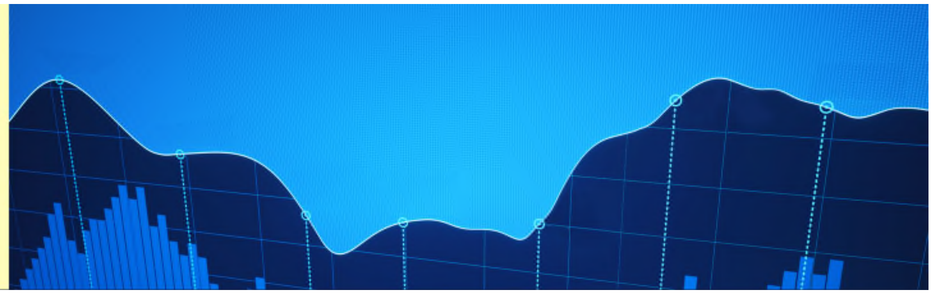

Securities Quarterly Update

March 2025 | Spring Edition

Welcome to the spring edition of Securities Quarterly Update*, a publication that provides updates and guidance on securities regulatory and compliance issues. In this edition, we review recent SEC developments, guidance, and enforcement actions and proposed changes to Delaware corporate law, as well as some disclosure and corporate governance considerations.*

SEC Disclosure Considerations

Diversity, Equity and Inclusion

As companies are reexamining their diversity, equity and inclusion (DEI) programs in light of the recent executive orders discussed below under "DEI Updates" and anti-DEI campaigns and litigation, companies should ensure alignment between their programs and practices, their policies, and public disclosures, including in annual reports and proxy statements. In addition, mentions of anti-DEI sentiment increasingly appear in SEC filings, either as new, standalone risk factors (*e.g.,* p. 19) or additions to existing risk factors (*e.g.,* p. 34), such as those addressing environmental, social and governance (ESG) risks.

Institutional Shareholder Services (ISS) recently announced that it will no longer consider the gender, racial and/or ethnic diversity of the board of directors in its voting recommendations for director elections. Glass Lewis has indicated that it is assessing its voting recommendations on board diversity and DEI-related shareholder proposals and is expected to announce updates in early March 2025. A number of institutional shareholders have also pulled back their voting policies on board diversity.

In the current uncertain environment, companies face similar competing considerations for their ESG programs and related public disclosures.

Artificial Intelligence

Artificial intelligence (AI) is being increasingly discussed in SEC filings, particularly in risk factors, but also in business and management's discussion and analysis (MD&A) sections and earnings calls and releases. Companies should remain mindful of the SEC's recent enforcement actions involving AI-washing when discussing AI in their filings.

Extreme Weather Events

Companies should consider the impact that natural disasters and severe weather events, such as the recent wildfires in Los Angeles, may have on their businesses. If the impact is significant, additional disclosures may be necessary in, for example, the MD&A and risk factor sections in upcoming filings.

Deregulation, DEI, Tariffs and Other Executive Orders

In addition to the recent executive orders on DEI discussed below, the presidential administration has published a number of other executive orders and taken other actions that could require additional disclosures. For instance, new or increased tariffs have been implemented or are expected to be implemented on imports from Canada, Mexico, China and the European Union, although some uncertainty regarding final tariffs remains. Companies, particularly those that rely on imported materials and goods, should consider how these tariffs may impact their business and if additional disclosure is required in their upcoming Form 10-K/10-Q filings (*e.g.,* risk factors, business section and MD&A). In addition, the administration has recently issued

ATTORNEY ADVERTISING

several executive orders that are expected to result in federal agencies modifying or rescinding existing regulations and forgoing implementing new regulations. Companies involved in heavily regulated industries should monitor changes implemented by relevant agencies and prepare for changes to the larger regulatory environment. Additionally, these potential modifications or rescissions are likely to trigger litigation, and companies should monitor any pending lawsuits that may impact them or their industry.

