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Predictions for Financial Regulatory Enforcement Under the Trump Administration

Meghan E. Flinn, Clifford C. Histed, Cheryl L. Isaac, Theodore L. Kornobis

Agenda

Enforcement by the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) Under Trump 2.0, With Related Enforcement Considerations Under the Bondi Department of Justice (DOJ)

1. Changes in Leadership and Organization
2. Changes in Enforcement Procedure
3. Developments in Enforcement Priorities
4. Related Enforcement Considerations at DOJ
5. Filling the Enforcement Gap: Anticipated Risk Areas
6. New Legal Framework for Regulatory Enforcement
7. Considerations Moving Forward

Changes in Leadership and Organization

U.S. Securities and Exchange Commission

Paul S. Atkins
Confirmed April 2025

Mark T. Uyeda
Term expires 2028

Hester M. Peirce
Term expires 2025

Caroline A. Crenshaw
Term expires 2024

TBD

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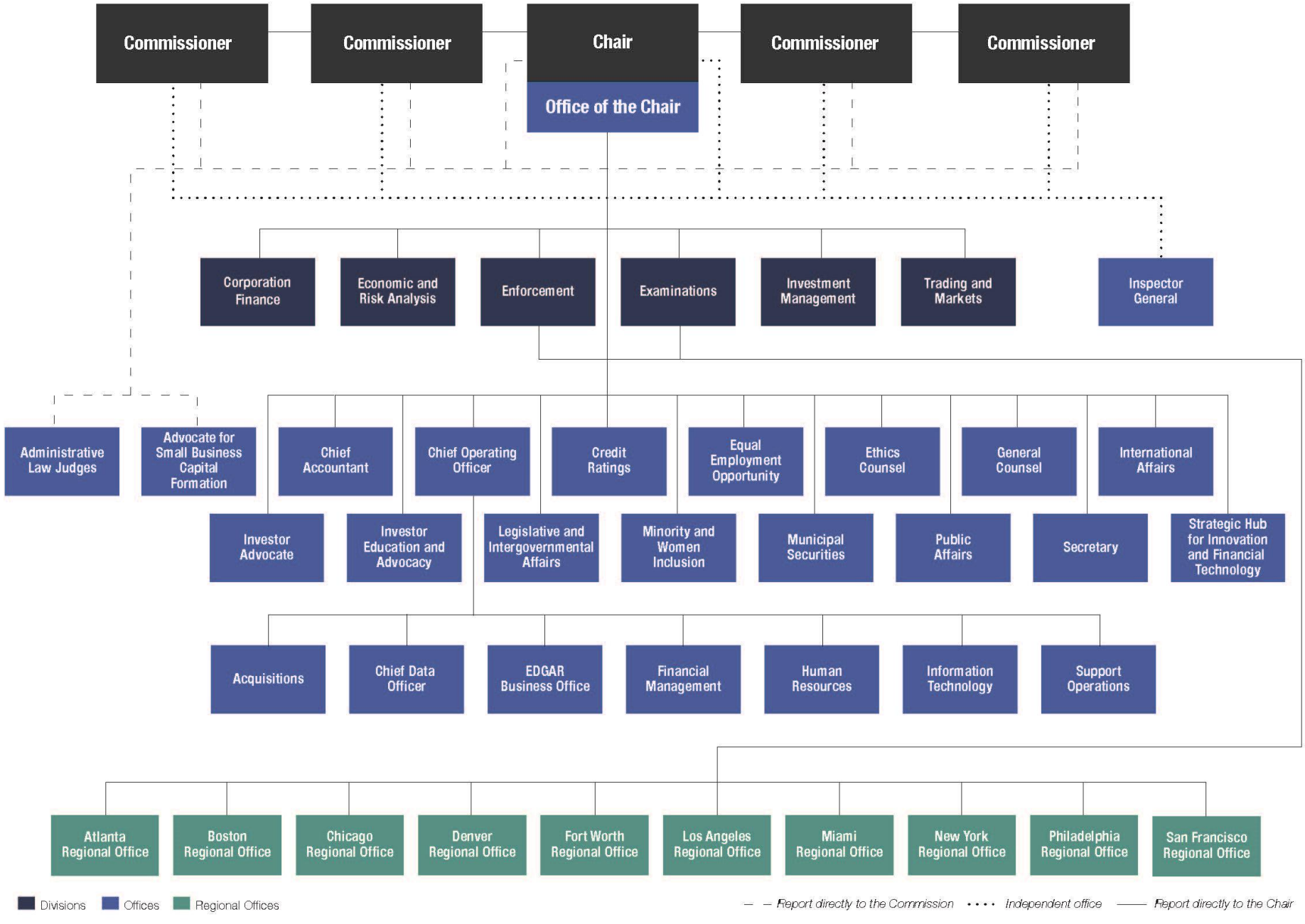
Commissioner
Commissioner
Chair
Commissioner
Commissioner
Office of the Chair
Corporation Finance
Economic and Risk Analysis
Enforcement
Examinations
Investment Management
Trading and Markets
Inspector General
Administrative Law Judges
Advocate for Small Business Capital Formation
Chief Accountant
Chief Operating Officer
Credit Ratings
Equal Employment Opportunity
Ethics Counsel
General Counsel
International Affairs
Investor Advocate
Investor Education and Advocacy
Legislative and Intergovernmental Affairs
Minority and Women Inclusion
Municipal Securities
Public Affairs
Secretary
Strategic Hub for Innovation and Financial Technology
Acquisitions
Chief Data Officer
EDGAR Business Office
Financial Management
Human Resources
Information Technology
Support Operations
Atlanta Regional Office
Boston Regional Office
Chicago Regional Office
Denver Regional Office
Fort Worth Regional Office
Los Angeles Regional Office
Miami Regional Office
New York Regional Office
Philadelphia Regional Office
San Francisco Regional Office
Divisions
Offices
Regional Offices
Report directly to the Commission
Independent office
Report directly to the Chair

