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Quarterly Survey of SEC Rulemaking and Major Court Decisions (July 1, 2025 – September 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 July 1, 2025 through September 30, 2025.

This quarter, the SEC proposed no new rules, approved four final rules and issued one concept release. The final rules released this quarter generally amended some internal procedures of the SEC and extended the compliance dates for other previously approved rules. The SEC's activity also focused on policy guidance and administrative relief, including clarifying the treatment of arbitration clauses in initial public offerings ("IPOs"), permitting a novel auto-vote plan for retail investors, postponing hedge fund disclosure deadlines and considering potential changes to corporate reporting frequency.

Final Rules

Extension of Compliance Date for Disclosure of Order Execution Information

On September 30, 2025, the SEC adopted a final rule extending the compliance date for the Rule 605 Amendments (defined below) from December 14, 2025 to August 1, 2026.

The SEC originally adopted the amendments to Rule 605 on March 6, 2024, which, among other things expanded the scope of reporting entities subject to Rule 605, modified the categorization and content of information required to be disclosed in the detailed execution quality reports published under Rule 605, and required reporting entities to produce a summary report of execution quality in addition to the existing detailed disclosures regarding execution quality for covered orders in national market system

*Mr. Silverman and Ms. Klein are members of the New York Bar and Partners at Olshan Frome Wolosky LLP. Associates Zachary Freedman, Rahmel Lee Robinson and Lisette Candia Diaz assisted the authors.

(“NMS”) stocks (the “Rule 605 Amendments”). “Execution quality” refers to factors such as the price at which an order is bought or sold, the time it takes for a trade to be completed once submitted and whether the order is completed in full.

The SEC extended the compliance date for the Rule 605 Amendments in response to concerns raised by market participants and its own analysis of the benefits of delaying compliance. After adopting the Rule 605 Amendments, SEC staff worked with market participants to resolve technical and interpretive issues related to implementing them. Market participants have continued to raise concerns about implementation and noted that a compliance date in the middle of a calendar month (such as December 14, 2025) would impose unnecessary costs. They suggested instead that the compliance date fall on the first day of a month, making August 1, 2026, a more practical starting point.

In its analysis, the SEC explained in this final rule that extending the compliance date would not only give firms more time to prepare but would also reduce costs. By delaying the start date, firms are expected to save approximately \$7.1 million in aggregate compliance expenses, avoid duplicative programming and lower the risk of having to rework reporting systems after new guidance or clarifications are issued. The SEC anticipates that the extended deadline will help ensure that all reporting entities will be ready at the same time, thereby improving the consistency and comparability of execution quality reports across the market. Aligning the new compliance date with the beginning of a calendar month eliminates the need for partial-month reporting, which the SEC concluded would otherwise create an unnecessary expense.

The SEC acknowledged that pushing back the deadline will also delay some of the anticipated benefits of the Rule 605 Amendments such as greater transparency into execution quality, stronger competition among market participants from such transparency and the long-term efficiency and capital formation benefits that may also arise. While the SEC considered a shorter extension period to realize these benefits sooner, the SEC concluded that a shorter extension would risk inconsistent readiness and reporting outcomes among broker-dealers and market centres. Additionally, the SEC concluded that inconsistency would undermine a key intended benefit of the amendments, which is enhancing the ability to compare order execution qualities among entities like broker-dealers and market centres. In the SEC’s view, extending the compliance date for the Rule 605 Amendments to August 1, 2026 strikes the appropriate balance between reducing burdens on firms and preserving the intended benefits of the Rule 605 Amendments.

Amendments to the SEC's Rules of Practice

On September 17, 2025, the SEC adopted a final rule amending Rule 431(e) of the SEC's Rules of Practice ("Rule 431(e)"). Rule 431(e) governs the SEC's review of actions made pursuant to authority that the SEC explicitly delegates to an individual SEC commissioner, division directors or other staff of the SEC (the "Staff"). Typically, many routine matters that require SEC action are handled by the Staff pursuant to this delegated authority. Such routine matters include the acceleration of the effectiveness of a registration statement.

