

M&A INSIGHTS:

REGULATORY CONSENTS AND COVENANTS, BAD BUYER DILIGENCE, REVLON DUTIES FOR PBCS, DELAWARE SAFE HARBORS

GIBSON DUNN

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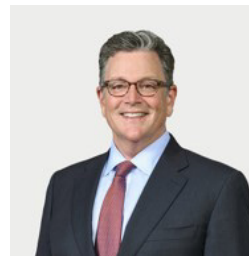
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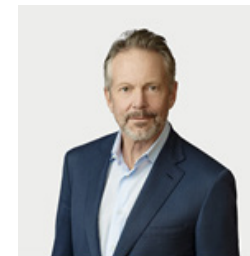
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Agenda

01 Negotiating Regulatory Provisions in M&A Agreements

02 Bad Buyer Diligence as a Defense to a Breach Claim

03 Delaware Chancery Court Update: Public Benefit Corporations, Revlon Duties and Statutory Safe Harbors

NEGOTIATING REGULATORY PROVISIONS IN M&A AGREEMENTS

01

U.S. Regulatory Trends

2.1%

of reported deals drew a Second Request in FY2025, down from 3.0% a year earlier

9.9 months

average significant U.S. merger investigation in 1H 2026, against 12.3 months in 2025

7 vs 8

settlements in 1H 2026 alone versus all of 2025

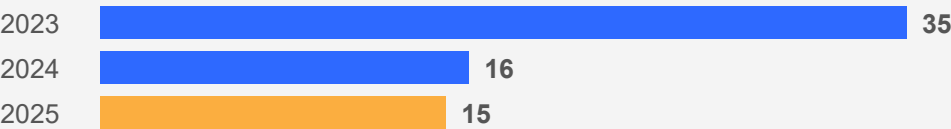
Antitrust: Shorter Reviews, More Settlements

- Deals are clearing faster, and agencies are resolving concerns by negotiated consent decree rather than litigation, with structural and behavioral remedies back on the table
- Early termination reinstated in 2025; 30% of reportable deals granted early termination in 1H 2026 up from ~13% in FY2025
- DOJ's Expedited Consideration process potentially narrows the scope of Second Request production and review timeline
- State attorneys general enforce independently: a DOJ or FTC clearance does not bind them, and they can separately sue under federal and state antitrust law

CFIUS: Mitigation Remains Steady

- The America First Investment Policy is risk-tiered: expedited review for allied investors showing verifiable distance from adversary countries
- Expected 2026 focus: advanced semiconductors and AI infrastructure, including data centers and bulk power systems, plus critical minerals and agricultural land
- Increased non-notified transaction monitoring
- Prohibition or divestment remain real possibilities if concerns cannot be resolved through mitigation agreements

Transactions requiring CFIUS mitigation



Allocating Regulatory Risk: The Efforts Covenant

The Efforts Spectrum

- **Hell-or-high-water** sits at one end: all actions necessary to obtain clearance, regardless of cost.
- An **anti-HOHW** covenant sits at the other, expressly relieving the buyer of any duty to divest, hold separate or accept conduct remedies
- In between sits the **burdensome condition** standard. Common formulations: a material adverse effect measured on the combined company, on the target alone, or the expected benefits of the transaction; or a quantified cap on divested revenue, EBITDA or assets
- CFIUS mitigation typically requires behavioral remedies (governance limitations, data access controls, proxy boards) so carve-outs written for divestitures do not fit
- Draft to avoid handing regulators a roadmap: a precise cap or named-business carve-out shows staff exactly how much the buyer is already committed to concede
- Address prior approval of future acquisitions, which FTC may seek
- Never negotiate the standard in isolation; consider against the remedies for breach and failure to obtain approvals, including payment of a reverse termination fee

Litigating and Clear Skies

- Agreements increasingly provide an obligation of the parties to litigate a government challenge; the obligation also signals to the agencies that the deal will be defended
- Consider litigation efforts in connection with the outside date, since a duty to litigate without time to litigate is illusory
- A “clear skies” covenant bars the buyer from entering into competing transactions that would materially delay or impede receipt of regulatory approval of the pending deal
- It matters most with serial acquirers and sponsors: without it, a buyer can acquire an overlapping asset and complicate the regulatory risk profile of a transaction prior to closing