Reorganizations Around Crypto

- Establishment of Crypto Task Force
  - Endeavors to “provide clarity on the application of the federal securities laws to the crypto asset market and to recommend practical policy measures that aim to foster innovation and protect investors.”
  - Hosts public roundtables to discuss various topics touching on crypto regulation, including defining security status, tailoring regulation for crypto trading, crypto custody, and DeFi.
- Rebrand of Crypto Assets and Cyber Unit to Establish Cyber and Emerging Technologies Unit
  - Established to “focus on combatting cyber-related misconduct and to protect retail investors from bad actors in the emerging technology space.”
  - Priority areas include fraud committed using emerging technologies (*e.g.*, artificial intelligence (AI), blockchain technology, crypto assets, social media, dark web), hacking for material nonpublic information, fraudulent disclosures by public issuers relating to cybersecurity, and compliance with cybersecurity regulations

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CFTC
COMMODITY FUTURES TRADING COMMISSION

Caroline D. Pham
Acting Chairman

Christy Goldsmith Romero
Term expires 2027

Kristin N. Johnson
Term expires 2027

Summer K. Mersinger
Term expires 2028

Brian Quintenz
Nominated Chairman

CFTC

- After Commissioner Caroline Pham was named Acting Chair of the CFTC, she made sweeping changes to the CFTC leadership, including:
  - New Director of Division of Enforcement: Brian Young
  - Acting Director of Division of Market Oversight: Rahul Varma
  - Acting Director of Division of Clearing and Risk: Richard Haynes
  - Acting General Counsel: Megan Tente
- Former Commissioner Brian Quintenz was nominated as chairman of the CFTC in February 2025 but has not had his Senate confirmation hearings scheduled.
  - Once confirmed, he may replace all of Acting Chair Pham's leadership picks.

CFTC: New Task Forces

- Under prior Chairman Rostin Behnam, the CFTC Division of Enforcement created two task forces: the Environmental Fraud Task Force and the Cybersecurity and Emerging Technologies Task Force.
  - These task forces demonstrated the agency's enforcement priorities—particularly related to carbon and crypto markets.
- Acting Chair Pham eliminated these task forces and replaced them with two new ones: the Complex Fraud Task Force and the Retail Fraud and General Enforcement Task Force.
  - This is consistent with Acting Chair Pham's stated priorities of going "back to the basics" and going after misconduct that leads to actual consumer harm with the possibility for recompense.

Changes in Enforcement Procedure

SEC: Changes in Enforcement Procedure

- Rulemaking to Revoke Delegation of Authority to Director of the Division of Enforcement to Issue Formal Orders of Investigation
  - A formal order of investigation gives the Division staff the authority to pursue an investigation with subpoenas for documents and witness testimony.
  - In 2009, the SEC promulgated a rule giving the Director of Enforcement the authority to issue formal orders. The Director of Enforcement could "sub-delegate" the authority to senior enforcement personnel.
  - The amended rule, issued on 10 March 2025, now requires all formal orders to be approved by a majority vote of the commissioners, returning to the pre-2009 procedures.
  - Voluntary requests will be an alternative pathway.