New SEC Guidance

Eligibility to Report on Schedule 13G

In February 2025, the staff of the SEC's Division of Corporation Finance (also referred to as Staff) issued new guidance impacting shareholder engagement and activism. The new and revised Compliance and Disclosure Interpretations (CD&Is) address how greater than 5% shareholders can engage with companies without losing their eligibility to report on Schedule 13G (as opposed to a more burdensome Schedule 13D). The CD&Is provide that the subject matter of engagement may be dispositive in determining if a shareholder may continue to use Schedule 13G, with the following provided as examples of engagement that would render Schedule 13G unavailable:

- Calling for the sale of the company or a significant amount of the company's assets;
- Calling for the restructuring of the company; or
- Calling for the election of director nominees other than the company's nominees.

The Staff also emphasized that the context of the engagement is highly relevant in determining Schedule 13G eligibility. Generally, a shareholder discussing a particular topic and how its views may inform its voting decisions, without more, would not be disqualified from reporting on Schedule 13G. However, going beyond this discussion may be "influencing" control over the company. The Staff provided the following examples as situations in which a shareholder may be disqualified from reporting on Schedule 13G.

- A shareholder:
  - (i) recommends that the company:
    - Declassify its board of directors;
    - Change to a majority voting standard in uncontested director elections;
    - Eliminate its shareholder rights plan (poison pill);
    - Change its executive compensation practices; or
    - Take specific actions on a social, environmental, or political policy; and
  - (ii) in an effort to influence the company to adopt the shareholder's recommendation, explicitly or implicitly makes its support of one or more of the company's director nominees at the next director election conditional on the company's adoption of its recommendation.
- When discussing with the company how the company does not meet the shareholder's expectations on a particular topic, the shareholder states or implies that it will not support one or more of the company's director nominees at the next director election unless the company implements changes to align with the shareholder's expectations.

Greater than 5% shareholders who have traditionally reported on Schedule 13G are revisiting how they engage with companies to avoid appearing as if they are trying influence control over a company, which has affected, and may continue to further impact, company investor engagement.

Use of PX14A6G Notices of Exempt Solicitation

In January 2025, the SEC's Division of Corporation Finance issued CD&Is regarding the use of PX14A6G filings, which are short notices of exempt solicitation. In recent years, some investors, including some shareholder proposal proponents, have used these filings on a voluntary basis to publicize their views in connection with various issues being submitted for inclusion in company proxy statements and/or being voted on at shareholder meetings.

Under Rule 14a-6(g) of the Exchange Act, a PX14A6G filing is required when shareholders who own over $5 million of a company's securities engage in a solicitation without seeking proxies. The rule was initially adopted to address concerns that large shareholders could conduct "clandestine" solicitations, but in practice these filings have often been submitted by shareholders who own less than $5 million of a company's securities.

Staff clarified that voluntary PX14A6G filings by shareholders who do not own more than $5 million of the company's securities are allowed, with appropriate disclosures (*i.e.,* clearly indicating that a filing is being made on a voluntary basis), but that these filings are required to include a cover page containing the information required by Rule 14a-103. Additionally, Staff clarified that since the purpose of a PX14A6G filing is to notify the public of written soliciting material that a person has provided to shareholders through other means, these filings should only include previously disseminated written communications – these filing themselves are not intended to be the means to disseminate written soliciting material to shareholders. Finally, Staff reiterated that PX14A6G filings are subject to liability for false and misleading statements under Rule 14a-9.

Shareholder Proposal Updates

In February 2025, Staff issued Staff Legal Bulletin 14M (SLB 14M), which rescinds Staff Legal Bulletin 14L and provides updated guidance on shareholder proposals under Rule 14a-8. SLB 14M generally reinstates previous guidance related to Rule 14a-8(i)(5) ("economic relevance") and Rule 14a-8(i)(7) ("ordinary business"), making it easier for companies to exclude some shareholder proposals.

When considering the "economic relevance" exclusion, Staff clarified that they view the analysis "as dependent upon the particular circumstances of the company to which the proposal is submitted. That is, a matter significant to one company may not be significant to another." Staff also noted that proposals that include significant social or ethical issues may be excludable, regardless of "their importance in the abstract."

