PAUL HASTINGS

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Private Company Report

Key Issues Impacting Private Companies

Overview

This edition of the Private Company Report highlights critical developments and regulatory changes affecting private companies, including recent presidential actions, SEC guidance on Regulation D and amendments to the Delaware General Corporation Law (DGCL). We also provide updates on the IPO market, developments in the biotech industry and Foreign Corrupt Practices Act (FCPA) and antitrust enforcement. Staying informed on these topics is important for a private company's effective compliance and strategic planning.

Highlights include:

- **Presidential Actions:** A compilation of our ongoing commentary on the impacts of the Trump administration on businesses, including updates on the new "America First Investment Policy," tariffs and the executive order on diversity, equity and inclusion.
- **IPO Updates:** Key trends from the 2024 IPO market and an outlook for the 2025 market, as well as details on expanded access to confidentially file draft registration statements for review by the SEC.
- **SEC Guidance on Regulation D Rule 506(c) Offerings:** Takeaways from an SEC no-action letter that facilitates issuers' reliance on Rule 506(c) to use general solicitation in private placements.
- **Updates on the FDA and Biotech M&A:** How changes in funding for the FDA have the potential to affect new product development and significantly impact biotech M&A activity.
- **FCPA Enforcement Update:** A review of the current state of FCPA enforcement and what the recent executive order and Department of Justice (DOJ) guidance mean for U.S. and global companies.
- **Antitrust Update:** Details on two new sources of guidance from the DOJ Antitrust Division, together with the Department of Labor and the Federal Trade Commission, that continue the increased focus on anticompetitive conduct in labor markets and its impact on workers.
- **Amendments to Delaware General Corporation Law:** The significant impacts of new amendments on corporations and their stockholders with respect to controlling stockholder and interested party transactions and stockholder inspection rights.
- **Key Considerations:** Select questions to consider based on legal updates in the quarter.

In This Edition

Presidential Actions

Since Inauguration Day, the Trump administration has been very active, including through issuing executive orders, announcing policy priorities and taking action through the Department of Government Efficiency. For a compilation of our ongoing commentary on the impacts of the Trump administration on businesses, including with respect to Securities and Exchange Commission (SEC) enforcement actions, please visit Paul Hastings' Presidential Actions Hub.

Key Highlights:

- **New "America First Investment Policy."** On February 21, 2025, President Donald Trump issued the "America First Investment Policy" National Security Presidential Memorandum (NSPM), reaffirming the United States' commitment to promoting foreign investment while announcing means to address threats to U.S. national security posed by investment from countries defined in the NSPM as "foreign adversaries." The NSPM lists mechanisms by which the United States will both facilitate allied and partner inbound investment and restrict inbound and outbound adversary investment. The NSPM's announced changes give rise to key considerations for investors. For more information, please see our client alert.

- **Tariffs.** On April 2, 2025, the Trump administration announced the rollout of its "Reciprocal Tariff Policy," which imposes ad valorem duties on all articles imported into the U.S. from virtually all U.S. trading partners. This development marks a fundamental shift in the global trading system and has practical effects on virtually all companies exporting to the United States. Absent new trade agreements between the U.S. government and the governments of the jurisdictions subject to these new tariffs that would eliminate them completely, major multinationals will face tariffs on goods shipped to the U.S. for the first time, or in significantly increased amounts. Aside from the obvious commercial consequences of being subject to these duties, companies shipping to the U.S. will also face a new — and potentially acute — compliance risk: the potential for tariff evasion and the already-professed intent of the U.S. government to increase enforcement against companies responsible for such practices. For more information on the actions that the administration has taken with respect to the new tariffs, the new commercial and compliance risks this fundamental shift in the U.S. business environment presents and what practical steps companies may take to mitigate those risks, please see our client alert.

