PAUL HASTINGS

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Public Company Watch

Key Issues Impacting Public Companies

This edition of the Public Company Watch highlights critical updates and regulatory changes affecting public companies. Staying informed on these topics is crucial for effective compliance and strategic planning.

Highlights include:

- **DC Circuit Court of Appeals Rules That Proxy Voting Advice Is Not a ‘Solicitation’:** On July 1, 2025, the U.S. Court of Appeals for the District of Columbia Circuit ended more than five years of uncertainty and confusion by ruling that proxy voting advice issued by proxy advisors is not a “solicitation” under the Securities and Exchange Act of 1934 (the Exchange Act).
- **SEC Roundtable on Executive Compensation:** The SEC hosted a roundtable on executive compensation during which the commissioners, investors, directors, in-house counsel, securities counsel and other experts in the field discussed potential changes to executive compensation disclose requirements.
- **SEC Issues Concept Release on Foreign Private Issuer Eligibility:** The SEC published a concept release soliciting feedback regarding whether and how the definition of foreign private issuer (FPI) should change in light of shifting demographics of FPIs over the past 20 years.
- **DOJ’s M&A Safe Harbor Highlights Importance of Post-Close Due Diligence and Integration:** Corporations and private equity firms can face significant financial, enforcement and reputational risks for past or ongoing misconduct of an acquired entity. A recent DOJ announcement regarding the agency’s decision not to prosecute White Deer Management for violations of U.S. sanctions and export control laws committed by a company White Deer acquired provides important lessons for minimizing such risks.
- **New DOJ FCPA Guidelines Target Cases Linked to US Strategic Interests:** An exploration of U.S. Deputy Attorney General Todd Blanche’s new DOJ FCPA guidelines, including key takeaways for companies.

In This Edition

Presidential Actions

For a compilation of our ongoing commentary of the impacts of the Trump administration on businesses, including with respect to SEC enforcement actions and the One Big Beautiful Bill, please visit Paul Hastings’ Presidential Actions Hub.

SEC Insights

SEC Roundtable on Executive Compensation

On June 26, 2025, the SEC hosted a roundtable focused on evaluating executive compensation disclosure requirements. Investors, directors, in-house counsel, securities counsel, compensation consultants and other experts in the field attended the roundtable alongside SEC Chair Paul Atkins and the other commissioners. The universal theme of the roundtable was the need to simplify executive compensation disclosure, thereby alleviating the burden imposed by the current rules on issuers and adhering more closely to the original congressional mandate while also satisfying the needs of investors.

Overall, there remains a good deal of tension amongst parties regarding what should be done to modernize, simplify and improve the executive compensation rules. The roundtable did not suggest immediate solutions but provided experts a forum to begin the discussion regarding potential reform. The discussion focused on making changes to the following rules:

- **Pay Ratio (Item 402(u)):** The group discussed revisiting the Pay Ratio disclosure rules, including simplifying the rules and limiting them to what was congressional mandated.
- **Pay v. Performance (Item 402(v)):** The group discussed ways to lessen the significant burden of providing pay v. performance disclosure on issuers while making it more usable for investors, including potentially requiring disclosure to be based on current information.
- **Clawback Rules (Item 402(w)):** The group suggested that the clawback rules could be revised to mirror the specific requirements of the congressional mandate.
- **SEC Guidance on Perks:** The SEC's guidance on perquisites, particularly in the context of personal security and aircraft usage, has proven to be controversial. Panelists encouraged the SEC to reconsider classifying executive personal security guidance as a perquisite and reexamining the current approach for calculating aircraft usage.

Panelists floated numerous ideas for potential rule changes to update the executive compensation disclosure requirements, including, for example:

- **XBRL Tagging of Proxies:** Commissioner Crenshaw and various investors suggested requiring inline XBRL tagging of proxies so that the public can utilize machine-readable data and potentially rely less on proxy advisors.
- **Life Cycle Disclosure:** Participants encouraged the SEC to adopt full life cycle disclosure for each tranche of equity awarded (i.e., grant, vesting, performance metrics achieved, etc.) to be shown on a year-over-year basis since such information is difficult to visualize and calculate under the current disclosure rules.
- **Pay v. Performance:** Panelists provided feedback on the pay v. performance rules, stating that helpful disclosure would show the true measure of pay v. performance (i.e., what pay is actually realized rather than awarded), which remains hard to discern pursuant to the current rules.

