GIBSON DUNN

Accounting Firm Quarterly Update

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SEC Returns to Simultaneous Consideration of Settlement and Waiver Requests

On September 26, 2025, SEC Chairman Paul S. Atkins issued a statement announcing that the Commission will simultaneously consider enforcement settlements and collateral waiver requests. The announcement is a reversal of the Commission's stated approach during the Biden administration and a return to a policy adopted in 2019 by then-Chairman Jay Clayton. The policy change will enable entities considering settlement of a Commission enforcement action to make a decision better informed about the collateral regulatory consequences of a settlement.

The Commission's "simultaneous consideration" of settlement offers and waiver requests will occur when they are submitted by the SEC Staff as a consolidated recommendation. Should the Commission deny the waiver request, the settling party will have five business days to confirm to SEC Staff that it is willing to move forward with that portion of the settlement offer accepted by the Commission; otherwise, the settlement order will not be issued. For more detailed information, please refer to Gibson Dunn's client alert.

Ninth Circuit Rejects Challenge to SEC No-Admit/No-Deny Rule

On August 6, 2025, the U.S. Court of Appeals for the Ninth Circuit denied a petition for review of the SEC's decision to deny a request to amend SEC Rule 202.5(e), also known as the "No-Admit/No-Deny Rule" ("Rule"). The challenge, *Powell v. SEC*, was brought by the public interest litigation group New Civil Liberties Alliance on the grounds that the Rule facially violates a settling party's First Amendment free speech rights.

Adopted in 1972, the Rule provides that the SEC will not settle a civil enforcement action with a defendant unless the defendant agrees it will not publicly deny the SEC's allegations against it. Although the Rule does not require that defendants affirmatively admit to wrongdoing or prevent them from denying wrongdoing in other legal proceedings, it does provide a basis for the SEC to attempt to reopen a settled enforcement action if a defendant publicly denies wrongdoing after settlement.

In issuing its decision, the Ninth Circuit relied on longstanding precedent permitting voluntary waiver of constitutional rights, including First Amendment rights. However, the Court was clear that it made the decision on narrow grounds. The Ninth Circuit left open the possibility that future, more particularized challenges to the Rule could raise legitimate First Amendment concerns, especially if a party waived its constitutional rights unknowingly or involuntarily, or the SEC used the Rule to prevent criticism of itself, its officers, or programs.

Accounting Firm Settles Lawsuit Challenging Constitutionality of PCAOB

On September 25, 2025, one of the accounting firms challenging the constitutionality of the PCAOB's in-house disciplinary process voluntarily dismissed its suit in the U.S. District Court for the District of Columbia, following the PCAOB's September 23 acceptance of the firm's offer of settlement in the underlying disciplinary matter. The lawsuit had alleged that the PCAOB's funding, appointments, and adjudication of disciplinary actions violate Articles I, II, and III of the Constitution as well as the Fifth and Seventh Amendments. Two other "John Doe" challenges to the PCAOB's disciplinary regime remain pending in federal court.

Ninth Circuit Holds Companies May Be Required to Disclose Interim Financial Results

In *Sodha v. Golubowski*, No. 24-1036, a divided Ninth Circuit panel held that a company may violate the securities laws if it discloses historical financial results in securities offering materials without also disclosing current, intra-period financial results that materially differ from the historical results. With respect to disclosure obligations under Item 303 of Regulation S-K, in the context of public offerings, the panel expressly rejected the bright-line rule adopted by some courts that a business pattern must persist for at least two months to trigger disclosure as a known trend under Item 303, holding instead that companies' disclosure obligations under Item 303 may be triggered by short-lived, but material, shifts. The court pointed to the fallouts from the COVID-19 pandemic and 2008 financial crisis as examples. For more detailed information, please refer to Gibson Dunn's client alert.

Meanwhile, President Trump has recently advocated for doing away with quarterly reporting in favor of semiannual filings, and Chairman Atkins has indicated the agency will consider that change. If the reporting cadence is reduced, the Ninth Circuit's ruling could form the basis for further judicial consideration of companies' disclosure obligations during the expanded gap between periodic financial statement reporting.