SEC: Changes in Enforcement Procedure

- In a 2008 article, Chair Paul Atkins argued the SEC should convene an advisory committee, with the same mandate as the 1972 Wells Committee, to "'bring to date' the best thinking on enforcement practices," including:
  - More thoughtful use of discretion in bringing (or, more importantly, not bringing) an enforcement action;
  - Greater transparency regarding the SEC's evidence and allegations;
  - More prompt closure to investigations; and,
  - Increased opportunities for a Wells meeting.

  Paul S. Atkins & Bradley J. Bondi, "Evaluating the Mission: A Critical Review of the History & Evolution of the SEC Enforcement Program," 13 Fordham J. Corp. & Fin. L. 367 (2008)
- Enforcement staff has recently reported an increased willingness to have a Wells meeting.

SEC: Changes in Enforcement Procedure

- *SEC v. Jarkesy*, No. 22-859 (June 27, 2024)
  - The Supreme Court held that when the SEC seeks civil penalties against a defendant based on claims of securities fraud, the Seventh Amendment entitles the defendant to a jury trial.
  - This means that provisions of the securities laws that permitted the SEC to compel adjudication of such claims before an administrative tribunal—where there are no juries — violate the Constitution.
  - The SEC must instead file such claims in federal court.

SEC: Changes in Enforcement Procedure

- Cooperation and Remediation
  - The SEC under multiple chairs has emphasized the benefits of cooperation, self-reporting, and remediation.
  - Current Acting Enforcement Director Sam Waldon spoke about this at length last year, providing some examples:
    - Providing documents the SEC cannot compel
    - Conducting an internal investigation and sharing results
    - Providing helpful financial analyses and translations
  - Waldon recently said that these remain “huge” for the SEC Staff and that there is probably greater opportunity to get real, meaningful benefits from cooperation and remediation moving forward.

SEC: Changes in Enforcement Procedure

- "Project 2025"
  - Chair Atkins contributed to the chapter on financial regulators.
  - The following are among the proposals:
    - Eliminate all administrative proceedings, except for stop orders for defective registration statements;
    - Allow removal of administrative proceedings to federal courts;
    - Abolish the Public Company Accounting Oversight Board (PCAOB) and Financial Industry Regulatory Authority (FINRA), and absorb their enforcement activities into the SEC;
    - Look into continued use of other self-regulatory organizations; and
    - Pursue legislation to limit the time for an investigation to two years, with no extensions.

CFTC: Advisory on Self-Reporting, Cooperation, and Remediation

- In February 2025, the Division of Enforcement published an advisory intended to encourage self-reporting and create a transparent framework of credits for doing so.
  - This advisory follows very vocal dissents by then-Commissioner Pham in recent enforcement actions related to the CFTC failing to provide sufficient credit for good faith self-reporting and cooperation.
- The advisory supersedes all of the CFTC's prior guidance and advisories on this topic.
- Commissioner Kristin Johnson dissented, stating that the advisory should have been published in coordination with the other Divisions.

CFTC: Advisory on Referrals to the Division of Enforcement

- In April 2025, multiple CFTC Divisions published a Staff Advisory to provide guidance on materiality or other criteria that the Divisions will use to determine whether to make a referral to the Division of Enforcement.
  - The guidance provided relates to self-reported violations, or supervision or noncompliance issues.
  - A “reasonableness” standard is applied to (i) prolonged deficiencies in supervisory systems, (ii) knowing and willful misconduct by management, and (iii) lack of progress towards completion of remediation program.
  - Nonmaterial supervision and noncompliance issues will not be referred to the Division of Enforcement (the relevant operating Division will instead address this directly).

Potential Implications

Investigations may decrease in pace.

Investigations may remain in an informal stage (voluntary requests for documents and interviews/testimony) for a longer period of time.

Enforcement actions may take longer to resolve.

With fewer resources and closer executive oversight, the SEC and CFTC may be more selective in the cases they bring and choose to litigate, focusing on key priorities.

