

## CONSIDERING “DEXIT”: A COMPARATIVE REVIEW OF KEY ISSUES IN DELAWARE, NEVADA AND TEXAS CORPORATE LAWS

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### Key Takeaways

- There are several substantive differences impacting the scope of fiduciary duties, dispute resolution processes and minority stockholder rights in Delaware, Texas and Nevada.
- While all three states have adopted the business judgment rule, Nevada and Texas offer greater potential to shield corporate fiduciaries from liability for breaching their fiduciary duties. Nevada provides the strongest counterpoint to Delaware, as its courts have taken clear positions on several issues with respect to which there remains little affirmative jurisprudence in Texas.
- Notably, Nevada does not require corporations to pay annual franchise taxes, unlike Delaware and Texas.

On July 9, leading venture capital firm Andreessen Horowitz (“AH”) announced that it had decided to redomicile its primary business entity, AH Capital Management, from Delaware to Nevada. AH made an intentionally noisy exit, publishing a memorandum detailing its reasons for leaving Delaware and the various advantages it saw in moving to Nevada,<sup>1</sup> while also indicating that it gave due consideration to Texas. The move by AH caught the attention of many and has brought to a crescendo a public conversation about “Dexit” (exit

from Delaware) that has been getting louder in recent years.

Nevada and Texas have been the primary beneficiaries of Dexit thus far. High-profile companies such as Dropbox, TripAdvisor and Meta have, during the past few years, reincorporated or indicated that they are actively considering reincorporating<sup>2</sup> in one or the other state. At the same time, Nevada and Texas have pushed forward with multifaceted efforts, including revisions to their respective corporate law statutes, to position themselves as attractive alternatives to Delaware.

Only time will tell whether Dexit represents a paradigmatic shift or something more moderate. At present, Delaware remains the preeminent state of incorporation in the United States, being home to more than two million incorporated business entities, including approximately 68% of Fortune 500 companies. However, we think this is an opportune time to provide some insight into what corporate boards and stockholders may consider if they wish

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to reassess their corporation's existing relationship with Delaware or, alternatively, if they are considering incorporating a new company and are thinking twice about where to do so.

### Business Judgment Rule: A Comparative Review of the Rule's Content and Its Exceptions

Delaware is known for its business judgment rule, which is part and parcel of a business-friendly attitude that has long attracted Delaware incorporations. Delaware courts apply the business judgment rule when reviewing decision-making by corporate boards, typically in the context of claims for breaches of fiduciary duty. Under the rule, Delaware courts presume that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Directors will be insulated from personal liability for shareholder losses resulting from their decisions unless the plaintiff is able to rebut any of the foregoing presumptions through a showing of substantial misconduct—for example, fraud, illegality, conflict of interest or gross negligence. The business judgment rule has been referred to as the centerpiece of Delaware's corporate law,<sup>3</sup> and it reflects Delaware's commitment to giving corporate boards latitude to manage corporations in accordance with their business judgment without undue second-guessing and exposure to liability.

Notwithstanding Delaware's leadership in developing the business judgment rule, detractors have focused on the fact that the rule in Delaware is a creature of case law rather than black-letter law, and have suggested that recent judicial decisions are causing the rule to evolve in a manner adverse to corporate boards. AH referred to two cases in support of its contention that Delaware judges are widening existing exceptions to the application of the business judgment rule in a way that opens up directors to increased potential liability and may even evidence a bias against technology startup founders and their boards.<sup>4</sup> Whether or not one agrees with these conclusions, actual or perceived unpredictability in judges' potential application of the business judgment rule can pose challenges to boards seeking to weigh the risk of liability attaching to their decisions. In this regard, some boards may prefer the regimes adopted in Nevada or Texas, each of which has codified the business judgment rule through statutes as opposed to case law. In addition, Nevada's rule has definitively broader coverage and fewer exceptions than Delaware's, making it more board-favorable. While Texas law remains subject to further development, there is reason to believe the jurisprudence on its business judgment rule will develop along the lines of Nevada's.