SEC Allows Companies to IPO with Mandatory Arbitration Provisions

On September 17, 2025, the SEC issued a Policy Statement announcing that the presence of a provision in an issuer's charter or bylaws requiring arbitration of investors' federal securities law claims will not factor into the Staff's decisions of whether to accelerate the effectiveness of a registration statement—effectively clearing a path for IPOs with such provisions. The action reverses decades of Staff practice of treating such clauses as inconsistent with the "public interest/investor protection" standard of Section 8(a) of the Securities Act, under which the Staff has historically refused to accelerate registration statements for companies with mandatory investor arbitration provisions. The Policy Statement was adopted by a 3–1 vote, with dissenting Commissioner Caroline Crenshaw criticizing the move as harmful to investors. In explaining its position, the Commission reasoned that federal securities statutes do not override the Federal Arbitration Act, that statutory anti waiver clauses protect substantive, not procedural rights, and that the securities laws do not guarantee a right to class actions. The Staff will instead focus on the adequacy of disclosure regarding any such clause. The Policy Statement applies not only to IPO registration statements, but also to Exchange Act registrations, post effective amendments, and Regulation A offerings. For more detailed information, please refer to Gibson Dunn's recent client alert.

SEC Allows Retail Voters to Give Standing Proxy Instructions

On September 15, 2025, the SEC's Division of Corporation Finance issued a no action letter to an issuer stating that the Staff would not recommend enforcement under Exchange Act Rules 14a 4(d)(2) and (3) if the company implements a "Retail Voting Program" that allows retail shareholders to submit standing instructions that their shares be voted, on an ongoing basis, in line with the board's recommendations. The Staff noted several features of the proposed program as providing a basis for its decision, including its availability to both record and beneficial holders, annual reminders to participants of their participation, the ability to opt out at any time, and the right to override the standing instruction for any particular proposal. The program would not be available to registered investment advisers exercising voting authority. The instructions could be used, among other things, to govern shareholders' votes regarding an issuer's outside auditor. For further information, please refer to Gibson Dunn's recent client alert.

SEC Announces Cross-Border Fraud Task Force

On September 5, 2025, the SEC announced the formation of a Cross-Border Task Force within its Division of Enforcement. The task force will focus on investigating foreign-based issuers for potential market manipulation, such as pump-and-dump and ramp-and-dump schemes, and will increase scrutiny of gatekeepers, particularly auditors and underwriters, who help foreign issuers access the U.S. capital markets. The statement notably singles out China as a jurisdiction where governmental control and other factors pose unique investor risks.

The SEC's creation of the Task Force is consistent with its longstanding practice of forming special task force teams to concentrate nationwide resources on priority enforcement areas. In announcing this Task Force, Chairman Atkins noted that it "will consolidate SEC investigative efforts and allow the SEC to use every available tool to combat transnational fraud." He also noted a Commission-wide approach to protecting U.S. investors, including directing Staff in the Divisions of Corporation Finance, Examinations, Economic and Risk Analysis, and Trading and Markets as well as the Office of International Affairs to consider and recommend new disclosure guidance and any necessary rule changes.

Companies with ties to China should anticipate continued, and potentially heightened, SEC enforcement in traditional areas within the SEC's expertise.

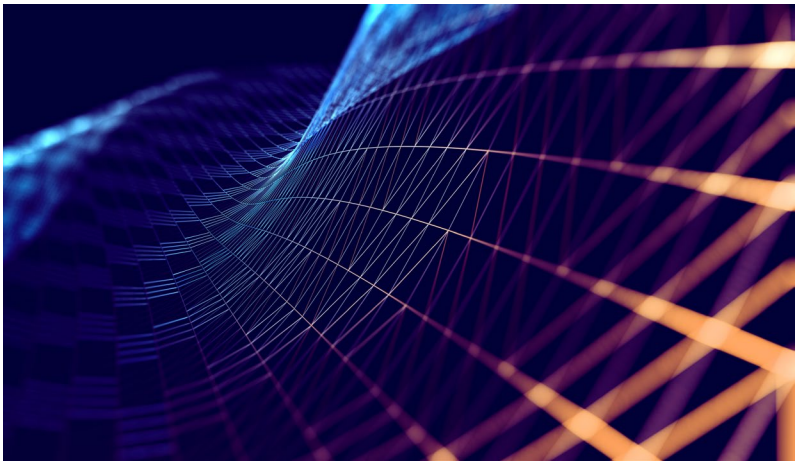
UK Entities Update Guidance on Failure to Prevent Fraud

On August 18, 2025, the United Kingdom's public prosecution and Serious Fraud Office published updated guidance on corporate prosecutions. The Crown Prosecution Service said that the updated guidance covers changes to the identification doctrine introduced under the Economic Crime and Corporate Transparency Act 2023 (ECCTA). The ECCTA imputes corporate liability based on "senior managers" acting within the scope of their responsibilities, marking a departure from the common law test, which only holds companies liable for the actions of employees who meet a "directing mind and will" test. The updated guidance clarifies that "[c]orporate liability may be established under statutory provisions or common law. Where available, statutory routes to corporate liability are generally preferable to reliance on common law principles; they provide clearer legal tests and avoid the limitations of the [common law] identification doctrine."