Developments in Enforcement Priorities

SEC: Developments in Enforcement Priorities

- *Decreased Enforcement of Certain Gensler-Era Priorities*
  - ***Crypto*** —
    - The SEC has dropped or paused many active cases against crypto companies based on claims that the companies should have been registered with the SEC.
      - 27 Feb. 2025: SEC files dismissal with prejudice in lawsuit against cryptocurrency exchange.
      - 25 Mar. 2025: SEC and Ripple Labs announce settlement in principle pursuant to which the SEC has agreed to drop its appeal of a summary judgment order and to return US$75 million of a US$125 million fine originally imposed by the district court.
      - 27 Mar. 2025: SEC files dismissals with prejudice in lawsuits filed against three crypto industry participants.
      - Pauses in other lawsuits have been announced (and extended).
    - *But see SEC v. Palafox* (E.D. Va. Apr. 22, 2025): SEC alleges that Ramil Palafox, founder of a claimed crypto asset and foreign exchange trading company, orchestrated a fraudulent scheme by offering investments in crypto assets and, instead, misappropriated the investments for personal benefit.

SEC: Developments in Enforcement Priorities

- *Decreased Enforcement of Certain Gensler-Era Priorities*
  - ***Off-channel communications*** —
    - The waves of enforcement actions concerning off-channel communications, an initiative that began in 2021, resulted in charges against more than 100 firms, with more than 70 of those cases settled in 2024.
    - In September 2024, Commissioners Hester Peirce and Mark Uyeda filed dissenting opinions with respect to one of the settled actions, noting that the SEC cannot "enforce our way to compliance" and is "equat[ing] reasonableness with perfection."
    - In January 2025, the SEC announced settlements against nine investment advisers and three broker-dealers in what may prove to be the last tranche of the off-channel communications sweep.
    - ***This is likely to remain an issue in SEC exams, and it is possible the SEC may still tack on a recordkeeping violation in egregious cases involving other misconduct.***
      - → SEC rejected motion request of 16 financial firms to decrease settlement amounts by 2-1 vote.

SEC: Developments in Enforcement Priorities

- *Decreased Enforcement of Certain Gensler-Era Priorities*
  - ***Exchange Act Rule 21F-17***
    - Rule 21F-17(a) prohibits actions to impede whistleblower reporting to the SEC, "including enforcing, or threatening to enforce, a confidentiality agreement…with respect to such communications."
    - Sweep of actions in 2023 based on language in employment or separation agreements that required representations that the employee had not filed complaints with government agencies or required waiver of whistleblower awards and, therefore, *could be interpreted* as impeding whistleblower reporting.
    - The orders did not include allegations that whistleblowers actually interpreted the language this way and were impeded.
    - Acting Enforcement Director Waldon indicated a continuation of Rule 21F-17 cases when agreements prohibit reporting to SEC, but likely with changes from the recent expansive approach.

SEC: Developments in Enforcement Priorities

- *End to "Regulation by Enforcement" and "Broken Windows"*
  - ***Recent dissents preview this turn in policy.***
    - January 9, 2023 settled order concerning alleged failure of a public company to suffiiently disclose information regarding the termination of its CEO.
      - Commissioners Peirce and Uyeda dissented, stating that the order involves "a novel interpretation of the Commission's expansive executive compensation disclosure requirements."
      - "If the Commission intends to expand a settled disclosure requirement, the Commission or its staff should publicly articulate its views through rulemaking or formal guidance so that companies understand the requirement before the Commission starts enforcing it."
    - January 23, 2023 settled order concerning alleged violation of Section 17(a)(2) of the Securities Act of 1933 based on a purported materially misleading omission regarding use of a data algorithm for pricing securities.
      - Commissioners Peirce and Uyeda dissented on the ground that the statements about the algorithm "are far removed from any offers or sales of securities."
      - "A one-off enforcement action that rests on a strained reading of Securities Action Section 17(a)(2) is not the right way to make regulatory policy."

SEC: Developments in Enforcement Priorities

> In some instances, exercising discretion may not be appropriate. There should not be institutional encouragement for using discretion to formulate theories of liability that overstep the boundaries of existing law.
>
> --- Atkins & Bondi, 13 Fordham J. Corp. & Fin. L. at 411.

