PAUL HASTINGS

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Public Company Watch

Key Issues Impacting Public Companies

SEC Spotlight

SEC's Enforcement Sweep Against Seven Public Companies Regarding Violations of the Whistleblower Protections Rule

On September 9, 2024, the SEC announced that it settled enforcement actions against seven public companies for violations of the whistleblower protection rule stemming from certain provisions in their employment, severance, consultant, and other agreements. Each company was charged with violating whistleblower protection Rule 21F-17(a), which prohibits any "action to impede an individual from communicating directly with [the SEC Staff] about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications." The companies each paid between $1,386,000 and $19,500 in civil penalties to settle the enforcement actions.

In each case, although the companies' agreements expressly permitted the employee to participate in government whistleblower programs, they also required the employee waive his or her right to recover a monetary award for participating in an investigation by a government agency.

Notably, the SEC acknowledged that the companies took no action to enforce these provisions, and were unaware of any instances where affected individuals declined to speak with the SEC about potential violations of securities laws. However, the SEC alleged that the mere presence of these provisions created impediments to participation in the SEC's whistleblower program, and that such restrictions on accepting financial awards for providing information undermine the purpose of Section 21F and Rule 21F-17(a), which is to "encourag[e] individuals to report to the [SEC]," and violate Rule 21F-17(a) by impeding individuals from communicating directly with the SEC about possible securities law violations.

This latest sweep underscores the SEC's continued focus on any potential impediment to whistleblowers' ability to report possible securities law violations. It also underscores the SEC's focus on ensuring that neither employees nor consultants are discouraged from reporting possible securities laws violations to the SEC.

Edgar Next to Overhaul Access to EDGAR

On September 27, 2024, the SEC adopted a final rule updating the rules governing access to and the management of accounts with the SEC's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) as well as amending certain related forms and the EDGAR Filer Manual. The new rules will upgrade the security of EDGAR, including introducing multifactor authentication to the

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system, require filers to authorize individuals to utilize their EDGAR accounts and add optional application programming interfaces (APIs). The new process is referred to as EDGAR Next and will be available to the public on March 24, 2025, though users are currently able to access EDGAR Next in a beta environment. Between March 24, 2025 and December 22, 2025, compliance with the new rules will be phased-in. While the new rule is quite technical covering an area of scant disclosure-related concern, the impact of the rules on public companies is significant, and if not closely attended to, could jeopardize an essential function—a company's ability to submit (or authorize a financial printer to submit on its behalf) a filing with the SEC.

The Dashboard

The amendments introduce a dashboard on which filers will manage who is able to access their EDGAR account and make filings on their behalf. Filers will be required to authorize individuals as account administrators who will manage their EDGAR account via the dashboard, including who is able to act on behalf of the filer. These individuals will need to utilize Login.gov (a separately maintained secure sign-in service of the U.S. General Services Administration) to obtain credentials as a prerequisite for utilizing the system and complete multifactor authentication in order to login to the filer's account. Thereafter, filers (via their account administrators) will be asked to annually verify the accuracy of their account administrators and all other account and filing delegees as well as all information included on the filer's dashboard. If a filer's information is not timely verified, the filer's EDGAR account will be deactivated and the filer will be required to submit a new Form ID application to regain access to its account.[1]

New Roles: Account Administrator, User, Technical Administrator

Generally, filers will be asked to designate at least two individuals as account administrators to manage their EDGAR account and make filings on their behalf.[2] Account administrators will be empowered to add and remove users, additional account administrators or technical administrators utilizing the filer's dashboard (or an API). In addition, account administrators will be able to manage and view the filer's CCC, submit filings to the SEC, delegate to other filers, and manage user API tokens. The other access types are more limited, enabling individuals in that role to partake in certain functions. The SEC outlines the key functions for each role as set forth in the below chart.[3] All roles will be required to utilize their individual account credentials in order to access the filer's account.

Role	Submit filings, view CCC	Generate/ change CCC	Manage account administrators, users, technical administrators, and delegated entities	Delegate to another filer	Manage delegated users	Manage filer API token	Manage user API token
Account Administrator	x	x	x	x			x
User	x						x
Technical Administrator						x	
Delegated Administrator	x				x		x
Delegated User	x						x

New Steps Required to Make a Filing

Once compliance with EDGAR Next is mandatory, in order to submit a filing on a filer's behalf, a user would need to clear the following hurdles:

1 Account administrators can choose one of March 31th, June 30th, September 30th or December 31st as a filer's annual confirmation deadline. Confirmations will be subject to a three-month grace period prior to account access shutting off.

