GIBSON DUNN

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PCAOB Survives One Big Beautiful Bill but Board Changes Underway

On July 4, 2025, President Trump signed the reconciliation bill H.R. 1, known as the One Big Beautiful Bill Act, enacting various tax and spending policies. As originally drafted, H.R. 1 would also have dissolved the PCAOB by amending the Sarbanes-Oxley Act to replace references to the PCAOB with references to the SEC after a one-year transition period. The proposal to eliminate the PCAOB sparked opposition from PCAOB Chair Erica Y. Williams, who argued, including at the 2025 ALI-CLE Accountants' Liability Conference and April 29, 2025 PCAOB Investor Advisory Group Meeting, that the PCAOB's unique expertise and experience "cannot simply be cut and pasted" onto the SEC "without significant risk to investors." Williams also cautioned that the PCAOB's international agreements allowing for inspections in foreign countries would not automatically cover the SEC and argued that the measure would not save taxpayers money because of the PCAOB's funding structure.

Ultimately, the Senate Parliamentarian advised that the PCAOB dissolution provision violated the Senate's Byrd Rule, which restricts what may be included in reconciliation legislation, and the measure was stripped out in the version of the bill ultimately passed by the Senate and signed into law.

In the wake of the PCAOB's survival, Chair Williams announced on July 15, 2025 that she would leave the PCAOB effective July 22.

On July 21, 2025, the SEC appointed George Botic as Acting Chair of the PCAOB, and on July 23, 2025, SEC Chair Paul Atkins announced that he was soliciting applications for all five Board seats, with staggered ending dates.

SEC Considers Changing Definition of Foreign Private Issuer

On June 4, 2025 the SEC published a concept release seeking "public input on whether the definition of foreign private issuer should be amended in light of significant changes in the population of foreign private issuers since 2003." The SEC's foreign private issuer (FPI) regulatory framework modifies the requirements of the U.S. securities laws for certain foreign issuers to mitigate the effect of varying legal and accounting reporting obligations imposed by their home countries. The accommodations are based on an expectation that FPIs are "subject to meaningful disclosure and other regulatory requirements in their home country" and primarily traded on foreign markets. However, a recent review of FPIs by Commission staff indicated that the FPI population "may no longer reflect the issuers that the Commission intended to benefit from current FPI accommodations." According to the Staff review, many FPIs are incorporated in jurisdictions with limited disclosure requirements, and a majority of FPIs have their equity securities traded almost exclusively in U.S. capital markets.

The SEC is seeking input on several potential updates to existing FPI rules, including (1) updating existing eligibility criteria, (2) introducing a foreign trading volume requirement, (3) requiring listing on a major foreign exchange, (4) introducing SEC assessments of foreign regulation, (5) expanding mutual recognition arrangements to other jurisdictions with comparable investor protection standards, and (6) requiring an international cooperation arrangement with the issuer's home country. Comments on the SEC's concept release are due on September 8, 2025. For more detailed information, please refer to Gibson Dunn's client alert.

SEC Maintains but FINRA Plans to Revise Off-Channel Communications Settlements

From 2021 through 2024, the SEC initiated multiple enforcement actions against member firms of the Financial Industry Regulatory Authority (FINRA) for recording-keeping violations related to off-channel communications (OCC). Resulting settlements included burdensome collateral consequences such as ongoing "heightened supervision plans" (HSPs), which require FINRA follow-up exams to review for compliance. In 2025, the SEC began imposing less onerous terms on FINRA member firms in OCC-related settlements. Some firms subject to the stricter pre-2025 settlements moved the SEC to revise their sanctions to be more in line with those of the later resolutions. On April 14, 2025, the SEC denied those motions in an omnibus order, over the dissent of Commissioner Peirce. FINRA announced on May 8, 2025, however, that it planned to revise and harmonize the pre-2025 resolutions including by adjusting the HSPs.

