

Client Alert

Special Matters & Government Investigations

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For more information, contact:

Alec Koch

+1 202 626 8982

akoch@kslaw.com

Carmen Lawrence

+1 212 556 2193

clawrence@kslaw.com

William Johnson (Bill)

+1 212 556 2125

wjohnson@kslaw.com

Aaron Lipson

+1 404 572 2447

alipson@kslaw.com

Jackson Grubbe

+1 202 626 8980

jgrubbe@kslaw.com

Nadia Doherty

+1 202 626 5593

ndoherty@kslaw.com

King & Spalding

Washington, D.C.

1700 Pennsylvania Avenue, NW

Suite 900

Washington, D.C. 20006

T. +1 202 737 0500

Rebranding of SEC Cyber Unit Reflects Shift in Enforcement Priorities

INTRODUCTION

On Thursday, February 20, the U.S. Securities and Exchange Commission (“SEC”) announced that it created a Cyber and Emerging Technologies Unit (“CETU”) to combat cyber-focused financial misconduct.ⁱ The announcement reflects a (re)branding of the unit and forecasts a shift in the SEC’s overall regulatory and enforcement priorities. The Cyber Unit, originally established by the SEC in 2017, was renamed in May 2022 under Chair Gary Gensler as the Crypto Assets and Cyber Unit and expanded to include 50 positions.ⁱⁱ And, as has been exhaustively discussed, during Chair Gensler’s tenure, the SEC instituted numerous enforcement actions against participants in the cryptocurrency industry, many of which did not include allegations that the defendants engaged in fraudulent conduct.

In its most recent redesign, the SEC did not disband the Unit altogether, and it is notable that Laura D’Allaird – a former counsel to a Democratic Commissioner who had been named co-head of the Crypto Assets and Cyber Unit in December – will remain as the head of the CETU.ⁱⁱⁱ Instead, as emphasized in the SEC’s press release, the CETU now will focus on fraud and other clearcut instances of cyber-related misconduct, particularly fraud that impacts retail investors. These “new” priorities greatly parallel those announced by the SEC with the initial iteration of the Cyber Unit under then Chairman Jay Clayton in 2017.^{iv} The CETU will work alongside the Commission’s newly formed Crypto Task Force launched by Acting Chairman Mark Uyeda and led by Commissioner Hester Peirce.^v

BIDEN ADMINISTRATION POLICIES AND ENFORCEMENT

Although crypto enforcement received much of the attention under the prior administration, the SEC was also very active in the area of cybersecurity. This included not only the promulgation of extensive new disclosure requirements for public companies, but also multiple enforcement actions against public companies for allegedly making misleading disclosures regarding cybersecurity risks and incidents and failing to have adequate disclosure controls, as well as against regulated entities such as broker-dealers and investment advisers.

In July 2023, the SEC adopted final rules on cybersecurity risk management, strategy, governance, and incident disclosure by a split vote of 3-2.^{vi} Commissioners Uyeda and Peirce dissented from the final rules (“the 2023 Cybersecurity Rule”), criticizing them as overly prescriptive and costly, and denounced the Commission’s expansive view of its authority and its effort to “create new disclosure obligations for cybersecurity matters that do not exist for any other topic.”^{vii}

In the litigated arena, the SEC suffered a significant defeat in July 2024 when much of its case against SolarWinds and its CISO Timothy Brown was dismissed. The SEC complaint alleged that (1) SolarWinds and Brown defrauded investors and customers through misstatements and omissions that concealed SolarWinds’ known cybersecurity risks, and (2) SolarWinds failed to maintain adequate internal accounting and disclosure controls. The Court dismissed claims based on the company’s disclosures concerning a significant cyberattack as “rely[ing] on hindsight and speculation,”^{viii} and also dismissed the SEC’s internal accounting controls and disclosure controls claims. The accounting controls ruling was significant because the SEC had overreached in recent years by claiming that multiple types of conduct involving an entity’s governance (e.g., management of cybersecurity risks) fit within the internal accounting controls provision. The SEC’s claims based on certain statements in a Security Statement posted on the Company’s website survived, and the litigation remains pending.