When considering the "ordinary business" exclusion, Staff clarified that they "will take a company-specific approach in evaluating significance, rather than focusing solely on whether a proposal raises a policy issue with broad societal impact or whether particular issues or categories of issues are universally 'significant.'"

Staff also noted that they no longer expect companies to include a discussion of board analysis in their no-action requests, as Staff found that these discussions often did not have relevant information and were not dispositive.

This new guidance applies to currently pending no-action requests. In the Frequently Asked Questions included in SLB 14M, Staff indicated that if a company with a currently pending no-action request wishes to raise new legal arguments in light of this new guidance, they should submit any new arguments as supplemental correspondence via the online portal.

Reverse Stock Split Updates

In January 2025, the SEC approved amendments proposed by Nasdaq and NYSE to limit the ability of listed companies to use reverse stock splits to regain or maintain compliance with minimum bid price requirements. See our winter *Securities Quarterly Update* newsletter for a more detailed discussion of these amendments.

EDGAR Next Enrollment Opens

On March 24, 2025, EDGAR Next, the SEC's new EDGAR Filer Management website and dashboard, will go live. To prepare, companies and other filers should (i) gather their CIK, CCC and passphrase, (ii) determine who will serve as account administrators for the filer, (iii) determine who will enroll the filer in EDGAR Next, and (iv) coordinate with all individuals and entities who currently file on their behalf.

Beginning September 15, 2025, compliance with EDGAR Next will be required to file. Starting December 22, 2025, new filers or existing filers who did not enroll in EDGAR Next before December 22, 2025 must apply for access on Form ID. Please see our previous *Securities Law Update* for more details on how to prepare for EDGAR Next.

Delaware Law Updates

On February 17, 2025, Delaware lawmakers proposed significant amendments to the Delaware General Corporation Law (DGCL). Among other things, Senate Bill 21 would amend Section 144 of DGCL to provide safe harbor for conflicted party transactions if approved or ratified by a "majority of the disinterested directors or by a majority of the votes cast by the disinterested share entitled to vote thereon, in each case upon disclosure or in full knowledge of the material facts giving rise to the conflict or potential conflict."

Additionally, Senate Bill 21 would amend Section 220 to (i) limit what qualifies as corporate "books and records" for shareholder inspection demands to a specific list of documents, which could allow companies to exclude emails, text messages, and informal board communications; (ii) impose a three-year lookback period for shareholder access to books and records; (iii) allow corporations to impose confidentiality requirements for produced records; and (iv) impose stricter procedural requirements, such as requiring a demand to state a proper purpose, with particularity, and show that the requested information is "specifically related" to that purpose. Courts would still be able to compel production of certain documentation, but only if the shareholder complies with the new requirements.

Commissioner Peirce Previews What May Be Ahead for the SEC

In January 2025, SEC Commissioner Hester M. Peirce offered a preview of what we may expect from the SEC in the coming years, among other things, calling for less prescriptive, materiality-guided disclosures, encouraging the SEC to refrain from using enforcement actions to "override managerial decision-making," and suggesting to re-examine the ownership thresholds in Rule 14a-8 for submission of shareholder proposals for inclusion in company proxy statements. Commissioner Peirce also discussed increasing the Division of Corporation Finance's and the Office of the Chief Accountant's efforts to provide guidance to companies about disclosure issues that arise in the normal course of business.

Potential Updates to SEC Filer Status and Scaling of Public Company Disclosure Requirements

In February 2025, Mark T. Uyeda, Acting Chairman of the SEC, indicated that the SEC may be considering updates to SEC filer status definitions. Acting Chairman Uyeda noted that the current rules and disclosure obligations are "needlessly complex and do not provide sufficient scaled disclosure benefits." He also noted that the current regime has outdated financial thresholds, a lack of scaling, and overlapping definitions, which can create an ineffective regulatory regime and impose unnecessary costs on companies. Acting Chairman Uyeda ended his remarks by calling for the SEC to consider "whether to re-align the Commission's filer categories to reflect the size and makeup of public companies today" and "review its disclosure requirements and identify rules that should apply only to the largest companies."

