FENWICK

Securities Law Update

Securities Law Update—August 2024

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Welcome to the latest edition of Fenwick's Securities Law Update. This issue contains news on:

- The SEC's Spring 2024 Reg-Flex Agenda delaying much of its rulemaking activity, including the proposed rule on board diversity, until after the presidential election
- Texas and Pennsylvania federal district courts' split regarding whether the FTC has the authority to enact a nationwide ban on noncompete agreements set to take effect on September 4th
- California Gov. Gavin Newsom's proposal to delay the state's climate reporting bills by two years
- Updates on new NYSE and Nasdaq listing rules
- Trends related to life science companies adding risk factor language in response to the Chevron Doctrine being overturned—as well as an anticipated uptick in comments on 13D and 13G filings this year following the implementation of the new beneficial ownership rules
- Reminders for upcoming effective dates, including Delaware General Corporation Law amendments and new requirements for large, accelerated filers submitting fee data in registration statements, fee bearing proxies and tenders offers

Rules and Regulations

- **The SEC published its Spring 2024 Reg-Flex Agenda** updating the anticipated timing of the following rules:

Rule Topic	**Spring 2024 Agenda**	**Fall 2023 Agenda**
14a-8 - Final Rule	April 2025	April 2024
Human Capital Management - Proposed Rule	October 2024	April 2024
Board Diversity - Proposed Rule	April 2025	October 2024
Regulation D - Proposed Rule	April 2025	April 2024

Definition of Securities Held of Record - Proposed Rule	April 2025	April 2024
Rule 144 Holding Period - Proposed Rule	April 2025	October 2024

The Reg Flex Agenda only provides insight into the SEC's priorities as of the date submitted. The agenda outlines a general timeframe, but the new final or proposed rules could still be released before or after the dates in the agenda.

- **2024 Delaware General Corporation Law amendments became effective on August 1st.** These amendments will have significant impact on both private and public companies and should address questions about market practice raised in controversial rulings recently issued by the Delaware Court of Chancery. For more information, please see our client alert, which provides an overview of the amendments.
- **Conflicting court rulings on FTC noncompete ban.** In contrast to a Texas federal district court's granting, in part and only as to certain named parties, a stay of enforcement of the noncompete rule in July, a Pennsylvania federal district court recently ruled that the FTC acted within its authority in adopting the noncompete rule. While other litigation challenging the rule is still pending, the federal noncompete ban is currently scheduled to become effective on September 4th. A final ruling in the Texas case is expected by no later than August 30th. For more information about preparation for compliance with the FTC's noncompete rule, please see our client alert. We will continue to monitor and report on further developments regarding the status of the rule.
- **Gov. Newsom proposes a two-year delay to California climate reporting bills.** "California Gov. Gavin Newsom is proposing delays to California climate laws SB 253 and SB 261. The first law will require certain companies to report their Scope 1 and 2 greenhouse gas (GHG) emissions beginning in 2026 and Scope 3 GHG emissions beginning in 2027. SB 261 will require certain companies to disclose their climate-related financial risk on or before January 1, 2026 and biennially thereafter.

  The proposed amendments would delay reporting of Scope 1 and 2 GHG emissions until 2028 and Scope 3 GHG emissions until 2029 and would delay climate-related financial risk disclosure until January 1, 2028." California Climate Laws May be Delayed (Fenwick, July 2024).

  The proposed amendments remain subject to ongoing negotiations and are not yet final.
- **Senate Democrats introduce bill to codify Chevron deference.** See Newly Introduced Senate Bill Would Codify Chevron (*theCorporateCounsel.net*, July 2024).
- **On July 1, 2024, the SEC issued updated guidance regarding the voluntary submission of draft registration statements for its nonpublic review.** In particular, the SEC included new guidance regarding the confidential submission process for de-SPAC transactions. See Question 19 of the Voluntary Submission of Draft Registration Statements – FAQS.
- **The SEC approved NYSE's amended proposal to allow NYSE to commence immediate suspension and delisting proceedings if a company changes its primary business focus**. The most recent amendments to the proposal are outlined in footnote 6 of the SEC's approval order. See SEC Approves NYSE's Amended Proposal to Make it Easier to Delist Companies that Change Primary Business (*theCorporateCounsel.net*, July 2024).
- **Nasdaq proposes to amend the delisting rules governing SPACs.** Nasdaq has proposed changes to Listing Rules IM-5101- 2 and 5810(c)(1) to tighten the delisting appeals process for SPACs. The proposed amendments will become effective on October 7th subject to SEC approval.
- **The SEC issued an order instituting proceedings to determine whether to approve a proposed NYSE rule permitting SPACs to remain listed until 42 months after the original**