SEC: Developments in Enforcement Priorities

- *Proportional Penalties*
  - Gensler SEC expressly sought to use high penalties for deterrence.
    - "We must design penalties that actually deter and reduce violations, and are not seen as an acceptable cost of doing business." Gurbir Grewal, PLI Broker-Dealer Regulation & Enforcement 2021 (Oct. 6, 2021).
    - FY2024 remedies highlighted as the "highest amount in SEC history."
  - A different approach is expected in the Atkins SEC.
    - Acting Enforcement Director Waldon recently referenced the SEC's 2006 statement "Concerning Financial Penalties," which emphasizes the benefit and harm to shareholders in analyzing a penalty, particularly as compared to a penalty against the individual violator.
    - Waldon: "With this Commission, we're going to have to show our work, and we're going to have to be able to point back to the legal basis for how we got to our penalty" as well as the "comps."
    - Atkins article: Advocating for a "re-evaluation of the incentives for bringing actions and obtaining large penalties (such as through promotions, awards, and public recognition)."

SEC: Developments in Enforcement Priorities

- *Continued Enforcement of Staple Issues*
  - **Fiduciary Duty of Investment Advisers and Conflicts of Interest.**
    - *In the Matter of One Oak Capital Mgmt., LLC*, Rel. No. 102425 (Feb. 14, 2025) — SEC settlement under Section 206(2) of the Investment Advisers Act of 1940 for alleged failure to disclose advisory fees, failure to disclose conflict of interest associated with conversion from brokerage account to advisory account, and failure to review accounts for suitability for advisory accounts. Involved elderly customers.
    - *SEC v. Cutter* (D. Mass) — SEC win following five-day jury trial against investment adviser and his advisory firm for violations of Section 206(2) of the Investment Advisers Act of 1940 relating to failures to disclose upfront commissions and other conflicts of interest in marketing services to current and future retirees.

Statement of SEC Division of Enforcement Acting Director Samuel J. Waldon:

"We are pleased with the jury verdict holding Jeffrey Cutter and Cutter Financial Group, LLC accountable for breaching their fiduciary duties to their clients. As the hard work of the SEC team demonstrates, we will continue to hold investment advisers responsible when they engage in wrongdoing."

SEC: Developments in Enforcement Priorities

- *Continued Enforcement of Staple Issues*
  - **Fraud / Individual Accountability.**
    - *SEC v. Burak* (S.D.N.Y. Feb. 2025) — Complaint alleges misappropriation of investor funds, many from the Spanish and Latino community, for personal expenses by falsely representing himself as a wealthy hedge fund owner and claiming guaranteed returns. Parallel criminal action.
    - *SEC v. Butkus* (S.D.N.Y. Feb. 2025) — Complaint alleges operation of fictitious investment firms and offering investments in "sham" mutual funds through materially false advertisements.
      - → *Waldon: "This case underscores the SEC's unwavering commitment to hold individuals accountable for engaging in fraud that harms retail investors."*
    - With focus on misconduct that results in investor harm (as opposed to potential harm or the risk of harm), the SEC will likely continue focus on insider trading and other types of trading misconduct (e.g., cherry picking).

SEC: Developments in Enforcement Priorities

- *Continued Enforcement of Staple Issues*
  - **Disclosure Issues, Including AI-Washing.**
    - *In the Matter of Presto Automation,* File No. 3-22413 (Jan. 14, 2025) — Settled action against publicly traded restaurant technology company for allegedly false and misleading statements about its AI product, intended to automate order taking at fast-food restaurants. Specifically, the settled order found that the company failed to disclose that the technology was owned by a third party and falsely claimed that the product did not require human intervention.
    - *SEC v. Saniger* (S.D.N.Y. Apr. 11, 2025) — Complaint filed against founder of tech startup, alleging false and misleading statements about the company's use of AI. Specifically, the SEC claims that, while representing reliance on AI technology to process mobile app orders, the company actually used contract employees to input orders.
      - → Complaint seeks injunctions, disgorgement, civil penalties, and an officer-and-director bar.
    - Continued enforcement of "greenwashing" may also be on the horizon.

SEC: Developments in Enforcement Priorities

- *Continued Enforcement of Staple Issues*
  - **Insider Trading**
    - *SEC v. Safi* (D. Mass. Mar. 2025) — Complaint alleges defendants participated in an international insider trading scheme after acquiring topics from sources at publicly traded companies about impeding corporate transactions or other confidential information.

CFTC: Developments in Enforcement Priorities

- Acting Chairman Pham has emphasized “Getting Back to Basics” concerning enforcement – fraud, manipulation, and restitution for victims.
- Ordered staff not “to not seek to charge regulatory violations in cases involving digital assets, in particular violations of registration requirements unless there is evidence that the defendant knew of the licensing or registration requirement at issue and violated such requirement willfully”.
- CFTC has not filed new enforcement cases since January 20, 2025.
- CFTC is clearing out the backlog of old cases that no longer meet CFTC’s enforcement priorities – no customer harm or market abuse.
- Closing Letters being sent across the industry.