Key Takeaway: While no rule changes have been made yet, the roundtable indicates that the SEC is focused on executive compensation disclosure and will likely pursue executive compensation-related rulemaking in the near term that is geared toward streamlining issuer's disclosure obligations while providing more universally useful data.

SEC Withdraws 14 Proposed Rules

On June 12, 2025, the SEC formally withdrew 14 proposed rule amendments, including the July 2022 proposed rule revising three of the bases for the exclusion of a shareholder proposal in a company's proxy statement, because the SEC no longer plans to adopt final versions of the rules.

Impact on Shareholder Proposals: The bases for excluding shareholder proposals from a company's proxy statement is a hotly contested area, which has seen revisions of guidance followed by recissions of the revisions under the last two administrations. Most recently, in February, the SEC rescinded Staff Legal Bulletin No. 14L and issued Staff Legal Bulletin No. 14M. Pursuant to Staff Legal Bulletin No. 14M, it may be easier for companies to exclude proposals related to social, ethical or other significant policy issuers from their proxy statements. Similar to now rescinded Staff Legal Bulletin No. 14L, the July 2022 proposed shareholder proposal rule would have limited companies' ability to exclude shareholder proposals from their proxy statements, in particular through limiting the applicability of the substantial implementation, the duplication and the resubmission exclusions. Collectively, Staff Legal Bulletin No. 14L and the July 2022 proposed rule would have made it easier for shareholders to get their proposals in front of voters, in particular on issues related to overarching policy concerns.

Key Takeaway: The withdrawing of the July 2022 proposed shareholder proposal rule, taken together with Staff Legal Bulletin No. 14M and the SEC's recent Compliance and Disclosure Interpretations (C&DIs) related to the filing of beneficial ownership reports on Schedules 13D and 13G, showcase the SEC's steady shift away from empowering activist shareholders from influencing company management through aggressive shareholder engagement or shareholder proposals, especially when the issues are social, ethical or policy related. While new SEC Commissioner Paul Atkins has not yet released his rulemaking agenda, we could see additional rule changes or guidance discouraging shareholder activism that does not have a significant nexus to a particular company.

For additional information regarding the other withdrawn rule proposals, please see our June 18 client alert.

SEC Concept Release on Foreign Private Issuer Eligibility: A Portent for the Foreign Private Issuer Regulatory Framework?

On June 4, 2025, the SEC published a concept release in which the agency analyzes trends related to foreign private issuers (FPIs) and solicits extensive feedback regarding whether and how the definition of FPI should be amended. This results from the fact that FPIs are increasingly traded exclusively in the United States and are not subject to any non-U.S. disclosure requirements, and yet benefit from significant exemptions that are not available to their U.S. counterparts.

The current framework for the definition of "foreign private issuer" was adopted in 1983 and last amended in 1999. The test for FPI status is based on whether a majority of the shareholders of a non-U.S. incorporated company are U.S. residents. Even if that is the case, a non-U.S. incorporated company can still be a FPI if it does not maintain certain U.S. nexuses.[1]

At this stage, no definitive rule changes are proposed, and it is not clear how the SEC will proceed. The concept release does not seek comment on the exemptions that apply to FPIs, focusing instead only on the definition of FPI.

The public has 90 days from when the concept release is published in the Federal Register to provide comments in response to the SEC's solicitation.

Shift in the Nature of Foreign Private Issuers[2]

The Concept Release sets forth data on the changes in the nature of FPIs that has occurred between 2003 and 2023.

The following table sets forth the top five jurisdictions of incorporation for FPIs and related information from 2003 and 2023:

2003		2023			
Country	**Number**	**Country**	**Number**	**Aggregate Market Cap ($MM)**	**Median Market Cap ($MM)**
Jurisdiction of Incorporation					
Canada (non-MJDS)	224	Cayman Islands	322	$1,047,823	$104
United Kingdom	106	Israel	97	$116,454	$121
Israel	81	Canada (non-MJDS)	75	$24,097	$24
Brazil	48	British Virgin Islands	62	$13,008	$29
Mexico	38	United Kingdom	44	$1,593,934	$13,072

1 A "foreign private issuer" is any foreign issuer, other than a foreign government, that as of the last business day of its most recently completed fiscal quarter meets the following conditions:

(1) 50% or less of its outstanding shares are held by U.S. residents; or
(2) If more than 50% of its outstanding shares are held by U.S. residents, all of the following conditions are met:
  (i) A majority of the issuer's executive officers or directors are non-U.S. citizens or residents;
  (ii) More than 50% of the issuer's assets are located outside of the U.S.; and
  (iii) The issuer's business is administered principally outside of the U.S.

