Paul, Weiss

Client Memorandum

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Q2 2025 U.S. Legal & Regulatory Developments

In This Issue:

The following is our summary of significant U.S. legal and regulatory developments during the second quarter of 2025 of interest to Canadian companies and their advisors.

SEC Soliciting Comments on “Foreign Private Issuer” Definition and Exemptions

On June 4, 2025, the U.S. Securities and Exchange Commission (the “SEC”) issued a concept release soliciting comments on whether it should amend the definition of “foreign private issuer” (“FPI”).

In the release, the SEC summarized findings from its recent review of FPIs filing on Form 20-F, expressing concerns about recent changes to their composition, primarily with respect to their (i) jurisdictions of incorporation and headquarters and (ii) lack of volume of trading outside of the United States. In 2003, the most common jurisdiction of incorporation and headquarters for FPIs was Canada, followed by the United Kingdom. As of 2023, the most common jurisdictions of incorporation and headquarters were the Cayman Islands and China, and approximately 55% of FPIs traded almost exclusively in the United States. Given these changes, the SEC is considering whether to modify the FPI definition to address the fact that many FPIs are (i) not subject to robust disclosure requirements and regulatory review and (ii) not trading securities in their home countries. Some of the changes on which the SEC is soliciting feedback include:

- lowering the thresholds for ownership of securities and/or business contacts required to be subjected to U.S. reporting requirements, effectively tightening the FPI definition;
- adding a foreign volume trading requirement and/or a foreign listing requirement to ensure FPIs are subject to meaningful foreign regulation;
- conducting an assessment of foreign jurisdictions’ regulations to determine whether such regulations provide adequate investor protection;

- developing systems of mutual recognition with select foreign jurisdictions; and
- requiring FPIs to be incorporated or headquartered in jurisdictions where the foreign securities authority is a signatory to the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation, Cooperation, and the Exchange of Information ("MMoU") or the Enhanced MMoU.

The SEC is not soliciting comments on changes to the Multijurisdictional Disclosure System (the "MJDS") framework on which many Canadian issuers rely, as the primary concern seems to lie with jurisdictions whose reporting and disclosure requirements are less onerous. Nonetheless, the MJDS is only available to Canadian issuers that are FPIs, so any tightening of the FPI definition may limit the ability of Canadian issuers to continue to rely on the MJDS.

The SEC has requested that comments be submitted no later than September 8, 2025. Comments may be submitted via the SEC's internet comment form at https://www.sec.gov/rules/submitcomments.htm, or by email to rule-comments@sec.gov (the email should include File Number S7-2025-01 in the subject line).

For the SEC's concept release, please see:

- https://www.sec.gov/files/rules/concept/2025/33-11376.pdf

New York's Highest Court Affirms Dismissal of Derivative Action Where Plaintiff Lacked Standing Under Foreign Law

On May 20, 2025, in *Ezrasons, Inc.* v. *Rudd* ("*Ezrasons*"), New York's highest court affirmed dismissal of a shareholder derivative lawsuit against officers and directors of Barclays PLC—a bank holding company incorporated under the laws of England and Wales and headquartered in London. The 6–1 opinion held that plaintiff lacked standing to pursue derivative claims under English substantive law and rejected plaintiff's argument that the New York state legislature intended to bestow standing on all shareholders of foreign corporations to file derivative lawsuits in New York. The opinion provides foreign corporations with another arrow in the quiver of defenses available to achieve dismissal of derivative actions at an early stage.

The Court of Appeals Opinion

Writing for the six-judge majority, Judge Anthony Cannataro reaffirmed New York's "longstanding adherence to the internal affairs doctrine," which mandates that "the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation." The court rejected plaintiff's argument that Sections 626 and 1319 of New York's Business Corporation Law (the "BCL")—enacted over 60 years earlier—overrode the internal affairs doctrine. Section 626 specifies procedures for bringing a shareholder derivative action in New York but does so "without displacing the internal affairs doctrine or precluding application of foreign substantive limitations on a particular plaintiff's standing." And Section 1319 simply "sets forth a list of various BCL articles and sections" that apply to foreign corporations doing business in New York. Neither section "clearly manifest[ed] legislative intent to override the internal affairs doctrine as it applies to shareholder derivative standing."

Applying English corporate law pursuant to the internal affairs doctrine, the Court of Appeals agreed that plaintiff lacked standing to sue derivatively and affirmed dismissal. Notably, the court "assume[d]," without deciding, that the registered member requirement was "substantive." Although plaintiff argued at the Court of Appeals that the requirement was "procedural," the argument had not been made below and therefore was not preserved for appellate review.

Implications

The *Ezrasons* decision reaffirms New York's commitment to applying the substantive law of the place of incorporation to litigation impacting internal corporate rights and relationships, including shareholder derivative actions. At the same time, the decision rejects the contention that New York should apply its own laws to all derivative lawsuits involving non-U.S. corporations, which are often subject to more prohibitive prerequisites under the laws of their home countries.

Directors and officers of non-U.S. companies hauled into New York courts to defend shareholder derivative suits thus now have additional support for motions to dismiss where plaintiffs have not satisfied all the prerequisites imposed by the laws of their home country. Directors and officers facing derivative lawsuits should also consider whether additional defenses may be deployed early to secure dismissal, including lack of personal jurisdiction, *forum non conveniens*, and defenses on the merits. Indeed, on the same day that the Court of Appeals decided *Ezrasons*, it also issued a one-paragraph order in

Haussmann v. *Baumann* ("*Haussmann*") affirming dismissal of a *different* derivative suit against the German pharmaceutical company, Bayer AG, on *forum non conveniens* grounds.

Although the Court of Appeals did not shut the door to derivative lawsuits against non-U.S. companies, the *Ezrasons* opinion rejects recent efforts to transform New York courts into an open forum for shareholder derivative lawsuits against non-U.S. companies. The *Ezrasons* opinion, coupled with the short order in *Haussmann*, reflects an increased skepticism of New York courts to foreign derivative lawsuits filed in the state.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/new-york-s-highest-court-affirms-dismissal-of-derivative-action-where-plaintiff-lacked-standing-under-foreign-law

For the State of New York Court of Appeals' opinion in *Ezrasons, Inc.* v. *Rudd*, please see:

- https://www.uschamber.com/assets/documents/Opinion-Ezrasons-v.-Rudd-N.Y.-Court-of-Appeals.pdf

For the State of New York Court of Appeals' opinion in *Haussmann* v. *Baumann*, please see:

- https://www.uschamber.com/assets/documents/Opinion-Haussmann-v.-Baumann-N.Y.-Court-of-Appeals.pdf

DOJ Antitrust Official Discusses Merger Enforcement Policy

On June 4, 2025, Deputy Assistant Attorney General for Antitrust Bill Rinner outlined the position of the current administration regarding several areas of merger enforcement in a speech to the George Washington University Competition and Innovation Lab Conference. Highlights from Mr. Rinner's speech include:

Merger remedies. The overarching criteria for merger settlements is that "they must be strong, robust, and provide great confidence in their ability to protect competition."

