PAUL HASTINGS

July 2023

Public Company Watch

Key Issues Impacting Public Companies

SEC Spotlight

Reminders for Form 10-Q Season

We are rapidly approaching the due date for Q2 Form 10-Qs for December 31 year-end companies. This is the first filing in which issuers who are not smaller reporting companies will need to provide new Item 408(a) disclosures regarding insider trading plans in their Part II disclosure. Smaller reporting companies are able to delay compliance until their first filing that covers the first full fiscal period beginning on or after October 1, 2023. For an overview of the new rules, visit our **client alert**.

Issuers need to determine whether any of their officers or directors have adopted, terminated or modified any trading arrangements intending to qualify for the affirmative defense conditions of Rule 10b5-1(c) (i.e., Rule 10b5-1 plans) or "non-Rule 10b5-1 trading arrangements" (as defined by new Item 408(c)) of Regulation S-K between April 1st and June 30th. For the purposes of Item 408 disclosure, modified plans are treated as the termination of the existing plan and adoption of a new plan.

If any officers or directors adopted, terminated or modified any such trading arrangements, then the issuer's Form 10-Q must include disclosure (other than pricing information) regarding the material terms of the trading arrangement. Even if there were no trading arrangements triggering Form 10-Q disclosure obligations during the quarter, we recommend issuers include language indicating as such in their Form 10-Q filings as a best practice.

Regulation S-K Item 408(d) disclosure regarding issuers' adoption, termination or modification of Rule 10b5-1 trading plans will not be required in this quarter's filing (see our **client alert** for additional information regarding upcoming issuer disclosure of insider trading arrangements).

In This Edition

SEC Spotlight 1

- Reminders for Form 10-Q Season
- SEC Rulemaking Tracker

Activism Update 3

- Contests Under Universal Proxy Rules Have Produced Mixed Results

Litigation Corner 4

- SCOTUS Weighs in on Staying Proceedings During Appeals from Denial to Compel Arbitration
- SCOTUS Permits States to Require Companies to Consent to Personal Jurisdiction

Other Regulatory Updates 6

- FTC Proposed Massive Expansion and Revamp of HSR Merger Notification Program
- Developments in Carbon Offsets and Voluntary Carbon Markets
- Sustainability-Linked Bond Guidance Updates

SEC Rulemaking Tracker

Recently Adopted Rulemaking		
Share Repurchase Modernization	Amendments requiring quarterly tabular disclosure of daily share repurchases and related narrative disclosures	Final rule adopted May 2023, effective July 31, 2023 Compliance for corporate issuers who file on domestic forms beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023

10b5-1 Plans and Insider Trading	Series of changes revamping conditions to be met in order for a person to rely on the affirmative defense from insider trading available under Rule 10b5-1(c)(1), requiring related quarterly and annual disclosures and impacting Form 4 / 5 filings	Amendments to Forms 4 / 5 effective as of April 1, 2023 Compliance with the new disclosure requirements generally required in the first filing that covers the full fiscal period that starts on or after April 1, 2023 (or after October 1, 2023 for SRCs) Clarified in recent C&DI to mean, for December 31 fiscal year-end companies (that are not SRCs): • Quarterly disclosures in Form 10-Q for period ended June 30, 2023 • Annual disclosures in Form 10-K or 20-F for the fiscal year ended December 31, 2024 • Proxy / Information Statement disclosures for first annual meeting for election of directors after the completion of the first full fiscal year beginning on or after April 1, 2023
Pay v. Performance	Requires comprehensive narrative and tabular disclosure regarding the relationship between the compensation actually paid to executives and an issuer's financial performance	Compliance required in proxy and information statements for fiscal years ending on or after December 16, 2022, subject to phased lookback period
Form 144	Requires most Form 144s to be filed via Edgar rather than optionally on paper and extends deadline to 10 pm ET	Effective April 13, 2023
Glossy Annual Report	Requires reporting companies to furnish glossy annual reports on Edgar in PDF form no later than date report is first sent / given to stockholders	Effective January 11, 2023
Proxy Voting Advice	Rescinds rules requiring proxy firms to provide voting recommendations to clients and companies at the same time and to incorporate company responses to the proxy firm recommendations	Effective September 19, 2022
Compensation Clawbacks	Requires adoption of / compliance with clawback policy in connection with erroneously awarded incentive-based compensation	Effective October 2, 2023, meaning issuers will be required to include disclosures in relevant SEC filings after that date and to adopt and adhere to compliant clawback policies as of December 1, 2023
Pending Rulemaking		
Modernization of Beneficial Ownership Reporting	Significant amendments to modernize the filing deadlines for initial and amended beneficial ownership reports on Schedules 13D and 13G	Comment period reopened until June 27, 2023; final action pushed back until October 2023
Climate Change	Comprehensive climate-change-related disclosure overhaul impacting registration statements and periodic reports and related notes to financial statements	Awaiting final action; pushed back until October 2023
Cybersecurity and Risk Governance	Would require current reporting of material cybersecurity incidents and periodic updates as well as additional disclosure related to an issuer's cybersecurity risk management system and the board's cybersecurity oversight of cybersecurity risk and their expertise	Awaiting final action; pushed back until October 2023