In addition, the SEC brought a number of other settled actions against public companies for cybersecurity-related violations, prompting strong dissents from Commissioners Uyeda and Peirce. In June 2024, Commissioners Uyeda and Peirce dissented from a settled action against R.R. Donnelley & Sons Company for alleged insufficiencies in its internal accounting and disclosures controls related to a 2021 ransomware attack.^{ix} Commissioners Peirce and Uyeda expressed concern over the Commission’s plans to “dictate public company cybersecurity practices indirectly using its ever-flexible Section 13(b)(2)(B) tool” and its “decision to stretch the law to punish a company that was the victim of a cyberattack,” noting that “such an action inappropriately amplifies a company’s harm from a cyberattack.”^x And then in October 2024, Commissioners Uyeda and Peirce dissented from settled actions against four customers of SolarWinds, which allegedly made materially misleading disclosures about the impact of the cyberattack against SolarWinds on their operations. Commissioners Uyeda and Peirce criticized the Commission for engaging in “hindsight review” and stated that “aggressive enforcement by the Commission may cause companies to fill their risk disclosures with occurrences of immaterial events, for fear of being second-guessed by the Commission” and then “the benefits and underlying rationale used to support the 2023 Cybersecurity Rule may be undermined.”^{xi}

THE NEW SEC’S CYBERSECURITY ENFORCEMENT PRIORITIES

Now that Commissioners Uyeda and Peirce comprise a majority of the Commission, with Commissioner Uyeda as the Acting Chair, we expect to see an approach to cybersecurity enforcement that more closely aligns with their dissents in these cases, and those priorities are reflected in the stated priority areas of the CETU, which include:

- Fraud committed using emerging technologies, such as artificial intelligence and machine learning
- Use of social media, the dark web, or false websites to perpetrate fraud
- Hacking to obtain material nonpublic information

- Takeovers of retail brokerage accounts
- Fraud involving blockchain technology and crypto assets
- Regulated entities' compliance with cybersecurity rules and regulations
- Public issuer fraudulent disclosure relating to cybersecurity^{xii}

These priorities reflect a return to a focus on clearly fraudulent conduct and violations that impact retail investors, which typically are SEC enforcement priorities during Republican administrations. These newly announced bullets describing the CETU's priorities are incredibly consistent with the priorities announced when the Cyber specialized enforcement unit was first created under the most recent previous Republican administration in 2017.^{xiii} They are also consistent with many of the public statements of former Commissioner and now SEC Chair nominee Paul Atkins, who has commented in the past that the SEC should not be "devising new legal theories that reach behavior that does not clearly violate an existing rule" or playing "gotcha" with its enforcement powers, but rather should pursue enforcement when "fraud and deception have taken place."^{xiv}

As a result, while public company disclosures and regulated entities' compliance with cybersecurity rules will remain areas of focus, we expect that cases in those areas will focus on clearcut violations where there is evidence of *scienter*, rather than instances where the SEC is second-guessing language choices or materiality judgments with the benefit of hindsight.

In 2024, King & Spalding won the Innovation in Digital Legal Products Award from the *Financial Times*, which recognized the firm for its work leveraging Generative AI to enhance cybersecurity risk assessments for clients.

ABOUT KING & SPALDING

Celebrating more than 140 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 24 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

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ⁱ SEC Announces Cyber and Emerging Technologies Unit to Protect Retail Investors, SEC.GOV (Feb. 20, 2025), <https://www.sec.gov/newsroom/press-releases/2025-42>.

ⁱⁱ SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors, SEC.GOV (Sept. 25, 2017), <https://www.sec.gov/newsroom/press-releases/2017-176>; SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit, SEC.GOV (May 3, 2022), <https://www.sec.gov/newsroom/press-releases/2022-78>.

ⁱⁱⁱ Aislinn Keely, SEC Taps New Co-Leaders For Crypto Enforcement Unit, LAW360.COM (Dec. 4, 2024), <https://www.law360.com/pulse/articles/2269188/sec-taps-new-co-leaders-for-crypto-enforcement-unit>.

^{iv} SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors, SEC.GOV (Sept. 25, 2017), <https://www.sec.gov/newsroom/press-releases/2017-176>.

^v SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force, SEC.GOV (Jan. 21, 2025), <https://www.sec.gov/newsroom/press-releases/2025-30>.

^{vi} See King & Spalding, SEC Adopts Final Cybersecurity Disclosure Rules (July 31, 2023), <https://www.kslaw.com/news-and-insights/sec-adopts-final-cybersecurity-disclosure-rules>.

