PAUL HASTINGS

Fourth Quarter 2024

Private Company Report

Key Issues Impacting Private Companies

Overview

This edition of the Private Company Report highlights critical updates and regulatory changes affecting private companies, including a temporary stay on the enforcement of the new beneficial ownership reporting requirements under the Corporate Transparency Act, updates to DOJ guidance on corporate compliance programs relating to AI and other new technology risks and antitrust compliance, recent SEC enforcement actions, new information and threshold requirements under the Hart-Scott-Rodino Act, employment laws and significant litigation rulings. Staying informed on these topics is important for a private company's effective compliance and strategic planning.

Highlights include:

- **The Corporate Transparency Act:** Reporting deadlines for the Corporate Transparency Act are currently subject to a stay by the Fifth Circuit until at least March 25, 2025.
- **DOJ Updated Guidance:** Updated DOJ guidance on corporate compliance programs related to the risks of AI and other technologies and antitrust compliance.
- **SEC Enforcement:** SEC charges for failing to timely file a Form D in connection with unregistered securities offerings.
- **HSR Updates:** Increased HSR thresholds and fees for 2025 announced and long-anticipated updates to the Hart-Scott-Rodino Act finalized.
- **Employment Law:** Recent developments affecting non-competes, employee mobility and overtime pay.
- **Delaware Courts:** Recent cases concerning earnouts in M&A transactions and Section 220 shareholder demands.
- **Key Considerations:** Select questions to consider based on legal updates in the quarter.

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Regulatory Updates

Corporate Transparency Act Updates

The beneficial ownership reporting obligations and deadlines for the Corporate Transparency Act ("CTA") are currently subject to a temporary stay by the Fifth Circuit.

As noted in a prior edition of this Report, entities formed or registered to do business in the United States on or before December 31, 2023 were required to file a Beneficial Ownership Information ("BOI") Report with the US Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") pursuant to the CTA by January 1, 2025, unless the entity is subject to an exemption to the reporting requirements.

On December 3, 2024, the District Court for the Eastern District of Texas issued an order in *Texas Top Cop Shop, Inc., et al. v. Garland, et al.*, No. 4:24-cv-00478 (E.D. Tex.) implementing a nationwide preliminary injunction of the CTA and its enforcement. In response, FinCEN issued a statement on December 9, 2024, confirming that they will comply with the order and that BOI Reports are not currently required.

On December 26, 2024, the Fifth Circuit once again stayed the enforcement of, and the reporting deadlines for, the CTA on a temporary basis. In its order, the Fifth Circuit stated its aim to preserve the constitutional status quo by again pausing the CTA filing deadlines until a merits panel can rule on the appeal of the case at the next scheduled oral argument, set for March 25, 2025. In response, FinCEN issued updated guidance acknowledging the renewed stay on the reporting deadlines and stating that FinCEN will be accepting BOI Reports solely on a voluntary basis while the stay remains.

As long as the current order stands, the nationwide preliminary injunction of the CTA is in effect and could last until at least March 25, 2025. However, this remains a continually evolving situation. Therefore, potential reporting companies subject to the CTA should continue to prepare for filing to accommodate any subsequent shifts in the reporting deadline. As a reminder, potential reporting companies should keep in mind any privacy law obligations that could be triggered by voluntarily reporting personally identifiable information.

For more information on the CTA beneficial ownership reporting requirements, please see the previous edition of our **Private Company Report**.

DOJ Criminal Division Issues Updated Guidance on Corporate Compliance Programs Focused on AI Risks

As noted in a prior edition of this Report, U.S. regulators are issuing policies to govern AI usage and mitigate risks like fraud and discrimination. On September 23, 2024, the Criminal Division of the Department of Justice ("DOJ") announced significant changes to its Evaluation of Corporate Compliance Programs ("ECCP"), which prosecutors use in assessing the effectiveness of corporate compliance programs. The changes to the ECCP cover a range of compliance topics, but most notably focus on steps companies should be considering to mitigate the increasing risks of artificial intelligence ("AI") and other new technologies.