DEI Updates

Executive Orders

In January 2025, President Trump issued several executive orders aimed at eliminating DEI policies and programs both in the federal government and in the private sector. The executive orders apply to all federal agencies, as well as to government contractors and grant recipients, and have implications for private sector companies.

E.O. 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

The Trump administration ordered the termination of all "discriminatory and illegal" preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders and requirements in the federal government, and ordered federal agencies to combat "illegal private-sector" DEI preferences, mandates, policies, programs and activities.

This executive order also revoked Executive Order 11246, a nearly 60-year-old executive order signed by President Lyndon B. Johnson, which prohibited employment discrimination by federal contractors and subcontractors and required contractors to undertake affirmative action in employment based on gender and race/ethnicity. Executive Order 14173 now seeks to incorporate new certifications in federal contracts and grants, including a provision requiring recipients to certify that they do not operate any DEI programs that violate applicable federal law.

Given these changes, the executive order could significantly impact private sector companies that contract with the federal government, and companies should review the order and consider if they have any current policies or programs that may be implicated.

E.O. 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing

The Trump administration ordered the termination of all "discriminatory programs, including illegal DEI and 'diversity, equity, inclusion, and accessibility' [(DEIA)] mandates, policies, programs, preferences, and activities in the Federal Government, under whatever name they appear." Within 60 days, all federal agencies must terminate all DEI and environmental justice offices and positions, equity action plans, initiatives, or programs, equity-related grants or contracts, and all DEI performance requirements for employees, contractors, or grantees.

United States Attorney General Memorandum

In February 2025, Attorney General Pam Bondi issued a memorandum titled *Ending Illegal DEI and DEIA Discrimination and Preferences*, which indicates that the Department of Justice's (DOJ) Civil Rights Division "will investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." By March 1, 2025, the Civil Rights Division and Office of Legal Policy must submit a report containing recommendations to "encourage the private sector to end illegal discrimination and preferences." The report is also required to include a list of the "most egregious and discriminatory DEI and DEIA practitioners in each sector of concern" and a plan to deter the use of DEI and DEIA programs that constitute illegal discrimination or preferences, including proposals for criminal and civil investigations. Companies should review the DOJ's report when released and assess whether any policies or programs may be implicated.

Preliminary Injunction

On February 21, 2025, the U.S. District Court for the District of Maryland issued a nationwide injunction against several key components of President Trump's DEI-related executive orders. One of the items challenged was the "enforcement threat provision" of the executive order where the attorney general had been directed to develop strategic enforcement plans for investigating DEI programs in the private sector. The court found that this requirement raised First Amendment and due process concerns for private employers and temporarily blocked the government's ability to take enforcement action against private companies for DEI programs that the government may consider to violate the executive order. For more information, see our *Labor & Employment Law Update*.

Given a number of developments concerning DEI, companies should nevertheless review their DEI programs and any related disclosures.

Select Recent SEC Enforcement Actions

Controls and Procedures – Failure to Disclose Settlement Agreements

In January 2025, the SEC announced settled charges against the former executive chairman and chief executive officer of a large entertainment company for allegedly signing two settlement agreements on behalf of himself and the company without disclosing the agreements to the company's board of directors, legal department, accountants, financial reporting personnel, or auditor. In the SEC's view, this alleged failure to disclose circumvented the company's system of internal accounting and caused material misstatements in the company's financial statements. Additionally, the agreements should have been disclosed as related party transactions.

"Company executives cannot enter into material agreements on behalf of the company they serve and withhold that information from the company's control functions and auditor," said Thomas P. Smith Jr., Associate Regional Director in the New York Regional Office.

The former executive consented to the entry of the SEC's order finding that he knowingly violated the Securities Exchange Act, directly or indirectly made or caused to be made false or misleading statements to the company's auditor and caused the company's violations of the reporting and books and records provisions of the Exchange Act. The former executive also agreed to cease and desist from violating those provisions, pay a civil penalty, and reimburse the company.

