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Quarterly Survey of SEC Rulemaking and Major Court Decisions (April 1, 2025 – June 30, 2025)

*By Kenneth M. Silverman and Kerrin T. Klein**

This issue's Survey focuses on the U.S. Securities and Exchange Commission's ("SEC") rulemaking activities and other decisions relating to the Securities Act of 1933, as amended (the "1933 Act"), the Securities Exchange Act of 1934, as amended (the "1934 Act"), and other federal securities laws from April 1, 2025 through June 30, 2025.

This quarter, the SEC proposed no new rules, approved 19 final rules and issued one concept release. The final rules released this quarter generally withdrew previously proposed rules, provided technical changes to previously approved rules and the extension of compliance dates for other previously approved rules. The SEC's published its concept release to solicit input regarding the definition of a foreign private issuer to determine future amendments.

Final Rules

Extension of Compliance Date for Amendments to the Broker-Dealer Customer Protection Rule

On June 25, 2025, the SEC adopted a final rule extending the compliance date for the amendments to 1934 Act Rule 15c3-3 (the "Customer Protection Rule"). The Customer Protection Rule requires broker-dealers that hold customer securities and cash ("Carrying Broker-Dealers") to maintain a reserve bank account that holds cash or qualified securities in an amount determined by computing the net cash owed to a Carrying Broker-Dealer's customers under the Customer Protection Rule's formula (the "Customer Reserve Computation"). The SEC previously adopted amendments to the Customer Protection Rule on December 20, 2024 to require Carrying Broker-Dealers to perform the Customer Reserve Computation and make any required deposits into the reserve bank account daily rather than weekly. The amendments

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also reduced the debit reduction under Rule 15c3-3, allowing Carrying Broker-Dealers that perform daily Customer Reserve Computations to reduce their aggregate debit items by 2% rather than 3%. These amendments only apply to broker-dealers with average total credits of at least \$500 million.

Pursuant to the final rule adopted by the SEC on June 25, 2025, the SEC extended the compliance date of the amendments from December 31, 2025 to June 30, 2026. The SEC extended the compliance date by six months to allow Carrying Broker-Dealers that exceed the \$500 million threshold to develop and implement applicable policies, procedures and systems. The extension is also intended to allow Carrying Broker-Dealers whose average total credits come close to the \$500 million threshold to determine whether they will be subject to the requirement on its effective date.

Extension of Compliance Date for the Amendments to N-PORT

On April 16, 2025, the SEC adopted a final rule extending the compliance dates for the amendments to Form N-PORT under the Investment Company Act of 1940, as amended (the “Investment Company Act”). The SEC previously adopted amendments to Forms N-PORT and N-CEN on August 28, 2024, requiring certain registered funds to file Form N-PORT reports monthly and to provide information regarding liquidity risk management programs on Form N-CEN with the goal of improved transparency.

Pursuant to the final rule adopted by the SEC on April 16, 2025, the SEC extended the compliance date of the amendments to Form N-PORT from November 17, 2025 to (i) November 17, 2027 for funds with net assets of at least \$1 billion as of the end of their most recent fiscal year end and, (ii) May 18, 2028 for funds with less than \$1 billion of net assets as of the end of their most recent fiscal year end.

The SEC extended the compliance dates to review the Form N-PORT amendments and determine the need for any action, including proposing additional amendments. The SEC cited a Presidential Memorandum, issued on January 20, 2025, advising agencies to postpone the effective dates of any rules that had not taken effect, and a challenge to the Form N-PORT amendments filed in the Fifth Circuit. The SEC extended the compliance dates to address concerns regarding preparation time and costs associated with increased filing and operational adjustments.