Key Highlights:

Under the revised ECCP, prosecutors in the Criminal Division will evaluate:

- **Artificial Intelligence and Other New Technology:** how companies assess and manage risk related to their use of new technology, such as AI, both in their business and in their compliance programs, including whether the company has conducted a risk assessment of the use of the technology, taken necessary steps to mitigate risks of the technology or monitors or tests its technology to evaluate if it is working as intended and is consistent with the company's code of conduct and enterprise risk management strategies.
- **"Speak Up" Culture:** whether the company fosters a culture that encourages employees to speak up and report misconduct, including whether individuals know how to report concerns and feel comfortable doing so, and whether the company encourages and incentivizes reporting of potential misconduct, and the company's commitment to anti-retaliation policies and treatment of employees who report misconduct.
- **Data Resources and Access:** whether compliance personnel have adequate access to data, assets, resources and technology and how the company manages the quality of its data sources and measures the accuracy, precision or recall of its data analytics models.

For additional information on these and other notable changes to the ECPP, please see our **client alert**.

Enforcement Actions

SEC Enforcement Actions For Failing to File Form D

On December 20, 2024, the U.S. Securities and Exchange Commission ("SEC") issued a **press release** announcing charges against two private companies and a private fund advisor for violations of Regulation D after they failed to timely file a Form D for several unregistered securities offerings. Regulation D provides certain offering exemptions and a safe harbor from the registration requirements of the Securities Act of 1933, as amended ("Securities Act"). Issuers that rely on the Regulation D exemptions must file a Form D with the SEC within 15 calendar days after the first sale of securities. As the SEC's Division of Enforcement noted in the press release, "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 [SEC]'s efforts to promote investor protection while also facilitating capital formation, especially with respect to small businesses."

The three subject issuers agreed to cease and desist orders and to pay civil penalties.

Antitrust Updates

FTC Finalized New HSR Rules

On October 10, 2024, the Federal Trade Commission ("FTC") voted to adopt new rules under the Hart-Scott-Rodino ("HSR") Act that will significantly change the amount of information and number of documents required to be produced with the initial HSR filing for both deals with competitive concerns and those without, making HSR filings more burdensome and significantly more expensive for both buyers and sellers.

Key Takeaway: Among other things, the new rules modify the HSR filing form by requiring up front certain disclosure covering the type of information that is commonly asked for during preliminary investigations and second requests. The rules were scheduled to go into effect February 10, 2025, but are currently subject to a regulatory freeze issued by President Trump.

For more information on the new rules and steps companies should take to prepare for future antitrust filings, please see our **client alert**.

Increased HSR Thresholds and Filing Fees for 2025

The HSR Act provides that, where certain jurisdictional thresholds are met, unless an exemption applies, parties intending to merge or make acquisitions must furnish a notice regarding their respective businesses and the proposed transaction and adhere to a waiting period. The FTC makes annual adjustments to the HSR Act filing thresholds and fees each year based on changes in the gross national product.

An overview of the updated 2025 thresholds and filings fees for the most common HSR filing issues is included below:

2025 Jurisdictional Thresholds	
Size of Transaction Test	The Acquiring Person will hold, as a result of the transaction, an aggregate total amount of voting securities, assets and/or interests in non-corporate entities of the Acquired Person valued at in excess of **$126.4 million**.
Size of Person Test	Transactions valued at more than **$505.8 million** are reportable, regardless of the size of person test above.
	One party has annual net sales or total assets of **$252.9 million** or more, and the other party has annual net sales or total assets of **$25.3 million** or more.*
Subsequent Acquisitions of Voting Securities	Voting securities valued at **$252.9 million** or more;
	Voting securities valued at **$1.264 billion** or more;
	Voting securities constituting 25% of the issuer's securities if valued at more than **$2.529 billion**.

*Where the target is not engaged in manufacturing, it must have total assets of $25.3 million or annual net sales of $252.9 million

New HSR Filing Fee Ranges	
2025 Adjusted Filing Fee	**2025 Adjusted Size of Transaction**
$30,000	Transaction valued at more than **$126.4 million** but less than **$179.4 million**
$105,000	Transaction valued at more than **$179.4 million** but less than **$555.5 million**
$265,000	Transaction valued at more than **$555.5 million** but less than **$1.111 billion**
$425,000	Transaction valued at more than **$1.111 billion** but less than **$2.222 billion**
$850,000	Transaction valued at more than **$2.222 billion** but less than **$5.555 billion**
$2.390 million	Transaction valued at **$5.555 billion** or more

For more background on HSR filings and fees, please see our **client alert**.