^{vii} Hester M. Peirce, SEC Comm'r, *Harming Investors and Helping Hackers: Statement on Cybersecurity Risk Management, Strategy, Governance, and Incidence Disclosure*, SEC.GOV (July 26, 2023), <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-cybersecurity-072623>; Mark T. Uyeda, SEC Chairman, *Statement on the Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, SEC.GOV (July 26, 2023), https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-cybersecurity-072623#_ftn6.

^{viii} *SEC v. SolarWinds Corp.*, 741 F.Supp.3d 37, 50 (S.D.N.Y. 2024).

^{ix} *SEC Charges R.R. Donnelley & Sons Co. With Cybersecurity-Related Controls Violations*, SEC.GOV (July 2, 2024), <https://www.sec.gov/newsroom/press-releases/2024-75>.

^x Hester M. Peirce and Mark T. Uyeda, SEC Comm'rs, *Hey, look, there's a hoof cleaner! Statement on R.R. Donnelley & Sons, Co.*, SEC.GOV (June 18, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-rr-donnelley-061824>.

^{xi} Hester M. Peirce and Mark T. Uyeda, SEC Comm'rs, *Statement Regarding Administrative Proceedings Against SolarWinds Customers*, SEC.GOV (Oct. 22, 2024), <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-solarwinds-102224>.

^{xii} *SEC Announces Cyber and Emerging Technologies Unit to Protect Retail Investors*, SEC.GOV (Feb. 20, 2025), <https://www.sec.gov/newsroom/press-releases/2025-42>.

^{xiii} *SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors*, SEC.GOV (Sep. 25, 2017), <https://www.sec.gov/newsroom/press-releases/2017-176>.

^{xiv} Paul Atkins, SEC Comm'r, *Remarks Before the U.S. Chamber of Commerce Mid-Market Elite Series*, SEC.GOV (July 8, 2008), <https://www.sec.gov/news/speech/2008/spch070808psa.htm>.

Special Matters & Government Investigations Partners

Gary Adamson
New York
+1 212 556 2113
gadamson@kslaw.com

Adam Baker
New York
+1 212 556 2376
abaker@kslaw.com

J.C. Boggs
Washington, DC
+1 202 626 2383
jboggs@kslaw.com

Christopher C. Burris
Atlanta
+1 404 572 4708
cburris@kslaw.com

Craig Carpenito
New York
+1 212 556 2142
ccarpenito@kslaw.com

Steve Cave
Northern Virginia
+1 703 245 1017
scave@kslaw.com

Michael J. Ciatti
Washington, DC
+1 202 661 7828
mciatti@kslaw.com

Daniel R. Coats
Washington, DC
+1 202 626 2642
dcoats@kslaw.com

Patrick M. Collins
Chicago
+1 312 764 6901
pcollins@kslaw.com

Ander M. Crenshaw
Washington, DC
+1 202 626 8996
acrenshaw@kslaw.com

Sumon Dantiki
Washington, DC
+1 202 626 5591
sdantiki@kslaw.com

Dan Donovan
Washington, DC
+1 202 626 7815
ddonovan@kslaw.com

Robert L. Ehrlich, Jr.
Washington, DC
+1 202 626 9710
rehrllich@kslaw.com

David Farber
Washington, DC
+1 202 626 2941
dfarber@kslaw.com

Zachary Fardon
Chicago
+1 312 764 6960
zfardon@kslaw.com

Lucas Fields
Washington, DC
+1 202 626 2399
lfields@kslaw.com

Emily Gordy
Washington, DC
+1 202 626 8974
egordy@kslaw.com

Leah B. Grossi
Washington, DC
+1 202 626 5511
lgrossi@kslaw.com

Ehren Halse
San Francisco
+1 415 318 1216
ehalse@kslaw.com

Max Hill, K.C.
London
+44 20 7551 2130
mhill@kslaw.com

Amy Schuller Hitchcock
Sacramento/San Francisco
+1 916 321 4819
ahitchcock@kslaw.com

