PAUL HASTINGS

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Public Company Watch

Key Issues Impacting Public Companies

Activism Update

Exxon Mobil Sues Shareholder over Shareholder Proposal

On January 21, 2024, Exxon Mobil filed a complaint seeking a declaratory judgment to exclude a shareholder proposal from Arjuna Capital, a U.S. based impact investment firm, and Follow This, a Dutch shareholder activist group. Exxon's complaint is a rare occurrence since companies typically use one of three paths to exclude shareholder proposals:

- request no-action relief from the SEC under Rule 14a-8 of the Exchange Act;
- negotiate with a shareholder activist to withdraw their proposal in exchange for a concession from the company; or
- include the proposal in the proxy statement and solicit against it.

The fourth path, litigation, is the least common option. Litigation is historically unpopular with companies in these situations because court battles are typically long and costly, and suing shareholders can reflect poorly on a company.

Arjuna Capital and Follow This's proposal requested Exxon to adopt stricter climate targets to reduce oil and gas emissions. Exxon claims that the proposal should be excluded because it relates to matters in the ordinary course of business operations and is substantially similar to proposals submitted by Arjuna Capital and Follow This in 2022 and 2023. On February 1, 2024, Arjuna Capital and Follow This withdrew their shareholder proposal. Despite this, Exxon asked the court to continue the case. U.S. District Judge Mark Pittman ordered Exxon to file a status update outlining the claims and issues that remain before the court because "the Court struggles to see what the ongoing case or controversy is in this matter." On February 5, 2024, Exxon filed a status update claiming the proposal withdrawal did not provide them complete relief because Arjuna Capital and Follow This could submit similar proposals in future years. Exxon claims they need a ruling from the court on SEC Rules 14a-8(i)(7) (the "Ordinary Business Exclusion") and (i)(12) (the "Resubmission Exclusion") to properly resolve this case. The case remains ongoing.

Key Takeaways: By filing the compliant, Exxon ultimately achieved its goal of excluding the proposals from this year's proxy statement since Arjuna Capital and Follow This withdrew their proposals in the face of the litigation. This case is part of a larger trend of companies using litigation in the shareholder activism context, including in cases relating to advance notice bylaws, activism settlement agreements, and books and records demands. This case may have implications for the future, since other companies may pursue litigation against shareholders submitting 14a-8 proposals in the hope of replicating Exxon's success. It should be noted that Arjuna Capital and Follow This are relatively small funds and the prospect of litigation may not have the same impact on larger proponents.

In This Edition

Other Regulatory Updates

NYSE Annual Guidance Memo

In early February, the NYSE put forth its annual guidance memo. The memo highlights the big changes adopted during 2023—clawbacks; the rule change regarding sales of securities to passive shareholders; and the upcoming shortened settlement cycle to T+1 (to be effective May 28, 2024). It also includes reminders to issuers related to the following topics:

- NYSE Timely Alert/Material News Policy
- Publishing Material News After the Close
- Changes to the Date of a Listed Company's Earnings Release
- Annual Meeting Requirement
- Record Date Notification
- Shares Reporting
- Corporate Action Notifications
- DRS Eligibility
- Requirements for Annual Reports
- Annual and Interim Written Affirmations of Compliance with Exchange Corporate Governance Requirements
- Change in Executive Officers
- Transactions Requiring Supplemental Listing Applications
- Related Party Transactions
- Broker Search Cards
- NYSE Rule 452, Voting by Member Organizations
- Shareholder Approval and Voting Rights Requirements
- Voting Requirements for Proposals at Shareholder Meetings
- FPI Semi-annual reporting

For issuers listed on the NYSE, it could be helpful to review the 12-page annual compliance memo, which is accessible **here**, to ensure their practices are in line with the NYSE's requirements.

FTC Announces Increased HSR Thresholds and Filing Fees

Effective March 6, 2024, the mandatory notification thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act"), will be increasing. The Size of Transaction threshold will jump from $111.4 million currently to $119.5 million. Several other associated thresholds will increase as well. This is also the first time that the HSR filing fees have been increased as part of the annual inflation adjustment, following legislation in 2023. The revised thresholds were published on February 5, 2024 in the Federal Register, and become effective in 30 days. They apply to all transactions that close on or after March 6, 2024. See our **client alert** for an overview of the applicable thresholds.

Merger Enforcement Update

While parties are typically concerned with a transaction's clearance by the federal agencies, recent developments indicate parties should keep an eye on state antitrust enforcers as well. Notably, on February 14, 2024, the Colorado Attorney General sued to block Kroger's proposed $24.6 billion acquisition of Albertsons. With a focus on competitive impact to the labor market, the complaint alleged that the deal violates the Colorado Antitrust Act and that the companies' history of collusion demonstrates that workers and consumers would likely suffer anticompetitive harm should the deal close. Colorado joins Washington as the second state to file a lawsuit against the merger. State attorneys general have become increasingly active in bringing cases with federal antitrust claims.