2 Filers that are individuals or sign-member companies need only designate one individual as account administrator.

3 Replicated from adopting release.

- Sign-in using individual account credentials through Login.gov;
- Complete multifactor authentication;
- Be authorized by the filer itself or its account administrator; and
- Enter the applicable CIK and CCC number.

APIs

With EDGAR Next, filers will be able to utilize fifteen optional APIs to interact with EDGAR, "providing a machine-to-machine method of making submissions, retrieving information, and performing account management tasks." In order to connect to the APIs, filers will need to follow additional technical security protocols and delegations. The APIs will, among other things, enable filers to make live and test submissions on EDGAR, check the status of an EDGAR submission, check EDGAR operational status, confirm the validity of all credentials involved in API-based filings, replicate aspects of dashboard functionality, view filer account information, generate CCCs, create custom CCCs, and automate enrollment with EDGAR Next.

Form ID

The new rules adopt amendments to Form ID related to the move to EDGAR Next. Among other things, the new Form ID will require applicants to: provide the names of the applicant's account administrators; provide its Legal Entity Identifier (LEI), if any; provide additional contact information for the filer, its account administrator and others; disclose if the applicant, its authorized individual, person signing power of attorney or others related to the account have been criminally convicted due to a federal or state securities law violation or otherwise civilly or administratively enjoined, barred, suspended or banned as a result of a securities law violation; and indicate whether it is in good standing with its state or country of incorporation (for applicants that are corporate entities).

Next Steps

The move to EDGAR Next will require significant and ongoing planning on behalf of public companies. In order to ensure undisrupted access to submitting SEC filings in accordance with the applicable deadlines, public companies will need to ensure their timely enrollment with the platform and promptly make their annual confirmations. In addition, public companies should coordinate with Section 16 filers to ensure their understanding of the new requirements so that they are likewise able to make future Section 16 filings in a timely manner. Historically, applicants could obtain EDGAR Access Codes within two to three business days of submitting an application on Form ID. However, in times of increased application volume (such as during the 2020-2021 SPAC boom), the SEC's processing of Form IDs could be delayed. It would not be surprising if the Form ID process becomes similarly log-jammed surrounding key compliance dates during the phase-in period for EDGAR Next or following the expiration of the quarterly grace periods for filers that select a particular quarter end as their annual confirmation date. Accordingly, it will be essential for public companies to ensure they do not lose access to their account (and therefore their ability to make submissions with the SEC) through poor account management.

Compliance Dates

The transition to EDGAR Next will be phased-in, with the dashboard going live on March 24, 2025, and the phase-in concluding on December 22, 2025. The key dates throughout the phase-in are included in the below chart.

Key Dates	Transitions
March 24, 2025	▪ Dashboard goes live and filers can begin enrollment and connect to APIs. ▪ Compliance with amended Form ID required. ▪ Form IDs to be submitted through the dashboard. ▪ Existing filers can submit filings using legacy process.
March 24, 2025-September 12, 2025	▪ Existing filers can continue to submit filings using legacy process. ▪ New filers, who must utilize amended Form ID to obtain access to EDGAR, will be in compliance and not need to enroll in the dashboard.
September 15, 2025	Compliance with all rule and form changes required.
September 15, 2025 – December 19, 2025	Enrollment on EDGAR Next dashboard required for existing EDGAR filers as a prerequisite to make a filing.
December 22, 2025	Existing filers who have not enrolled with EDGAR Next or otherwise obtained access must submit Form ID prior to making an SEC filing or accessing their account.

Schedule 13G

Last October, the SEC adopted rules modernizing beneficial ownership reporting, as discussed in more detail in our **Client Alert**. Among other things, the amended rules shortened the filing deadlines for initial and amended Schedule 13G filings. Filers must comply with the new Schedule 13G filing deadlines as of September 30, 2024. See Annex A for a summary of the new deadlines.

M&A Updates

Delaware Court Ruled Buyers Breached Earnout Obligations

Two recent Delaware cases provide useful guidance to parties negotiating, drafting and applying earnout and contingent value right provisions (referred to herein interchangeably for convenience as "earnouts") in acquisition agreements. An earnout is a mechanism used in M&A transactions where a portion of the purchase price is determined after the closing based on the performance of the acquired company, its business or certain assets in the hands of the buyer over a period of time. Earnouts are frequently used in the acquisition of early- and developmental-stage life sciences companies to bridge the gap to the extent the value of the seller is based on highly speculative future events, such as regulatory approvals and commercial success.