SPACs	Comprehensive changes overhauling regulation of SPAC structure	Awaiting final action; pushed back until October 2023
Anticipated Rulemaking		
Corporate Board Diversity	Potential rulemaking requiring disclosure regarding diversity of board members and director nominees	Pushed back until April 2024
Human Capital Management	Additional rulemaking enhancing disclosures regarding human capital management (beyond what is already required by an issuer's Business section)	Pushed back until October 2023
Reg D and Form D Improvements	Updates to Reg. D exemption for private placements, including to definition of "accredited investor" and Form D	Pushed back until October 2023
Revisiting Definition of "Held of Record"	Revisiting definition of "held of record" used in Section 12(g) of Exchange Act (i.e., for determining whether an issuer will need to register its equity securities with the SEC)	Pushed back until October 2023
Rule 144 Holding Period	Potential amendments to resale safe harbor for restricted / control securities	Pushed back until April 2024

Activism Update

Contests Under Universal Proxy Rules Have Produced Mixed Results

There have been 12 proxy contests that have gone to a vote under the SEC's universal proxy rules, which became effective on September 1, 2022. A review of these contests reveals several themes.

Overall Results: Activists obtained a board seat at companies in six of 12 contests. In four of those contests, the activist gained fewer seats than it sought. These results show that a company may still want to take a proxy contest all the way to a vote in the universal proxy era rather than settle, if they believe they have winning arguments to defeat the activist at the ballot box.

ISS Influence: 29 of the 32 directors recommended by ISS were elected. This is a staggering number, especially considering the number of split-ticket recommendations where ISS recommended the election of some but not all the activists' nominees. Two companies overcame a negative ISS recommendation to get a nominee elected: WisdomTree, Inc. and Alkermes Plc. Companies faced with a proxy contest may wish to review and deploy the legal, public relations, shareholder engagement, and solicitation strategies used in these two proxy contests to overcome a negative ISS recommendation.

Split-Ticket Recommendations and Voting: As anticipated upon the implementation of the universal proxy rules, ISS issued a significant number of split ticket recommendations where it recommended some but not all the activists' nominees. Based on voting outcomes, it appears that institutional investors often voted for a subset of activist nominees, which was made much easier by the adoption of universal proxy.

Campaign Expenses: Based on publicly disclosed data from proxy contests that went to a vote, company campaign expenses ranged from $150,000 to $31,500,000. Activist campaign expenses for such contests ranged from $50,000 to $4,500,000. Note that while this post focuses on proxy contests that went to a vote, Trian disclosed in its subsequently withdrawn proxy contest at The Walt Disney Company that its estimated proxy contest expenses were $25,000,000 while the company expected to spend $40,000,000. Proxy contest expenses were largely consistent with previous years.