2 FPIs are permitted to adopt voluntarily the forms filed by U.S. domestic filers. The SEC's survey of FPIs is limited to those that file annual reports on Form 20-F.

Jurisdiction of Headquarters					
Canada (non-MJDS)	218	China	219	$462,669	$84
United Kingdom	106	Israel	103	$119,202	$121
Israel	81	Canada (non-MJDS)	70	$17,836	$24
Brazil	50	United Kingdom	63	$1,844,040	$2,957
Mexico	38	Hong Kong	45	$220,018	$56

The SEC noted the following points based on this data:

- FPIs tended to be incorporated in a different jurisdiction from their headquarters, and the most common jurisdictions shifted to the Cayman Islands for issuers' jurisdiction of incorporation and mainland China for their headquarters.
- Despite the shift in foreign jurisdictions, the market capitalization of FPIs incorporated in the Cayman Islands and/or headquartered in mainland China tended to be relatively small, resulting in those issuers representing a small percentage of the aggregate global market capitalization of all FPIs despite their numerosity. In 2023, the aggregate global market capitalization of FPIs incorporated in the Cayman Islands represented 11.6% and the aggregate global market capitalization of FPIs headquartered in mainland China represented 5.1% of the aggregate global market capitalization of all FPIs.
- The increase in China-based issuers[3] from approximately 5% of FPIs in 2003 to an estimated 28% in 2023 led to a corresponding increase in issuers incorporated in the Cayman Islands or the British Virgin Islands, since 97% of China-based issuers are incorporated in either of those two territories.

The following table sets forth the percentage of trading on U.S. exchanges by FPIs:

	2014	2023
Percentage of FPIs > 99% Percentage of U.S. Global Trading[4]	44%	55%
Percentage of FPIs > 90% Percentage of U.S. Global Trading	48%	64%
Percentage of FPIs > 50% Percentage of U.S. Global Trading	64%	76%
Percentage of U.S. Global Trading of the lowest 25% of FPIs	22%	53%

The SEC noted the following points based on this data:

- Global trading of FPIs has not only become more concentrated in the United States over the past 20 years, but also a majority of FPIs' equity securities trade nearly exclusively on U.S. exchanges.
- FPIs that trade almost exclusively on U.S. exchanges are likely to have smaller market capitalizations and be incorporated in the Cayman Islands and headquartered in China. These exclusive FPIs represent only 9.2% of the aggregate FPI market capitalization due to their smaller market capitalizations, despite being numerous as a percentage of total FPIs.
- After reviewing the data, the SEC notes that a growing number of FPIs are subject to limited current disclosure requirements compared to U.S. domestic reporting requirements and the reporting requirements of jurisdictions like Canada, the European Union, the United Kingdom, Brazil and Japan, which are declining in prevalence as jurisdictions in which FPIs are incorporated or headquartered.

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3 "China-based issuers" are defined as those issuers that are either headquartered or incorporated in any of mainland China, Hong Kong or Macau.

4 The concept of Percentage of U.S. Global Trading is based on an analysis conducted by the SEC, where it computed global daily trading volume in U.S. dollars for all FPIs across all global markets for which daily trading volume information was available for each FPI. This global daily trading volume was then aggregated for a 12-month window around each FPI's fiscal year-end date, with a similar variable constructed for each FPI's aggregated 12-month U.S. dollar trading volume specifically in U.S. capital markets.

Potential Changes in Foreign Private Issuer Eligibility

The SEC is concerned that there is a significant uptick in issuers that are not subject to substantive disclosure and regulatory frameworks outside of the United States while still being afforded the scaled disclosure obligations conferred by FPI status. In the SEC's view, the absence of home jurisdiction regulation is at odds with the central underpinning of the FPI regime — that foreign issuers should be accommodated *because* they are subject to meaningful regulation under the laws of their home jurisdictions and traded in foreign markets.