- The U.S. Department of Justice (the "DOJ") will strongly prefer "structural remedies"—that is, those that resolve competitive concerns by requiring parties to divest overlapping businesses.
- This is in contrast to so-called "behavioral remedies" that would govern the parties' ongoing conduct, which are generally disfavored by the DOJ. However, Mr. Rinner indicated that "there may be times in which limited behavioral remedies buttress genuine structural relief."
- Divestiture buyers should have "incentive and ability to replace lost competition in every dimension, including product or service quality."

Merger review process. The DOJ will take action where parties fail to comply with the requirements set forth in the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act"). In particular, the DOJ "will seek judicial sanctions where parties systematically abuse legal professional privilege or recklessly disregard professional duties by withholding or altering documents required by the HSR Act."

- The DOJ will not send what Mr. Rinner termed "'scarlet' warning letters." The prior administration had a practice of sending letters informing parties that they close their deal at peril of a subsequent antitrust investigation and lawsuit to unwind the merger. Mr. Rinner noted that the law provides for post-consummation challenges, and if the DOJ "declines to bring an enforcement action, there is no need to" inform parties of this.
- Merger enforcement will be limited to antitrust issues. The DOJ will not seek to use the merger review process to advance non-competition goals.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/doj-antitrust-official-discusses-merger-enforcement-policy

For the Deputy Assistant Attorney General for Antitrust's speech, please see:

- https://www.justice.gov/opa/speech/daag-bill-rinner-delivers-remarks-george-washington-university-competition-and

District Court Holds That "Negative Causation" Defense Bars Section 11 Liability Where Market Absorbs Disclosure Before Stock Price Drops Below IPO Price

On April 10, 2025, a California district court granted summary judgment to defendants in a Section 11 lawsuit based on the issuer's evidence that the market absorbed any impact from a disclosure before its stock price dropped below the initial public offering ("IPO") price nearly two weeks later. The decision helpfully clarifies two important points of law for defendants facing post-offering securities class actions: *first*, that Section 11 plaintiffs cannot recover investment losses based on share price declines above the offering price, and *second*, that defendants are not required to affirmatively identify an alternative cause of a stock price decline to support a negative causation defense.

Background

In September 2021, Freshworks Inc., a software company, held an initial public offering in which it sold 28.5 million shares of its common stock at $36 per share. The company's share price quickly rose following the IPO. Several weeks later, when the company disclosed relatively weak results for 3Q 2021, its share price dropped 14% and 8% on consecutive days, but remained above the IPO offering price. Approximately two weeks later, the company's share price first dropped below its IPO price.

A shareholder brought claims under Section 11 of the Securities Act of 1933, as amended (the "Securities Act"), and alleged that Freshworks' registration statement failed to disclose the company's disappointing interim 3Q financials at the time of the IPO. Freshworks ultimately moved for summary judgment on the grounds that plaintiff could not recover for losses sustained above the $36 IPO price, and that any losses below that threshold were not caused by the alleged omissions in the registration statement.

The District Court's Decision

The district court, Judge Breyer in the Northern District of California, granted defendants' motion for summary judgment and held that no recoverable losses were caused by defendants' alleged omissions. The court agreed with defendants that, as a matter of law, plaintiff could not recover investment losses under Section 11 based on stock drops above the company's IPO price.

The court also credited defendants' uncontested expert evidence that Freshworks' stock traded in an efficient market and, therefore, that the market absorbed any impact from the issuer's post-IPO disclosure in the two weeks between the disclosure and the date when the company's stock price first dropped below the IPO price. Defendants thus proved their "negative causation" defense, i.e., that any investment losses below the IPO price were not caused by the alleged omissions.

Notably, the court rejected plaintiff's argument that the negative causation defense required defendants to affirmatively identify an alternative cause of the stock drop below the IPO price, explaining: "Nowhere in the statute or the case law is there a requirement that the defendant affirmatively prove what caused the decline; all a defendant must show is that the decline was not caused by the alleged misstatement or omission." As a result, any dispute of fact as to what caused the stock price to decline below the offering price was not material—and could not prevent summary judgment—because plaintiff had not offered any evidence to dispute defendants' expert's conclusion that the decline was not caused by the alleged omissions.

Implications

The decision joins a growing consensus that the plain language of Section 11 prohibits plaintiffs from recovering for investment losses sustained by stock drops *above* an offering price. The decision also rejects a common argument from plaintiffs that, to establish a negative causation defense, defendants must prove not only that their alleged misrepresentations were *not* the cause of a stock drop, but also affirmatively prove what *was* the cause of the stock drop. Issuers facing Section 11 lawsuits following a public offering should carefully review their stock price movement around the time of the offering and the alleged truthful disclosure to see if the arguments or defenses that persuaded the district court in this case may apply.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-holds-that-negative-causation-defense-bars-section-11-liability-where-market-absorbs-disclosure-before-stock-price-drops-below-ipo-price

For the district court's opinion in *Sundaram* v. *Freshworks Inc.*, please see:

- https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_22-cv-06750/pdf/USCOURTS-cand-3_22-cv-06750-4.pdf

District Court Concludes Section 11 Liability "Likely Foreclose[d]" For Companies Going Through Direct Public Listing

On April 4, 2025, a federal district court in Colorado dismissed a Section 11 claim arising out of a direct listing and concluded that recent Supreme Court precedent "likely forecloses Section 11 liability in the direct listing context" altogether. The court applied the Supreme Court's unanimous decision in *Slack Technologies, LLC* v. *Pirani* ("*Slack*"), which requires that a Section 11 plaintiff plead and prove that it purchased shares traceable to the registration statement it claims is materially misleading. Notwithstanding plaintiffs' creative legal theories and plea for an opportunity to prove traceability through discovery, the district court held that plaintiffs could not plausibly allege that the shares they purchased were issued pursuant to the allegedly deficient registration statement because both registered and unregistered shares of the issuer's stock were available at the time of the direct listing. This decision demonstrates that, in the wake of the Supreme Court's decision, Section 11 plaintiffs will be held to a strict tracing requirement, which may effectively insulate companies that go public through a direct listing from Section 11 liability.