There are numerous fundamental issues in an earnout that can result in complex and challenging negotiations and litigation risk between buyers and sellers. One of the thorny issues is determining the efforts obligations that the buyer must apply in the earnout context. In two recent earnout decisions, the Delaware Court of Chancery found that the buyer breached its contractual obligation to use "commercially reasonable efforts" to achieve the earnout. Among other things, these two cases highlight alternative ways that parties can define an efforts obligation, by using an "*inward*-facing"/subjective standard, or an "*outward*-facing"/objective standard.

In one recent case, the Court found that the buyer breached its *inward*-facing/subjective obligation to the seller, requiring the buyer to use efforts to develop the earnout product (a medical robot) similar to the efforts the buyer used for its other "priority medical products." The Court found that the buyer caused the earnout product to compete with, and ultimately combine with, the buyer's own competitive product. The Court found that the buyer expended lesser efforts than those the buyer applied to its other "priority medical products," and thus, the Court found, the buyer breached its earnout obligation. The Court ruled that the buyer was liable for damages to the seller as a result of the breach.

In another recent case, the Court found that the buyer breached its *outward*-facing/objective obligation, requiring that the buyer use efforts to develop the earnout product (an antibody) similar to the efforts of similar companies for similar products under similar circumstances. The buyer terminated the earnout product due to alleged concerns over safety data and its impact on timing for entry into the marketplace. The Court, however, found these concerns to be a pretext, with the actual reason for termination being that the buyer itself was acquired during the earnout period and the buyer's acquirer wanted the earnout product terminated. The Court found that under similar circumstances, a similar company would have pursued more safety data and testing prior to terminating the product. Therefore, the Court ruled that the buyer breached its efforts obligation and ordered the buyer to pay the first earnout payment of $130 million, and the Court will later determine the amount of damages related to the breach and the remaining seven earnout payments.

The following are some practical take-aways from these earnout cases:

- For an *outward*-facing/objective efforts standard, consider the differences between the buyer's specific development practices and subjective factors as appliable to the earnout product and how those could differ from the standards of similarly situated peers, and whether they comport with the buyer's objectives. As courts will parse the precise agreement language, consider specifying whether the buyer's efforts is intended to be compared to actual actions taken by actual similar companies or expected actions taken by a hypothetical similar company.
- For an *inward*-facing/subjective efforts standard, consider how the buyer's products similar to the earnout product are treated and what the buyer's efforts have been with respect to them, and how this would compare against the expected treatment for the earnout product under the earnout provisions.
- Earnouts often lead to disputes, and in both cases the court closely examined the specific language in the agreements and the facts giving rise to the dispute. Earnout provisions should be carefully and thoughtfully drafted to avoid ambiguity with the assistance of subject matter experts and experienced lawyers. When a court finds earnout provisions to be ambiguous, the court is likely to extensively review extrinsic evidence to determine the parties' intent, often in prolonged and costly litigation.
- Buyers should ensure that teams working with earnout products are knowledgable about the applicable efforts standards and other important provisions underlying the earnout and that they conduct themselves accordingly.
- Consider addressing the consequences of a buyer with an earnout obligation being acquired during the earnout period. An acquirer of a company with ongoing earnout obligations should diligence the efforts obligations under the earnout and the conduct of the buyer with respect to the earnout.

Merger Control Overhaul Takes Effect in India

Public companies contemplating cross-border M&A transactions should be aware that certain provisions of India's Competition (Amendment) Act, 2023, went into effect on September 10, 2024. India now has a new deal value threshold. All transactions exceeding USD $238 million must be notified if the target has substantial business operations in India. This means certain high-value deals, with limited impact on competition in India, may require now suspensory notification, which could increase the regulatory burden of obtaining necessary approvals to meet the conditions for closing an M&A transaction and impact closing timelines.

Other Updates

FTC Supports USDA Efforts to Strengthen Enforcement of Packers and Stockyards Act

On September 11, 2024, the Federal Trade Commission (FTC) submitted a comment supporting the U.S. Department of Agriculture (USDA)'s proposed rule to clarify the scope of what constitutes unfair practices under the Packers and Stockyards Act (PSA). The PSA grants the USDA broad rulemaking authority over the livestock, meat, and poultry industries by providing that it is unlawful to "[e]ngage in or use any unfair, unjustly discriminatory, or deceptive practice or device." Courts have differed on whether plaintiffs must show market-wide harm to competition to be successful. According to the FTC, "[b]ecause the PSA's prohibition on unfairness is by its plain text broader than the FTC Act, and the FTC Act's unfair trade practices prohibition does not itself require a showing of market-wide ongoing harm to competition, the proposed rule correctly recognizes that competitive injury is not required for a PSA violation." If the rule is finalized in its current form, it could increase litigation risk and compliance challenges for public companies in the meat processing industry.