- **Diversity, Equity and Inclusion (DEI).** The landscape of federal employment priorities is being redefined. On January 21, 2025, President Trump issued an executive order titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (the DEI EO). The DEI EO rescinds Executive Order 11246 — which had, for decades, served as the basis for federal contractors' affirmative action programs. The DEI EO further seeks to encourage the private sector to do away with DEI programs and practices, though it does not specifically prohibit such programs. For more information on the DEI EO, please see our client alert.

  On February 21, 2025, the U.S. District Court for the District of Maryland preliminarily enjoined certain aspects of DEI EO. For more information, please see our client alert. Then on March 14, 2025, the Fourth Circuit Court of Appeals stayed the nationwide preliminary injunction previously issued by the District of Maryland.

  Following the issuance of the DEI EO and the preliminary injunction, on March 19, 2025, the Equal Employment Opportunity Commission (EEOC) and DOJ released a joint one-page technical assistance document and a longer question-and-answer technical assistance document, providing insight into what the government considers to be DEI-related discrimination. For more details on the EEOC and DOJ guidance, please see our client alert.

  Though there is no direct immediate impact to employers, the DEI EO and the EEOC and DOJ guidance represent a seismic shift. Employers should evaluate their existing equal employment opportunity policies and procedures and diversity-related programs. Moreover, until the legal status of the DEI EO is finally resolved, companies that contract with — or receive grants from — the federal government should take account of the new requirements that it establishes, which could expose them to investigations and liability under the False Claims Act (FCA). For more information on liability under the FCA as a result of the DEI EO, please see our client alert.

IPO Updates

Paul Hastings IPO Report – Overview of the 2024 IPO Market

In the 2024 Going Public: U.S. IPO Report, the Paul Hastings team examined key trends in the IPO market through the most significant of the 170 traditional IPOs that priced in 2024, which collectively raised over $29.4 billion in gross proceeds. We saw significant year-over-year growth in the volume of IPOs that went to market and the number of IPOs across various sectors. For more information, please see our full 2024 Going Public: U.S. IPO Report.

Expanded Access to Confidentially File Draft Registration Statements

On March 3, 2025, the Staff of the SEC Division of Corporation Finance (the Staff) expanded the categories of issuer that may submit draft registration statements confidentially for review by the SEC, effective immediately. Confidential submission of a registration statement is a longstanding accommodation granted by the Staff to certain issuers. For an issuer that is not already public in the United States, the SEC review process, which involves iterative filings of the draft registration statement, can be conducted outside of the public spotlight and, in some cases, without the public ever knowing the issuer was considering a U.S. offering or listing if subsequently abandoned by the issuer.

The table below summarizes the impact of the new guidance on different categories of issuer.

Category of Issuer	New Accommodation	Implication
Companies conducting an IPO	The first confidential submission of an IPO registration statement will be accepted by the Staff for review even if it does not include the name of the underwriter(s), provided the underwriter(s) are named in subsequent submissions.[1]	This formalizes a practice permitted informally by the SEC from time to time. It could assist certain companies to move forward with an IPO more rapidly if the lead underwriter is still completing internal approval formalities or, less commonly, if the company makes the initial filing before selecting underwriters for various reasons.
Private companies establishing an over-the-counter (OTC) trading market	The prior guidance permitted the confidential submission of Exchange Act registration statements on Forms 10, 20-F and 40-F in connection with establishing a stock exchange listing without an offering under the Securities Act. This was used to facilitate direct listings (by U.S. and non-U.S. companies) and the establishment of Level II ADR programs (by non-U.S. companies traded on non-U.S. exchanges). The new guidance extends the accommodation to establishing an OTC trading market without requiring that there be a stock exchange listing.[2]	There were 73 initial Exchange Act registration statements filed under Section 12(g) of the Exchange Act in 2024. A number of these were voluntary filings and were subject to full SEC review and comment over a period of months. We expect that most issuers will now submit those registration statements confidentially and only file publicly 15 days prior to effectiveness, similar to an IPO process.[3]

For more information on the new accommodations for filing draft registration statements confidentially, please see our client alert.