Background: The Direct Listing

The lawsuit, *Cupat* v. *Palantir Technologies, Inc.*, concerned Palantir Technologies, Inc. ("Palantir"), a software company that went public through a direct listing in September 2020. A direct listing is different from a traditional IPO in several respects. In an IPO, a company files a registration statement to issue new shares and unregistered shares (such as those owned by company insiders) are "locked up" and cannot be sold on an exchange for a period of time. By contrast, in a direct listing, a company files a registration statement to permit existing shareholders to publicly sell their shares, and both registered and unregistered shares are immediately tradeable. When Palantir went public by way of direct listing, approximately 53% of the shares available for trading were registered under the direct listing registration statement, while the remaining shares were exempt from registration under SEC rules.

After Palantir's share price declined, a putative class of shareholders sued, alleging that defendants misled the market about the company's growth prospects. Among other claims, plaintiffs alleged that Palantir made misleading statements in its registration statement in violation of Section 11 of the Securities Act.

The District Court's Dismissal Decision

The district court granted defendants' motion to dismiss the Section 11 claim. The court acknowledged *Slack*'s requirement that a Section 11 plaintiff "plead and prove that he purchased shares traceable to the allegedly defective registration statement," but noted that the Supreme Court "did not assess whether any specific allegations were sufficient to plead traceability, nor what evidence is sufficient to prove it."

Plaintiffs sought to satisfy the tracing requirement by alleging that (i) the probability that plaintiffs "purchased at least one registered share is so high as to constitute a legal certainty"; (ii) they would be able to prove traceability with appropriate discovery; and (iii) "any unregistered shares they purchased should be deemed registered on an integrated offering theory." The court rejected each of these theories. Plaintiffs identified no authority permitting them to proceed on a Section 11 claim on a probabilistic tracing theory or to engage in discovery to establish Section 11 standing. To the contrary, and consistent with decisions from the First and Ninth Circuits, the court reasoned that a Section 11 plaintiff "must plead facts supporting a plausible inference that its shares are traceable, not simply facts supporting a plausible inference that its shares are probably traceable to the challenged registration statement." The court also rejected plaintiffs' integrated offering allegations, which sought to "make an end-run around what the Supreme Court has suggested is a strict tracing requirement." As the court explained, the integrated offering doctrine applies when an issuer seeks to avoid registration regulations by dividing what is effectively a single offering into multiple offerings; here, however, the issuer conducted only one offering, albeit via direct listing.

Although the court acknowledged that its decision "produces a harsh result" because it "likely forecloses Section 11 liability in the direct listing context," it concluded that its ruling is consistent with *Slack*'s strict tracing requirement, even if it does create a potential "loophole" for direct listings.

Implications

The decision confirms that *Slack*'s strict tracing requirement may effectively insulate companies that go public through a direct listing from Section 11 liability. The decision further suggests that nothing short of chain-of-title allegations will suffice to plead traceability, posing a significant challenge to plaintiffs seeking to plead a Section 11 claim arising out of a direct listing. The decision may also have implications in other circumstances where tracing shares to a particular registration statement is difficult, such as where unregistered shares enter the market after an IPO lockup period expires, or where there have been multiple offerings pursuant to multiple registration statements. Ultimately, this decision and others interpreting *Slack* may make direct listings a more attractive avenue for companies that are looking to go public, as a direct listing may reduce associated litigation exposure.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-concludes-section-11-liability-likely-foreclose-d-for-companies-going-public-through-direct-listing

For the district court's opinion in *Cupat* v. *Palantir Technologies, Inc.*, please see:

- https://cases.justia.com/federal/district-courts/colorado/codce/1:2022cv02384/218281/54/0.pdf?ts=1679489509

For the full text of our memorandum analyzing *Slack Technologies, LLC* v. *Pirani*, please see:

- https://www.paulweiss.com/insights/client-memos/supreme-court-limits-who-may-sue-under-section-11-of-the-securities-act

District Court Dismisses Section 11 Suit on Traceability Grounds Where IPO Allowed Sale of Certain Preexisting Shares to the Public

On June 23, 2025, the District Court for the Northern District of California dismissed a Section 11 claim where non-executive employees of the issuer were permitted to sell a portion of their preexisting shares to the public in connection with the company's IPO. The court applied the U.S. Supreme Court's unanimous decision in *Slack*, holding that plaintiffs had not adequately alleged that the shares they purchased were issued pursuant to the allegedly deficient registration statement because both registered and unregistered shares of the issuer's stock were available at the time of the IPO. This decision also reinforces the strict tracing requirement for Section 11 plaintiffs—even at the pleading stage. And while courts have previously noted that *Slack*'s rigorous traceability requirement likely forecloses Section 11 liability in the direct listing context, as discussed above, this opinion suggests those same protections—and reduced litigation exposure—extend to companies that go public through a traditional IPO, so long as registered and unregistered shares commingle at or near the time of the offering.

Background: The IPO

The lawsuit, *Shnayder* v. *Allbirds*, concerned Allbirds, Inc., a retail footwear company that went public through an initial public offering in November 2021. The registration statement filed in connection with the IPO provided that "beginning at the commencement of trading of our Class A common stock on the first trading day on which our common stock is listed on Nasdaq and through the seventh consecutive trading day thereafter, any of our current employees (but excluding current executive officers and directors) may sell in the public market up to 25% of the shares of our common stock." After Allbirds' share price declined, a putative class of shareholders sued, alleging that defendants misled the market about Allbirds' business strategy. Among other claims, plaintiffs alleged that Allbirds made misleading statements in its registration statement in violation of Section 11 of the Securities Act of 1933.

The District Court's Dismissal Decision

The district court granted defendants' motion to dismiss the Section 11 claim. The court acknowledged *Slack*'s requirement that Section 11 plaintiffs must plead sufficient facts to establish that they "purchased shares traceable to the allegedly defective registration statement." Plaintiffs argued that they had sufficiently alleged that their shares were traceable to the registration statement because "Allbirds issued shares in a single offering under one registration statement." The court rejected that contention because certain employees were permitted to sell preexisting shares not subject to registration requirements during the first seven days of public trading, meaning that "by definition not all of the company's shares will be directly traceable" to the registration statement. Accordingly, plaintiffs' "cursory allegation" did not suffice, and "further factual enhancement [was] needed" to adequately plead statutory standing. The court accordingly dismissed the Section 11 claims, but granted plaintiffs leave to amend "if they can in good faith add allegations that their shares are directly traceable" to the registration statement.