Rule 431(e) provides that an action made pursuant to such delegated authority would have immediate effect and be deemed the action of the SEC. In addition, Rule 431 provides that, until the SEC orders otherwise, actions made pursuant to delegated authority will be automatically stayed when (1) an aggrieved person files a notice of intention to petition for SEC review of the matter on which the SEC took action, or (2) at least one member of the SEC votes for the matter to be reviewed. Rule 431(e) contains exceptions for certain delegated actions which are thus not subject to an automatic stay if the aforementioned scenarios occur.

The final rule eliminates the automatic stay for certain delegated Staff actions that would otherwise attach upon a (1) notice of intention to petition for SEC review or (2) vote of one member of the SEC that the matter underlying the Staff action be reviewed. Specifically, the final rule eliminates the automatic stay in connection with the SEC's delegated actions that (1) take registration statements and post-effective amendments effective and (2) determine the date and time of (a) qualification of an offering statement and (b) post-qualification amendments under Regulation A.

When a company sells securities pursuant to a registration statement, such registration statement must be effective in order for the company to sell such securities pursuant to the registration statement. Under Section 8 of the 1933 Act, registration statements automatically become effective on the 20th day after the registration statement is filed. However, an issuer may delay automatic effectiveness of a registration statement by including a "delaying amendment." When such delaying amendment language is included in a registration statement, effectiveness of the registration statement is delayed until (1) the issuer files an amendment stating the registration statement is to become automatically effective in accordance with Section 8(a) of the 1933 Act or (2) such date that SEC grants the issuer's request to accelerate the effective date of the registration statement. Typically, once the SEC provides an issuer with notice that it no lon-

ger has any comments to a registration statement, the issuer will submit a request to the SEC to accelerate the effectiveness of the registration to such date requested by the issuer. If an issuer chooses to file an offering statement, the SEC must qualify the offering statement before the issuer may sell securities. The registration and qualification processes give issuers some flexibility when timing the release of securities into the market.

Prior to these amendments to Rule 431(e), the (1) filing of a notice of intention to petition for SEC review or (2) vote of one member of the SEC on a matter pertaining to the registration or offering statement would automatically stay any SEC action taken with respect to a registration or offering statement. The SEC noted that it amended Rule 431(e) to prevent an automatic stay because they determined that an automatic stay would be unnecessary and disruptive in this context. For example, an automatic stay on the SEC's determination to accelerate effectiveness of a registration statement or qualify an offering statement after sales have commenced can disrupt the issuer's sales process and cause market participants to experience costs and uncertainty. Now, the SEC will on a case-by-case basis evaluate whether: (1) there is a likelihood of inadequate disclosure in the relevant registration or offering statement; and (2) the balance of harms from the potential inadequate disclosures are sufficient to justify imposing a stay on the relevant statement given the potential disruptive consequences that a stay may cause.

In the absence of the automatic stay, there are still myriad ways that investors can be protected from potentially deficient registration statements, post-effective amendments, offering statements and post-qualification amendments. For example, under Section 8(b) of the 1933 Act, the SEC may issue an order preventing a registration statement from becoming effective and Section 8(d) allows the SEC to issue a stop order to suspend the effectiveness of a registration statement. In the context of offering statements made pursuant to Regulation A, Rule 258 promulgated under the 1933 Act allows the SEC to enter an order suspending such exemption at any time.

The final rule went into effect on September 19, 2025.

Extension of the Compliance Date for Form PF and Reporting Requirements for all Filers and Large Hedge Fund Advisors

On September 17, 2025, the SEC adopted a final rule extending the compliance date for the amendments to Form PF under the Investment Company Act of 1940, as amended (the "Investment Company Act"). On February 8, 2024, the SEC, in coordination with the Commodity Futures Trading Commission ("CFTC"),

adopted amendments to the confidential reporting form for certain SEC-registered investment advisers to private funds, including those that are also registered with the CFTC as a commodity pool operator or commodity trading adviser. Form PF is a confidential report that discloses the basic operations and strategies of private funds and their advisers to the SEC. The SEC noted that the final rules were designed to provide greater insight into private funds' operations and strategies, assist in identifying trends, including those that could create systemic risk, improve data quality and comparability and reduce reporting errors.

Since adopting the amendments, the CFTC and SEC have now extended the compliance date for the amendments three times. Pursuant to this final rule adopted by the SEC on September 17, 2025, the SEC extended the compliance date of the amendments to Form PF from October 1, 2025 to October 1, 2026.