Concept Release

Concept Release Regarding Foreign Private Issuer Eligibility

On June 4, 2025, the SEC issued a concept release to obtain public input regarding the foreign private issuer (“FPI”) definition following significant demographical changes to the FPI population. A “foreign issuer” is an issuer that is a foreign government, a national of a foreign country, or corporation or other organization which is incorporated under the laws of a foreign country. There are two tests that are used to determine whether a foreign issuer is an FPI: the shareholder test and the business contacts test. Under the shareholder test, a foreign issuer will be deemed an FPI if more than 50% of its outstanding voting securities are directly or indirectly held of record by non-U.S. residents. However, under the business contacts test, if more than 50% of a foreign issuer’s outstanding voting securities are directly or indirectly held of record by U.S. residents such foreign issuer will still be deemed to be an FPI if none of the following applies: (1) a majority of its executive officers or directors are citizens or residents of the United States; (2) more than 50% of its assets are located in the United States; or (3) its business is administered principally in the United States.

The SEC established the initial framework for FPIs in 1935 and conducted its last review of the regulations in 2008. The SEC’s concept release broadly reviews reporting FPIs from fiscal year 2003 through fiscal year 2023. The SEC originally provided FPIs with accommodations and exemptions from certain reporting and regulatory requirements based on the assumption that foreign issuers submitted meaningful disclosures and satisfied regulatory requirements enforced by their home country jurisdiction. Pursuant to the exemptions and accommodations, FPIs:

- benefit from extended deadlines for filing annual reports;
- are not required to file quarterly reports;
- are not required to use the U.S. generally accepted accounting principles;
- are exempt from Section 16 filing obligations;
- are exempt from certain proxy requirements;
- are exempt from say-on-pay rules;
- are subject to limited disclosure requirements under Form 6-K, rather than Form 8-K; and
- benefit from extended deadlines for updating interim financial statements included in a registration statement.

The SEC conducted an analysis of recent FPIs’ characteristics

and found that FPIs' home country jurisdictions has changed significantly in recent decades, resulting in potentially less information about such FPI being disclosed to U.S. investors than in the past due to such home country jurisdiction's disclosure requirements. In addition, the SEC found that an increasing percentage of FPIs' equity securities trade almost entirely in U.S. capital markets, rather than foreign markets, raising the question about the extent to which such issuers are regulated in foreign markets. The SEC stated in its concept release that if an FPI is not subject to meaningful requirements in its home country jurisdiction that elicit disclosure in a timely manner, or if there are other limitations to foreign regulatory oversight of an FPI, the FPI definition may need to be revised.

The concept release invites public comments on potential approaches to amending the definition of FPI, some of which include:

- updates to the existing FPI eligibility criteria;
- addition of a foreign trading volume requirement;
- addition of a major foreign exchange listing requirement;
- incorporation of a commission assessment of foreign regulation;
- establishment of mutual recognition systems; and
- addition of an international cooperation arrangement requirement.

The SEC aims to use comments addressing the above matters to strike a balance between attracting foreign issuers to U.S. markets and ensuring domestic companies are not disadvantaged under the current regulatory framework. The comment period is scheduled to remain open through September 8, 2025.

Withdrawal of Proposed Rules

Withdrawal of Proposed Regulatory Actions

On June 12, 2025, the SEC formally withdrew 14 of its rule proposals originally issued between March 2022 and November 2023 under the Biden Administration. The SEC does not intend to issue final rules in connection with the following proposals:

1. Shareholder Proposals — the SEC proposed amendments to three substantive bases for exclusion of shareholder proposals under Rule 14a-8 of the 1934 Act.
2. The Use of Predictive Data Analytics by Broker-Dealers and Investment Advisors — the SEC proposed amendments under the 1934 Act and the Investment Advisers Act of 1940, as amended (the “Advisers Act”), aimed to eliminate conflicts of interest caused by investors' use of predictive data analytics and associated technologies that predict, guide, or forecast behaviors during investor interactions.

