

2024: UPDATES AND REMINDERS FOR UPCOMING QUARTERLY FILINGS

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In addition to hot topics and reminders for last quarter set forth in our [April 8, 2024](#) post, companies should consider:

UPDATES TO RISK FACTORS

Potential regulatory uncertainty in light of Supreme Court decisions. The recent Supreme Court term produced several landmark decisions affecting administrative agencies, including:

- [*Loper Bright Enterprises v. Raimondo*](#) – ending long-standing “Chevron” deference to administrative agency interpretations and requiring courts to exercise their judgment in deciding whether an agency has acted within its statutory authority, such as when determining the meaning of ambiguous statutes.
- [*Corner Post, Inc. v. Board of Governors, FRS*](#) – allowing “facial challenges” of regulations governed by the Administrative Procedure Act within six years after “injury” – even if more than six years after the regulation became effective and where the plaintiff was newly-created specifically to challenge the regulation.
- [*Ohio v. EPA*](#) – among other things, faulting EPA for failing to provide a “reasoned response” to certain comments viewed by the agency as not significant or pertinent when adopting final regulations under an arbitrary and capricious review.

The effect of these decisions will play out over time as litigation develops, with some commenters predicting [“hundreds and hundreds of challenges to very old rules”](#). Companies that operate in regulated industries, as well as those that rely on established regulatory environments, should evaluate potential risks of future challenges to agency rules or interpretations – particularly by competitors that operate at a regulatory disadvantage. Note that some regulations may not be vulnerable under *Corner Post* because they governed by statutes with their own distinct limitations provisions.

Uncertainties from political or electoral changes. Elections in the U.S., Europe and elsewhere may result in significant political shifts, with resulting changes in the regulatory environment.

RULE 10B5-1 QUARTERLY DISCLOSURES

Even though the issuer share repurchase disclosure rules in Regulation S-K Item 408(d) were vacated, companies remain obligated to disclose trading arrangements of directors and officers, as discussed in our [December 15, 2022 post](#). S-K Item 408(a) requires companies to disclose quarterly the adoption and termination of Rule 10b5-1 trading arrangements and other pre-planned trading arrangements (whether or not compliant with Rule 10b5-1) by directors or officers (but not issuers), and the material terms of such trading arrangements.

REVIEW DIRECTOR NOMINATION BYLAWS

[Reports indicate](#) that plaintiff firms have brought class action complaints challenging director nomination provisions in bylaws that require nominees to provide a conditional letter of resignation that would become effective if the board determines that their nomination submission was untrue or misleading. The complaints allege that such provisions conflict with Delaware law by allowing the board to remove a director without a stockholder vote. Should these cases succeed, additional companies with similar provisions should expect to receive demand letters, which would likely be followed by attorney fee requests. As a result, companies should consider whether to review their bylaws and evaluate whether any changes would be appropriate.

CYBERSECURITY DEVELOPMENTS

Potential for Disclosure Delays. According to [Matthew Olsen, Assistant Attorney General for National Security](#), the Justice Department has delayed disclosures of cybersecurity breaches on “a number of occasions.” As discussed in our [July 27, 2023 post](#), an Item 1.05 8-K is due four business days after the determination of materiality but may be delayed if the U.S. Attorney General determines that immediate disclosure would pose a substantial risk to national security or public safety and so notifies the SEC in writing. Olsen recommends that companies coordinate with the FBI at the earliest opportunity after identifying a breach – before making a materiality determination – to determine whether any delay would be appropriate, in light of the filing deadline.

Handling Cybersecurity Incidents. As discussed in our [June 24, 2024 post](#), the SEC staff recently published guidance regarding:

- The effect of ransomware payments on the obligation of companies to report material cybersecurity incidents in Item 1.05 8-K filings.
- The effect of consultation with or national security findings by the Attorney General.

- Selective disclosure and the ability of companies to rely on traditional Regulation FD practices to share information about material incidents with commercial partners.
- Use of alternative Form 8-K items (such as Item 8.01) instead of Item 1.05 when reporting incidents that have not yet been determined to be material – or that have been found to be immaterial.

REVIEW INSIDER TRADING POLICIES

Beginning in 2025, calendar year companies will need to file their insider trading policies and procedures as exhibits to their 10-Ks. As discussed in our [June 12, 2024 post](#), companies should review their policies in light of DOJ shadow trading prosecutions as well consider whether any adjustments would be appropriate in anticipation of their public visibility. Companies may also wish to consider if any updates are desirable to address the new Rule 10b5-1 Plan requirements (if plans are discussed in policies with any specificity), and whether gifts of securities should be subject to greater restriction under policies, given the SEC's recent focus on gifts.

UPDATE PROCEDURES FOR T+1

On [May 28, 2024](#), securities markets converted to a T+1 settlement cycle. Companies should update their corporate secretary functions to adapt to the new cycle. Additionally, although firm commitment underwritten offerings of securities priced after 4:30 pm Eastern Time will continue to be settled two trading days after pricing, unless otherwise agreed, ATM programs will likely need to be adjusted.

RELATED PRACTICE AREAS

- Securities & Corporate Governance

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