These extensions have been made with the hope that the SEC can use the delays to complete a full comprehensive review of the amendments adopted on February 8, 2024 in accordance with the Presidential Memorandum (the "Memorandum") signed by President Donald J. Trump on January 20, 2025. The Memorandum directed agencies to consider postponing the effective dates of any rules published in the Federal Register, or issued and not yet effective, in order to review any questions of fact, law and policy that the rules may raise. SEC Chair Paul Atkins has also expressed intent to prioritize making sure the SEC is not demanding excessive information from people and suggested that the SEC will be prudent in their review. Chair Atkins also expressed a desire to reduce the number of private funds required to file Form PF and to strike a balance between such a reduction and the SEC's interest in having the key risk and exposure information needed by regulators to identify and monitor financial instability.

Since June 12, 2025, the SEC has initiated a review of the amendments adopted in February 2024 and believes they need more time to complete a substantive review of Form PF and determine whether they need to take any further action (e.g., proposing new amendments to Form PF). By extending the compliance date to October 1, 2026, the SEC now has more time to complete their review.

Extension of Compliance Dates for Electronic Submission of Certain Materials Under the 1934 Act and Amendments Regarding the FOCUS Report

On September 8, 2025, the SEC adopted a final rule extending the compliance dates by 12 months for several rule amendments it adopted on December 16, 2024. The previously adopted final

rules included amendments that require (1) electronic filing or submission of certain forms and reports under the 1934 Act such as Form 17-H and broker-dealer and security-based swap entity annual reports; (2) electronic filing or submission on the SEC's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system, using structured data as necessary, for certain forms filed or submitted by self-regulatory organizations ("SROs"); (3) information contained in Form 19b-4(e) to be publicly disclosed on the SROs website; (4) clearing agencies to post supplemental material on their websites; (5) the electronic filing or submission on EDGAR, using structured data as necessary, of certain forms, reports, and notices provided by broker-dealers, security-based swap dealers, and major security-based swap participants under the 1933 Act, and (6) withdrawal of notices filed in connection with an exception to counting certain dealing transactions toward determining whether a person is a security-based swap dealer if the circumstance calls for it. Also, in connection with the amendments, the SEC began permitting electronic signatures in certain broker-dealer filings. The SEC also amended the Financial and Operational Combined Uniform Single Report ("FOCUS Report") to be consistent with other rules, make technical corrections and provide clarifications.

After the SEC adopted these various amendments on December 16, 2024, many individuals expressed concerns about the EDGAR filing or submission and structured data requirements and requested additional time to comply with the various amendments. One industry group, the Securities Industry and Financial Markets Association ("SIMFA"), submitted a letter to the SEC requesting a 12-month extension to comply with the requirement to file or submit several forms and submissions on EDGAR in the structured data format. These forms and submissions included certain parts of the FOCUS Report, valuation dispute notices, and certain compliance reports. SIMFA cited the SEC's failure to produce structured data taxonomies, which prevent filers from beginning substantive work on the technology builds necessary to convert documents into structured data format, as an important reason for extending compliance dates.

Pursuant to this final rule adopted by the SEC on September 8, 2025, the SEC extended the compliance date of several of the amendments by 12 months. The SEC's final rule identifies the amendments with extended compliance dates, such as those relating to Forms 1, CA-1 and 15A, among others, and those that retain their original dates.

Concept Release

Residential Mortgage-Backed Securities

On September 26, 2025, the SEC issued a concept release requesting public comment on its rules governing asset-backed securities (“ABS”) and residential mortgage-backed securities (“RMBS”). ABS is a type of financial investment that is supported by a bundle of loans or other debts, such as mortgages, auto loans or credit card balances. Investors receive bond-like payments funded by the cash flow from those underlying loans, making ABS a way to earn steady income while the issuing company gets upfront funding. RMBS is a type of ABS and is specifically a debt instrument backed by pools of residential loans (e.g., mortgages and home-equity loans).

The SEC is soliciting public comment on its rules regarding RMBS and ABS to evaluate how those rules may discourage or facilitate the registration of RMBS offerings in the public market. The SEC has noted that no public RMBS offerings have occurred since 2013. The SEC believes a more vibrant public RMBS market will promote broader investor participation, diversified liquidity and potential cost reductions for consumers, and is seeking comments on regulatory impediments that may be contributing to the absence of registered issuance of these securities.