Related Enforcement Considerations Under the Bondi DOJ

DAG Memo: Ending Regulation by Prosecution

- On 7 April 2025, the Deputy Attorney General issued a memorandum called “Ending Regulation by Prosecution.”
- “The Department of Justice is not a digital assets regulator.”
- DOJ’s “investigations and prosecutions involving digital assets shall focus on prosecuting individuals who victimize digital asset investors, or those who use digital assets in furtherance of criminal offenses such as terrorism, narcotics and human trafficking, organized crime, hacking, and cartel and gang financing.”
- Absent evidence of knowing and willful violations, DOJ will not target:
  - Virtual currency exchanges,
  - Mixing and tumbling services, or
  - Offline wallets

  for acts committed by end users.

DAG Memo: Ending Regulation by Prosecution

- DOJ should not charge regulatory violations such as:
  - Unlicensed money transmitting
  - Violations of Bank Secrecy Act
  - Unregistered securities offerings or broker-dealer violations or registration violations under the Commodity Exchange Act
- DOJ should not charge violations of the Securities Act, Securities Exchange Act or Commodity Exchange Act where (a) the charge would require the Justice Department to litigate whether a digital asset is a “security” or “commodity” and (b) there is an adequate alternative criminal charge available.
- DOJ will prioritize investigations and prosecutions” addressing:
  - Embezzlement and misappropriation of customer funds on exchanges
  - Digital investments scams
  - Hacking of exchanges and decentralized autonomous organizations resulting in theft of funds
  - Exploiting vulnerabilities in smart contracts

Pause on Foreign Corrupt Practices Act (FCPA) Enforcement

"[O]verexpansive and unpredictable FCPA enforcement against American citizens and businesses — by our own Government — for routine business practices in other nations not only wastes limited prosecutorial resources that could be dedicated to preserving American freedoms, but actively harms American economic competitiveness and, therefore, national security."

- Orders the Attorney General (AG), for a period of 180 days, to:
  - "cease initiation of any new FCPA investigations or enforcement actions";
  - "review in detail all existing FCPA investigations or enforcement actions and take appropriate action with respect to such matters to restore proper bounds on FCPA enforcement and preserve Presidential foreign policy prerogatives"; and
  - "issue updated guidelines or policies."
- Requires the AG to determine whether "remedial measures with respect to inappropriate past FCPA investigations and enforcement actions are warranted."

False Claims Act Enforcement

- *Executive Order 14173*
  - Requires government contractors to certify in every contract or grant award that they do not operate any programs promoting diversity, equity, and inclusion (DEI) that violate any applicable federal antidiscrimination laws.
  - All future contracts must include a term requiring that the contractor "agree that its compliance in all aspects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of [the FCA]."
  - AG Bondi, in consultation with agency heads, must submit a report with recommendations for enforcing federal civil rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences.
    - → Including identification of up to nine potential civil compliance investigations of publicly traded companies and certain large nonprofits, foundations, higher education institutions, and professional associations.