White House and DOJ Announce Criminal Enforcement Measures

In May and June 2025, the White House and U.S. Department of Justice announced several measures that clarify the Trump Administration's approach to criminal enforcement:

- On May 9, 2025, President Trump issued Executive Order 14294, "Fighting Overcriminalization in Federal Regulations," which seeks to curb criminal prosecutions that are better addressed through regulatory enforcement. The order specifically highlights offenses based on strict liability or where the conduct is based on less than a knowing state of mind. Agencies must now publicly list all criminal regulatory offenses they enforce, including applicable intent requirements, and are encouraged to favor civil remedies when possible.

- On May 12, 2025, the DOJ Criminal Division issued four guidance documents: (1) a memorandum outlining a new White-Collar Enforcement Plan; (2) an update to the Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy; (3) an update to DOJ's Corporate Whistleblower Awards Pilot program; and (4) an updated memorandum describing the process for implementing monitorships and selecting monitors. The Enforcement Plan lays out ten focus areas for enforcement, including securities fraud; threats to national security; and waste, fraud, and abuse in federal contracting; it also renews the Criminal Division's focus on criminal conduct related to China. The guidance documents also instruct the Criminal Division to take all reasonable steps to minimize the length and collateral impact of investigations; and instruct that independence compliance monitors should be imposed only when necessary and should be narrowly tailored.

- On June 10, 2025, DOJ's Criminal Division announced a new memorandum providing guidance on the investigation and enforcement of the Foreign Corrupt Practices Act (FCPA). The guidance sets out four factors in determining whether to pursue FCPA investigations or enforcement actions: (i) whether the conduct relates in certain ways to a cartel or transnational criminal organization (TCO); (ii) the extent to which the conduct adversely affects the ability of U.S. entities to obtain business abroad; (iii) whether the conduct affects U.S. companies' ability to access certain "infrastructure or assets" such as key minerals and deepwater ports; and (iv) whether the conduct indicates corrupt intent on the part of individuals. The guidance comes in the wake of an FCPA enforcement pause that prompted questions at the Organization for Economic Co-operation and Development (OECD) regarding America's compliance with Article 5 of the Anti-Bribery Convention, and a statement by California Attorney General Rob Bonta to businesses in California that foreign bribery remained illegal under California law and "will not be tolerated."

For more detailed information, please refer to Gibson Dunn's recent client alerts regarding the Executive Order, the DOJ Criminal Division guidance, and the FCPA memorandum.

Fifth Circuit Scrutinizes FDIC Internal Enforcement Actions

A trio of cases before the Fifth Circuit challenges the constitutionality of in-house enforcement proceedings used by key banking regulators, including the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and National Credit Union Administration. Former banking executives argue that these agencies' administrative tribunals violate their Seventh Amendment right to a jury trial, echoing the Supreme Court's 2023 decision in *SEC v. Jarkesy*, which curtailed the SEC's use of similar forums. The agencies assert their actions fall within the "public rights" exception to the Seventh Amendment and warn that requiring jury trials could severely hamper their enforcement capabilities. The appeals also raise questions about whether courts have jurisdiction to hear constitutional challenges before agency proceedings conclude, which the Supreme Court found to be the case in certain situations in its 2023 ruling in *Axon Enterprises Inc. v. FTC*. The Fifth Circuit heard argument on these cases on June 3, 2025. The outcomes of these three cases may significantly reshape how federal financial regulatory enforcement is carried out going forward.