Allocating Regulatory Risk: Conditions and Termination

Closing Conditions

- Identify scope of required approvals based on legal requirement and negotiated filing strategy
- Always include suspensory merger control, foreign direct investment and mandatory CFIUS filings. Consider other filings as may be necessary or appropriate (e.g., voluntary CFIUS filing, FERC, FCC, healthcare regulatory)
- No injunction condition can obstruct closing as a result of a pending challenge notwithstanding receipt of regulatory approvals (e.g., state AG suit brought under antitrust law)

Termination Rights and Remedies

- Outside date and extensions driven by regulatory timeline and efforts (e.g., Second Request or desire to litigate)
- Ticking fees are rare but shift risk to the buyer for extended delay
- Regulatory reverse termination fees typically run 4 to 7% of deal value, with fees exceeding 10% in some outlier transactions
- Remedies consist of specific performance to perform the efforts covenant to the outside date, then if approvals are not obtained, either an RTF (typically as an exclusive remedy) or a walk-away right with no further liability to either party

BAD BUYER DILIGENCE AS A DEFENSE TO A BREACH CLAIM

02

Paragon Metals v. Smith

Fraud, Justifiable Reliance & MAE Considerations

August 4, 2026

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Background & Summary of Facts

Background

- Delaware Supreme Court reversed a Delaware Superior Court trial verdict against a buyer on a claim of seller fraud.
- Private equity buyer (Stellex) acquired Paragon Metals, an auto-components manufacturer, from founder/CEO Michael Smith for \$100 million (closed January 2019)
- Smith warranted no knowledge of key customer changes (§ 3.23) and no Material Adverse Effect (§ 3.8); the buyer gave a customary one-sided anti-reliance acknowledgment (§ 5.10)
- During diligence, top customers ZF and FCA told Smith they would sharply cut orders — FCA cancelled an entire program and ZF ended Paragon's sole-supplier status (\$4M+ in lost 2019 revenue)
- Smith concealed the changes: scrubbed volume data from ZF's contract amendment in exchange for a \$300K off-books rebate, deleted the "ZF Letter" from a pre-closing email, kept a stale sales projection, and destroyed his phone
- The buyer missed red flags: Stellex accepted Smith's false explanations, never requested the ZF Letter, and never read the email referencing it
- Post-closing: orders collapsed, the buyer defaulted on its acquisition financing, the company neared bankruptcy, and the buyer infused another \$37 million before suing for common law fraud
- The Delaware Superior Court held that falsity and scienter had been proven, but not justifiable reliance by the buyer. The Delaware Supreme Court reversed on appeal.

Supreme Court Holdings

Issues and the Court's Rulings

Issue	Outcome	Court's Reasoning
Justifiable Reliance	Reversed — buyer justifiably relied	- Willful blindness requires subjective belief of a high probability plus deliberate action to avoid the truth - Buyer's trust, "while perhaps naïve," was not deliberate avoidance — when the buyer asked questions, Smith concealed the truth - Imperfect diligence does not defeat reliance on express warranties
Anti-Reliance Clause (§ 5.10)	Seller's shield only	- One-sided clause waives the buyer's extra-contractual fraud claims — "a right, rather than an obligation" - "To its satisfaction" is a subjective standard; no duty of reasonable diligence - Cannot bar reliance on representations inside the agreement
Falsity & Scierter	Affirmed	- A change in customer "terms" includes losing an entire category of business - Scierter proved by circumstantial "conscious behavior" (deleted attachment, off-books rebate, destroyed phone) - Preponderance of the evidence governs fraud — not clear and convincing
No-MAE Representation (§ 3.8)	Affirmed false at closing	- Concealed customer losses made a financing default "reasonably likely" — the imminent risk of bankruptcy was the MAE - Only the second MAE ever found in Delaware (after Akorn)

The MAE Holding

Imminent Bankruptcy Risk Falsified the No-MAE Representation

- Smith warranted (§ 3.8) that no fact, event, or circumstance had occurred that “has had or would reasonably be expected to have” a Material Adverse Effect
- The Court rejected Smith’s reading that the volume declines themselves were the claimed MAE — the concealed customer losses made a financing default “reasonably likely,” and the resulting imminent risk of bankruptcy was the MAE
- Forward-looking “would reasonably be expected to have” language captured a risk that had not yet materialized at closing