The concept release includes 69 multipart questions organized around the following central themes:

Concept	Commentary
Should the 50% U.S. ownership threshold be lowered for FPI status?	In our view, the effect would be minimal because most FPIs do not rely on this prong, but on the three "nexus" tests.
Should a foreign trading volume test be added as a condition to FPI status?	According to the SEC's data, requiring 5% of foreign trading volume would cause 62.4% of current FPIs to lose their status. It would cause 89% of China-headquartered companies to lose FPI status.
Should FPIs be required to be listed on a major foreign exchange?	The SEC points to its existing definition of "designated offshore securities exchange" under Regulation S as one possible way of determining such exchanges. It also solicits comment on other possible definitions.
Should FPIs be required to be incorporated or headquartered only in jurisdictions in which the SEC has determined there to be an adequately robust regulatory regime and be subject to their home country regimes without exemption?	The SEC notes that this would require the individual assessments of foreign securities regimes, which would necessitate cooperation of foreign authorities and potentially require SEC staff to monitor changes and updates in those foreign regimes. The tone of the SEC's commentary indicates some concern about this approach.
Should the SEC establish additional systems of mutual recognition like the MDJS approach with other foreign jurisdictions?	This question is distinct from any change to the definition of FPI. MJDS is currently the only mutual recognition arrangement. The benefit of such arrangements is that they can be tailored to each non-U.S. system and can evolve over time.
Should the SEC require FPIs to certify that they are headquartered or incorporated, and under the oversight of, a foreign jurisdiction that is a party to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information (MMoU) or the enhanced MMoU?	The IOSCO is an international body of securities regulators, which seeks to develop and implement international standards regulating the financial markets. The MMoU is voluntary, nonbinding and does not supersede domestic laws. IOSCO members that sign the MMoU are expressing their intent and legal authority to assist other MMoU members in enforcement matters, including the sharing of information in enforcement matters involving FPIs.
What considerations should be given to the impact of FPIs having to transition to domestic reporting status?	The SEC raises numerous questions about the transition, including whether there should be a transition period for FPIs that report in IFRS before being required to report in U.S. GAAP. Currently there is only an 11-month de facto conversion period from the date on which FPI status is determined until the date that the next Form 20-F is due.

Statement on the Concept Release — Commissioner Mark Uyeda

SEC Commissioner Mark Uyeda voiced support for the SEC's efforts to review the regulatory treatment of FPIs while cautioning against unintended consequences that could undermine the system's longstanding benefits. Commissioner Uyeda emphasized that the current regime has effectively enabled foreign companies to access the U.S. capital markets and allowed U.S. investors to diversify their holdings, noting that:

> Notwithstanding these concerns, it is important to note that we have not seen to date large-scale market failures from the differing disclosure regimes for U.S. issuers and foreign private issuers. To the extent that there have been issues with respect to FPIs, they often involve outright fraud and material misstatements and omissions. In other words, fraud can occur irrespective of the form the issuer files — or the exemption the issuer relies on.

Commissioner Uyeda underscored that while investor protection remains critical, any changes to the framework should preserve the economic substance of cross-border access and the benefits it provides to both issuers and U.S. investors.

Conclusion

If the SEC pursues any of the changes outlined in the concept release, a sizable percentage of FPIs could lose their status. It is also not clear how any potential new rules would be applied in the context of a company undertaking an initial public offering. Furthermore, it is likely that any changes would disproportionately impact smaller market capitalization FPIs or would-be FPIs, with the greatest numerical impact being on those headquartered in Canada (non-MJDS reporting companies), China, Hong Kong, Israel and Singapore, which represent the largest group of FPIs after Canada. FPIs that are likely to be impacted by a rule change should considering submitting feedback to the SEC.

SEC Issues Updated Insider Trading Plan C&DIs

On April 25, 2025, the Staff revisited the C&DIs related to Rule 10b5-1. The recent changes impact the following C&DIs:

- **New:** 120.32-33
- **Withdrawn:** 120.02, 120.19 and 220.01
- **Revised:** 120.01, 120.03-120.12, 120.14-16, 120.18, 120.21-24 and 220.02

Many of the changes to the revised C&DIs are technical in nature in order to align the C&DIs with the amendments to the Rule 10b5-1 disclosure regime adopted in 2022 (for an overview of the rule changes please see our 2022 client alert), though a few of the revised C&DIs included more extensive revisions, including those related to limit orders and employer 401(k) plans. The withdrawn C&DIs address the impact of transferring plans to a new broker in the event a broker goes out of business, modifying the as of date for the knowledge representation in Form 144 and cancelling plans on future plan transactions.

New C&DI 120.32 addresses how purchases and sales of issuer securities are treated in the case of an employer sponsored 401(k) plan in which contributions can be invested through a self-directed brokerage window. In such circumstances, because the counterparty to the self-directed brokerage window transaction is an open market participant, the instruction for any transaction will need to satisfy each of the conditions of Rule 10b5-1(c)(1).