Increased Focus on Individual Directors: The proxy advisory firms as well as institutional investors were focused on the skills of individual director candidates and how those skills contributed to the overall composition of the board. While N-PX data disclosing how institutional investors voted will not be available until August, based on our review of ISS and Glass Lewis reports and public disclosure of how certain institutional investors voted, we believe that the data will reflect several split-ticket votes by large institutional investors.

Increase in Settlements: With only 12 contests having gone to a vote since September 1, 2022, under the universal proxy regime, there has been an increase in the number of settlements at companies subject to the U.S. proxy rules as compared with settlements

in previous years. This increase is likely due to both the difficulty of predicting favorable outcomes for a company under the universal proxy regime and the belief that it is difficult under the regime to prevent an activist from obtaining one or two seats on the board, especially when a company has vulnerable directors.

What Companies Should Do Now: With the majority of proxy contests for the 2023 proxy season in the rearview mirror, companies should assess the results of this proxy season and the themes set forth in this post to develop an activism defense strategy. In addition, we continue to encourage companies as part of their ongoing activism preparedness efforts to:

- Review their articles of incorporation, bylaws, and other governing documents to assess structural vulnerabilities;
- Consider whether to make any proactive corporate governance enhancements that improve corporate governance but do not create any additional activism vulnerability;
- Prepare or update a shareholder activism day-one public communications plan;
- Consider the preparation of a poison pill to be placed on the "shelf" so that it can be implemented quickly if needed;
- Initiate or enhance stock surveillance procedures to understand what investors are buying or selling the stock;
- Assess financial, operational, and stock price vulnerability;
- Establish an activism response team (legal, financial, and public relations professionals and proxy solicitor); and
- Assess board composition with a view to ensuring that the board has the right mix of skills to create shareholder value, and prominently disclose this information.

Litigation Corner

SCOTUS Weighs in on Staying Proceedings During Appeals from Denial to Compel Arbitration

On June 23, 2023, the U.S. Supreme Court ruled in *Coinbase v. Bielski*, 599 U.S. __ (2023) that a district court must stay proceedings during the pendency of an interlocutory appeal regarding whether the dispute should be resolved by arbitration. This ruling resolved a circuit split that had developed because Section 16(a) of the Federal Arbitration Act, 9 U.S.C. § 16(a), creates a right to an interlocutory appeal from the denial of a motion to compel arbitration, but is silent regarding stays of the underlying district court action pending that appeal.

In this case, plaintiffs were customers of defendant Coinbase, an online cryptocurrency platform, who brought claims arising out of Coinbase's alleged failure to replace funds fraudulently taken from users' accounts. Defendant moved to compel arbitration on the ground that the user agreement between Coinbase and its customers required those disputes to be resolved in arbitration. When the district court denied the motion, in accordance with Section 16(a), the defendant filed an interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit. The defendant's subsequent motions to stay district court proceedings pending resolution of the arbitrability issue on appeal were denied by both the District Court and the Court of Appeals, at which point the U.S. Supreme Court granted certiorari.

The U.S. Supreme Court's ruling rested primarily on the ruling in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held that an appeal, including an interlocutory appeal, "divests the district court of its control over those aspects of the case involved in the appeal." The Court reasoned that in this case, because the question on appeal was whether the case properly belonged in arbitration or instead in the court, the entire case was essentially "involved in the appeal." As such, the U.S. Supreme Court ruled, the district court lacked the power to proceed with the litigation. The Court was particularly concerned that a different ruling would undermine the efficiency for which arbitration was designed.

The decision continues the long stretch of pro-arbitration decisions from the U.S. Supreme Court. The change is especially noteworthy in the Second, Fifth, and Ninth Circuits, which had all previously refused to grant such automatic stays.

The dissent raised the concern that the court's ruling will create a "Pandora's box" by removing the district court's discretion as to whether a stay of proceedings should be imposed and would result in a cascade of meritless appeals because "a wide array of appeals" would warrant an automatic stay of district court proceedings. However, the consequences that the dissent outlined appear unlikely to materialize because the majority's decision was limited to appeals under Section 16(a), in which Congress expressly provided for an interlocutory appeal as of right.