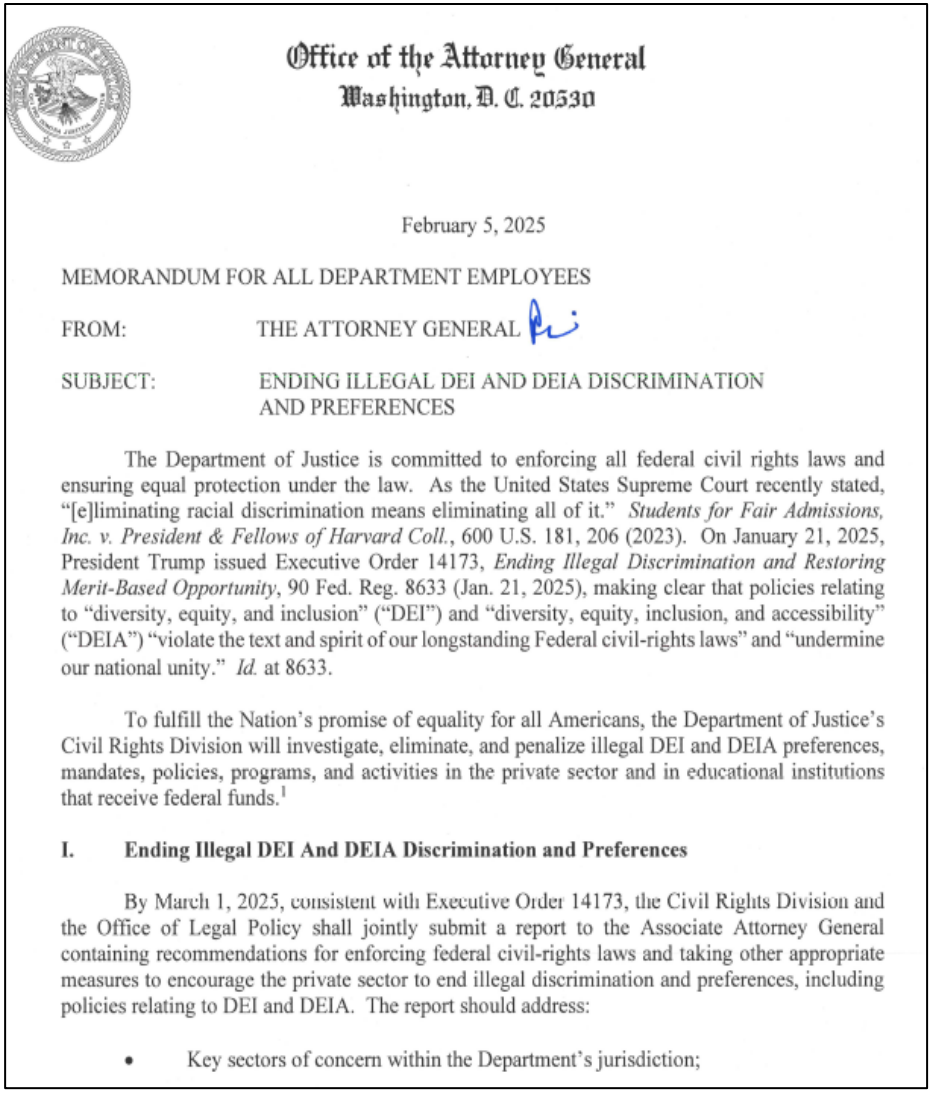
False Claims Act Enforcement

AG Bondi's "Ending Illegal DEI" Memo

Directs DOJ's Civil Rights Division to investigate, eliminate, and penalize illegal DEI policies and activities in the private sector and in educational institutions that receive federal funds.

Civil Rights Division shall issue a report to the Associate AG by 1 March 2025 that addresses:

- Key sectors of concern.
- The most egregious and discriminatory DEI practitioners in each sector.
- A plan with specific steps to deter the use of DEI programs that constitute illegal discrimination or preferences, "including proposals for criminal investigations and for up to nine potential civil compliance investigations."
- Additional potential litigation activities.



Office of the Attorney General
Washington, D. C. 20530

February 5, 2025

MEMORANDUM FOR ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: ENDING ILLEGAL DEI AND DEIA DISCRIMINATION AND PREFERENCES

The Department of Justice is committed to enforcing all federal civil rights laws and ensuring equal protection under the law. As the United States Supreme Court recently stated, "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023). On January 21, 2025, President Trump issued Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, 90 Fed. Reg. 8633 (Jan. 21, 2025), making clear that policies relating to "diversity, equity, and inclusion" ("DEI") and "diversity, equity, inclusion, and accessibility" ("DEIA") "violate the text and spirit of our longstanding Federal civil-rights laws" and "undermine our national unity." *Id.* at 8633.

To fulfill the Nation's promise of equality for all Americans, the Department of Justice's Civil Rights Division will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds.[1]

I. Ending Illegal DEI And DEIA Discrimination and Preferences

By March 1, 2025, consistent with Executive Order 14173, the Civil Rights Division and the Office of Legal Policy shall jointly submit a report to the Associate Attorney General containing recommendations for enforcing federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences, including policies relating to DEI and DEIA. The report should address:

- Key sectors of concern within the Department's jurisdiction;

Filling the Enforcement Gap: Anticipated Risk Areas

Possible Gap-Filling by States

- *State Securities Regulators*
  - Some state securities regulators have been historically active in enforcing securities fraud under state law, e.g., Massachusetts Securities Division.
  - States also coordinate to investigate and prosecute, as a multistate coalition, enforcement actions for securities fraud, including with respect to digital assets and the sale of unregistered securities.
  - In an 8 April 2025 speech, then-Acting Chair Uyeda discussed possible reevaluation of federal preemption of state registration requirements under National Securities Markets Improvement Act of 1996 (NSMIA) and announced that he has asked the staff to revisit the “split” in regulatory oversight of mid-size advisers between the states and the SEC.
  - Bottom line: We can expect a more active role being taken by state securities agencies.