The FTC is currently reviewing the transaction and is expected to sue to prevent the merger later this month. Many predict that the FTC is similarly focused on impacts to labor markets in its investigation of the deal. While antitrust enforcement has historically focused on harm to purchasers of a merged firm's products, the now-final 2023 Merger Guidelines emphasize the importance of avoiding harm to the merged company's employees and suppliers. Among other things, the guidelines note that the FTC and DOJ will "examine merging firms' power to cut or freeze wages, slow wage growth, exercise increased leverage in negotiations with workers, or generally degrade benefits and working conditions without prompting workers to quit." And, notably, the agencies emphasize that any potential concerns about labor or supplier markets must be analyzed independently of any other aspect of the deal.

EU Adjusts Timeline for Corporate Sustainability Reporting Directive (CSRD) and Delays Vote on Corporate Sustainability Due Diligence Directive (CSDDD)

On February 7, 2024, the Council and European Parliament reached an agreement extending the time limits for the adoption of sustainability reporting standards for certain sectors through amending the EU Corporate Sustainability Reporting Directive ("CSRD"). The CSRD requires detailed reporting, including obligatory disclosure related to human rights, environmental rights, social rights, and governance factors, and applies to a wide range of EU and non-EU companies. It was adopted on July 31, 2023 and applies to non-EU companies with €150 million turnover in the EU and which have at least one subsidiary or branch in the EU.

The February 7 agreement provided more time for companies to prepare for the sector-specific European Sustainability Reporting Standards ("ESRS"). In addition, the agreement postpones by two years the adoption deadline for separate standards for certain non-EU companies. The February 7 directive postpones the adoption of new sector specific standards from the original date of June 2024 to June 30, 2026. Additionally, non-EU companies will have until the financial year 2028 to comply. For more information regarding the CSRD, please see our client alerts **here**, **here** and **here**.

This agreement to limit reporting requirements and provide companies with more time to implement the ESRS was followed by a postponement of a vote related to the Corporate Sustainability Due Diligence Directive ("CSDDD"). The CSDDD requires that certain EU-based and non-EU-based companies conduct broad human rights and environmental due diligence across their operations and value chains. On February 9, the European Council delayed the vote on CSDDD after Italy and Germany indicated they would abstain due to concerns about the potential administrative burden imposed by the CSDDD. The vote was rescheduled, but has been postponed again. If and when it is passed, EU Member States will have two years to enact laws that align with the corporate due diligence obligations outlined in the CSDDD. For more information regarding the CSDDD, please see our client alerts **here**, **here**, **here**, **here** and **here**.

These developments may signal a pause in the recent push for sustainability disclosures— but the pause offers companies, particularly non-EU companies, additional time to prepare for the new sustainability disclosure obligations. Non-EU companies also may, nonetheless, feel the impacts of these initiatives sooner, as EU-based partners and customers that are subject to shorter timelines request further information and actions from their non-EU partners and suppliers in order to fulfill their own reporting obligations.

SEC Spotlight

Reminder Regarding Effectiveness of Beneficial Ownership Rules

On October 10, 2023, the SEC adopted final rules modernizing the beneficial ownership reporting requirements pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934. The main thrust of the amendments is shortening the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G and providing guidance on how to make the "group" determination for purposes of Sections 13(d)(3) and 13(g)(3). For a fulsome explanation rule changes, including the nuances of the revised filing deadlines, please see our **client alert**.

The final rules are effective as of February 5, 2024. However, filers will have extended time to comply with certain aspects of the rule changes. The below chart outlines the differing compliance dates for the various rule changes.

Rule Change	Compliance Date
Schedule 13D: Changes in Initial Filing Deadline	February 5, 2024
Schedule 13G: Changes in Initial Filing Deadline	September 30, 2024
Schedule 13D: Changes in Amended Filing Deadline	February 5, 2024
Schedule 13G: Changes in Amended Filing Deadline	September 30, 2024
New Filing "Cut-off" Time	February 5, 2024
Structured Data Requirements	December 18, 2024

New SPAC Rules: How They Might Impact Public Operating Companies

On January 24, 2024, nearly two years after the SEC initially proposed industry-chilling rules overhauling the treatment of SPACs in their IPOs and de-SPAC transactions, the SEC adopted final rules. The rules add new Subpart 1600 to Regulation S-K, which relates to the disclosure requirements for SPAC IPOs and de-SPAC transactions, and new Article 15 to Regulation S-X, which "more closely aligns" the financial reporting requirements for de-SPACs with those of traditional IPOs. The final rules will be effective 125 days following their publication in the Federal Register. For an overview of the rule changes, please see our **client alert**. While public operating companies may not consider the new SPAC rules as particularly relevant to their businesses, buried in the 581 page adopting release and extensive rule changes related to SPACs is guidance public companies should consider.

Updated Guidance on Projections

Item 10(b) of Regulation S-K sets forth the SEC's policy on the use of financial projections, including the basis for projections, the format for projections and disclosures accompanying the projections. This item applies to all filings made with the SEC. The rule changes are focused on the format of projections, adding that the presentation of projections:

- Not based on historical financial results or operational history should be "clearly distinguished" from projections that are based on historical financial results or operational history; and
- Including non-GAAP financial measures must also contain (1) a definition or explanation of the measure, (2) a description of the most closely related GAAP financial measure, and (3) a discussion of why the registrant elected to utilize the non-GAAP financial measure in lieu of the GAAP financial measure.

