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INTO THE BREACH: STATE REGULATORS, PRIVATE LITIGANTS, AND SECURITIES ENFORCEMENT

As federal enforcement priorities shift, actions brought by state authorities and private litigants continue to serve as significant enforcement mechanisms within the financial markets. History demonstrates that these alternative actors can impose substantial costs and risks on market participants. This article examines how these other enforcement actors have historically responded to perceived federal gaps, and highlights key risks and strategic considerations for companies and counsel operating in today's evolving regulatory environment.

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With the Trump administration having committed to substantially cutting federal regulations and concentrating on enforcement priorities other than white-collar crime, state securities regulators and private litigants are likely to step into the breach, as they have in the past. Experience suggests that these alternative enforcement mechanisms can bring similar, and sometimes greater, costs for the securities industry. Accordingly, the industry must remain alert to risks from state and private enforcement actions.

I. STATE SECURITIES REGULATORS AND THEIR AUTHORITY

Although securities regulation is typically viewed as the province of the federal government, state securities regulation predates the core federal securities laws enacted in 1933 and thereafter. Consistent with their longstanding regulatory mandate, states have historically

stepped in to fill real or perceived federal enforcement gaps. Aggressive state securities enforcement under New York Attorney General (“NYAG”) Eliot Spitzer and the example his approach set for subsequent Attorneys General illustrates how state securities regulators across the country may deploy their long-standing enforcement authorities in the coming years.

A. Who Are State Securities Regulators

State securities laws are generally enforced through state Attorneys General, though some states have administrative departments dedicated to regulating securities.¹ The majority of states, including New York, Massachusetts, California, Texas, and Oregon, have popularly elected and directly politically accountable

¹ Andrew K. Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. 67, 85 (2021).

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