Implications

This decision further extends *Slack*'s reasoning to traditional IPOs, suggesting that companies that allow certain employees to sell preexisting, unregistered shares in an IPO may frustrate investors' ability to trace their shares to an IPO registration statement, and, accordingly, reduce associated litigation exposure. The decision may have further implications at the class certification stage, where the ability to trace shares to the IPO may limit the class of investors with Section 11 claims to those who purchased stock prior to the commingling of registered and unregistered shares, such as at the end of an initial lock-up period for company insiders.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-dismisses-section-11-suit-on-traceability-grounds-where-ipo-allowed-sale-of-certain-preexisting-shares-to-the-public

DOJ Accepts Divestitures to Resolve Concerns With Technology Merger

On June 2, 2025, the DOJ announced that it resolved concerns that the $1.5 billion merger of Spirent, Inc. and Keysight Technologies Inc. would harm competition in three semiconductor and light simulation software markets. Spirent will be required to divest certain businesses that overlap horizontally with Keysight businesses it is acquiring in the merger.

According to the complaint, "Keysight and Spirent are the dominant providers of high-speed ethernet testing equipment, network security testing equipment, and RF channel emulators in the United States. Their proposed merger would extinguish the competition between them and would presumptively result in a substantial lessening of competition in each market." Each market is "already highly concentrated and would become significantly more concentrated after the proposed merger."

The required divestitures include "the high-speed ethernet, network security, and channel emulation business lines of Spirent, Spirent TestCenter, and" several "product lines and projects" and is being made to Viavi Solutions, Inc. Assistant Attorney General for Antitrust Abigail Slater noted that the consent order is a "structural solution [that] preserves competition," and the divestiture is being made to "an established and innovative" company.

The settlement is subject to review by the United States District Court for the District of Columbia pursuant to the Tunney Act which, at a high level, requires that the settlement is in the public interest.

The development is significant because it marks a clear change from the prior administration's policy which favored litigation over settlement. This indicates that antitrust agency leadership will consider and approve structural merger remedies where appropriate.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/doj-accepts-divestitures-to-resolve-concerns-with-technology-merger

For the DOJ's announcement, please see:

- https://www.justice.gov/opa/pr/justice-department-requires-keysight-divest-assets-proceed-spirent-acquisition

California State Appellate Court Affirms Dismissal of Securities Act Claims Against Issuer and Underwriters Based on Federal Forum Provision

On April 23, 2025, a California state appellate court affirmed the dismissal of claims brought under sections 11 and 15 of the Securities Act against an issuer and its underwriters based on a federal forum provision ("FFP") found in the issuer's articles of incorporation. The appellate court's decision adds authoritative support to past trial court opinions enforcing FFPs (the "Previous Decisions"), and affirms that underwriters have standing to enforce FFPs, both of which are welcome news for companies seeking to eliminate costly, uncertain, and often duplicative Securities Act litigation in state courts.

Background

In November 2021, Rivian Automotive, Inc., a manufacturer of electric vehicles, held an initial public offering. Plaintiffs filed a putative class action in California state court in February 2023 asserting Securities Act claims against Rivian and its underwriters, alleging that the IPO registration statement contained materially misleading information. Rivian moved to dismiss based on the FFP in its charter, which provides that "the federal district courts of the United States of America shall, to the fullest extent permitted by law, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933." The IPO underwriters filed a joinder to the motion to dismiss. The trial court granted the motion to dismiss for all defendants on the basis of the FFP, and plaintiffs appealed.

The Appellate Court Decision

A three-judge panel for California's Fourth Appellate District Court unanimously affirmed the dismissal and rejected all four arguments advanced by Plaintiffs. *First*, the court found that the FFP did not violate the "anti-removal provision" of the Securities Act because the issuer did not seek removal to federal court—it sought dismissal. *Second*, the Delaware law enabling FFPs did not violate the supremacy clause or commerce clause of the United States Constitution because it does not "preclude[] a plaintiff from bringing a [Securities Act] claim in state court," but instead allows corporations and shareholders to agree to forum selection provisions that limit such claims to federal courts. *Third*, the FFP was valid and enforceable under California law, which favors and generally enforces mandatory forum selection clauses. *Fourth*, the IPO underwriters had standing to enforce the FFP because the allegations against them and the issuer were "so intertwined that they cannot be separated," and principles of judicial economy favor enforcing forum selection provisions by a noncontracting party "closely related to the contractual relationship."

Implications

In the past five years, corporations have increasingly adopted FFPs to avoid the risk and expense of defending Securities Act claims in state courts and courts have consistently enforced such provisions. Although the number of Securities Act claims brought in state courts has declined in recent years, such claims still arise, with the majority of complaints being filed in California, according to a 2024 study by Cornerstone Research. This unanimous appellate decision provides authoritative support for the enforceability of FFPs in a jurisdiction that has been favored by the plaintiffs' bar and helpfully clarifies that underwriters may enforce an FFP despite not being parties to a corporate charter. This continued trend is good news for corporations and another helpful step on the path to restoring Securities Act lawsuits to federal courts and reducing litigation costs and insurance premiums.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/california-state-appellate-court-affirms-dismissal-of-securities-act-claims-against-issuer-and-underwriters-based-on-federal-forum-provision

For the California Court of Appeals' opinion in *Bullock* v. *Rivian Automotive*, please see:

- https://www4.courts.ca.gov/opinions/nonpub/G063033.PDF

For our memorandums discussing the Previous Decisions, please see:

- https://www.paulweiss.com/insights/client-memos/california-state-court-enforces-federal-forum-provision-and-dismisses-securities-act-claims
- https://www.paulweiss.com/insights/client-memos/a-second-california-state-court-enforces-federal-forum-provision-and-dismisses-securities-act-claims-against-all-defendants-including-underwriters
- https://www.paulweiss.com/insights/client-memos/new-york-state-court-enforces-federal-forum-provision-and-dismisses-securities-act-claims-against-all-defendants-including-underwriters

District Court Holds Securities Act Claims Are Time-Barred Based on Date Crypto Assets Are First "Offered," Not Distributed

On March 25, 2025, a California district court granted a motion to dismiss a class action lawsuit asserting claims brought against a crypto-issuer under the Securities Act, ruling that the claims were time-barred by the three-year statute of repose. The decision clarifies that a crypto asset is considered to be "offered," for purposes of the statute of repose, when an issuer first solicits purchasers, even if there is a significant delay before the crypto asset is distributed to investors.

Background

Dfinity USA Research LLC ("Dfinity") was engaged in the development of a blockchain-based, decentralized version of the internet known as the "Internet Computer." In February 2017, Dfinity held an initial crowdsale of ICP, a crypto asset and the native utility token of the Internet Computer, to raise donations for the network's development. Although ICP tokens did not yet exist, participating "donors" were promised future ICP tokens proportional to their "donations." In May 2021, more than four years later, Dfinity held an initial coin offering and distributed ICP tokens to donors who had participated in the February 2017 crowdsale.