The evolution of the current regulatory regime for ABS began in 2004 when the SEC adopted Regulation AB, which established the first comprehensive registration, disclosure and ongoing reporting regime for ABS under the 1933 Act and the 1934 Act. After the Great Recession ended in 2009, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act which, among other things, mandated the SEC to adopt rules and regulations that could address concerns about the assets underlying ABS. In 2014, the SEC adopted major revisions to its regulation, disclosure, and reporting regime for ABS and also **amended** Regulation AB (generally referred to as “Regulation AB II”). Regulation AB II included changes like requiring ABS issuers to disclose asset-level data for all assets underlying RMBS and certain other asset classes.

Since the adoption of Regulation AB II in 2014, there have been market trends and developments, including the creation of new asset classes. The changes in the market **over** the last 11 years have prompted a renewed look at how the current framework for registration and reporting is serving the needs of the ABS market. In particular, the SEC seeks public comments on the following:

1. **Asset-level disclosure requirements** — whether certain **modifications** may be warranted with respect to the cur-

rent asset-level disclosure requirements for RMBS under Item 1125 of Regulation AB (Schedule AL), including whether and how to address potential disclosure of certain sensitive RMBS asset-level data;

2. **Balancing interests in cost reduction and increased liquidity with investor protection** — how to (1) promote the SEC’s objectives of (a) reducing costs and regulatory obstacles to registration of RMBS offerings in order to facilitate public offerings of RMBS and (b) increasing liquidity in the registered RMBS market; and (2) balance their objectives with their interests of *all* market participants, including investors;
3. **Expanding access to the registered ABS market** — potential changes that may facilitate expanded access to the registered ABS market;
4. **Other aspects of the ABS framework** — any other aspects of the ABS registration and reporting regime;
5. **Schedule AL format and usability** — whether the presentation and organization of Schedule AL, which is the standardized XML data table for RMBS loan-level information, should be revised to improve usability for investors and reduce the complexity of compliance. The SEC also asked whether a “provide-or-explain” approach should be adopted to permit issuers to omit certain fields if they disclose and explain the omission; and
6. **Definition of “asset-backed security”** — whether the definition of ABS in Regulation AB should be updated to better align with the broader definition of ABS under the 1934 Act, and what conforming changes across Regulation AB might be required if such a revision were made.

Beyond these specific issues, the SEC emphasized that its goal is to encourage a more active registered RMBS market without undermining the transparency and protections that investors expect. In the SEC’s view, revitalizing public RMBS issuance could expand investor participation, diversify liquidity sources, and reduce costs for borrowers, but any reforms would need to be carefully calibrated to balance efficiency with disclosure integrity.

The SEC also made clear that its request for comment is not limited to the areas identified in the release. Market participants are invited to provide input on any aspect of the ABS registration and reporting regime that may be outdated, overly burdensome or in need of modernization given how the market has developed since the adoption of Regulation AB II in 2014. Comments on the concept release are due on December 1, 2025.

Policy Guidance

The SEC Permits Mandatory Arbitration Clauses

On September 17, 2025, the SEC issued a Policy Statement announcing that the presence of a mandatory arbitration clause in a company's governing documents will not impact the SEC's decision regarding whether to accelerate the effectiveness of a registration statement under the 1933 Act. This announcement reverses long-standing SEC policy that blocked companies from going effective on a registration statement if the company's governing documents included a mandatory arbitration clause. The SEC did not take a position on whether companies should adopt mandatory arbitration clauses, but with this announcement, it has now cleared the path for companies seeking to go public to include a mandatory arbitration clause in their governing documents.

It is important to note that the SEC's announcement does not necessarily legalize the use of mandatory arbitration for claims arising under the federal securities laws. This announcement simply provides that the SEC will no longer block companies from going effective on a registration statement if the company's governing documents include a mandatory arbitration clause. For companies interested in including a mandatory arbitration clause in its governing documents, it is prudent to review federal law and applicable state law to determine if such clause is permissible. In addition, there are other factors that companies should take into account if interested in including a mandatory arbitration clause in its governing documents, such as how proxy advisory firms may view such clause and whether arbitration is a beneficial route to resolve disputes under federal securities laws compared to a traditional proceeding in court.