DOJ's Antitrust Division Updates Guidance on Corporate Compliance Programs

On November 12, 2024, the Antitrust Division of the DOJ updated its guidance on how prosecutors will evaluate corporate antitrust compliance programs for the first time since 2019. The new guidance stresses a company's ongoing responsibility to monitor and minimize risks of criminal antitrust violations.

Key Highlights:

- **Civil Antitrust Risks:** While the guidance applies only to criminal investigations, it notes that antitrust compliance programs should also reduce the risk of civil antitrust violations, and companies should expect that civil and criminal investigators will consider many of the same factors when evaluating the effectiveness of an antitrust compliance program.
- **Emerging Technology and Ephemeral Messaging:** The updated guidance focuses heavily on the role of technology and, specifically, a compliance program's ability to monitor and mitigate antitrust risks associated with a company's use of emerging technology, in particular, AI, algorithmic pricing and employees' use of ephemeral messaging and other non-company communication methods.
- **The Importance of Compliance Culture:** The guidance also emphasizes the significance of building a "culture of compliance" and self-reporting through the administration of an effective antitrust corporate compliance program, including how anti-retaliatory reporting mechanism are deployed and maintained and how a company's hiring and incentive structures reinforce ethical conduct.
- **Lessons Learned:** Companies will also be evaluated on their consideration and implementation of lessons learned, not only to account for previous antitrust violations at the company itself, but in its industry.

Updates to the Antitrust Division's guidance on corporate compliance programs largely track the DOJ's broader push for stronger corporate compliance programs, including the recent guidance issued by the DOJ's Criminal Division regarding the risks of AI and other new technologies.

For more information on the updated guidance, please see our **client alert**.

Employment Law Updates

Recent Developments Affecting Non-Competes and Employee Mobility

FTC Non-Compete Rule: On October 4, 2024, ATS Tree Services, LLC voluntarily dismissed its lawsuit challenging the FTC's Non-Compete Clause Rule ("Non-Compete Rule"), a recently-promulgated regulation prohibiting most employee non-compete agreements. The voluntary dismissal follows the decision in *Ryan, LLC v. FTC*, in which the U.S. District Court for the Northern District of Texas issued a permanent injunction against the Non-Compete Rule in August 2024, and a string of unfavorable decisions for ATS, including denials of a pre-*Ryan* motion challenging the Non-Compete Rule and a post-*Ryan* motion to stay proceedings.

This latest development refocuses attention on *Ryan* as well as *Properties of the Villages, Inc. v. FTC*. In *Properties*, the U.S. District Court for the Middle District of Florida entered a limited injunction to enjoin the FTC from enforcing the Non-Compete Rule, granting relief to the plaintiff-employer and becoming the second court in the nation to find that the FTC had overstepped its authority.

In August 2024, the FTC filed notices of appeal for both the *Ryan* and *Properties* judgments, but the agency faces an uphill battle in both cases, given that the Fifth and Eleventh Circuits tend to be conservative.

NLRB GC Memo Introduces an Additional Complication for Employers Using Non-Competes: On October 7, 2024, National Labor Relations Board ("NLRB") General Counsel Jennifer Abruzzo issued memorandum GC 25-01, providing regional offices around the country guidance on whether and how to prosecute cases against employers who use non-competes and/or so-called "stay-or-pay" provisions for non-managerial employees. In the memo, GC Abruzzo announced her intention to prosecute employers for using non-competes, and she extends her view to retention rules that require workers to repay certain company expenses if the worker resigns before a certain date, stating that these provisions unlawfully restrict employee mobility. GC Abruzzo noted that these provisions can take various forms, such as training repayment agreement provisions, educational repayment contracts, quit fees, damage clauses, sign-on bonuses or other types of cash payments tied to a mandatory stay period, and more. GC Abruzzo stated that employers will be granted a sixty-day window from the date of the memo to remedy any preexisting stay-or-pay provisions, after which she intends to prosecute employers over such arrangements.