Why It Matters

- Only the second MAE ever found by a Delaware court — after *Akorn v. Fresenius Kabi AG* (VC Laster, 2018) — and both cases involved seller fraud. In *Akorn*, the court focused on “dramatic, unexpected, and company-specific downturn” that was disproportionate to its peers.
- Delaware courts remain highly reluctant to find MAEs, but concealed deterioration was sufficient here
- Courts will trace concealed commercial developments through their downstream financial consequences (customer losses → likely financing default → bankruptcy risk)
- Treat the MAE definition, its forward-looking language, and its carve-outs as negotiated terms — not boilerplate

Considerations: Negotiating & Drafting

For Buyers

- Importance of getting highly specific reps into the four corners of the contract — the buyer won only because the misrepresentations were express warranties. Buyers should push for broad customer, No-MAE, and financial representations plus disclosure schedules
- Diligence still matters — buyers need to follow up on red flags, obtain documents a seller references, and document requests and answers. Courts will not always be sympathetic to buyer failures to pursue red flags

For Sellers

- A standard one-sided anti-reliance clause blocks extra-contractual claims only — it will not defeat intra-contractual fraud claims or impose a diligence duty on the buyer
- Sellers can instead focus on narrowing the scope of representations with knowledge and materiality qualifiers and disclosures of adverse developments on the schedules. Conduct showing intent to conceal can be the circumstantial evidence for scienter

Bottom Line

- The purchase agreement's express reps and warranties are the focus for fraud claims. Fraud can be proved by a preponderance of evidence (not a higher a standard), and buyer failure to conduct perfect diligence does not in itself defeat a claim of fraud.

**DELAWARE CHANCERY
COURT UPDATE:
PUBLIC BENEFIT
CORPORATIONS,
REVLON DUTIES AND
STATUTORY SAFE
HARBORS**

03

What Makes a PBC Different

- **A charter-specified public benefit (§ 362).** The certificate of incorporation must identify one or more specific public benefits the corporation will promote.
- **A statutory balancing mandate (§ 365(a)).** The board must manage the corporation in a manner that balances the pecuniary interests of stockholders, the best interests of those materially affected by its conduct, and the specific public benefit in the charter.
- **A fiduciary safe harbor (§ 365(b)).** As to a decision implicating the balancing requirement, a director will be deemed to satisfy his or her fiduciary duties if the decision is informed, disinterested, and not such that no person of ordinary, sound judgment would approve.
- **A bad-faith carve-out (§ 365(c)).** Absent a conflict of interest, a failure to satisfy the balancing requirement is not bad faith or a loyalty breach for Sections 102(b)(7) and 145 purposes, unless the charter provides otherwise.
- **A requirement to produce a PBC report (§ 367).** No less than biennially, the corporation provide its stockholders with a statement as to the corporation's promotion of its specified public benefit and of the best interests of those materially affected by the corporation's conduct.
- **A standing threshold (§ 367).** Suits to enforce the balancing requirement require 2% of shares — for listed companies, the lesser of 2% or \$2 million in market value.

Publicly Traded Delaware Public Benefit Corporations

Eighteen U.S.-listed Delaware PBCs, shown by the year each first traded publicly as a PBC.

Delaware authorized the form in 2013 and liberalized it in 2020, eliminating both the supermajority vote for conversions to or from PBC status and the special appraisal right on conversion into a PBC.

Company	Ticker	Exchange	PBC since
Laureate Education	LAUR	Nasdaq	2017
Lemonade	LMND	NYSE	2020
Vital Farms	VITL	Nasdaq	2020
Veeva Systems †	VEEV	NYSE	2021
Coursera	COUR	NYSE	2021
Amalgamated Financial	AMAL	Nasdaq	2021
Broadway Financial †	BYFC	Nasdaq	2021
United Therapeutics †	UTHR	Nasdaq	2021
Warby Parker	WRBY	NYSE	2021

Company	Ticker	Exchange	PBC since
Zevia PBC	ZVIA	NYSE	2021
Vita Coco	COCO	Nasdaq	2021
Planet Labs PBC	PL	NYSE	2021
BRC Inc.	BRCC	NYSE	2022
Grove Collaborative	GROV	NYSE	2022
Sezzle	SEZL	Nasdaq	2023
Aptera Motors	SEV	Nasdaq	2025
Once Upon a Farm	OFRM	NYSE	2026
HawkEye 360	HAWK	NYSE	2026

† Converted to PBC while already publicly traded

Background: MPower's Rescue Financing

- **January 2025 — the liquidity squeeze**

- MPower Financing, PBC, whose stated mission is expanding international students' access to U.S. postsecondary education, faced debt covenants requiring a \$17 million minimum cash balance by January 31. An earlier equity raise had failed.

