) is Co-Chair of Gibson Dunn's Employee Benefits and Executive Compensation Practice Group and Co-Partner in Charge of the firm's Dallas office. She counsels clients of all sizes across all industries using a multi-disciplinary approach to compensation and benefits matters that crosses tax, securities, labor, accounting and traditional employee benefits legal requirements. Top-ranked by Chambers USA and the Legal 500, Krista has significant experience with all aspects of executive compensation, health and welfare benefit plan, and retirement plan compliance, planning, and transactional support. She also serves on the Board of Directors of Dallas CASA and oversees the Dallas office's pro bono adoption program.



Stephen Glover (*Moderator*)
Partner, Washington D.C.

[Stephen Glover](#) is a partner in the Washington, D.C. office of Gibson Dunn and a former Co-Chair of the firm's Global Mergers and Acquisitions Practice. Stephen has an extensive practice representing public and private companies in complex mergers and acquisitions, joint ventures, equity and debt offerings, and corporate governance matters. His clients include large public corporations, emerging growth companies and middle market companies in a wide range of industries. He also advises private equity firms, individual investors, and others. Stephen has been ranked in the top tier of corporate transactions attorneys in Washington, D.C. for the past nineteen years (2005 – 2025) by Chambers USA America's Leading Business Lawyers, among numerous other accolades.