SCOTUS Permits States to Require Companies to Consent to Personal Jurisdiction

On June 27, 2023, the U.S. Supreme Court issued a major personal jurisdiction ruling that could greatly expand the jurisdictions in which public companies are subject to suit, including outside their home jurisdictions and in remote jurisdictions where they engage in relatively little commerce and that have little to no ties to the conduct at issue in the lawsuit. In *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168, 600 U.S.____, 2023 WL 4187749, the Court rejected a Fourteenth Amendment Due Process challenge to a Pennsylvania law that requires foreign corporations registered to do business in that State to consent to be sued in Pennsylvania on "any cause of action."

Background and Holding

A Virginia resident commenced a civil action in Pennsylvania against his former employer, a Virginia railroad corporation principally operating from Virginia. The plaintiff filed suit after being diagnosed with colon cancer, claiming that he was exposed to asbestos and other toxic chemicals while working for Norfolk Southern, primarily in Ohio and Virginia. The plaintiff claimed that Pennsylvania was a proper forum for his suit because, *inter alia*, Pennsylvania has a statute that requires corporations registering to do business in Pennsylvania to submit to the general personal jurisdiction in Pennsylvania for all suits.

Norfolk Southern moved to dismiss, contending that the exercise of personal jurisdiction by a Pennsylvania court would violate the Due Process Clause of the Fourteenth Amendment. The trial court granted the motion, and dismissed the action with prejudice. The plaintiff appealed, and ultimately the Supreme Court of Pennsylvania affirmed the lower court.

In a split 5-4 ruling, the U.S. Supreme Court vacated and remanded, holding that the Due Process clause does ***not*** prohibit a State from requiring that businesses consent to personal jurisdiction as a condition of registering to do business. The Court pointed to its 1917 holding in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), and distinguished the seminal jurisdictional case, *International Shoe Co. v. State of Washington*, 325 U.S. 310 (1945), as addressing a separate issue—*i.e.*, consent by minimum contacts—rather than consent by statute.

> In realty, then, all *International Shoe* did was stake out an *additional* road to jurisdiction over out-of-state corporations. *Pennsylvania Fire* held than at out-of-state corporation that *has* consented to in-state suits in order to do business in the forum is susceptible to suit there. *International Shoe* held that an out-of-state corporation that *has not* consented to in-state suits may also be susceptible to claims in the forum State based on 'the quality and nature of [its] activity' in the forum.

Mallory, 2023 WL 4187749, at *9 (citation omitted). As such, the Court has clarified that the "minimum contacts" Due Process protections long understood to protect companies from being haled into court under *International Shoe* and its progeny do not prevent companies from having to litigate in jurisdictions that have adopted a consent-by-registration statute, like Pennsylvania.

Notwithstanding the Court's rejection of the Fourteenth Amendment Due Process challenge, in his concurring opinion, Justice Alito left open the possibility for other constitutional challenges to consent-by-registration statutes, including under the dormant Commerce Clause: "[i]t is especially appropriate to look to the dormant Commerce Clause in considering the constitutionality of the authority asserted by Pennsylvania's registration scheme. Because the right of an out-of-state corporation to do business in another State is based on the dormant Commerce Clause, it stands to reason that this doctrine may also limit a State's authority to condition that right." *Id*. at *18. Because a challenge under the dormant Commerce Clause was not raised on appeal, and thus not squarely before the Court, it is likely to be raised on remand, leaving the possibility that the case could again arrive in the U.S. Supreme Court following further litigation and a possible ruling on the Dormant Commerce Clause issue Justice Alito raised.

What *Mallory* Means for Public Companies

1. Public companies need to pay close attention to the foreign registration statutes of all states where they register to do business, as such statutes may provide plaintiffs a pathway to forum shop. In addition to Pennsylvania, other states with consent-by-registration statutes includes, Georgia, Iowa, Kansas, and Minnesota.

2. Increased lobbying efforts by the plaintiffs' bar for consent-by-registration statutes are likely to occur. Corporations should at least monitor such activity.