listing date if they entered into a business combination agreement within three years of listing. See SEC Probes NYSE's Bid To Extend SPAC Merger Deadlines (*Law360*, July 2024).

- **Nasdaq proposes to codify standards of review that govern appeals before the Nasdaq Listing and Hearing Review Council (the Listing Council).** When a listed company receives a Staff Delisting Determination or a Public Reprimand Letter—or when its application for initial listing is denied—a company may request that a Hearings Panel review the matter. The Hearing Panel's decision may then be reviewed by the Listing Council, either on appeal or on its own initiative. Nasdaq's Listing Rules currently do not specify a standard of review that applies when the Listing Council reviews Hearings Panel decisions. Accordingly, Nasdaq now proposes to amend Listing Rule 5820 to adopt a standard of review for appeals of Hearings Panel decisions before the Listing Council and a separate standard of review for Hearings Panel decision called for review by the Listing Council.
- **EU AI Act to become effective on August 1st subject to a phase-in period.** See Artificial Intelligence: EU AI Act to be Effective August 1 (*theCorporateCounsel.net*, July 2024).
- **FinCEN Updates Beneficial Ownership FAQs.** On July 24, FinCEN posted updated Beneficial Ownership Information FAQs. The updated FAQs include, among other changes, information for entities that are disregarded for U.S. tax purposes (see Question G.3).

SEC Public Commentary and Guidance

- **TREND: SEC comments on 13D and 13G filings.** The SEC staff is closely monitoring the implementation of the new beneficial ownership rules and recently issued a comment letter questioning the timing of a 13D filing. While SEC comments on 13D and 13G filings have historically been rare, the SEC listed compliance with the new rules as one of the priorities for the 2024 disclosure review program. Accordingly, we expect to see a potential uptick in SEC comments on 13D and 13G filings this year. See the Deep Quarry newsletter (Olga Usvyatsky, July 2024).
- **The SEC announced new Interagency Securities Council (ISC) to coordinate enforcement efforts** across federal, state, and local agencies. According to the SEC's press release, the ISC will meet quarterly to discuss "emerging threats, hear from investigators conducting and supervising investigations, and explore case study examples of agencies employing innovative approaches to combat financial fraud."

Relevant Litigation and Enforcement Actions

- **On August 4th, the U.S. District Court for the District of Columbia ruled that Google acted illegally to maintain a monopoly in online search.** According to *The New York Times*, the court found that "Google's agreements to be the automatic search engine on devices and web browsers hurt competition, making it harder for rivals to challenge Google's dominance." Google's monopoly over online search allowed the company to inflate its prices for search ads. The court must now decide the remedies for Google's monopoly, which could include forcing the company to change the way it runs its business or to sell off part of its business. See 'Google Is a Monopolist,' Judge Rules in Landmark Antitrust Case (*The New York Times*, August 2024).
- **The SEC filed an "AI-Washing" enforcement action against the CEO of an AI-based startup.** The SEC's complaint alleges that the CEO defrauded investors of at least $21 million by making false and misleading statements, including by employing buzzwords like "artificial intelligence" and "automation."
- **The SEC announced an award of more than $37 million to a whistleblower** who provided information and assistance that led to a successful SEC enforcement action.