Nevada's long-standing business judgment rule is contained in Section 78.138 of the Nevada Revised Statutes ("NRS"). Texas recently adopted its related statute when it

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## Wall Street Lawyer

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(ISSN#: 1095-2985)

adopted Senate Bill 29 (“SB 29”). SB 29 effectuated a number of changes to the Texas Business Organizations Code (the “TBOC”), effective as of May 14, including the addition of Section 21.419, which sets forth its business judgment rule.<sup>5</sup> Both states’ rules establish presumptions that corporate directors act in good faith, on an informed basis, in the corporation’s best interests—and only in Texas, in accordance with the law and the corporation’s governing documents—and they set out conditions for the rebuttal of such presumptions, discussed below. In Nevada, the business judgment rule statute applies automatically to all corporations; in Texas, the statute only applies automatically to Texas corporations with securities listed on a national securities exchange, but other corporations can opt in to the rule by including relevant provisions in their governing documents.

As mentioned above, there are some key distinctions in Nevada’s and Texas’ approaches to the business judgment rule. For one thing, in Delaware, gross negligence is sufficient to rebut the presumption of good faith inherent in its business judgment rule. However, in 2020, the Nevada Supreme Court held that gross negligence is not sufficient.<sup>6</sup> The court pointed to the plain language of Section 78.138 of the NRS, which says that subject to limited exceptions, directors and officers will not have individual liability to a corporation or its stockholders or creditors unless a plaintiff (1) rebuts one of the business judgment rule’s presumptions and (2) proves that (A) the director’s or officer’s act or failure to act constituted a breach of fiduciary duty and (B) the breach involved *intentional misconduct, fraud or a knowing violation of law*. Consider that in Delaware, a director may be held liable for grossly negligent failure to inform him- or herself with respect to a transaction, whereas in Nevada such a failure would not rise to the level of misconduct necessary to remove it from the protection of the business judgment rule. It is reasonable to think that Texas courts will take the same view as Nevada’s on this point, as the exculpatory language in Texas’ business judgment rule statute is similar to Nevada’s—*provided* that Texas’ statute adds that a breach involving an ultra vires act can form the basis for liability.

Finally, Nevada has taken an approach to exceptions to the business judgment rule’s coverage notably different from that used in Delaware. Delaware courts have histori-

cally used the business judgment rule as their standard of review in most circumstances, but they applied the rigorous “entire fairness” standard to transactions involving alleged conflicts of interest unless an applicable “safe harbor” applies and the “enhanced scrutiny” standard to certain disputes involving hostile takeovers. Nevada has no such exceptions to its business judgment rule, as confirmed by the Nevada Supreme Court in its opinion in *Guzman v. Johnson*.<sup>7</sup> In that opinion, the court reaffirmed existing precedent establishing that liability under Section 78.138(7) of the NRS provides “the sole avenue to hold directors and officers individually liable for damages arising from official conduct”; in addition, the *Guzman* court overturned then-existing precedent that had previously applied an “inherent fairness” test to disputes involving alleged conflicts of interest at the board level.<sup>8</sup> Boards seeking comfort in the predictable application of a deferential standard of review may prefer Nevada’s straightforward approach to all others.

We do note that Delaware has amended its Delaware General Corporation Law (“DGCL”) recently to expand and clarify the safe harbors available to conflicted transactions, which, if complied with, would cause an applicable transaction to receive business judgment rule review rather than entire fairness review. As of March 25:

- Section 144(a) of the DGCL provides that transactions involving the corporation or any of its subsidiaries and any of the corporation’s officers, directors or their affiliates may not be the subject of equitable relief or give rise to an award of damages against a director or an officer of the corporation if (1) the transaction is approved by a majority of the disinterested members of the board or a committee thereof, provided they are acting on an informed basis in good faith and without gross negligence by an informed, uncoerced majority of the votes cast by the corporation’s disinterested stockholders, or (2) the transaction is fair to the corporation and its stockholders.
- Section 144(b) of the DGCL provides that controlling stockholder transactions other than going-private transactions may not be the subject of equitable relief or give rise to an award of damages against a director, an officer or a controlling stockholder of the corporation or a member of a control group if (1) the

transaction is approved by a majority of the disinterested members of a special committee of the board empowered to negotiate or oversee the negotiation of such transaction and to reject such transaction, acting on an informed basis in good faith and without gross negligence, or by an informed, uncoerced majority of the votes cast by the corporation's disinterested stockholders, such approval being a condition to such transaction, or (2) the transaction is fair to the corporation and its stockholders.

- Section 144(c) of the DGCL provides that a controlling stockholder transaction constituting a going-private transaction may not be the subject of equitable relief or give rise to an award of damages against a director, an officer or a controlling stockholder of the corporation or a member of a control group if (1) the transaction is approved by *both* of the votes described above with respect to Section 144(b) and (2) the transaction is fair to the corporation and its stockholders.