Possible Gap-Filling by States

- *State Attorneys General Offices*
  - 18 April 2025: The Oregon Department of Justice sued cryptocurrency exchange because it allegedly "encouraged and helped" the sale of unregistered cryptocurrencies "without them being properly vetted to protect customers."

    "States must fill [the] enforcement vacuum being left by federal regulators who are abandoning these cases under [the] Trump administration."

    Statement by Oregon AG Dan Rayfield

  - 2 April 2025: California AG Rob Bonta issued an "Alert to Businesses on Violations of the Foreign Corrupt Practices Act," emphasizing that, for businesses operating in California, "the FCPA remains binding federal law and violations are actionable under California's Unfair Competition Law."

    "Businesses should continue to maintain rigorous internal accounting controls and to ensure that they and their agents do not offer or pay anything of value to foreign officials to obtain or retain business."

Other Areas of Continued Exposure

- *FINRA*
  - Crypto Asset Sweep 2024
- Private Litigants
- National Futures Association (NFA)
- Exchanges

New Legal Framework for Regulatory Enforcement

Executive Orders Addressing Independent Agencies

- President Trump issued two executive orders designed to limit the autonomy previously afforded to independent agencies, which, while sitting under the Executive Branch, are structured by law to be shielded from presidential control.
- Independent agencies include, among others, the SEC and CFTC.
- Both have implications for enforcement—and the first specifically seeks to curtail the enforcement power of independent agencies.

Executive Orders Addressing Independent Agencies

"Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative" (19 February 2025)

- "It is the policy of my Administration to focus the executive branch's limited enforcement resources on regulations squarely authorized by constitutional Federal statutes and to commence the deconstruction of the overbearing and burdensome administrative state."
- The executive order requires agency heads to coordinate with the Office of Management and Budget (OMB) Director and Department of Government Efficiency (DOGE) to review regulations "for consistency with law and Administration policy."
- It further requires agencies to "preserve their limited enforcement resources by generally de-prioritizing actions to enforce regulations that are based on anything other than the best reading of a statute and de-prioritizing actions to enforce regulations that go beyond the powers vested in the Federal Government by the Constitution."

Executive Orders Addressing Independent Agencies

"Ensuring Accountability for All Agencies" (25 February 2025)

- Under a 1993 executive order, independent agencies were exempted from oversight by the Office of Information and Regulatory Affairs (OIRA) in the OMB.
- This executive order removes that exemption.
- Among other things, the executive order:
  - Gives certain oversight authority to the OMB director;
  - Requires all "so-called independent agencies" to submit proposed rulemakings and "final significant regulatory actions" to OIRA before publication in the Federal Register; and
  - Prohibits agency employees from advancing an interpretation of the law "that contravenes the President or the Attorney General's opinion."

Loper Bright Enterprises v. Raimondo

- The Supreme Court overruled the *Chevron* doctrine, which, for the last 40 years, has required courts to defer to agencies' reasonable interpretations of ambiguous statutes.
- Under *Loper Bright*, courts must instead exercise their "independent judgment" in interpreting a statute.
- This vast change in administrative law is beginning to affect lower court litigation.
  - *SEC v. Pinnacle Advisors, LLC*, No. 5:23-cv-547 (N.D.N.Y): The Court allowed further briefing on how *Loper Bright* applies to defendants' arguments that the SEC exceeded its authority in promulgating the Liquidity Rule.
- How *Loper Bright* may interact with (or limit) the reach of these two executive orders remains an open question.

Considerations Moving Forward

Key Points to Consider:

- Expect federal pullback on aggressive areas of financial regulatory enforcement.
- Prepare for continued focus on core enforcement issues, including fraud and manipulation.
- Consider greater White House control / involvement.
- Don’t fall asleep at the switch!
  - Other regulators and private plaintiffs can fill an enforcement gap.
  - Statutes of limitations will extend past this administration.
  - There may be benefits from credible, professional internal investigations when allegations are raised, followed by cooperation.

Other Relevant K&L Gates Client Programs: Guiding Through Change Series

→ *The Corporate Enforcement Landscape and the Bondi DOJ*

→ *DEI Enforcement: False Claims Act and Other Risks on the Horizon*

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