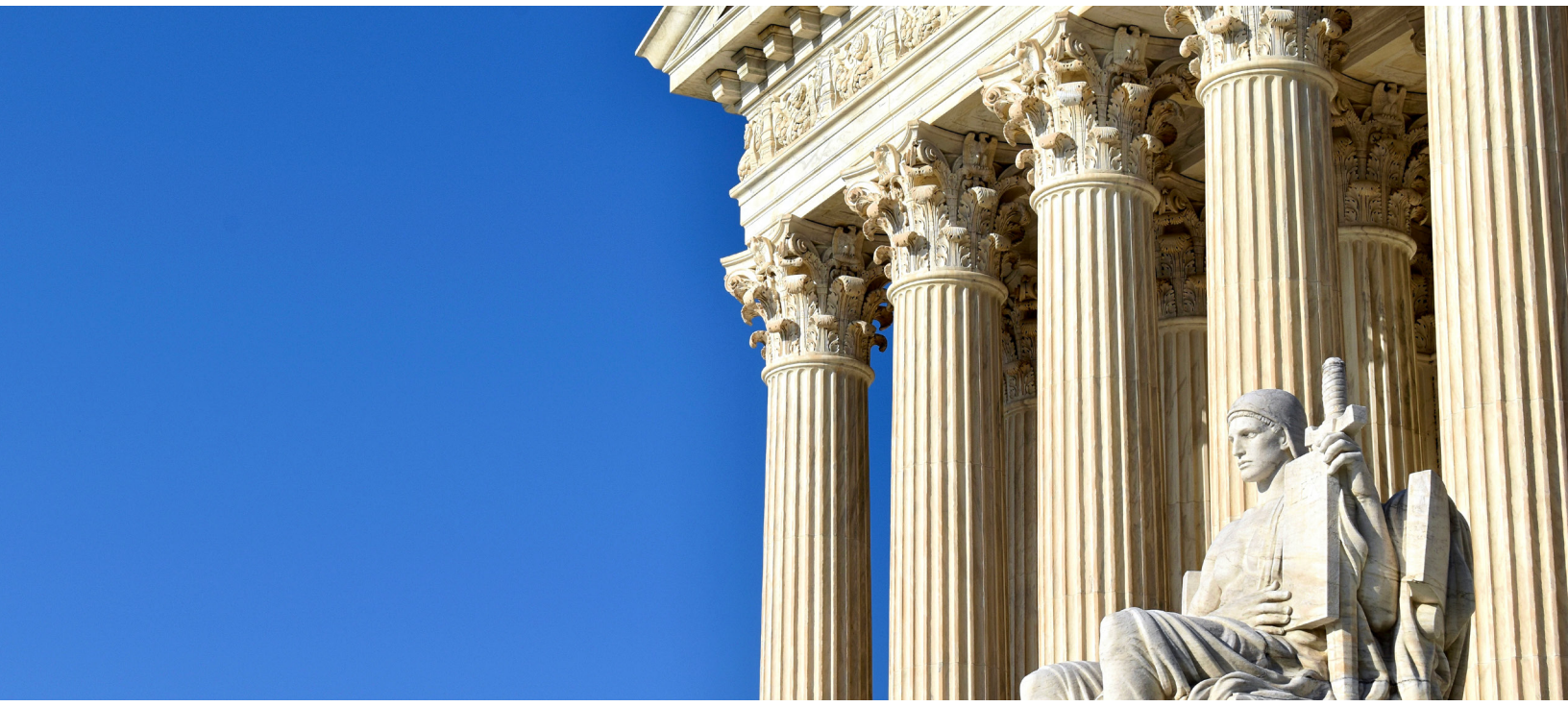
Supreme Court Issues Decisions on Federal Fraud, Employment Lawsuits, and Agency Deference

On May 22, 2025, the Supreme Court held in *Kousisis v. United States* that a defendant may be convicted of federal fraud for inducing a transaction with materially false pretenses, even without intending economic loss. In *Kousisis*, the defendants obtained two contracts for projects with the Pennsylvania Department of Transportation by falsely representing that they would obtain supplies from a disadvantaged business enterprise as required by federal regulation. In reality, the disadvantaged business was only a pass-through entity, funneling paperwork without providing any supplies. Despite successful completion of the project, the United States obtained a conviction of the defendants on wire fraud and conspiracy charges. Moving for acquittal, the defendants argued that fraud requires a pecuniary loss. The Court unanimously rejected that argument and held that fraudulent inducement is sufficient for a federal fraud conviction.

On June 5, 2025, the Court clarified that Title VII imposes no heightened evidentiary burdens on majority-group plaintiffs to establish a prima facie case of disparate treatment. In *Ames v. Ohio Department of Youth Services*, Marlean Ames alleged discrimination based on her being a heterosexual. Following some other Circuits, the Sixth Circuit affirmed the district court's dismissal of Ames's case because she had failed to establish "background circumstances" indicating the unusual situation of discrimination against a member of a majority group. The Supreme Court unanimously rejected the "background circumstances" requirement, affirming that majority group plaintiffs face the same evidentiary hurdles as other Title VII plaintiffs.