- **January 30–31 — the Funds' proposal**

- Two existing lenders and significant stockholders — together holding roughly \$109 million of MPower's debt, 25.5% of its common stock and two board designees — offered \$20 million of new financing plus an option to convert their debt to equity. The final conversion price of \$2.25 per share compared with \$15.50 in the July 2021 round; full conversion would take them to approximately 85% of the equity. The board approved the term sheet on a non-exclusive basis, with the two designees recusing.

- **February–March — the special committee**

- A three-member committee, concededly disinterested and independent, retained its own counsel and financial advisor, directed the advisor to find comparable capital with materially less dilution, and ran a market process with a data room and a mid-March bid deadline.

- **Mid-March — the demand for a stockholder vote**

- Two stockholder groups holding more than 50% objected in writing and demanded a vote; company counsel and the CEO likewise recommended one. No vote was held.

- **March 28 and after — signing and suit**

- The committee approved a \$28.125 million secured note alongside a governance agreement giving the Funds seven board seats and consent rights over issuances, new debt, mergers, charter amendments and management changes. Stockholders holding roughly 30% sued in August 2025.

Revlon: Conduct vs. Review

As a standard of conduct — does not apply to a PBC

Delaware law distinguishes a standard of conduct, meaning what directors are expected to do, from a standard of review, meaning how a court evaluates whether they met it. The Court observed that Delaware decisions are less than clear on which of the two *Revlon* supplies.

Read as a standard of conduct, *Revlon* cannot govern a PBC. Instructing directors that maximizing sale value is their primary objective is irreconcilable with Section 365(a)'s command to balance other interests against stockholder pecuniary interests. The reasoning tracks former Chief Justice Strine's view, cited in the opinion, that the PBC statute takes exclusive value maximization off the table.

As a standard of review — expressly left open

Read as a standard of review, aspects of the enhanced-scrutiny rationale may survive. The enormous implications of a change-of-control transaction, and the range of human motivations it can activate, do not disappear because a corporation has a chartered public benefit.

The Court suggested a PBC-specific inquiry might ask whether the directors' balancing of the Section 365(a) interests fell outside the range of reasonableness, but declined to decide whether that standard applies — noting in a footnote that it would almost certainly have found the pleading inadequate under it in any event.

Section 365(b) Safe Harbor

Informed

Undefined in Section 365(b), in pointed contrast to Section 144(a)(1), which specifies both the information required and the applicable standard. The Court did not resolve whether the business judgment rule or enhanced scrutiny governs, because the plaintiffs failed under both: they conceded they could not plead gross negligence, and their complaint attacked only the thoroughness of the market canvass — a pecuniary-interest allegation — while saying nothing about the committee's information as to materially affected constituencies or the chartered public benefit.

Disinterested

Conceded at oral argument: all three committee members were disinterested and independent.

Not such that no person of ordinary, sound judgment would approve

This prong sounds in waste — an extreme and rarely satisfied standard requiring that the company receive literally nothing for what it gave. MPower received urgently needed financing. The plaintiffs did not attempt to plead waste and did not respond to the defendants' waste arguments.

The burden rests on plaintiffs to plead facts supporting a reasonable inference that these requirements were not satisfied. The Court twice noted that they could have sought books and records under Section 220 before filing, but chose not to.

Statutory Safe Harbors: Delaware's New Frontier

Section 365(b) is only one of several safe harbors now in the DGCL

SB21 introduced new statutory safe harbors in the context of traditional corporations through the amendments to Section 144. In particular, the safe harbors offer a means to shield certain potential conflict of interest transactions from review: transactions presenting conflicts for one or more directors/officers, controlling stockholder transactions, and take-private transactions.