For more information, please see our **client alert**.

Federal Court Vacates DOL's Final Overtime Rule Nationwide

The Fair Labor Standard Act generally requires an employer to pay an employee time and-a-half if the employee works more than 40 hours a week, but includes an exemption for certain employees, including certain executive, administrative and professional ("EAP") workers. In April 2024, the U.S. Department of Labor ("DOL") issued a Final Rule increasing the weekly salary threshold for the exemption for EAP employees and other "highly compensated" employees, with further increases scheduled for every three years.

On November 15, 2024, the U.S. District Court for the Eastern District of Texas invalidated the DOL's Final Rule, finding that issuing the Final Rule exceeded the DOL's statutory authority. The decision vacates the rule nationwide, halting its implementation and restoring the salary level in effect prior to July 1, 2024, the effective date of the first scheduled salary increases. The DOL may seek to appeal the court's decision to the Fifth Circuit Court of Appeals, but such an appeal is not likely with the change in the presidential administration.

For more information, please see the article published in the November/December edition of our **Public Company Watch**.

Litigation Spotlight

Recent Delaware Court Decisions Regarding Earnout Obligations

Two recent Delaware cases provide useful guidance to parties negotiating, drafting and applying earnout and contingent value right provisions (together referred to herein as "earnouts") in acquisition agreements. There are several fundamental issues in earnout provisions that can result in complex and challenging negotiations and litigation risks between buyers and sellers. One of these issues is determining the efforts obligations that the buyer is required to apply in the earnout context. In two recent 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.

For more information and some practical takeaways from the Delaware cases, please see the article titled "*Delaware Court Ruled Buyers Breached Earnout Obligations*" published in the October edition of our **Public Company Watch**.

Delaware Chancery Court Limits Section 220 Demands

On October 24, 2024, the Delaware Chancery Court issued its opinion in *Roberta Ann K.W. Wong Leung Revocable Trust U/A Dated 03/09/2018 v. Amazon.com, Inc.*, in which it addressed the limits to Section 220 stockholder demands in a decision that will have significant implications for companies seeking to prevent stockholders from inspecting their books and records. Section 220 of the Delaware General Corporation Law allows a company's stockholders to make a written demand to inspect the books and records of the company provided the stockholder has a "proper purpose" for the inspection. If the company refuses a Section 220 demand, the stockholder may apply to the Delaware Chancery Court for an order compelling the company to furnish its books and records.

In *Roberta Ann K.W. Wong Leung Revocable Trust U/A Dated 03/09/2018 v. Amazon.com, Inc.*, the Court ruled that Amazon was not required to furnish its books and records because the plaintiff's stated purpose for the demand was too broad and was therefore not proper. The decision significantly limits stockholders' rights to make a Section 220 demand and may have broad implications for companies seeking to prevent objectors from investigating their books and records to gather information that can be used in an activist campaign.

For more information on the case and its implications, please see the article published in the November/December edition of our **Public Company Watch**.

Key Considerations for Private Companies Based on Recent Legal Updates

- **Regulatory Compliance and Risk Management:**
  - Have you taken steps to prepare for compliance with the new CTA beneficial ownership requirements?
  - Have you reviewed your corporate compliance programs in light of the DOJ's updated guidance on antitrust compliance and the risks of AI and other technologies?
    - Have you evaluated how your antitrust compliance program fits within your broader compliance program and whether it is given appropriate emphasis in light of actual antitrust risks?
    - Have you evaluated your use of AI and other new technologies for business and compliance activities to identify risks and implement mitigation strategies?
    - Have you assessed the effectiveness of your processes for reporting misconduct and protecting employees from retaliation?
- **Mergers & Acquisitions:**
  - For companies contemplating a merger or acquisition, have you reviewed the new HSR rules to take into account the updated filing thresholds and information requirements?
  - Could an earnout provision in your transaction expose you to increased litigation risk in light of the recent decisions by the Delaware Court?

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