On June 20, 2025, the U.S. Supreme Court ruled in *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.* that district courts are not bound by agency interpretations in civil proceedings. Instead, district courts are to independently interpret the law while giving appropriate respect to the agency's interpretation. This matter in question involved a healthcare products company allegedly sending unsolicited online fax advertisements in violation of the Telephone Consumer Protection Act (TCPA). The Ninth Circuit treated an FCC order excluding online faxes from the TCPA as binding. Reversing, the Supreme Court ruled that, where certain statutes are silent regarding judicial review in enforcement proceedings, district courts are not bound by an agency interpretation but should instead independently interpret the statute.

Gibson Dunn's client alerts regarding *Ames* and *McLaughlin* provide additional information.



Federal District Court Bars Clawback of Accidentally Produced Privileged Documents

In a putative antitrust class action in the Western District of Washington, the defendant produced almost 14 million documents using a team of about 160 document reviewers. During a privilege log dispute, the defendant re-reviewed about 100,000 documents; a small number had their privilege designations incorrectly downgraded and were produced. The plaintiffs cited three of the documents in their motion for class certification, and refused the defendant's prompt request to claw back the documents. The district court sided with the plaintiffs, holding that, when a document is marked not privileged and is produced, the document is deemed not to have been "inadvertently" disclosed for purposes of Federal Rule of Evidence 502(b). The court noted that, in the present case, the document had first been marked privileged before being re-coded. On June 25, 2025, the Ninth Circuit denied the defendant's petition for a writ of mandamus.

For additional information, please refer to Gibson Dunn's client alert.

U.K. Serious Fraud Office Issues Guidance on Corporate Self-Reporting and Cooperation

On April 24, 2025, the U.K. Serious Fraud Office (SFO) issued guidance on "corporate co-operation and enforcement in relation to corporate criminal offending." The guidance is intended to add certainty around the benefits of self-reporting and cooperation. Under the new guidance, a corporation that promptly self-reports a violation upon discovery of "direct evidence" of offending and that cooperates fully with the SFO will be "invited" to negotiate a Deferred Prosecution Agreement (DPA) unless "exceptional circumstances" apply. If a company does not self-report, the SFO will "have regard to whether it was aware of the offending before [the SFO] investigation began" and will still consider a DPA if the company has provided "exemplary co-operation."

For cooperation credit, the SFO provided the following "non-exhaustive list of co-operative conduct," and it clarified that "corporates which take all these steps are likely to be assessed as providing exemplary co-operation": (1) preserving evidence, (2) identifying and providing relevant documentation to SFO, (3) presenting the facts of the suspected criminal conduct to SFO, (4) involving the SFO at the beginning stages of any internal investigation, including providing regular updates, findings, and non-privileged interview records, (5) informing the SFO of any prior relevant criminal conduct, personnel actions in response to the offending, and harm caused by the offending, (6) presenting a thorough analysis of the relevant compliance program and any planned remediation, and (7) facilitating employee interviews and legal advice to employees as needed. The SFO emphasized that companies will not be penalized for maintaining "a valid claim of legal professional privilege" but that waiving privilege will be considered "a significant co-operative act."

Gibson Dunn's client alert provides more information.

Other Recent SEC and PCAOB Developments

SEC

- SEC Chair Paul Atkins and Commissioners Mark Uyeda, Hester Peirce, and Caroline Crenshaw each provided their perspective on the SEC's agenda at the SEC Speaks conference.

PCAOB

- The PCAOB has recently issued settled enforcement orders against individuals and firms for, among other things: (i) failing to perform adequate fraud procedures; (ii) arranging for a senior manager to perform engagement quality reviews; and (iii) failing to perform adequate testing of a China-based company's revenue and to supervise China-based team members.

- The PCAOB announced that Connor Raso has been appointed the PCAOB's Acting General Counsel and that Joshua White has been appointed Acting Chief Economist.

- The PCAOB announced a Statement of Protocol with the audit regulator of Slovakia.

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For further information about any of the topics discussed herein, please contact one of the Accounting Firm Advisory and Defense Practice Group Chairs or the Gibson Dunn attorney with whom you regularly work.