Accounting for Stock-Based Compensation

In January 2025, the SEC announced a settled action against a company relating to allegedly improper accounting for stock-based compensation expenses. The company seemingly modified the terms of stock awards for departing employees and retiring board members, including by accelerating vesting periods and allowing vesting to continue after the departure date, so that the stock awards would not be cancelled or forfeited. These changes were considered modifications under generally accepted accounting principles (GAAP), and the SEC claimed that the company's alleged failure to record the modifications as required resulted in materially misstated financial statements. The company also indicated that it complied with ASC 718, but the SEC alleged that "[n]o one at the company consulted ASC 718 or took other steps to ensure the accounting for the modified stock awards for the departing employees and board members was in accordance with GAAP." The SEC alleged that the improper accounting also resulted in inaccurate books and records. The SEC further alleged that from at least September 2019 to August 2023, the company failed to maintain adequate disclosure controls and procedures.

Additionally, the company's chief executive officer, after the company filed its quarterly reports with allegedly misleading financial statements, sold shares of company stock and received a grant of restricted stock units. The company seemingly clawed back some of this compensation, as the chief executive officer reimbursed the company for the amount of profits on the sale of shares and returned vested shares. The company also cancelled the chief executive officer's remaining restricted stock units.

The company reached a settlement with the SEC and agreed to pay a $3 million civil penalty.

AI-Washing

In January 2025, the SEC announced settled charges against a restaurant-technology company for allegedly making materially false and misleading statements about its AI-assisted speech recognition technology used to automate drive-thru ordering. The SEC alleged that the company's false and misleading statements, made from November 2021 to May 2023, failed to disclose that the technology was owned and operated by a third party. The company also allegedly falsely claimed that its AI technology eliminated the need for human order-taking, but the vast majority of the orders placed through the technology required human intervention.

The company consented to a cease-and-desist order. The SEC did not impose a civil penalty based on the company's cooperation during the investigation and remedial efforts.

Failure to Timely File Forms D

In December 2024, the SEC announced settled charges against two private companies and one registered investment adviser for alleged failure to timely file Forms D in connection with unregistered securities offerings in violation of Regulation D. Regulation D contains certain offering exemptions and a safe harbor from the Securities Act's registration requirements, and companies relying on these exemptions are required to file a Form D within 15 calendar days of the applicable offering's first sale of securities.

"Form D filings are crucial sources of information on private capital formation, and compliance with the requirement to make such filings in a timely manner is vital to the Commission's efforts to promote investor protection while also facilitating capital formation, especially with respect to small businesses," said Sanjay Wadhwa, Acting Director of the SEC's Division of Enforcement.

Without admitting or denying the findings, the companies and adviser agreed to cease and desist from violating the charged provisions and pay civil penalties.

Beneficial Ownership Reports on Schedules 13D and G and Forms 3, 4, 5 and 13F

As discussed in our fall *Securities Quarterly Update* newsletter, the SEC appears to remain focused on late beneficial ownership reports on Schedules 13D and 13G and Forms 3, 4, and 5. Companies should consider if a training refresher is needed and if it is clear when the company did and did not assume responsibility for these filings.

FOR MORE INFORMATION

For more information, please contact:

Jurgita Ashley
Partner, Securities, Capital Markets & Corporate Governance
216.566.8928
Jurgita.Ashley@ThompsonHine.com

Matthew Kissling
Partner, Labor & Employment
216.566.5586
Matthew.Kissling@ThompsonHine.com

Julia Miller
Counsel, Securities, Capital Markets & Corporate Governance
216.566.5831
Julia.Miller@ThompsonHine.com

Kellie Tomin
Associate, Securities, Capital Markets & Corporate Governance
216.566.5673
Kellie.Tomin@ThompsonHine.com

or another member of our Securities, Capital Markets & Corporate Governance team.

The authors send their thanks to associate **Maryam Mahboob** for her assistance with this newsletter.

Previous Editions of *Securities Quarterly Update*

- Winter 2024
- Fall 2024
- Summer 2024
- Spring 2024

*****

This publication may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgment of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions.

© 2025 THOMPSON HINE LLP. ALL RIGHTS RESERVED.