Section 144 incorporates traditional common law doctrines

The safe harbors of Section 144 attempt to restore certain traditional principles that have long existed at Delaware common law: the core idea that approval by informed, independent decisionmakers should result in judicial deference—the very essence of the business judgment rule.

But applying statutory language presents a different task from applying doctrines

The close, careful analysis the Court of Chancery undertook in *Drakes Landing*—including, in particular, the juxtaposition of the “informed” requirements in Sections 365 and 144—illustrates the new landscape. The background case law will inform how the courts approach the issue, but the language of the statute will be paramount.

***Dodiya v. Franklin*: An early failed application of § 144**

The Court applied the safe harbors element by element

Section 144 “delivers the certainty its terms promise,” and the Court worked through each requirement in turn: a majority vote of the disinterested directors, the heightened presumption that protects independent directors of exchange-listed companies, and only then whether the authorization was in good faith and without gross negligence. The Board’s disinterested majority was upheld.

What defeated the safe harbor was an extreme record

The CEO leaked a valuation implying \$9.73 per share while the stock traded at \$3.84, refused to participate fully in an investigation, but then was still handed Special Committee materials once the Board knew of the leak. These were “not the ordinary imperfections of a sale process” but reckless indifference to the Board’s own safeguards, and the proxy then assured stockholders he had been walled off from the process.

On those facts, gross negligence was reasonably conceivable under § 144(a)(1) and the vote was uninformed under § 144(a)(2).

Five of seven directors still dismissed

Losing a safe harbor does not equal not liability. Exculpation cleared every disinterested director; only the CEO and the Chairman with a secret \$1.4 million consulting agreement remained in the case. The Court elegantly stressed that to show bad faith in the context of a *Revlon* claim, a plaintiff must plead facts establishing that the independent and disinterested directors utterly failed to try to meet their duties.

Aiding and Abetting: Why § 365(b) Differs

- Section 365(b) provides that a qualifying director **will be deemed to satisfy** the director's fiduciary duties. That language negates the predicate breach itself, rather than merely protecting the director from particular relief.
- Neither Section 144 nor Section 102(b)(7) uses comparable language. They bar relief against a particular defendant or limit monetary damages, leaving the underlying fiduciary breach intact — so a secondary claim may still have something to attach to.
- Because no predicate breach remained here, there was nothing for a third party to have abetted, and the claim against the Funds failed with the claims against the directors.
- **What deal counterparties should take from this.** Section 365(b) can extinguish secondary aiding-and-abetting liability predicated on a protected director decision in circumstances where Sections 144 or 102(b)(7) may not.
- It does not, however, eliminate an independent claim against a counterparty or controller based on that party's own conduct. The opinion did not address whether or when the Funds qualified as a controlling stockholder or control group.
- Sponsors, lenders and acquirers negotiating with PBCs should factor this into their litigation-risk assessment and seek appropriate assurance that the target committee is following a robust process — while avoiding involvement that could compromise its independence or support an allegation of knowing participation.

Key Takeaways

- **PBC status changes the deal-side analysis**

- A PBC board approving a change of control is not subject to Revlon's exclusive value-maximization mandate — a meaningful planning point for mission-driven companies weighing conversion, and for bidders competing on dimensions other than price.

- **It is not, however, a free pass**

- Only the standard of conduct was decided. Whether PBC enhanced scrutiny applies, and whether it governs the safe harbor's own informed requirement, remains open.

- **Build a contemporaneous record on all three interests**

- Nothing requires minutes to document each Section 365(a) component separately, but a record showing the board informed itself about, considered and balanced all three should strengthen a Section 365(b) defense — particularly if plaintiffs first obtain books and records under Section 220.

- **Particularly powerful against secondary claims**

- A qualifying decision defeats the primary claim against directors and eliminates the predicate breach for an aiding-and-abetting claim against a counterparty.

- **Conventional committee protections still carry weight**

- Independence, separate counsel and banker, a real market process and a mandate to seek less dilutive alternatives materially strengthened the defense. Notably, no stockholder vote was held despite a majority demand — and its absence did not prevent dismissal.

- **Do not over-read the decision**

- This was a Rule 12(b)(6) ruling on a complaint filed without a Section 220 investigation and containing significant concessions. Several of the most favorable passages are express dicta, the decision may be subject to appellate review, and it does not resolve controlling-stockholder claims under amended Section 144.

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