Will November Bring Changes to ESG?

While over the last 12 months there have been a number of new legal and regulatory requirements for companies regarding ESG, at the same time ESG has become a social and political flashpoint in the United States. The U.S. elections in November could impact political control of certain states, the U.S. Congress, and the U.S. Presidency, creating the potential for significant change in how ESG risks are viewed from a political, legal, and regulatory perspective. However, given global ESG developments, companies should expect continued focus on how companies approach ESG risk oversight, reporting and disclosure, even if the political tides shift in the U.S.

In the last year, global regulators have imposed a number of new ESG related requirements, some culminating after years of discussion and debate. Some of the more significant include:

- In March, the SEC finally released its final rule on climate disclosures [**SEC Issues Final Rule on Climate Disclosures | Paul Hastings LLP**]. While omitting scope 3 emissions from the disclosure requirements, the rule imposes a formal disclosure requirement on public companies. The rules have been stayed pending resolution of multiple lawsuits filed to block the rules.
- In April and July respectively, the EU formalized and finalized both its Corporate Sustainability Reporting Directive (CSRD) and Corporate Sustainability Due Diligence Directive (CSDDD) [**PH ESG Comparative Analysis of the SEC Climate Rule and EU CSRD & ESRS | Paul Hastings LLP**]. Global companies are analyzing how and the extent to which they apply to their businesses, either directly or indirectly.
- In October of last year, California passed ESG disclosure bills requiring climate-related disclosure requirements on companies doing business in California, while also enacting a bill governing voluntary carbon market disclosures and greenwashing [**California Passes New ESG Disclosure Laws Ahead of SEC, Triggering Increased Regulatory and Litigation Risk for Companies Doing Business in California | Paul Hastings LLP**]. Lawsuits have been filed against the two major laws as well.

Almost all have yet to be implemented, requiring either enabling regulations and legislation or resolution of legal challenges that may take years, but the contours of more formal reporting and disclosure regime are beginning to take shape.

At the same time, the U.S., in particular, has seen significant negative reaction to and attacks on the emerging regulatory framework, with the most acute response coming from individual states [**Pecuniary vs. Nonpecuniary Factors: Understanding the Potential Scope of Anti-ESG Restrictions in U.S. State Laws | Paul Hastings LLP**]. This has placed companies in the middle between different regulators, different investor groups, and different political interests. The legal aspects of these conflicts are far from resolved [see e.g., **Federal Court Rules That Missouri Anti-ESG Rules are Preempted by Federal Law and are Unconstitutional | Paul Hastings LLP**], and the political differences are unlikely to dissipate soon.

While the legal and regulatory environment is complicated and still emerging, and the political and social environment even more complex, it is unlikely that near-term political changes will fundamentally alter the long-term trends in regulatory and societal interest in ESG. The ecosystem of regulators and jurisdictions addressing ESG risks is significant, and a single election result is unlikely to undermine all the ESG-related regulatory frameworks relevant to most large public companies.

Companies with an international footprint will need to consider both non-U.S. regulations and the demands of non-U.S. partners who may be subject to disclosure and due diligence requirements impacting their supply chains, such as those imposed by the EU and EU-member states. Companies also will need to consider both applicable Federal and state-level reporting and disclosure requirements. For example, any effort to repeal the SEC's rule-making is unlikely to have an immediate impact of the implementation of California's climate disclosure requirements. Furthermore, despite the social and political differences regarding ESG, sustainability concerns continue to be a major concern of investors and the public at-large.

The upcoming U.S. elections may have an impact on the U.S. regulatory requirements facing public companies. As a result, companies are well advised to monitor these developments while also anticipating ESG risks to remain the subject of continuing regulatory activity and interest globally.

Annex A[4]

Issue	Old Schedule 13G	Current Schedule 13G
Initial Filing Deadline	QIIs & Exempt Investors: 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: 10 days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	QIIs & Exempt Investors: 45 days after calendar quarter-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: Within five business days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).
Amendment Triggering Event	All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Same as current Schedule 13G: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).
Amendment Filing Deadline	All Schedule 13G Filers: 45 days after calendar year-end in which any change occurred. Rule 13d-2(b). QIIs: 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month- end, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).	All Schedule 13G Filers: 45 days after calendar quarter-end in which a material change occurred. Rule 13d-2(b). QIIs: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(d).

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4 Replicated from the Final Rule

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