3. Safeguarding Advisory Client Assets — the SEC proposed amendments to the Advisers Act to address how investment advisers safeguarded client assets.
4. Cybersecurity Risk Management for Investment Companies and Advisers — the SEC proposed amendments to the Advisers Act and the Investment Company Act that would have required investment companies and advisers to implement comprehensive cybersecurity policies and procedures, as well as require such investment companies and advisers to make certain related disclosures.
5. Environmental, Social and Governance Disclosure — the SEC proposed amendments to the Advisers Act and the Investment Company Act requiring enhanced disclosure of environmental, social, and governance (“ESG”) practices by certain registered investment advisers and registered investment companies.
6. Outsourcing by Investment Advisers — the SEC proposed amendments to the Advisers Act prohibiting registered investment advisers from outsourcing functions to service providers prior to meeting minimum requirements.
7. Reporting of Large Security-Based Swap Positions — the SEC proposed amendments to the 1934 Act that would have required owners of a security-based swap position that exceeded a certain threshold to disclose certain information related to the security-based swap position to the SEC.
8. Volume-Based Transaction Pricing for NMS Stocks — the SEC proposed amendments to the 1934 Act prohibiting national securities exchanges from offering volume-based transaction pricing in connection with the execution of agency related orders in national market system (“NMS”) stocks.
9. Regulation Best Execution — the SEC proposed amendments to the 1934 Act to establish a best execution standard for broker-dealers by amending the existing framework developed by the Financial Industry Regulatory Authority and the Municipal Securities Rulemaking Board (“MSRB”).
10. Order Competition Rule — the SEC proposed amendments to Regulation NMS under the 1934 Act aimed to promote competition by requiring certain retail investor orders to be exposed to a qualified auction prior to being executed internally.
11. Regulation Systems Compliance and Integrity — the SEC proposed amendments to Regulation Systems Compliance and Integrity (“Regulation SCI”) under the 1934 Act which

sought updates to certain Regulation SCI provisions to account for developments in the technology landscape of the markets since Regulation SCI's adoption in 2014.

12. Cybersecurity Risk Management for Various Market Entities — the SEC proposed various amendments regarding cybersecurity risk management that would have applied to broker-dealers, clearing agencies, major security-based swap participants, the MSRB, national securities associations, national securities exchanges, Security-Based Swap Data Repositories, security-based swap dealers, and transfer agents (collectively “Market Entities”). Under the proposed rules, all Market Entities would have been required to establish and enforce written policies and procedures to address cybersecurity incidents and review their practices annually.
13. Definition of Exchange and Amendments to Alternative Trading Systems (“ATs”) — the SEC proposed amendments to the definition of “exchange” under the 1934 Act to include systems that use communication protocols and non-firm trading interests to connect buyers and sellers of securities. The SEC also proposed amendments to the ATs framework, including eliminating certain exemptions for ATs that limit activities to government securities and repurchase and reverse repurchase agreements on government securities.
14. Amendments to Consolidated Audit Trail — the SEC proposed amendments to the consolidated audit trail rules required by Rule 613 under the 1934 Act (the “CAT NMS Plan”), which sought to enhance the security and confidentiality of its trading data derived from participant data, industry member data and SIP data (“CAT Data”) by, among other things, (i) defining the scope of the information security program, (ii) establishing a security-focused working group, (iii) creating secure analytical workspaces, (iv) limiting extraction of CAT Data, and (v) adding and modifying reporting requirements related to CAT Data.

Major Court Decisions

Second Circuit Rejects Suit under Section 29(b) Against “Unregistered Dealer”

On June 25, 2025, the United States Court of Appeals for the Second Circuit dealt a blow to private parties seeking to void agreements to hold “unregistered dealers” accountable under Section 29(b) of the Exchange Act. While acknowledging the right of action for private parties under 29(b), the Court explained that

“because the [convertible promissory note] did not *require* [Defendant] to engage in an unlawful transaction, *i.e.*, quintessential dealer activity, the contract cannot be rescinded under Section 29(b).”