New C&DI 120.33 clarifies that, for purposes of the exception to the prohibition against overlapping Rule 10b5-1 plans for plans providing sale-to-cover transactions upon the vesting of an equity award, “necessary to satisfy tax withholding obligations” refers to tax withholding payments that are calculated *in good faith* consistent with applicable tax law and accounting rules.

Activism Insights

Regulating Proxy Advisors: Court Rules Advice Is Not a ‘Solicitation’ and Texas Enacts Its Own Law

On July 1, 2025, the U.S. Court of Appeals for the District of Columbia Circuit ended more than five years of uncertainty and confusion by ruling that proxy voting advice issued by proxy advisors is not a “solicitation” under the Exchange Act. Absent an appeal to the Supreme Court, the court’s decision effectively ends the SEC’s long-running regulatory effort to hold proxy advisors accountable based on the theory that their recommendations constitute a “solicitation” under the proxy solicitation provisions of the Exchange Act.

The SEC may look for other ways to regulate proxy advisors, but in the meantime, Texas has led the way by enacting legislation aimed at proxy voting advice related to companies with a Texas nexus. Other states and even the federal government may follow suit. Each of these efforts is likely to result in legal attacks, potentially including challenges based on First Amendment grounds.

***ISS v. SEC*: Court Rules Proxy Advice Is Not a ‘Solicitation’**

Background: The decision from the D.C. Circuit Court of Appeals ends a multiyear saga stemming from the SEC’s efforts to regulate proxy advisors under the Exchange Act. In 2019, the U.S. Securities and Exchange Commission (SEC) issued Interpretive Guidance confirming its view that proxy voting advice provided by proxy advisors may constitute a “solicitation” under Section 14(a) of the Exchange Act and, as a result, proxy advisor recommendations would be subject to the SEC’s proxy rules promulgated under that provision, including filing requirements and the antifraud provisions under Rule 14a-9. Shortly after the issuance of this guidance, prominent proxy advisory firm Institutional Shareholder Services Inc. (ISS) filed a complaint in the U.S. District Court for the District of Columbia, arguing that its proxy voting advice and related services do not constitute a "solicitation" within the meaning of the Exchange Act and seeking to set aside the SEC's interpretive guidance. The case was later stayed while the SEC considered whether it would adopt new rules related to the guidance.

In 2020, the SEC adopted amendments to the proxy rules codifying its prior interpretation and guidance (the 2020 Rules). Under the 2020 Rules, absent an available exemption, proxy voting advice would be required to be filed, like any other solicitation, under the proxy rules. The SEC adopted two filing exemptions, available if the proxy advisor: (1) discloses conflicts of interest in its voting advice and (2) adopts policies to timely (i) disseminate proxy voting advice to each subject public company and (ii) notify the proxy advisor's clients of any response from the subject company. In addition, proxy advisors would be liable for material misstatements or omissions, including a failure to disclose "methodology, sources of information, or conflicts of interest." Following the issuance of the 2020 Rules, ISS revived its original suit and sought summary judgement against the SEC.

In June 2021, after Gary Gensler was appointed as the chairman of the SEC, he directed the SEC staff to consider whether the 2020 Rules should be revisited. The case was once again suspended while the SEC reexamined the rules. Finally, in July 2022, the SEC adopted amendments to the 2020 Rules rescinding the second filing exemption requirement — that proxy advisors adopt policies to timely disseminate recommendations and notify clients of responses — thereby making it easier for proxy advisors to comply with the new rules. However, the amendments did not change the overall concept that proxy voting advice is a "solicitation" under the proxy rules or the requirement that proxy advisors disclose their conflicts of interest. As a result, the case brought by ISS was again revived. For an in depth discussion of the 2020 Rules and the 2022 amendments, see our 2022 client alert.

The District Court granted summary judgement to ISS, holding that "the term 'solicit' could not reasonably be stretched to include disinterested voting advice." The SEC appealed the grant of summary judgement to the D.C. Circuit Court of Appeals. For more information on the decision of the District Court, see our March 2024 public company update.