The SEC is Prioritizing President Trump's Proposal to Reduce Frequency of Public Company Reporting

The SEC announced in a statement, on September 15, 2025, that it is currently pursuing a proposal to reduce the frequency of corporate earnings reports, by potentially eliminating the requirement for public companies to report quarterly earnings. The SEC's announcement came on the heels of President Trump's expressed desire to shift from a quarterly reporting framework to a semi-annual reporting framework. The SEC said in its statement that it is pursuing this proposal to further eliminate unnecessary regulatory burdens on public companies, which have been subject to quarterly and annual reporting requirements since 1970.

Since showing interest in considering this proposal, the SEC

also received a petition from Long-Term Stock Exchange Inc., a securities exchange, formally asking the SEC to switch financial reporting to a semi-annual schedule. Such a change would align the SEC's earnings reporting requirements with those of the European Union, United Kingdom and Japan, which all have semi-annual reporting requirements.

Proponents of a shift to semi-annual reporting requirements point out that this framework can alleviate some of the cost of SEC compliance, permit companies to dedicate more time to operating their business as opposed to SEC compliance and can be a benefit to smaller companies that may be disadvantaged by the short-term snapshot of financial health that quarterly reports provide investors. To that end, proponents also argue that a shift to semi-annual reporting can incentivize companies to embrace a more long-term outlook when making business decisions.

Critics, by contrast, point out that the quarterly reporting requirements prioritize transparency to investors, and thus argue that the current reporting regime engenders trust from investors, which benefits the market as a whole. The current quarterly reporting framework has been in place since 1970 and, at that time, was the product of decades of advocacy aimed at increasing transparency following the stock market crash in 1929. For some, implementation of a new policy may be viewed as a step back that would undermine the progress made to restore investor confidence in the public market.

Notwithstanding the SEC's stated intent to consider a new reporting schedule, it remains to be seen whether substantive steps will be taken to effect any meaningful change. In 2018, during President Trump's first term, the SEC solicited public comments on quarterly reporting requirements, but no meaningful changes followed.

The SEC Allows Auto Vote Program for Retail Investors

On September 15, 2025, the Staff of the Division of Corporation Finance of the SEC issued a no-action letter that permitted Exxon Mobil Corp. ("Exxon") to proceed with a novel, opt-in auto-voting program for its retail investors. Currently, retail investors hold roughly 40% of Exxon's outstanding shares and three-quarters of those retail investors do not typically vote in proxy contests. Exxon stated that the initiative responds to the disproportionate influence of activist investors, highlighting a 2021 proxy contest with Engine No. 1, which resulted in the replacement of three Exxon directors despite the activist holding only 0.02% of the company's outstanding stock.

Exxon refers to this program as the Retail Voting Program,

whereby Exxon's retail investors can opt-in to the program thereby authorizing Exxon to vote their shares in support of the recommendations made by Exxon's Board of Directors on all matters brought before shareholders or only certain matters. Retail investors who opt in to the Retail Voting Program would then receive annual reminders of their participation and could opt out or override their voting instructions at any time with no cost to the investor. Such retail investors would continue to receive all proxy materials and retain the right to vote on any proposal.

The SEC's position allows Exxon to proceed without risk of enforcement, effectively green lighting the first program of its kind at a major U.S. public company. Exxon characterized the program as a counterbalance to activist-led services that recruit shareholders and automatically vote the shareholder's shares in alignment with the activists' agendas. With the program in place, Exxon stated that it expects that it will now be easier for retail investors to speak up, be heard and be counted during shareholder meetings.

Major Court Decisions

Second Circuit Clarifies Director by Deputization Doctrine and Board Approved Exempt Issuances under Section 16(b) of the 1934 Act

On August 28, 2025, the United States Court of Appeals for the Second Circuit affirmed a district court's decision dismissing a derivative suit seeking disgorgement of \$87 million in short-swing profits pursuant to Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act") against an investment manager, investment fund, and the manager's chief investment officer. The Second Circuit held that the defendants were corporate insiders subject to the Exchange Act's short-swing provisions, but that the disgorgement claim was barred by an exemption that allows short-swing transactions by insiders where the transaction is approved in advance by the issuer's board of directors.