Plaintiff-appellant Xeriant, Inc. (“Xeriant”) is a publicly traded aerospace and technology company. Defendant-appellee Auctus Fund LLC (“Auctus”) is a hedge fund that routinely invests in convertible debt financing agreements. On October 27, 2021, Xeriant and Auctus entered into a convertible loan agreement which included a stock purchase agreement (the “SPA”). Under those agreements, Auctus advanced more than five million dollars to Xeriant, which Xeriant was to repay within a year in cash or stock. The stock option allowed repayment through a stock purchase warrant. After Auctus extended the repayment deadline twice, it finally sought to convert the debt into stock. Xeriant refused and instead brought suit against Auctus, seeking declaratory judgment to rescind the convertible loan, alleging that the SPA was void under Section 29(b) of the Exchange Act because Auctus was allegedly “an unregistered securities dealer in violation of Section 15(a)(1) and was not lawfully permitted to effectuate the securities transactions outlined in the SPA.” Xeriant’s position was based in part on the SEC’s own litigation pending against Auctus for “engaging in securities transactions as an unregistered dealer in violation of Section 15(a) of the Exchange Act.”

The Second Circuit first assumed without determining that Xeriant “plausibly alleged that Auctus [was] engaging in quintessential ‘dealer’ activity in violation of Section 15(a).” The court then assessed whether “Xeriant sufficiently alleged a claim for rescinding the parties’ contract . . . pursuant to Section 29(b)” and ultimately decided that it did not. While the court held that Section 15(a)(1) can serve as a predicate statute to rescind a contract under Section 29(b), it may do so only where the contract itself is unlawful. As the court explained, “[s]ection 29(b) creates only a limited private right of action. Indeed, only unlawful contracts may be rescinded, not unlawful transactions made pursuant to lawful contracts.” The Second Circuit thus affirmed dismissal of Xeriant’s complaint.

Xeriant, Inc. v. Auctus Fund, LLC, No. 24-682, United States Court of Appeals for the Second Circuit.

Fourth Circuit Holds “Bump-Up” Exclusion Bars Coverage for Settlement of Securities and State Law Claims Relating to Merger Dispute

On May 28, 2025, the United States Court of Appeals for the Fourth Circuit held that a “bump-up exclusion” included in a

directors and officers (“D&O”) insurance policy barred indemnity for settlement awards arising from a merger dispute.

In 2015, Plaintiff-Appellant, Towers Watson & Co (“Towers Watson”) and Willis Group Holdings plc (“Willis”) entered into a merger agreement that involved a reverse triangular merger. In the years that followed, Towers Watson shareholders brought suit against various parties involved in the merger, including Towers Watson’s former chairman and CEO. Shareholder lawsuits—including one brought in federal court in Virginia asserting federal securities law claims, and two consolidated in the Delaware Court of Chancery asserting Delaware state law claims—settled for a total of \$90 million.

While insurers funded Towers Watson’s defense, they denied indemnity coverage for any resulting settlement or judgment. In the face of the insurance company’s refusal to assist with the settlement payouts, Towers Watson sought a declaratory judgment that the bump-up exclusion did not preclude indemnity coverage. That exclusion provided that:

In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased.

The district court concluded that the bump-up exclusion applied to the parties’ settlement and granted summary judgment in favor of the insurers. On appeal, the Fourth Circuit affirmed. The Fourth Circuit held that settlements were properly excluded under the bump-up provision because the two conditions under the exclusion were triggered: (1) the claims alleged that consideration or price paid to former shareholders was inadequate; and (2) “the settlement of such claim[s] represent[ed] an effective increase in the price or consideration shareholders received for that acquisition.”

Towers Watson also argued that settlements of actions asserting violations of Section 14(a) of the Securities Exchange Act are categorically immune from the application of bump-up provisions, because that statute governs inadequate disclosures, not inadequate consideration. The Fourth Circuit rejected that argument, as the settlement “does in fact ‘represent[]’ an ‘effective[] increase[]’ in deal consideration, such that it falls within the terms of the exclusion.”

Directors, officers, and other insureds should thus pay close attention to the provisions of insurance policies in advance of any contemplated merger or other transaction that may be the subject of litigation.

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Towers Watson v. Nat'l Union Fire Ins. Co., No. 24-01302,
United States Court of Appeals for the Fourth Circuit.