3. *Mallory* may not be the final word on whether companies registered to do business in States with consent-by-registration statutes must face lawsuits in such States. As Justice Alito recognized, the dormant Commerce Clause may provide a pathway to avoid personal jurisdiction in such States.

Other Regulatory Updates

FTC Proposed Massive Expansion and Revamp of HSR Merger Notification Program

Summary: Last month the FTC issued a 133-page Notice of Proposed Rulemaking outlining major changes to the premerger notification program under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). If the regulations are amended as proposed, companies should anticipate 1-2 months of time to prepare an HSR filing, as opposed to the current process, which is often 1-2 weeks. The FTC estimates the HSR filing preparation under its proposed changes will be nearly four times as burdensome for the average company as under the current scheme.

Current Regime: The HSR Act requires premerger notification for transactions that meet certain statutory thresholds, including a minimum size of transaction threshold currently set at $111.4 million. Currently, parties required to file HSR submit a relatively straightforward form putting the FTC and DOJ on notice that the deal is coming. The parties must then observe a 30-day waiting period during which time the agencies may initiate an investigation into the deal for competition concerns.

Overview of Changes: The proposed changes are extensive and dramatically expand the types of information and documents that the parties must provide with their HSR filings. The proposed changes call for greater detail regarding the acquired parties, a narrative description of key deal issues and timelines, expanded identification of prior acquisitions, limitations on filings based on Letters of Intent and Term Sheets, and additional information on U.S. and foreign government connections. Notably, the proposed changes contain drastically expanded document search and production requirements, including drafts of documents prepared by deal teams, even if not prepared by or for a director or officer of the company. The notification under the proposed rules would also require the parties to submit a narrative description of competition and market definition issues for any known or planned horizontal overlaps, supply relationships, and information related to labor markets. What's more, filing parties will also be required to identify the officers, directors, or board observers of *all entities* within the acquiring person and acquired entity, while also listing the entities for which those individuals have served in a similar role within the last two years prior to filing. For more detail regarding the key proposed changes, please see our **client alert**.

Timing: The proposed changes are subject to a 60-day public comment period and will go through an Office of Management and Budget review under the Paperwork Reduction Act. Though timing is uncertain, if adopted, it is expected that changes will take effect later this year or early next year.

Takeaway: While transaction agreements often include HSR filing timelines of five to ten business days, companies considering transactions should proactively consult with antitrust counsel to develop appropriate antitrust risk mitigation strategies and build in considerably more time to prepare HSR filings under the new regime. An extended antitrust review period will also impact the closing timeline for mergers that exceed the statutory threshold, which will impact cost and could impact overall closing risk for both parties.

Developments in Carbon Offsets and Voluntary Carbon Markets

Summary: Carbon offsets and credits have increased in both popularity and controversy as companies seek to lower their emissions, improve their sustainability practices and meet their climate objectives. This creates significant challenges for public companies as climate-related disclosure expectations increase, and participants struggle to establish efficient markets and market high-integrity credits.

Voluntary v. Regulatory Compliance Markets: There are voluntary and regulatory compliance carbon markets. Regulatory compliance markets like the EU and UK Emissions Trading Schemes, and the California Compliance Carbon Offset Market require certain industries to limit their carbon output and establish carbon markets to help those industries manage their carbon risks and satisfy their regulatory commitments. Voluntary carbon markets are independent, are not mandatory, and allow companies to purchase carbon credits or off-sets for their own use. Many voluntary markets rely on third-party registries to certify the carbon credits and verify that the underlying project is meeting the stated goals and emission reductions.

Limitations: The voluntary carbon market is rapidly growing along with increasing focus by corporate leaders on ESG efforts and net-zero goals. However, the existing market faces challenges with questions about the quality of the carbon credits, transparency, liquidity, transferability, and legal and regulatory exposures. This also leads to greater regulatory scrutiny. For example, on June 20, 2023, the CFTC Whistleblower Office issued an alert seeking tips relating to misconduct in the voluntary carbon markets, yet another signal of a growing focus by regulators on the marketing of carbon credits and carbon market integrity.