Prior to the recent amendments, Section 144(a) of the DGCL provided that, if a conflicted transaction involving an officer or director was approved in accordance with Section 144(a), it not be “void or voidable”; however, the relevant language now provides that an applicable transaction that complies with the safe harbor “may not be the subject of equitable relief or give rise to an award of damages,” potentially creating much stronger protection for directors and officers. In addition, Sections 144(b)-(c) of the DGCL are provide entirely new statutory safe harbors for controlling stockholder transactions. Until these amendments, controlling stockholder transactions would be receive business judgment rule review rather than entire fairness review if they were approved in accordance with procedures set forth in certain Delaware case law. The new subsections (b) and (c) of Section 144 address two issues with that construct: first, the approval processes set forth in Section 144(b) of the DGCL, with respect to controlling stockholder transactions other than going-private transactions, are less onerous than under heretofore controlling case law. Secondly, because the DGCL amendments define “controlling stockholder” and “disinterested director,” the issue of varying judicial interpretation of these terms can be avoided. (In Delaware case law, for example, there have been widely

diverging interpretations of the term “independent” director, which has caused consternation in the business community.)

Practically speaking, if officers, directors, or controlling stockholders of Delaware corporations comply with an applicable safe harbors under Section 144 of the DGCL they may receive the same or greater benefits in respect of protections from liability for breaches of fiduciary duty as they would receive under the NRS. That said, corporations preferring lesser formalities may prefer to incorporate in a state such as Nevada, where special committees and “majority of the minority” votes need not be considered in respect of conflicted transactions in order for such transactions to be reviewed under the deferential business judgment rule standard.

Texas law relating to conflicted transactions appears to still be evolving. Texas courts historically have applied a “fairness” standard to conflicted transactions similar to that used in Delaware, and this fairness standard is likely to continue to apply in at least some circumstances; for example, it may continue to apply with respect to corporations that are not public companies and that have not opted in to Texas’ business judgment rule statute. The main question is whether and in what circumstances the fairness analysis will apply to corporations that are public corporations or have opted in to Texas’ business judgment rule statute (collectively, “BJR Companies”). Commentators are split on this question, and Texas authorities have not yet provided clear guidance. That said, given the similarities between Nevada’s and Texas’ business judgment rule statutes, it would be easy to infer that Texas will take a position similar to Nevada’s—*i.e.*, that with respect to BJR Companies, the business judgment rule is the “sole avenue” to hold directors and officers individually liable for damages arising from official conduct.

It bears noting that Texas, like Delaware, has a safe harbor applicable to certain conflicted transactions, which if complied with protects officers and directors from liability for breaches of fiduciary duties. Specifically, Section 21.418 of the TBOC provides that a transaction between the corporation and any of its officers or directors or their affiliates may be ratified by the approval in good faith of a majority of the disinterested members of the board or a

committee thereof or the stockholders entitled to vote in respect of such transaction voting in good faith. Interestingly, SB 29 has also effectuated an amendment to the TBOC that may serve to strengthen the safe harbor's protection. SB 29 has added a new Section 21.4161, permitting BJR Companies that wish to form committees of disinterested directors to review proposed transactions to petition a Texas court for a dispositive determination as to the disinterested status of the applicable directors. The addition of this protection may indicate that Texas authorities still wish to encourage BJR Corporations to utilize the safe harbor established by Section 21.418 of the TBOC, notwithstanding that applicable transactions would be subject to deferential business judgment rule review even if the safe harbor is not complied with.

### Fiduciary Duties of Controlling Stockholders

Delaware and Nevada each has taken a position on fiduciary duties of controlling stockholders, defining such duties recently through case law (in Delaware) and statutory amendments (in Nevada). Delaware imposes a greater range of fiduciary duties on controlling stockholders than does Nevada, with Nevada responding to Delaware's construct and paring it back, as well as going so far as to establish a presumption in favor of a controlling stockholder. Of the three states, Texas has the least-developed law, which may not provide clear guidance for corporations considering this issue from a comparative standpoint.