SEC Drops SolarWinds Case, DOJ Reaches Settlement in Two FCA Cybersecurity Cases

On November 20, the SEC voluntarily dismissed, with prejudice, its case in the Southern District of New York against SolarWinds Corp. and its former Vice President, Timothy Brown. The SEC case, filed in 2023, alleged that SolarWinds had committed fraud by misstating the strength of its cybersecurity controls to investors.

Separately, on July 31, 2025, the Department of Justice announced two settlements that reinforce DOJ's focus on cybersecurity within the False Claims Act (FCA) space. In the first matter, DOJ settled an FCA action against private equity firm Gallant Capital Partners, LLC and its portfolio company, defense contractor Aero Turbine, Inc. According to the settlement agreement, Aero Turbine allegedly failed to comply with the cybersecurity standards required under the Defense Federal Acquisition Regulation Supplement in connection with its contracts with the Air Force and, under direction from a Gallant employee, provided access to controlled unclassified information to a software company based in Egypt. The agreement credited both companies' self-disclosure and cooperation. In the second matter, DOJ resolved a 2023 *qui tam* action brought against Illumina Inc. by a former employee who alleged that the company defrauded the federal government when selling genomic-sequencing software with extensive cybersecurity vulnerabilities to federal agencies and government-funded health programs, in violation of 2024 Food and Drug Administration cybersecurity regulations. For more detailed information, please refer to Gibson Dunn's client alert.



FTC Changes Strategy on Non-Compete Agreements

On September 5, 2025, the Federal Trade Commission voted to accede to the vacatur of the Non-Compete Clause Rule by the U.S. District Court of the Northern District of Texas by dismissing its appeals in *Ryan, LLC v. FTC*, No. 24-10951 (5th Cir.) and *Properties of the Villages v. FTC*, No. 24-13102 (11th Cir.). In his statement accompanying the dismissals, FTC Chairman Andrew N. Ferguson emphasized that the FTC remains concerned with the anticompetitive effects of non-compete agreements but is shifting its focus from the Non-Compete Clause Rule to investigating and litigating specific cases. Chairman Ferguson warned that companies "in industries plagued by thickets of noncompete agreements" will receive warning letters from his office in the near term "urging them to consider abandoning those agreements."

Coinciding with this shift, on September 4, 2025, the FTC filed a complaint against Gateway US Holdings, Inc. regarding its use of non-compete agreements. The FTC also voted to approve a consent order preventing Gateway from using non-compete clauses in most of its employment agreements. The same day, the FTC's Joint Labor Task Force made a public request for comments from current and former employees and rival employers affected by non-compete agreements. These three actions signal the FTC's continued interest in non-compete agreements, despite its move away from the Non-Compete Clause Rule.

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

Other Recent SEC and PCAOB Developments

SEC

- During the recent federal government shutdown, reports stated that the SEC has furloughed over 90% of its workforce, retaining fewer than 400 employees.

- On September 10, 2025, Gibson Dunn partner James J. Moloney was named the Director of the SEC's Division of Corporation Finance. Jim spent the past twenty-five years with Gibson Dunn, where he co-led the firm's Securities Regulation and Corporate Governance Practice Group.

- On September 4, 2024, the SEC published its Spring 2025 Unified Agenda of Regulatory and Deregulatory Actions announcing its forthcoming rulemaking items. The twenty-three short-term agenda items represent a shift in focus toward deregulatory and disclosure simplification actions, as well as crypto assets and crypto-market structure rulemaking reforms, and away from environmental, social and governance-related (ESG) topics. For more detailed information, please refer to Gibson Dunn's recent client alert.

PCAOB

- On September 23, 2025, the PCAOB announced settled charges against Marcum Asia CPAs, LLP related to the firm's transfer of draft workpapers to it successor auditor, China-based Shandong Haoxin Certified Public Accountants Co., Ltd. The PCAOB alleged that the transfer took place without the firms reaching an understanding of their use as required under AS 2610, *Initial Audits—Communications Between Predecessor and Successor Auditors*. To settle the charges, Marcum agreed to pay a civil penalty of $100,000 and conduct training.

- On August 28, 2025, the PCAOB announced that it will postpone the effective date for its newly adopted QC 1000, *A Firm's System of Quality Control*, for one year to December 15, 2026. QC 1000, which the Board adopted on May 13, 2024, represents the first update to the Board's quality control standards since the PCAOB's founding.

- On or about June 30, 2025, Marc Dorfman retired from his position as Chief Hearing Officer with the PCAOB after nearly twelve years. Mr. Dorfman's retirement came without a public announcement, and no successor has been named.

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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.