Decision: On July 1, 2025, the D.C. Circuit Court of Appeals affirmed the judgement of the District Court, relying on the plain meaning of the word "solicit" to conclude that proxy voting services are not "solicitations," noting that unlike a company director who asks shareholders to vote for a particular outcome, a proxy advisor merely provides recommendations at the request of its clients. The court distinguished between advice that may *influence* a shareholder's decision on how to vote and a *solicitation*, finding that a simple voting recommendation rendered by a proxy advisor without a request for proxy authority, while no doubt *influential*, falls outside of the statutory definition of "solicitation" because nothing in the proxy rules suggests that the rules were "intended to reach those entities that merely advise others how to vote, without themselves seeking votes or acting on behalf of those who do." As a result, the court concluded that the SEC's adoption of the 2020 Rules expanding the definition of "solicitation" to encompass proxy voting advice was improper. With its decision, the court effectively ended the SEC's long-running efforts to apply the proxy rules to the activities of proxy advisors.

New Texas Law Regulating Proxy Advisors

On June 20, 2025, the Texas governor signed into law Senate Bill 2337, which regulates proxy advisors providing voting recommendations or other proxy advisory services to public companies headquartered or incorporated in, or redomesticating to, Texas. The new law imposes mandatory disclosure and other obligations on proxy advisory services "not provided solely in the financial interest of the shareholders," including advice based on ESG or DEI factors and recommendations that are inconsistent with a board's recommendation.

Under the Texas law, proxy advisors are required to comply with the following disclosure and other obligations for the proxy services listed:

Any proxy advice based on **nonfinancial factors**, such as ESG, DEI or sustainability scores	▪ Provide a statement that the service is not being provided solely in shareholders' financial interests and give notice to the company. ▪ Explain, ***with particularity***, the basis of the advice and that the advice subordinates shareholders' financial interests to other objectives. ▪ Disclose on the proxy advisor's website home page that its services include recommendations that are not based solely on the financial interests of shareholders.
Recommendations on **shareholder proposals** that are inconsistent with a board's recommendation	▪ Comply with all requirements for nonfinancial proxy advice. ▪ Provide a written economic analysis that includes (1) the proposal's short/long-term economic costs and benefits, (2) an analysis of whether the proposal is consistent with the client's investment objectives and its impact on returns and (3) an explanation of the methods used to prepare the economic analysis.

Recommendations in opposition to the board made to clients who have not expressly requested nonfinancial proxy advice (i.e., **materially different advice**)	▪ Comply with all requirements for nonfinancial proxy advice. ▪ Notify the company, each client receiving advice and the Texas attorney general of the conflicting advice. ▪ Disclose if the conflicting advice is based solely on financial factors and supported by any specific financial analysis.

These new regulations are expected to impose substantial financial and compliance burdens on proxy advisors. As a result, proxy advisors may choose not to render services for Texas companies or may make fewer recommendations against them. Despite the likelihood that the Texas regulations will be challenged in court, as efforts progress in additional states, Texas may provide a framework for legislatures seeking to constrain proxy advisors in their jurisdictions.

Conclusion

For over a decade, there have been growing concerns raised by business associations, public companies and politicians over the substantial influence proxy advisors wield over shareholder voting decisions, attracting the attention of successive Republican and Democrat administrations. More recently, proxy advisors have been attacked for basing their voting advice on ESG or DEI considerations, rather than on the financial interests of shareholders. To date, efforts to regulate proxy advisors have primarily come in the form of SEC rulemaking and guidance. However, the D.C. Circuit Court's decision has rendered moot all prior regulatory efforts by the SEC based on the theory that proxy voting advice constitutes a "solicitation." Having exhausted that path, the SEC will need to find another basis in the securities laws to regulate proxy advisors.

In the absence of SEC regulation and amid mounting pressure to manage their influence, efforts to regulate proxy advisors at the state and federal level are increasing. The regulations enacted in Texas provide a roadmap for other states looking to impose constraints on proxy advisory activities in their states. In addition, federal legislators are also considering legislation that would impose antifraud liability on proxy advisors, prohibit them from issuing voting advice if they have a conflict of interest and require them to register with the SEC, among other proposals. It is likely that any legislation, including the Texas legislation, will be challenged in court, and it is not certain whether state or federal legislation will be upheld, either in whole or in part. As a result, the situation is likely to continue to develop.

Other Updates

New DOJ FCPA Guidelines Target Cases Linked to US Strategic Interests

On June 9, U.S. Deputy Attorney General Todd Blanche issued a memorandum entitled "Guidelines for Investigations and Enforcement of the Foreign Corrupt Practices Act (FCPA)," which establishes guidelines to ensure that FCPA investigations and prosecutions align with President Donald Trump's February 10, 2025 Executive Order 14209 and with Attorney General Pamela Bondi's February 5, 2025 memorandum. Specifically, Blanche emphasized the dual aims of "(1) limiting undue burdens on American companies that operate abroad, and (2) targeting enforcement actions against conduct that directly undermines U.S. national interests."