The Delaware Court of Chancery addressed the fiduciary duties of controlling stockholders in *In re Sears Hometown and Outlet Stores Stockholder Litigation* (January 24, 2024).<sup>9</sup> In that case, the court established that, generally, controlling stockholders do not owe fiduciary duties to a corporation or its minority stockholders. However, fiduciary duties can arise in two scenarios. First, if a stockholder proposes to exercise its stockholder-level voting rights to change the status quo of a corporation, it must act in accordance with "limited" fiduciary duties, including a duty of good faith, which requires that the controller not harm the corporation or its minority stockholders intentionally, and a duty of care, which demands the controller not harm the corporation or its minority stockholders through grossly negligent action. Alternatively, if a controller uses its influence over a corporation's board and management to

wield corporate power indirectly and causes the corporation to act, the controller "effectively moves into the boardroom" and becomes subject to the same heightened fiduciary standards that apply to directors, including the duty to affirmatively promote the best interests of the corporation.

On May 30, Nevada enacted Assembly Bill No. 239 ("AB 239"), which included several amendments to the NRS, including, among others, to statutorily define controlling stockholders' fiduciary duties or lack thereof. The NRS now contemplates fiduciary duties in the two contexts contemplated by *Sears*. As amended, Section 78.240 of the NRS provides that controlling stockholders may exercise their voting power in any manner—even to change the status quo—without fiduciary duties to the corporation or minority stockholders. This appears to be directly responsive to the imposition of limited fiduciary duties in that scenario under Delaware law.

Further, Section 78.240 of the NRS provides that a controlling stockholder's only fiduciary duty, in such person's capacity as a stockholder, arises in the conflict of controlling stockholder transactions. Specifically, a controlling stockholder must "refrain from exerting undue influence over any director or officer of the corporation with the purpose and proximate effect of inducing a breach of fiduciary duty by such director or officer" for which such officer or director would be liable under Section 78.138 of the NRS (the business judgment rule statute) and (1) which breach relates specifically to a controlling stockholder transaction or a transaction in which the controlling stockholder or any of its affiliates or associates has a material and nonspeculative financial interest; and (2) results in material, nonspeculative and non-ratable financial benefit to the controlling stockholder, which benefit excludes and results in a material and nonspeculative detriment to the other stockholders generally. Similar to the safe harbors under Sections 144(b) of the DGCL, a controlling stockholder will be presumed not to have breached such fiduciary duty when an applicable transaction was approved by a committee of the board consisting only of disinterested directors and/or the board in reliance upon the recommendation of such a committee.

In Texas, controlling shareholders generally do not owe

formal fiduciary duties to the corporation or minority stockholders. However, cases are typically analyzed based on their specific facts and, in some instances, controlling shareholders have been found to have informal fiduciary duties.

### Specialized Business Courts, Forum Selection and Jury Waivers

Business disputes arising under the DGCL are routinely handled initially by the Delaware Court of Chancery and appealable to the Delaware Supreme Court. These courts have developed an unrivaled body of common law applicable to corporate disputes. Due to its focus on corporate disputes, Delaware has attracted attorneys and judges with expertise in these matters and has earned the trust of the business community. Further, corporate boards often appreciate that the Delaware Court of Chancery, being a court of equity, provides a forum for the resolution of complex business disputes through bench trials rather than jury trials, allowing them to present issues directly to judges with significant experience and specialized expertise. They often take advantage of the permission, under Section 115 of the DGCL, to include a forum selection clause in their certificates of incorporation or bylaws requiring internal corporate affairs—including issues related to mergers, acquisitions, fiduciary duties and shareholder rights—to be litigated exclusively in a Delaware court. This can function as a *de facto* jury trial waiver; as in practice, the Delaware Court of Chancery is often specified as the exclusive forum and, as mentioned above, such court holds only bench trials.

It makes sense that in their efforts to attract incorporations, Texas and Delaware each has approached the matter of establishing a specialized business court and also has considered forum selection clauses and jury trial waivers.

Texas is ahead of Nevada in this regard. Texas created the Texas Business Court on September 1, 2024, pursuant to Texas House Bill 19. The court has concurrent jurisdiction with state district courts and can hear business disputes subject to specified amount-in-controversy thresholds—except that the thresholds do not apply to publicly traded companies—and other criteria. Unlike the Delaware Court of Chancery, the Texas Business Court holds both jury trials and bench trials. However, pursuant to SB 29, Texas has added a new Section 2.116 to the TBOC allowing a corpora-

tion to include a provision in its governing documents that prospectively waives jury trials for internal entity claims. Additionally, Texas has amended Section 2.115 to the TBOC to permit corporations to designate a specific Texas court as the exclusive forum for internal entity claims, subject to state and federal jurisdictional requirements. The expectation is that, in practice, many corporations will select the Texas Business Court as the exclusive forum just as Delaware corporations often select the Delaware Court of Chancery as the exclusive forum. These two amendments to the TBOC, operating together, can have the effect of relegating internal entity claims to a specialized business court where they will be heard by experienced judges—Texas Business Court judges are required to have at least a decade of relevant experience—thereby replicating some of the advantages of corporate dispute resolution in Delaware. It bears noting that the Texas Business Court is divided into 11 divisions, to which judges are being appointed in stages. At the time of this article, judges have been appointed at five such divisions; however, judges will not be appointed to the remaining six divisions until at least July 1, 2026. This may pose logistical challenges for bench trial litigation, notwithstanding the aforementioned TBOC clauses.