Agenda

01 Issues relating to informal settlements with activists

02 The SEC's new exemptive order shortening the minimum time period for tender offers

03 Developments in the law governing covenants not to compete

INFORMAL SETTLEMENTS WITH ACTIVISTS

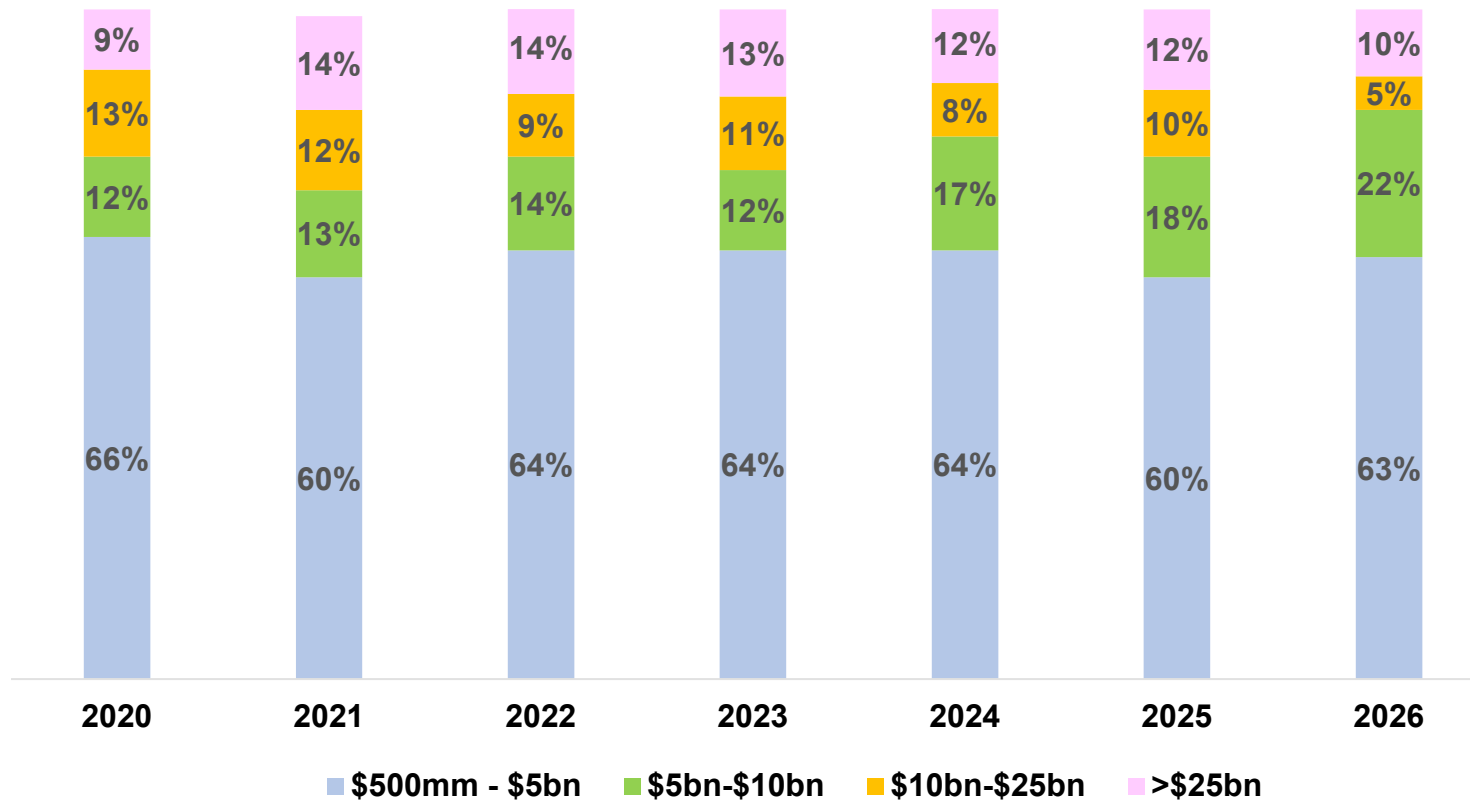
01

Activism is the **New Normal**



Activism is the **New Normal**

Activist Campaigns by Market Capitalization



Responding to Stockholder Activism

Negotiated Settlement Agreements

- Settlement agreements have been prevalent resolutions to proxy fights
- Settlement may occur in conjunction with other board or governance changes (e.g., existing directors or management stepping down)

- Common terms include:

- Board representation (including committee rights)
- Standstill
- Non-disparagement
- Negotiated peace usually lasting for one or two annual meetings

Pros:

- Can avoid an ugly and time-consuming fight while maintaining stability
- Can win over activist to publicly support board and management
- May deter other activists from joining the fray
- Can contribute positive ideas

Cons:

- Settlement is generally viewed publicly as an activist victory
- Even if an activist gets a few seats on a board, it can wield disproportionate power within the boardroom
- Activist board members inherently protected by same defenses as incumbents
- May result in board dissension and board debates may become public

Informal Settlements

- Activists are increasingly gaining board seats without formal settlement agreements.
- Timing and history with activist will often play a key role in a Board's evaluation of a settlement without a formal agreement.
 - Has the Activist already gone public with its position?
 - Has the Activist publicly presented its investment thesis?
- What is the Activist looking for?
 - Fund representative versus independent, highly-qualified, industry expert
 - Quote in press release
- Many considerations for informal settlements are the same as formal settlements
 - What are the risks of proceeding without a standstill, and how can those risks be mitigated
 - Is there an opportunity for both sides to benefit by foregoing a formal agreement?

NEW TENDER OFFER RULES

02

SEC Allows 10-Business-Day Equity Tender Offers

Division of Corporation Finance exemptive order, April 16, 2026 — abbreviates minimum offering period to 10 (not 20) business days, subject to conditions.

MINIMUM OFFERING PERIOD

~~20~~ → 10
business days

*Purpose: address market inefficiencies,
reflect technological advances, and
reduce exposure to market fluctuations.*

Who can use it

- Third-party & issuer tender offers for Section 12 registered equity securities (e.g. public reporting companies' equity shares)
- Issuer tender offers for equity securities of non-reporting companies (Reg 14E)

Key conditions

- Fixed, cash-only consideration; friendly/negotiated (if third party)
- No going-private (Rule 13e-3) effect; no competing offer; no cross border offers
- Accelerated notice and dissemination requirements

Why it matters

- Faster two-step mergers — aligns with the 15-day HSR waiting period
- More deal certainty; less exposure to volatility and interlopers
- Watch: Revlon market-check duties and retail-holder investor protection scrutiny

Possible Uses of the 10-Business-Day Relief

Remains to be seen how often the relief will be used; principally serves to provide practical flexibility and options for bidders in structuring their tender offers

Public-company issuers

- Option in lieu of share repurchase
- Return capital to shareholders — signaling board and management confidence
- Reduce the number of shareholders or outstanding shares/share price valuation impact

Private-company issuers

- Reduce the number of unaccredited holders to ease a future private acquisition
- Stay under 2,000 holders to avoid Section 12 public-reporting registration thresholds
- Offer a liquidity opportunity for otherwise illiquid private company securities, enhancing liquidity opportunities for employees via employee tender offers