Following a substantial decline in the value of ICP shortly after the initial coin offering, a putative class of ICP purchasers filed a lawsuit against the crypto-issuer. Among other claims, plaintiffs alleged that Dfinity unlawfully offered to sell securities without a registration statement, in violation of Sections 5 and 12(a)(1) of the Securities Act. Dfinity moved to dismiss and argued, among other things, that the Securities Act claims were time-barred by the three-year statute of repose.

The District Court's Decision

The district court granted defendants' motion to dismiss and held that the three-year repose period begins when the crypto asset is "first bona fide offered." Although plaintiffs argued that no ICP tokens were issued, sold or made available for trading until the initial coin offering in May 2021—less than three years before the class action was filed—the court emphasized that bona fide offers require only "clear objective attempts to secure purchasers" and do not require an actual transfer of ownership. The court therefore reasoned that the repose clock began during the initial crowdsale in February 2017, more than three years before the lawsuit was filed—even though this occurred several years before the token was distributed and plaintiffs suffered investment losses.

Note that, although defendants indicated their intent to "vigorously contest" that the crypto assets at issue (ICP tokens) were securities, that issue was preserved for a later stage of litigation and the court had no occasion to consider or determine whether ICP tokens were securities in granting the motion to dismiss.

Implications

The decision clarifies that, for purposes of the Securities Act's statute of repose, an offer occurs at an issuer's first bona fide attempt to secure purchasers, even if significant time elapses before ownership is actually transferred. This may provide particular comfort for issuers of crypto assets, who sometimes experience years-long intervals between a first fundraising round and the minting and first distribution of an associated crypto asset. Under the reasoning of this opinion, Securities Act claims arising from such offers are time-barred three years after the initial solicitation of investors, even if the investors do not receive the assets or suffer financial harm until a later date.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/district-court-holds-securities-act-claims-are-time-barred-based-on-date-crypto-assets-are-first-offered-not-distributed

For the district court's opinion in *Valenti* v. *Dfinity USA Research LLC*, please see:

- https://www.govinfo.gov/content/pkg/USCOURTS-cand-3_21-cv-06118/pdf/USCOURTS-cand-3_21-cv-06118-2.pdf

DOJ Announces New Corporate and White-Collar Enforcement Policies and Priorities

On May 12, 2025, the Head of the DOJ's Criminal Division, Matthew R. Galeotti, announced significant changes to the Criminal Division's corporate and white-collar enforcement policies and priorities. Speaking at the Securities Industry and Financial Markets Association, Galeotti stated that the Criminal Division is "turning a new page on white-collar and corporate enforcement" by "recognizing that law-abiding companies are key to a prosperous America" and prioritizing "the most egregious white-collar crime."

That same day, Galeotti sent the Criminal Division a memorandum entitled "Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime" (the "Memorandum") outlining "the Criminal Division's enforcement priorities and policies for prosecuting corporate and white-collar crimes in the new Administration." The Memorandum emphasizes the need for prosecutors to "avoid overreach that punishes risk-taking and hinders innovation," and calls on prosecutors to abide by three core tenets: focus, fairness, and efficiency.

DOJ's Updated White-Collar Enforcement Policies & Priorities

1. Areas of Focus

The Memorandum states that the "Criminal Division must be laser-focused on the most urgent criminal threats to the country." And that doing so requires prioritizing "investigating and prosecuting corporate crime in areas that will have the greatest impact in protecting American citizens and companies and promoting U.S. interests."

a. New Criminal Enforcement Priorities

The Memorandum announces new white-collar enforcement priorities, stating that "the Criminal Division will prioritize investigating and prosecuting corporate crime in areas that will have the greatest impact in protecting American citizens and companies and promoting U.S. interests."

First, the Memorandum instructs prosecutors to prioritize investigations of "[d]ishonest actors [who] exploit government programs, funded by American taxpayers, to enrich themselves through waste, fraud, and abuse." This includes corporations and individuals who defraud "Medicare, Medicaid, defense spending, and other programs intended to assist vulnerable citizens." Other forms of fraud and abuse to be prioritized under the new guidance include the following:

- "[H]ealth care fraud and federal program and procurement fraud that harm the public fisc";
- "Fraud perpetrated through [Chinese variable interest entities or VIEs], including, but not limited to, offering fraud, 'ramp and dumps,' elder fraud, securities fraud, and other market manipulation schemes"; and
- "Fraud that victimizes U.S. investors, individuals, and markets including, but not limited to, Ponzi schemes, investment fraud, elder fraud, servicemember fraud, and fraud that threatens the health and safety of consumers."

Second, the Memorandum notes that the DOJ will prioritize investigations of "threats to the U.S. economy, American competitiveness, and our national security." The Memorandum highlights "[t]rade and customs fraudsters, including those who commit tariff evasion" and notes that "[p]rosecuting such frauds will ensure that American businesses are competing on a level playing field in global trade and commerce." Additional conduct with national security implications selected for prioritization include the following:

- "[T]hreats to the U.S. financial system by gatekeepers, such as financial institutions and their insiders that commit sanctions violations or enable transactions by Cartels, [transnational criminal organizations] ("TCOs"), hostile nation-states, and/or foreign terrorist organizations";
- "Material support by corporations to foreign terrorist organizations, including recently designated Cartels and TCOs";
- "Complex money laundering, including Chinese Money Laundering Organizations, and other organizations involved in laundering funds used in the manufacturing of illegal drugs"; and
- "Bribery and associated money laundering that impact U.S. national interests, undermine U.S. national security, harm the competitiveness of U.S. businesses, and enrich foreign corrupt officials."

The inclusion of bribery offenses is particularly notable in light of the Administration's February 10, 2025 Executive Order *Pausing FCPA Enforcement to Further American Economic and National Security*, which required a 180-day pause on all new Foreign Corrupt Practices Act of 1977 ("FCPA") investigations or enforcement actions. The language reinforces that the

Administration intends to continue enforcing the FCPA and its companion statute, the Foreign Extortion Prevention Act, which criminalizes the request, receipt, or acceptance of bribes by foreign officials.