1 Items 501 and 508 of Regulation S-K otherwise require the names of the underwriters.

2 The prior guidance was limited to Exchange Act registration statements registering securities under Section 12(b), which relates solely to securities traded on a national securities exchange. The new guidance extends the accommodation to Exchange Act registration statements registering securities under Section 12(g). Section 12(g) is triggered by a company having at the end of its fiscal year total assets over $10 million and more than 2,000 holders of record of its securities or more than 500 holders of record of its securities that are nonaccredited investors. In such a circumstance, a company must register its securities under the Exchange Act within 120 days after the end of the fiscal year. In addition, any company can voluntarily register its equity securities under Section 12(g) and thereby subject itself to Exchange Act reporting obligations.

3 In the guidance, the Staff notes that filings on Forms 10, 20-F and 40-F will need to be publicly filed so that the full 30-day or 60-day period, as applicable, concludes prior to the registration statement's effectiveness, meaning that an earlier confidential filing does not start the clock. However, issuers are able to request earlier effectiveness.

SEC Updates

New SEC Guidance Related to Rule 506(c) Verification Requirement

On March 12, 2025, the Staff provided guidance in response to a letter requesting interpretive guidance (the No-Action Letter) to clarify the verification requirement of Rule 506(c) of Regulation D. Rule 506(c) provides an exemption from registration for securities that are offered and sold by companies to accredited investors in a private placement. In addition, on the same day, the Staff published two new Compliance and Disclosure Interpretations (C&DIs) related to questions surrounding the verification requirement of Rule 506(c). The Staff's guidance from the No-Action Letter and updated C&DIs will likely encourage issuers to raise capital through offerings that use general solicitation and advertising.

Key Takeaways:

- **Ability to Rely on Minimum Investment Amounts.** The No Action Letter indicates that the Staff views reliance on certain minimum investment amounts and written representations from a purchaser as sufficient to fulfill the verification requirement. As a result, an issuer following these procedures could reasonably conclude that it has taken reasonable steps to verify the accredited investor status of such purchasers in a Rule 506(c) offering (and thus comply with the Rule 506(c) verification requirement).
- **Increase in 506(c) Offerings.** The No-Action Letter offers a method for issuers to conduct private placements under Rule 506(c) in a manner that is more efficient for investors and less invasive for purchasers, and the new guidance will likely encourage more issuers to take advantage of the safe harbor provided by Rule 506(c).

For more information regarding the No-Action letter, the updated C&DIs and their potential impacts, please see our client alert.

Regulatory Updates

FDA Funding Changes Could Impact Biotech M&A

With companies constantly developing new therapies and technologies, the biotech industry is a hotbed of innovation. This dynamic environment often leads to M&A as a vehicle for larger companies to acquire promising technologies and product candidates to bolster their development pipeline. However, changes in funding for the U.S. Food and Drug Administration (FDA) have the potential to affect new product development and significantly impact biotech M&A activity.

The Trump administration has signaled a reduction in government funding across many departments, including the FDA and other government agencies, like the National Institutes of Health, that fund research and development activities. Reductions and fluctuations in FDA funding can directly impact biotech M&A in several ways, including by causing cash runway concerns and regulatory uncertainty, and by affecting investor confidence, making it more likely that biotechs will seek to combine with peers or be acquired by large pharma companies.

For a more detailed look at how funding cuts may impact biotech companies, please see our client alert.

Keep Calm and Carry On: Thoughts on Recent Orders on FCPA Enforcement

On February 10, 2025, President Trump signed an executive order pausing criminal enforcement of the Foreign Corrupt Practices Act (FCPA), stating that the statute "has been systematically ... stretched beyond proper bounds and abused in a manner that harms the interests of the United States." In declaring the 180-day hold on enforcement, the order instructs the DOJ to generally cease initiation of any new investigations/actions, review all existing FCPA investigations/enforcement actions and issue updated guidelines or policies. The order comes on the heels of a memo from the attorney general directing the Criminal Division's FCPA Unit to prioritize certain investigations related to foreign bribery that enables the criminal activities of cartels and transnational criminal organization, while shifting focus away from other investigations, and streamlining procedures for bringing FCPA cases related to foreign bribery involving cartels.