John A. Horn
Atlanta
+1 404 572 2816
jhorn@kslaw.com

Andrew C. Hruska
New York
+1 212 556 2278
ahruska@kslaw.com

Rob Hur
Washington, DC
+1 202 383 8969
rhur@kslaw.com

Mark A. Jensen
Washington, DC
+1 202 626 5526
mjensen@kslaw.com

Dixie L. Johnson
Washington, DC
+1 202 626 8984
djohnson@kslaw.com

William Johnson
New York
+1 212 556 2125
wjohnson@kslaw.com

Barry Kamar
Miami
+1 305 462 6044
bkamar@kslaw.com

Allison F. Kassir
Washington, DC
+1 202 626 5600
akassir@kslaw.com

M. Alexander (Alec) Koch
Washington, DC
+1 202 626 8982
akoch@kslaw.com

Yelena Kotlarsky
New York
+1 212 556 2207
ykotlarsky@kslaw.com

Steve Kupka
Washington, DC
+1 202 626 5518
skupka@kslaw.com

Jade R. Lambert
Chicago
+1 312 764 6902
jlambert@kslaw.com

Jamie Allyson Lang
Los Angeles
+1 213 443 4325
jlang@kslaw.com

Raphael Larson
Washington, DC
+1 202 626 5440
rlarson@kslaw.com

Carmen Lawrence
New York
+1 212 556 2193
clawrence@kslaw.com

Brandt Leibe
Houston
+1 713 751 3235
bleibe@kslaw.com

Aaron W. Lipson
Atlanta
+1 404 572 2447
alipson@kslaw.com

Daniel E. Lungren
Washington, DC
+1 202 626 9120
dlungren@kslaw.com

William S. McClintock
Washington, DC
+1 202 626 2922
wmclintock@kslaw.com

Amelia Medina
Atlanta
+1 404 572 2747
amedina@kslaw.com

Kendrick B. Meek
Washington, DC
+212 626 5613
kmeek@kslaw.com

Andrew Michaelson
New York
+212 790 5358
amichaelson@kslaw.com

Nema Milaninia
Washington, DC
+202 626 9273
nmilaninia@kslaw.com

Jim C. Miller III
Washington, DC
+1 202 626 5580
jmiller@kslaw.com

Patrick Montgomery
Washington, DC
+1 202 626 5444
pmontgomery@kslaw.com

Paul B. Murphy
Atlanta/Washington, DC
+1 404 572 4730
pbmurphy@kslaw.com

Grant W. Nichols
Austin/Washington, DC
+1 512 457 2006
gnichols@kslaw.com

Alicia O'Brien
Washington, DC
+1 202 626 5548
aobrien@kslaw.com

Patrick Otlewski
Chicago
+1 312 764 6908
potlewski@kslaw.com

Michael R. Pauzé
Washington, DC
+1 202 626 3732
mpauze@kslaw.com

Michael A. Plotnick
Washington, DC
+1 202 626 3736
mplotnick@kslaw.com

Olivia Radin
New York
+1 212 556 2138
oradin@kslaw.com

John C. Richter
Washington, DC
+1 202 626 5617
jrichter@kslaw.com

Rod J. Rosenstein
Washington, DC
+1 202 626 9220
rrosenstein@kslaw.com

Daniel C. Sale
Washington, DC
+1 202 626 2900
dsale@kslaw.com

Heather Saul
Atlanta
+1 404 572 2704
hsaul@kslaw.com

Greg Scott
Sacramento/San Francisco
+1 916 321 4818
mscott@kslaw.com

Richard Sharpe
Singapore
+65 6303 6079
rsharpe@kslaw.com

Kyle Sheahen
New York
+1 212 556 2234
ksheahen@kslaw.com

Michael Shepard
San Francisco
+1 415 318 1221
mshepard@kslaw.com

Thomas Spulak
Miami
+1 305 462 6023
tspulak@kslaw.com

Aaron Stephens
London
+44 20 7551 2179
astephens@kslaw.com

Cliff Stricklin
Denver
+1 720 535 2327
cstricklin@kslaw.com

Jean Tamalet
Paris
+33 1 7300 3987
jtamalet@kslaw.com

Courtney D. Trombly
Washington, DC
+1 202 626 2935
ctrombly@kslaw.com

Rick Vacura
Northern Virginia
+1 703 245 1018
rvacura@kslaw.com

Anthony A. Williams
Washington, DC
+1 202 626 3730
awilliams@kslaw.com

David K. Willingham
Los Angeles
+1 213 218 4005
dwillingham@kslaw.com

David Wulfert
Washington, DC
+1 202 626 5570
dwulfert@kslaw.com

Sally Q. Yates
Atlanta/Washington, DC
+1 404 572 2723
syates@kslaw.com

Joseph Zales
New York
+1 212 827 4087
jzales@kslaw.com