Third-party friendly bids

- Makes two-step mergers more attractive — a faster front-end tender offer
- Accelerates the second-step merger and overall deal closing
- Greater certainty; narrower window for interlopers and activists
- Caveat: half the solicitation time may not fit complex or retail-heavy deals

COVENANTS NOT TO COMPETE

03

Continuing Panoply of State Legislative Developments

- **Washington (HB 1155):** Joins California, Oklahoma, North Dakota and Minnesota with a [near total ban](#)
 - Effective June 30, 2027, state law nullifies both *existing and* future non-competes; Covers forfeiture-for-competition provisions as well
 - Affirmative notices must be sent by October 1, 2027, to employees and contractors that existing covenants are void and unenforceable
 - *Limited Exceptions:* confidentiality/trade secret protections; up to 18-month client/employee non-solicits limited to those with whom worker had direct contact; and business sale non-competes if the party is selling **at least 1%** of the business
- **Wyoming (SF 107):** Enacts its first statutory restrictions on non-competes
 - Effective July 1, 2025, prospective ban on non-competes with key exceptions for trade secret protections, recovery of employers' costs to relocate or train employees (on specified schedule with full recovery if employee departs in <2 years), and restrictions on “executive or managerial personnel” and their professional staff
- **Virginia (SB 170):** Expands non-compete restrictions to **require severance** payments if discharged (unless terminated for Cause)
 - Prior law prohibited covenants with low-wage employees (currently all non-exempt and those earning < \$78,365)
 - Effective July 1, 2026, must provide severance or other monetary consideration to support non-compete and that severance must be disclosed upon entry into covenant (excludes employees who resign)

Florida Flips the Script

- **Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act**
- Effective July 3, 2025, Florida applies a presumption of enforceability for garden leave agreements and covenants of:
 - up to four years in duration against
 - covered employees and contractors earning more than mean wage for their county
 - whose primary place of employment is Florida and any entity with a principal place of business in Florida.
- Must meet statutory requirements:
 - Employee provides written acknowledgement they will receive confidential information or customer relationships
 - Employee advised, in writing, of right to seek legal counsel
 - 7-day consideration period
 - Must reduce non-compete duration for any nonworking post-employment day of garden leave

Delaware Courts Continue Scrutiny of Broad Covenants

- ***Weil Holdings II, LLC v. Jeffery Alexander, DPM* (Del. Ch. Mar. 4, 2025).**
 - Alexander agrees to a non-compete tied to 25-mile radius of where he worked and a 15-mile radius of any of the employer holding company's affiliates across multiple states
 - Covenant runs for period during which investors held units in the company and two years thereafter with no mandatory redemption right
 - Chancery Court finds both geographic and temporal scopes unreasonable (as they could theoretically be unlimited)
 - Refuses to blue pencil
- ***Fortiline, Inc. v. McCall* (Del. Feb. 10, 2026).**
 - McCall, founder of Fortiline, subject to non-compete and non-solicit covenants in parent company, PSH, option award agreements
 - For 1-year post termination, prohibits engaging in any business under PSH umbrella nationwide
 - Chancery court denies preliminary injunction finding covenants unreasonable in that they restricted activity in other geographies and business sectors than those in which Fortiline operated
 - Court refuses to blue pencil
 - Delaware Supreme Court affirmed in February 2026

Delaware Courts Continue Scrutiny of Broad Covenants

- *Payscale Inc. v. Norman* (Del. Mar. 19, 2026).
 - Norman receives profits interests in exchange for a non-compete. Profits interests have \$0 value at grant but would increase in value as business appreciates
 - Non-compete covenant runs for 18-months and applies nationwide
 - Norman resigns and joins a direct competitor
 - Chancery court invalidates non-compete covenant at the pleading stage
 - Delaware Supreme Court reverses, noting contingent consideration can constitute valid consideration for a non-compete and nationwide covenant not presumptively invalid

What to Do?

- **One size does not fit all**
- **Proactively monitor developments and refine agreements**
- **Appropriately limit temporal, geographic and business restrictions**
- **Ensure adequate consideration, which varies by state**
- **Consider true forfeiture-for-competition alternatives where jurisdictions allow**
- **Enhance other trade secret protections**

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