Nevada is further behind in its development of a specialized business court, but it has addressed the business community's appetite for bench trials through its limited authorization of jury waivers. In February, the Nevada Legislature proposed an amendment to the Nevada Constitution to permit the establishment of a specialized business court for the state; however, the proposed amendment remains subject to a lengthy approval process and will not be voted on by the Nevada constituency until at least 2027. That said, on May 30, AB 239 amended the NRS to permit Nevada corporations to include jury trial waivers in their articles of incorporation with respect to internal affairs disputes. Additionally, since 2019, the NRS have permitted Nevada corporations to include forum selection clauses in their articles of incorporation or bylaws requiring internal actions to be brought solely or exclusively in one or more specified courts, which must include at least one Nevada court. Together with the jury trial waiver, this may provide comfort to corporations that they can have internal affairs disputes heard by judges in home-state courts, albeit not specialized business courts; however, there is no guarantee

that such courts would provide judges with specific corporate law expertise, making this statutory construct potentially less appealing than those in Delaware and Texas.

### Inspection of Books and Records

Stockholders of Delaware corporations are broadly permitted to inspect corporate books and records upon making a demand in good faith and for a proper purpose under Section 220 of the DGCL. In contrast, under Section 78.257 of the NRS, only those stockholders who hold at least 15% of a Nevada corporation's stock are entitled to inspect the books and records of the corporation, and for this purpose, such books and records include only books of account and financial statements. Further, Nevada corporations that furnish stockholders with a detailed, annual financial statement and public corporations that have filed all required reports under the Securities Exchange Act of 1934, as amended, during the preceding 12 months are exempt from the requirement to permit inspection of books and records. Under Section 21.218 of the TBOC, only stockholders who hold at least 5% of a Texas corporation's stock or who have held shares of the corporation's stock for more than six months have statutory inspection rights. Pursuant to amendments under SB 29, the books and records of a Texas corporation exclude certain categories of communications, including emails, text messages and similar electronic communications or information from social media accounts, unless any of them effectuates an action by the corporation.

### Merger Approval Process

Earlier this year, pursuant to AB 239, Nevada amended Section 78.315 of the NRS to provide that whenever a corporation's board is required under the NRS to approve any agreement, instrument, certificate or document, it may approve such document in "final form or such preliminary form as the directors deem appropriate in their business judgment." This amendment appears responsive to a recent amendment to Section 147 of the DGCL, clarifying that boards of Delaware corporations are required to approve documents in "final or substantially final" form.

The amendment to the DGCL had been enacted as a response to a ruling by the Delaware Court of Chancery in *Sjunde AP-fonden v. Activision Blizzard, Inc.* in 2024, in which the court determined that a merger agreement must

be approved in "essentially complete" form.<sup>10</sup> The decision spurred a lot of pushback from the business community, as it did not align with market practices. Whereas the DGCL amendment, effective as of Aug. 1, 2024, sought to loosen the requirements for board review to align with prevailing market practices, the amendment to the NRS provides an even looser standard, prioritizing deference to corporate boards' business judgment.

### Franchise Taxes

As is widely known, Delaware generates substantial revenue by charging annual franchise taxes to domestic Delaware corporations. In contrast, Nevada does not impose any franchise taxes. Texas imposes franchise taxes on corporations generating at least \$2.47 million in annualized total revenue. Its franchise taxes are calculated differently than those in Delaware and may or may not result in lower ultimate tax liability for some corporations.

### ENDNOTES:

<sup>1</sup>"We're Leaving Delaware, And We Think You Should Consider Leaving Too," by Jai Ramaswamy, Andy Hill and Kevin McKinley. See <https://a16z.com/were-leaving-delaware-and-we-think-you-should-consider-leaving-too/>.