Finally, consistent with the Deputy Attorney General's April 7, 2025 memorandum on digital assets, the Memorandum states that prosecutors should focus on prosecuting crimes (1) involving digital assets that victimize investors and consumers; (2) that use digital assets in furtherance of other criminal conduct; and (3) willful violations that facilitate significant criminal activity. Cases impacting victims, involving cartels, TCOs, or terrorist groups or that facilitate drug money laundering or sanctions evasion shall receive highest priority.

b. Expansion of the Corporate Whistleblower Awards Pilot Program

Consistent with the enforcement priorities identified above, the Memorandum outlines changes to the subject areas covered by the DOJ Corporate Whistleblower Awards Pilot Program. Whereas the prior whistleblower program covered four categories of criminal conduct—including foreign corruption, domestic corruption, healthcare fraud, and certain crimes involving financial institutions—the revised whistleblower program will prioritize six new subject areas as follows:

- "Violations by corporations related to international cartels or transnational criminal organizations, including money laundering, narcotics, Controlled Substances Act, and other violations";
- "Violations by corporations of federal immigration law";
- "Violations by corporations involving material support of terrorism";
- "Corporate sanctions offenses";
- "Trade, tariff, and customs fraud by corporations"; and
- "Corporate procurement fraud."

Whistleblowers who provide the Criminal Division with "original and truthful information about corporate misconduct that results in a successful forfeiture may be eligible for an award." The DOJ calculates potential awards based on the value of any assets that are forfeited to the DOJ, after compensating eligible individual victims and paying other costs associated with the forfeiture, and whistleblowers may receive up to 30% of the first $100 million in net proceeds forfeited and up to 5% of any net proceeds forfeited between $100 million and $500 million.

2. Fairness – Prosecuting Corporations and Individuals

The DOJ's next major change is to the declination guidelines under the CEP. Under the updated CEP, companies that fully cooperate, timely and appropriately remediate, and have no aggravating circumstances will not be required to enter into a criminal resolution. The Memorandum observes that "[i]t is individuals—whether executives, officers, or employees of companies—who commit these crimes, often at the expense of shareholders, workers, and American investors and consumers." Thus, "[i]t is critical to American prosperity to promote policies that acknowledge law-abiding companies and companies that are willing to learn from their mistakes and provide those companies with transparency from the Department."

Under the revised CEP, the Criminal Division will decline to prosecute companies for criminal conduct when the following factors are met:

- "The company voluntarily self-disclosed the misconduct to the Criminal Division";
- "The company fully cooperated with the Criminal Division's investigation";
- "The company timely and appropriately remediated the misconduct"; and
- "There are no aggravating circumstances related to the nature and seriousness of the offense, egregiousness or pervasiveness of the misconduct within the company, severity of harm caused by the misconduct, or criminal adjudication or resolution within the last five years based on similar misconduct by the entity engaged in the current misconduct."

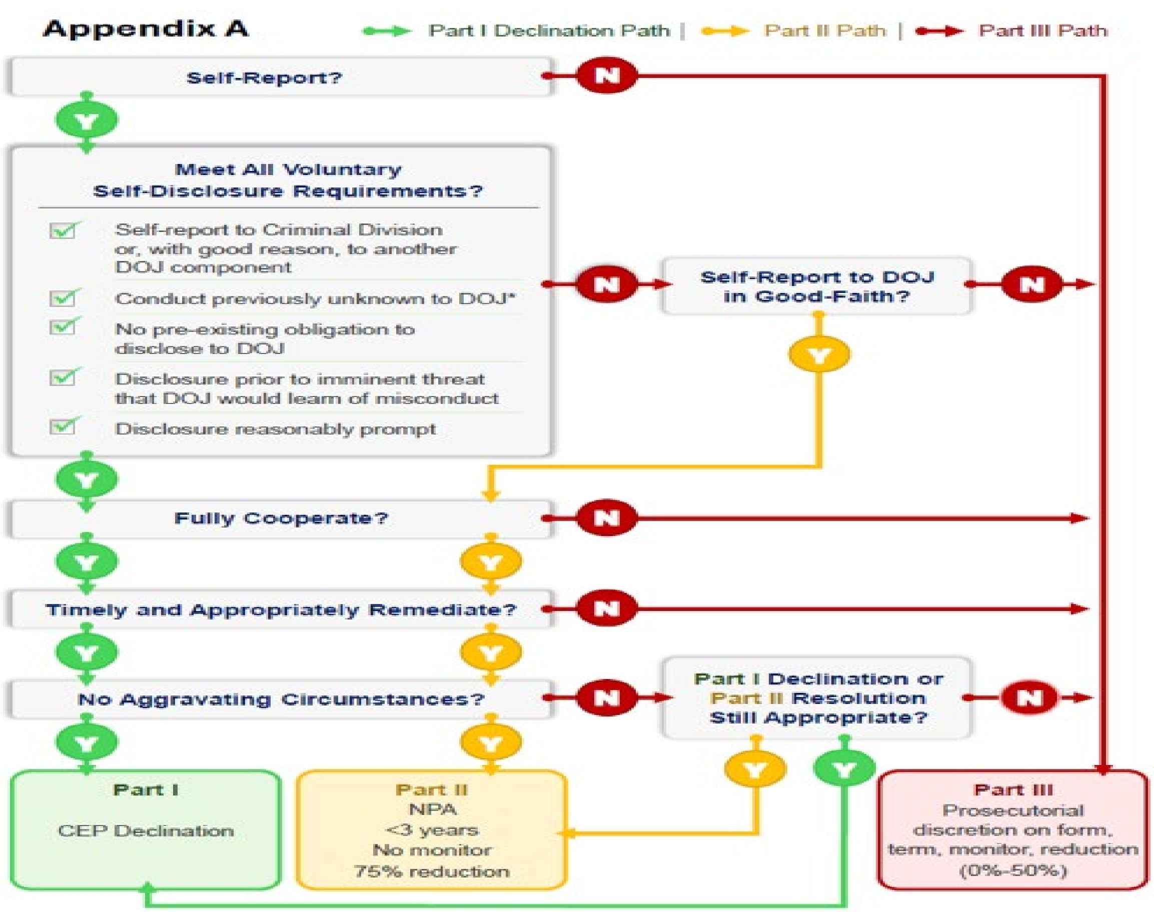
If there are aggravating circumstances, prosecutors retain the discretion to recommend a declination "based on weighing the severity of those circumstances and the company's cooperation and remediation." The CEP also states that, as "part of the CEP declination, the company will be required to pay all disgorgement/forfeiture as well as restitution/victim compensation payments resulting from the misconduct at issue." Similar to the prior CEP, all declinations under the revised CEP will be made public.

The policy now also states that if a company "fully cooperated and timely appropriately remediated but it is ineligible for a declination" because either "(1) it acted in good faith by self-reporting the misconduct but that self-report did not qualify as a voluntary self-disclosure . . . or (2) it had aggravating factors that warrant a criminal resolution, the Criminal Division shall":

- "Provide a [non-prosecution agreement]—absent particularly egregious or multiple aggravating circumstances";
- "Allow a term length of fewer than three years";
- "Not require an independent compliance monitor"; and
- "Provide a reduction of 75% off the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range."