Takeaway: Public and private efforts to curb emissions and demonstrate commitments to sustainability and net-zero emissions have bolstered the voluntary carbon markets and led to rapid growth in demand. Purchasers of carbon credits, however, face a risky,

still developing market struggling to provide consistent and high-integrity carbon credits necessary to meet that demand. Public companies must be diligent and deliberate about how they engage with carbon markets to ensure they do not run afoul of regulator, shareholder, and public expectations.

For additional information regarding this topic visit our **client alert**.

Sustainability-Linked Bond Guidance Updates

Summary: On June 22, 2023, the International Capital Markets Association (the "ICMA") released the 2023 edition of its **Climate Transition Finance Handbook** ("CTFH") – the first update since the original publication of the CTFH in December 2020. The CTFH provides guidance and clarifies issuer-level practices (i.e., actions and disclosures) to credibly position financial issuances related to climate transitions. Concurrently, the ICMA also updated its **Green, Social, Sustainability and Sustainability-Linked Bond Principles** ("SLBP"). The principles are the leading framework for sustainable bond issuances and are referenced in over 98% of international sustainable bond issuances.

Updates to the CTFH: Issuers interested in offering climate transition themed financings should closely review the updated CTFH for guidance as they evaluate their use of proceeds and whether their sustainability-linked instruments are, in fact, aligned with the SLBP, particularly issuers in "hard-to-abate" sectors. As compared to previous edition, the updated CTFH places greater emphasis for issuers on aligning their greenhouse gas ("GHG") emission reduction strategies and the Paris Agreement goals. Additionally, it acknowledges the development of "climate transition" bonds in specific jurisdictions.

Generally, the CTFH disclosure guides issuers to keep in mind the following key guidance:

- **Issuer's climate transition strategy and governance**: A strategy to address climate change-related issues is a pre-requisite for transition themed financings. However, key performance indicators ("KPIs") alone do not equate to broader strategic intention. A climate transition strategy should clearly communicate and provide details on how the business intends to adapt its business model and GHG emissions reduction strategy to reach the goals of the Paris Agreement.

- **Business model environmental materiality**: Climate transition financing is most relevant to and required by industries with high GHG emissions and complex transformational challenges. Therefore, a strategy should address the most material areas of an issuer's activities, and should be science-based and consider broader environmental and societal impacts.

- **Climate transition strategy and targets to be 'science based'**: While an issuer has discretion to design a climate transition strategy, the strategy should be science-based. The CTFH clarifies there is scientific guidance around required reduction rates for GHG emissions to align with the goals of the Paris Agreement, and that a climate transition strategy should: (i) be quantitatively measureable and aligned with the latest available methodology; (ii) be aligned with, benchmarked to and reference third-party, science-based trajectories where they exist; (iii) be publicly disclosed (ideally in mainstream financial filings), and (iv) be supported by independent assurance or verification.

- **Implementation transparency**: There is increasing pressure for issuers to announce GHG emission reduction strategies, targets and commitments, especially in "hard-to-abate" sectors. Relatedly, the internal allocation of capital and establishment of governance structures to implement strategy is key. Qualitative and quantitative expectations of climate-related outcomes and impacts are relevant, and issuers should also consider how climate transition may have positive or negative impacts for workers, communities and the environment (i.e., issuers should incorporate consideration of "just transition" into their transition strategy).

Updates to the SLBP: Issuers interested in offering Sustainability-Linked Bonds should reference the updated SLBP and related tools. Updates are particularly useful to sovereign and sub-sovereign issuers, which are now explicitly discussed. In light of this, updates to supporting resources were made for alignment, including expanding and updating the KPI registry to include new metrics for sovereigns and social issues.

Takeaway: As the sustainable bond industry grows and public companies look to engage in sustainability-linked financings, reference to the CTFH and the SLBP may be instructive. In addition, they should be on the lookout as further updates from the ICMA are expected.

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