<sup>2</sup>According to a January 2025 *Wall Street Journal* article, Meta Platforms Inc. is considering Texas (<https://www.wsj.com/tech/meta-incorporation-texas-delaware-f06e8bab>); TripAdvisor Inc. reincorporated in Nevada in April; and Dropbox Inc. reincorporated in Nevada in March.

<sup>3</sup>"The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyally and Carefully." See <https://corplaw.delaware.gov/delaware-way-business-judgment/>.

<sup>4</sup>"Director independence has been questioned in cases where the board has granted 'moonshot' grants [to exceptional founders, and in one notable case the court reprised the chorus from Hotel California by rejecting a board's decision to move its place of incorporation out of Delaware (although it was later reversed by the Delaware Supreme Court)]. . . . Although the Delaware Legislature has taken some exception to these developments, its actions fail to take full measure of the problem. In particular, Delaware courts can at times appear biased against technology startup founders and their boards."

<sup>5</sup>Both states' rules presume that corporate directors act in good faith, on an informed basis and in the corporation's best interests—and only in Texas, in accordance with the corporation's governing documents and applicable law.

Note that in Texas, the business judgment rule statute only applies automatically to Texas corporations with securities listed on a national securities exchange; however, corporations may opt into the statute's coverage by including relevant provisions in their governing documents.

<sup>6</sup>See *Chur v. Eighth Judicial District Court in and for County of Clark*, 136 Nev. 68, 458 P.3d 336, 136 Nev. Adv. Op. No. 7 (2020).

<sup>7</sup>*Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531, 137 Nev. Adv. Op. No. 13 (2021).

<sup>8</sup>Prior to *Guzman*, a stricter inherent fairness test had applied to disputes involving alleged conflicts of interest; however, the *Guzman* court said that such application went against the plain language of Nev. Rev. Stat. § 78.138, which requires a plaintiff to both rebut the business judgment rule's presumption of good faith and show a breach of fiduciary duty involving intentional misconduct, fraud or a knowing violation of the law. Thus, the inherent fairness standard, if it will continue to apply at all, could apply only if the foregoing elements were established.

<sup>9</sup>*In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*, 309 A.3d 474 (Del. Ch. 2024), modified on reargument, 2024 WL 3555781 (Del. Ch. 2024).

<sup>10</sup>*Sjunde AP-fonden v. Activision Blizzard, Inc.*, 2024 WL 863325 (Del. Ch. 2024).

## SEC RESCINDS STAFF POSITION LIMITING REGISTERED CLOSED-END FUNDS' INVESTMENTS IN PRIVATE FUNDS

By Kelley A. Howes, Derek N. Steingarten, Stephanie C. Thomas, Elizabeth Kemery Sipes and Aaron J. Russ

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On August 15, 2025, the Division of Investment Management (the "Division") of the U.S. Securities and Exchange Commission ("SEC") published Accounting and

Disclosure Information 2025-16 ("ADI"),<sup>1</sup> providing updated guidance for registered closed-end funds that invest in private funds ("CE-FOPFs"). This guidance formalizes statements made by senior members of the SEC staff earlier this year that had reversed prior SEC staff guidance.

### Key Takeaways

- When reviewing CE-FOPF registration statements, Division staff will no longer request that the registrant either (i) include accredited investor status and \$25,000 minimum investment requirements or (ii) limit its private fund investments to 15% of its assets.
- CE-FOPF registration statements must include robust disclosures regarding costs, risks, strategies, and underlying private fund characteristics.
- In light of the new guidance, registrants should carefully consider whether it is necessary to file a post-effective amendment pursuant to Rule 486(a) or Rule 486(b) or a prospectus supplement pursuant to Rule 424 and engage with Division staff as needed.

### Background

Historically, Division staff comments led many CE-FOPFs investing 15% or more in private funds to restrict their offerings to "accredited investors"<sup>2</sup> as defined under Regulation D of the Securities Act of 1933 (the "1933 Act") and require minimum initial investments of at least \$25,000. This staff position was not reflected in any statute or formal rule.

### ADI Summary

The ADI clarifies that Division staff will no longer issue comments suggesting that CE-FOPFs restrict their offerings to accredited investors or limit private fund investments to 15% of their assets. The ADI notes that existing regulatory protections under federal securities laws provide adequate protection of investors in CE-FOPFs that indirectly invest in private funds. These include requirements that the CE-FOPF: (i) be managed by a registered investment adviser that owes fiduciary duties to the fund; (ii) be overseen by a board of directors, that also has fiduciary duties to the fund; and (iii) make certain periodic disclosures and bear liability for material omissions and misstatements.