In addition, amended Item 10(b) requires that projections based on historical financial results or operational history be presented alongside the underlying historical measure or operational history, with such historical measure or operational history presented with equal or greater prominence. Note that the SEC's staff's guidance in Questions 101.01, 101.02 and 101.03 of the Compliance and Disclosure Interpretations related to Non-GAAP Financial Measures are not impacted by the rule change.

Finally, the final rules specify that the guidance set forth in Item 10(b) apply not only to the financial projections of the registrant, but also to any other financial projections included in a registrant's filing, such as those of a target company in the context of a business combination.

Updated Guidance on Investment Company Status

The proposing release contained a safe harbor from the "investment company" definition under the Investment Company Act for SPACs that complied with the safe harbor's conditions regarding the SPAC's asset classes, activities, primary engagement, and duration. In the final rule, the SEC elected to provide updated guidance on "investment company" determinations rather than adopting the proposed safe harbor.

The adopting release includes the SEC staff's views on the facts and circumstances that should be taken into account when a SPAC analyzes whether or not it falls under the definition of "investment company." In particular, the staff clarifies that SPACs should evaluate their investment company status both at inception and throughout their duration utilizing the Tonopah factors or the five-factor test commonly utilized to analyze an issuer's investment company status. A portion of the guidance looks at how the length of time the SPAC's assets are substantially composed of and income derived from securities prior to the completion of a deSPAC transaction might contribute to a finding that the SPAC is an investment company, particularly if the duration spans greater than 12-18 months. While this guidance and the staff's other guidance as to how to apply the other Tonopah factors is geared toward SPACs, in his Dissenting Statement on the final rule, Commissioner Mark Uyeda warns:

> "All types of issuers – not just SPACs – should pay heed to this guidance because the framework for investment company status determinations could have implications for an operating company that temporarily derives income from investment securities. Would a pharmaceutical company that takes more than 12 or 18 months to bring a drug to market suddenly find itself primarily engaged in the business of investing in securities? While targeted at SPACs, the knock-on effects of this guidance could raise serious legal and compliance issues across a wide array of issuers."

It remains to be seen whether the staff's guidance in the adopting release will be extrapolated to apply to traditional operating companies.

SEC Rulemaking Tracker

Recently Adopted Rulemaking		
SPACs	Comprehensive changes overhauling regulation of SPAC structure	Adopted January 24, 2024, effective 125 following publication in Federal Register
Modernization of Beneficial Ownership Reporting	Significant amendments to modernize the filing deadlines for initial and amended beneficial ownership reports on Schedules 13D and 13G	Final rule effective as of February 5, 2024 Filers will have until September 30, 2024 to comply with the revised Schedule 13G filing deadlines and until December 18, 2024 to comply with the structured data requirements.
Cybersecurity and Risk Governance	Amendments requiring current reporting of material cybersecurity incidents and annual disclosure related to an issuer's cybersecurity risk management system, including the board's and management's role therein	Final rule adopted July 26, 2023, effective September 5, 2023 Compliance with current reporting requirements for filers other than SRCs as of December 18, 2023, and as of June 15, 2024 for SRCs. Compliance with annual reporting requirements in annual reports for fiscal years ending on or after December 15, 2023. Issuers must comply with Inline XBRL tagging requirements in current reports as of December 18, 2024 and for annual reports for fiscal years ending on or after December 15, 2024
Share Repurchase Modernization	Amendments requiring quarterly tabular disclosure of daily share repurchases and related narrative disclosures	Vacated by Fifth Circuit on December 19, 2023; disclosure requirements revert to those in effect prior to the final rule's effective date.

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 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
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[1]		
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 again until April 2024
Rule 14a-8	Potential amendments regarding updating bases for exclusion of shareholder proposals under the substantial implementation exclusion, the duplication exclusion and the resubmission exclusion	Awaiting final action; pushed back until April 2024
EDGAR Filer Access and Account Management	Comprehensive technical changes to EDGAR referred to as EDGAR Next	Awaiting final action; no timeline provided
Anticipated Rulemaking		
Corporate Board Diversity	Potential rulemaking requiring disclosure regarding diversity of board members and director nominees	Pushed back again until October 2024

1 Note that the projected dates for the pending and anticipated rulemaking are based on the SEC's most recent Regulatory Flexibility Agenda, which was released by the U.S. Office of Information and Regulatory Affairs on December 6, 2023.

Human Capital Management	Additional rulemaking enhancing disclosures regarding human capital management (beyond what is already required by an issuer's Business section)	Pushed back again until April 2024
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 again until April 2024
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 again until April 2024
Rule 144 Holding Period	Potential amendments to resale safe harbor for restricted / control securities	Pushed back again until October 2024
Incentive-Based Compensation Arrangements	Potential re-proposal of regulations regarding incentive-based compensation practices at certain financial instructions with over $1 billion in total assets	Anticipated release of re-proposed rule April 2024

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