Most notably, Blanche outlined four key but nonexclusive factors for prosecutors to evaluate when determining whether to pursue FCPA investigations and enforcement actions: (1) a connection to cartels or transnational criminal organizations (TCOs); (2) the deprivation of fair access for, or economic injury to, U.S. companies or individuals; (3) a connection to U.S. national security-related sectors; and (4) strong indicia of corrupt intent involving serious misconduct.

Key Takeaways:

- **Non-US Companies Face Increased Exposure From DOJ:** The memorandum focuses FCPA enforcement actions on cases that protect U.S. interests, companies and entities, amplifying the risk for non-U.S. companies. The memorandum caveats that DOJ will not target "particular individuals or companies on the basis of their nationality," perhaps in an effort to harmonize with Article 5 of the OECD Anti-Bribery Convention. At the same time, a footnote comments that "the most blatant bribery schemes have historically been committed by foreign companies," making clear that DOJ views non-U.S. actors as most likely to be responsible for "disadvantag[ing] law-abiding U.S. companies."

  In addition, Blanche's memorandum, when coupled with the Criminal Division's recent updates to the Corporate Enforcement Policy emphasizing greater opportunities for declinations based on voluntary self-disclosures and full cooperation, may create new opportunities for U.S. companies to mitigate risk. If a U.S. company perceives less risk of prosecution, it may be even more comfortable self-disclosing its own potential FCPA violation. This may be particularly true for publicly traded U.S. companies that are subject to civil FCPA enforcement risk by the SEC and whose outside auditors remain bound by Section 10A of the Securities Exchange Act of 1934 to report to the SEC illegal acts discovered during an audit that have a material impact on the company's financial statements.

- **US Companies May Face Increased Exposure From Non-US Enforcement Authorities:** Although historically DOJ has focused much of its enforcement efforts on non-U.S. companies — nine of the ten largest FCPA criminal resolutions involved foreign corporations, after all — the Blanche memorandum supports a conclusion that this focus will shift even further outside of the United States. This, in turn, raises the question of whether authorities outside the United States will return the favor by focusing their enforcement efforts on the activities of U.S. companies. Although leaders of the recently established U.K./French/Swiss International Anti-Corruption Prosecutorial Taskforce expressly rejected a suggestion that it was created as a reaction to Executive Order 14209, the pressure on these actors may increase depending on DOJ's enforcement activity. It remains to be seen what effect a more U.S. interests-focused approach will have on multijurisdictional investigations and prosecutions: Will a more U.S.-centric approach by the U.S. reduce the appetite of other jurisdictions to enter into coordinated resolutions with the U.S.? It also remains to be seen what the second order effects of Blanche's memorandum will be, but there is certainly the risk that — at the end of the day — U.S. companies may in fact face greater enforcement in more jurisdictions.

- **Non-US Companies in Strategic Markets and Industries Should Take Note:** DOJ may also focus on companies in or doing business with third parties in "strategic industries," including critical life sciences, minerals, key infrastructure, defense and intelligence. The memorandum quotes President Trump's Executive Order 14209 in saying that "American national security depends ... on the United States and its companies gaining strategic business advantages." There is also a reference to President Trump's National Security Strategy from 2017 on how strategic competitors to the U.S. often exploit corruption and state weakness to extract resources for themselves. It is clear that the Trump administration as a whole has a policy goal of leveling the playing field for U.S. companies to compete in these markets and industries. Companies involved with or adjacent to the defense, aerospace, artificial intelligence, mining and minerals, life sciences and critical infrastructure industries should pay particular attention to their heightened FCPA risks. As with the first factor, this emphasis will raise the risks for non-U.S. companies who may be seen as competing (unfairly) with their U.S. counterparts.

- **DOJ Will Focus on the Most Serious Bribery Cases:** Prosecutors will prioritize substantial and serious bribery violations over misconduct involving "routine business practices" or low-value generally accepted courtesies. This does not mark a radical shift in practice, as a review of DOJ's recent corporate FCPA resolutions confirms that the agency has historically declined to prosecute cases involving insignificant misconduct and instead has generally focused on cases involving high-dollar bribes. Further, the Principles of Federal Prosecution require consideration of the nature and seriousness of the offenses, among other factors.