Our view is that it is premature to reach any hard conclusions about exactly what these announcements mean, both in the short- and long-term. Bribery is still illegal — in the United States and around the world. Companies must maintain their compliance commitments — notwithstanding any pause in enforcement by a single enforcement agency. But there could undoubtedly be significant impacts as new guidance is issued and global enforcement trends shift one way or another. We work through some of the related issues in this client alert and try to answer the questions that our global team has received from our clients operating in nearly every country in the world.

Antitrust Updates

DOJ Antitrust Division Continues Focus on Conduct in Labor Markets

The DOJ Antitrust Division (Division), together with the Department of Labor (DOL) and the Federal Trade Commission (FTC), recently issued two new sources of guidance continuing the increased focus on anticompetitive conduct in labor markets and its impact on workers.

On January 14, 2025, the Division issued a joint statement with the DOL Occupational Safety and Health Administration, cautioning companies that the use of non-disclosure agreements that deter individuals from reporting antitrust violations may limit a company's eligibility for corporate leniency and influence the Division's charging decisions. And only two days later, the Division, joined by the FTC, issued updated Antitrust Guidelines on Business Practices that Impact Workers, instructing how the FTC and DOJ will "assess whether business practices affecting workers violate the antitrust laws."

Together, these two directives reflect antitrust enforcers' growing attention to competition in labor markets, highlighting renewed scrutiny of specific employers' practices such as the use of non-disclosure agreements, no-poach and non-compete agreements, and information-sharing.

For more information, please see our client alert.

Delaware Law Updates

Delaware Enacts Significant Amendments to the Delaware General Corporation Law

On March 25, 2025, the Delaware General Assembly enacted amendments to the DGCL, which were subsequently signed into law. The DGCL amendments have significant implications for corporations and their stockholders, most specifically with respect to controlling stockholder and interested party transactions under Section 144 of the DGCL and stockholder rights under Section 220 of the DGCL, which governs the inspection of corporate books and records.

Summary of Important Changes

- **Reset of Standards Governing Controlling Stockholder and Interested Party Transactions to Provide More Predictability (Section 144).** The DGCL amendments provide a clear framework for controlling stockholder and interested party transactions that create safe harbors so that decisions by independent directors will not be seconded-guessed and litigation can more easily be dismissed at the pleadings stage. This is a change from the prior jurisprudence regime governing such transactions that became increasingly difficult (and expensive) to comply with in order to obtain pleading stage dismissal.

- **Presumption of Independence for Directors (Section 144).** The DGCL amendments provide a presumption of independence for public company directors that the corporation determines to be independent and that meet the criteria under the applicable stock exchange rules.

- **Refinement of Stockholder Inspection Rights (Section 220).** The revisions clarify and, in some cases, limit the scope of records stockholders can access through a Section 220 demand, reducing administrative burdens and potential misuse of inspection rights.

For a more detailed analysis of the DGCL amendments and their potential impacts, please see our client alert.

Key Considerations for Private Companies Based on Recent Legal Updates

- **Presidential Actions**
  - Have you evaluated the impact of recent executive orders, policy priorities and other announcements issued by the Trump administration and prepared for any changes that might be required?
  - Have you assessed the compliance risks associated with any changes implemented in response to the new tariffs?
  - Have you evaluated your existing equal employment opportunity policies and procedures and diversity-related programs for compliance with the DEI EO? Have you assessed whether the DEI EO may expose the company to investigations and liability under the FCA?
- **Regulatory and Antitrust Considerations**
  - Have you reviewed the new FCPA executive order and related DOJ guidance to see how you may be affected?
  - Have you evaluated practices related to the use of non-disclosure agreements, no-poach and non-compete agreements and information-sharing for compliance with the DOJ directives?

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About Paul Hastings

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