PAUL HASTINGS

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Public Company Watch

Key Issues Impacting Public Companies

Delaware Law Update

2024 DGCL Amendments Now Effective

On August 1, 2024, the Delaware legislature's most recent amendments to the Delaware General Corporation Law ("DGCL") became effective. The amendments include a number of changes designed to address certain statutory provisions at issue in recent Delaware Chancery Court decisions, including (i) the ability of a corporation to enter into stockholder agreements, including relating to corporate governance matters and consent rights over corporate actions, (ii) the board approval process for merger and other agreements and (iii) available remedies and the appointment of stockholders' representatives pursuant to merger agreements. The DGCL amendments will apply retroactively to all contracts entered into by, or approved by the board of, a Delaware corporation.

For details on the DGCL amendments and their possible implications, please see the Delaware Law Update section of our **April 2024 Public Company Watch**.

Litigation Update

The Post–Chevron Future: Litigating Against Administrative Agencies Following *Loper* and *Corner Post*

This summer, the Unites States Supreme Court issued two decisions that are likely to significantly impact litigation against administrative agencies—and will also inform strategies for defending against investigations and enforcement actions.

On June 28, 2024, the Supreme Court issued its decision in *Loper Bright Enterprises v. Raimondo*, overruling *Chevron v. Natural Resources Defense Council* and as a result, striking down a decades-old doctrine that required federal courts to defer to administrative agencies' interpretation of the statutes from which they draw their authority, provided the statute is ambiguous and the agency's interpretation is reasonable. The Supreme Court's elimination of the requirement of judicial deference to agencies' statutory interpretation has significant practical implications for businesses and industries challenging agency regulations, particularly with respect to complex statutory provisions. The decision also potentially impacts how agencies will interact with highly-regulated businesses going forward, even when those businesses are not challenging a particular rulemaking or agency regulation. *Loper* will also likely dictate how aggressively an agency pursues a particular regulatory position during an investigation, litigation or settlement negotiations.

In This Edition

Delaware Law Update 1

2024 DGCL Amendments Now Effective

Litigation Update 1

The Post–Chevron Future: Litigating Against Administrative Agencies Following *Loper* and *Corner Post*

Federal Court Strikes Down FTC's Non-Compete Ban

Other Updates 2

EU Corporate Sustainability Due Diligence Directive Update

DOJ Offers New Incentives for Whistleblowers and Companies to Report Misconduct

Shortly after the *Loper* decision, the Supreme Court handed down another landmark Administrative Procedure Act ("APA") decision in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, which resolved a long-existing circuit split over when the six-year statute of limitations on an APA claim begins to run. The Supreme Court's decision raises the gate for litigants to challenge agency actions that were previously thought to be time-barred or precluded on account of an earlier unsuccessful challenge.

Loper and *Corner Post* have significant implications for regulatory litigation. Together, the Supreme Court's decisions open the door to new or renewed challenges to agency actions, including improper enforcement actions and unlawful regulations. By eliminating judicial deference to agency interpretations of ambiguous statutes, courts no longer have the option to declare the law ambiguous, and simply defer to an agency's interpretation on the grounds that it is "reasonable"—even if that interpretation is not the best reading of the statutory provision in question. The Supreme Court's decision in *Corner Post* will serve to intensify the effect of *Loper* by reviving challenges once thought to be time-barred and making it possible for litigants to bring challenges many years after an agency action has become final.

For more information on *Loper* and *Corner Post* and their implications for regulatory litigation, please see our **client alert**.

Federal Court Strikes Down FTC's Non-Compete Ban

On August 20, 2024, the Northern District of Texas issued its final ruling in *Ryan, LLC. v. FTC*, finding the Federal Trade Commission's ("FTC") Non-Compete Rule (the "Rule"), which would have prohibited most employee non-compete agreements, unlawful. As a result, the Rule shall not be enforced and did not take effect on its effective date. This decision marks the last anticipated ruling before the Rule was set to take effect. In recent statements to the press, an FTC spokesperson indicated that the agency is "seriously considering a potential appeal" of the court's decision and will continue addressing non-compete agreements through case-by-case enforcement actions. As a government agency, the FTC has 60 days to appeal the decision.

For more information on the court's decision, please see our **client alert**.

Other Updates

EU Corporate Sustainability Due Diligence Directive Update

On July 5, 2024, the EU's long-discussed Corporate Sustainability Due Diligence Directive ("CSDDD") was finalized after years of deliberations. Member states will have two years to implement the Directive (by July 26, 2026) and the largest companies covered by the CSDDD will need to meet its requirements a year later in 2027. The Directive directly applies to EU companies with more than 1,000 employees and more than €450 million turnover worldwide, and to non-EU companies with more than €450 million turnover in the EU.

The CSDDD requires covered companies to conduct broad human rights and environmental due diligence across their operations and supply chains ("chain of activities"), including due diligence regarding actual and potential adverse impacts on the environment and human rights. This includes adopting due diligence policies, instituting risk-management systems, incorporating contractual assurances, instituting grievance or complaints mechanisms, publicly reporting on due diligence policies and regularly monitoring the effectiveness of those policies and the relevant steps taken to mitigate, prevent and address adverse impacts. This will inevitably impose indirect obligations on companies not directly covered by the Directive when they fall within the chain of activities of covered companies.

U.S. companies can expect both direct and indirect impacts on their businesses. U.S. companies who have €450 million turnover in the EU or expect to hit that milestone in the coming years should start thinking about how the directive will impact their businesses and the steps they may need to take to comply. Even U.S. companies that do not have a major presence in the EU can expect new inquiries and reporting requirements from their business partners with an EU presence as their partners begin to determine what they need from their supply chain partners to meet their own CSDDD obligations. While implementation of the Directive is still years away, the CSDDD may require new investments in technology, people and processes that will take time and money to implement.

The first group of covered companies will not be subject to the rules until 2027, but companies should start considering how the CSDDD may apply directly or indirectly to their business. Despite the desire to create a consistent approach across member states, the CSDDD provides a floor, and member states may apply more stringent rules when implementing the directive, which will require companies to be flexible in their approach as the Directive is implemented in member states in which the company operates.

For additional information on due diligence requirements under the CSDDD, please see our **client alert**.

DOJ Offers New Incentives for Whistleblowers and Companies to Report Misconduct

Earlier this year, the Criminal Division of the DOJ announced a landmark pilot program to pay monetary awards to whistleblowers (the "Program"). On August 1, 2024, the Criminal Division unveiled details of the now-effective Program, including a website with formal program guidance and additional information for whistleblowers and companies.[1]

In an effort to target criminal misconduct in areas not otherwise covered by another agency's whistleblower program, the Program is focused on potential violations of law in four subject areas: financial crime, foreign bribery, domestic bribery and healthcare fraud. Companies should expect to see continued enforcement focus in these areas.

Paul Hastings will be hosting a webinar in September to discuss further observations about the landscape of government whistleblower programs and the impact on corporate compliance efforts.

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

1 U.S. Dep't of Just., Criminal Division Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024), **https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program**.

About Paul Hastings

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