Disclosure Trends - Reporting Implications for Public Companies Impacted by CrowdStrike

- Companies impacted by CrowdStrike's defective software update should consider the following long-term reporting implications:

- **Risk Factors and Forward-Looking Statements** – Impacted companies should consider updating their risk factors about systems downtime and/or reliance on third parties to operate critical business systems. Reminder to update relevant hypothetical and forward-looking language about outages or systems downtime to indicate that such risks have already occurred. For example, language that system outages "may" occur when the company has already experienced outages and downtime due to the CrowdStrike update.
- **MD&A –** Materially impacted companies should consider discussing any material impacts in the management's discussion and analysis (MD&A) section of the company's next Form 10-Q.
- **Internal Controls and Disclosure Controls –** Impacted companies should evaluate their response to the CrowdStrike update and related outages to identify any risks and gaps in their policies or practices, including internal controls and disclosure controls and procedures, and address any deficiencies.

For more information, see CrowdStrike: More Disclosure Implications (*theCorporateCounsel.net*, July 2024) and IT Meltdown Triggers Corporate Reporting Requirements: Explained (*Bloomberg Law*, July 2024).

Disclosure Trends – Risks re. Chevron Doctrine Ruling

- **Life science companies are adding risk factor language in response to the U.S. Supreme Court overturning the Chevron Doctrine.** The high court decision and other related decisions may prompt widespread litigation challenging existing federal regulations, which may create uncertainty for a number of industries and businesses. Accordingly, we have observed a recent trend of companies, particularly life science companies, including new risk factor language about this ruling. For example, please see the following language:

> "In addition, three decisions from the U.S. Supreme Court in July 2024 may lead to an increase in litigation against regulatory agencies that could create uncertainty and thus negatively impact our business. The first decision overturned established precedent that required courts to defer to regulatory agencies' interpretations of ambiguous statutory language. The second decision overturned regulatory agencies' ability to impose civil penalties in administrative proceedings. The third decision extended the statute of limitations within which entities may challenge agency actions. These cases may result in increased litigation by industry against regulatory agencies and impact how such agencies choose to pursue enforcement and compliance actions. However, the specific, lasting effects of these decisions, which may vary within different judicial districts and circuits, is unknown. We also cannot predict the extent to which FDA and SEC regulations, policies, and decisions may become subject to increasing legal challenges, delays, and changes."

Disclosure Committee Practices and Trends

- **The Society of Corporate Governance and EY conducted a benchmarking survey regarding current disclosure committee practices and trends.** The Society of Corporate Governance reports the following key takeaways:
  - Formal disclosure committees are a nearly universal practice among public companies.
  - Two-thirds of disclosure committees operate pursuant to a written committee charter.
  - Representation on the committee by functions—such as risk, information security, and human resources—is on the rise.

- While disclosure committees continue to focus primarily on SEC financial reporting and related disclosures, an increasing number of committees also review other types of disclosures (e.g., human capital, risk management and oversight) and publications (e.g., ESG reports).
- Most disclosure committees meet at least quarterly; around 50% maintain formal minutes; and nearly 40% have written disclosure controls and procedures.
- Management regularly reports to the audit committee about the disclosure committee meetings at nearly 40% of companies.
- While disclosure committees are sometimes involved in determining the materiality of cyber incidents for SEC purposes, more than 50% of companies have another individual or group to make that determination.
- More than 20% of companies expanded their disclosure committee composition over the past three years to include sustainability-focused roles.

Please see Corporate Governance in Focus: Harnessing Disclosure Committees for Modern Reporting (EY and Society for Corporate Governance, July 2024) for the full report.

Notable Resources and News

- Tips for Improving Board Communications and Effectiveness (Deloitte)
- Benchmarking Audit Committee Oversight & Priorities (Deloitte)
- S&P 500 ESG Reporting & Assurance Analysis (CAQ)
- CrowdStrike Outage Is Another Warning for Banks (*Bloomberg Law*, July 2024)
- CrowdStrike Outage Puts Its Financial Reporting Under Scrutiny, Too (*The Wall Street Journal*, July 2024).
- Attorneys Brace for Wave of CrowdStrike Litigation (*Law.com*, July 2024)