Andrew E. Roth, a shareholder of Vaxart, Inc. ("Vaxart"), brought a derivative action against investment advisor Armistice Capital, LLC, its investment fund Armistice Capital Master Fund Ltd. (collectively, "Armistice") and its Chief Investment Officer Steven Boyd ("Boyd," and together with Armistice, the "Appellees"), who served on Vaxart's board of directors (the "Board"), claiming that the Appellees engaged in an insider securities transaction that violated Section 16(b) of the Exchange Act ("Section 16(b)").

Vaxart is a publicly traded biotech company. In addition to investing in Vaxart common stock, Armistice acquired two series

of warrants in April 2019 and September 2019 that provided Armistice with the right to acquire shares of Vaxart common stock upon exercise of such warrants. Both of these warrants contained blocker provisions that limited Armistice from exercising such warrants if Armistice would have held greater than 4.99% and 9.99%, respectively, of Vaxart's outstanding common stock upon exercise of such warrants.

After Armistice invested in Vaxart, Boyd asked to replace two Vaxart directors with Armistice-affiliated directors and to add two seats to Vaxart's Board to be filled by independent directors chosen by Armistice. Vaxart agreed. In October 2019, Boyd and Keith Maher ("Maher"), a member of Armistice's management team, were added as directors of Vaxart's Board. Both Boyd and Maher continued to hold their positions at Armistice while serving on the Board.

In May 2020, Boyd and Vaxart's Chief Executive Officer discussed amending the blocker provisions in Armistice's warrants to increase the equity limitation to 19.99%. Following discussions amongst the disinterested directors of Vaxart, on June 5, 2020, all eight directors, including all six disinterested directors as well as Boyd and Maher, unanimously approved the amendments to increase the warrants' blocker limitation to 19.99%. The Board resolutions specifically acknowledged that Boyd and Maher were "Interested Parties" because they were both directors of Vaxart and affiliates of Armistice. The Board resolutions also confirmed that the amendments to the warrants were fully disclosed to all members of the Board as "Interested Party Transactions."

In June 2020, Armistice exercised both warrants and sold 27,612,053 shares of Vaxart's common stock, including 20,612,053 shares that Armistice received after exercising the warrants. As a result of such sale, Armistice liquidated a vast portion of its holdings in Vaxart and allegedly profited more than \$87 million.

Following Armistice's sale of Vaxart's common stock, Andrew E. Roth ("Plaintiff") brought a derivative action against the Appellees alleging they violated Section 16(b). Section 16(b) imposes strict liability on insiders of a company (e.g. significant beneficial owners, directors and officers) who earn "short swing profits" by buying and selling stock within a six-month period. When insiders realize short swing profits in violation of Section 16(b), they must disgorge those profits to the issuing company even if such insiders did not trade on insider information or intended to profit on the basis of such information.

Since Boyd and Maher were members of the Board, they were both insiders under Section 16(b). Plaintiff alleged that (i) the amendments to Armistice's warrants constituted a cancellation

and re-grant of the warrants, therefore deeming the amended warrants to be an “acquisition” for purposes of Section 16(b) and (ii) Appellees violated Section 16(b) when Armistice exercised the warrants and then sold the underlying shares of Vaxart common stock less than one month after amending the warrants.

The District Court concluded that the Appellees were exempt from liability under SEC Rule 16b-3(d) because the challenged transaction was “approved in advance by the issuer’s board of directors.” SEC Rule 16b-3(d) provides that an insider who has engaged in a short-swing transaction is exempt from liability if (1) the transaction involves the insider acquiring issuer equity securities from the issuer, (2) the insider is a director or officer of the issuer at the time of the transaction, and (3) the transaction is approved in advance by the issuer’s board of directors. The Second Circuit agreed with the District Court’s findings that the Appellees were exempt from liability.