- **DOJ May Not Bring FCPA Cases Based on Internal Controls Violations:** The memorandum states that "prosecutors shall focus on cases in which individuals have engaged in misconduct and not attribute nonspecific malfeasance to corporate structures." This statement appears to indicate that DOJ will no longer bring cases that charge only internal controls and books-and-records violations (i.e., internal structures) without bribery charges. For publicly traded companies subject to the FCPA's accounting provisions, this new guidance could be significant in multiple respects. Historically, the ability to bring a criminal internal controls or books-and-records charge has been a powerful tool used by DOJ where bribery charges may not be available for jurisdictional or other reasons. Companies also have been able to leverage potential internal controls and books-and-records charges as a bargained-for alternative to a more serious bribery charge, for example when the company's cooperation warrants a less serious disposition or where a company may face debarment risk in a foreign jurisdiction based on a bribery charge. Under Blanche's guidance, it appears at first blush that such cases are less likely to be brought, which may mean that companies may be more successful advocating for declinations, where appropriate, rather than agreeing to a lesser charge. Here, the SEC, which typically focuses more on the FCPA's accounting violations, might fill the void. SEC Chair Paul Atkins recently told a concerned lawmaker that the agency was not "directly affected" by the pause on FCPA enforcement ordered by Executive Order 14209. However, how the SEC will proceed given this new guidance is still an open question.

- **All Companies That Touch Cartels and TCOs Are at Risk:** Given President Trump's and Attorney General Bondi's previous statements about the clear focus on cartels and TCOs, which were designated as Foreign Terrorist Organizations on the first day of this Trump administration, U.S. and non-U.S. companies alike can expect DOJ to investigate and prosecute potential FCPA cases that include any indication of improper payments to a corrupt foreign official working on behalf of a cartel. This will place a premium on the maintenance of the integrity of supply chains and distribution networks of sprawling multinational companies.

- **DOJ Will Assess Collateral Consequences on Companies Throughout the Investigation:** Under the Principles of Federal Prosecution of Business Organizations, DOJ already requires prosecutors to consider the potential collateral consequences of a criminal disposition on a corporate defendant. Under these new guidelines, prosecutors now must also consider the collateral consequences of an investigation in the first instance, such as potential disruption to companies and employees. Consistent with other recent department guidance, prosecutors are specifically instructed to conduct FCPA investigations efficiently.

For additional information on the new DOJ FCPA guidelines, including their application to existing FCPA cases and guidance on how companies should respond, please see our June 12 client alert.

DOJ's M&A Safe Harbor Highlights Importance of Post-Close Due Diligence and Integration

On June 16, the DOJ's National Security Division (NSD or Division) announced they had declined to prosecute the private equity firm White Deer Management LLC for violations of U.S. sanctions and export control laws committed by a company it acquired, Unicat Catalyst Technologies LLC. This marks the first declination by the DOJ since the department released its Merger and Acquisitions Policy in March 2024.

Key Takeaways: Buyers can face significant financial, enforcement and reputational risks for the past or ongoing misconduct of an acquired entity. Whether a buyer is a corporation or private equity firm, pre- and post-acquisition due diligence combined with robust compliance integration can help mitigate both commercial and compliance risks, including risks presented by any criminal or regulatory misconduct by a target entity. The DOJ's Safe Harbor Policy provides significant benefits for companies taking such actions.

Because of the policy's premium on prompt and complete self-disclosure, it is important for companies to proactively align their M&A policies and processes with these qualification requirements, with particular focus on post-close action, to position themselves to best take advantage of the safe harbor. While companies will need to weigh the potential advantages and disadvantages of self-disclosure, losing out on an opportunity to avoid or mitigate the consequences of a DOJ enforcement action because a company failed to identify criminal activity in a timely fashion not only increases potential financial and other consequences, but now presents a greater risk of negative scrutiny by internal and external stakeholders, including the risk of a shareholder suit when things go wrong.

Looking beyond the United States, which has long recognized the doctrine of successor liability — holding acquirors strictly liable for the misconduct of their acquired companies — additional jurisdictions, such as France, have begun to embrace the concept. While other jurisdictions may not have created a safe harbor program similar to that of the DOJ, the risk of scrutiny by multiple enforcement agencies that may impose liability on the acquiror highlights the criticality of this issue for companies based and operating around the world.

For additional information regarding the M&A Safe Harbor Policy, the White Deer Management LLC declination and pre- and post-close takeaways, including what to do if red flags are identified in diligence, audits or testing, or otherwise during integration, please see our June 30 client alert.

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