Finally, "prosecutors maintain discretion" if a company is not eligible for any of the above because it met some but not all of the first four factors, to "determine the appropriate resolution including form, term length, compliance obligations, and monetary penalty."

These changes are mapped out in an appended flow chart that the DOJ created:



3. Efficiency: Streamlining Corporate Investigations

The DOJ's final pronouncement is to focus on streamlining corporate investigations by making investigations more efficient and narrowly tailoring the imposition of independent compliance monitors. The Memorandum states that while prosecuting "white-collar crime is essential to the Department's efforts[,] . . . federal investigations into corporate wrongdoing can be costly and intrusive for businesses, investors, and other stakeholders, many of whom have no knowledge of, or involvement in, the misconduct at issue. Federal investigations can also significantly interfere with day-to-day business operations and cause reputational harm that may at times be unwarranted." Accordingly, moving forward, "[i]ndependent compliance monitors must only be imposed when they are necessary, *i.e.*, when a company cannot be expected to implement an effective compliance program or prevent recurrence of the underlying misconduct without such heavy-handed intervention." The DOJ also directed its prosecutors to "move expeditiously to investigate cases and make charging decisions" and "take all reasonable steps to minimize the length and collateral impact of their investigations, and to ensure that bad actors are brought to justice swiftly and resources are marshaled efficiently."

Accordingly, the DOJ announced that it will prepare a "new monitor selection memorandum," which: "(1) clarifies the factors that prosecutors must consider when determining whether a monitor is appropriate and how those factors should be applied; and (2) ensures that when a monitor is necessary, prosecutors narrowly tailor and scope the monitor's review and mandate to address the risk of recurrence of the underlying criminal conduct and to reduce unnecessary costs." The DOJ further notes that, in line with these principles, the Criminal Division "has undertaken an individualized review of all existing monitorships to make case specific determinations of whether each monitor is still necessary."

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/doj-announces-new-corporate-and-white-collar-enforcement-policies-and-priorities

DOJ FCPA Guidelines End the Enforcement Pause and Shift Focus to U.S. Interests

On June 9, 2025, the DOJ released its Guidelines for Investigations and Enforcement of the FCPA (the "Guidelines") setting forth the DOJ's evaluation criteria for FCPA actions and bringing to an end the FCPA enforcement pause established by the Administration's February 10, 2025 Executive Order Pausing Foreign Corrupt Practices Act Enforcement to Further American Economic and National Security (the "FCPA Order"). In a speech on June 10, DOJ Criminal Division Chief Matthew R. Galeotti framed the Guidelines as a set of "common-sense principles" under which "conduct that genuinely impacts the United States or the American people is subject to potential prosecution by U.S. law enforcement" while "[c]onduct that does not implicate U.S. interests should be left to our foreign counterparts or appropriate regulators." The overarching theme of the Guidelines is that FCPA investigations and enforcement actions must serve U.S. interests, as measured by four key criteria: (1) safeguarding fair opportunities for U.S. companies; (2) protecting U.S. national security interests; (3) addressing serious misconduct; and (4) prioritizing corruption with a link to cartels or TCOs.

The Guidelines are broadly in line with the Administration's prior pronouncements on the FCPA, mapping out a more business-friendly approach to FCPA enforcement by calling on prosecutors to exercise caution before attributing individual misconduct to corporate entities. Specifically, the Guidelines state that "prosecutors shall focus on cases in which individuals have engaged in misconduct and not attribute nonspecific malfeasance to corporate structures." During his remarks, Mr. Galeotti explained this aspect of the Guidelines as directing focus on "specific misconduct of individuals, rather than collective knowledge theories." Additionally, the Guidelines explicitly direct prosecutors to consider the disruption to lawful business and the impact on a company's business throughout an investigation—establishing the need to consider "collateral consequences" throughout an investigation and "not just at the resolution phase." They also counsel against penalizing routine business practices and *de minimis* payments and encourage more accelerated investigation timelines.

Background

The Guidelines were issued 120 days into the 180-day FCPA enforcement pause established by the FCPA Order, which also mandated a review of FCPA enforcement matters and the development of FCPA guidelines that "prioritize American interests, American economic competitiveness with respect to other nations, and the efficient use of Federal law enforcement resources." The Guidelines are the culmination of this months-long process and will shape FCPA case evaluations going forward.

The Guidelines

When evaluating whether to pursue FCPA investigations and enforcement actions, prosecutors must now consider the following factors, which the DOJ explains is a non-exhaustive list.

1. **Protecting Competition for American Companies Operating Abroad**

The Guidelines build on a common theme in U.S. Attorney General Pam Bondi's Memorandum on the Total Elimination of Cartels and Transnational Criminal Organizations (the "Bondi Memorandum") and the FCPA Order: protecting competition for American companies operating abroad. The Guidelines reference the penalties and scope of past FCPA enforcement actions and note that the "most blatant bribery schemes have historically been committed by foreign companies." The Guidelines caution that prosecutors should not "focus on particular individuals or companies on the basis of their nationality, but by identifying and prioritizing . . . conduct that most undermines these principles," including activity that distorts markets, undermines the rule of law and disadvantages those companies playing by the rules. The Guidelines advise prosecutors to consider:

- Whether the alleged misconduct deprived specific and identifiable U.S. entities of fair access to compete and/or resulted in economic injury to specific and identifiable American companies or individuals.

- Whether, for Foreign Extortion Prevention Act ("FEPA") enforcement, specific and identifiable U.S. entities or individuals have been harmed by foreign officials' demands for bribes.

2. **Prioritizing Industries with a National Security Interest**

The Guidelines explain that certain industries, including defense, intelligence and critical infrastructure, implicate national security interests that should be factored into the FCPA enforcement calculus. The DOJ instructs prosecutors to "focus on the most urgent threats to U.S. national security resulting from the bribery of corrupt foreign officials involving key infrastructure or assets," suggesting that companies in certain sectors may be more exposed to FCPA scrutiny should they get caught in the crosshairs of a government investigation.

3. **Prioritizing Investigations of Serious Misconduct**

The Guidelines instruct prosecutors to avoid penalizing companies for conduct considered to be "routine business practices" or "the type of corporate conduct that involves de minimis or low-dollar, generally accepted business courtesies." The Guidelines suggest that such leniency extends beyond the facilitation payments exception and affirmative defenses for reasonable and bona fide payments. While the Guidelines do not establish boundaries for "routine business practices" and "generally accepted courtesies," the DOJ appears to suggest a higher tolerance for hospitality expenditures and other business-related expenditures absent aggravating circumstances, such as a link to cartels/TCOs or a national security interest.