The Second Circuit noted in its decision that SEC Rule 16b-3(d) extends to directors by deputization, such as Armistice. An entity that has a representative serving on a portfolio company’s board of directors may be deemed to be a “director by deputization” if the director serves on the board as such entity’s “deputy.” Plaintiff argued that the SEC Rule 16b-3(d) exemption did not apply because the Board was not aware that Armistice *itself* was a director of Vaxart, because Armistice had not formally disclosed its status as a director by deputization. Both the District Court and Second Circuit rejected this novel argument. The Second Circuit held that the issuer’s board need not be on notice of an investor’s formal, legal status as a “director by deputization” to understand that it is approving a transaction with an insider. Instead, an issuer’s board only needs to be aware that “one of its members serves as the eyes, ears, voice, and vote of an investor when deciding whether to approve a transaction with that investor.” As the Second Circuit noted in its decision, it was beyond dispute that the Board understood that both Boyd and Maher were Armistice’s representatives on the Board, which was sufficient for the exemption to apply.

Roth v. Armistice Capital LLC, Case No. 24-950, United States Court of Appeals for the Second Circuit.

Third Circuit Holds that “Reasonable Indication” Standard Does Not Permit Class Members to Opt-Out without Following Court-Ordered Procedures

On August 12, 2025, the United States Court of Appeals for the Third Circuit firmly held that investors are subject to the consequences of counsel’s failure to timely file a request to opt out from a class action.

Perrigo Company plc (“Perrigo”) is the world’s largest manufacturer of over-the-counter healthcare products. In April 2015, a then-competing drug manufacturer announced an unsolicited tender offer to buy Perrigo. While Perrigo successfully defeated that tender offer, Perrigo and its officers made allegedly material misrepresentations and omissions about Perrigo’s business performance, and Perrigo’s stock dropped precipitously.

Institutional Perrigo investors filed a class action lawsuit against Perrigo and several of its officers, alleging, among other things, violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Sculptor Master Fund, Ltd., and Sculptor Enhanced Master Fund Ltd., (together “Sculptor”) were putative class members but chose to pursue their claims in a separate action. After the District Court certified the class, a class action notice was sent to all class members, including Sculptor, with instructions on how to opt-out of the class action. Despite the notice, neither Sculptor nor Perrigo realized that Sculptor never submitted an exclusion request, and for **over** 3.5 years Sculptor’s individual lawsuit Perrigo continued alongside the class action. Only once the District Court had already preliminarily approved a proposed class action settlement did Sculptor’s failure to opt out come to the parties’ attention. Sculptor then moved to belatedly “opt out” of the class. The District Court rejected Sculptor’s arguments.

On appeal, Sculptor argued that: (1) a class member may opt out of a class action by providing a “reasonable indication” of its intent to opt out; (2) if the “reasonable indication” standard does not apply, Sculptor demonstrated excusable neglect sufficient to permit its belated request for exclusion from the class; and (3) the class action notice did not satisfy due process. The Third Circuit considered and rejected each argument.

First, the Third Circuit determined that the “reasonable indication” standard finds no support in Rule 23, which affords courts “substantial discretion to manage class actions and establish the procedures for absent class members to request exclusion.” The Third Circuit held that, based on the plain language of Rule 23, where the district court sets such procedures for exclusion, class members must follow those procedures to be excluded from the class. The Third Circuit thus rejected Sculptor’s urging “to follow the Second and Tenth Circuits which have suggested that ‘[a] reasonable indication of a desire to opt out’ is sufficient for an absent class member to exclude themselves from the class.”

Second, using the four factors articulated by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74, 24 Bankr. Ct. Dec. (CRR) 63, 28 Collier Bankr. Cas. 2d (MB) 267, Bankr. L.

Rep. (CCH) P 75157A, 25 Fed. R. Serv. 3d 401 (1993), the Third Circuit determined that “those factors—the danger of prejudice; length of delay; reason for delay; and whether the movant acted in good faith” weighed against excusing Sculptor’s failure to timely opt-out of the class action.

Finally, the Third Circuit concluded that the class notice satisfied due process requirements because the class notice “suppl[ied] class members with enough information to make an informed decision about their rights and how best to protect them.”

Perrigo Individual Investor Group et al. v Joseph C. Papa et al., Case No. 24-2861, United States Court of Appeals for the Third Circuit.

Ninth Circuit Rejects Challenge to SEC’s “No-Deny” Settlement Rule

On August 6, 2025, the United States Court of Appeals for the Ninth Circuit rejected a facial challenge to Securities and Exchange Commission (“SEC” or “the Commission”) Rule 202.5(e) on First Amendment grounds. Rule 202.5(e) provides that the agency will not settle a civil enforcement action unless the defendant agrees not to publicly deny the allegations against him. If the defendant violates this provision of the settlement, the SEC may return to court to seek to reopen the case.

The New Civil Liberties Alliance (“NCLA”) filed a petition asking the SEC to amend Rule 202.5(e). The NCLA cited First Amendment concerns, and suggested that the SEC eliminate the language preventing a defendant from denying the SEC’s allegations. The SEC denied the petition to amend, and petitioners challenged the SEC’s denial by filing a petition for review with the Ninth Circuit. Petitioners argued that the Rule violates the First Amendment and was adopted in violation of the Administrative Procedure Act (the “APA”).

The Ninth Circuit refused to find the rule per se unconstitutional, reasoning that “voluntary relinquishment of constitutional rights [w]as permissible, so long as appropriate safeguards are attached.” The Court reasoned that Rule 202.5(e) was not “simply a speech-restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits.” The Court explained that First Amendment rights could be waived “upon clear and convincing evidence that the waiver is knowing, voluntary, and intelligent.”

While the Court ultimately rejected petitioners’ First Amendment challenge to Rule 202.5(e), as well as the argument that the Rule was adopted in violation of the APA, the holding was narrow. The Court noted that its decision only applied to the facial challenge to the rule, but that individual defendants were free to

bring as-applied challenges based upon their individual circumstances.

Powell v. SEC, Case No. 24-1899, United States Court of Appeals for the Ninth Circuit.

Ninth Circuit Rules that Fractional Interests in Life Settlements are Subject to Federal Securities Laws.

On August 11, 2025, the United States Court of Appeals for the Ninth Circuit held that fractional interests in life settlements are investment contracts and thus subject to federal securities laws, following the reasoning of the Fifth and Eleventh Circuits, and declining to follow the D.C. Circuit's approach.

Life settlements originated in transactions during the 1980s AIDS epidemic in which terminally ill patients sold their life insurance policies to investors in exchange for a fraction of the policy's value. Investors agreed to pay the insured for the policy and took on the responsibility of paying the insurance premiums in exchange for receiving the death benefits once the insured died.

Pacific West Capital Group ("PWCG") promoted and sold fractional interests in life settlements and structured the payment of their premiums. PWCG's promotional materials advertised its investment strategy. PWCG also created a three-tiered premium reserve system to fund continued payment of life settlement premiums.

The Securities and Exchange Commission ("SEC" or the "Commission") sued PWCG and affiliated persons and entities in 2015, alleging that defendants violated Sections 5(a) and (c) of the Securities Act of 1933 for offering and selling unregistered securities and section 15(a) of the Exchange Act of 1934 for failing to register as broker-dealers. Following dismissal and settlement of many of the defendants, the District Court entered summary judgment in favor of the SEC and against the remaining defendants, who were sales agents for PWCG. The Ninth Circuit affirmed.

The key issue posed to the Ninth Circuit was whether fractional interests in life settlements are investment contracts and thus securities subject to federal securities laws under the Securities Act of 1933. The Ninth Circuit held that the features of PWCG's life settlements—its selection of specific policies, its tiered reserve system, and the fractional nature of the interests—satisfied the requirement that the profits come from the "efforts of others" as set forth by the Supreme Court in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244, 163 A.L.R. 1043 (1946).

In determining that PWCG's selection of policies helps estab-

lish investors' dependence on the "efforts of others," the Ninth Circuit followed the Eleventh and Fifth Circuits' refusal to adopt the D.C. Circuit holding in *S.E.C. v. Life Partners, Inc.*, 87 F.3d 536, Fed. Sec. L. Rep. (CCH) P 99256 (D.C. Cir. 1996) that the viatical settlements are not investment contracts where the relevant entrepreneurial efforts of the promoters take place pre-purchase. Instead, the Ninth Circuit agreed with the Fifth and Eleventh Circuits that "pre-purchase activities" like PWCG's curation of policies for investors should be considered by courts and may be relevant for evaluating whether profits can be expected to come from the "efforts of others."

The Ninth Circuit rejected each of defendants' other challenges on appeal, including defendants' arguments that PWCG's issue of fractional securities were exempt from federal securities laws' registration requirements, and that the district court erred in awarding disgorgement.

SEC v. Barry, Case No. 23-3699, United States Court of Appeals for the Ninth Circuit.