The Guidelines state that prosecutors should instead focus their resources on matters involving more serious conduct:

- Whether the alleged misconduct "bears strong indicia of corrupt intent tied to particular individuals," including matters involving "substantial bribe payments, proven and sophisticated efforts to conceal bribe payments, fraudulent conduct in furtherance of the bribery scheme, and efforts to obstruct justice."

But even serious conduct is not an automatic trigger for an FCPA enforcement action, as prosecutors must also consider whether their foreign counterparts have the capacity and will to handle the matter:

- Whether it is likely that an "appropriate foreign law enforcement authority is willing and able to investigate and prosecute the same alleged misconduct."

4. **Continued Focus on Conduct Implicating Cartels and TCOs**

Consistent with the Bondi Memorandum, the Guidelines instruct prosecutors to prioritize cases with a cartel/TCO nexus, noting that cartels have "infiltrat[ed] into foreign governments across the Western Hemisphere." Prosecutors are advised to consider the following factors:

- Whether the alleged misconduct is associated with the criminal operations of cartels or TCOs.
- Whether the alleged misconduct utilizes money launderers or shell companies that engage in money laundering for cartels or TCOs.
- Whether the alleged misconduct is linked to employees of state-owned entities or other foreign officials who have received bribes from cartels or TCOs.

Case Initiation and Coordination

The Bondi Memorandum imposed a 90-day suspension of the Justice Manual requirements that FCPA/FEPA cases be authorized by the Criminal Division and conducted by Fraud Section trial attorneys, a policy change that lapsed nearly a month ago and is not addressed in the Guidelines. While the Guidelines do require that future FCPA matters be authorized by the Assistant Attorney General for the Criminal Division or a more senior DOJ official, such cases will once again be coordinated centrally by the Fraud Section's FCPA Unit.

Resource Considerations

Media reports suggest that the DOJ FCPA Unit has shrunk to half of its size since the start of the year, dropping from 32 prosecutors in January to roughly 15 prosecutors by June. While some prosecutors have left the DOJ to pursue other opportunities, others have transferred to other components, including accepting details in the Fraud Section's Healthcare Fraud Unit and may ultimately boomerang back to the FCPA Unit. At the same time, the DOJ has reportedly "closed nearly half of its foreign-bribery investigations to align with new guidelines" and plans to authorize new investigations, including matters arising from tips submitted during the period of the FCPA enforcement pause. Thus, while the FCPA Unit appears to be at its leanest in over a decade, it is unburdened by legacy investigations that may have distracted prosecutors from higher-priority matters.

Conclusion

The Guidelines do confirm the DOJ's commitment to enforcing the FCPA, consistent with the Administration's policy views and priorities, and provide guidance on how prosecutors are to evaluate such actions going forward. Here are some key takeaways for companies and their advisors:

No Compliance Rollbacks: Companies are advised to avoid any rollbacks of their FCPA compliance programs, and should continue to reinforce their commitment to compliance through trainings and messaging. Companies should keep in mind where choosing not to self-report that certain FCPA statutes of limitations exceed a single Presidential term, and even if an issue that arises internally may fall outside the new priorities, a different Administration may adopt a different approach to enforcement.

Greater Scrutiny for Companies Operating in Cartel/TCO Hotspots: We anticipate greater FCPA scrutiny for multinational companies operating in Mexico and other Latin American countries with reputations for cartel/TCO activity, and such companies would be well advised to allocate more resources to monitoring compliance in those regions.

Greater Scrutiny When National Security Interests Are at Play: We also anticipate increased FCPA scrutiny for multinational companies operating in sectors with national security implications, including defense, intelligence and critical infrastructure but also mining/extraction (especially companies involved in rare earth metals) and sensitive technologies (e.g., artificial intelligence and semiconductor chips). The risks appear to be more acute for non-U.S. companies with U.S. touchpoints that are perceived as using bribery to undermine the competitiveness of American companies in international markets.

Potential Adjustment to Voluntary Self-Disclosure Calculus: The Guidelines suggest that the DOJ will be less inclined to prosecute companies for conduct considered to be "routine business practices" or "generally accepted business courtesies," and caution prosecutors against attributing "nonspecific malfeasance [by individuals] to corporate structures." While the DOJ continues to encourage self-reporting, as explored in our memorandum titled "DOJ Announces New Corporate and White-Collar Enforcement Policies and Priorities," the latest guidance may cause some companies to reevaluate their position on voluntary disclosures.

Potential Increase in Whistleblower Complaints Targeting Industry Peers: U.S. companies that believe that they are handicapped overseas by competitors willing to engage in bribery/corruption may have a sympathetic ear at the DOJ's Bond Building, where the FCPA Unit is based. We anticipate more companies coming forward to the DOJ with whistleblower claims in an effort to address concerns about unfair competition abroad.

Raising Collateral Consequences of Investigations: Given the Guidelines' express directive that prosecutors consider disruptions to lawful business throughout an investigation and not just at the resolution phase, U.S. companies under DOJ investigation should document how those investigations are impacting their operations and share those findings with DOJ.

Related Enforcement Actions: It is not yet clear whether the SEC will adopt these Guidelines or how the SEC will otherwise fit into the new FCPA enforcement framework. It is also unclear the extent to which the DOJ will focus on criminal internal accounting controls and books and records violations going forward.

For the full text of our memorandum, please see:

- https://www.paulweiss.com/insights/client-memos/doj-fcpa-guidelines-end-the-enforcement-pause-and-shift-focus-to-us-interests

For the DOJ's Guidelines for Investigations and Enforcement of the FCPA, please see:

- https://www.justice.gov/dag/media/1403031/dl

For the White House's FCPA Order, please see:

- https://www.whitehouse.gov/presidential-actions/2025/02/pausing-foreign-corrupt-practices-act-enforcement-to-further-american-economic-and-national-security/

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Matthew W. Abbott
+1-212-373-3402
mabbott@paulweiss.com

Andre G. Bouchard
+1- 302-655-4413
abouchard@paulweiss.com

Christopher J. Cummings
+1-212-373-3434
ccummings@paulweiss.com

Adam M. Givertz
+1-212-373-3224
agivertz@paulweiss.com

Ian M. Hazlett
+1-212-373-2562
ihazlett@paulweiss.com

Christian G. Kurtz
+1-416-504-0524
ckurtz@paulweiss.com

Audra J. Soloway
+1-212-373-3289
asoloway@paulweiss.com

Stephen C. Centa
+1-416-504-0527
scenta@paulweiss.com

Andrea Quek
+1-416-504-0535
aquek@paulweiss.com

Associate Bryn M. Berry, law clerk Jeremy Jingwei and summer associate Paul E. Buzzelli contributed to this client memorandum.